REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

HCCA NO. 11 OF 2019

DIAMOND TRUST BANK LIMITED.....APPELLANT

VERSUS

AMCEA LIMITED.....RESPONDENT

JUDGMENT

1. The respondent herein, **AMCEA LIMITED**, who was the plaintiff before the trial court, sued the Appellant herein (then the defendant) seeking orders for both Special and General Damages together with costs and interests.

2. The plaintiff's case was that it operated several accounts with the defendant including 2 account Nos…. (particulars withheld), (hereinafter **"011"**and **"101"**) and that it was therefore the duty of the defendant to honour cheques drawn by the plaintiff from its account with sufficient funds.

3. It was the plaintiff's case that on 17th October 2013, it transferred Kshs 122,200 vide cheque No. 353 from account number 101 to 011 but that the defendant negligently and without legal justification, declined and/or refused to effect the said transfer to account No. 011 with the consequence that a cheque No. 35 drawn by the plaintiff on 17th October 2013 from account No. 011 for Kshs 5,000 payable to one **Kiigi Waweru** was on 20th October 2013 returned unpaid with the remarks, **"insufficient funds",** yet the plaintiff's account had sufficient funds thereby causing the plaintiff loss of business of the payee and injury to its credit and reputation.

4. The defendant denied the plaintiff's claim. After considering the evidence presented by both parties, the trial court found in favour of the plaintiff and awarded him kshs 1,500,000 General Damages and Special Damages of Kshs 2,400 thereby triggering the instant appeal in which the Appellant (defendant) has set out the following Grounds of Appeal in the Memorandum of Appeal:-

> ***1. The Learned magistrate erred in law and in fact in holding that the Appellant was negligent in failing to honour cheque number 353 drawn by the respondent.***
>
> ***2. The Learned magistrate erred in law and in fact in holding that the Appellant breached its contractual obligations in failing to honour cheque number 353.***
>
> ***3. The Learned magistrate erred in law and in fact in holding that the Appellant should have honoured cheque number 353 despite insufficiency of the funds in account number [….].***
>
> ***4. The Learned magistrate erred in law and principle in redrafting the contract entered into between the Appellant and the respondent.***
>
> ***5. The Learned magistrate erred in law for awarding general damages for breach of contract.***
>
> ***6. The Learned magistrate erred in law and in fact in holding that the insufficiency of funds was caused by negligence of the appellant.***
>
> ***7. The Learned magistrate erred in law and in fact in holding that the insufficiency of funds in account number [….] was caused by the Appellant's breach of contractual obligation.***
>
> ***8. The Learned magistrate erred in law and in fact in holding that the Appellant should have cleared cheque number 353 within one day contrary to the clear provisions of Kenya Bankers Association cheque clearing timelines, Bill of Exchange Act and***

Central Bank guidelines which provide for T+1.

9. The Learned magistrate erred in law and in fact by failing to hold that the respondent did not satisfy the burden of proof in proving the common practice in clearing cheques in the year 2013.

10. The Learned magistrate erred in law and in fact by assuming banking common practice/custom as at in the year 2013.

11. The Learned magistrate erred in law and in fact in interpreting "insufficient funds- Refer to Drawer" to mean that the respondent was incapable of paying its debts.

12. The Learned magistrate erred in fact in finding that the crediting of kshs 122,000/- in account number […..] on 18th October, 2013 amounted to reversal of the transactions previously conducted in the account.

5. At the hearing of the appeal, **Mr. Shah**, learned counsel for the Appellant, expounded on the Grounds of Appeal and submitted that the finding by the Trial Court that the appellant failed to honour cheque No. 353 was erroneous as there was ample evidence to show that the said cheque was honoured on 18th October 2013 less than 24 hours after it was issued. Counsel took issue with the finding by the trial court that cheque No. 353 was not subject to the clearing process provided for by the Central Bank of Kenya and the Kenya Bankers Association.

6. Counsel further took issue with the reference by the trial court to Trade Practice and Custom when the same was not pleaded by the plaintiff. For this argument, counsel cited several decisions including the decision in ***Samuel Ndiba Kihara v Housing Finance Company of Kenya Limited & 2 Others*** [2018] eKLR wherein it was held:

"***On my part, I observe that the bank seeks to rely on the penalty interest as a Trade Usage and Custom. My understanding of the law is that, unlike a matter upon which the court should take Judicial Notice, a Trade Usage and Custom must be proved by way of evidence. Considering somewhat similar circumstances, Newbold, P. In C. A. Harilal & Co. V Standard Bank Ltd [1967] EA512 pg517 observed,***

"Where a claim is based upon a trade usage then the pleadings should quite clearly aver not only that fact but the precise nature of the trade usage on which the claim is founded."

On His part Duffus, J. A. said,

"On the question of usage, as my Lord the President points out, this has not been pleaded, though I should think it possible that a usage if properly pleaded and proved, could be established to show that there would be a variation of interest paid by or to a bank in accordance with the change of a recognized and established bank rate."

The Court of Appeal held a similar view in Civil Appeal No. 57 of 2005 Highway Furniture Mart Limited Vs Permanent Secretary Office of the President & another (2006)eKLR, reiterating the Mercantile Usage must be pleaded and proved."

7. It was further submitted that Trade Usage or Custom is a matter that cannot be assumed but must be proved save where Trade Usage and Custom is of such general and local notoriety as to require no proof. For this argument, reference was made to the decision in ***China Wu Yi Co. Limited v China Africa Total Logistics Company Ltd*** [2019] e KLR wherein it was held:

"***Save where Trade Usage or Custom is of such general or local notoriety as to require no proof(and for which the court shall take judicial notice), Trade Usage and Custom must not only be pleaded but also proved to the satisfaction of the court. In the decision in Harilal & Co. Vs The Standard Bank Ltd[1967]ea 512, the court had this to say on the manner of proving Trade Usage and Custom,***

"A Trade and Usage may be proved by calling witnesses, whose evidence must be clear, convincing and consistent, that the Usage exists as a fact and is well-known and has been acted on generally by persons affected by it. A Usage is not proved merely by the evidence of persons who benefit from it unsupported by other evidence. Where a particular usage has acquired sufficient general and local notoriety judicial notice may be taken of it under S. 60 of the Evidence Act. Where a Trade Usage is proved to exist then, unless expressly or impliedly excluded, it is presumed to have been incorporated into the contract between the parties and this is so even though one of the parties may in fact be unaware of the usage so long as the circumstances are such that he ought to have been aware of it.

In the matter before this court, the only witness who was called to prove the alleged Trade Usage or Custom was Jackson Ngua who testified on behalf of China Africa who attempted to draw a benefit from it. No independent evidence was called and even the evidence of Jackson Ngua was not backed by any documentary evidence that established that such Custom and Usage not only existed but was well known and acted on generally by persons affected by the Trade."

8. It was submitted that the Appellant complied with Trade Usage and Custom and further, that the account No. 011 narration shows that it had insufficient funds as at 17th October 2013 when cheque No. 35 was presented but that on 18th October 2013 Kshs 122,200 was credited on the said account.

9. It was the Appellant's case that the award of Kshs 1,500,000, General Damages was excessive and without justification. For this argument, the Appellant relied on the decision in ***Bank of Baroda (Kenya) Limited v Timwood Products Ltd*** [2008]eKLR wherein the court

observed as follows on what amounts to a temperate award:

> "***All Mr. Fraser told us was that a temperate award is the usual thing in such matters and that the Kshs 3 million awarded was excessive and unjustified. We do not think so. Timwood was a trading company and the bank knew that. In quick succession the bank dishonoured a total of eighteen cheques amounting to Kshs 646,258/85; Timwood had a total of kshs 3 million to its credit with the bank. The reason given for the dishonor was wholly untrue, i.e. that "cheque stopped". That could have been interpreted to mean that it was Timwood itself which stopped the cheques. As the trial judge correctly pointed out other more innocent words could have been used- like cheque not countersigned etc. We think and are satisfied that the kshs 3 million awarded, in the circumstances of the case, was temperate i.e. it is not so inordinately high that it calls for out intervention."***

The Respondent's case.

10. The respondent opposed the Appeal through the written submissions filed on 20th January 2020.

11. At the hearing of the Appeal, **Mr. Njiru,** learned counsel for the respondent submitted that since cheque No. 353 was not honoured on time the subject cheque No. 35 for Kshs 50,000 issued by the respondent was dishonoured thereby occasioning loss to the respondent.

12. It was submitted that on the respondent's previous instructions, cheques were honoured on the same day and that owing to the banker customer relationship that existed between the Appellant and the respondent, the Appellant was under an obligation to honour the respondent's instructions. For this argument counsel cited the decision in ***Eunice Wairimu Muturi & Another v James Maina Thuku & Another*** [2018] eKLR wherein it was held:-

> "***The general principles of the law are that, the relationship between the Bank and its customer is contractual. The main basis of this relationship is one of debtor and creditor. As held in the case of: Foley Vs Hill (1848), where the customer's account is in credit, then the bank is in effect the customer's debtor, that is to say that the bank owes the money to the customer. Where it is in debit, then the customer is the banker's debtor. In this contractual relationship, the bank owes the customer several duties which includes but not limited to: a duty to comply with the customer's mandate(Joachson Vs Swiss Bank Corporation(1921). It is important to realize that this duty not only refers to the original mandate completed when the customer opened the account but also various other documents which are interpreted as mandates, including standing orders, direct debits and cheques. Therefore, the bank owes its customer an obligation to obey the customer's instructions based on the mandate given."***

13. It was submitted that the trial court was justified in holding that cheque No. 353 was not honoured on 17th October 2013 and that as a result, cheque No. 35 bounced. Counsel argued that the respondent's expectation was that the Appellant would act swiftly on cheque No. 353 having been informed that a transaction would be carried out in account No. 011. It was the respondent's case that it expected that as with other cheques involving the internal transfer of funds from the account to another, cheque No. 353 would be cleared within the same day of presentation.

14. Reference was made to the decision in ***Lipkin Gorman v Karpnale*** [1992] 4 ALL ER 409 quoted in ***Barclays Bank of Kenya Limited v John Nyangeri Simba (Liquidator of Lakestar Insurance Company Staff Retirement Scheme) in Liquidation*** (2015) eKLR wherein the banker's basic obligations was stated to be;-

> ***"In the civil case of a current account, the basic obligation of the banker is to pay his customer's cheques in accordance with his mandate."***

15. It was submitted that the practice by the Appellant was to clear internal cheques on the same day a fact that was admitted by the Appellant's own witness DW1. It was the respondent's case that a cheque is payable on demand and is not subject to the provisions of Section 14 (1) of the Bills of Exchange Act. It was further submitted that the trial court was right in holding that cheque No. 353 did not have to go through a clearing house considering the nature of the instrument, the usage of trade of bankers and the particulars of the case.

16. It was submitted that it was due to the Appellant's negligence in debiting account No. 101 and crediting account No. 011 on 17th October 2013 instead of debiting account No. 101 and crediting acc No. 011 that led to cheque No. 35 being dishonoured. Reference was made to the decision in ***Equity Bank of Kenya & Another v Robert Chesang*** [2016] eKLR where it was held:

> "***A bank has a duty under its contract with its customer to exercise reasonable care and skill in carrying out its part with regard to operations with its contracts with its customers. The duty to exercise reasonable care and skill extends over the whole range of banking business within the contract with the customer. Thus the duty applies to interpreting, ascertaining and acting in accordance with the instructions of the customer……The bank/customer relationship is based on utmost good faith. The bank is also under a contractual duty to diligently handle accounts of a customer, to ensure that funds- deposited on account are available when required by the customer. Any deviation from that understanding without justifiable reasons which should be communicated to the customer well in advance or immediately, the bank is in breach of a contract with the customer and is liable in damages."***

17. Counsel argued that the reversal of the entry in Account No. 101 on 17th October 2013 clearly points to the Appellant's negligence. On the award of general damages it was submitted that the court exercised proper discretion in awarding the respondent the sum of Kshs 1,500,000 which award should not be interfered with. Counsel maintained that the principle that the award should be based on the amount of credit that a customer had with the bank should only be used as a guide.

18. I have considered the appellant's submissions in support of the grounds of appeal contained in the Memorandum of Appeal, the Record

of Appeal and the respondent's arguments in opposition to the Appeal. The main issues for determination is this appeal are as follows:-

a) Whether the Appellant was negligent and/or breached its contractual obligations to the respondent in failing to honour cheque No. 35.

b) Whether cheque No. 35 was to be paid on presentment on 17th October 2013.

c) Whether the award of Kshs 1.5 million general damages was merited.

19. As the first appellate court, this court is under an obligation to abide by the provisions of Section 78 of the Civil Procedure Act to evaluate and examine the lower court record and the evidence presented before it in order to arrive at its own conclusion. This principle of law was well settled in the case of ***Selle v Associated Motor Boat Co. Ltd*** (1968) EA 123 where Sir Clement De Lestang stated that:-

"This court must consider the evidence , evaluate it itself and draw its own conclusions though in doing so it should always bear in mind that it neither saw nor heard witnesses and should make due allowance in this respect. However, this court is not bound necessarily to follow the trial judge's findings of the fact if it appears that he had clearly failed in some point to take account of particular circumstances of probabilities materially to estimate the evidence of if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally(Abdul Hammad Sarif –Vs- Ali Mohammed Solan(1955, 22 EACA 270)."

20. In ***Mbogo v Shah & Another*** (1968) EA 93, the court set out circumstances under which an appellate court may interfere with a decision on the trial court as follows:

"I think it is well settled that this court will not interfere with the exercise of discretion by the inferior court unless it is satisfied that the decision is clearly wrong because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into account and consideration and in doing so arrived at a wrong conclusion."

21. The respondent's case before the trial court was presented through the testimony of its Director **Mr. Kimani Waweru** (PW1) who relied on his witness statements and produced the documents in the plaintiffs list of documents as evidence before the trial court. He repeated the contents of the plaint regarding the respondent's two accounts (011 and 101) held in the Appellant's Bank. He testified that the respondent transferred the sum of Kshs 122,200 through a cheque No. 353 from account No. 101 to account No. 011 which transfer ought to have been effected on 17th October 2013 but that instead of crediting account No. 011, the Appellant credited and debited account No. 101 only for a reversal to be effected the following day on 18th October 2013 by which time, the cheque No. 35 for Kshs 50,000/- issued to the respondents supplier had already been returned unpaid for lack of sufficient funds. He stated that as a result of the Appellant's negligence and breach of contract, the respondent suffered loss of credit and reputation thus severely affecting its business of a monthly turnover of 2 million.

22. On cross examination PW1 testified the proceeds of cheques No. 353 were received in the respondents account the following day on 18th October 2013. He also testified that the Appellant's General Terms and Conditions did not contain a term that a cheque deposited on a particular date will be cleared on the same day but that it was a practice of the bank to pay internal cheques on the same day.

23. On re-examination he testified that he was still the Appellant's customer but that in 2013, the Appellant repossessed his vehicle pending the service of a loan balance. He further testified that the respondent had alerted the Bank Manager that there was an incoming cheque.

24. The Appellant's case was presented by the testimony of **Lwangu Munyi** (DW1) who adopted his witness statement dated 12th October 2016 as his evidence and produced the statements in respect to account Nos. 011 and 101 as exhibits. He testified that when a transfer is done by way of a cheque, the proceeds become available as soon as the cheque is cleared and that clearance involves establishing if the account to be debited has funds or not. He stated that the standard time for clearance of cheques within the day of transaction plus one day.

25. On cross examination, he testified that the instructions on cheque No. 353 was to debit account No. 101 and credit account No. 011 but that instead, the bank debited and credited the same account (101). He reiterated that Central Bank of Kenya (CBK) policies require that in-house cheque are cleared within the date of presentation plus one day. He added that he did not know why cheque No. 353 was not cleared on the same day or if there were other cheques like 353 that were not cleared on the same day.

Analysis and determination.

26. Having considered the Record of Appeal and the submissions s by counsel, I will now turn to determine the issues that I have already highlighted herein above as the issues for determination.

Negligence /Breach of contract.

27. The following were the undisputed facts:

a) That the respondent and Appellant had a customer/Bank Relationship dating back to 10 years as at the time of the hearing of the case before the Trial Court.

b) That the respondent operated 5 bank accounts with the applicant of which two accounts being account Nos. 011 and 101 are the

subject of this appeal.

c) That on 17th October 2013, the respondent issued cheque No. 353 to transfer for the sum of Kshs 122,200/- from account No. 101 to 011. The said amount was credited on the account No. 011 on 18th October 2013.

d) That on the same day,(17th October 2013) the respondent drew cheque No. 35 from account No. 011 for Kshs 50,000 payable to one ***Kigi Waweru*** *but that the same cheque was returned by the payee(****Kigi Waweru****) on 20th October 2013 with the remarks from Equity Bank Kenya Limited* ***" Insufficient funds refer to Drawer."***

28. The respondent was aggrieved by the actions of the Appellant whom he accused of negligence and blantant breach of contractual obligations for failing to immediately credit its account No. 011 with the sum of Kshs 122,200 from cheque No. 353 thereby leading to the dishonour of cheque No. 35. It listed the following particulars of breach:-

a) Failing to debit account 0602707101 with kshs 122,200/=

b) Failing to credit account number [….] with kshs 122,200/=

c) Failing to honour cheque number 35 while the same had been signed by proper mandates and the account was in credit.

d) Illegally levied charges on the account number [….].

29. On its part, the Appellant maintained that it promptly credited the respondents account No. 011 with the sum of Kshs 122,200 on 18th October 2013 within the period stipulated by the Central Bank of Kenya regulations regarding internal cheque clearance being T+1 day. The question which then arises is whether the Appellant was guilty of breach of its contractual obligations to the respondent.

30. I note that when determining the issue of the Appellant's breach of contractual obligations, the Trial Court held as follows:-

"Having considered the evidence on record I find the defendant was not justified in failing to pay cheque number 35. The defendant acted negligently and was in breach of its contractual obligations to the plaintiff when it failed to transfer of Kshs 122,200/= from account number [….] to account number [….] on 17th October 2013. Cheque number 35 bounced because the defendant failed to credit account number [….] with Kshs 122,200/=. The plaintiff has proved negligence on the part of the defendant."

31. The question which then arises is whether, in the circumstances of this case, the Appellant can be said to have acted negligently and in breach of its contractual obligations to the respondent. **Halsbury's Laws of England, 4th Edition Volume 3,** states as follows on bank/customer relationship and obligations at para 125:

"The characteristics usually found in bankers are: (1) that they accept money from and collect cheques for their customers and place them to their credit; (2) that they honour cheques or orders drawn on them by their customers when presented for payment and debit their customers accordingly; and (3) that they keep current accounts in their books in which the credits and debits are entered."

32. On wrongful dishonor of a cheques **Halsbury's Laws of England, 4th Edition, Volume 3** states as follows at para 155:

"If without justification, a banker dishonours his customer's cheque, he is liable to the customer in damages for injury of credit... Proof of actual injury to credit is not necessary to secure substantial damages, either for a business customer or for personal customers. The answer on a cheque dishonoured on presentation by a third person may constitute libel, but such cases are rare; in such cases general damages may be awarded."

33. I will now turn to consider if in the present case, there was breach of the Bank-Customer relationship when the Appellant dishonoured cheque No. 35. In doing this, it will be necessary to examine the reason given by the appellant for its failure to honour the plaintiff's cheque.

34. Through the evidence of DW1 and in its submissions the Appellant stated that the reason for not paying the cheque was that there were insufficient funds in the Respondents account at the time cheque No 35 was presented for payment and that in those circumstances, the cheque could not be honoured. On its part, the respondent maintained that had the cheque No. 353 been credited in its account No. 011 on 17th October 2013, there would have been sufficient funds in the said account to honour the amount in cheque No. 35. The respondent contended that it contacted the Appellant's manager to inform him of the incoming cheque. I however note that no material was placed before the court to prove that any such information was relayed to the bank manager.

35. The trial court found that the trade usage and practice required that the cheque be cleared the same day and in this regard, the respondent submitted that its internal cheques had previously been cleared within the same day. I however note that no evidence was presented by the respondent in support of the claim on trade usage and same day cheque clearance. Needless to say, the burden of proof in civil matters rests on the party who makes a claim. This is the position that was adopted in ***William Kabogo Gitau v George Thuo & 2 Others*** [2010] 1 KLR 526 stated that:

"In ordinary civil cases, a case may be determined in favour of a party who persuades the court that the allegations he has

pleaded in his case are more likely than not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred."

36. Similarly, in ***Palace Investment Ltd v Geoffrey Kariuki Mwenda & Another*** **(2015) eKLR,** the Court of Appeal expressed itself as hereunder:

"Denning J. in Miller Vs Minister of Pensions (1947) 2 ALL ER 372 discussing the burden of proof had this to say;-

"That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say; we think it more probable than not; the burden is discharged, but if the probability are equal it is not. This burden on a balance of preponderance of probabilities means a win, however narrow. A draw is not enough. So in any case in which a tribunal cannot decide one way or the other which evidence to accept, where both parties…are equally (un)convincing, the party bearing the burden of proof will loose, because the requisite standard will not have been attained."

37. In **Evans Nyakwana vs. Cleophas Bwana Ongaro (2015) eKLR** it was similarly held that:

"As a general preposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of Section 107(i) of the Evidence Act, Chapter 80 Laws of Kenya. Furthermore the evidential burden … is cast upon any party, the burden of proving any particular fact which he desires the court to believe in its existence. That is captured in Section 109 and 112 of law that proof of that fact shall lie on any particular person…The appellant did not discharge that burden and as Section 108 of the Evidence Act provides the burden lies in that person who would fail if no evidence at all were given as either side."

38. It is trite law **(See Paget's Law of Banking)** and indeed simple logic that a customer must be taken to know the state of each of his accounts and more so, in instances where such a customer issues out a cheque to be paid from the funds held in his account. If the balance on the whole is against him or less than the amount to be paid on the cheque that he has issued, he has no right to expect such cheques he draws will be cashed. In addition, money is not available immediately it is paid into an account even if the payment is by cash as the bank must be allowed sufficient time to carry out book keeping operations before crediting the account.

39. In the present case, it was not in dispute that the respondent's account No. 011 did not have sufficient funds to pay out the amount stated in cheque No. 35 (Kshs. 50,000) as at 17th October 2013 and this explains why the respondent issued cheque No. 353 for the sum of Kshs. 122,000 to be paid into the said account. It was not disputed that both cheques No. 353 to credit account No. 011 and cheque no. 35 to be paid out of the said account, were issued on the same date being 17th October 2013.

40. A perusal of the respondent's exhibit (Return Cheque Advice) from the collecting bank (Equity Bank), shows that the respondent's supplier and recipient of cheque No. 35 banked it on 17th October 2013 at a time when it is clear that the respondent's account did not have sufficient funds to pay the sum stated in the said cheque. The respondent's case was that it expected cheque No. 353 to be cleared on 17th October 2013 so that the supplier's cheque could be paid on the same date. As I have already stated in this judgment, no evidence was led by the respondent to demonstrate that such cheques could be cleared on the same day.

41. It was also not in dispute that the amount in cheque No. 353 was credited in the respondent's account No. 011 on 18th October 2013 and on the same date, cheque No. 35 was returned unpaid for lack of sufficient funds. No evidence was presented from the collecting bank to show the exact time that cheque No. 35 was returned unpaid and my take is that it is very possible that it was a matter of slight difference, in terms of hours or even minutes, between the time the amount in cheque No. 353 was credited in account No. 011 and the time cheque No. 35 was returned unpaid.

42. My humble view is that looking at the facts of this case, cheque No. 35 would not have bounced had the respondent been prudent and cautious enough to ensure that the sum in cheque No. 353 was first credited in his account No. 011 before issuing cheque No. 35, or better still, to advice its supplier to withhold/delay the banking of cheque No. 35 at least till 18th October 2013 so as to give the Appellant reasonable time to process cheque No. 353 and credit account. No. 011. I am guided by the decision in the case of ***Union Bank of Nigeria Ltd v Ifeatu Augsutine Nwoye*** **[1996] 2 iLAW/SC.51/1993,** where the Nigerian Supreme Court expressed the view that:

"...a cheque which has not been cleared, where clearance is necessary, does not put the account of the customer in funds...the correct banking procedure, as has been explained by the bankers, is that the amount in the draft cheque, even if credited to a customer's account, is not equivalent to cash lodgments. The customer has to wait until after the cheque has been cleared in the Clearing House within the Central Bank before it could be regarded as cash..."

43. It turns out that cheque No.35 was also issued on 17th October 2013 and banked in the collecting bank on the same day. My finding is that the respondent's account No. 011 did not have sufficient funds to honour cheque No. 35 as at 17th October 2013 when the said cheque was issued and banked. Going by the principle that the bank must be given reasonable time to carry out book keeping and reconcile accounts even in instances where cash payment is made into an account, the appellant was not expected to immediately credit the respondent's account No. 011 on 17th October 2013 with the sum of Kshs. 122,200 so as to be able to also immediately honour cheque No. 35.

44. In law, a customer of a bank who is aware that they have insufficient funds in hand at the time of drawing cheques is not relieved of liability flowing from the failure by any bank to carry out such instructions. (***Carew v Duckworth [1869] LR 4 Exch 313 cited in Braz v Afonso 1998 (1 SA) 573.*** Further, where funds are to be credited to a customer's account, to be used to clear such cheques as aforesaid, the

banker is entitled to a reasonable time for clearing and collection according to the respective nature of the documents. (**See Halsburys Laws of England 4th Edition at Volume 3 at para 53). This was also the finding in *Forman v Bank of England* [1902] 18 TLR 339.**

45. In the present case, having found that the available funds in the respondent's account No. 011 could not pay cheque No. 35 as at the date the cheque was presented being 17th October 2013, I am unable to find that the Appellant was negligent or in breach of its contractual obligations to the respondent. In my considered opinion, the bank was not expected to honour the cheque at the time when there were insufficient funds in the customer's account.

46. The Trial Court rendered itself as follows on the claim for General Damages:

> ***"The plaintiff seeks compensations by way of damages following the defendant's negligence; it pleads that the defendant defamed them. It is the finding of this court that, the defamatory claim as a result is remote and time barred and any purported remedy would be a side show in this judgment. The plaintiff's assertion that as result of the negligence on the part of the defendants over the single cheque ended up closing their business is also not tenable in a claim for compensation."***

47. Having regard to the above observations and findings by the Trial Court, I will hasten to add that had I found that the respondent proved its claim for breach of contract, I would have awarded it nominal damages since the respondent did not adduce any evidence to prove that as a result of the alleged breach, he suffered any loss. In the present case, I find that the issue of compensation for the loss and damages due to the respondent does not arise.

48. In conclusion, I find that the instant appeal is merited and I allow with the result that the judgment and orders of the trial court are hereby set aside and in its place an order is hereby issued dismissing the respondent's case in its entirety with costs to the appellant

Dated, signed and delivered via skype at Nairobi this 23rd day of April 2020 in view of the declaration of measures restricting court operations due to Covid -19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on the 17th April 2020.

W. A. OKWANY

JUDGE

In the presence of:

Mr. Shah for the appellant.

Miss Njiru for the respondent

C/A & DR – Hon. Tanui