



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**COMMERCIAL AND TAX DIVISION**  
**CIVIL CASE NO. 630 OF 2006**  
**DR. DIVYA J. PATEL .....PLAINTIFF**  
**VERSUS**  
**GUARDIAN BANK LIMITED.....DEFENDANT**  
**JUDGMENT**

[1] The Plaintiff, **Dr. Divya J. Patel**, filed this suit on **20 November 2006**, seeking judgment in her favour against the Defendant for **Sterling Pounds 36,480**, General Damages for embarrassment and for loss of reputation as well as interest and costs. Her cause of action was that on or about **11 October, 2005**, she bought from the Defendant a **Banker's Cheque Number 392067** for **Sterling Pounds 36,480** against a credit balance in her account; and that without any justification, the Defendant stopped payment of the cheque after she had endorsed it to a third party. The Plaintiff therefore pleaded that a right of action had accrued to her under the **Bills of Exchange Act, Chapter 27** of the **Laws of Kenya** in respect of the amount of the cheque together with interest thereon at commercial rates.

[2] The Plaintiff was subsequently amended on **28 September 2007** whereby the Plaintiff added details in connection with the deposit of a cheque for **GBP 36,480** in her Sterling Account with the Defendant Bank, which cheque was drawn in the Plaintiff's favour by one **S. Sukhadwala** trading as **S.P. Consultants**. She further pleaded that, although that cheque was later returned unpaid, the Defendant duly credited her account with the said sum of **GBP 36,480**; and that it was on the strength of that credit that the Banker's Cheque was purchased by the Plaintiff. The Plaintiff further pleaded that she completely lost her bargain in respect of the cheque in that she had been offered a discount of **GBP 20,000** for a house she had reserved for purchase in London, United Kingdom, which sum she also claims.

[3] The Plaintiff testified herein on **17 January 2017** as **PW1** and accordingly adopted her Witness Statement filed herein on **20 June 2012**, in which she stated how, on the **23 September 2005**, she deposited a cheque in a joint Sterling Pound account she held with her husband **Dr. J.D. Patel** in the Defendant bank. The said cheque was drawn by **Sukhadwala** trading as **S.P. Consultants** in favour of the Plaintiff in the sum of **GBP 36,480**. Upon that deposit she purchased a **Banker's Cheque** for **GBP 36,480**, which was duly issued by the Defendant bank in the Plaintiff's favour and was drawn on **Citibank N.A. London** by the Defendant. The cheque was issued on **11 October 2005**, seven days after the funds had been credited into her account; but that the Defendant stopped the payment of the Banker's Cheque claiming that the cheque upon which it was issued had not been cleared.

[4] It was further the evidence of the Plaintiff that instead of immediately returning the cheque drawn by

**Sukhadwala** to her, the Defendant presented the cheque for payment a second time without any reference to her, before countermanding the Banker's Cheque. She added that the Banker's Cheque was bought by her from the deposits in her account; and that due to the Defendant's unlawful action aforesaid, she lost a bargain to the extent of **GBP 20,000** in the form of a discount she had been offered for a house in London which she had reserved for purchase. She added that she was unnecessarily embarrassed by the Defendant's unjustified actions by way of loss of reputation, which adversely affected her business. The Plaintiff therefore asked for judgment in her favour for **GBP 36,480** being the value of the Bankers Cheque which she says was unlawfully stopped by the Defendant; and **GBP 20,000** for the lost bargain aforementioned, as well as compensation for her damaged reputation.

[5] In its Amended Statement of Defence filed herein on **12 October 2007**, the Defendant denied that it credited into the Plaintiff's account the sum of **GBP 36,480** being proceeds of **Cheque Number 000282** drawn on **Natwest Bank, Golders Green Branch** in London in favour of the Plaintiff; and contended that the said cheque had not been cleared, and was never cleared. While conceding that it issued a **Banker's Cheque No. 392067** for **GBP 36,480** at the Plaintiff's request and instance, the Defendant denied that the said cheque was bought out of a credit balance standing in the Plaintiff's **Account No. [...]** as alleged in the Amended Plaintiff. The Defendant's contention was that the Banker's Cheque was issued on the Plaintiff's representation and understanding that **Cheque No. 000282** was good and valid for payment of the sum of **Sterling Pounds 36,480**; which turned out to be a misrepresentation.

[6] The Defendant further averred that it was a condition of the contract between the parties herein that payment by the Defendant on the **Banker's Cheque No. 392067** for the sum of **Sterling Pounds 36,480** would only be made if the **Cheque No. 000282** drawn on **Natwest Bank, Golders Green Branch** in London (herein after, **the Natwest Cheque**) was cleared and paid; but that the said cheque was twice returned unpaid, thereby frustrating this fundamental term of the contract. For the reason that there was failure of consideration, it was the Defendant's posturing that the Plaintiff would be unjustly enriched were the Court to grant the prayers sought by her. The Defendant also accused the Plaintiff of cheque kiting as well as an attempt to defraud, contending therefore that it countermanded the Banker's Cheque to protect itself from the Plaintiff's aforementioned fraudulent schemes. The Defendant accordingly urged for the dismissal of the suit with costs.

[7] In proof of its case, the Defendant called its Westlands Branch Manager, **Sonal Parmar (DW1)**, who adopted her Witness Statement dated **29 January 2016**. She confirmed that the Plaintiff was a joint account holder of a **Current Account No. STG [...]** at the Westlands Branch, Nairobi; and that, on **23 September, 2005**, the Plaintiff deposited a **Cheque No. 000282** drawn on **Natwest Bank, Golders Green Branch** in London, in her favour. She explained that being a crossed cheque, that cheque was incapable of negotiation; and as such the Bank could become neither a holder for value nor a holder in due course.

[8] **DW1** further stated that on **11 October 2005**, whereas the Bank issued a **Banker's Cheque No. 392067** for the sum of **GBP 36,480** at the Plaintiff's request and instance against her **Current Account No. STG. [...]**, that cheque was not issued against a credit balance in the Plaintiff's said account, but on the understanding that the **Natwest Cheque No. 000282** for an equivalent sum, which had been deposited by the Plaintiff in her account, was a good and valid cheque for payment; which turned out not to be the case. It was further the testimony of **DW1** that, on learning of the invalidity of the cheque, the Bank, by a letter dated **12 October, 2005**, duly informed the Plaintiff thereof and requested the Plaintiff to return the Banker's Cheque, or pay the amount of the cheque into her account to enable the Bank recover the same.

[9] **DW1** added that although the Plaintiff acknowledged receipt of the letter dated **12 October 2005** (at page 11 of the Defendant's Bundle of Documents), she failed and neglected to return the Banker's Cheque or deposit the value thereof with the Defendant. Thus, from the Defendant's perspective, the Plaintiff was intent on defrauding it by way of cheque kiting; and that it was out of that apprehension that it countermanded the Banker's Cheque. It was thus the evidence of **DW1** that, in the circumstances, the Bank had a legal right and obligation to countermand payment of the **Banker's Cheque No. 392067**; and that, since no loss of reputation or bargain had been proved by the Plaintiff that was attributable to any fault on the part of the Defendant, her claim ought to be dismissed with costs.

**[10]** From the foregoing summary of the pleadings and evidence, it is clear that most of the facts are not in dispute. There is no dispute that the Plaintiff opened a Sterling Pound account with the Defendant Bank, **No. [...]** sometime in the year **2000**. That account was in the joint names of the Plaintiff and her husband, **Dr. J.D. Patel**. The account opening documents were exhibited by the Defendant at pages 1 to 6 of the Defendant's Bundle of Documents marked Defence **Exhibit 1**. It is also common ground that on **23 September 2005**, the Plaintiff deposited in the said account the **Natwest Cheque No. 000282** for **GBP 36,480**, drawn by one **S. Sukhadwala T/A S P Consultants**. A copy of that cheque, which was exhibited at page 8 of the Defendant's Bundle of Documents, confirms that the cheque was dated **22 September 2005**, and that it was drawn in the sum of **GBP 36,480** against **Account No. [...]** held at **Natwest, Golders Green Branch** in London.

**[11]** Whereas it was the evidence of **DW1** that it would normally take about 21 days for an international cheque such as this to be cleared, it was conceded that, by **5 October, 2005**, the Defendant had availed funds in the Plaintiff's account, equivalent to the value of the cheque, as was confirmed by the Bank Statement at **page 17** of the Defendant's Bundle of Documents. On that basis, the Plaintiff requisitioned for, and was issued with a Banker's Cheque by the Defendant for the equivalent sum of **GBP 36,480**. The Banker's Cheque was issued on **11 October 2005** in the name of the Plaintiff to be drawn from the Defendant's NOSTRO account with **Citibank, N.A. London**. A copy of the Banker's Cheque was exhibited at page 10 of the Defendant's Bundle of Documents.

**[12]** A careful consideration of the evidence adduced herein further shows that just one day later, the Defendant was advised by Citibank that the Natwest Cheque had been returned unpaid. Thus this information was passed on to the Plaintiff vide the Defendant's letter dated **12 October 2005** (at page 11 of the Defendant's Bundle of Documents). That letter reads as follows in part:

**"We refer to Cheque No. 000282 dated 22<sup>nd</sup> September, 2005 for £ 36,480/- drawn on NAT West, Golders Green Br, London NW11 8EQ by Mr. S. Sukhadwala T/A S. P. Consultants. The cheque was sent for collection and proceeds were credited to your account on 5th October, 2005. You had purchased a Banker's Cheque for £ 36,480/- on 11<sup>th</sup> October, 2005 in your name.**

**We have now been advised by Citibank that the said cheque is returned unpaid. Copy of their advise enclosed for your information. You are therefore, kindly requested to:-**

**(a) Return the Banker's Cheque purchased on 11<sup>th</sup> October, 2005 for £ 36,480/- for our cancellation.**

**OR**

**(b) Provide funds in your account to enable us to recover the amount from your account.**

**Your immediate action and cooperation in this regard would be much appreciated. This has reference to our telephonic conversation of date..."**

**[13]** The Plaintiff did concede having received the letter aforementioned. Indeed, she promptly responded thereto vide her letter dated **13 October 2005** (at page 12 of the Defendant's Bundle of Documents), promising to revert to the Defendant as soon as possible. It was the uncontroverted evidence of **DW1** that despite being notified of the non-payment of the Natwest Cheque, the Plaintiff failed and or neglected to return the Banker's Cheque or deposit funds in her account as instructed by the Defendant. Accordingly, the Defendant admittedly countermanded the Banker's Cheque.

**[14]** In the light of the foregoing agreed facts, quite a number of the issues flagged up for determination in the Statement of Agreed Issues filed herein on **2 July 2008** have been resolved. Consequently, the remaining issues for the Court's determination, as succinctly set out by the Learned Counsel for the parties in their written submissions are:

**(a) Whether the Defendant was justified in stopping the payment of the Banker's Cheque that it issued to the Plaintiff; and if so,**

**(b) Whether the Plaintiff is entitled to a full refund of GBP 36,480 and whether the Defendant is liable to pay damages to the Plaintiff for wrongful dishonour of cheque, loss of bargain and damage to reputation;**

**(c) Whether the Plaintiff is entitled to aggravated damages.**

**(d) What order should be made as to costs hereof.**

**(a) Whether the Defendant was justified in stopping the payment of the Banker's Cheque that it issued to the Plaintiff;**

[15] The Plaintiff's Counsel urged the Court to take into consideration that a banker's cheque is a guarantee of payment issued by a bank drawn on funds in a customer's account; and that it is proof of payment issued by the Bank against money, not a promise to pay. Accordingly, Counsel reiterated the Plaintiff's standpoint that the Banker's Cheque was issued on a credit balance against the Plaintiff's current account and urged the Court to note that the Plaintiff never made any request for immediate credit of the amount of the Natwest Cheque.

[16] The Plaintiff relied on the case of **Holland vs. Manchester and Liverpool District Banking Co. Limited, TLR Vol. XXV page 386**, in which the Plaintiff, a customer of the Defendant Bank, on examining his pass book found that it showed a balance of 70 pounds to his credit. He thereupon drew a cheque for 67 pounds in favour of a firm to whom he owed that amount. The cheque was dishonoured on presentation for the reason that the Plaintiff only had 60 pounds to his credit, and that in his pass book, one of the bank clerks had, in error, entered to the Plaintiff's credit the sum of 10 pounds twice, with the result that from the pass book, the Plaintiff appeared to be in credit in the sum of 70 pounds. The Court held that although the Defendant was entitled to have the wrong entry ultimately corrected, the Plaintiff who had not been guilty of any negligence or fraud in connection with the matter, was entitled, until that correction to act on those statements. Accordingly, it was the submission of Counsel for the Plaintiff that the Defendant herein was not justified in stopping the payment of the Banker's Cheque.

[17] The Defendant on the other hand, relied on **Section 74 of the Bills of Exchange Act, Chapter 27 of the Laws of Kenya** to support the argument that every contract must have valuable consideration for it to have legal effect. Counsel for the Defendant to note the concession by the Plaintiff that she did not make any personal payment to the Defendant after the dishonour of the Natwest Cheque; and that as of **23 September 2005**, the balance in her Sterling Pounds Account was **GBP 183.47** and that the consideration given by the Plaintiff for the issuance of the **Banker's Cheque No. 392067** was the Natwest Cheque, whose dishonour was brought to her attention. The Defendant accordingly posited that owing to the failure of consideration, it was entitled to stop the payment of the Banker's Cheque. In support of this argument, the Defence relied on **Chitty on Contracts, Vol. 1** on the General Principles of Contract; **Chalmer & Quest on Bills of Exchange**; as well as the persuasive authority of **Banque de l'Indochine et de Suez S.A. vs J.H. Rayner (Mincing Lane) Ltd [1982] 2 Lloyd's Rep. 476**.

[18] Needless to say that a cheque is a bill of exchange that, in commercial parlance, is usually drawn for valuable consideration; and in this connection, the authors of **Chitty on Contracts, Vol. 1, 29<sup>th</sup> Edition** at paragraph 3-004 express the opinion that:

**"The traditional definition of consideration concentrates on the requirement that 'something of value' must be given and accordingly states that consideration is either some detriment to the promisee (in that he may give value) or some benefit to the promisor (in that he may receive value). Usually, this detriment and benefit are merely the same thing looked at from different points of view. Thus payment by a buyer is consideration for the seller's promise to deliver and can be described either as a detriment to the buyer or as a benefit to the seller; and conversely delivery by a seller is consideration for the buyer's promise to pay and can be**

**described either as a detriment to the seller or as a benefit to the buyer..."**

[19] Accordingly, when the Plaintiff applied for a Banker's Cheque for **GBP 36,480** it was on the basis of the value of the Natwest Cheque which she had deposited into her Sterling Pound account. It is instructive that the Cheque Deposit Slip dated **23 September 2005** in respect of the Natwest Cheque had the remarks "**Under reserve until cleared and paid**". In this connection, it was the evidence of **DW1** that, at the material time, it would take about 21 days to have an international cheque, such as the subject cheque, cleared. Accordingly, the Plaintiff did not expect to be in funds by way of proceeds of the Natwest Cheque until around **14 October 2005**. Nevertheless, the Defendant posted a credit balance of **GBP 36,480**, the equivalent sum of the Natwest Cheque into her account on **5 October 2005**. Indeed, it was the evidence of the Plaintiff that it was not upon her request that the funds were thus paid. That notwithstanding, she applied for a Banker's Cheque and the same was issued by the Defendant.

[20] In the premises, I find instructive the explanation offered by **Parker J** of the words "**under reserve**" in the **Banque de L'Indochine Case** (supra) in connection with cheques, namely:

**"A more natural and as I think commercially sensible meaning to give to the words is that the bank reserves the right to have the money back if it was not at the date of payment contractually payable...Such a meaning, is moreover, one which accords with the realities of the situation. At the time of the payment under reserve the beneficiary either is or is not entitled to payment. If he is entitled to payment the bank should have paid him without reserve and he should in justice be entitled to retain that which was from the start due to him. I find it impossible to suppose that either he or the bank intended by the use of such words to put him under an obligation to repay and then claim against the bank. On the other hand, there is every reason to protect the bank from being unable to reclaim even if at least one of the discrepancies was valid. It is this protection only which in my judgment the bank obtains when a payment is made and accepted under reserve."**

[21] Consequently, by the **5 October 2005** when the funds were availed to the Plaintiff, it was known to her that those funds were on the basis of the Natwest Cheque; and therefore that the Plaintiff was, at that point in time, not entitled to the funds. I would therefore agree with the Defendant that both the crediting of the Plaintiff's account and the issuance of the Banker's Cheque thereupon by the Defendant, was all at the discretion of the Defendant; and that it expressly reserved its right to have the money back in the event the foundational cheque was dishonoured. And it is in this connection that a clear distinction can be made between the facts of this case and the facts of **Holland vs. Manchester and Liverpool District Banking Co. Limited Case**, where no cheque deposit under reserve was made. Indeed, in the case of **Union Bank of Nigeria Ltd vs. IfeatuAugsutineNwoye [1996] 2 iLAW/SC.51/1993**, 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..."**

[22]The Defendant further adduced evidence to demonstrate that when it was brought to its attention that the Natwest Cheque had been dishonoured, it did not move to immediately countermand the Banker's Cheque, but vide the letter dated **12 October 2005**, informed the Plaintiff to either return the same or provide funds in her account to enable the Defendant recover the amount thereof. The Plaintiff acknowledged receipt of the letter aforementioned vide her letter dated **13 October 2005** and promised to revert on the issue, yet by **18 October 2005**, she had neither returned the Banker's Cheque, nor availed funds in respect thereof. Accordingly, it is my finding that the Defendant was entitled, in the circumstances, to recall the Banker's Cheque as it did.

[23] I note that the Defendant made heavy weather of its allegations that the Plaintiff was intent on cheque kiting with a view of defrauding it; and that this was compounded by her **"...flip flopping and**

making fake assurances to the Defendant that she would sort out the issue with the drawer of the NatwestCheque which she failed to do or put funds in her account to cater for the debit." It is however manifest that, firstly, the Plaintiff was not the drawer of the Natwest Cheque. Secondly, it was the Defendant that opted to not only put the funds at the disposal of the Plaintiff before the clearance of the Natwest Cheque, but to also issue the Banker's Cheque in her favour for an equivalent amount. I therefore find no merit in the argument that the intention of the Plaintiff was fraudulent.

**[b] Whether the Plaintiff is entitled to a full refund of GBP 36,480 and whether the Defendant is liable to pay damages to the Plaintiff for wrongful dishonour of cheque, loss of bargain and damage to reputation;**

[24] It was the contention of the Plaintiff that she is entitled to a full refund of **GBP 36,480** together with an award of general damages for the loss of bargain and damage to her reputation. According to the Plaintiff, no reason whatsoever was ever communicated to her as to why the **Natwest Cheque** was dishonoured; and that the bounced cheque was never given to her or returned for correction or for replacement. Counsel for the Plaintiff relied on **Section 74B of the Bills of Exchange Act** as well as the case of **Hadley vs. Baxendale [1854] 9 Ex. 354** for the proposition that the party in breach must pay the amount of damage which flows directly and naturally from his failure to keep his contract, provided that such would reasonably have been within the contemplation of the parties at the time when the contract was made. It was thus the evidence of the Plaintiff that she lost a bargain of **GBP 20,000** being a discount for a house in London which she had reserved to purchase; and that in addition to the said amount of **GBP 20,000** she is entitled to an award of **GBP 36,480** being the equivalent value of the Banker's Cheque and an additional GBP for loss of reputation. To this end she relied on the case of **Bank of Baroda (Kenya) Limited vs Timwood Products, Nairobi Civil Appeal No. 132 of 2001** in which **Kshs. 3 million** was awarded for the wrongful dishonour of a cheque for that amount when the customer's account had sufficient funds to cover the cheque.

[25] However, having found that the Plaintiff was not entitled to the proceeds of the Natwest Cheque until after clearance, which turned out not to be the case, it cannot be said that the countermanding of the Banker's Cheque was wrongful, noting that she did not otherwise have sufficient funds in her account to cater for the Banker's Cheque, given the balances as shown by the Bank Statements exhibited by the Defendant at page 17 of the Defendant's Bundle of Documents (see **Kitui Tobacco Distributors Ltd vs. Barclays Bank of Kenya Ltd [2001] eKLR**). Accordingly, it is my finding that the Plaintiff is not entitled to a refund, having not made any payment to the Defendant in the first place; and that she is not entitled to compensation in general damages or otherwise for wrongful dishonour, injury to reputation or lost bargain, in respect of the non-payment of the Banker's Cheque, having found that the Defendant was justified in countermanding the cheque as it did.

[26] In the result, it is my considered finding that the Plaintiff's case against the Defendant is devoid of any merit. The same is hereby dismissed with costs.

Orders accordingly.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 7<sup>TH</sup> DAY OF AUGUST, 2017**

**OLGA SEWE**

**JUDGE**