**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT KISUMU**

**CIVIL SUIT NO. 42 'A' OF 2015**

**BETWEEN**

**ERIC OMUODO OUNGA…...……PLAINTIFF**

**AND**

**KENYA COMMERCIAL BANK LIMITED……...DEFENDANT**

**JUDGMENT**

## The Claim

1. The Plaintiff's claim, set out in the plaint dated 18th December 2015, is against the defendant ("the Bank"). He seeks damages for loss of business opportunity following the loss of a title of a property charged to the Bank and other ancillary reliefs. The Plaintiff stated that he was a customer of the Bank and in 2008 he charged his property situated in Nairobi, LR No. 1/913 ("the suit property") to secure a loan of Kshs. 15,000,000/=. Following creation of a charge in the Bank's favour, the Certificate of Lease ("the Certificate") was kept in its custody.

2. In 2009, the Plaintiff together with an associated company, obtained another loan facility from the bank for Kshs. 108,000,000/= to purchase 20 housing units in Kisumu. Because part of this loan was outstanding, the Bank began putting pressure on him to settle the debt. To settle the debt, the Plaintiff decided to sell the suit property. Consequently, he entered into a sale agreement dated 22nd January 2015 with David Otieno Waiyera ("Waiyera") who agreed to purchase the suit property for Kshs. 31,000,000/=. The Plaintiff received Kshs. 5 million deposit while Standard Chartered Bank agreed to finance the balance of Kshs. 26,000,000/= on behalf of Waiyera upon the Bank accepting the offer by Standard Chartered Bank to take over its facility and redeem the charged suit property.

3. The Plaintiff stated that by a letter dated 5th March 2015, *Kalya and Company Advocates* wrote to the Bank on behalf of Standard Chartered Bank requesting it, as chargee, to confirm that it had no objection to the intended sale and propose the terms of the undertaking or guarantee necessary for the Bank to release the title documents. He further stated that as a result of failure by the Bank to respond to the letter, he decided to repay the outstanding debt. Thereafter the Bank failed, refused and or ignored his request to release the Certificate to enable him process the discharge of charge and thereafter complete the sale of the suit property to Waiyera.

4. As a result of the Bank's negligence in misplacing the title, the Plaintiff claimed that he suffered loss and damage amounting to Kshs. 237, 356, 0000/= which he now claims. In addition to this sum, he prayed for release of the Certificate to the suit property, general damages, costs and interest.

**The Defence**

5. In its statement of defence dated 12th February 2016, the Bank admitted that the Plaintiff was its customer and that it granted the Plaintiff a loan of Kshs. 21,600,000/=. Of the total amount, Kshs. 15,000,000/= was secured by a charge over the suit property and Kshs 6,000,000/= secured by a further charge over Kisumu Municipality/Block 12/192. After the sums were advanced, the loan account fell into arrears.

6. The Bank confirmed that it received a letter dated 5th March 2015 from *Kalya and Company Advocates* who were acting for Standard Chartered Bank for the benefit of Wayiera. According to the Bank, the Plaintiff, as its customer, had neither informed nor given it instructions on how it was expected to deal with the request.

7. The Bank denied that the Plaintiff was entitled to any damages as pleaded in the plaint as he did not communicate the sale to it nor inform him of his intention to enter into other business relations. It further averred that the damages claimed were too remote, speculative, unenforceable and could not be sustained in law. The Bank admitted that it misplaced the Certificate but averred that the loss alone could not constitute a cause of action.

8. The Bank also averred that the Plaintiff's claim was an afterthought as he never requested for the Certificate. It further contended that the claim was made in bad faith as the Bank requested the Plaintiff to execute statutory declarations necessary to enable it apply for and process a fresh Certificate.

**Issues and admitted facts**

9. The parties filed separate issues for determination. Each side called one witness; the Plaintiff (PW 1) and George Pande (DW 1) for the Bank. Their testimony followed the contours set out by their respective pleadings as I have set out above. Their counsel also filed written submissions. After considering all the testimony and documents filed, several matters emerged that were not contested.

10. The Bank through DW 1 admitted that the Certificate was misplaced. This fact is confirmed by the Bank applying for a police abstract in July 2015. In December 2015, the Bank forwarded statutory declarations to the Plaintiff, for his execution, to enable the Bank process a replacement Certificate of Lease for the suit property.

11. The parties are in agreement that the debt secured by the charge was ultimately paid off, entitling the Plaintiff to the release of the Certificate. According to bank statements produced by the parties, the Plaintiff paid Kshs. 7,600,000.00 on 8th April 2015 to clear a debt amounting to Kshs 12,034,600.82. On 3rd December 2015, the Bank confirmed that the balance of Kshs. 4,434,600.02 had been cleared.

12. The Plaintiff admitted the Bank's contention that the Certificate was in fact being held by it on the strength of his instructions contained in a letter dated 20th August 2017. DW 1 testified that after the Plaintiff had cleared the loan, he approached the Bank and instructed it to retain the Certificate to secure advances to a third party. DW 1 confirmed that the debt being secured by the suit property had not been settled by the time of trial.

13. The dispute between the parties is whether the Plaintiff is entitled to damages following the Bank's misplacement of his Certificate. I agree with the Bank's position that this Court cannot order release of the Certificate as it is now a security for advances to a third party as requested by the Plaintiff. The question for consideration is whether the Bank was able to release the Certificate at the time it was requested to do so by the Plaintiff.

**Determination**

14. The gravamen of the Plaintiff's case is that the Bank failed to respond to the letter from *Kalya and*

*Company Advocates* despite several requests and visits to the Bank. The Plaintiff referred to another letter written to the Bank by his advocate, *Shivaji & Company Advocates* seeking a response to the letter from *Kalya & Company Advocates*. The Plaintiff claimed that as a result of the Bank's negligence and failure to release the Certificate, he suffered loss as the sale to Waiyera was supposed to be completed on or about 22nd April 2015.

15. Counsel for the Plaintiff submitted that the Bank had a duty of care to him to ensure that the Certificate was kept in safe custody and as result of the loss of the Certificate, he was entitled to indemnity for any loss and damage as a result of his inability to use his Certificate for whatever purpose.

16. In response to the Plaintiff's case, counsel for the Bank submitted that the relationship between it and the Plaintiff was governed by the Charge document which provided that the Plaintiff could not sell the suit property unless it sought and obtained prior written permission from the Bank. Counsel argued that the letter written by *Shivaji & Company Advocates* threatening to sue the Bank was not a letter contemplated by the Charge seeking such consent. Counsel urged that the letter written by *Kalya & Company Advocates* could not be construed as seeking authority and as it was an inquiry by a third party, the Bank was not obliged to respond to it as it did not have the Plaintiff's authority to do so.

17. It is not disputed that the Bank did not respond to the letter written by *Kalya & Company Advocates*. There is no evidence that the Bank even approached the Plaintiff, it's customer, to inquire what the letter was about and to seek his instructions. This is why the Plaintiff was constrained to instruct his advocates, *Shivaji & Company Advocates*, to issue the letter dated 15th April 2015 which I will set out in full;

> *15th April 2015*
>
> *The Legal and Documentation Manager*
>
> *Securities Documentation Centre*
>
> *Kenya Commercial Bank Limited*
>
> *Head Office, Moi Avenue*
>
> *Nairobi*
>
> *Dear Sir/Madam*
>
> *RE: MAISONETTE "A", ERECTED ON LAND REFERENCE NUMBER*
>
> *1/913 (ORIGINAL NUMBER 1/323/3) TURBO ROAD YAYA SHOPPING*
>
> *CENTER, NAIROBI I.N.O ERIC OMUODO OUNGA*
>
> *We have instructions to act on behalf of the above named Mr. Eric Omuodo Ounga.*
>
> *Our instructions are that our client offered the title document for the above named property to the bank and a mortgage was registered in favour of the bank to secure certain facilities granted by the bank to him.*
>
> *It has transpired that our client has entered into an agreement for the sale of the said property and a professional undertaking to pay the amount outstanding under the secured facilities has been delivered to the bank. Kenya Commercial Bank has however failed, refused and or ignored to respond to the letter of professional undertaking and it has only indicated verbally to our client that the title document cannot be traced.*

*It is no lost to our client that Kenya Commercial Bank has forwarded his name to the Credit Reference Bureau as an un-creditworthy person, yet his efforts to clear the outstanding liabilities are being frustrated by the Bank. The negligence on the part of the bank has therefore exposed our client to losses owing to continued accrual of interest on outstanding sums, the possibility of breach of the contract of sale for the above named property as well as the loss of business.*

*Consequently, our client demands the restitution of loss incurred as a result of the delays caused by the bank and the negligent manner in which his title documents have been handled. This is (sic) additions to an account of the whereabouts of our client's documents.*

*We hope to receive your response on the matter within SEVEN (7) DAYS of the date of this letter to enable the parties get into the issue of quantum of restitution. In the absence of a response, then we shall proceed to take appropriate legal action without reference to you.*

*Yours faithfully*

*S. SHIVAJI*

*FOR SHIVAJI & COMPANY ADVOCATES*

18. The Bank received the letter on 15th April 2015. The letter is important in several respects. First, it was written on behalf of the Plaintiff by his advocates after the Plaintiff failed to receive any response from the letter by *Kalya & Company Advocates*. Second, it confirmed the Bank's inaction in responding to the *Kalya & Company Advocates*. Third, it revealed the fact that the Plaintiff was aware that the Bank had lost the Certificate.

19. The Bank also argued that it could not respond to the letter from *Kalya & Company Advocates* on grounds of confidentiality. Even if I accept that the Bank was correct on this score, nothing stopped it from communicating to the Plaintiff's duly appointed agent, his advocate. The letter from *Shivaji & Company Advocates* buttressed the Plaintiff's case that he had made inquiries about this issue from the Bank and when he failed to get a response, he had no option but to seek legal counsel. Why would he instruct his advocate to write a demand in these circumstances? DW 1 did not give any explanation why the Bank did not respond. Its loud silence in the face of such accusations leads to the irresistible conclusion that the Bank was aware that the Plaintiff wanted to sell the suit property and that it had, by that date, already misplaced the Certificate.

20. Whether and when the Plaintiff was entitled to the documents would depend on when the loan was cleared. Counsel for the Bank submitted that it is uncertain when the Plaintiff cleared the loan and that it could have been cleared in the period between 8th April 2015 and 3rd December 2015. DW 1 stated in examination in-chief that the Plaintiff cleared the loan on or about 17th April 2015. This is confirmed by the certificate issued by Metropol Credit Reference Bureau on 22nd April 2015 clearing the Plaintiff. It is strange that the Bank, as custodian of the accounts, would speculate on when the loan was paid when this matter was specially within its knowledge. Anyway, I am satisfied that the Plaintiff cleared his loan on or about 17th April 2015.

21. Since the Plaintiff was still owing the Bank money by 15th April 2015, nothing would have been easier than for the Bank to inform him that it could not honour the request from *Kalya & Company Advocates* for whatever reason. Further, the Bank's reliance on Clause 10 of the Charge is not well-founded as it does not mean that the Plaintiff could not enter into prospective agreements which the Bank would accept or reject when a formal request is made. Clause 10 of the Charge reads as follows:

*The Chargor shall not sell, transfer, lease, agree to lease, accept surrenders of lease, Charge or part with the possession of any part of the premises without the prior written consent of the Chargee and the provisions of section 69(F) and Section 69(G) of the Registered Land Act shall apply to this Charge.*

22. While it was possible for the Bank to rely on this Clause to avoid any liability, the facts before the court do not support the application of this Clause. The demand letter by *Shivaji & Company Advocates* was written and received on 15th April 2015 while the debt was owing, DW 1 confirmed in his evidence that the debt was cleared on 17th April 2015 on which date the Plaintiff would have been entitled to his documents or at any rate a response to the demand letter. Despite the Plaintiff writing a demand through his advocates and clearing the loan, the Bank chose to keep quiet despite knowing well that the Certificate had been misplaced.

**Negligence**

23. The Plaintiff's case is predicated on negligence by the Bank for misplacing his Certificate. The bank-customer relationship is contractual in nature and imposes a duty on the bank to exercise reasonable care and skill in its dealings with the customer. In ***Karak Brothers Company Ltd v Burden*** **[1972] All ER 1210**, the Court observed as follows:

> *[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 within its contract with its customer. The standard of that reasonable care and skill is an objective standard applicable to bankers. Whether or not it has been attained in any particular case has to be decided in the light of all the relevant facts, which can vary almost infinitely.*

24. The bank's duty of care to its customers may also arise concurrently in tort. Thus in ***Selangor United Rubber Estates Ltd v Cradock (No. 3)*** **[1968] 1 WLR 1555**, Ungoed-Thomas J., stated as follows, as regarding a bank's duty of care:

> *To my mind… 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 within its contract with its customer. The standard of that reasonable care and skill is an objective standard applicable to bankers. Whether or not it has been attained in any particular case has to be decided in the light of all relevant facts which can vary almost infinitely.*

25. As the cause of action arises in both tort and contract, a claimant may elect which one to pursue bearing in mind issues like the difference in limitation periods and rules as to remoteness of damages (see ***Andrew Kiriti Gathii v Equity Bank Limited*** **NRB HCCC No. 37 of 2016 (UR)**). The Plaintiff elected to make its case based on the tort of negligence. In order to prove negligence, the Plaintiff has to prove that the defendant owed a duty of care and that the duty was breached and that it suffered loss and damage as a result of such breach (see ***Brite Print (K) Ltd & George Maina Kingori v Barclays Bank (K) Ltd*** **NRB HCCC No. 657 of 2006 [2014] eKLR**).

26. Given the nature and proximity of the relationship between the Bank and its customer, it is not difficult to locate a duty of care by the Bank to ensure that it keeps the customer's title documents in safe custody. In the ***ACC Bank PLC v Fairlee Properties Limited and Others*** **[2009] IEHC 4**, the High Court in the Republic of Ireland held the bank liable for loss of deeds to certain properties. The court held as follows:

> *39. It is not disputed on the facts of this case that the Plaintiff had such close and direct relations with Fairlee and Mr. Beades as the owners, at least of the equity of redemption in the properties to which the deposited title-deeds related, that it must have known that they would be directly affected if the Plaintiff were careless in the storing of the title-deeds such that they could not produce them when requested. It must have been reasonably foreseeable to the plaintiff that if it was careless in the storing of the title-deeds such that they could not produce them on request, that such carelessness would be likely to injure the defendants.*

27. Counsel for the Bank conceded that the Bank had a duty of care to ensure that its customer's documents are kept safely. The Bank admitted that it misplaced the Certificate. I have also found that the Bank knew that the Certificate was misplaced when the demand letter was addressed to it and even after

the Plaintiff had cleared the loan. It did not formally inform the Plaintiff of this fact until it forwarded to him the statutory declarations to enable him process the replacement Certificate. The question then is whether the Plaintiff suffered loss or damage to the extent of Kshs. 237,356,000/- as a result of the loss of the Certificate as claimed.

**Damages**

28. I now turn to the issue of damages. The Plaintiff claimed that he suffered loss arising from the sale agreement with Wayiera dated 22nd January 2015 being penalty and interest payment of 10% per annum on the deposit received by the Plaintiff for the period between 22nd January 2015 and 22nd November 2015 amounting to Kshs. 416,000.00. In addition, the Plaintiff claimed that he lost a business opportunity where he stood to gain Kshs. 39,000,000.00 from trading with the sale proceeds of the suit property.

29. The Plaintiff also claimed loss of Kshs. 21.6 million from the sale agreement with one John Obunga Okore for land parcel No. L.R. Kisumu/Dago/3197. He claimed that he lost Kshs. 4.4 million deposit paid for the purchase price of Kshs 14.4 million only. He also claimed that he had lost a business opportunity when he had identified a buyer who had offered to purchase the same parcel of land at Kshs. 36 million only which meant Kshs. 2,927,000/- per acre or factor of 2.5 on the original purchase price the Plaintiff purchased at thus he expected to make a profit of Kshs. 21.6 million. Had the transaction gone through, the Plaintiff contended that he would have realized a further sale value of Kshs. 54 million in new land purchase for sale around June and July, 2015 after employing the 2.5 factor on the profit of Kshs. 25.6 million resulting in an additional Kshs. 32.4 million by 30th November 2015.

30. The Plaintiff also pleaded that on 15th March 2015, he received an offer to buy 15.3 ha under title Kisumu/Dago/3543 for Kshs. 76,000,000/= by *Lake Estate Agency* being Kshs. 2 million per acre. He calculated that by expiry of the offer on 30th April 2015, he would have paid Lake Estate Agency Limited a deposit of 10% being Kshs. 7.6 million arising from the sailed sale of the suit property and seal a deal with *Kicha Agencies* who had agreed to buy this land from the Plaintiff at Kshs. 133 million only being Kshs. 3.5 million per acre. As a result, he lost a business opportunity which is the difference (profit margin) between the price that he purchased the land from Lake Estate Agency being Kshs. 2 million per acre and the Plaintiff anticipated sale price of Kshs. 3.5 million per acre for the 38 acres translated to Kshs. 57 million. He therefore stood to make an additional profit of Kshs. 85.5 million by 30th November 2015 by redeploying the above profit of Kshs. 57 million above in new land purchases and sale during the period of July 2015. He also lost an opportunity of realizing an additional amount (being 142.5 million less 57 million) based on the profit made earlier in transactions with Sony Sugar Company Limited.

31. The Bank's response was that the Plaintiff's claim for damages did not constitute a natural and ordinary consequence of the default. Counsel submitted that the contracts between the Plaintiff and third parties were not known to the Bank and could not have been known to it or contemplated at the time of the breach. Counsel cited the cases of ***Nduico Limited v Nairobi City Commission*** **Civil Appeal No. 40 of 1995(UR)** and ***Nalinkumar Shah v Mumias Sugar Company Ltd*** **MSA HCC No. 40 of 2009 [2010] eKLR** to support its proposition.

32. The Bank also resisted the Plaintiff's claim for loss of business opportunity on the ground that the Plaintiff or the persons he dealt with were carrying on the business of buying and selling property contrary to the ***Estate Agents Act (Chapter 533 of the Laws of Kenya)***. The Bank, through it advocates, requested the Estates Registration Board for the 2015 registration status of the Plaintiff and the other estate agents he was dealing with. The Board, by its letter dated 9th February 2016, confirmed that Eric Omuodo Ounga trading as *Ounga Commercial Agencies*, Erastus Ian Khandira trading as *Kicha Agencies* and Nishma Karia trading as *Lake Estate Agency* were not registered under the ***Estate Agents Act*** and were therefore contravening **section 18** of the ***Estate Agents Act*** which prohibits unregistered persons from practicing as estate agents and imposes a penalty of a fine or imprisonment for those found guilty.

33. Counsel for the Bank submitted that the nature of the business conducted by the Plaintiff and the profits contemplated constituted practice of estate agency within the meaning of **section 2** of the ***Estate***

***Agents Act*** which provides as follows:

> *"Practice as an estate agent" means the doing, in connection with the selling, mortgaging, charging, letting or management of immovable property or of any house, shop or other building forming part thereof, of any of the following act –*
>
> *(a) bringing together, or taking steps to bring together, a prospective vendor, lessor or lender and a prospective purchaser, lessee or borrower; or*
>
> *(b) the terms of sale, mortgage, charge or letting as an intermediary between or on behalf of either of the principals;*

34. Counsel for the Bank relied on ***Mapis Investment (K) Limited v Kenya Railways Corporation*** **NRB CA Civil Appeal No. 14 of 2005 [2006]eKLR** to submit that the court cannot allow any person to earn a profit from an illegal transaction which would translate to rewarding the person for committing an offence. In that case, the Court of Appeal disallowed a claim for commission that was in breach of **section 18** of the ***Estate Agents Act*** as the claimant was not a registered estate agent. The Court expressed the view that:

> *After careful consideration we have decided that it is clear from the evidence before the superior court and the provisions of **section 18 of Cap 533** that, if the contract alleged by Mapis and Mr. Shompa to exist, did in fact exist, the conduct of Mr. Shompa and the appellant company was in breach of express provisions of the statute and illegal. In view of this we are not prepared to countenance the award of a further sum of Kshs. 17.5 million plus interest at 34% to the appellant as claimed in the memorandum of appeal read with the plaint.*

35. The Court then concluded as follows:

> *In the letter dated **20th November 2002** in which it was stated that the appellant and Mr. Shompa were not registered, was produced in evidence by Mr. Shompa, a director of the appellant without any denial of the non registration. This was in our view tantamount to an admission of the facts giving rise to the illegality. That being the case it was then a matter of law as to whether the non registration resulted in the illegality of the contract; it is clear that a contract to perform estate agency services can only be legal if entered into with a **registered** Estate Agent.*

36. The Plaintiff elected to make his claim in tort where the primary rule that determines what damage is recoverable remains that of reasonable foreseeability. In ***Joshua Mugwe Wanganga v Joseph Nyaga Karingi*** **NYR CA Civil Appeal No. 4 of 2011 [2014]eKLR**, the Court adopted the principles in ***Overseas Tankship (UK) Limited v Morris Dock Engineering Co. Ltd (The Wagon Mound) [1961] AC 388*** *where the Privy Council held that in order to be recoverable, the damages must be foreseeable. In other words, the damages must not be too remote.*

37. In his submissions, Counsel for the Bank, relied on decisions relating to assessment of damages under the law of contract. Lord Hope of Craighead in ***Transfield Shipping Inc v Mercator Shipping Inc*** **[2009] 1 AC 61]** distinguished foreseeability of damages under contract and under tort as follows:

> *Assumption of responsibility, which forms the basis of the law of remoteness of damage in contract, is determined by more than what at the time of the contract was reasonably foreseeable. It is important to bear in mind that, as Lord Reid pointed out in The Heron II [1969] 1 AC 350, 385, the rule that applies in tort is quite different and imposes a much wider liability than that which applies in contract. The defendant in tort will be liable for any type of loss and damage which is reasonably foreseeable as likely to result from the act or omission for which he is held liable. Reasonable foreseeability is the criterion by which the extent of that liability is to be judged, and it may result in his having to pay for something that, although reasonably foreseeable, was very unusual, not likely to occur and much greater in amount than he could have anticipated. In contract it is different and, said Lord Reid, at p 386, there is good reason for the difference:*

*"In contract, if one party wishes to protect himself against a risk which to the other party would appear unusual, he can direct the other party's attention to it before the contract is made, and I need not stop to consider in what circumstances the other party will then be held to have accepted responsibility in that event."*

*The fact that the loss was foreseeable - the kind of result that the parties would have had in mind, as the majority arbitrators put it - is not the test. Greater precision is needed than that. The question is whether the loss was a type of loss for which the party can reasonably be assumed to have assumed responsibility.* [Emphasis]

38. In ***ACC Bank PLC v Fairlee Properties Limited and Others*** **(Supra),** the claimant was a property developer and the property, whose deeds were lost by the bank, was a development property and these matters were known to the bank. The court held that the reduction in probable profits from development of the property as a result of the delay in seeking alternative financing caused by the loss of the deeds was the type of damage within the scope of the duty of care of the bank. In order to bridge the financial gap to complete the development, the claimant had to seek alternative finance at higher than commercial rates. This would have been avoided had the deeds to his property been available to enable him to obtain a commercial loan by using the deeds as security. The court held that this loss was reasonably foreseeable by the bank. The court therefore awarded the claimant damages for the reduction in probable profits for development resulting from sale of the properties below the market value and the additional cost of financing.

39. One of the factors in determining the foreseeability of damages is the nature of the relationship between Plaintiff and the Bank, whether the Bank knew of the Plaintiff's intention to sell the property after settling the loan and the kind of property that was being sold. The letters from *Kalya & Company Advocates* and *Shivaji & Company Advocates* were crystal clear that the Plaintiff wanted to dispose of the suit property and had entered into a sale agreement. This fact was known by the Bank and breach of that agreement of sale was a foreseeable consequence of the Bank's breach of duty of care. As regards the nature of business the Plaintiff was carrying out, the documents produced in court, that is the letter of offer supporting the charge over the suit property, did not indicate that it was the kind of property that would be used for business nor was it suggested in the documents that it was a development property.

40. I agree with the counsel for the Bank that the other losses flowing from loss of business opportunities and deals with third parties including loss of anticipated profits were too speculative and failure of the said deals could not be attributed to the Bank's action or inaction. The Bank knew nothing of these transactions and none of them were brought to its attention between April and August 2015. Moreover, these opportunities arose from the Plaintiff conducting the business of estate agency which, according to the case of ***Mapis Investment (K) Limited v Kenya Railways Corporation*** **(Supra)**, I would have to disregard as the Plaintiff and the third parties conducting the business were not registered agents under the ***Estate Agents Act***.

41. The measure of damages must be adjudged from the effect of breach of the Bank's duty of care on the sale agreement between the Plaintiff and Waiyera. The Plaintiff did not sell the property and in fact, offered it to the Bank as security in August 2015. The Plaintiff testified that when he entered in the sale agreement with Waiyera he was paid Kshs. 5 million deposit. Under Clause 6.2 of the agreement, the purchaser was required to give a 21-day notice of completion if the vendor failed to comply with the terms of the agreement. Thereafter, the purchaser was entitled to rescind the agreement and within 7 days, the vendor was required to refund the deposit with interest at a rate of 10% p.a. from the date of payment until payment in full. Given that the Plaintiff had to return the deposit, he could not have lost anything since he still retained the property. Further, the Plaintiff did not prove that he paid any interest on the deposit to Waiyera which would have represented his actual loss. I therefore hold that the Plaintiff failed to prove his loss.

42. Proof of damages is an essential element of the tort of negligence. As the Plaintiff has failed to prove damages, this action must fail and it is accordingly dismissed.

**Costs**

43. I now turn to the issue of costs. Ordinarily costs follow the event unless there is a good reason to deprive the successful party of costs as a result of its conduct (see ***Orix Oil (Kenya) Limited v Paul Kabeu & 2 Others*** **[2014] eKLR**). I take a dim view of the Bank's conduct. It was aware that it had misplaced the Plaintiff's Certificate but failed to inform him promptly. It failed to respond to his queries about his property despite a demand being issued through his advocates. This suit would probably have been avoided had the Bank been more forthcoming. It is not entitled to costs and I decline to award it costs

**Disposition**

44. I dismiss the suit with no order as to costs.

**DATED and DELIVERED at KISUMU this 19th day of October 2017.**

**D.S. MAJANJA**

**JUDGE**

Mr Onyango instructed by S. M. Onyango and Associates Advocates for the Plaintiff.

Mr Ragot instructed by Otieno, Ragot and Company Advocates for the defendant.