



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIVASHA**  
**CIVIL CAUSE NO. 17 OF 2015**

**SHALIMAR FLOWERS SELF HELP GROUP.....PLAINTIFF**

**-VERSUS-**

**KENYA COMMERCIAL BANK.....DEFENDANT**

**JUDGMENT**

**The Plaintiff's Case**

1. Shalimar Flowers Self Help Group (hereinafter the group) suing through its officials Mark Odongo, Julius Njuguna, and Edwin Ayieba filed this suit on 15<sup>th</sup> October 2009 seeking through prayer (a) to recover from the defendant the sum of kshs 2,216,182.00 and in prayer (b) the sum of €43,817 at the exchange rate prevailing at the time of judgment. The plaintiffs suit is founded on negligence and breach of express and implied contract and obligations on the part of the defendant.
2. The plaintiff's case, through pleadings and evidence tendered by Mark Odongo, (PW1) and Julius Njuguna (PW2) is as follows.

The Plaintiff was a self-help group duly registered as a society. Its membership was mainly drawn from flower farm workers at the Shalimar Flowers Company, Naivasha. It had several officials. In the year 2008 the office bearers were Amos Sitati Wamalwa (Chairman), Mark Odongo (vice chairman), Philip Hambani (Ambani) Ngutuku (secretary) and Sitienei Yego (treasurer).

3. During the material period, the group operated several bank accounts with the Kenya commercial Bank at Naivasha. These included, a Kenya shillings account and a foreign currency (Euro) account. It would seem, from the specimen cards from the bank that the latter account initially had been assigned the account No. **[particulars withheld]** which was later crossed over and changed to number **[particulars withheld]**. Similarly, the former account, as per the cheques exhibited was assigned the number **[particulars withheld]**.
4. The signatories of the two accounts were the four officials of the group. In addition, one James Kelmanson, then General Manager of the Shalimar Flowers Company was the mandatory signatory to the accounts. The group was a beneficiary of cash commissions given by the company's flower customers abroad under the Fair Trade arrangement. Such payments would be deposited into the group's accounts.
5. Between June 2008 and January 2009, a series of cheque payments and transfers were made from the group's two accounts. Through four cheques being No. 000151 for Shs. 486,350/=, No. 000158 for Shs 890,632.00; No. 000174 for Shs. 464,200.00; and No. 000193 for Shs 375,000.00, a total sum of Shs 2,216,182.00 was paid from the local currency account to a payee known as Tri-systems Technology. All the cheques were cleared through an account in the Cooperative Bank of Kenya, Nairobi on various dates.

6. Similarly, between December 2008 and January 2009, there were five letters of instructions for cash transfers from the group's Euro account. Four of the payments were to the Tri-systems Technology account held at the Cooperative bank, and one to Marris Innovations through an account at Barclays Bank, Nairobi.
7. The latter payment was allegedly made in respect of supply of water pumps to the group. Payments to Tri-systems Technology were purported to be in respect of supply of standby UPS, networking accessories, lap tops and printers. In total a sum of 43,817.00 Euros was paid out of the group's foreign account. The letters authorizing these transfers and the cheques all bore the purported signatures of the authorized officials. These matters came to light early in 2009, after four cheque leaves were reported missing from the group's cheque book.
8. Police were notified and investigations commenced. Four persons including the group's former chairman and secretary were charged in court with various offences in connection with the payments which the group denied authorizing. The Plaintiff contends that the payments were not authorized by the group. And that the bank was negligent for failing to verify and confirm the authenticity of the signatures on the payment documents, failing in the statutory duty owed to the plaintiff as customers, and authorizing illegal payments.
9. Further the Plaintiff contends that the defendants are in breach of express and implied obligations to the Plaintiff as a customer under the mutual contract, by failing to authenticate the signatures on the payment documents and failing to inquire from the Plaintiffs regarding transactions in their account as duty bound to do.

### **The Defendant's Case**

10. For their part, the Defendants denied liability in their statement of defence filed on 5<sup>th</sup> November 2009. The gist of the defence statement is that the defendant, while admitting the banker-customer relationship with the plaintiff, denies that payments were made out of the Plaintiff's account without due verification of authorized signatures on cheques and transfer letters. The Defendant asserts that the transactions were properly confirmed. With regard to the Euro account the Defendant avers that the transactions thereon were duly authorized and that beyond verifying the signatures the Defendant confirmed the letters via the contact address provided on the signature specimen card held by the bank.
11. The Defendant further pleaded negligence against the Plaintiff for failing to conduct due checks on their books of accounts and bank accounts, failure to keep its cheque books securely and to notify the bank of the loss of cheque leaves, and failure to keep their signatories accountable for payments and withdrawals on the accounts. The Defendant avers that any irregularity in the transactions arose from the criminal conspiracy of the Plaintiff's signatories who were beneficiaries of the transactions, and not any fault on the part of the Defendant.
12. The Defendant's sole witness was Christopher Karanja Waweru, the operations Manager with the Defendant's Naivasha branch. (DW1). He testified that the Plaintiff had several accounts with the Defendant previously but retained only two at the material time. The signatories to the accounts were 4 officials of the group and Kelmanson. The current account was No. **[particulars withheld]** and the Foreign account No. **[particulars withheld]**. Both were operated by the same five signatories as at 19/3/08. The mandate of the Plaintiff was that any cheque had to be signed by the signatories; including Kelmanson who was a mandatory signatory. To pay the four cheques before court, it was a requirement that the bank verifies the signatures thereon as per the mandate of the plaintiff.
13. However according to DW1, the bank would ordinarily go the extra mile in confirming payment by calling a signatory via the number on the signature specimen card held at the bank, which was usually answered by the group Chairman, Amos Wamalwa. He said there was no requirement that any payment be thus confirmed by Kelmanson, the mandatory signatory. He claimed that the signatures on the cheques before the court were in accordance with the held mandate. He also identified five letters authorizing transfer of funds to Tri systems Technology and Marris Innovation Ltd. Such letters he said would be stamped upon receipt and passed to the back office for verification.
14. He stated with regard to the letters that having verified the signatures thereon, he put calls through to Amos Wamalwa who confirmed the instructions therein. He claimed that similar confirmation

was done for the cheques by the Nairobi office. He admitted that he only dealt with the letters of transfer and not the cheques with regard to this case.

15. Nevertheless it was his evidence that the normal bank procedure adopted by the bank was to call their customer to confirm any cheque payment. This he said was out of extra caution. When the questioned payments came to light, he advised the Plaintiff's officials to report to the police and was eventually a witness in the trial against the culprits who included the former group's Chairman and Secretary. DW1 exonerated the bank from being blamed by stating that the security of cheque books was the customer's responsibility.

### **Analysis and Determination**

16. I have considered the pleadings, evidence tendered by the parties as well as the written submissions. Certain basic facts are not disputed. These include the particulars of the two accounts held by the group at the defendant bank, authorized signatories at the material period and the payment of the sums reflected in the four disputed cheques and the five transfer letters to Tri - systems Technology and Marrs Innovations, by the defendant bank from the group's accounts.
17. The questions for determination are three pronged; namely the mandate of operating the group's accounts, the duty owed by the Defendant to the group and whether the Defendant is in breach of the said duty and therefore liable to pay to the group the sums claimed in the plaint.
18. These issues are a restatement of the issues Agreed Issues filed by the parties reflected as No.2-5. Clearly issue 1 and 6 of the agreed issues are no longer in disputation. I propose to deal with the issues seriatim.

### **The Plaintiff Customer's mandate in respect of the two accounts**

19. The evidence of Marko Odongo (PW1) was that 3 signatories including the mandatory signatory James Kelmanson could transact business on the two group accounts. According to him the group's instructions to the bank were that the bank was to confirm payments with the signatories and/or the mandatory signatory and fair trade officer before allowing payments.
20. During cross examination he was shown the disputed cheques and transfer letters. He admitted that the signatures therein were those of the group's signatories save the one by the mandatory signatory which was allegedly forged. He was unable to tell whether the telephone contacts on the specimen card were those of the mandatory signatory. PW2 joined the group after 2009 and his evidence on the signing mandate of the account is similar to that of PW1.
21. DW1 said the authorized signatories were the same for both accounts. He identified the specimen cards in respect of the foreign account as an exhibit. According to him 4 signatories including the farm manager James Kelmanson could transact on the accounts. Kelmanson was a mandatory signatory. He stated that the bank's responsibility was to verify the signatures and confirm payment with the group as a further precautionary step even though that was not a requirement of the group.
22. He said he had called often on the numbers provided in the specimen card and usually spoke to the chairman Amos Wamalwa. He said the telephone numbers on the card were intended for correspondence and did not imply a requirement to call the mandatory signatory or any other signatory before authorizing payments.
23. Regarding the specimen signatures, DW1 said that the bank did not employ hand writing experts to verify signatures but ordinary bank staff. He explained during cross-examine.

***“ NO, bank doesn't have handwriting expert. Any officer can counter check the signature. We don't employ experts. Since we have original signatures, we merely compare signatures or instructions with specimen held. Yes I have heard that Kelmanson's signature was forged. I gave evidence in the criminal case. The bank did its part by comparing signatures and using numbers on bank card to call.”***

24. In submissions the plaintiff did not address separately the question of the exact mandate governing the operation of the accounts that had been given to the bank. I note also that the signature specimen cards tendered relate only to the euro account. None were tendered in respect of the

- current account. However, it seemed from the evidence of both parties that the two accounts had similar mandates thus the specimen card tendered is representative.
25. The defence submissions on this score merely reiterated the evidence of DW1 regarding mandate and further cited the case of ***Rising Freight Ltd versus Eco Bank Nairobi HCC No. 313 of 2009*** to the effect that an ordinary banker does not possess the skill and knowledge of a handwriting expert and all that was required of him was to make a comparison of signatures.
26. Having considered all of the foregoing, it is my considered view that the onus lay on the plaintiff to clearly establish the instructions they allege against the defendant. While it is not in dispute that the defendant was duty bound under the terms of engagement to ensure that four signatures including the mandatory signatory authorized any payment, there was no evidence of the additional requirement for the bank to call any signatory or even the mandatory signatory to confirm payments.
27. Such instructions, if given, ought to have been in writing in ordinary circumstances. The signatures specimen card tendered by both parties does not reflect any such instructions. The plaintiff sought to make capital out of the existence of two telephone numbers on the account bank specimen card. The words proceeding these telephone numbers are as follows:-

**“ all correspondence relating to the account to be sent to:”**

In the blank space provided are the words “Shalimar Flowers self Help Group” and two telephone numbers. While one of the numbers admittedly used on all occasions was picked by the chairman, it was not clear who the holder of the second telephone number was. DW1 said he had never called that number in the course of dealing with the group’s transactions.

28. Thus I have not found any credible evidence to support the assertion that the group’s instructions to the bank was to confirm all payments by calling all signatories and especially the mandatory signatory or the Fair Trade Officer before approving payments. The mandate was as reflected in the specimen card, namely to allow payment upon verification of the signatures of the four signatories who had to include the mandatory signature, and to direct all correspondence to the telephone numbers supplied.

### **The Duty owed to the Plaintiff Customer by the Defendant**

29. What the foregoing means is that, the Defendant’s duty to the Plaintiff, on the basis of the customer’s instructions was that the bank had to ensure that transactions on the group’s accounts were properly authorized by the recognized signatories, and to direct any inquiries or correspondence to the numbers given by the customer. And as observed in the case of ***Rising Freight Ltd***, the defendant’s employees not being handwriting experts were only required to compare the signatures on instructions presented against the specimens held at the bank.
30. That is not to say that a banker’s attitude in carrying out this exercise was to “see no evil and hear no evil”. The banker’s duty in processing payments for customers and others was extensively discussed by the Court of Appeal in the case of ***Standard Chartered Bank Kenya Ltd versus Intercom Services Ltd and 4 others. (2004) eKLR.***
31. Although the case related to the bank’s duty of confidentiality to its customer, the court indicated that there exists an express and implied duty arising from a contract between a banker and the customer. In the context of this case the evidence on the contract does not establish the alleged express terms of the parties contract. To imply out of the proven contract that the Defendant was obligated to call all signatories to a cheque or instructions before paying it would impose an onerous duty on the banker. However, it is reasonable to expect the Defendant to act with due care and in the interest of its customer. This duty calls upon the banker to exercise skill while dealing with transactions on the customer’s account.
32. This sense of duty in my view informs the “further step” taken by the DW1 to call one of the signatories, despite there being no such instructions, to confirm the payments on the five instruction letters. In the ***Standard Bank case, Githinji J A*** distinguished between the duty imposed on the collecting bank and the paying bank when sued by the true owner of money or the customer of the bank respectively.

33. Citing the case of *Lipkin Gorman V Karpnale Ltd (1992) 4 ALL ER 409*, the learned judge paraphrased the words of Parker LJ as follows:

**“ (Parker LJ) observed that the cases dealing with the question of breach of duty of care by a paying banker to his customer when carrying out (the) customer’s mandate must be approached with caution as they are no more decisions of fact i.e. of the application of the law to an endless variety of circumstances.”**

Githinji JA continued to state:-

“His lordship sounded a further warning in approaching those cases at page 440 paragraph (b) thus:

**“ In addition, cases relating to a collecting banker being sued in conversion and those relating to a paying banker sued for breach of contract raise different considerations. In the former case, it is for the banker to establish that he collected without negligence, and in the latter the burdens is on the customer to prove negligence. The statutory protection is also different in the two types of cases .....**”

34. As observed by the learned judge of appeal statutory provisions protecting bankers were intended to mitigate against the strict duty imposed under common law **“to one’s neighbor who is the owner, or entitled to possession of any goods is to refrain from doing any voluntary act in relation to his goods which is an usurpation of his proprietary or possessory rights in them ....”** . This protection was purposed to create an environment where the banking industry would develop (*See Diplock LJ in Marjani & Company Ltd vs. Midland Bank Ltd (1968) 2 ALLER 573*)

35. The collecting banker is protected under section 3(2) of the Cheques Act which states:

**“Where a banker, in good faith and without negligence and in the ordinary course of business—**

**(a) receives payment for a customer of a prescribed instrument to which the customer has no title or has a defective title; or**

**(b) having credited the customer’s account with the amount of a prescribed instrument to which the customer has no title or a defective title, receives payment of the instrument for himself, the banker does not incur any liability to the true owner of the instrument by reason only of his having received payment of it; and a banker is not to be treated for the purposes of this subsection as having been negligent by reason only that he has failed to concern himself with the absence of, or irregularity in, endorsement of a prescribed instrument of which the customer in question appears to be the payee.”**

36. English authorities dealing with this protection include the much quoted *Marfani & Co. Ltd versus Midland Bank Ltd (1968) 2 ALL ER 573*; *the London Bank of Australia versus Kendall (1920) 28 CLR 410*, *Karak Rubber Co. Ltd versus Burden (No 2) ( 1972) 1 ALLER 1210* and *Thackwell versus Barclays Bank PLC (1986) 1 ALLER 676*, and the *Lipkin Gorman Case (Supra)*. *Kenya Standard Bank* case though related to the duty of a collecting banker has some insights that I found useful for the present case.

37. The case cited by the Plaintiff in support of their claim, namely *Kenya Grange Vehicle Industries Ltd versus Southern Credit Banking Corporation Ltd (2014) eKLR* belongs to the category of cases brought by a true owner of a cheque against a collecting bank. That is clear from the court’s decision. The reasonableness test applied in *A and A Jewellers Ltd versus Royal Bank of Canada (2001) Can LII 24012 (ON CA)* was applied to the latter case .

38. The learned Judge in the *Grange case* cited Section 3 of the Cheques Act with regard to the protection accorded by statute to a collecting banker. The authority cited by the Defendant in the present suit appears more relevant to the case at hand as it involves a suit brought by a customer

against the paying bank. The said case, *Barclays Bank of Kenya Ltd versus John Peter Nyagetari Simba (Liquidator of Lakestar Insurance Co. Staff Retirement Benefits Scheme (in liquidation))* where the liquidator sued the bank for making certain payments from the account of the scheme is a pertinent authority, in my view. Unfortunately the Defendants counsel did not bother to highlight the relevance of the authority to the present case.

39. The protection accorded by statute to a paying bank is found in section 4 (1) of the Cheques Act cap 35 which states :

***“Where a banker, in good faith and in the ordinary course of business, pays a prescribed instrument drawn on him to a banker, he does not in doing so incur any liability by reason only of the absence of, or irregularity in, endorsement of the instrument, and—***

***a. in the case of a cheque, he is deemed to have paid it in due course, and***

***(b) the case of any other prescribed instrument, the payment discharges the instrument”***

40. On the other hand the protection is reinforced in Section 60 of the Bills of Exchange Act Cap 27:

***“(1) When a bill payable to order on demand is drawn on a banker, and the banker on whom it is drawn pays the bill in good faith and in the ordinary course of business, it is not incumbent on the banker to show that the endorsement of the payee or any subsequent endorsement was made by or under the authority of the person whose endorsement it purports to be, and the banker is deemed to have paid the bill in due course, although such endorsement has been forged or made without authority; and in this subsection “bill payable to order on demand” includes a prescribed instrument within the meaning of the Cheques Act which is payable to order.***

***(2) Any draft or order (other than a bill or a cheque) drawn upon a banker for a sum of money payable to order on demand which shall, when presented for payment, purport to be endorsed by the person to whom it shall be drawn payable, shall be a sufficient authority to the banker to pay the amount of the draft or order to the bearer thereof; and it shall not be incumbent upon the banker to prove that the endorsement, or any subsequent endorsement, was made by or under the direction or authority of the person to whom the draft or order was or is made payable either by the drawer or endorser thereof.”***

41. The paying banker must pay in good faith and in the ordinary course of business. Hence the burden lies with the plaintiff customer in such case to prove negligence, whereas the collecting banker will aim to show that he acted without negligence. In the *Barclays Bank of Kenya case (Supra)*, the learned Judge (Aburili J) cited a portion of the judgment in *Simba Commodities Ltd versus Citibank N.A. Civil Case No. 236 of 2003 (2013) eKLR* wherein the case of *Karak Brothers Company Ltd versus Burden (1972) ALLER* was quoted.

42. The cited passage demonstrates the scope of the duty of a paying banker to its customer and is worth reproducing in extenso:

***“ as to the nature and extent of the contractual duty of care owed by a paying bank to its customer when called on to honour a cheque drawn by the customer; and in particular, in the case of a corporate customer which has given the usual mandate to its bank, to what extent the bank is entitled to place exclusive reliance on the fact that the cheque is signed by the corporation’s duly authorized signatories the conclusion reached by Ungood-Thomas J was 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. The relevant considerations include the prima facie assumption that men are honest, the practice of bankers, the very limited time in which banks have to decide what course to take with regard to a cheque presented for payment without risking liability for delay, and the extent to which an operation is unusual or out of the ordinary course of business. An operation which is reasonably consonant with the normal conduct of business (such as payment by a stock broker into his account of proceeds of sale of his client's shares) of necessity does not suggest that it is out of the ordinary course of business. If "reasonable care and skill" is brought to the consideration of such an operation, it clearly does not call for any intervention by the bank. What intervention is appropriate in the exercise of reasonable care and skill again depends on circumstances.'*

*As between the company and the bank, the mandate, in my view, operates within the normal contractual relationships of customer and banker and does not exclude them. These relationships include the normal obligation of using reasonable skill and care; and that duty, on the part of the bank, of using reasonable skill and care, is a duty owed to the other party to the contract, the customer, who in this case is the plaintiff company, and not to the authorized signatories. Moreover, it extends over the whole range of banking business within the contract. So the duty of skill and care applied to interpreting, ascertaining, and acting in accordance with the instructions of a customer; and that must mean his really intended instructions as contrasted with the instructions to act on signatures misused to defeat the customer's real intentions. Of course, omnia praesumuntur rite esse acta, and a bank should normally act in accordance with the mandate – but not if reasonable skill and care indicate a different course.”* (emphasis supplied)

43. The basic duty in respect to the cheques paid out by the Defendant herein was the obligation to pay the Plaintiff's cheques *as per the customer's mandate*. (See **Lipkin Gorman Case**) However in so doing it had to act in good faith and in the ordinary course of business while exercising reasonable care and skill.

#### **Whether the Defendant breached its duty to the Plaintiff.**

44. Having established the scope of the duty of the defendant, I turn now to the allegations of breach thereof by the Plaintiff. The Defendant argues that the transactions in question were carried out in good faith and in the ordinary course of business as per evidence by DW1.

45. I have highlighted the second part of the above quoted passage from **Karak Brothers** with the intention of testing the Defendant's admitted conduct against the principles enunciated therein.

46. Firstly, in relation to the set of cheques paid out to Tri-systems Technology and Marrs Innovations, no evidence was tendered by the bank that the signatures therein were verified as required by the customer. DW1 did not deal with those cheques as they were all processed by the Defendant's office in Nairobi. Hence, beyond speculating that the signatures were verified, he could not tell if that was done.

47. Secondly, he could not tell whether any call was made, as he did with the instruction letters to confirm the instructions. PW1 said the cheques were fraudulently used by some of the officials to defraud the society. This fact is not in a dispute, as well as the fact that the group had not resolved to pay any moneys nor had any dealings with the stated payees. Even assuming that DW1's counterpart in Nairobi acted on the cheques in the same manner that DW1 processed the letters authorizing the transfer of funds, the question arises whether their actions reflect good faith and the exercise of reasonable skill and care to the customer.

48. Undoubtedly, DW1 passed the letters of transfer for payment upon verification of signatures, and confirmation by calling the same telephone number on all occasions, and which was invariably answered by one of the signatories, Amos Wamalwa, the seeming architect of the fraud perpetrated upon the Plaintiff. In considering the bank's conduct, several undisputed matters are relevant.

49. Firstly, the Plaintiff was a self-help group comprised of flower farm workers of Shalimar Flowers

Company. These facts were well known to the Defendant as DW1 stated that:-

***“ this account opened a while back but we up dated often whenever signatories changed.....Before such change the Ministry officials must approve. This was approved by the Social Development Assistant”***

- 50.The status of the Plaintiff as a self- help group is admitted in the defence statement. The self-help group according to PW1 would receive commissions from flower buyers abroad under the Fair Trade Programme which funds would be deposited into their accounts. They were therefore not using the account for trading as such. It is because of the nature of the group and funds it received that the Farm Manager at Shalimar Flowers Company who was not a member of the self help group acted as a mandatory signatory.
- 51.The obvious purpose of this arrangement was to protect the interests of the entire membership by checking on transactions carried out on the groups accounts. The funds did not belong to the officials but to the members of the self-help group, hence, according to PW1 withdrawals from the account required the resolution of the members and the approval of the Farm Manager or Fair Trade Officer.
- 52.The court did not have the advantage of seeing any prior transactions on this account as none were tendered on either side. Be that as it may, it is a fact that the cheque payments totaling Shs 2,216,182.00 were paid between 26.6.08 and 15.8.08, a span of less than two months. The lowest sum is Shs 375,000/= and highest Shs 890,632/=. Unlike the letters instructing transfers, these cheques appear to be unaccompanied by any supporting document or narration of purpose of the payment.
- 53.Regarding the five letters of instructions all admittedly processed and approved by DW1, they are dated 1<sup>st</sup> December, 2008, 9<sup>th</sup> December 2008, 15<sup>th</sup> December 2008, 29<sup>th</sup> December 2008 and 16<sup>th</sup> January 2009- a total of €43,817.00 which is a tidy sum of money. The first 3 payments were about 8 days apart, the first being for a whopping €15000.00. With the exception of the payment to Marrs Innovations, the beneficiary of the fund transfers and the cheques was the same -Tri-systems Technology. The purpose of the payment in the former case is water pumps, the others being for the alleged supply of laptops, printers, UPS and networking accessories.
- 54.Apart from verifying the signatures, DW1 said he called the first number on the specimen card and on all occasions the call was received by one of the signatories, Amos Wamalwa. During cross-examination he was pressed to explain this conduct. He stated:

***“there was no instruction to call the mandatory signatory. I called the number on the document (specimen card). The chairman received calls on the number. I could not assume that the mandatory signatory was more important to call than the chairman whose number was given.... In the case of the five cash transfers I called Amos Wamalwa being number on account card. I called only the one (number) I have identified.... Not the second telephone number on the card. Yes I called it five times ..... The first went through, always picked by Amos Sitati Wamalwa.... All the transactions are in one month or so. I did not call any other signatories because I did not have any other telephone number ..... I did not record the calls any where.....”***

- 55.Did the paying banker pay in good faith and ordinary course of business while exercising reasonable care and skill? Possibly, DW1 acted in good faith. But as to whether he exercised reasonable care and skill is another matter. While it was not expected of him to go outside the remit of the mandate of the customer, ordinarily, it is my view that the cash transfers he approved were exceptional by purpose, amount and chronology, especially considering the nature of the Plaintiff group. In quick succession, large sums were moved from the foreign currency account to pay for what appears to be items out of consonance with the nature and purpose of the account and the raison d’etre of the group itself- welfare group.
- 56.Obvious questions would have arisen to a reasonable man seized of these facts for instance, whether the Plaintiff was operating a computer business, school etc. I take judicial notice of the fact that most flower farm laborers, as would no doubt be the case of the

Plaintiff's members, have as little formal education as PW1 and PW2 and eke out a livelihood being farm hands on the myriad flower farms around Naivasha. The sophistication of the majority of the equipment being paid for by the cash transfers would no doubt ring an incongruent bell in the mind of a reasonably discerning banker, whether or not the signatures on the document were in accordance with the customer's mandate. After all, DW1 was a senior officer of the bank operating within Naivasha and familiar with the Plaintiff group.

57. On this aspect I must return once more to the Court of Appeal's decision in the **Standard Chartered Bank** earlier referred to. In that case, the signatories of the impugned cheque for over Shs 17,000,000/= put on special clearance by the bearer were employees of the Customs and Excise Department. This is how Onyango Otieno JA (as he then was) expressed himself:-

*“ What I am saying is that in a case where the signatories to a cheque are mere agents of the drawer of the cheque, the duty to make inquiry in full is more pronounced for the very reason that there would be nothing to stop the signatories of the cheque from conspiring with the customer to defraud the true owner of the cheque ..... In such a case, the signatories to a cheque being ultimate beneficiaries would mislead the bank by accepting on inquiry that the cheque is good.... I would thus hold the view that where a bank is faced with a cheque from a body corporate or government, the bank's duty to inquire into the validity of the cheque goes beyond the mere signatories to the cheque and beyond the paying bank and the customer”.*

58. Granted, the above case involved a collecting bank. But the stated principles also hold true in my view regarding a paying bank where the customer is a body corporate and the cheque signatories its mere agents. The reasoning of the learned Judge resonates with the statement in **Karak Brothers (Supra)** as cited in **Simba Commodities Ltd** regarding the duty of a paying bank that inter alia:

*“..... the duty of skill and care applies to interpreting, ascertaining, and acting in accordance with the instructions of a customer; and that must mean his really intended instructions as contrasted with the instructions to act on signatories misused to defeat the customer's real intentions. Of course ..... a bank should normally act in accordance with the mandate- but not if reasonable skill and care indicate a different course”.*

59. In my considered view the circumstances surrounding the nine payments from the group's account required that the Defendant in exercise of reasonable skill and care makes a more extensive inquiry beyond the minimum verification of signatures and placing a call to the self-same number and signatory who, on all accounts misled the bank. In this case, it mattered not that there was no requirement to confirm payments with the mandatory signatory. It mattered not, in my opinion that the signatures were on the face of it genuine. What the mandatory signatory really implied is a matter of common sense. The excuse by DW1 that his telephone details were not on the specimen card cannot hold water. The bank ought to have satisfied itself that the signatories were not misusing their positions to defeat the intentions and purposes of the group.

60. All the red flags were waving in this case in my view but the Defendant by not exercising reasonable care and skill, missed or ignored them, thereby allowing the withdrawal, in quick succession, of large sums of money donated to flower workers as commissions I find on a balance of probability that the Defendant bank was negligent in the manner in which it handled and approved the nine payments and is 100% liable.

61. This was a case where officials entrusted with a group's bank accounts colluded to steal from the group. It was almost impossible for the ordinary members to pre-empt such collusion, and the mere fact that the cheque leaves were retained by society officials or that the theft was only discovered after a period of 6 months cannot be blamed on the Plaintiff. There is no basis upon which contributory negligence can be found against the Plaintiffs, in my considered view.

**Whether the Defendants are liable to pay the sums claimed**

I find from all the foregoing that the Plaintiff is entitled to the reliefs prayed for. I will enter judgment for the Plaintiffs against the Defendant in terms of the prayers a,b,c,d in the plaint.

Delivered and signed at Naivasha this 18<sup>th</sup> day of March, 2016.

In the presence of:-

The Plaintiff .....

The Defendant .....

Court assistant .....

**C. W. MEOLI**

**JUDGE**