



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI COMMERCIAL & ADMIRALTY DIVISION**

**CIVIL CASE NO. 220 OF 2006**

**KENYA GRANGE VEHICLE INDUSTRIES LTD. .... PLAINTIFF**

**VERSUS**

**SOUTHERN CREDIT BANKING CORPORATION LTD.....DEFENDANT**

**J U D G E M E N T**

1. The Plaintiff herein by way of a Plaint dated 26th April 2006, as amended on 5th December 2007, seeks Special Damages as against the Defendant in the amount of Shs. 4,000,182.95 (hereinafter “the suit amount”) as well as General Damages. It also seeks interest on the Special Damages prayed for and costs of the suit.

2. In its said Amended Plaint, the Plaintiff detailed that it was in the business of selling vehicles and providing motor vehicle repairs, fitting and maintenance services based in Nairobi and elsewhere in Kenya. It maintained that on 16th November 2004 it delivered 10 cheques totalling the suit amount, drawn in its favour, to the Kenya Commercial Bank Ltd, Kencom House Branch, Moi Avenue, Nairobi. The 10 banking slips in relation to the transaction were duly signed for and stamped by the said Kenya Commercial Bank but the Plaintiff discovered that none of the said cheques was ever credited to its account at the Bank. A complaint was made by the Plaintiff to the Banking Fraud Investigation Unit on 8th February 2005 and investigations revealed that a bank account had been opened on or about 20th November 2004 apparently in the name of the Plaintiff company, at the Eldoret Branch of the Defendant Bank being given the account number 81100032. The Amended Plaint noted that the said Account was opened by two individuals namely one Alexander G. Mwangi and a Peter Omwaka posing as directors of the Plaintiff company presenting at the said branch a number of documents purporting to emanate from the Plaintiff Company. The two signatories were neither directors nor shareholders of the Plaintiff company. The Plaintiff averred that the Defendant had been negligent in the opening of the bank account and accepting the said 10 cheques to be credited thereto. In collecting the proceeds of the cheques for holders who did not have any legal title thereto and crediting the same to the above numbered account, the Defendant had denied the Plaintiff, the true owner of the said cheques, the proceeds thereof.

3. In its Defence, the Defendant bank maintained that it had no association with the Kenya Commercial Bank or knowledge as regards the relationship between that bank and the Plaintiff. It maintained that there was no link between the Plaintiff’s loss of cheques and account number 81100032 at the Eldoret Branch of the Defendant bank in the name of the Plaintiff Company. It admitted the opening of the said account during normal banking and working hours and in accordance with its standard procedure and guidelines for the opening of corporate client accounts. It maintained that it had obtained from the

directors of the Plaintiff their ID cards, copies of the Memorandum and Articles of Incorporation together with the Original Certificate of Incorporation all in the name of Kenya Grange Vehicle Industries Ltd. It had also seen the PIN Certificate for the company and the Resolution to open the account as issued by the directors. The opening of the said account was done in good faith and the bank officials exercised due diligence to the requisite standards. The documents provided by the directors were regular and proper on the face of them and were accepted in good faith. The Defendant denied its admission that the said 10 cheques referred to in the Plaint were the property of the Plaintiff. The Defendant, as regards the operation of the said account, maintained that it was under a legal obligation to pay the credit proceeds, if any, of the said account to its holders and owners. It also maintained that the Plaintiff had been guilty in failing to keep proper and secure custody of its Memorandum and Articles of Association as well as the original Certificate of Incorporation. It was also guilty of failing to ensure that its cheques were safely and securely kept or that they were actually banked. They had failed to follow up the loss of the cheques in time with their bankers and to take steps to ensure that payment of the said stolen cheques were stopped by the Plaintiff's customers.

4. Each party called one witness that of the Plaintiff being **Robert Wambugu Njagi** who stated that he was the accountant with the Plaintiff company and had been working in that position for 17 years. He was in charge of the company's Debtors Ledger and receipts. He recalled that in November 2004, he was given five cheques to fill in the banking slips by the Chief Accountant of the company who had given another five cheques to the other accountant who worked with him, namely one **Carol Njoki** who had since left the employment of the Plaintiff. He gave details of the banking slips that he had completed for five customers of the Plaintiff company. He completed the banking slips and return them to the Chief Accountant. All cheques were normally banked by one **Moses Otiato** who was the Managing Director's driver but in his absence one **Samuel Kidiangi Arap Rusei** would take the cheques to the bank. He maintained that the cheques were normally banks at the Moi Avenue Branch of the Kenya Commercial Bank Ltd but that cash was normally taken by the said accountants to the Kenya Commercial Bank Ltd's Industrial Area Branch. He recalled that on the 16th November 2004, Mr. Atiato was absent from work and the banking was assigned to Mr. Arap Rusei.

5. PW 1 went on to say that in 2004, the Plaintiff received bank statements monthly from its bankers and a reconciliation would be carried out as regards each previous month. In December 2004, he was doing the reconciliation and he noted that 10 cheques were missing from the bank statement totalling Shs. 4,000,182.95. He discovered that none of those cheques were ever credited to the Plaintiff's account with the Kenya Commercial Bank Ltd's Moi Avenue Branch, Nairobi. As a result on 28th December 2004, a complaint was made by the Plaintiff, along with the Kenya Commercial Bank Ltd to the Banking Fraud Investigation Unit of the Criminal Investigation Department. On 8th February 2005, the investigating officer from the Fraud Investigation Unit one **Cpl. Yegon** had informed him that his investigations revealed that a bank account had been opened ostensibly in the name of the Plaintiff Company at the Eldoret Branch of the Defendant Bank on 20th November 2004 being account No. 81100032. On being asked by the said Cpl Yegon as to the signatories to that account, PW 1 confirmed that the two signatories were neither directors nor shareholders of the Plaintiff Company. He also maintained that the Defendant bank seemed to be in unusual haste in opening the said account as the lodging of the application for the opening thereof and the approval of the same, was concluded on the same day.

6. PW 1 was of the opinion that that the Defendant bank acted negligently in the opening of the said account in the following ways:

**“(a) Failing to carry out any official search at the Companies Registry in order to verify the authenticity of the particulars supplied by the purported signatories prior to the opening of the said account number 81100032 allegedly in the name of the Plaintiff Company.**

**(b) Failing to notice the discrepancy in the account opening forms where the fraudsters indicated that the Company was purportedly incorporated on 20<sup>th</sup> November 2004 while the PIN certificate supplied was issued on 10<sup>th</sup> December 2003.**

**(c) Failing to notice the glaring discrepancy between the forged Certificate of Incorporation**

**which showed that the Company was incorporated on 24<sup>th</sup> December 2003 while the PIN Certificate indicated that the Company was issued with the PIN on 10<sup>th</sup> December 2003.**

**(d) Failing to request for any reference from the purported signatories and the Company as a prerequisite for opening the account.**

**(e) Approving the purported signatories application with undue haste and opening of the said account number 81100032 without undertaking any type of due diligence on ‘Know Your Customer Regulations’.**

**(f) Failing to inquire on the physical address for the Company as provided for in the account opening forms to determine the existence of the Company”.**

PW 1 concluded his witness statement by saying that, in his opinion, by reason of the Defendant’s acts of negligence and/or breach of fiduciary duty, the Plaintiff had suffered loss in the amount of Shs. 4,000,182.95 and the Plaintiff claimed this amount as against the Defendant by way of recompense and/or special damages together with accrued monthly interest from the 16th November 2004 until payment in full.

7. In cross-examination, PW1 repeated most of what he had detailed in his witness statement before Court. He noted that enquiries were made of Mr. Arap Rusei who had confirmed that he had banked the cheques and brought back the banking slips from Kenya Commercial Bank Limited. He had been interviewed by the officers from the Banking Fraud Investigation Unit. However, PW 1 was unaware if anybody had been charged with an offence as regards the missing cheques. Upon re-examination, PW 1 stated that he had gone to the City Hall Court to give evidence and the accused was one Alexander. G. Mwangi but he was not an employee of the Plaintiff company and PW 1 didn’t know for whom he worked. He agreed that he had been informed by the said Cpl Yegon that the account at the Defendant’s bank in Eldoret was operated by the said Alexander Mwangi and Peter Omwaka, who were not directors of Kenya Grange.

8. DW 1 was **Douglas E. Okiring** who confirmed that as between 2002 and 2006 he had worked with the Defendant bank as a Customer Service Officer. He noted that sometime towards the end of 2004 an account was opened by the Defendant bank in Eldoret in the name of the Plaintiff Company. He recalled that the opening of the said account was prompted by two people namely Alexander Gathuya Mwangi and Peter Omuroka Omwaka. They had presented themselves to him as directors of the Plaintiff Company and had made available copies of their respective ID cards, the Memorandum and Articles of Association of the Plaintiff company as well as a PIN Certificate and the Certificate of Incorporation. Acting on this documentation and in good faith, DW 1 confirmed that a current account No. 081100032 had been opened by the Defendant bank on 20th November 2004, such being operated by the two above named persons as per the mandate. DW 1 observed that cheques were banked in the account drawn in favour of the Plaintiff Company. The credits to the account was cashed by the two persons whom the Defendant believed were the sole directors and shareholders of the company. He maintained that the Defendant bank had acted diligently in opening and operating the said account. The actions were such as any banker would have performed in the ordinary course of business. DW 1 confirmed that, having ascertained the identity of the account holder (both the directors and the Company), the account was opened and operated normally. Later it turned out that the two persons who opened the account were fraudsters. The witness maintained that they had forged the PIN Certificate as well as the Certificate of Incorporation and the Memorandum and Articles of Association of the Plaintiff Company. They had also deposited cheques which had truly belonged to the Plaintiff company. This had been discovered by the Defendant bank towards the end of December 2004 after investigation by the said Banking Fraud Investigation Unit. The witness maintained that prior to such investigation, there had been no way of knowing that the documents were not genuine. The Defendant operated in the way that all banks undertook business in the year 2004. All that was necessary for the intending account holder was to avail to the bank copies of the required documents as well as the originals and this was exactly what happened in this case. DW 1 noted that the fraudsters were later arrested and jailed.

9. Before Court, DW 1 went through his witness statement and produced the Defendant's Bundle of Documents before Court as Defendant's Exhibit No. 1. He noted that after the account was opened, the customers proceeded to operate the same by depositing funds. They had requested for a cheque book. The witness noted that several cheques were deposited to the account and several cheques drawn as against the account. He then went on to say that after observing the operation of the account, the bank had discovered that the signatories were fraudsters and not the proper owners of the Plaintiff Company. They were arrested and DW 1 had given evidence against them. They were jailed but he could not remember the date. In his opinion, they had satisfied the opening procedures of the Defendant bank as all the documents that were requested, were presented in original form. In DW 1's view, the Bank was not negligent. Under cross-examination, DW 1 was taken through the account opening procedure and admitted that he was the one who had opened the account. He maintained that the Defendant bank did not have any guidelines as to account opening procedures and the verification of customers opening accounts. The directors had come in person but he had not asked for references. The Bank had opened the account in 2 days. He also stated that the PIN certificate was not a mandatory document for the opening of an account and that he had not noticed the discrepancy between the date of the PIN certificate (10th December 2003) and the date of the Certificate of Incorporation (24th December 2003). DW 1 then stated that the account was not being operated properly as there were deposits which were then drawn upon and the same amount was deposited again. He confirmed to the Plaintiff's counsel that they were no KYC guidelines at that time and that "knowing the customer" was a process. The bank would open the account first and then would need to know more about the customer. He agreed that the deposits were all made at once, they were drawn against and no further deposits were made. There were no letters from the customer on record with the bank. The fraudsters had notified him that they were starting their western Kenyan business and wanted a bank account in that region.

10. The Plaintiff's submissions filed herein on 4th April 2014 explored the Pleadings, the evidence and thereafter detailed what it saw as the Issues for Determination as follows:

**“(i) Whether the Plaintiff delivered ten cheques for a total sum of Kshs. 4,000,182.95 to Kenya Commercial Bank, Moi Avenue on 16<sup>th</sup> November 2004 which were not credited to the Plaintiff's account at Kenya Commercial Bank as expected in the normal course of business?”**

**(ii) Whether there is any link between the Plaintiff's loss of ten cheques and the account number 81100032 opened at the defendant's Eldoret Branch in the name of Kenya Grange Vehicle Industries Ltd?**

**(iii) Whether the Defendant was negligent and acted contrary to banking regulations issued by Central Bank of Kenya in the opening and handling of account number 81100032?**

**(iv) Whether the Defendant collected the ten cheques for holders who did not have any legal title and denied the Plaintiff as true owner of the proceeds of the ten cheques in the sum of Kshs. 4,000,182.95?**

**(v) Whether the Defendant acted in good faith in opening and operating account number 81100032 and if so whether the Defendant was under a legal obligation to pay the credit proceeds to the said account number 81100032 to its holders and owners?**

**(vi) Whether the Defendant is liable to compensate the Plaintiff to the sum of Kshs. 4,000,182.95”.**

11. The Plaintiff submitted that the evidence of PW 1 had not been controverted by the Defendant and no evidence was produced by the Defendant to rebut the facts as to the banking of the said 10 cheques and the fact that the same were never credited to the Plaintiff's Account with Kenya Commercial Bank Limited. As regards the link between the Plaintiff's loss of the said 10 cheques and the account opened at the Defendant bank's branch at Eldoret, the Plaintiff observed that DW 1 had admitted that the same had been deposited into account No. 81100032 thereat. Further, it was the Plaintiff's submission that the Defendant bank had contravened banking regulations issued by the Central Bank of Kenya by failing to

request for references from the two signatories prior to the opening of the said account in the name of the Plaintiff company. The Plaintiff submitted that the Defendant bank was negligent and that there had been unusual haste to open the said account. In the Plaintiff's view the account opening documentation were all clear forgeries and DW 1 had admitted that the Defendant bank had not verified the authenticity of the company documents supplied before opening the account. Thereafter, the Plaintiff quoted from the **Central Bank of Kenya Guidelines on Proceeds of Crime and Money Laundering**. It also referred this Court to **Charlesworth & Percy, Negligence, 12th Edition** as well as **Baker v Barclays Bank Ltd (1995) 2 All ER 571**, **Lloyd's Bank Ltd v E. B. Savory & Co (1932) KB 122**, **Lumsden & Co v London Trustees Savings Bank (1971) Lloyd's Rep. 114**, **Hampstead Guardians v Parties Bank Ltd (1923) 39 T.L.R. 229**, the Law of Bank Payments, 2nd Edition, 1999, section 3 (2), of the Cheques Act, Halsbury's Laws of England 4th Edition 2005 Reissue Vol. 3 (1), **M.S.Parthasarathy, Cheques in Law and Practice, 5th Edition**, **Marfani v Midland Bank Ltd (1968) 2 All ER 571**, **Lloyd's Bank Ltd v Chartered Bank of India, Australia and China (1928) All ER 285**, **A & A Jewellers Limited v Royal Bank of Canada (2001) CanLII 24012 (ON CA)**, **Edward Katana v CMC Motors Group Ltd & Anor. (2006) eKLR**, **Eric C. Kotut v S.E.O. Bosire & 2 Ors (2008) eKLR** as well as **Clerk & Lindsell on Torts, 20th Edition page 1131**. The Plaintiff claimed special damages in the amount of Shs. 4,000,182.95, General Damages for conversion, interest on the said special damages plus costs of the suit.

12. The Defendant's submissions were filed herein on 15th May 2014. The Defendant laid out the facts and evidence as it saw it and identified 10 issues which had been settled by the parties as follows:

- “1. Whether the Plaintiff delivered ten cheques for the total sum of Kshs. 4,000,182.95 to Kenya Commercial Bank, Moi Avenue on 16<sup>th</sup> November 2004?**
- 2. Whether the ten cheques were credited to the Plaintiff's account at Kenya Commercial Bank as expected in the normal course of business?**
- 3. Whether there is any link between the Plaintiff's loss of ten cheques and the account number 81100032 at the Defendant's Eldoret Branch in the name of Kenya Grange Vehicle industries Ltd?**
- 4. Whether the Defendant was negligent in the opening of account number 81100032?**
- 5. Whether the Defendant acted in good faith in opening and operating account number 81100032 and, if so, whether the Defendant was under a legal obligation to pay the credit proceeds to the said account number 81100032 to its holders and owners.**
- 6. Whether the Defendant collected the ten cheques for holders who did not have any legal title and denied the Plaintiff as true owner of the proceeds of Kshs. 4,000,182.95.**
- 7. Whether the Defendant was under a legal obligation to pay the credit proceeds of account number 81100032 to its owners?**
- 8. Whether the Plaintiff's loss was as result of it negligence?**
- 9. Whether the Defendant is liable to compensate the Plaintiff the sum of Kshs. 4,000,182.95 with interest from 16<sup>th</sup> November 2004?**
- 10. Who is entitled to the costs of the suit?”**

13. As regards the delivery of the said 10 cheques to Kenya Commercial Bank Ltd, the Defendant expressed surprise that no witness had been called from that bank as to whether the banking slips produced before Court actually reflected deposits at the said bank. It was not the duty of the Defendant to counter the same and it submitted that the Plaintiff had failed to show that the cheques were ever delivered to Kenya Commercial Bank Limited. As a result, whether those cheques were credited to the Plaintiff's account was left to conjecture. The Plaintiff had not exhibited its Statement of Account with

Kenya Commercial Bank Ltd to show that the cheques were never deposited there. The Defendant maintained that the only link that the cheques were apparently re-banked into the account at its branch at Eldoret was from the Defendant itself and that fact did not make the Defendant culpable. The Defendant was not the custodian of the bank account. The Defendant did not handle the cheques so as to be accused of conversion by the Plaintiff who no longer had custody of the same. The Defendant, having opened an account, was under a duty to its customer to ensure the operation of the said account was not hindered. As regards whether it was negligent in the opening of the account, the Defendant asked the question as to what was the standard of care expected of it in 2004. It submitted that it did not contravene any single regulation in opening the said account. It denied that its servants/officers were negligent as to the opening of the same. DW 1 had observed that the Defendant practised the existing banking regulations which was to have a short interview with the prospective customer, to receive the original documents and have the directors appear personally before the officers of the bank. The two directors had appeared before DW 1 and had availed all the requisite documents. They had availed the resolution for the opening of the bank account, as well as their ID cards, passport size photographs, the original Memorandum and Articles of Association and the original Certificate of Incorporation. The Defendant maintained that this documentation alone was sufficient for it to open the account. It was opened in good faith and in the ordinary course of banking practice. There was no requirement for verification at the Companies Registry. There was no evidence availed to the contrary to contradict or controvert DW 1's testimony. The Defendant noted that the said Central Bank of Kenya Guidelines on Proceeds of Crime and Money Laundering did not exist in 2004, they were issued in January 2006. It was evident that the Defendant had taken all the necessary steps expected of a prudent banker before the opening of the account. It had acted in good faith in opening and operating of the said account. It was under a legal obligation to credit the proceeds of the 10 cheques to the account. The cheques were to be collected by the Defendant as agent for the account holders. In this connection it pointed to the case of **Joachimson v Swiss Bank (1921) 3 KB 110.**

14. The Defendant continued its submissions by maintaining that it did not deny the Plaintiff the proceeds of the 10 cheques, it paid in good faith the proceeds of those cheques to its customer. Its customer was one for whom the bank had opened an account and it was under an obligation to make the payments. It was under a legal obligation to pay the credit proceeds of account number 81100032 to its owners. No third party could, in law or in fact, lay claim to the said amount. As far as the Defendant was concerned it was the Plaintiff that was negligent in that it was the original sole custodian of all 10 cheques. How and at what point the Plaintiff could let go of those cheques on diverse dates could only imply gross negligence on its part. For a period of nearly 2 months, the Plaintiff had "lost" its cheques and had taken no action. As a result, the Defendant was not liable to compensate the Plaintiff. There was no evidence of conversion as at the time they were purportedly lost, they could already have been delivered to the Kenya Commercial Bank Ltd and the Plaintiff was consequently no longer the holder. The Defendant had only acted as an intermediary, as an agent for its customer. It did not collect for the wrong party. The cheques were neither forged nor altered. The Defendant then made the extraordinary submission that the Plaintiff knew the fraudsters and ought to have sought recourse from them. Finally, the Defendant was not liable as it had acted "without negligence". In closing, the Defendant referred to the question as asked by **Diplock LJ** in the case of **Marfani v Midland Bank Ltd (supra)**: Whether the:

**"circumstances would cause a reasonable banker possessed of such information about his customer as a reasonable banker would possess to suspect that his customer is not the true owner of the cheque?"**

All the cheques presented gave no semblance of forgery. The Defendant's suspicions could not have been aroused in any way.

15. In order to clear up a salient point first, the Plaintiff herein placed great store as to the Central Bank of Kenya's **Guideline on Proceeds of Crime and Money Laundering (Prevention) CPK/PG/08** which it annexed to its submissions as authority No. 2. At page 10, that Guideline quite clearly states that the effective date thereof would be 1st January 2006. As a result, such Guideline could not have applied to the Defendant bank at the time that the suit transaction took place in November December 2004. Having said that, this Court must necessarily review and determine the Agreed Issues for Determination dated 4th

April 2011 which document was signed by the advocates for both parties and as set out above. In answer to the first two issues, I am satisfied from the evidence of PW 1 that the Plaintiff delivered the 10 cheques for the total sum of Shs. 4,000,182.95 to the Kenya Commercial Bank, Moi Avenue Branch, Nairobi on 16th November 2004. I have perused copies of the Cheque Deposit Slips exhibited at pages 1 to 5 of the Plaintiff's list and bundle of documents filed herein on 10th November 2006. All of those Slips bear the stamp of the Kenya Commercial Bank dated 16th November 2004 with the words "USER NO. 1734" clearly detailed thereon. Secondly, although the Plaintiff did not produce before Court copies of its Statement of Account with the Kenya Commercial Bank, I am satisfied from the evidence of PW 1 that the cheques were never credited to the Plaintiff's said account.

16. As regards issue No. 3, DW 1 at paragraph 6 of his witness statement before Court clearly details that the cheques were banked in the account opened by the Defendant at its Eldoret Branch. He states that the cheques were drawn in favour of Kenya Grange Vehicle Industries Ltd. The Plaintiff Company's letter dated 16th December 2004 addressed to the Corporate Relationship Manager of Kenya Commercial Bank Ltd at page 6 of the Plaintiff's list and bundle of documents clearly details the 10 cheques that were supposedly deposited with Kenya Commercial Bank Ltd on 16th November 2004. The various amounts as against the drawers of those cheques appear to have been credited to the account at the Eldoret Branch of the Defendant between the 22<sup>nd</sup> and 29<sup>th</sup> November 2004 as per the copy statement appearing at page 25 of the Plaintiff's list and bundle of documents. Accordingly, I do find a clear link between the Plaintiff's loss of the 10 cheques and the same being credited to account No. 81100032 at the Defendant's Eldoret Branch.

17. The fourth issue for determination by Court was whether the Defendant was negligent in the opening of the said account No. 81100032? It is the Plaintiff's position that the Defendant was negligent as per the sub-paragraphs (a) to (f) of PW 1's witness statement as above. In this regard, I drew some comfort from the Canadian Court of Appeal case cited to Court by the Plaintiff being **A & A Jewellers Limited v Royal Bank of Canada (2001)** (supra) in which **Moldaver JA** delivered the Court's Judgement as follows:

**"In cases such as this, where the Bank is under a duty to make inquiries of its customer regarding a possible breach of trust, the Bank will be found to be in constructive knowledge of the breach of trust if it 'fails to make the appropriate inquiries'. See Citadel General Assurance Co., supra at P. 839.) Whether the inquiries are appropriate or not will depend on the particular facts and circumstances of the case. No bright line test can be fashioned. What can be said is that the Banker is not required to engage in an impractically extensive inquiry, nor is it to be held to a standard of perfection. All that is required of the Bank is that it act reasonably in the circumstances. (See *Gold v. Rosenberg*, [1997] 3 S.C.R. 767, 152 D.L.R. (4th) 385 per Sopinka J. for the majority at p. 802.)"**

**Although it is impossible to specify the types of inquiry that might be encompassed by the words 'reasonable', at a minimum, they surely must include steps and measures that are part of the Bank's obligation under the terms of the agreement governing the account, not to mention the Bank's policy. In other words, in assessing whether the inquiries made by a bank in a particular case are reasonable, it is proper to measure them against the terms and conditions of the agreement with the customer, as well as the Bank's policy. If the steps or measures taken do not accord with either, then absent a valid explanation, I fail to see how the inquiries can pass the 'reasonableness' test."**

18. I have perused the Defendant's Bundle of Documents as filed in this Court 19<sup>th</sup> February 2010. The Application for the opening of an Account (for Companies) is dated 20th November 2004. In the second paragraph thereof, the persons opening the account declare that they would abide by the rules and regulations governing such accounts which they had read and understood. Unfortunately for the Defendant, it did not include in its Bundle of Documents a copy of such rules and regulations. At paragraph 7 of the document, it details that the copies of documents enclosed would include:

**"a) Memorandum and Articles of Association**

**b) Certificate of Incorporation**

**c) Certified copy of board resolution for opening account**

**d) Specimen Signature Card e) Annual Audited Accounts for.....”**

Part B (presumably of the Account Opening document) contains an obvious bank sample of a Resolution of Board of Directors. The persons opening an account on behalf of a limited company are required to complete the blanks in the document including the name of the company opening the account. The document is to be signed by the Chairman (presumably of the company) and details of the directors and persons authorised to sign are indicated in a table at the bottom of the form. There is no provision on the standard form for the company to seal such Resolution. Further, midway down the form are the words:

**“That the Company give Southern Credit Banking Corporation Limited a list of the names of the Directors, Secretary and other officers of the Company and advise Southern Credit Banking Corporation Limited in writing of any changes that may take place and Southern Credit Banking Corporation Ltd shall be entitled to act upon the information so given.”**

There is no such list of the details of the directors, secretary or other officers of the account holder supplied amongst the documentation received by the Defendant bank. Further, and in my view, on the copy of the Memorandum and Articles of Association of the Plaintiff company dated 16th November 2003 there is a 5 Pounds Kenya Revenue stamp which to all intents and purposes looks genuine. There is even the rubber stamp of an advocate, one Omondi Achungo, plus a signature as witness to the subscribers signatures to the Memorandum and Articles of Association. Somebody has indeed gone to a lot of trouble to provide genuine looking documentation for the opening of an account with the Defendant bank. I say so, for even a cursory glance at the copy of the Certificate of Incorporation of the Plaintiff company dated 24th December 2003 as compared to the original provided in the bundle of documents on the Plaintiff before Court, looks genuine apart from the signature of the Senior Deputy Registrar of Companies. Indeed, the ID cards of the signatories to the account opened appear to me as the genuine article.

19. The one point picked upon by the Plaintiff, in its submissions, was that the Defendant bank’s officer should have picked up on the fact that the copy of the PIN Certificate for the Plaintiff bore the date 10th December 2003 which was before the Date of Incorporation as detailed in the false Certificate of Incorporation being 24th December 2003. It would not have been possible for the Plaintiff to have obtained a PIN Certificate in advance of the company being incorporated. However, in terms of the test of reasonableness, should the Defendant bank’s official have picked up on this point sufficient to arouse suspicion as to the genuineness of the account? In this regard, there are in my opinion a number of factors which should have raised the Defendant bank’s suspicions as to the genuineness of the account. Firstly, the account openers did not provide a list of Directors, Secretary and Officials for the company. Secondly, the so-called Board Resolution was not given under Seal and was dated the same day as the account opening form. Thirdly and as observed by the Plaintiff, the account was opened in a hurry which would indicate that no checking as to the genuineness of the account holder was made by the Defendant bank’s officials. Fourthly of course, was the discrepancy as regards the date of the PIN Certificate vis-a-vis the date of the Certificate of Incorporation. All in all, taking into account the evidence of DW1 which I found to be weak, I do believe that the Defendant was negligent in the opening of account number 81100032.

20. As regards issue No. 5 having opened the said account, albeit in error and negligently, it does appear that the Defendant acted in good faith in operating the same. Whether the Defendant was under a legal obligation to pay the credit proceeds to the said account to its holders and owners is another matter. Although the Defendant referred this Court to the **Joachimson** case (supra), it failed to attach a copy of its authority to its submissions. However I have no reason to dispute the quotation made by the Defendant from the case in its submissions viz:

**“The bank undertakes to receive money and to collect bills for its customer’s account. The proceeds so received are not held in trust but for the customer, but the bank borrows the proceeds and**

**undertakes to repay them. The promise to repay at the branch of the bank where the account is kept and during banking hours.... against the written order of the customer... The customer on his part undertakes not to mislead the bank or to facilitate forgery.”**

Further, I have no reason not to accept the Defendant’s submission that the relationship between bank and customer is fundamentally that of a creditor and debtor. The Defendant went on to say that having opened the account and allowed its operation, it was duty bound to credit all monies collected on behalf on the account holders to that account. However, I cannot accept the submission that no third party could in law or in fact lay claim to that amount.

21. The line of authorities as cited to this Court by the Plaintiff lays testament to the position where the Defendant bank owes a duty of care to the true owner of the cheques. **Charlesworth & Percy on Negligence** (supra) at paragraph 9-85 details as follows:

**“Where a bank is acting as a clearing bank, that is, as agent for collection of a cheque on behalf on another bank or financial institution, it owes a duty of care to the true owner of the cheque, but is in general entitled to consider that the duty will be performed by its own customer, who should be in a far better position to know the circumstances in which the cheque was brought for collection and the identity of the person who submitted it. But the extent to which the clearing bank can rely on its customer will vary with the circumstances.”**

Similarly, under the heading **“Time for assessing the collecting bank’s conduct”**, **Brindle & Cox’s** excellent volume on **Law of Bank Payments 2nd Edition** at paragraph 7-219 details:

**“It might be thought that as a matter of construction of section 4 of the Cheques Act 1957, the relevant time for determining whether the collecting bank had complied with its duty of care towards the true owner of the cheque is the time it receives payment. However, in *Marfani & Co Ltd v Midland Bank Ltd* (supra) Diplock LJ held that the relevant time was the time when the collecting bank pays out the proceeds of the cheque to his own customer holder, so depriving the true owner of his right to follow the money into the bank’s hands. Thus, facts and matters which come to the collecting bank’s attention between the time it receives payment of the cheque and the time when the holder draws against the cheque, are relevant. In *Marfani*, this enabled the collecting bank to prove that it had acted without negligence. Equally, facts which should put the collecting bank on inquiry might be received during this time.”**

22. Indeed, the **Marfani** case was cited by both the Plaintiff and the Defendant in their respective submissions before this Court. Somewhat surprisingly, the Defendant did not refer the Court to the provisions of **section 3** of the *Cheques Act (Cap 35, Laws of Kenya)*. Those provisions are very much along the lines of **section 4** of the *English Cheques Act (1957)* and reads as follows:

**“3. (1) A banker who gives value for, or has a lien on, a cheque payable to order which the payee delivers to him for collection either without endorsing it or without endorsing it regularly has such rights, if any, as he would have had if upon delivery the payee had endorsed it regularly in blank.**

**(2) 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 the payee”.

23. **Diplock LJ** extensively commented upon the common law position vis-a-vis the statutory position under the English Act. In the **Marfani** case he detailed as follows:

“At common law one’s duty to one’s neighbour 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. Subject to some exceptions which are irrelevant for the purposes of the present case, it matters not that the doer of the act of usurpation did not know, and could not by the exercise of any reasonable care have known, of his neighbour’s interest in the goods. This duty is absolute; he acts at his peril.

A banker’s business, of its very nature, exposes him daily to this peril. His contract with his customer requires him to accept possession of cheques delivered to him by his customer, to present them for payment to the banks on which the cheques are drawn, to receive payment of them and to credit the amount thereof to his own customer’s account, either on receipt of the cheques themselves from the customer, or on receipt of actual payment of the cheques from the banks on which they are drawn. If the customer is not entitled to the cheque which he delivers to his banker for collection, the banker, however, innocent and careful he might have been, would at common law be liable to the true owner of the cheque for the amount of which he receives payment, either as damages for conversion or under the cognate cause of action, based historically on *assumpsit*, for money had and received.

So strict a liability, so absolute a duty, on bankers would have discouraged the development of banking business. It was accordingly progressively mitigated by statute, first by s.82 of the Bills of Exchange Act, 1882, then by the Bills of Exchange (Crossed Cheques) Act, 1906, and finally by s.4 of the Cheques Act, 1957, which is the current statute with which we are concerned, and sub-s. (1) of which reads as follows:

‘(1) where a banker, in good faith and without negligence – (a) receives payment for a customer of an instrument to which this section applies; or (b) having credited a customer’s account with the amount of such an instrument, receives payment thereof for himself, and the customer has no title, or a defective title, to the instrument, the banker does not incur any liability to the true owner of the instrument by reason only of having received payment thereof’.

The only respect in which this substituted statutory duty differs from a common law cause of action in negligence is that, since it takes the form of a qualified immunity from a strict liability at common law, the onus of showing that he did take such reasonable care lies on the defendant banker. Granted good faith in the banker (the other condition of the immunity) the usual matter with respect to which the banker must take reasonable care is to satisfy himself that his own customer’s title to the cheque delivered to him for collection is not defective, i.e. that no other person is the true owner of it. Where the customer is in possession of the cheque at the time of delivery for collection, and appears on the face of it to be the “holder”, i.e. the payee or indorsee or the bearer, the banker is, in my view, entitled to assume that the customer is the owner of the cheque unless there are facts which are known, or ought to be known, to the banker which would cause a reasonable banker to suspect that the customer is not the true owner.

What facts ought to be known to the banker, i.e. what inquiries he should make, and what facts are sufficient to cause him reasonably to suspect that the customer is not the true owner, must depend on current banking practice, and change as that practice changes. Cases decided thirty years ago, when the use by the general public of banking facilities was much less widespread, may not be a reliable guide to what the duty of a careful banker, in relation to inquiries and as to facts which should give rise to suspicion, is today.

The duty of care owed by the banker to the true owner of the cheque does not arise until the cheque is delivered to him by his customer. It is then, and then only, that any duty to make inquiries can arise. Any antecedent inquiries that he has made are relevant only in so far as they have already brought to his knowledge facts which a careful banker ought to ascertain about his customers before accepting for collection the cheque which is the subject-matter of the action, and so have relieved him of any need to ascertain them again when the cheque which is the subject matter of the action is delivered to him. What the court has to do is to look at all the circumstances such as would cause a reasonable banker possessed of such information about his customer as a reasonable banker would possess, to suspect that his customer was not the true owner of the cheque”.

24. The **Marfani** case was extensively referred to in the Court of Appeal matter of the **Standard Chartered Bank Kenya Ltd v Intercom Services Ltd & 4 Ors (2004) eKLR** principally by **Onyango Otieno AgJA** (as he then was) when after quoting the second of the above passages, he went on to say:

“The learned judge was fully alive to the above requirements and he reproduced part of the above decision I have reproduced hereinabove. The extent to which the inquiry should go, according to the above case, depends on the circumstances of each case. As a first appellate court, I am also enjoined to peruse and analyze the same circumstances that existed in this case subject to limitations I have stated above, to be able to come to my own conclusion as to whether or not the appellant went too far in its enquiry.”

In the same case **Githinji JA** went a step further in his adoption of the Judgement of **Diplock JA** with reference to the case of **Thackwell v Barclays Bank Plc (1986) 1 All ER 676** at page 687 wherein then the learned Judge stated:

“That test was applied with approval... in relation to the defence afforded to a collecting banker under Section 4 of the Cheques Act 1957 (English). That passage was again cited with approval by Parker, L.J. in the Court of Appeal in *Lipkin Garman vs Karpnale Ltd [1992] 4 All ER 409* at page 439 paragraphs g-j, who, in addition, observes that cases dealing with the question of breach of duty of care by a paying bank to its customer when carrying out customers’ 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. 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 bank sued for breach of contract raise different considerations. In the former class of case it is for the banker to establish that he collected without negligence, in the latter the burden is on the customer to prove negligence. The statutory protection is also different in the two types of cases...’. In the present case, both counsel relied on the numerous English and Commonwealth decisions in support of their respective case. The decisions referred to fall into two classes. The first class relates to the case where the customer had sued his banker as the paying bank under the bank/customer contract or under the doctrine of constructive trustee to recover money paid out to third parties from the account in breach of contract or constructive trust. That class of authorities is not relevant to the present case.

In the second class of cases, the true owner of the cheque had sued a bank in tort – (conversion) to recover money paid out by the bank to its customer. The cases of *Marfani & Co. Ltd vs Midland Bank Ltd*. (Supra) and *Thackwell vs Barclays Bank Plc* (supra) [1896], 1 All ER 676 are good examples of the second class of the authorities.”

25. The case before court obviously falls under the second class of the authorities above referred to. Indeed it is the Plaintiff’s case, by its Amended Plaintiff dated 20th September 2007, that the Defendant was firstly, negligent for failing in its duty to observe the basic banking procedures and safeguards as to the opening of the said account number 81100032 and secondly, breached its fiduciary duty towards the Plaintiff as the true owner of the cheques drawn in its name. However, it was only in the Plaintiff’s submissions that the word “conversion” was first used. The Court presumes that by the time the Plaintiff got round to writing its submissions, it had reviewed **MS Parthasarathy’s** volume on **Cheques in Law and Practice, Fifth Edition** in which the learned author had defined “conversion” as:

**“An act of or complex series of acts, of willful interference, without lawful justification with any chattel in a manner inconsistent with the right of another, whereby the other is deprived of the use and possession of it.”**

The learned author had gone on to say in simplification of the term as regards banking:

**“Occasionally, a bank may collect a cheque (or bank draft) for a customer who has no title or only a defective title to it. The bank would then have committed an act of conversion and, if the general principles of law applied, would be liable to the true owner to pay damages arising from the conversion to refund the ‘money had and received’”.**

In my view, the submissions of the Plaintiff did not go far enough in reinforcing its view that what the actions of the Defendant bank amounted to was, in fact, an act of conversion. To this end, **M. S. Parthasarathy** in his said volume goes on to state further under the heading “Conversion” as follows:

**“A person is guilty of conversion, in the modern sense of the term, if he wrongly takes, detains, or disposes of, another’s property. Conversion is defined as ‘an act, or complex series of acts, of willful interference, without lawful justification, with any chattel in a manner inconsistent with the right of another, whereby that other is deprived of the use and possession of it’. Intention, implied in willful interference, refers only to the intentional commission of the act. Where the act done is necessarily a denial of the other’s right or an assertion of a right inconsistent with it, the tort may have been committed, though the doer may not know of, or intend to challenge, the property or possession of the other.**

**A cheque represents a claim to money of the drawer in the hands of the drawee bank. Once a bank collects the money and credits it to the account of the customer for whom it has collected the cheque, the bank becomes a debtor of the customer to the extent (unless the credit goes to reduce an overdraft on the account). It may not, therefore, be easy to see how the bank can be held to have converted the moneys represented by the cheque. As explained by Scrutton LJ in *Lloyds Bank Ltd v Chartered Bank of India, Australia and China*, courts have overcome the difficulty ‘by treating the conversion as of the chattel, the piece of paper, the cheque under which the money was collected, and the value of the chattel converted as the money had and received under it’.**

**In *Midland Bank Ltd v Reckitt*, Atkin LJ recalled his own remarks in *A L Underwood Ltd v Bank of Liverpool and Martins Ltd*:**

**‘The bank so disposed of the chattels, the cheques, as to deprive both themselves and the true owners of the dominion over them, and in exchange for the pieces of paper constituted themselves the debtors of the customer. I cannot imagine a plainer case of conversion. It is quite irrelevant to the issue of conversion that after payment the pieces of paper came into possession of the paying bank to be held as vouchers on account of the true owner’.**

**Denning J explained the legal principles in *Nelson v Narholt* as under:**

**‘A man’s money is property which is protected by law. It may exist in various forms, such as coins, treasury notes, cash at bank, or cheques, or bills of exchange of which he is ‘the holder’, but, whatever its form, it is protected according to one uniform principle. If it is taken from the rightful owner, or, indeed, from the beneficial owner, without his authority, he can recover the amount from any person into whose hands it can be traced, unless and until it reaches one who receives it in good faith and for value and without notice of the want of authority. Even if the one who received it acted in good faith, nevertheless if he had notice that is, if he knew of the want of authority or is to be taken to have known of it – he must repay. All the cases that occur in the books of trustees or agents who draw cheques on the trust account or the principal’s account for their own private purposes, or of directors who apply their company’s cheque for their own account, fall within this one principle. The rightful owner can recover the amount from anyone who takes the money with notice,**

subject, of course, to the limitation that he cannot recover twice over. This principle has been evolved by the courts of law and equity side by side. In equity it took the form of an action to follow moneys impressed with an express trust, or with a constructive trust owing to a fiduciary relationship. In law, it took the form of an action for money had and received or damages for conversion of a cheque. It is no longer appropriate, however, to draw a distinction between law and equity. Principles have now to be stated in the light of their combined effect. .... Remedies now depend on the substance of the right, not on whether they can be fitted into a particular frame work. The right here is not peculiar to equity or contract or tort, but falls naturally within the important category of a case where the court orders restitution, if the justice of the case so requires’.”

26. This theme has been extensively explored in **Clerk & Lindsell on Torts, 20th Edition** where after the learned authors had defined the modes of conversion in paragraph 17-08 looked at the tort in direct relationship to negotiable instruments and securities. At paragraph 17-37 the authors had this to say:

**“Cheques, negotiable instruments and other securities, such as guarantees, insurance policies and bonds, considered as corporeal property, are simply pieces of paper. Their sole value is as choses in action, which cannot as such be converted. If, however, such physical documents are unlawfully dealt with, as where a cheque is stolen and paid into a bank account controlled by the thief, the person entitled to them may recover full damages based on their value as choses in action. This principle extends to any document which is specially prepared in the ordinary course of business as evidence of a debt or obligation, and thus including (for example) share certificates and trading stamps. Nevertheless, it applies only in so far as the document is, in fact, a valid security. Thus no substantial recovery is available in respect of a cheque which, when converted, had been avoided as a result of an unauthorised alteration. The measure of damages is prima facie the value of the debt or obligation of which the document is evidence.”** (Underlining mine).

27. With the above jurisprudence in mind, I now return to the parties’ Issues. Having dealt as above with Issues Nos. 1 to 5, I find so far as Issue No. 6 is concerned that the Defendant bank did collect the 10 cheques for the holders (Messrs. Alexander Gathuya Mwangi and Peter Omuroka Omwaka) who did not have legal title thereto and, as a result, denied the Plaintiff as the true owner, the sum of Shs. 4,000,182.95. Under the banker/customer relationship as between the Defendant and the said holders, I find that the Defendant was under a legal obligation to pay the credit proceeds of the said account number 81100032 to them. Such is in relation to Issue No. 7. As regards to whether the loss of the Plaintiff was due to the negligence of the Defendant bank, I so find in favour of the Plaintiff. As above, I find the Defendant guilty of negligence in the opening of the said account as aforesaid. I also find that the Defendant failed to take proper precautions so as to ensure that the holders (signatories) to the said account were legally who they said they were. The ostensible company as per the forged Certificate of Incorporation was formed on the 24th December 2003. Its so-called directors and shareholders were seeking the opening of an account for the so-called company 11 months later yet the Defendant failed to even check whether the same was in operation, where was its premises and other obvious questions that should have been asked by DW 1. Further, with direct reference to the 10 cheques deposited by the fraudsters with the Defendant bank for collection, I have noted that such were all received by the Defendant bank on different dates as between 22<sup>nd</sup> November 2011 and 29<sup>th</sup> November 2011. From the pay-in slips exhibited at pages 1 – 5 of the Plaintiff’s Bundle of documents, all those cheques were issued by drawers from Nairobi or Mombasa. I would have thought that the fraudster’s account having been opened at its Eldoret Branch, the Defendant should have been put to some enquiry as regards the origin of those cheques, all being banked in an up-country account.

28. As a result and as regards Issues Nos. 9 and 10, I find the Defendant liable to compensate the Plaintiff in the amount of Kenya Shs 4,000,182.95 together with simple interest thereon from 15th December 2004 at Court rates. The date of 15th December 2004 is the last date upon which the Defendant allowed payments to be made to the fraudsters out of the said account No. 81100032 (See **Thackwell v Barclays Bank Plc** (supra)). The Plaintiff will also have the costs of this suit.

**DATED and delivered at Nairobi this 30<sup>th</sup> day of June, 2014.**

**J. B. HAVELOCK**

**JUDGE**