



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI COMMERCIAL & ADMIRALTY DIVISION**  
**CIVIL CASE NO. 444 OF 2012**

**ITALIAN MARKET KENYA LIMITED.....PLAINTIFF**

**-VERSUS-**

**FIDELITY COMMERCIAL BANK LTD.....1ST DEFENDANT**

**PHILIP MUOKA.....2ND DEFENDANT**

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

1. By a Plaint filed in court on 11th July 2012 the Plaintiff seeks against the Defendants the following prayers, some of which, as we shall shortly see hereunder, have been comprised and overtaken by events. In the Plaint, the Plaintiff sued the Defendant seeking the following orders:-
  - a. *That the Honourable court be pleased to issue an interlocutory mandatory injunction compelling the removal of the 1st and 2nd Defendant's and/or employees and/or agents and/or anybody interfering with the Plaintiff's business operations, offices, equipments and movables until the determination of the application and this suit.*
  - b. *An injunction restraining the Defendants their servants and/or agents from alienating, transferring, charging, leasing or in any manner whatsoever dealing with the Plaintiff's assets or alienating, transferring, charging, leasing or in any manner whatsoever dealing with any other securities held by the Defendants in respect of the Plaintiff's accounts pending the hearing and final determination of this matter.*
  - c. *That the Honourable court be pleased to issue an interlocutory mandatory to compel the the 1st Defendant's directors and officials and the 2nd Defendant and/or employees and/or agents and/or and/or assigns and/or anybody to return possession of the Plaintiff's business until the determination of the application and this suitor further order of this honourable court.*
  - d. *That this court be pleased to grant orders to eject and remove the 2nd Defendant as Receivers and Managers form the Plaintiff's premises and/or offices and the Plaintiff's possession of its premises and/or offices be reinstated.*
  - e. *That the Plaintiff be at liberty to apply for and the honourable court be pleased to grant any further orders and direction as may be just and expeditious disposal of the application and suit herein.*
  - f. *An order directing the 1st and 2nd Defendants, respectively to render true and full accounts to the Plaintiff.*
  - g. *An order directing the 1st and 2nd Defendants to reverse the illegal debits loaded on the Plaintiff's account.*

- h. **General damages for negligence.**
  - i. **Costs of this suit together with interest thereon at such rate and for such period of time as this honourable court may deem fit to grant.**
  - j. **Any such other or further relief as this honourable court may deem appropriate.**
2. The Defendant opposed the suit through a joint defence filed in court on 10th September 2012. Parties complied with order 11 of the Civil procedure Rules, and filed their various bundles of documents leading to the hearing of the suit and this Judgment.
  3. The brief facts of the Plaintiff's case is as follows. The Plaintiff herein maintained a current account No. 11100415 in the name of Italian Market K Limited with the 1<sup>st</sup> Defendant which the Plaintiff operated for purposes of and in connection with its trade or business giving rise to the relationship of banker and customer as between the Plaintiff and the 1<sup>st</sup> Defendant. The signatories of the said account were Stefano Garibaldi Sala and John Nguli. The signing mandate was 'Either director to sign'. In or about 2005, the Plaintiff applied for and was granted an overdraft and Bills Discounting facilities on its current account number 11100415 with the 1<sup>st</sup> Defendant amounting in aggregate to Kshs. 2,500,000/= for the purpose of financing its business activities. These facilities were governed by terms and conditions set out in the letter of offer dated 3<sup>rd</sup> March 2005 appearing at page 1 of Defendant's Bundle of documents and secured by a Debenture dated 24<sup>th</sup> June 2005. The said overdraft facility was to be utilised **solely** for purposes of working capital and the Bills Discounting facilities for discounting Bills drawn on **Nakumatt Holdings Limited and Dhanjee Brothers Limited**
  4. Stefano G. Sala and Monica Garibaldi were directors of the Plaintiff company at all material times. They were also married to each other and were living as husband and wife.

Vide a letter dated 27<sup>th</sup> April, 2006 the 1<sup>st</sup> Defendant invited one Mr. Stefano G. Sala who was at the time one of the Directors of the Plaintiff, to apply for a Visa Gold Card. This was an invitation in his personal capacity. Stefano G. Sala and his wife Monica Garibaldi applied and were issued with Visa Gold Card numbers 4116290000080762 and 4116290100080175 and Local Visa Card numbers 410030000080848 and 4100330100081050 respectively in their names and personal capacity.

5. On 26<sup>th</sup> July 2007 Mr. Stefano G. Sala and his wife Monica Garibaldi signed an Auto Credit application form purportedly to authorise the 1<sup>st</sup> Defendant to link the said visa cards held by themselves with the Plaintiff's account aforesaid. The effect was that any use of the said visa cards would be offset against the Plaintiff's account aforesaid. Stefano Sala and Monica Garibaldi used the said visa cards apparently in their personal accounts for at least one year before the said linking with the Plaintiff's current account aforesaid. At no time was Monica Garibaldi a signatory to the Plaintiff's account aforesaid. Subsequently, the Plaintiff's account was at various times between July 2007 and January 2011 debited with amounts to offset debits on usage of the said visa cards. The Plaintiff alleges that its attempts to get details of the said debits from the 1<sup>st</sup> Defendant has been met with contempt, with the 1<sup>st</sup> Defendant stating that the details thereof are personal to the users of the visa cards. The 1<sup>st</sup> Defendant has denied the Plaintiff information regarding usage of the visa cards and subsequent debiting of its current account. It is alleged that the amounts debited into the said account from 3<sup>rd</sup> July 2007 to 11<sup>th</sup> January 2010 totals to Kshs. 2,889,764/= and the same have been subjected to interest at the bank rates with the latest standing at 23.5%.
6. On 1<sup>st</sup> January 2010 and 16<sup>th</sup> June 2010, Monica Garibaldi and Stefano G. Sala respectively resigned from the directorship of the Plaintiff leaving the said debits hanging in the Plaintiff's account. The Plaintiff state that Stefano Sala was the face of the Plaintiff to the 1<sup>st</sup> Defendant and was expected to deal with the bank in good faith on behalf of the Plaintiff.
7. On realising that these debits were loaded on the Plaintiff's account, the other director Mr. John Nguli visited the 1<sup>st</sup> Defendant bank to question the action of the bank in effecting these debits. It is then that he learned the activities that had transpired including the unauthorised signing of the

auto credit authorisation form cited at page 1 of the Plaintiff's bundle of documents. This happened after the resignation of Stefano Sala from directorship of the Plaintiff. Several meetings were held between the said John Nguli, the Bank's Managing Director and other bank officials. The negotiations culminated into acceptance by the bank to reverse the debits and the attendant interest, but later the bank back-tracked on its promise. Sometimes in June 2012 the 1<sup>st</sup> Defendant purported to appoint a Receiver over the assets of the Plaintiff company. The receivership was lifted vide a consent dated 26<sup>th</sup> July 2012 and filed in court on 27<sup>th</sup> July 2012 wherein the Plaintiff was ordered to deposit the suit amount of Kshs. 3,490,466/= in an escrow interest earning account at CFC Stanbic Bank opened in the joint names of the Advocates pending the outcome of this suit. This money is still held in the said account. The consent also required that the Plaintiff settles the receiver/manager's fees and charges in the sum of Kshs. 223,000/= and the same was done by debiting the Plaintiff's account aforesaid. This consent was to pave way for the suit to proceed to trial.

8. The effect of the said Consent was that it altered several issues in the main suit by discharging the 2<sup>nd</sup> Defendant from the suit, changed references to the 2<sup>nd</sup> Defendant and several prayers that touched on the 2<sup>nd</sup> Defendant. The present then case proceeded to trial on that premise, without the need to belabour the parties with laborious amendments to pleadings.

This means that Prayers A,B,C,D, and E were done with in the said consent. The Plaintiff therefore claims from the 1st Defendant Prayers F, G, H, I and J. Plaintiff's prayer G refers to the sum of Kshs.2,889,764/= (as effectively summarized in page 11 of the Plaintiff's bundle of documents), and the attendant interest for the period it has been in debit in the said account.

9. Both parties produced a single witness for their case. The Plaintiffs witness PW1 was John Kisalu Ngulu, who confirmed that at all material times he was the director of the Plaintiff since 2005. He confirmed that the other two directors were Stefano Sala and Monica Garibaldi and that the two were husband and wife and have since left directorship of the Plaintiff as per their resignation letters at pages 55 and 56 of Plaintiff's bundle. The witness confirmed that the signing mandate for the current account number 11100415, that the Plaintiff maintained with the 1<sup>st</sup> Defendant bank was 'either director to sign', meaning that either him or Stefano Sala could sign on behalf of the company. He explained to this court that indeed Stefano Sala received a letter dated 27<sup>th</sup> April 2006 inviting him to apply for a visa card; that this invitation did not extend to him but was intended for Mr. Sala himself as an individual and that this invitation did not in any way extend to the Plaintiff Company.

Mr. Nguli told the court that he later learned that Mr. Sala and his wife Monica applied for and were indeed issued with visa cards. On re-examination he explained that he learned about the card numbers later on seeing a document contained in the Plaintiff's bundle at page 2 - the Auto credit for corporate application form. The card numbers were 4100 3300 0008 0848 & 4100 3301 0008 1050 both as Local visa cards and 4116 2900 0008 0762 & 4116 2901 0008 0175 both as Gold visa cards. Mr Nguli further explained to the court that local visa cards are used within the country while Gold visa cards are used internationally. He explained to the court that he later learned that the said visa cards were linked to the Plaintiff's said account and that Plaintiff's account was being drawn using the said visa cards. He testified that he thereafter visited the Bank to seek clarification on the debits at which point he also disputed the debits clarifying that the Plaintiff had no visa card. Mr Nguli confirmed that he discussed the matter with a Mr. Manji, the Bank's company secretary and a Ms Samira, who told him that the cards were a personal matter. He further said that he requested and/or asked for a statement of, which is at pages 33-54 of the Plaintiff's bundle.

10. The witness also confirmed that he also met the Executive director and the Finance manager of the Bank who at their meeting agreed that the issue would be sorted out with Stefano Sala as a personal matter. The bank then agreed to reverse the debits from the company account. He testified that the said debits were never reversed. On the contrary, the Plaintiff received a demand

letter dated 15<sup>th</sup> July 2011 demanding a sum of Kshs. 2,633,970.95 –at page 3 of Plaintiff’s bundle. He testified that the company could not do business on the said account as long as the debits sat in the company account. The witness testified that he never issued any instructions to link the company account with the visa cards and that the 1<sup>st</sup> Defendant bank did not at any time communicate to the Plaintiff company that it was linking the company account with any visa cards. He stated that had the Plaintiff wished to have the company account linked with the said visa cards, the company would have made a Board Resolution allowing such action on its account. He further stated that the effect of the purported linkage would in any case amount to ‘*standing instructions*’ by the Plaintiff to the Bank, which was way beyond the signing mandate of the account in question. The witness was shown page 2 of the Plaintiff’s bundle and confirmed that the document was signed by Stefano Sala and Monica Garibaldi; that the document does not bear a company seal of the Plaintiff and that it neither was in the company letterhead, thus clearly showing it was devoid of sanction by the Plaintiff. At page 9 of the Plaintiff’s bundle, the witness confirmed that he wrote to the 1<sup>st</sup> Defendant specifically requesting the reversal of the debits. He stated that at the time, other than the card debits the company had no debts with the bank.

11. On cross-examination PW1 stated that as regards the mandate of the account, the mandate was on instructions to operate the account and it related to signing of cheques. On further cross examination he confirmed that Stefano Sala was the Managing director of the Plaintiff. Mr Nguli stated that he did not query entries for auto credit visa within 21 days of statement of account. He also explained that Stefano Sala often dealt with the Bank as the face of the Plaintiff. He clarified that he learned about the debits way later since banking matters were handled by Stefano Sala who as the managing director received statements of account from the bank and was trusted to act in good faith. He however, stated that before Stefano and Monica resigned on 15<sup>th</sup> June 2010 and 1<sup>st</sup> January 2010 respectively, Stefano and Nguli queried the statement on 31<sup>st</sup> March 2010. He further stated that the Plaintiff’s new managing director wrote a demand letter on 15<sup>th</sup> June 2011 to the Bank - appearing on page 6 of the Plaintiff’s bundle. Further to the foregoing, PW1 testified that at page 3 of the Plaintiff’s bundle, the letter from the bank dated 15<sup>th</sup> July 2011 is a clear testimony at paragraph 4 that the debits were queried and the 1<sup>st</sup> Defendant bank considered the queries accordingly. Shown pages 7 & 8 of the Plaintiff’s bundle, the witness clarified that on realising that the 1<sup>st</sup> Defendant was not budging, even after reneging on their promise to make the reversals, the Plaintiff passed the matter on to its lawyers who wrote to the bank. He clarified that as per documents on pages 43-48 the 1<sup>st</sup> Defendant purportedly appointed a Receiver over the assets of the Plaintiff. Still on cross examination, the witness confirmed that the visa debits continued to be loaded onto the company account beyond June 2010 after Stefano and Monica had left the Plaintiff company. He also clarified that he did not know what the visa payments related to and neither did the 1<sup>st</sup> Defendant disclose the same to the Plaintiff. He testified that all attempts to get information on the details of the visa debits were thwarted with claims by the 1<sup>st</sup> Defendant that such was a personal matter for Stefano and Monica. He pleaded with the court to order a detailed account of the debits, reversal of the debits and the attendant interest and release of the funds held at a CFC Stanbic Bank.

12. The Defendant’ sole witness was Stella Mbuli, DW 1. Ms Mbuli testified that she is the legal manager of the 1<sup>st</sup> Defendant bank. After joining the bank in 2013, she served as the legal adviser to the bank and that her testimony was based on information narrated to her and documents read as she was not an employee of the bank at the material time. DW 1 confirmed that she knows the Plaintiff and the relationship it had with the 1<sup>st</sup> Defendant. She explained that the Plaintiff approached the 1<sup>st</sup> Defendant for a credit facility in the form of overdraft facility and bills discounting facility in 2005. She confirmed that the facilities were secured by a debenture over the Plaintiff’s assets, dated 24<sup>th</sup> June 2005 and registered on 15<sup>th</sup> July 2005. She confirmed the Plaintiff’s account no. 11100415 opened in the bank in the name of Italian Market Kenya Limited and also confirmed that the Plaintiff has no other account with the 1<sup>st</sup> Defendant. She explained to the court that the 1<sup>st</sup> Defendant appointed a receiver over the Plaintiff’s assets because there was

an overdraft amount in the Plaintiff's said account owing to the 1<sup>st</sup> Defendant. She stated that she is aware that the amount in dispute was incurred by 2 directors of the Plaintiff namely Stefano Garibaldi Sala and Monica Garibaldi. DW1 was shown page 2 of the Plaintiff's bundle and she identified it as an application for visa cards. She confirmed that it shows the names of the card holders, the card numbers, the name of the company, nature of business, and that at the top it indicated that it is an auto credit for corporate application - not for individuals. She confirmed that it indicated the account to be debited i.e. Italian Market Kenya Limited account number 11100415 and that it is a current account. She confirmed that the document constituted instructions to the bank and she read the instructions clause to the court. Reads: *'I/we instruct you to pay autocredit payments from my/our account at the request of Fidelity Bank Visa Card'*. She confirmed that it was signed by 2 directors of the Plaintiff and dated 26<sup>th</sup> June 2007. She explained that it formed the basis of the Plaintiff's instructions to the 1<sup>st</sup> Defendant.

13. Referred to page 36 of the Defendant's bundle, she indicated the mandate of the account to the bank was *'either director to sign'* and the persons to sign were Stefano Sala or John Nguli. She explained to the court that what she understands by instructions for operating account - refers to *'... anything, any instructions given by any of the two directors pertaining to this account – withdrawals, signing cheques, specific instructions ...'* She further confirmed that Stefano was 'the face' of the Plaintiff to the bank. Shown page 2 of the Plaintiff's bundle, she confirmed that Stefano, being a director of the Plaintiff signed the document. That after signing *'the application, they were given whatever they asked for'*. She further explained that *'...they were mandated by the company to sign this application'*. Shown pages 33-54 of the Plaintiff's bundle and she confirmed that they are statements of account. She confirmed the disputed entries in the statement of account (the visa card debits) and also confirmed they were debited subsequent to the purported application. She said that the 1<sup>st</sup> Defendant did not receive queries on the entries from the Plaintiff. Shown pages 3-7 of the Plaintiff's bundle, she confirmed that there was no query prior to October 2011. Shown pages 55 & 56 of the Plaintiff's bundle, she confirmed that Stefano could sign the account upto 16<sup>th</sup> June 2010. She confirmed again that queries on the account came after 16<sup>th</sup> June 2010. On the last line of the letter of resignation appearing at page 56 of the Plaintiff's bundle, she confirmed that Stefano had undertaken to assist with settlement of debits. She went further to state that she wouldn't know whether Stefano assisted the Plaintiff. She stated that the letter of resignation 'must have been accepted' by the Plaintiff. Asked why the linking of the visa cards to the company account without a board resolution, she stated that it was not a condition in the operating mandate to the bank. She further confirmed that the document of instructions to the bank did not have the company Seal of the Plaintiff on it, apparently *'...because it was not a requirement'*. She also stated that the document of instructions was not on company letter head because *'... it was not expected to be on company letterhead'*. On the statement of account at pages 49-115 of the Defendant's bundle, she confirmed that other than visa entries, there were no further debits. But on further questioning she stated that the entries are a mix of visa debits and other entries. She explained to the court that an overdraft account operates by drawing the account to be repaid latter - *'...that money into the account is deemed as debits to the account'*. However, upon cross-examination by the court on whether the account must always be overdrawn, she answered – **'No'**. She explained that the account can be in credit also and further *'it is not true that there are no other entries other than visa entries'*. Shown page 115 of the Defendant's bundle, DW1 confirmed that as at 16<sup>th</sup> July 2012 the amount owing stood at Kshs. 3,490,466.75 and still accruing interest. She stated that visa allocation to Sala and Monica was personal. Shown page 2 of the Plaintiff's bundle, she confirmed that the application does not indicate the accounts were personal. She also stated that the claim was brought up after the 2 directors resigned from the company.

She explained that with no payments, the bank placed the Plaintiff under receivership and that is how the matter ended up in court. On cross-examination, DW1 confirmed that her date of appointment was 1<sup>st</sup> September 2013 and that her testimony was based on information acquired and not from own knowledge of the facts. Shown page 2 of Plaintiff's bundle and she was at a loss to explain what document it was and what it was for. She told the court that it was an application for visa cards. She subsequently could not explain that if it was an application for visa

cards, where the card numbers indicated on the document were from.

14. While explaining that she had never seen Stefano Sala or Monica Garibaldi, she confirmed to the court that the two signatures at the bottom of the document were that of Stefano Sala and Monica Garibaldi. However, she could not give the basis of her belief that the said signatures belonged to the two persons, other than by mere look at the signatures. On further questioning she explained that her confirmation of the signatures was based on an assumption. Shown page 1 of the Plaintiff's bundle, she stated that the letter was addressed to Stefano Sala individually. Asked whether she was aware that Sala and Monica applied and were issued with visa cards, she answered – 'No'. Asked whether there existed any account on the visa cards she answered – 'No' and explained that '...they were to be debited from the account of the Plaintiff'. Asked whether there was a board resolution authorising the two directors to sign the auto credit authorization form, DW1 explained that it was not required. Yet she explained to the court that you require a board resolution to open an account by a limited company. She further explained that a board resolution is required to authorise the company and that the resolution must have a company seal on it. She stated that even standing instructions do not require resolution of the board or seal of the company. She confirmed to the court that Sala and Monica are married. She also confirmed that the visa cards herein operated for a year before they were linked to the company account herein, yet she could not reconcile how the document at page 2 of the Plaintiff's bundle and dated 26<sup>th</sup> June 2007 could be an application for the visa cards when they had been in operation for one year before. She could not tell the court on which accounts these visa cards operated before the said linkage. She clearly confirmed to the court that there were no queries lodged on the debits in the Plaintiff's account before 16<sup>th</sup> July 2012, yet on reading to the court paragraphs 1 & 2 of page 6 of the Plaintiff's bundle (a letter dated 15<sup>th</sup> June 2011), she confirmed to the court that the letter therein refers to the same debits. Shown page 1 of the Defendant's bundle and identified it as a letter of offer for a revolving overdraft facility for a maximum principal amount of Kshs. 1 million and bills discounting facility for a maximum principal amount of Kshs. 1.5 million. She explained that the facilities were to be utilised solely for purposes stated in the letter of offer. The purposes stated in the letter of offer were (a) the overdraft facility shall be utilised by the borrower for working capital. (b) the Bills Discounting shall be utilised for purpose of discounting Bills drawn on Nakumatt Holdings Ltd and Dhanjee Brothers Ltd. Other than the specified purposes, they were to be utilised for such other purpose as the bank might in its discretion first approve in writing. No other purpose was approved by the bank. She confirmed to the court that the facilities were to exist for 12 months and to be renewed annually. She said they were renewed but could not demonstrate to the court how the facilities were renewed. She confirmed that the debenture dated 24<sup>th</sup> June 2005 was created as security to these facilities and it is on the strength of this debenture that the 1<sup>st</sup> Defendant purported to place the Plaintiff under receivership. Shown pages 104 of the Defendant's bundle, a debit item dated 31-Oct 2008 PART PYMT TO VISA CARD- STEFANO SALA for Kshs, 200,000/=, Page 113, credit item dated 28<sup>th</sup> January 2010 REVERSAL OF LATE PAYMNT FEES ON VISACARD FOR STEFANO... for Kshs. 35,118.80 and Page 114, credit item dated 24<sup>th</sup> March 2010 50% REBATE OF THE FISCAL CHARGES ON HIS FCB VISA C... and asked what 'HIS' refers to, and she answered Stefano. Of course depicting the personal nature the visa card transactions were. On how she could know how 'HIS' referred to Stefano, she told the court because he is the one director who signed. Clearly the 1<sup>st</sup> Defendant handled Plaintiff's corporate account as personal account of Stefano. On being asked whether there was any communication to the Plaintiff with regard to linking of the visa cards to the company account herein, she stated that there must have been a communication. But on being asked where it was, she replied 'I don't have it'. She however, agreed that the bank is under duty to communicate to the company when such action is being meted on its account; an obligation that was never ever discharged. While confirming that the 1<sup>st</sup> Defendant issues statements of account to its customers, she said that indeed the bank did issue statements of account on visa cards to the company prior to linking of account, thus contradicting her earlier position that there were no accounts on the visa cards and further contradicting the bank's position that the visa cards statements were a personal matter. She insisted that the statements of account on the visa cards were issued to the company. She was then asked whether she could show the court statements on the visa cards to which she

- said she couldn't. Asked how much was debited on the Plaintiff's account with regard to the visa cards, DW1 told the court that she did not know the exact amount. Her subsequent re-examination did not add much to the evidence tendered earlier during her examination in chief.
15. Both the Plaintiff and the Defendants have raised different set of start issues for determination. The Defendants issues are as follows:-
- a. ***Whether the Plaintiff account with the first Defendant was in arrears as at the time the first Defendant appointed the receiver.***
  - b. ***Whether the debits in the statement of account were lawful and whether the Plaintiff is entitled to a reversal on the same.***
  - c. ***Whether the conduct of the Plaintiff of not raising any query with the first Defendant is prejudicial to the first Defendant and whether the Plaintiff acted prudently and in good faith.***
16. The Plaintiff has raised a total of six (6) prayers which encompass the issues raised by the Defendants. I will therefore adopt the Plaintiff's issues, and consider the responses provided by the Defendants in addition to the Defendants own issues stated above.
17. The Plaintiff submitted that the case before this honourable court is a case about a commercial bank acting on improper instructions to the detriment of its customer, a limited company and the attendant consequences arising there from. The action complained of herein is that the 1<sup>st</sup> Defendant took upon itself to draw a document called an Auto Credit for Corporate Application appearing at page 2 of the Plaintiff's bundle and cause the same to be signed by two directors of the Plaintiff (who is a limited company). The 1<sup>st</sup> Defendant wrongfully assumed that such signing was adequate authorization by the Plaintiff and purported to act on it. This was done without discharging its duty of obtaining the mandatory authorization from the Plaintiff. Being a limited company, a board resolution was required to authorize the signing by the Plaintiff's directors.
18. From the evidence tendered to this court, whether the disputed action actually occurred is not in dispute. What is in dispute is whether the 1<sup>st</sup> Defendant's actions were proper, legal, and in line with its duty to the Plaintiff, owing to the Bank-Customer relationship that existed between them at the time.
19. The Plaintiff has raised the following issues for determination:-
- i. ***Whether the 1<sup>st</sup> Defendant obtained proper authorization to link the visa cards debits with the Plaintiff's current account number 11100415;***
  - ii. ***Whether the 1<sup>st</sup> Defendant acted negligently and in breach of its duty of care owed to the Plaintiff, if any;***
  - iii. ***Whether the 1<sup>st</sup> Defendant was under duty to communicate to the Plaintiff its act of linking the alleged debits to the said account;***
  - iv. ***Whether failure by the Plaintiff to query the debits within 21 days of statement of account disentitles it from its claim for reversal of the debits and the attendant interest;***
  - v. ***Whether the 1<sup>st</sup> Defendant was right to appoint a receiver over the assets of the Plaintiff;***
  - vi. ***Who should bear the costs of receivership;***
  - vii. ***Who should bear the costs of the suit.***
20. On the first issue the Plaintiff submitted that it was not in dispute that the account mandate was 'either director to sign'. The question that next arises is what was the scope of that mandate? What could they transact and what could they not transact? To answer this question the Plaintiff referred the court to the document containing the signing mandate appearing at page 36 of the 1<sup>st</sup> Defendants bundle. The document is identified as "Specimen signature card" and specifies the instructions for operating account as "Either director to sign". The specimen signatures and photographs on the card are that of Sala Stefano and John Nguli meaning that either Stefano Sala or John Nguli could operate this account. The document also has a slot for indicating 'special instructions if any'. That slot is left blank, meaning that there are no special instructions whatsoever that were intended by the Plaintiff on its account. Looking at the evidence tendered in court, DW1 stated that the mandate referred to '***. . . anything, any instructions given by any of the two directors pertaining to this account – withdrawals, signing cheques, specific***

***instructions ...'***

The mandate card is very clear. It does not allow specific instructions and if it was indented to do that, then it could have been filled clearly indicating such. The slot for specific instructions was deliberately left blank meaning that the directors did not contemplate it when they gave their signing mandate to the bank. If the 1<sup>st</sup> Defendant had any doubt on this mandate it ought to have sought clarification from the Plaintiff. In the case of **Patel & Ors v Standard Chartered Bank (2001) All ER 66**. The court held that where a mandate is held to be ambiguous, it was the duty of the Bank to seek clarification from its customers or it will be held liable. The case emphasises the position that a bank that pays out on a patently ambiguous mandate, without first seeking clarification from its customer, runs the risk of being unable to debit the customer's account.

21. The issue of *standing instructions* arose in the testimony of PW1 who testified that since visa card debits were to be made on the account severally, this amounted to *standing instructions*. Standing instructions deals with specific amounts to be debited. Herein the amounts were not specified and thus the correct word to us is *direct debits* as the debited amounts were varied. However, what PW1 could have meant is that the nature of instructions contemplated when the two directors of the Plaintiff signed the document appearing at page 2 of the Plaintiff's bundle depict instructions of the nature of a continuous debiting of the Plaintiff's account, thus befitting the description of specific instructions. These could not fit in the account signing (or operating) mandate which was given for the said account. This then begs the question; what could have been proper authorization in the circumstances? And was it done or sought? Since special instructions could not hold water in this case, the Plaintiff, being a limited company was required (in order to bind it), to give a board resolution in order to authorize its directors to sign the necessary documents that the 1<sup>st</sup> Defendant issued/drew. The board resolution ought to have been signed by the directors of the company under the common seal of the company and dated. This is what was required to accompany the so called Auto Credit for Corporate Application stated above. This is what the 1<sup>st</sup> Defendant did not seek when the two directors signed the purported document at page 2 of the Plaintiff's bundle. Their signatures were therefore, devoid of authority (authority to bind the Plaintiff) to the instructions issued. Without this being done, the 1<sup>st</sup> Defendant acting with proper expertise, due diligence and care ought not to have acted without due authorization.
22. In response to the Plaintiff's submissions on this issue, the Defendant submitted that the first issue is whether the first Defendant obtained proper authorization to link the Visa Cards debits with the Plaintiff current account number 11100415. The issue presupposes the existence of Visa Cards in the personal names of the Directors. There were no personal Visa Cards. The issue of linkage therefrom does not arise. The directors with the mandate to sign applied for the Visa Cards under the corporate application. The same was granted and the cards issued. The Plaintiff is purporting to tell the court that operation mandate to operate the Plaintiff account would not cover authorization of direct debits or auto credits to the Company Account. The operation mandate allow the signatories to handle the account of the company and sign all or any document touching on the account as the Bank may require. The Plaintiff is giving the term operation mandate strict interpretation in order to support its claim that the application for Visa Cards was applied for without authority.
23. My finding on this issue is as per the authority provided in the above case of **Patels Ors – Vs – Standard Chartered Bank [2001] ALL ER 66**, where it was held that a mandate is held to be ambiguous, it was the duty of the bank to seek clarification from its customers or it would be held liable. The Defendant did not seek proper authorisation to link the visa card debits with the Plaintiff's current account number 11100415.
24. The second issue for the Plaintiff is whether the 1st Defendant acted negligently and in breach of its duty of care to the Plaintiff. The contractual relationship between the Plaintiff and the 1<sup>st</sup> Defendant was that of a Bank and its Customer and as such the 1<sup>st</sup> Defendant could only lawfully accept instructions to debit the Plaintiff's account with visa card debits in accordance with the instructions contained in the mandate card. In the absence of such, then it duty bound to seek proper and adequate instructions from the Plaintiff, and in this case, duly sanctioned by the board of the Plaintiff. The Defendant was under a strict duty to carry out the instructions in accordance

with the mandate and in case of inadequacy of the mandate to ensure due authorization by the Plaintiff, and that it would exercise reasonable skill and care in so doing. The Defendant had failed to do so. It is the Plaintiff's submission that there was an implied contractual duty on the part of the 1<sup>st</sup> Defendant to exercise reasonable care and diligence in executing the purported instructions of the directors of the Plaintiff. The evidence presented to this court is adequate to show that there was no mandate authorizing the 1<sup>st</sup> Defendant to act the way it did. The mandate the 1<sup>st</sup> Defendant purported to act on was either non-existent, incomplete, or imaginary. The 1<sup>st</sup> Defendant acted negligently and in breach of the duty of care that it owed to the Plaintiff.

25. In my view, and this is my finding on this issue, the issue of duty of care in a bank-customer relationship was well dealt with in the case of **Simba Commodities Limited v Citibank N.A. Civil Case No. 236 of 2003**. The learned Judge heavily relied on the celebrated case of **Karak Brother Company Ltd v Burden (1972) 1 All ER 1210** wherein **Brightman J** extensively examined a banker's duty of care and its contractual duty to the customer to exercise care and skill. The learned Judge opined as follows:

*'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...'*

*"... while carrying out the customer's instruction a bank is under obligation to exercise reasonable skill and care. That skill and care applies to interpreting, ascertaining and acting in accordance with the instructions of the customer"*

The court further observed as follows:

*"in exercising its duty of care the paying bank was bound to make such enquiries as might, in given circumstances, be appropriate and practical, where it had, or a reasonable banker would have, grounds of believing that the authorised signatories were misusing their authority for purposes of defrauding their principal or otherwise defeating his true intentions."*

The 1<sup>st</sup> Defendant in the present case failed to exercise the duty of care owed to the Plaintiff when it failed to obtain proper authorization before linking the disputed visa debits to the Plaintiff's current account aforesaid. It is a duty it owed to the Plaintiff and it cannot purport to claim any duty it owed to Stefano Sala and/or Monica Garibaldi, the two directors who purported to give it instructions to debit the Plaintiff's account with their personal visa usage debits. No evidence was tendered to show that it even tried to seek clarification in case it had any doubts. It clearly acted recklessly, without due regard to the Plaintiff's rights as a customer and to the Plaintiff's great detriment.

Therefore, this duty of care is a duty that cannot be wished away and the 1<sup>st</sup> Defendant cannot purport to deny it. I find that the 1<sup>st</sup> Defendant was negligent and was in breach of its duty of care which it owed to the Plaintiff.

26. In response to this issue, the Defendant submitted that there is no negligence on the part of the first Defendant, and that the particulars of negligence set out at paragraph 26 of the Plaintiff viz:-

- a. ***failing to act diligently in ensuring proper authorization was sought before linking the personal credit cards to the Company Account.***
- b. ***failing to communicate the Bank's decision and act of linking the said visa cards to the company account in good time and thereby exposing the Plaintiff to debt,***

cannot be strictly called particulars of negligence. The Defendant submitted that it has been demonstrated that the corporate application was properly signed and the procedures followed.

The Plaintiff cannot claim lack of communication. The Bank statements and the fact that the Application was done by the Managing Director for the company clearly shows it was the Company's application.

The application for Visa Card is made, the application form is properly signed by the authorized signatory and who indeed, it is admitted, was the face of the Company to the Bank and the Company continue seeing the debits in the statement and does not raise any issue for about four years.

27. Whether the 1<sup>st</sup> defendant was under duty to communicate to the plaintiff its act of linking the alleged debits to the said account. The Plaintiff submitted that in her testimony to the court, DW1 confirmed that the 1<sup>st</sup> Defendant did not communicate to the Plaintiff its action of linking the said visa card debits to the Plaintiff's account. The two directors' purported act of signing the said auto credit for corporate application cannot be deemed to be sufficient notice to the Plaintiff. It is the Plaintiff's submission that the 1<sup>st</sup> Defendant ought to have communicated that action either before or even immediately after doing so. This is a duty that must have been exercised by the Plaintiff on its own motion based on the bank-customer relationship that existed between the two parties.
28. In response to this issue, the Defendant submitted there was no linkage to the Account. The company applied for the Visa Cards for its directors and the same were granted. This is not an act done by the Bank on its own. It is something done by the Directors of the Company who are the same directors the Bank was dealing with. Indeed the Bank was dealing with the request of the Company to the Bank. If it was something done by the Bank eg changing the rate of interest or some debits on its own, the need to communicate to the Plaintiff would have arisen. Further the debits were contained in the monthly statements, and that was sufficient communication.
29. My position on this issue is that the Defendant failed to recognize the legal personality of the Plaintiff, and chose to deal with individuals rather than the Company. The Defendant must take full responsibility for that failure.
30. The fourth issue is whether failure by the plaintiff to query the debits within 21 days of statement of account disentitles it from its claim for reversal of the debits and the attendant interest. The Plaintiff submitted that the notes at the end of the statement of account do not amount to a contractual duty or otherwise on the part of the Plaintiff that can be claimed was breached. It can only amount to a far-fetched disclaimer that cannot be relied upon to disentitle the Plaintiff of its claim for a fundamental breach of duty by the 1<sup>st</sup> Defendant. The Plaintiff relied on **Tai Hing Cotton Mill Ltd. v Liu Chong Hing Bank Ltd (1986) 1 AC 80** as well as the case of **London Joint Stock Bank Ltd v Macmillan & Arthur (1918) AC 777** as referred to in **Kepitigalla Rubber Estate Ltd v National Bank of India Ltd (1909) 2 KB 1010**, it is clear that the position in common law is that there is no duty on the customer to check its bank statements or indeed to take other such steps to check its balances.
31. In response the 1<sup>st</sup> Defendant submitted that the only way for the first Defendant to know there was an issue was the Plaintiff making a query on its statement or questioning the account entries. There are statements for approximately 4 years and the Plaintiff's offers no explanation why it did not raise the issue. The Company learnt of the said debits after one year. They did not query within 21 days, did not query after a year and did not query while the directors were indeed in the company. Had the Plaintiff raised the issue within one year when they allegedly discovered the Bank would have taken some action and seek clarification while the beneficiaries of the Cards were still directors.
32. My finding on this issue is that the notes at the bottom of a bank statement are merely for direction, and amount to invitation to treat. They do not form part of the contract between the bank and the customer, but they direct good orders and practice. The bank cannot use those notes to deny a claim based on either negligence or contract, where the bank is the guilty party.
33. From the foregoing findings, it is not necessary for this court to determine the issues, that is, whether the 1<sup>st</sup> Defendant was right to appoint a Receiver over the assets of the Plaintiff. It is obvious that if there was no debt owed to the bank, there would be no need to appoint a Receiver,

and from the foregoing, the 1st Defendant was responsible for that debt. The appointment of the Receiver would not have been necessary if the 1st Defendant had acted rightfully and without negligence. The 1st Defendant was therefore not right in appointing the said Receiver. The 1st Defendant must be liable to any costs pertaining to that appointment.

34. From the foregoing paragraphs of this Judgement, it is not in dispute whether the visa card debits in the aggregate sum of Kshs. 2,889,764/= was irregularly debited from the Plaintiff's account herein. The Plaintiff has demonstrated that the action of debiting the Plaintiff's account with those visa card debits was unilateral on the part of the 1<sup>st</sup> Defendant and devoid of sanction by the Plaintiff since it was not backed by proper instructions from the Plaintiff. The Plaintiff has also demonstrated clearly and without contradiction that the debits were disputed at the earliest opportune time when PW1 learned of them. The case that comes out is a case of collusion by two directors of the Plaintiff to defraud the Plaintiff, and their scheme was enabled when the 1<sup>st</sup> Defendant failed to exercise proper care, diligence and skill expected of it to thwart it. The Plaintiff has clearly demonstrated that Bank-Customer relationship existed between the Plaintiff and the 1<sup>st</sup> Defendant. It was shown that the 1<sup>st</sup> Defendant therefore, owed a duty of care to the Plaintiff which duty the 1<sup>st</sup> Defendant breached to the Plaintiff's detriment. As a result, the Plaintiff has proved its case against the 1<sup>st</sup> Defendant on a balance of probability, and the court is satisfied that the Plaintiff deserves the orders prayed for. In that regard, I enter Judgement for the Plaintiff against the Defendant as follows:-

- a. *An order directing the 1st and 2nd Defendants, respectively to render true and full accounts to the Plaintiff.*
- b. *An order directing the 1st and 2nd Defendants to reverse the illegal debits loaded on the Plaintiff's account. This reversal to take into account the interests payable to the Plaintiff on the amounts reversed at court rates from the date the amounts were debited to the date of reversal.*
- c. *Costs of the suit with interest thereon at court rates.*
- d. *I decline to grant general damages for negligence since I have given the Plaintiff interest under Order (a) above.*

That is the Judgment of the court.

**READ, DELIVERED AND DATED AT NAIROBI THIS 19TH DAY OF DECEMBER 2014**

**E. K. O. OGOLA**

**JUDGE**

**PRESENT:**

No appearance for the for the plaintiff

No appearance for the for the Defendants

Teresia – Court Clerk