REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO. 236 OF 2003

SIMBA COMMODITIES LIMITED ……..…… PLAINTIFF

VERSUS

CITIBANK N. A. …… DEFENDANT

J U D G E M E N T

1. It is most unfortunate that this 2003 case has been through the hands of no less than 5 Judges of this Court before coming to allocation before me to complete the hearing of the suit and to determine the same. The Plaintiff's case as against the Defendant is that at all material times it maintained a current account at the Defendant Bank pursuant to a written mandate authorising the Defendant to pay the Plaintiff's company cheques in accordance with the instructions detailed in the mandate card. On or about 15 January 2002, the Plaintiff alleges that the Defendant without authority and in breach of the terms of the contract/mandate as between the parties, debited the Plaintiff's account with the sum of Shs. 4,320,000/- as a consequence of wrongfully honouring a stolen cheque fraudulently drawn against the Plaintiff's account. The Plaintiff maintained that it did not draw the said cheque or authorise the drawing thereof. By honouring of the said cheque, the Plaintiff maintained that the Defendant acted negligently and in breach of the duty of care that it owed to the Plaintiff.
2. In its Defence, the Defendant admitted maintaining a current account for the Plaintiff pursuant to a written mandate. It denied that it had breached its duty of care towards the Plaintiff and maintained that as far as the Plaintiff's said account was concerned, there was a reciprocal implied contractual duty on the part of the Plaintiff to exercise reasonable care and diligence in the giving of instructions to the Defendant so as not to mislead the Defendant and/or to facilitate a forgery. The Defendant averred that it had received the cheque referred to in paragraph 5 of the Plaint and debited the Plaintiff's account with the amount thereof. However, it denied that it did so without the authority of the Plaintiff and further averred that it had no knowledge that the said cheque was not drawn by the Plaintiff or that the signature thereon was forged. In the alternative, the Defendant pleaded that even if the cheque was not drawn by the Plaintiff, or that the signatures thereon were forged, it had paid the cheque in good faith and in the ordinary course of business. As an alternative pleading, the Defendant maintained that the Plaintiff contributed to any negligence as had been alleged, in that the Defendant had failed to keep the cheque book issued by the Defendant under lock and key as it was required to do. Further it failed to maintain security or proper security in its shared offices with regard to important documents including the cheque book and its company letterheads. It also pointed to the Plaintiff's negligence by leaving the cheque book in the custody of its accountant, Mr. Yusuf Alibhai knowing that he kept the company of a known fraudster, one Shabbir Janoo. The Defendant also accused the Plaintiff of neglecting and/or otherwise failing to make use of the "Citidirect" system installed by the Defendant at the

Plaintiff's offices, which enabled the Plaintiff to regularly access its account and to reconcile its bank statements. The Defendant averred that the Plaintiff was estopped from denying its instructions with regard to the payment of the said cheque having seen, adopted and/or accepted the account balances reflected on the Citidirect system. Finally, the Defendant maintained that if the signatures on the said cheque were a forgery, such was perpetrated on the Defendant by officers of the Plaintiff particularly the said accountant as above.

3. On the afternoon of the 7 February 2005, the Plaintiff opened its case with the evidence of Mr. Philip Robert Depass (PW 1) who detailed that he was a director of E.D.F. Wan Singai Ltd which company wholly owned the Plaintiff company. He noted that in 2000 the Plaintiff was banking with ABN Amro Bank whose business had been taken over by the Defendant bank. However, the Plaintiff had authorised the opening of the current account with ABN Amro by resolution that the account be opened in accordance with the bank's general terms and conditions. The witness pointed to the list of authorised signatories which were noted as per a meeting of the Board of Directors of the Plaintiff company held on 17 April 2000. The signatory list was in three parts being List A with Messrs Allport, Patel and Phipson, List B with Jane Thirikali as the sole signatory thereon and List C with Caroline Luzze as sole signatory. The mandate as per clause 2 (a) was that for sums of money of US$2500 and below (or the Kenya Shs. equivalent) – any two of the persons mentioned in List A, B or C were to sign. However for sums of money in excess of US$2500 the mandate was that any 2 of the persons mentioned in List A or one of the persons detailed on List A jointly with one of the persons mentioned in List B or List C could sign. PW 1 noted that the E. D. F. group operated in 47 countries and one of the requirements was that bank mandates were strictly controlled. He observed that the persons in List A were all non-resident. The company would not allow the operation of all accounts outside the mandates. Under cross-examination, PW 1 was aware that there had been an account opened with ABN Amro but he did not recall when it was transferred to the Defendant bank. He was also not sure whether there were new mandates required by the Defendant bank upon transfer of the account to it.
4. Mr. Yusuf Alibhai (PW 2) was the Plaintiff's second witness. He stated that he was the Managing Director of the Plaintiff company. He recalled the opening of the Plaintiff's Bank Account with ABN Amro bank on or about 20 April 2000. He repeated the mandate instructions as detailed to Court by PW1 as above. His Witness Statement dated 22 May 2012, which was admitted into evidence, detailed that on or about 15 January 2002, the Defendant debited the Plaintiff's account with the sum of Shs. 4,320,000/-in complete disregard and in breach of the mandate by wrongfully honouring a stolen cheque drawn on the Plaintiff's account. He noted that the cheque was in excess of the Kenyan shilling equivalent of US$2500 (PW 2 estimated that such was in excess of US$50,000) and the same had not been signed by any of the persons detailed in List A. In any event, he noted that the cheque was a forgery altogether as it was not signed by persons whom the Defendant alleged signed it. The Defendant had only notified the Plaintiff that a fraudulent cheque had been encashed 10 days after the event.
5. Under cross-examination, PW 2 told the Court that he had been a director with the Plaintiff Company for almost 9 years but he was not a director in April 2000 as he had only joined the company by 3 months. PW 2 confirmed the signature cards for the account opening at ABN Amro bank but noted that there was no detail on the same as to whether the account was a current, savings or deposit account. Upon being shown a copy of the offending cheque dated 8 January 2002, PW 2 noted that the signatures thereon closely resembled the signatures of Jane Thirikali and Caroline Luzze. He could not agree that the Plaintiff had waived its mandate with regard to the cheque. He maintained that Shabbir Janoo, who had been mentioned in the Defence, was not known to the Plaintiff Company and he would not have had access to the company's premises or interaction with the company's staff. PW 2 had no knowledge of how Mr. Janoo came into the possession of one of the Plaintiff Company's cheques. As far as he was aware, the company's cheque book was locked by Caroline Luzze in a drawer in her desk. However, he was aware that any cheque emanating from the Plaintiff Company would have been issued by her. He informed the Court that when the Plaintiff company's staff checked the cheque book from which the offending cheque was issued, the cheque counterfoil was also missing. He agreed that it was odd. He had asked Caroline Luzze about the missing counterfoil but she did not know how it had gone missing. He confirmed that Caroline Luzze no longer worked for the Plaintiff Company. When asked by counsel his opinion on how the counterfoil and stolen cheque had gone missing, PW 2

speculated that one of the three options was that when the cheque book was collected from the Defendant bank, the cheque and the counterfoil were missing from the outset. PW 2 detailed, that on the day in question, he had travelled to Kinshasa and when he got back, he was informed that the fraud had happened. He admitted that it was a possibility that the Plaintiff Company allowed the offending cheque to be stolen but the cheque book was kept under lock and key by Caroline.

6. In re-examination, PW 2 with reference to the offending cheque detailed that it was not signed according to the mandate. The Defendant bank had never asked the Plaintiff Company to regularise that. The cheque should have been stopped there and then. After the staff had checked the cheque book, the offending cheque and the counterfoil were noted as missing. The Plaintiff had only come to know that the cheque was missing when the Defendant bank called Jane Thirikali. The Defendant bank had never asked the Plaintiff Company to clarify the mandate but PW2 confirmed that it was a complicated mandate. In his view, the Defendant bank should have called the Plaintiff as the offending cheque was presented in a personal name and was drawn for a large amount.
7. PW 3 was Jane Thirikali. She was formerly the Trade Operations Director of the Plaintiff Company but now worked for Coca-Cola. Her witness statement dated 2 July 2012, was accepted into evidence and she noted that the Plaintiff had opened a bank account with ABN Amro bank on or about 20 April 2000. As per PW 1 and PW 2, she confirmed the mandate given to the ABN Amro bank indicating the three lists – List A, List B and List C. Being in List B, PW 3 was allowed to sign cheques above the sum of the Kenya shilling equivalent of US$2500 but only if the same were countersigned by any of the persons in List A. For sums below the Kenya shilling equivalent of US$2500 she was able to sign together with any person on List C i.e. Caroline Luzze. He was aware that on or about 15 January 2002, the Defendant had debited the Plaintiff's account with the sum of Kenya Shs. 4,320,000/-. She noted that this was in complete disregard and in breach of the mandate. The offending cheque had allegedly been signed by her alongside Caroline Luzze. She confirmed that the signature appearing on the cheque purporting to be hers was not in fact hers but a forgery. She recalled that on or about 25 January 2002, she received a call from a male officer of the Defendant bank asking for confirmation that the cheque had been issued. This was 10 days after the Defendant had honoured the cheque and debited the Plaintiff's account for which there was no explanation. She asked the Defendant's said officer to send a copy of the offending cheque and upon checking the cheque book, she had noticed that the folio for the particular cheque leaf was missing. She noted that she had informed PW 1 and the Anti-Banking Fraud Unit in Mombasa.
8. Under cross-examination, PW 3 stated that she was not at the directors' meeting in April 2000 but she believed that all three directors of the Plaintiff Company were present. She confirmed her signature at pages 17 and 18 of the Plaintiff's bundle of documents and that the signature cards had been submitted to the ABN Amro bank. She admitted that there had been cheques issued by the Plaintiff Company signed by herself and Caroline Luzze in excess of the US$2500 mandate on other occasions. However, ABN Amro bank would always call to verify the correctness of such an issued cheque. PW 3 also admitted that there were a lot of staff travelling within the organisation and sometimes there would be pre-signed cheques left for use but a lot of the time, there were not. There was an understanding between the Plaintiff Company and the bank. She confirmed that the cheque books were collected from the Defendant bank and kept by the office administrator – Caroline Luzze. In order to requisition a cheque, the invoice etc. would be verified by one or two directors and then the cheque in payment would be made out. She was not aware if the offending cheque had been stolen, all she knew was that the Plaintiff did not have either the cheque or the cheque leaf. Upon being referred to the Defendant bank's General Terms and Conditions, PW3 confirmed that the Plaintiff company complied with clause 18 (b) (i) in relation to the cheque books. On being called to speculate as to the offending cheque, PW 3 stated that she would not be surprised if the cheque had been paid from within the Defendant bank. She also confirmed that there was no time that an unauthorised person signed cheques for the Plaintiff. However, she mentioned that the Defendant bank did not understand the way that the Plaintiff worked. The payment of cheques outside the mandate was not, in PW 3's opinion, fraudulent.
9. Under re-examination, PW 3 stated that as far as she was aware, the Plaintiff did not vary the mandate given to the bank as per the minutes of the April 2000 Directors' meeting and resolution. She did not think that it was correct that the Plaintiff had facilitated the forgery of the offending

cheque. It was the Plaintiff Company's position that the Defendant bank should not have cleared that cheque as the signatures thereon were forgeries. She had checked the cheque book and confirmed that both the offending cheque and the counterfoil had been removed. It was the last cheque to be used in that particular cheque book. She had checked the previous cheque counterfoils and those detailed cheques that had been paid in January 2002.

10. The Defendant called only one witness, **Stanley Mbogo** (DW 1) a Senior Manager, Operations and Technology for the Bank. He noted that the Plaintiff maintained a current account with the Defendant Bank and that the account opening processes were undertaken by ABN Amro Bank. He confirmed the signature cards and that the Plaintiff had also completed and signed a Citibank Manual Transmission Procedure Authorisation bearing the Defendant's date stamp of 18 January 2002. He also confirmed that the Plaintiff's account was governed by the General Terms and Conditions on pages 19 to 26 of the Plaintiff's documents with the signature appearing at page 26 being that of PW 3. He then went on to say that the mandate for the account identified the signatures of Messrs. Patel, Allport, Phipson as well as PW 3 and the said Caroline Luzze. He maintained that the necessary portion which read: "either both/All to sign" had not been deleted as necessary, he took it that there was no specific instruction and consequently a combination of any of the signatories could sign the Plaintiff's cheques. DW 1 maintained that the mandate became the document used by the Defendant bank in verifying the signatures and confirmed that PW3 and Caroline Luzze signed a cheque dated 2 January 2002 for Shs. 1,941,787. 80. The witness drew the attention of the Court to clause 18 of the General Terms and Conditions detailing that all uncompleted cheque books were to be kept in safe custody at all times and that any person preparing a cheque was authorised so to do. He also referred to clause 22 of the General Terms and Conditions in which, he maintained, the bank would not be liable in any way to the customer for having honoured, even negligently, any cheque the signature or content of which has been forged, if the customer facilitated such forgery. He went on to note that in December 2001, the Defendant bank activated a system referred to as "Citidirect" at the Plaintiff's request. Such system enabled a customer to regularly access its accounts with the Defendant bank, to view and ascertain balances or to initiate transactions at any time, as well as to reconcile its bank statements.
11. Turning to the offending cheque, DW 1 noted that on 15 January 2002, the Standard Chartered Bank cleared cheque number 000034 drawn on the Plaintiff's account in the amount of Shs. 4,380,000/- in favour of Shabbir A. Janoo. He maintained that in line with the Defendant bank's anti-fraud policy and its internal procedures, all the technical aspects of the cheque were verified. Such verification included signature verification, date of the cheque, matching amount in words and figures, confirming the genuineness of the cheque and payee details. The Defendant was satisfied that on the face of it, the cheque was good and that it contained nothing irregular that would have put a banker, in the ordinary course of business, on enquiry as to its authenticity. He noted that attempt had been made to contact the plaintiff customer but its telephone lines were out of order for three consecutive days. He reiterated that the Defendant bank paid the cheque in good faith and in the ordinary course of business and admitted that the Plaintiff customer's account had been debited with the amount of Shs. 4,320,000/-. The Plaintiff did not make a report to the Defendant of any stolen or missing cheque leaf during the entire transit period of the cheque. The Defendant received no instructions to stop payment or that there was any unusual activity or discrepancy with the Plaintiff's account balance.
12. DW 1 stated that on the 25 January 2002, when reviewing pending items, the cheque was found amongst those still in clearing, despite the transit period having expired on 17 January 2002. The Defendant bank had a routine procedure to call customers to confirm cheques even after the transit period had expired. A call was made to the Plaintiff customer on that day and the two signatories to the cheque stated that there were unable to confirm the same as the counterfoil was missing from the cheque book. The Plaintiff had requested for a copy of the cheque which was faxed through to it and thereafter PW3 called the Defendant to state that they had not signed the cheque. It was DW 1's contention that PW 3 and the said Caroline Luzze had signed the cheque. Further, he maintained that there were no specific limitations given in the mandate to the Defendant. He stated that it was only by the Plaintiff's minutes of 15 July 2002 that the Bank was notified of change of signatories. That document detailed that PW 3 and Caroline Luzze were no longer authorised signatories for the Plaintiff. The witness also stated that if the cheque had been stolen, as claimed by the Plaintiff, then it meant that the Plaintiff was in breach of clauses 12 of the

Mandate and 18 of the General Terms and Conditions. He maintained that it was evident that the cheque book was not kept under lock and key and would have been easily accessible. No explanation had been offered by the Plaintiff as to how and when the cheque was stolen and no report of the theft was made to the Defendant bank as required. The signatures appearing on the cheque were verified as against the signature card and there was no evidence whatsoever concerning the allegation that the cheque was forged. DW 1 concluded his witness statement by saying that the Defendant bank had exercised due diligence at all material times and denied any claims of a refund by the Plaintiff and/or admission of liability. The Defendant was not liable for the loss as it was incurred as a result of the negligence of the Plaintiff and contractually, there could not be any claim against the bank.

13. Under cross-examination, DW 1 confirmed that he was an employee of the Defendant bank at the time of the incident but he did not personally handle the transaction. He confirmed the account opening checklist for ABN Amro bank and detailed that it was similar to what the Defendant bank would require for the opening of a company's account with it. He was then shown a certified copy of the resolution of the Board of the Plaintiff as to the opening of the account more particularly the mandate to the account of an incorporated company. He agreed that on the mandate it detailed the words: "Please refer to Minutes Extracts". He also confirmed that page 2 of the Plaintiff's documents were the instructions in terms of signatories that the Defendant bank was to comply with, whenever the Plaintiff issued cheques on the account. He also stated that the only other documents that the Defendant bank received were the signature cards. He confirmed that when the Plaintiff had detailed that the particular cheque was not issued by it, he had referred the matter to the Banking Fraud Investigation Unit of the Central Bank of Kenya. DW 1 went on the confirm that the offending cheque had been signed <u>not</u> in accordance with clause 3 of the Resolution of the Board of the Plaintiff's directors. DW 1 agreed that the purpose of the mandate was to indicate how the Plaintiff's account was to be operated. The signature card was taken as an isolated complete document which is how the case was interpreted.

14. On being referred to the Defendant's documents, DW 1 confirmed that that the signature cards at pages 1 and 2 thereof had been received by the Defendant on 17 July 2002 after the offending cheque had been issued. Similarly, the minutes of the Plaintiff's Board of Directors at page 9 of the Defendant's documents concerned a meeting held on 15 July 2002 and were received by the Defendant bank on 19 July 2002. He also confirmed that the letter at page 10 from the Defendant to the Plaintiff dated 13 October 2003 was well after the cheque incident. In reference to that incident, DW 1 confirmed to counsel that he did not deal with the particular cheque personally. He did not know, before the cheque was paid, whether any officer of the Defendant bank had checked the mandate and he couldn't confirm that one way or another. He could not confirm that any officer of the Defendant bank had checked the minutes as per pages 1 and 2 of the Plaintiff's documents. He went on record that his statement that PW 3 and Caroline Luzze had signed the offending cheque was based on the evidence of the signature cards. He further stated that the mandate referred to would be indicated on the signature cards. He confirmed that the mandate had detailed that the Defendant should refer to the said minutes of the meeting of the Board of Directors of the Plaintiff. There was no specific instruction recorded on the signature cards. DW 1 in answer to questioning from the Court, confirmed that the specimen signatures on the cards would be photographed and the images retained in a bank machine which would also have details of the mandate. The Defendant bank's officer would be able to check the signatures as well as the mandate on the said bank machine. In moving the signatures to the bank machine, in the absence of a specific mandate, the same would have shown up on the machine as "any to sign".

15. The Plaintiff filed its submissions in Court on 20 February 2013. It is contended that the Defendant:

> **"a. acted in breach of its duty by disregarding the express instructions contained on the mandate card governing the operation of its Account;**
>
> **b. failed to exercise reasonable care and skill expected of a banker in executing the Plaintiff's orders on cheques drawn on its Account;**
>
> **c. acted negligently in clearing a stolen forged cheque drawn without**

authority against the Plaintiff's Account in favour of the third party."

Thereafter, the Plaintiff commented upon the evidence, detailing that on or about the 15 January 2002, the Defendant, without authority, and in breach of the contractual terms of its relationship with the Plaintiff, had negligently debited the Plaintiff's account with Shs. 4,320,000/-by honouring a stolen cheque fraudulently drawn against the account. It maintained that the signatures on the cheque were forged and that the same had been honoured by the Defendant in breach of the instructions contained in the mandate card relevant to the Plaintiff's account. Thereafter the Plaintiff identified the issues for determination as follows:

> **"5.1.1 Whether the Defendant bank acted in accordance with the instructions contained in the mandate card.**
>
> **5.1.2 Whether the Defendant acted negligently and in breach of the duty of care owed to the Plaintiff if any.**
>
> **5.1.3 Whether the Plaintiff contributed to the fraudulent encashment of the cheque in question.**
>
> **5.1.4 Whether the Plaintiff is stopped from denying its instructions with regard to the payment of the said cheque having had access to its account balance as reflected on citi direct.**
>
> **5.1.5 Whether the Plaint discloses a reasonable cause of action.**
>
> **5.1.6 Whether the Plaintiff is entitled to the sum of Kshs.4,320,000/=.**
>
> **5.1.7 What the order should be as to costs".**

16. Having reviewed the evidence of each of the witnesses, the Plaintiff referred the Court to a number of authorities including **Bonax Ltd v Gold Trust Bank Ltd (1990-1994) EALR 37, Cranston's Principles of Banking Law 2nd Edition 262, Paget's Law of Banking 199, Chalmers & Guest** on **Bills of Exchange and Cheques 746, Karak Brother Company Ltd v Burden (1972) All ER 1210, section 24 of the Bills of Exchange Act Cap 27 Laws of Kenya, Bullion Bank Ltd v Fulchandmanek & Bros. (1996) eKLR, Kenya Industrial Research Development Institute v National Bank of Kenya Ltd HCCC No. 2525 of 1995 (unreported), J Ladies Beauty v States Bank of India (1984) AIR Guj 33, Catlin v Cyrus Finance Corp (London) Ltd (Catlin, third party), Opundo v Barclays Bank of Kenya Ltd (unreported)**. It was the Plaintiff's position that the contractual relationship between the parties herein was such that the Defendant could only lawfully accept to make cheque payments debited to the Plaintiff's current account in accordance with the payment instructions contained in the Minutes of the Board of Directors of the Plaintiff company dated 17 April 2000 which formed the mandate. The Defendant was under a strict duty to carry out the instructions in accordance with the mandate and that it would exercise reasonable skill and care in so doing. The Defendant had failed to do so. It was the latter's further submission that DW 1 was less than candid to this Court with his explanation that there was no signing mandate or that the mandate was misleading or incomplete. The Defendant had acted negligently and in breach of the duty of care that it owed to the Plaintiff and as per the **Karak** case (supra) the Plaintiff quoted:

> **"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".**

It further quoted from the **Karak** case 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."**

In the opinion of the Plaintiff, the Defendant was expected to know the Plaintiff's authorised signatures from the payment history if nothing else.

17. As regards the question of whether the Plaintiff had contributed to the fraudulent encashment of the offending cheque, the Plaintiff quoted from the well-known case of **Davies v Swan Motor Co. (1949) 2 KB 291** in which **Bucknill LJ** had stated:

> **"when one is considering the question of contributory negligence, it is not necessary to show that the negligence constituted a breach of duty to the Defendant. It is sufficient to show lack of reasonable care by the Plaintiff for his own safety."**

The Plaintiff pointed to PW 3's evidence as to the methodology of requisitioning a cheque as per the Plaintiff's internal payment procedures. The offending cheque had never been requisitioned or executed by the Plaintiff. The cheque books were in the custody of the office administrator, Caroline Luzze, and she was the only person who handled the same. It was also the Plaintiff's evidence that the offending cheque was not signed by any of its officers and PW 3 confirmed to the Court that the said cheque did not have her signature on it nor indeed that of Caroline Luzze either. The Plaintiff submitted that it was evident that the Plaintiff had put in place measures to eliminate fraud on its accounts and consequently it had not contributed to the loss in any way. Not only had it not made out the offending cheque but it had no dealings with the payee. Further, at the time, the Plaintiff had no access to the Citidirect system. Finally, the Plaintiff as regards the question of forgery quoted from **Halsbury's Laws of England vol. 3 page 208 paragraph 385**:

> **"where the forgery is that of the customer's name, it has been held that as a banker is bound to know its customers signature and to detect an imitation of it, his not doing so is negligence, and that, in such a case the bank cannot recover from an innocent person the money he has once paid him…."**.

18. The Defendant's submissions opened by relating the Plaintiff's claim against it as well as its denial in that regard. It took the Court through the evidence of the three Plaintiff's witnesses as well as that of DW1. The Defendant made three points of significance: firstly it noted that PW 3 had stated that Caroline Luzze collected the cheque books from the Defendant bank and prepared the cheques whenever required. Secondly, the Plaintiff as admitted by PW 3, did not make any claim that any cheque leaves were missing from the particular cheque book. Thirdly, PW 3 admitted that she and the said Caroline Luzze regularly signed cheques for sums in excess of US$2,500 contrary to the Plaintiff's mandate given to the Defendant bank. The said Caroline Luzze had not been available to give evidence as to the security of the cheque books and the preparation and requisitioning of cheques. As to the question whether the Plaintiff was entitled to the prayers sought in its Plaint, the Defendant referred to the introductory portion of the mandate given by the Plaintiff to the Defendant. It submitted in that regard:

> **"on the issue of the mandate, the plaintiff at clause 12 (h) undertook to observe the same style of signature as the specimen left at the bank. In order therefore for the bank to ascertain who the authorised signatories were, it had to refer to the signature card. It is to be noted that apart from an endorsement on the mandate, there is no reference whatsoever to the fact that they were to be different signatories for different amounts. We submit that the reference to the minutes in that document was purely to confirm that a meeting had indeed been held on 17th April 2000 and could not and in fact did not alert anybody as to further instructions on the mandate."**

19. The Defendant submitted that it could only go by the specimen signature card in ascertaining the signatures and that it was the Plaintiff's obligation to insure that the specimen card was completed in a manner that made it clear of the restrictions on monetary values. The Defendant maintained that, looking at the completed signature cards, they clearly showed that the Plaintiff as customer was required to delete as necessary and indicate how many signatories were to sign as per the mandate. There was no further instructions thereon that the Defendant was to make reference to any other document for such. The Defendant maintained that the Plaintiff, in not specifying any permutation as regards signatories, the Defendant took it as read that this meant that any could sign. In this regard the Defendant referred to **Paget's Law of Banking page 403** as follows:

> **"the mandate embodies an agreement which authorises the bank to pay if given instructions in accordance with its terms. Typically a mandate will list the individuals who have authority to sign cheques or other payment orders and will specify which individuals (if more than one) must sign the order". A bank which acts in accordance with the mandate is duly authorised.**

The Defendant also relied on the case of **Lipkin Gorman v Karpnale (1992) 4 All ER 409** where it was (simply) stated:

> **"in the civil case of a current account, the basic obligation on the banker is to pay his customer's cheques in accordance with his mandate."**

The Defendant maintained that the Plaintiff's mandate was at page 12 of its bundle of documents being mandate dated 20 April 2000. Such document was interesting to the extent that it was neither signed or endorsed by the Plaintiff and no deletions or bikes for completion in the former had been done simply the heading which read: **"(Please Refer to Minutes Extracts)"**.

20. The other salient point made by the Defendant was that if the Plaintiff contended that the persons who signed the cheques exceeded the limits in that they did not have authority to do so, then the Plaintiff was in breach of its contract with the Defendant as set out in clauses 12 (w) and (y) of the General Terms and Conditions. Such clauses indemnified the Defendant from any default of any person empowered to operate the account or indeed only upon proof provided by the Plaintiff that loss or damage arose from the wilful misconduct of the Defendant bank or its authorised agent. As a result, the Defendant submitted that even if there was a deviation from the list of authorised signatories as per the mandate, it did not mean that the payment of the cheque was invalidated. In its opinion, the two persons who signed the cheque had the authority to authorise the payment. In this regard the Defendant referred the court to the case of **London Intercontinental Trust Ltd v Barclays Bank Ltd (1980) 1 Lloyd's Law Reports 241**. It further contended that the signatures appearing on the cheque leaf were verified as against the signature card and that there was no evidence whatsoever to support the allegation that the cheque was forged. The Defendant maintained that the onus of proving that the signatures on the face of the cheque were forged was the Plaintiff's to discharge and it had failed to do so. The Defendant also submitted that the cheque in question was paid in the ordinary course of banking business and, as such, it had employed due care and skill in effecting the payment. There was no ground to suspect the cheque and no forgery had been reported or proved. The authorities quoted by the Plaintiff only support the Defendant's position that it acted as per instructions and was not therefore, liable. Finally, the Defendant referred to the cases of **Taxation Commissioners v English Scottish and Australian Bank (1920) AC 683, London Joint Stock Bank Ltd v Macmillan & Arthur (1918) AC 777, Greenwood v Martins Bank Ltd (1933) AC 51** and **Kimotho v Kenya Commercial Bank Ltd (2003) 1 EA 108**, the latter case having bearing on the Plaintiff not having called the said Caroline Luzze to give evidence on its behalf.
21. The Plaintiff replied to the Defendant's submissions by referring the Court to the case of **Patel & Ors v Standard Chartered Bank (2001) All ER 66**. It maintained 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 emphasisal 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. The Plaintiff maintained that in this instance, the mandate clearly indicated for the Defendant Bank to refer to the Minutes and it evidently chose to ignore that mandate. The Plaintiff also submitted that it had proved before Court through the evidence of PW 3 that the signatures on the offending cheque were forged and/or unauthorised. It maintained that the standard of evidence to be applied was that of the balance of probabilities. In the Plaintiff's view a comparison of the specimen signatures and those that appeared on the face of the cheque showed clear differences apparent to the naked eye. The Plaintiff also referred to sections 48 and 70 of the Evidence Act pointing to the instance where the Defendant was ignoring the finding of fact put before court by PW 3. Thereafter, the Plaintiff referred the Court to the authorities of **Tai Hing Cotton Mill Ltd. v Liu Chong Hing Bank Ltd (1986) 1 AC 80** as well as referring the Court (again) to the case of **London Joint Stock Bank Ltd** (supra) as referred to in **Kepitigalla Rubber Estate Ltd v National Bank of India Ltd (1909) 2 KB 1010**. The Plaintiff maintained that it was clear from these authorities 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. The Plaintiff in response to the Defendant's reference to the **Kimotho** case (supra) referred the Court to **Gafford v Trans-Texas Airways F.2d 60 (1962) USCA** as well as **Jones v Dunkel & Anor (1959) 101CLR, R v Burdett (1820) 4 B. & Ald. 95; 106 E.R. 873, Kimani v Attorney General (1969) EA 502** as well as **Riches v Westminster Bank Ltd (1947) AC 390**.

22. The Court is grateful to counsel for both parties in putting before it such detailed submissions as regards the principles of banking law. To my mind, however this Court needs to focus on the issues of fact as set out by the Plaintiff in its submissions at page 5 thereof. The primary issue for decision is whether the Defendant bank acted in accordance with the instructions contained in the mandate card. The problem that I consider arose here was that the account was initially opened with ABN Amro Bank in April 2000 and was eventually taken over by the Defendant bank. However, no evidence was put before this Court as to when the takeover of the account was complete. In my opinion, if the Defendant bank, upon such takeover, had any doubts as to the mandate for operating the Plaintiff's account, then that would have been the moment to contact the Plaintiff for clarification purposes. That does not seem to have happened and consequently the facts of this matter must necessarily be based on the documentation put before Court. At page 12 of the Plaintiff's List and Bundle of Documents dated 25 June 2012, appears a document entitled "Mandate for the Account of an Incorporated Company". That document is dated 20 April 2000 and commences with the printed words:

> **"At the meeting of the directors of …….. Ltd held at …… on ……. the following resolutions were passed:**"

The blanks as above have been completed by detailing that the directors were of Simba Commodities Ltd and the meeting was held at 9th Floor, Williamson Hse on 17th April 2000. Otherwise the rest of the document and the blanks therein had not been completed and the same is not signed. However, as detailed above, the words:

> **"(PLEASE REFER TO MINUTES EXTRACTS.)"**

appear next to the heading of the document. One then looks at page 1 of the Plaintiff's documents which is an extract from the minutes of proceedings at a meeting of directors held on 9th Floor, Williamson House, P. O. Box 40824, Nairobi, Kenya on 17th April 2000. As detailed above, in the Court's review of the evidence of PW 1, lists A, B, and C were detailed together with the signatories on each list, as well as the monetary value above or below US dollars 2,500 that the signatories could sign cheques for as well as other bank documents. Leaving aside for the moment the question of whether the offending cheque dated 8 January 2002 was a forgery or otherwise, the fact that the amount thereof was Shs. 4,320,000/- should have put the Defendant on guard in relation to the monetary limit, as per the mandate instruction of the Plaintiff detailed above. Shs. 4,320,000/- is well above the equivalent of US dollars 2,500. There is therefore no doubt that, with the cheque ostensibly having the signatures of PW 3 and Caroline Luzze upon the face of it, such breached the mandate given to the bank by the Plaintiff. PW 3's name appeared on List B while Caroline Luzze's appeared on List C. These two signatories could not, according to the mandate, sign cheques in excess of US

dollars 2,500.

23. The next issue was whether the Defendant acted negligently and in breach of the duty of care that it owed to the Plaintiff, if any. In my opinion, by passing the offending cheque for payment, the Defendant certainly did act negligently and in breach of its duty of care. The amount of the cheque was well outside the monetary limit allowed by the Plaintiff to be signed for by PW 3 and Caroline Luzze. However, cognizance must be had of the fact that those two signatories as confirmed by the evidence of PW 3 had signed cheques in excess of the said monetary limit on other occasions presumably knowing full well that such cheques signed contrary to the mandate would be passed by the Defendant bank. Indeed, I took due notice of PW 3's comment under cross-examination that the Defendant ***"did not understand the way we worked. The payment of cheques outside the mandate was not fraudulent."*** It seems to me that both parties knew full well that on occasions, whether for reasons of travel of the Plaintiff's personnel or otherwise, the mandate was duly breached, the Plaintiff substantially contributing to such breach.
24. This leads to the next issue as to whether the Plaintiff contributed to the fraudulent encashment of the cheque in question? In this instance, I do not think so. I have carefully examined the photocopy of the offending cheque dated 8th January 2002 in the amount of Shs. 4,320,000/-. I note that it bears the cheque number 000034 and account number 0103417007. On the face of it, I cannot agree with the submissions of the Plaintiff that the differences between the signatures on the cheque and the signatures on the Signature Card are apparent to the naked eye. However, what I find difficult to understand is why the document at page 4 to 8 of the Defendant's List and Bundle of documents was not put to PW 3. That document is a Manual Transmission Procedures Authorisation and bears the date 15 January 2002. Admittedly, this is after the date on the cheque in question but before it was paid, for according to the evidence of DW 1, the cheque was "found" by the Defendant bank on 25 January 2002 and debited to the account thereafter. However, from the face of the cheque, it seems to have been sent for clearing by the Standard Chartered Bank, Makupa Branch on 14 January 2002. Is it a coincidence that the Manual Transmission Procedures Authorisation was dated only a day later although there is a stamp of the Defendant bank dated 18 January 2002 detailing that the document had been scanned. At the end of the document (page 6), the signatures of PW 3 and Caroline Luzze are clearly indicated and indeed witnessed by one Sally Kanyiri who is detailed as the Assistant Manager, presumably of the Defendant bank's branch in Mombasa. Further, Attachment A dated 11th December, 2001 at pages 7 and 8 of the Defendant's bundle of documents, is also signed by PW 3 and Caroline Luzze, again witnessed by Sally Kanyiri and approved under the signature of the Assistant General Manager, Amin Habib. On these documents, there is no mention of the mandate or lists A, B or C. With such in front of a bank official, it is hardly surprising that DW 1 can make the statement that PW 3 and Caroline Luzze could sign cheques and bank documents with no monetary limits being applied. Interestingly, both those documents bear a stamp which reads "Signature Verified" and some official of the Defendant bank has signed the same. No attempt was made by DW 1 in his evidence, to explain these documents and their impact upon the offending cheque other than to say that:

> **"The customer also a completed and signed the Manual Transmission Procedure Authorisation (Pages 4-8 of the defendant's bundle)"**.

The Court is left to wonder as to just what transpired in terms of the offending cheque and as to just who was involved in what, to my mind, was a fraud on the Plaintiff company. Was PW 3 and/or Caroline Luzze involved in the whole scam? Was a fraud perpetuated by the Defendant Bank's officials or perhaps a combination of the two? The truth, it seems, will never be known.

25. I turn now to the fourth issue as to whether the Plaintiff is estopped from denying its instructions with regard to the payment of the said cheque having had access to its accounts balance as reflected on Citidirect. I accept the evidence of PW 3 that the time of the said cheque transaction, Caroline Luzze did not have access to the Citidirect system and that she had to call the bank to enquire as to why the system was down. Further, it seems that the bank statement was not reconciled at the end of the particular week as the accountant was away from the office. I also find

no cause to disbelieve the Plaintiff's witnesses who detailed that it did not make out the subject cheque and that it had no dealings with the payee. With no access to the Citidirect system at the time, I agree with the Plaintiff's submissions that the lack of knowledge of the payment did not amount to a consent or acquiescence as to the lack of mandate to effect the payment.

26. To my mind, the decision on the fifth and sixth issues as set out by the Plaintiff is really a matter of law rather than fact. I have extensively perused the authorities and cases cited to Court by both parties. To my mind, the relevant document as to the mandate given to the Defendant bank by the Plaintiff is not the Manual Transmission Procedures Authorisation and its Attachment A as above referred to but the Mandate for the Account of an Incorporated Company dated 20 April 2000. That document in its heading specifically stated that the bank should refer to the minutes extracts. In my view, those extracts were quite clear as to the signatory list and the monetary limits in relation to the signatures on those lists. PW 3 was on the list B. Caroline Wanjiru Luzze was on list C. For sums of US$2,500 and below the Defendant bank was to accept the signatures of any two persons mentioned in list A, B or C. For sums over US$2,500 the Defendant bank was to accept the signatures of any two persons detailed in list A or any one of the persons detailed in list A jointly with one of the persons mentioned in list B or C. To me it is quite clear that the Defendant bank could not accept the signatures of PW 1 and Caroline Luzze to sign for any amount over US$2,500. Having said that, one has to take into account the habit that seems to have grown up in the banking agreement and practice between the parties that on occasions the two signatories had signed the cheques in excess of US$2500 which had been honoured by the Defendant bank.

27. What then should the Defendant bank have done when faced with honouring or otherwise the said cheque dated 8th January 2002 for Shs. 4,320,000/-, way above the monetary limits of the said two signatories? I took some comfort from the passage detailed in **Ross Cranston's Principles of Banking Law 2nd Edition** at **P. 187**:

> **"There is long-established authority, in the context of bills of exchange, that a bank can be in breach of its duty of reasonable care and skill in failing to make inquiries. Certain transactions are so out of the ordinary course that they ought to arouse doubts and put the bank on inquiry. If the bank fails to inquire, it cannot be said to have acted without negligence in converting a bill. The Quincecare case applies the principle in another context – the care and skill the bank should exercise in paying money away from a customer's account: it will be liable if it does so knowing that the instruction is dishonestly given by, for example, fraudulent directors of the borrowing company, shutting its eyes to the obvious fact of dishonesty, or acting recklessly in failing to make such inquiries as an honest and reasonable bank would make. Factors such as the standing of the customer, the bank's knowledge of the signatory, the amount involved, the need for prompt transfer, the presence of unusual features, and the scope and means for making reasonable inquiries may be relevant".**

Cranston's general view on the customer/bank relationship is endorsed by the finding in the **Karak Rubber** case (supra) 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 to the nature and extent of the contractual duty of care owed by a paying bank to its customer when called on to honour a cheque drawn by the customer; and in particular, in the case of a corporate customer which has given the usual mandate to its bank, to what extent the bank is entitled to place exclusive reliance on the fact that the cheque is signed by the corporation's duly authorized signatories. The conclusion reached by Ungoed-Thomas J was as follows:**
>
> **'…. a bank has a duty under its contract with its customer to exercise "reasonable care and skill" in carrying out its part with regard to operations within its contract with its customer. The standard of that reasonable care and skill is an objective standard applicable to bankers. Whether or not it has been attained in any**

particular case has to be decided in the light of all the relevant facts, which can vary almost infinitely. The relevant considerations include the prima facie assumption that men are honest, the practice of bankers, the very limited time in which banks have to decide what course to take with regard to a cheque presented for payment without risking liability for delay, and the extent to which an operation is unusual or out of the ordinary course of business. An operation which is reasonably consonant with the normal conduct of business (such as payment by a stockbroker into his account of proceeds of sale of his client's shares) of necessity does not suggest that it is out of the ordinary course of business. If "reasonable care and skill" is brought to the consideration of such an operation, it clearly does not call for any intervention by the bank. What intervention is appropriate in the exercise of reasonable care and skill again depends on circumstances'.

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

28. The Defendant somewhat surprised this Court by stating after its reference to the **Lipkin Gorman** case (supra) that the mandate from the Plaintiff customer was the document at page 12 of the Plaintiff's bundle of documents, which I have referred to above. It seems therefore, that the Defendant is in agreement as to what the mandate consisted more so when it referred this Court to **Paget's Law of Banking chapter 19 para. 19.2** which read as follows:

> **"The mandate embodies an agreement which authorises the bank to pay if given instructions in accordance with its terms. Typically mandates will list the individuals who have authority to sign cheques or other payment orders and will specify how many individuals (if more than one) must sign in any given order. There are many possible combinations. Some mandates require orders to be signed by A and by any one of B, C and D. Others require the signature of any one of E, F and G and any one of H, I and J. There are many other possible combinations.**
>
> **A bank which acts in accordance with the mandate is duly authorised. But it does not follow that a bank which acts contrary to the mandate is bound to be unauthorised. This is illustrated by *London Intercontinental Trust Ltd v Barclays Bank Ltd*, where the defendant bank had honoured the cheque bearing a sole signature in breach of mandate requiring two signatures. However, the sole signatory had actual authority from the plaintiff's Board of Directors to order the transfer of the sum in question. Accordingly the plaintiff's claim was dismissed."**

To my mind, the position in **London Intercontinental** is totally distinguishable from the position in the matter before me. There was no actual authority from the Plaintiff's Board of Directors that PW 3 or the said Caroline Luzze had any actual authority to execute the offending cheque. Further, I hold little store by the case of **Lipkin Gorman** in that it involved a gaming club and stolen money in a case where the bank involved had received money under a void gaming contract.

29. It seems to me that where the Defendant was on stronger ground was its submission that a

customer of a bank owes a duty to the bank when drawing a cheque to take reasonable and ordinary precautions against forgery. To this end, the Defendant referred to and emphasised the decision in **London Joint Stock Bank Ltd v Macmillan & Arthur** (supra). In that case, in my opinion there was clear negligence of the bank's customer where there was no sum in words written on the cheque and the amount in figures was changed by the clerk drawing on the cheque. The court found that the alteration in the amount of the cheque was a direct result of that breach of duty by the customer to the bank. It is certainly distinguishable from the case in point here as was the position in **Greenwood's** case which involved a nondisclosure where a wife repeatedly forged her husband's signature to cheques after the joint account had been closed and reopened in the sole name of the husband. In any event, in order to counter these authorities the Plaintiff referred to page 801 of the **London Joint Stock Bank** case as per **Lord Findlay LC** as follows:

> **"So in Kepitigalla Rubber Estates v. National Bank of India (3), which was a case of forged cheques, Bray J. laid down that it is the duty of the customer of a bank to use reasonable care in the issuing of mandates, citing Young v. Grote (2) and other authorities, and went on to say: "I should come to the same conclusion apart from authority. It seems to me to be clearly the duty of a person giving a mandate to take reasonable care that he does not mislead the person to whom the mandate is given." The learned judge goes on to point out that to afford a defence to the banker the breach of duty must be, as in Young v. Grote (2), in connection with the drawing of the order or cheque, and that there is no obligation as between customer and banker that the person should take precaution in the general carrying on of his business or in examining and cheching the pass-book".**

30. Indeed the Plaintiff went further by pointing to the finding in the **Tai Hing Cotton Mill** case (supra) by **Lord Scarman** in considering the common law position as to the duty of care owed by the customer to the bank:

> **"….. the question is whether English law recognises today any duty of care owed by the customer to his bank in the operation of a current account beyond, first a duty to refrain from drawing a cheque in such a manner as may facilitate fraud or forgery, and secondly a duty to inform the bank of any forgery of a cheque purportedly drawn on the account as soon as he, the customer, becomes aware of it."**

I believe that the Plaintiff's submission is correct as to the Privy Council rejecting the contention that the customer owes a duty to take such steps to check its periodic bank statements as would take to enable it to notify the bank of any debit items in its account which it had not authorised. Further, I hold no stock as to the Defendant's view that the Plaintiff should have called the said Caroline Luzze to give evidence in respect of the said forgery. In that regard I adopt the finding of the United States Court of Appeals in the **Gafford** case (supra) in that:

> **"Failure of a party to call an available witness possessing peculiar knowledge concerning the facts essential to a party's case, direct or rebutting, or to examine such witness as to the facts covered by his special knowledge, especially if the witness would naturally be favourable to the party's contention, relying instead upon the evidence of witnesses who were less familiar with the matter, gives rise to an inference that the testimony of such uninterrogated witness would not sustain the contention of the party. No such inference arises where the only object of calling such witness would be to produce corroborative, punitive, or possibly unnecessary evidence."**

In this matter, I am satisfied from PW3's evidence that the said Caroline Luzze, if she had been produced by the Plaintiff, would have entirely corroborated the evidence of PW 3. As detailed above, I was concerned that the Defendant solely relied upon the evidence of DW1, without in any way calling those persons who actually dealt with the transaction of the said cheque dated 8 January 2002 and/or officers involved in the Defendant's branch in Mombasa who knew about the transaction.

31. The conclusion to all the above is that I find that the Plaintiff has proved its case. I do believe that the Defendant was negligent in paying the said cheque dated 8 January 2002 in the amount of Shs. 4,320,000/- contrary to mandate and, more particularly, without any inquiry of the Plaintiff in connection therewith. I believe that the Defendant breached its duty of care to the Plaintiff in that regard. I do not consider that the fact that on other occasions the Plaintiff's mandate was breached by the paying of cheques in excess of the monetary limit of US Dollars 2,500 signed by PW3 and Caroline Luzze, excuses the Defendant from such duty of care. Further, as I have detailed above, the whole circumstances of the transaction seemed suspicious to me bearing in mind the length of time that it took for the cheque to be cleared and debited as against the account of the Plaintiff. Accordingly, I enter judgement for the Plaintiff in the amount of Shs.4,320,000/- as per prayer a) of the Plaint dated 11 April 2003. As the Plaintiff put forward no evidence as to the rate of interest of 26% per annum prayed for, I allow interest to run from the date of filing Plaint – 30 April 2003 at Court rates until payment in full. The Plaintiff will also have the costs of this suit.

DATED and delivered at Nairobi this 20th day of June, 2013.

J. B. HAVELOCK
JUDGE