



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI COMMERCIAL & ADMIRALTY DIVISION**  
**CIVIL CASE NO. 495 OF 2004**

**JACKIE DISTRIBUTORS ..... PLAINTIFF**

**VERSUS**

**COOPERATIVE BANK OF KENYA LTD. .... DEFENDANT**

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

1. This is one of those unfortunate cases where judgement has been delayed owing to the transfer and lack of availability of Judges before whom the Court file has come from time to time. I am always wary concerning cases that come before me in which I have to interpret the note taking of others particularly with regard to evidence recorded from witnesses who I have not had the opportunity of viewing in relation to their appearance and demeanour in the witness box. It was for this reason that I required counsel for both parties to check the transcript of proceedings so as to ensure that they were satisfied, on behalf of their clients, that what was recorded before Court tallied with the evidence which they may have recorded themselves at the time of the extended hearing. The Court noted that this case had first been filed in Kisii, as *HCCC No. 214 of 2002*, but was later transferred to Nairobi and had been given the above case number.
2. The Plaintiff herein seeks the sum of Shs. 25,866,564/-by way of special damages as against the Defendant as well as general damages for loss of business and profit. The special damages figure was made up of unlawful debits made to the Plaintiff's account between February 2001 and November 2001 in the amount of Shs. 8,597,299.10 as well as monies paid to the Collector of Stamp Duties without authority, being Shs. 75,700.80 and cash used to purchase a banker's cheque in favour of Unilever (K) Ltd, which had been countermanded, in the amount of Shs. 1,072,279.40. As far as the claim for loss of profits is concerned, paragraph 10 of the Plaintiff recorded that for the first 14 months of its operations in which it had a sales contract with Unilever (K) Ltd, the Plaintiff had made a profit of Shs. 4,279,000/-and it expected to make the sum of Shs. 13,448,285/-over the remainder of the first 3 years of its said contract. Thereafter the Plaintiff intended to renew its contract for a further three year term. This is how it had arrived at the conclusion that general damages were merited.
3. The Plaintiff herein was amended pursuant to this Court's Order given on 30th October 2002. The amendment to the Plaintiff primarily brought in Jacqueline Amollo Odongo and Rosemary Akinyi Odongo as proprietors of the Plaintiff firm. The Defence herein was filed on 30th August 2002. At paragraph 3 thereof, the Defendant denied paragraph 4 of the Plaintiff. It averred that rather than one of the proprietors namely **Jacqueline Amollo Odongo** being the sole person authorised to operate

and give instructions with regard to the business' account with the Defendant bank, the Plaintiff had authorised a **Ms Grace Kimani** to issue instructions generally as regards the account, to draw cash, to requisition bankers cheques, bank and cash cheques and to obtain statements of account on the Plaintiff's behalf. The Defendant maintained that all debits to the Plaintiff's account were regular and were made in accordance with the instructions of the Plaintiff and/or the Plaintiff's agent. Paragraph 5 of the Defence was rather strange in that the Defendant admitted debiting the Plaintiff's account with Kenya Shs. 75,700.80. It averred that the said debit related to a banker's cheque requisitioned by the Plaintiff and/or the Plaintiff's agent on 23rd March 2001 but due to an oversight not posted to the account until 16th November 2001.

4. At the hearing of the suit which commenced on 5th March 2009, PW 1 was **Jacqueline Amollo Odongo** who stated that she lived in Langata and that the Plaintiff firm was a business partnership between her and the second proprietor **Rosemary Akinyi Odongo**, such being first registered on 7th September 2000 in her own name but was changed on 16th of October 2000 to include her sister's name. She produced before Court the Certificate of Registration and the change in the particulars as Plaintiff's Exhibits 1 and 2. The business was a distribution agency based in Homa Bay distributing Unilever products, cooking pots etc. On 28th September 2000, the Plaintiff had opened an Account No. 0112047965100 with the Defendant Bank's Branch in Homa Bay. PW 1 detailed that she used to reside in Kisumu. She had employed one **Grace Kimani** but she had no authority to operate the bank account. She had never introduced her to the Defendant bank. The witness noted that in December 2000, there was a cheque which was bounced on Unilever on 10 January 2001. She had complained to the Defendant Bank's branch as the same was a banker's cheque for Shs. 1.2 million. The Defendant Bank maintained that the witness had introduced another person, Grace Kimani, to operate the account. As a result, she wrote to the Defendant (Exhibit 3) 10th January 2001 detailing that no other person was to operate the account.
5. Exhibit 4 as produced by PW 1 was a letter dated 9th January 2002 written to the Branch Manager of the Homa Bay Branch of the Defendant bank by the advocates acting for the Plaintiff. The letter detailed that from February 2001 to November 2001 the Plaintiff had bought banker's cheques all payable to its supplier, Unilever (K) Ltd. The said letter detailed a total of 11 banker's cheques totalling Shs. 8,597,299.10. The Plaintiff maintained that the said banker's cheques were paid for in cash and the Plaintiff did not understand why the account had been debited with the same. Further, the letter noted that on 16th November 2001, the Plaintiff's account was debited with the sum of Shs. 75,700.80 to cover a banker's cheque in favour of the Collector of Stamp Duty. Further and finally, the Plaintiff had purchased a banker's cheque from the Defendant for Shs. 1,072,279.40 again payable to Unilever (K) Ltd which is the cheque that was countermanded by the Defendant for reasons unknown to the Plaintiff. The latter demanded that the said amounts be refunded to the Plaintiff's account together with interest.
6. Under cross examination, PW 1 noted that her sister worked for the National Bank of Kenya in Nairobi while she worked in Kisumu, where she was in college and operating a small business. She agreed that she was not involved with the day-to-day management of the Plaintiff's business. Grace Kimani was the one running the business based in Homa Bay but use only designated as an employee. The business employed 5 employees in total, Grace was in charge. PW 1 agreed that she had no problem with the Defendant bank even though banking matters were delayed as Grace was not a signatory. However she, together with the salesman, would deposit money made from sales and PW 1 also had a brother working for the business who would also bank cash earned therefrom. She noted that her sister, Rosemary, had contact with the Defendant bank but later changed her evidence in that regard by saying that she did not know whether her sister had contact with the Defendant Bank. She agreed that the banker's cheques were in dispute and Grace Kimani would be the one to ask the bank for the same to be issued and would collect the same. She was not aware whether it was Grace or her brother who was to go to the Defendant bank to collect the banker's cheques. She confirmed that Grace never contacted her when she was going to get the banker's cheques. She understood that Grace used to go to the Defendant bank with cash to purchase the banker's cheques. She could not tell the details of Grace's transactions in producing the cheques. She was not in a position to say whether she went with money or if she just requested the bank to issue a banker's cheques on the business' account. She was given a bank statements only the one time and she did not look at its contents at the time. However, she declared positively, that she had not taken Grace to introduce her to the Defendant's bank as the person to

run the Plaintiff's business. She did not know how the Defendant bank had come to know her in connection with the Plaintiff's business. Finally she confirmed to counsel that he did not know where Grace Kimani now is. She was not sure if it was Grace who took money from the business as she was not there up to the time that the business was closed. She never contacted Grace as regards her having "stolen" the money. In brief re-examination, PW 1 stated that her sister would not know whether Grace took out the money. All she knew was that she did not authorise the Defendant bank to allow Grace to withdraw money.

7. PW 2 was **Rosemary Akinyi Odongo**, who confirmed that she was a partner in the Plaintiff's business and that she worked for the National Bank of Kenya as a bank officer. She had become a partner in the business on 15th October 2000. The nature of the business was as a distributor of all Unilever (K) Ltd's products. She stated that the Plaintiff's business had seven employees including **Grace Kimani** as the manager. She confirmed opening a current account with the Defendant bank, Homa Bay Branch in the name of Jacki Distributors Account No. 011/20/47951/00. The mandate in respect of the operation of the account was one signature only, namely her sister **Jacqueline**. Although the business had a cheque book, goods were purchased by way of banker's cheque as well as by personal cheques drawn on the account. She was not present in the business on a day-to-day basis but she was in touch with **Grace Kimani** who would let her know what to purchase. She was based in the Kisumu branch of the National Bank. There was no credit agreements with the suppliers and product orders warnings would be placed on Fridays or Saturday. Sales monies were collected by **Grace Kimani** and her brother **Martin Odongo**. They used the Business's van for this purpose. As to the amount of money collected, PW 2 maintained that Grace would inform her thereof. She also confirmed that Grace would purchase banker's cheques in favour of Unilever.
8. PW 2 was then taken through the statements of the Plaintiff's account with the Defendant bank produced before Court as Plaintiff's Exhibit 5. She noted that on 8th February 2001 the statement reflected a debit of Shs. 1,503,792/- in respect of banker's cheque no. 183. She maintained that the said cheque was purchased in cash. PW 2 also pointed to other banker's cheques debited against the account being for Shs. 96,934.80 on 9th March 2001, Shs. 1,727,260.30 on 23rd March 2001, 600,000/- on 22<sup>nd</sup> August 2001, Shs. 600,000/- on 3rd September 2001, Shs. 700,000/- on 8th September 2001, Shs. 500,000/- debited on 10th September 2001, Shs. 800,000/- on 14th September 2001, Shs. 600,000/- debited on 19th September 2001, Shs. 600,000/- debited on 30th October 2001, and Shs. 655,378 .60 debited on 16th November 2001. PW 2 also gave evidence as regards a cheque in the amount of Shs. 357,427.20 which was debited against the account on 3rd April 2001. She maintained that someone at the Defendant bank had interfered with the account as the cheque came back unpaid, credited to the account on 16th August 2001. She gave evidence that there were further cheques deposited and returned unpaid and she did not know who was depositing such cheques into the account. For example, the statement showed an unpaid cheque debited to the account on 16th August 2001 for Shs. 510,600/-. The same cheque was debited again on 22nd August 2001 and again on 11th September 2001. PW 2 then gave evidence that on 22nd December 2001 when she was trading with Unilever, she issued a cheque which was deposited in the amount of Shs. 1,072,279.40. The Defendant bank then drew a banker's cheque in the same amount in favour of Unilever and that banker's cheque was duly delivered to Unilever. The cheque had been returned unpaid and when PW 2 asked the Defendant bank why so, she was told that there was an error. It had not been paid because there was no money in the Plaintiff's account yet it was a banker's cheque issued by the Defendant bank. Unilever had called PW 2 to say that the cheque had bounced and upon enquiry at the Defendant bank, PW 2 was told that there was no money in the account. She informed the Defendant bank that this was not the case and thereafter, it ceased to be cooperative. For this reason, PW 2 instructed Messrs. Otieno, Ragot & Company, advocates to write the said letter dated 9th January 2002 (Plaintiff's Exhibit 4). The Defendant bank had replied by way of a letter dated 17 January 2002 (Plaintiff's Exhibit 7) requesting a period of 21 days to look into the matter. The Plaintiff had received no further communication from the Defendant bank but PW 2 produced a letter written by Unilever Kenya Ltd dated 12th March 2002 (Plaintiff's Exhibit 8) addressed to the Defendant bank requesting an explanation as to why the aforesaid banker's cheque in the amount of Shs. 1,072,279.40 had been returned unpaid. As far as PW 2 was concerned, no reply to that letter was received from the Defendant bank either. PW 2 then stated that the relationship with Unilever did not continue and it

- stopped giving the Plaintiff their products. She confirmed that the Plaintiff was demanding of the Defendant bank, the sum of Shs. 8,597,299/-as regards the wrongly debited banker's cheques.
9. Under cross-examination, PW 2 detailed that she was not a signatory to the Plaintiff's said account with the Defendant bank. She was not actively managing the Plaintiff's business but she was strictly supervising the same. She confirmed that she would travel to Homa Bay over a weekend and check upon the business including the bank statements. Before November 2001, she had only received one statement despite asking for the same to be sent. She stated that the salesman would come to the shop while she was there to give orders for products. She would relay such orders to Grace and she would buy a banker's cheque in favour of Unilever. Grace would carry cash money and was taken in the business' van to the Defendant bank. She was the agent of the Plaintiff but could not use the bank account to purchase banker's cheques. At this stage, PW 2's evidence became quite confused but she confirmed that her sister had not introduced Grace to the bank manager and she had no special authority. PW 2 kept the cheque book herself. She confirmed that, as regards paragraph 10 of the Complaint, she had calculated the profit element claimed but she did not have the documents available in Court. PW 2 detailed that she had no audited accounts for the Plaintiff's business but it showed a profit for the period ending December 2001 of Shs. 2,314,963/-. She noted that the van utilised for selling purposes had initially been hired but after 3 months she and her sister had decided to purchase the same. They paid Shs. 900,000/-for the van. As far as the business premises were concerned, the witness stated that it was held under a five-year tenancy agreement. Because the business stopped, rent was paid for 18 months and not for the entire period. On further examination, PW 2 stated that she was unaware that her sister had obtained the bank statement for August 2001 which she had given to Grace Kimani to file. She confirmed, yet again, that Grace was not a signatory to the Plaintiff's account. Upon being questioned further as to profit figures, PW 2 stated that from 8th November 2000 to the 15th December 2001 the total turnover had been Shs. 70,290,254/-. The average purchases came to about Shs. 5,000,000/- per month.
  10. Upon re-examination, PW2 was referred to the banker's cheque requisition form dated 21st August 2000 for Shs. 600,000/-. Although Grace Kimani had paid cash for the banker's cheque, the account had been debited almost a month later on 30th September 2000. The witness maintained that Grace Kimani had not told her that she was signing requisitions on the Plaintiff's account. She would be taken to the bank by the business' vehicle together with Martin Onyango, the witness's brother.
  11. PW 3 Martin Onyango gave evidence that he had a small business in Kisumu but had worked for the Plaintiff, Jacline Distributors in the years 2000 and 2001. The business was located in Homa Bay town. He was the store man and also worked in marketing, taking orders from customers. He could not remember how much money was being handled as between the manager of the business Grace Kimani, the driver of the vehicle, the loaders and himself. He maintained that Unilever Kenya Ltd was supplying its products to the business and that such were paid for through banker's cheques which were purchased by Grace Kimani. He did not know how she did it after collecting cash money. The witness used to escort Grace to the Defendant bank. He did not know if she was authorised to operate the Plaintiff's account with the Defendant bank. He has stopped working for the business in December 2001 when he learnt that a banker's cheque paid to Unilever was returned unpaid. Under cross-examination, PW 3 stated that it was his duty to escort the manager Grace Kimani to the Defendant bank and carry money in to the bank for her. He knew she was dealing in cash but did not know what Grace was doing as to the requisitioning banker's cheques. He knew she was dealing with cash but only saw the issued banker's cheques.
  12. The Defence only called one witness, **Sebastian Chebere** who worked for the Defendant bank in Kakamega and had been employed for 27 years. He was in the Homa Bay branch as the operations manager when the matters involving the Plaintiff's business were going on. He had been introduced in July 2001 to PW1 and PW 2 by one Beatrice Owiti who was the outgoing Branch manager. The ladies were involved in the business of selling products both retail and wholesale. Grace Kimani was the manager and Jackline was the director. The business operated an account with the Defendant bank and the parties would bring both cash and cheques for crediting thereto. He had been informed that they were required to purchase their products by way of banker's cheque after they had bounced a cheque upon the supplier. DW 1 maintained that he had received information from the customer that banker's cheques were to be obtained through a person who

had the authority and referred to page 7 of the Defendant's bundle of documents which was a requisition for a banker's cheque dated 21st August 2001 and which had been signed by Grace Kimani. He was familiar with her signature. That particular requisition was for a banker's cheque for Shs. 600,000/-. The witness maintained that the bank would write a cheque as requested by Grace Kimani who was authorised so to do. He had been through the file and saw the authority given to her. That authority had disappeared after the banker's cheque issue in December 2001, when the same was countermanded. Grace would also collect bank statements and would come to deposit cash. Upon her request for banker's cheques, she would not pay cash to obtain the same. The requisition form authorised the debiting of the Plaintiff's account and no banker's cheque would be purchased by cash.

13. DW 1 stated that he was supposed to authorise the issuance of banker's cheques if there was insufficient cash to cover the same. The manager had discretion to advance monies to pay the amount of a banker's cheque for a short time. The manager could agree or refuse such advance request. For example, DW 1 pointed to the bank statements in relation to a cheque and debited on 22nd March 2001. That cheque had been presented 3 times without the money in the account to cover it. It was not correct that the bank had debited the Plaintiff's account without authority. If the banker's cheques had been purchased by cash then it would have been transacted through the Defendant bank's suspense account. DW 1 detailed that the Defendant bank had written a bankers' cheque in favour of the Collector of Stamp Duty in the amount of Shs. 75,700/- although there were insufficient funds in the account to cover the same. Under cross-examination, DW 1 confirmed that PW1 had given the Defendant bank a letter authorising Grace Kimani to operate the Plaintiff's bank account. He stated that when this suit commenced, that letter of authority had disappeared. He was unable to explain the disappearance and the bank's auditors had collected all the papers in connection with the same. DW 1 stated that PW1 would come to the Defendant bank to check balances but, in the witness' opinion she was not very conversant with the business of banking and used to ask the bank's staff to help her to deposit cash and write out the amount of the deposit for her. DW 1 noted that there were 11 irregular entries on the account in the 8 months from February to November 2001. The Defendant bank had not received any complaint as regards thereto until November 2002. The complaint made was that the Defendant bank had allowed an unauthorised person to operate the Plaintiff's account. PW 1 had complained that a cheque had been stopped. DW 1 noted that the claim was for Shs. 8,597,299.10 but he did not think that the Defendant bank should pay it. Whenever the account had been overdrawn, the Defendant bank had been sympathetic with the Plaintiff as both the partners were young persons. He noted that the Plaintiff was not making much profit moreover, the account was always in debit.
14. Under cross examination, DW 1 explained that the Account Opening Introduction Form which had been utilised by PW 1 to open the Plaintiff's current account with the Defendant bank would have been computerised so as to allow the Defendant bank to keep information in respect to customers' agents. The customer's signature was not captured by the computer and the Defendant bank had nothing to confirm the authorisation as regards the operation of the Plaintiff's account by Grace Kimani. He reaffirmed once again that such written authorisation had disappeared before this case was filed in Court. The witness was then shown Plaintiff's Exhibit No. 3 which was the letter from PW 1 dated 10 January 2002 and confirmed that it detailed that no one was to operate the Plaintiff's account as PW 1 was the sole signatory thereto. The Defendant bank had not replied to the letter because it had acted upon it. DW 1 confirmed that banker's cheques were issued to the person. He understood that banker's cheques meant: "We have money there". DW 1 then confirmed that the Defendant bank had stopped the banker's cheque issued in favour of Unilever Kenya Ltd in the sum of Shs. 1,072,279.40, as it was irregularly obtained. The witness was also taken through the issuance of the various banker's cheques obtained by the Purchaser in August, September and October 2001. He detailed that although PW 1 was the bank's best client, in most cases there were insufficient funds in the Plaintiff's account to meet the banker's cheques issued. He clarified that the bank manager had the authority to sanction the issue of banker's cheques even though there were insufficient funds in the account to cover the same.
15. The cross-examination of DW 1 took place, off and on, over a period of three days before Court. As a consequence, DW 1's evidence was somewhat disjointed. However he confirmed, again in cross-examination, that in his dealings with the Plaintiff's account there were personal cheques issued by the Plaintiff customer. He noted that one cheque on the 19th February 2001 for Shs.

1,203,151/-was first dishonoured but later paid. In this regard, bank officials could accommodate a customer by word-of-mouth. On 23rd March 2001, another of the Plaintiff's cheques in the amount of Shs. 1,727,260/-was dishonoured and this time the Defendant bank did not accommodate the customer. Unilever had banked the cheque twice. There were several other instances of cheques being returned by the Defendant bank. However, of particular note was the banker's cheque requisitioned in February 2001 in the amount of Shs. 75,700.80. That banker's cheque had taken eight months to clear. DW 1 did not have the requisition form in court. All the requisition forms for the banker's cheques were made out by Grace Kimani. There was nothing to show the manager's signature thereon. The only document before the Court showing that Grace Kimani had full authority to transact on the Plaintiff's behalf was the letter written by the Defendant bank dated 5 July 2002 addressed to the Plaintiff's then advocate, Mr. Rajni Somaia. Paragraphs 2 and 3 of that letter read:

**“2. The business of Jackie Distributors was carried on about 200 metres away from our Homa Bay Branch and it was operated by Ms. Jacqueline Odongo and a Depot Manager, Ms Grace Kimani, who was introduced to the Bank as an agent of the business. Ms Grace Kimani was represented to the Bank as having full authority to transact on the customer's behalf save for signing of cheques.**

**3. Consequently, the day to day banking transactions including cash & cheque deposits, bank cheque requisitions, collection of statements were undertaken by Ms. Jacqueline Odongo and Ms. Grace Kimani, jointly or separately.”**

The most telling statement in cross-examination of DW 1 went as follows:

**“We have nothing in court to show that Grace Kimani was a signatory, the plaintiff signed blank cheques and sent them to Unilever. I have no documents in court to support what I have said.....”**

**There was a introduction in the file. I saw it personally. She can be able deposit cash as other things except signing cheques for the company when this case came up most of the documents. They disappeared from customers file. Requisition for Banker's cheques were bankers forms. In most cases Grace and Customer used to come to the bank together. We gave plaintiff accommodation. It was given by the Manager or operations manager. If I am not in the branch and manager not present accommodation would not be..... branch would know the customers well.”**

16.The Plaintiff's submissions commenced by setting out the details of the claim against the Defendant and maintained that the same had been proved through the evidence of PW 1 and PW 2. It pointed out that the sole signatory for the Plaintiff's account as per the account opening document was PW 1 and nobody else. It maintained that the Defendant allowed a person not authorised by the Plaintiff, to operate the Plaintiff's account. That person was an employee of the Plaintiff being none other than Grace Kimani. The Plaintiff submitted that banker's cheques were issued by the Defendant bank and that there was conclusive evidence that they were paid for in cash. There was no authority, according to the Plaintiff, to remove money from its account. Furthermore, the Plaintiff submitted that it was illegal for the Defendant to debit its account with the amount of monies in relation to the banker's cheques. By doing so, the Plaintiff had lost the amount stated at paragraph 5 of the Amended Plaint being Shs. 8,597,299.10. The Plaintiff did not give instructions or authorise the Defendant bank to make any of the debits complained about in the Amended Plaint. As regards the banker's cheque of Shs. 1,072,279.40 purchased on 22nd December 2001, the Defendant had maintained that it was dishonoured on the grounds of fraud. The Plaintiff noted that no fraud had been proved by the Defendant through the evidence of DW 1. In the Plaintiff's view, it was standard practice and the law, that the Defendant bank as the drawer of the banker's cheque should have first received the money therefore prior to the issuance of the

same. The Plaintiff maintained that the Defendant's point that there had been a friendly accommodation was false. Turning to the banker's cheque for Shs. 75,700/- in favour of the Collector of Stamp Duties, the Plaintiff noted that it was purchased on 23rd March 2001 but illegally debited 8 months later on 16th November 2001. In the Plaintiff's opinion, it was illegal for the Defendant bank to debit the Plaintiff's account with the amount of the banker's cheque so many months after it had been issued.

17. Turning to the prayer for loss of profit, cost of hiring a van and cost of renting business premises, the Plaintiff submitted that, as a result of the Defendant bank dishonouring the banker's cheque for Shs. 1,072,279.40 issued on 22 December 2001, the business relationship between the Plaintiff and the Unilever Kenya Ltd was stopped by the latter. In the Plaintiff's view this entitled it to compensation for loss of business as pleaded in the Amended Plea. The Defendant's only defence in relation to the suit was that the Plaintiff had authorised the said Grace Kimani to operate the Plaintiff's account and that she did not purchase the various banker's cheques in cash. The Plaintiff noted that the Defendant had not produced any documentary evidence to show that such instructions had been issued by the Plaintiff. Indeed, document no. 22 of the Defendant's bundle of documents is categorical that the Plaintiff never authorised any other person apart from PW 1 to operate its account. Turning to the law, the Plaintiff submitted that the Defendant acted contrary thereto by breaching the banker/customer relationship that existed between it and the Plaintiff. It referred the Court to **Halsbury's Laws of England, Fourth Edition Volume 3 (1) paragraph 175** which read:

***“Banker paying without authority. Subject to questions of statutory protection, estoppel or adoption, a banker who has paid a cheque drawn without authority or who has paid one in contravention of his customer's order, or, probably, negligently, cannot debit the customer's account with the amount. However, if such a cheque is paid in discharge of the customer's debts, the banker is entitled to take credit for it.”***

Further the Plaintiff submitted that it was indisputable that the law does not permit a bank to accept instructions from a stranger with regard to a customer's account. The bank is entirely liable to a customer if it acts in contravention or ignorance of its instructions with a customer. Any loss arising from such breach of contract should be borne by the bank, in this case, the Defendant. The Plaintiff briefly referred to the fact that the Defendant had pleaded that the Plaintiff had misrepresented to it with regard to the said banker's cheque of Shs. 1,072,279.40. It noted that no claim from misrepresentation was made and no evidence adduced by the Defendant. Finally, the Plaintiff submitted that DW 1's allegations were baseless and prayed for damages to be awarded as set out in the Plea. The Defendant had breached its banker/customer obligations when it debited the Plaintiff's account “using their own banker's cheques” (!).

18. The Defendant noted in its submissions, that it had averred that the Plaintiff appointed the said Grace Kimani as its agent and gave her authority to *inter alia* issue general instructions, draw cash, requisition from banker's cheques and to deposit cash and cheques on the Plaintiff's behalf. The Defendant had denied that the said banker's cheques had been bought by cash although it admitted debiting the amount paid to the Collector of Stamp Duty but denied that it was done without authority. The Defendant had averred, in that instance that the debit related to the banker's cheque in favour of the Collector, which was not immediately posted, but was rectified after reconciliation. Finally, the Defendant in its opening averred that it refused to honour the banker's cheque for Shs. 1,072,279.40 on the basis of a misrepresentation by the Plaintiff that it would make payment to cover it to the Defendant. As a result, the Defendant identified the following issues for determination by this Court:

**i. Was it proper to debit the account of the Plaintiffs in respect of the transactions listed in paragraph 5 of the Plea amounting in total to Kshs 8,597,299.10?**

**ii. Was improper to debit the account of the Plaintiffs in respect of the payment to the Collector of Stamp Duty?**

iii. Was it proper to stop the payment of the banker's cheque of Kshs 1,072,279.40?

iv. Can the Plaintiffs successfully claim the consequential losses particularized in paragraph 12 (d), (e) and (f)?"

19. As regards issue i. the Defendant submitted that it was entitled to debit the Plaintiff's account with respect to the amount that was claimed by it in paragraph 5 of the Plaintiff. This was for the reasons firstly, that the Plaintiff claimed that it had bought the banker's cheques in cash and secondly, it claimed that the person who dealt with the bank on behalf of the Plaintiff's business, Grace Kimani, did not have authority to debit the Plaintiff's account. The Defendant maintained that the Plaintiff had not produced sufficient evidence before this Court to support its allegation that the banker's orders were paid for in cash. The Defendant drew the attention of the Court to the paucity of evidence of both PW 1 and PW 2 in this connection. None of the Plaintiff's witnesses could positively affirm that the said banker's cheques were paid for in cash. Against this, DW 1 had given evidence to the effect that customers, upon making a deposit, whether such be in cash or cheque, would be issued with a deposit slip. The Plaintiff's witnesses had not been able to produce any such deposit slips. DW 1 had also said that in his interaction with both PW 1 and Grace Kimani, they had never bought banker's cheques by cash. Paragraph 12 of the Defendant's submissions went into details as to the nature of a banker's cheque. Such submissions read:

**"It should be clear in the court's mind that a banker's cheque is an instruction issued by a bank (as opposed to an ordinary account holder) to another bank or to the issuing bank itself to pay a third party in whose favour it is written. Therefore, the third party would present the banker's cheque to the paying bank which would pay it. In the present case, it has not been denied that the amounts claimed are in respect of bankers' cheques. In this case, the bankers' cheques would be issued by the Defendant Bank in favour of Unilever (K) Ltd instructing the Defendant Bank to pay Unilever (K) Ltd a certain amount of money. Therefore, Unilever would present the cheque for payment to the Defendant Bank which would pay the same. The payment of the cheque would therefore be made out of the Bank's account and not on the account of the Plaintiffs as would be the case with a personal cheque."**

The Defendant then posed the question to this Court as to what was the consideration for the issuance of banker's cheques by the Defendant Bank? The Plaintiff had detailed that the consideration was payment in cash but this had not been proved by the Plaintiff.

20. The Defendant also drew attention to the evidence of DW 1 of the fact that the Defendant bank gave financial accommodation to the Plaintiff in which it allowed the issue of banker's cheques on the understanding that the Plaintiff would make good for the debt by depositing money through cash or cheques into its account. This arrangement was an extension of the Plaintiff's and Defendant's good business relationship and trust. The Defendant bank therefore undertook the risk of paying the banker's cheques in the hope that the debt it incurred would be made good. Therefore, it could reimburse itself by debiting the Plaintiff's account. The Defendant also noted that it was the evidence of DW 1 that the Defendant bank never sold banker's cheques on the Plaintiff's account by cash. He stated that if they were bought in cash, there would be no need to fill in the Defendant bank's requisition forms. I found that this submission on the part of the Defendant rather strange in that if one inspects any of the Banker's Cheque Requisition Forms they read:

**"Please issue me with a Banker's cheques of Kshs..... In favour of..... in exchange of cash/a debit to my/our account number..... and recover the necessary commissions."**

21. The next point that the Defendant's addressed in its submissions was whether the said Grace Kimani had the Plaintiff's authority to transact on its account. The Defendant pointed out that the letter produced by the Plaintiff prohibiting the Defendant bank from allowing any other person to

operate the account was allegedly dated 10th January 2001 whereas in fact the same was stamped as received by the bank 10th January 2002, after the time in which the transactions in question had taken place. The Defendant pointed to the evidence of DW 1 wherein he said that he had actually seen a formal letter of introduction in the file of the Plaintiff in respect of authority given to Grace Kimani. However, that letter had subsequently disappeared from the Defendant bank's file and DW 1 had no explanation for such disappearance. The Defendant then made the extraordinary submission that it had produced the documentary evidence which clearly established that Grace Kimani has sufficient authority to operate the account in that it had produced the requisition forms for the banker's cheques. The Defendant put forward the proposition that the said Grace Kimani had signed one of the requisition forms in respect of a banker's cheque for Shs. 600,000/- on the Plaintiff's account. I have perused the said bank requisition forms and in my opinion, all of them had been signed by the said Grace Kimani. Finally under this heading, the Defendant submitted that it could be reasonably inferred from the circumstances surrounding the case that Grace Kimani had authority to transact on the account. This was because she was the only person in the Plaintiff's business who dealt with the Defendant bank including the requisitioning of banker's cheques. The Defendant maintained that it was reasonable to presume that the Plaintiff knew that Grace Kimani had caused the said debits since she had the authority to do so.

22. Another matter upon which the Defendant submitted was the question as to why the Plaintiff had not raised any issue as regards to the statements of account which PW 1 admitted that she had received and signed for. This submission was in the face of the fact that DW 1 had informed the Court that PW 1 did not understand the banking business! The Defendant thereafter submitted that it had the right to rectify an error on the Plaintiff's account. This was in connection with the debiting of the amount of the banker's cheque in favour of the Collector of Stamp Duty some eight months after the same had been requisitioned. The Defendant maintained that such was within the statutory limitation period for the recovery of contractual debts. It referred the Court to the case of **British and North European Bank Ltd v Zalstein (1927) All ER 556**. The Defendant pointed to the holding of the Court as follows:

**“although *prima facie* a credit entry in a customer's passbook was an admission by the bank in his favour, in every case where a mere book entry could be treated as a payment some other circumstance must be present, e.g., some communication of circumstances to the customer and some action on it by him and alteration in his position; in the circumstances of the present case the defendant was not entitled to regard the credit entries as payments into his account and ignore the debit entries; and, therefore, the bank was entitled to succeed.”**

As true as I may and with respect to the Defendant, I do not see the relevance of this case to the matter before Court. However the Defendant has submitted that in the absence of evidence by the Plaintiff it altered its position as a result of this “credit”, the Defendant was entitled to rectify the error and debit the Plaintiff's account.

23. Turning to whether the Defendant bank was entitled to stop the payment of the banker's cheque in the amount of Shs. 1,072,279.40, the Defendant noted that the Plaintiff maintained that it had bought the same for cash. It was the Defendant's submission that it was entitled to dishonour the payment of the cheque since it was procured in fraudulent circumstances which the Plaintiff cannot purport to benefit from. Further, the Defendant submitted that, in any event, since the cheque was payable to Unilever, the Plaintiff was not entitled to sue for its value. The Defendant commented that there were insufficient funds in the Plaintiff's account to cater for its personal cheque. PW 2 had testified that the Plaintiff had drawn a personal cheque in the above amount in favour of Unilever, which had been returned unpaid. The Defendant maintained that PW 2's testimony directly contradicted paragraph 8 of the Plaintiff's statement where it is stated that the Plaintiff bought the banker's cheque in cash. The Defendant maintained that one would be left to wonder why the Plaintiff would issue a bouncing cheque when it had sufficient cash in its possession to pay for the banker's cheque? The Defendant maintained that it was a banker's duty to pay cheques depending on the availability of adequate funds upon which the customer is entitled to draw. As a result, the Defendant bank was not bound to effect payments of the cheque against insufficient funds.

Further, the Defendant maintained that it had issued the said banker's cheque for Shs. 1,072,279.40 as a result of the Plaintiff's false misrepresentation. It was the evidence of DW 1 that when the Plaintiff's personal cheque was returned unpaid, Grace Kimani and PW 1 had approached him seeking a banker's cheque for the same amount since they feared that the goods purchased would be repossessed by Unilever. On the understanding that the Plaintiff was to deposit an amount of Shs. 600,000/- in the Plaintiff's account, DW 1 had testified that he facilitated the issuance of the banker's cheque. It is presumed that the Defendant is maintaining by this submission that Grace Kimani and PW 1 had misrepresented that they were to pay in the said amount of Shs. 600,000/-. In this regard, the Defendant referred to **Halsbury's Laws of England, 3rd Edition, Vol. 26 at paragraph 1511** in which it was stated under the heading **"1511. Misrepresentation as a ground for the rescission of a contract or the award of damages"** as follows:

**"Where one person (who may be called "the representor") makes a false representation to another (who may be called "the representee") which has the object and result of inducing the representee to enter into a contract or binding transaction with him, the representee may, in general and subject to certain circumstances which may preclude him from so doing, elect to regard the contract as rescinded."**

24. In concluding its submissions, the Defendant maintained that the damages sought by the Plaintiff in respect of consequential losses were too remote. To this end it referred to the case of **Victoria Laundry (Windsor) Ltd v Newman Industries Ltd (1949) 2 KB 528** in which the Court had stated *inter alia*:

**"(2) In cases of breach of contract the aggrieved party is only entitled to recover such part of the loss actually resulting as was at the time of the contract reasonably foreseeable as liable to result from the breach.**

**(3) What was at that time reasonably so foreseeable depends on the knowledge then possessed by the parties or, at all events, by the party who later commits the breach."**

It was the Defendant's submission that the Plaintiff had failed to demonstrate that it was reasonably foreseeable that it would incur the losses that it had listed in the Plaint. It was not foreseeable that the Plaintiff would incur the cost of hiring a van nor, indeed, of renting the business premises. In any event, PW 2 had stated that the Plaintiff had bought the van and further, that the distributorship contract was for a period of three and not five years. Finally, the Defendant submitted that the Plaintiff had failed to prove the special damages that it was claiming. The Plaintiff had particularised special damages totalling Shs. 25,866,564.00. According to the Defendant, it had failed to prove any of its claims. The Defendant referred to the Court of Appeal case of **Hahn v Singh Civil Appeal No. 42 of 1983** in which the Court had found that:

**"Special damages must not only be specifically claimed but also strictly proved. The degree of certainty and the particularity of proof required depends on the circumstances and the nature of the acts themselves."**

The Defendant maintained that as regards the Plaintiff's claim that it had purchased banker's cheques in cash totalling Shs. 9,745,279.30, it had not produced a single deposit slip to prove the same and nor did the person, who supposedly made the cash deposits, give evidence before Court. The Defendant concluded by submitting that in view of the huge amount of money involved the Plaintiff's claims should be dismissed without hesitation. It put forward a similar position with regard to the consequential losses stating that there had been no proof produced by the Plaintiff's witnesses as concerning loss of profit. The Plaintiff had produced nothing to substitute its claim.

25. The Court's main concern in determining this matter is its surprise at the lack of documentation produced by the Defendant as regards the opening of the Plaintiff's account at its Homa Bay Branch. Before this Court is only the one document at page 1 of the Defendant's List and Bundle

of documents headed “*Application Form to Open a Current/Savings Bank Account for Limited Companies/Partnership/ Sold Proprietorship*”. That form simply records the name of PW 1 Jacqueline Amollo Odongo and her national Identity Card number plus details of two referees, one of whom was the said outgoing Branch Manager referred to by DW 1 in his evidence – Beatrice Owiti. The form is signed by PW 1 and is dated 28th September 2000. There are no specimen signature cards and no Bank mandate. It can only be presumed that the Defendant opened the Plaintiff’s account solely on that document. There is no written evidence of any authority given to the said Grace Kimani to operate the account. To a large extent from the evidence, the Plaintiff’s account was operated on the verbal say-so of PW 1 and 2 along with officials in the Defendant’s bank Branch. From the evidence before Court, it is obvious that a good bank/customer relationship existed between the parties, to the extent that it was submitted that the Plaintiff was the Branch’s best customer. In fact, it appeared to this Court that the bank/customer relationship was so good that it verged upon familiarity and as the saying goes: “familiarity breeds contempt”.

26. Taking the issues outlined by the Defendant, the first was whether it was proper for the Defendant to debit the Plaintiff’s account in respect of the transactions listed in paragraph 5 of the Plaintiff totalling Shs. 8,597,299.10. I have set out as above the format of the Requisitions for Banker’s cheques utilised by the Defendant. Copies of such Requisitions together with the internal debit vouchers in respect thereof were exhibited at pages 7 to 19 of the Defendant’s List of Documents. In every single case, I am satisfied that Grace Kimani executed all the Requisitions. Indeed on the Requisition exhibited at page 11, which was dated 15 September 2001, her name appears as the requisitioner. What is also apparent in all the Requisitions is that neither the cash nor the debit to the account options have been completed by way of deletion of one or the other. What is quite clear however, from the internal debit vouchers in every case authorised and signed by the Manager and the Accountant, is that the Account No. 0112047965100 (the Plaintiff’s current account) was debited with the amount of the banker’s cheques requisitioned. It is however interesting to note that the said Grace Kimani completed each Requisition form detailing an Account No. 0160047965100. Of course, this is not the Plaintiff’s account and it does seem that the Defendant’s officials at the Branch in Homa Bay had failed to pick this fact up lending further credence to the casualness of the aforesaid bank/customer relationship. As a result, two factors emerge – firstly, that perhaps the wrong account was debited and the Requisition instruction ignored by the Defendant and secondly, more importantly, the Defendant ignored the mandate as to the operation of the Plaintiff’s account that it was holding as per the Account Opening Form dated 28th September 2000.

27. In this regard, bankers ignore customers’ mandates at their peril. **Paget’s Law of Banking chapter 19 para. 19.2** reads 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 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 soul signature in breach of mandate requiring to 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.”**

Unfortunately for the Defendant I find that the decision in **London Intergovernmental** is totally distinguishable from the position in the matter before me. There was no actual authority given to the Defendant bank by the Plaintiff to the effect that Grace Kimani had the right to execute banker’s cheques requisition forms. There was evidence on both sides that Grace Kimani was introduced to the

Defendant bank as the Manager of the Plaintiff's business but no more than that. In any event, as regards the requisitions for Banker's cheques, what should the Defendant bank have done when faced with honouring the same or otherwise? In this regard, I refer to 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”.**

28. **Cranston's** general view on the customer/bank relationship is endorsed by the finding in the case of **Karak Brothers Company Ltd v Burden (1972) All ER 1210** in which **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 Ungood-Thomas J was as follows:**

**‘... a bank has a duty under its contract with its customer to exercise “reasonable care and skill” in carrying out its part with regard to operations within its contract with its customer. The standard of that reasonable care and skill is an objective standard applicable to bankers. Whether or not it has been attained in any particular case has to be decided in the light of all the relevant facts, which can vary almost infinitely. The relevant considerations include the prima facie assumption that men are honest, the practice of bankers, the very limited time in which banks have to decide what course to take with regard to a cheque presented for payment without risking liability for delay, and the extent to which an operation is unusual or out of the ordinary course of business. An operation which is reasonably consonant with the normal conduct of business (such as payment by a 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”.**

In my opinion, the Defendant bank herein as regards the issue of the banker's cheques was indeed negligent and in breach of its duty of care to the Plaintiff. Those transactions were so out of the ordinary course of banking business that they should have aroused doubts and put the Defendant bank on enquiry. Although PW 1 and PW 2 would have this Court believe that that Grace Kimani paid cash for the requisition of the banker's cheques, I have severe doubts in that connection. If one examines the banker's cheque requisition forms produced before Court and signed by Grace Kimani, every one of them details an account number which rather belies the Plaintiff's contention that the banker's cheques were paid for in cash. I also take the point raised by DW 1 that no evidence was put before court by the Plaintiff by way of deposit slips or otherwise, that cash was deposited in order to cover such banker's cheques. Of course, there is little doubt that the Plaintiff was supplied with products by Unilever (K) Ltd for onward sales, as the bank statements show numerous credits as entered to the Plaintiff's account throughout the material period – March 2001 to November 2001. A large part of those deposits were made in cash. Were there more sales by way of cash than what was deposited? I don't think so. Can the Plaintiff be said to have lost any monies in that regard? I don't think so. Accordingly as regards the first issue, I do not find that it was proper for the Defendant to have debited the Plaintiff's account in respect of the banker's orders transaction as it breached the Plaintiff's mandate. However, I do not find the Plaintiff's special damages claim in that regard, in the amount of Shs. 8,597,299.10 proved as against the Defendant. The Plaintiff, to my mind, has not paid twice for the said banker's cheques.

29. The second issue raised by the Defendant was whether it was proper to debit the Plaintiff's account in respect of a banker's cheque payment to the Collector of Stamp Duty in the amount of Shs. 75,000/-. It appears that Shs. 700.80 may have been the banker's charges for the issuance of the banker's cheque. In any event, it is apparent that the total amount of Shs. 75,700.80 was debited to the Plaintiff's account on 16th November 2001. The evidence of PW 1 and 2 in this connection was that they had no idea why such banker's cheque in favour of the Collector of Stamp Duty had been requisitioned. DW 1 admitted that he did not have the requisition form in court and that he had nothing to show the manager's signature approving the same. To my mind, the Defendant has not satisfied this Court that the Plaintiff's account was debited in error and consequently, on this issue, I find that the Defendant is liable to the Plaintiff in the amount of Shs. 75,700.80.

30. The next issue raised by the Defendant was whether it was proper for it to stop the banker's cheque in the amount of Shs. 1,072,279.40 in favour of Unilever (K) Ltd. From the evidence before Court, the banker's cheque was requisitioned but there was insufficient monies in the Plaintiff's account to cover it. Indeed one of the Plaintiff's personal cheques in the said amount had been returned earlier in December for reason of insufficient funds. Certainly, PW 1 and 2's evidence was that they met with the Defendant bank officials who agreed to issue the banker's cheque on the understanding that the Plaintiff's account would have monies paid into it sufficient to cover the said amount. It must be recalled that the banker's cheque was issued on 22nd December 2001 presumably so that purchases from Unilever could be made by the Plaintiff to cover anticipated Christmas sales. The Defendant has maintained that it issued the banker's cheque on the Plaintiff's false misrepresentation that it would pay in funds sufficient to cover the same in the near future. DW 1 gave evidence that he was the one who facilitated the issuance of the banker's cheque. To my mind, DW 1 must bear the responsibility for his actions for, as he put it:

**“We can accommodate a customer by word of mouth.”**

I do not find that there was any misrepresentation by the Plaintiff in inveigling the Defendant bank to issue the said banker's cheque. Indeed, as the Plaintiff put it in its submissions, no fraud was proved by the Defendant and such was a mere allegation. Further, I agree with the Plaintiff's submission that it is standard practice that the Defendant bank should have first received money prior to the issuing of that banker's cheque. It was the Defendant bank who was the drawer of the banker's cheque and I don't see how it can get around the fact that it is liable to pay thereon. There is little doubt that the Defendant bank, by stopping that banker's cheque in favour of Unilever, caused considerable embarrassment to the Plaintiff and may well have led to Unilever terminating its business relationship with the Plaintiff. There is no evidence, as the Plaintiff would have the Court believe, that the said banker's order was purchased in cash. The amount thereof was debited to the Plaintiff's account, the Defendant bank having taken the risk thereon. To my mind, the Defendant bank must pay for DW 1's indulgence to the Plaintiff and reimburse the latter the sum of Shs. 1,072,279.40.

31. Finally, the Defendant bank raised the issue as to whether the Plaintiff could successfully claim the consequential losses as particularised in paragraph 12 (d), (e) and (f). To this end, it referred to the **Victoria Laundry** and **Hahn** cases. This Court certainly concurs with the finding of the English Court of Appeal in the **Victoria Laundry** authority as to an aggrieved party only being entitled to recover damages actually resulting, as may be reasonably foreseeable, as a result of breach of contract. I have commented above that the Defendant bank, as a result of the dishonouring the said banker's cheque issued by it in favour of Unilever on 22nd December 2001, may have contributed to the business relationship between the Plaintiff and Unilever breaking down. However, no firm evidence of this was put before court by any of the Plaintiff's witnesses. PW 2 spent considerable time trying to justify the consequential losses of the Defendant bank's action, attempting to detail loss of profit particulars which to my mind were terribly confusing and no accounts of the Plaintiff, audited or otherwise, were produced before the Court to justify the same. Indeed, I would concur with the Defendant bank's submissions that it was not foreseeable that the Plaintiff could incur costs of hiring a van or indeed of renting its business premises. In fact, I would go so far as to say, that loss of profits and consequential losses put before court by the Plaintiff's witnesses were figments of the imagination rather than hard facts. As a result, I find that the Plaintiff is not entitled to any claim for Special Damages as pleaded.

32. The final outcome of the above is that I enter Judgement for the Plaintiff in the amount of Shs. 1,147,980.20 together with interest at Court rates from the date of filing suit (1st December 2002), until payment in full. Such figure is made up of the monies debited in respect of the alleged banker's cheque in favour of the Collector of Stamp Duties in the amount of Shs. 75,700.80 plus the amount of the wrongly stopped banker's cheque in favour of Unilever dated 22nd December 2001 for Shs. 1,072,279.40. As the Plaintiff has been largely unsuccessful in its claim against the Defendant bank, I make no order as to costs.

**DATED and delivered at Nairobi this 31<sup>st</sup> day of July 2013.**

**J. B. HAVELOCK**

**JUDGE**