



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**COMMERCIAL & ADMIRALTY DIVISION**  
**CIVIL SUIT NO. 535 OF 2007**  
**CONSOLIDATED BANK OF KENYA**  
**LTD.....PLAINTIFF**  
  
**VERSUS**  
  
**JULIUS KULUNDU ASIBA.....DEFENDANT**

**JUDGMENT**

By an amended plaint dated 12<sup>th</sup> July, 2007 and filed in the Chief Magistrate's Court, on 13<sup>th</sup> July, 2007, as **CMCC No. 4255 of 2007**, Milimani Commercial Courts, Nairobi the Plaintiff, Julius Kulundu Asiba prayed for judgment against Consolidated Bank of Kenya for –

- (a) *Kshs.1,518,673.55*
- (b) *Interest thereon at Court rates (12%) from 23<sup>rd</sup> December, 2002 to the time of judgment.*
- (c) *Damages of (sic) defamation.*
- (d) *Costs of this suit.*
- (e) *Interest on (a), (b) and (c) at Court rates.*

Consolidated Bank of Kenya Ltd. filed its defence on 28<sup>th</sup> June, 2007 denying liability.

Following closely on the heels of those pleadings, Consolidated Bank of Kenya Ltd. filed **HCCC No. 535** against Julius Kulundu Asiba in the High court of Kenya at Nairobi (Milimani Courts). The status of the parties thereby became reversed whereby the Plaintiff in the Magistrate's Court became the Defendant in the High Court while the Defendant in the lower Court became the Plaintiff in the High Court. In that suit, the Bank prayed for judgment against the Defendant for –

- 1. *Kshs.3,592,663/65.*
- 2. *Costs of the suit.*
- 3. *Interest on (1) and (2).*

**4. Any other or further relief that this Honourable Court may deem just and expedient to grant.**

Mr. Julius Kulundu Asiba, (the Defendant) filed his defence on 18<sup>th</sup> December, 2007. On 19<sup>th</sup> May, 2008 the following consent order between the parties was recorded –

**“IT IS HEREBY ORDERED BY CONSENT:**

- 1. That Nairobi CMCC Number 4255 of 2007, JULIUS KULUNDU ASIBA v. CONSOLIDATED BANK OF KENYA LTD, be transferred to the High Court (at Milimani) and be consolidated with this suit and heard together.**
- 2. That upon such transfer and consolidation, Nairobi CMCC No. 4255 of 2007 shall be the main suit whilst the present suit shall constitute the counterclaim.**
- 3. That the parties do amend their pleadings to reflect this agreed position.**
- 4. That the Defendant’s application dated 13<sup>th</sup> March, 2008 be withdrawn with no orders as to costs.**
- 5. That parties to file agreed issues, their list of documents and list of authorities on or before 29<sup>th</sup> May, 2008 when the matter shall be mentioned to confirm compliance and the taking of a hearing date for the substantive suit.**

These orders were subsequently varied on 8<sup>th</sup> July, 2008 by an order of the Court which read as follows –

**“By consent, the order of the Court issued on the 19<sup>th</sup> May, 2008 is hereby varied to reflect the following further consent of the parties:**

**Consolidated Bank of Kenya Ltd. shall be the Plaintiff whilst Julius Kulundu Asiba shall be Defendant. The parties are hereby granted leave to amend their pleadings within twenty one (21) days of today’s date so that the issues in dispute may be brought out with clarity.”**

During the hearing of the case in this Court, Eric Kinoti Mugambi testified for Consolidated Bank as PW1 and was the only witness called by the Bank. He told the Court that the Defendant was a customer of the Bank and narrated to the Court the mode of opening Current Accounts at the Bank. He also testified how the Defendant opened Account No.0120000944600 on 23<sup>rd</sup> October, 2002. According to the Bank records, the Defendant deposited a cheque No. 18292 for USD. 67,400.00 in that account on 4<sup>th</sup> November, 2002. This information was captured in a cheque’s deposit slip of the same date. On the said deposit slip were details of the Bank and Branch on which the cheque was drawn. It was drawn on Worth National Bank, 2901, Suffolk Drive, Suite 100 Fort Worth, and it was a foreign cheque. The witness produced the deposit slip as Plaintiff’s exhibit No.4. He also produced the cheque as Plaintiff’s exhibit No.5.

After receiving the cheque, the Bank sent it to its bankers, Citibank, New York, so that the latter could collect the money on behalf of the Plaintiff. The monies were duly credited into the Plaintiff’s Account in that Bank. The witness also said that the Plaintiff had an original telex statement (i.e. a telegraphic transfer statement). It came from Citibank to the Plaintiff and had the Plaintiff’s Account Number 36010446 and it was dated 7<sup>th</sup> November, 2002. As of that date, the status of the cheque was that it had not been paid as it had not matured. The witness produced a copy of the telex statement as Plaintiff’s exhibit No.6.

On 29<sup>th</sup> November, 2002, the Defendant went to the Bank and withdrew Kshs.3,572,663.65 for the purchase of Travellers Cheques. He also took cash in the sum of USD.5,000. This information is at the back of the cheque which the witness produced as Plaintiff’s exhibit No.7.

When the foreign cheque was deposited with Citibank, it was given a value date and after expiry of such a

date, funds can be withdrawn against the foreign cheque. After payment of Kshs.3,572,663.65 on 29<sup>th</sup> November, 2002 a balance of Kshs.1,518,673.55 remained. This is found in the Defendant's original Current Account bank statement which the witness produced as Plaintiff's exhibit No.8. On 13<sup>th</sup> December, 2002 the Plaintiff received a telex communication from its bankers in New York to the effect that the latter were reversing the proceeds of US Dollars 67,410 (US\$ 10 being their ledger fee) and informed the Plaintiffs that the cheque had been returned to them by the drawee Bank as a forgery. So the whole transaction was reversed. This information is contained in the communication from Citibank, New York, to the Plaintiffs which the witness produced as Plaintiff's exhibit No.9.

After this happened, the Plaintiff tried to find out why their bankers in New York had reversed the transaction and yet they had earlier advised the Plaintiff that the funds had been cleared. On that note, the Plaintiffs requested Citibank to refund the amount of US Dollars 67,410. The response was that Citibank could not do that because the cheque was returned as it was a forgery. When it was discovered that the cheque was a forgery, it was stamped FORGERY and returned to Consolidated Bank.

Against that information, the Plaintiff Bank could not allow the customer to withdraw the balance from the Account and this information was communicated to the Defendant. By the time the Bank was told that the cheque was a forgery, they had already paid out Kshs.3,572,663.65 on 29<sup>th</sup> November, 2002. The Bank was advised that the cheque was unpaid on 13<sup>th</sup> December, 2002. If they had known that the cheque was a forgery, they would not have paid out the Kshs.3,572,663.65 to the Defendant. He was therefore not entitled to the amount which he was paid and the Bank wants back the said sum of money which was wrongly paid to the Defendant.

On his part, the Defendant told the Court that he was a businessman and that this case revolved around cheque No.018292 for US Dollars 67,400.00. When he went to deposit that cheque to the Bank, the cashier told him the procedure was that he had to endorse the back of the cheque with his name, signature and ID. Number. He also told him that international cheque take 21 days to clear. The Defendant then filled in a deposit slip whose receipt the Bank acknowledged and gave him a copy. After 21 days, he went back to the same Bank to check whether the cheque had been cleared, and the cashier told him to see the Manager. The Manager told the Defendant that the latter's cheque had been cleared and in a few moments they would credit his account. After about two hours they credited his account and on the same date he withdrew Kshs.120,000. The following day, he withdrew Kshs.20,000 and the day thereafter he wrote a cheque for Kshs.5,000, to one Christopher Kyangu. On the same day he also bought Travellers Cheques for Kshs.3,572,663.65. All this money was for his air ticket to Hong Kong and accommodation, and the Travellers Cheques were for the business he wished to transact for Kshs.3.5 million.

The Defendant came back home on 21<sup>st</sup> December, 2002 and went to the Bank the following Monday to withdraw more funds. He went directly to the cashier who told him that there was no money in his account. He demanded to see the Manager who told him that the cheque he had deposited was a forgery. He asked the Manager to show him any document showing that the cheque was a forgery but the Manager did not do so. On 24<sup>th</sup> December, he went back to the Bank and the Manager showed him a paper to the effect that the cheque had been returned unpaid on 12<sup>th</sup> December, 2002. That was the date on which the Plaintiff knew that the cheque was unpaid. The Defendant thereafter reported the matter to the Bank Fraud Unit who informed him that the Plaintiff had not reported the matter to them. He waited in their offices, after they had gone to confirm at Consolidated Bank. When they came back after about two hours, they demanded from him Kshs.500,000 bribe but he refused and told them that they could not reap where they did not sow. They immediately locked his phone and locked him in and thereafter took him to Kileleshwa Police Station. He was then charged with six counts and none of those counts was proved against him. When his lawyer demanded to see the original cheque, the prosecution withdrew the case on 15<sup>th</sup> December, 2003 under **Section 87 (a) of the Criminal Procedure Code**. He then instructed his lawyer to write to the Bank and demand his balance.

On an unspecified date thereafter, the Defendant went to the Bank and as he came out, the Anti Fraud Unit called him to go and clear his name but when he went there, they locked him in for the second time. They took him to Court and the counts in this case were exactly the same as those in the previous

criminal case. The matter came up in Court several times and the Plaintiff never sent any witnesses. He was therefore acquitted under **Section 210** of the **Criminal Procedure Code**. None of the criminal charges were proved against him.

Shown exhibit No.5 which was the cheque he was said to have deposited, the Defendant said that this was not the one he deposited as it didn't have his features, i.e., his ID Number, his signature and his name. He concluded by saying that he didn't owe the Plaintiff any money. The money he had withdrawn was his own money and not the Bank's money. However, he claims from the Bank the amount he left in his account in the sum of Kshs.1,518,673/55 with interest from 2003 to-date. He also prayed for payment of damages for defamation, because his customers had come to know of his predicament and ran away. He further claimed costs of the suit at Court rates.

From the above evidence, it is clear that this case revolves around the cheque deposited by the Defendant in his account with the Plaintiff Bank. That was cheque No.18292 dated 29<sup>th</sup> October, 2002 for US Dollars 67,400.00. The basis of the Plaintiff's case is that the cheque deposited by the Defendant was a forgery. On the other hand, the Defendant contends that the Plaintiff was unable to prove the alleged forgery in the two criminal cases against him.

Truly, the record shows that the Defendant was prosecuted in **Criminal Case No. 112 of 2003** in the Chief Magistrate's Court, Nairobi. In that case, he was charged with six counts of handling stolen goods contrary to **Section 322 (2)** of the **Penal Code**; forgery contrary to **Section 349** of the **Penal Code**; uttering a false document contrary to **Section 353** of the **Penal Code**; and three counts of stealing contrary to **Section 275** of the **Penal Code**. After the evidence of six prosecution witnesses had been adduced, the Prosecutor applied to withdraw the case under **Section 87 (a)** of the **Criminal Procedure Code** to enable the Investigating Officer finalise his investigations. The defence Counsel opposed the application for withdrawal and submitted that the prosecution should instead close their case. The Court observed that the accused was brought to Court before investigations were completed and allowed the application to withdraw the case. The accused was accordingly discharged under **Section 87 (a)** of the **Criminal Procedure Code**.

Subsequently, fresh criminal charges were preferred against the Defendant in **Criminal Case No. 591 of 2004** in the Chief Magistrate's Court, Kibera. The accused was charged with six counts of receiving goods outside Kenya contrary to **Section 326** of the **Penal Code**; making a document without authority contrary to **Section 357 (a)** of the **Penal Code**; uttering a false document contrary to **Section 257B** of the **Penal code** and three counts of stealing contrary to **Section 375** of the **Penal Code**. It is clear from the first three counts that the Defendant was not charged with exactly the same counts as those in **Criminal Case No.112 of 2003** as he alleged. That notwithstanding, the accused pleaded not guilty to all the charges. The matter kept coming to Court from 23<sup>rd</sup> January, 2004 to 13<sup>th</sup> September, 2006 when the Prosecutor applied to be allowed to withdraw the case under **Section 87 (a)** of the **Criminal Procedure Code**.

Mr. Wesonga for the accused objected to the withdrawal under **Section 87 (a)** of the **Criminal Procedure Code** as the matter had been previously withdrawn under the same **Section**. Instead, he applied for the accused to be discharged unconditionally. The accused was accordingly acquitted under **Section 210** of the **Criminal Procedure Code** for want of prosecution. It was then that the accused person commenced these civil proceedings against the Bank.

Two points arise for observation from these criminal proceedings. The first one is that although the Defendant alleges that he was charged with exactly the same counts in both cases, the truth of the matter is that three counts in the second case were totally different from those in the first case. More importantly, however, is that in the first case, the Defendant was discharged because the Court observed that the accused was brought to Court before the investigations were completed. In the second case, he was acquitted, as the Court observed, for want of prosecution.

It would be instructive at this juncture to reflect on the standard of proof in cases. In a criminal matter, the standard of proof is much higher than that in a civil case. Whereas in a criminal trial, the prosecution must

prove its case against an accused person beyond reasonable doubt, in a civil case, the standard of proof is on a balance of probability. On the facts of this case, the Defendant was discharged in both trials on technicalities. In the first case, he was discharged because he had been taken to Court before the completion of investigations and in the second one he was acquitted for want of prosecution. In neither of those situations was an order made on the basis of the substantive evidence before the Court.

On the other hand, the Defendant maintains that the cheque in issue was paid to him by South Western Services who were his clients. He was communicating with them by e-mail and he printed all the e-mail and gave copies to M/S Ongoto & Company, who were his Advocates. However, Consolidated Bank gave those Advocates a job and therefore he could no longer represent him. When he got back his file from Mr. Ongoto so that he may instruct Mr. Ombeta, he discovered that all the e-mail was not there. It had been destroyed. The Defendant did not think of reprinting that e-mail and consequently, he didn't have any documents to show that there was any communication between and South Western Services. This is clear evidence by the Defendant himself that he is not able to justify how he obtained the cheque which is the subject matter of this suit.

By reason of the foregoing and on a balance of probability, I find that it is more probable that the cheque in contention in this case is the one tendered by the Plaintiffs as exhibit No.5 and that it is the same cheque that was declared a forgery by Worth National Bank in the U.S.A. A forged document is null and void and lacks any validity. It cannot confer any rights on the holder or the drawer and cannot be used to deny the Plaintiffs their funds.

Against that background, I note that on 11<sup>th</sup> September, 2008 the Plaintiff filed a "statement of agreed issues" although the Defendant had not signed them. These were –

- 1. Whether or not the Defendant deposited a foreign cheque No.018292 for US Dollars 67,400 with the Plaintiff.**
- 2. Was the Plaintiff responsible to the Defendant for collection, clearing and payment of the Defendant's aforesaid cheque? If so, to what extent was the Plaintiff responsible to the Defendant?**
- 3. Was the Plaintiff justified in allowing the Defendant to withdraw Kshs.3,592,663/65.**
- 4. Whether or not the Plaintiff was justified in denying/refusing and/or stopping the Defendant from withdrawing the balance of Kshs.1,518,673/55.**
- 5. Was the Defendant's cheque a forgery? If so, is the Defendant entitled to any payment from the Plaintiff.**
- 6. What is the law applicable to acceptance, payment and dishonour of the Defendant's foreign cheque No. 018292/**
- 7. Is the Plaintiff entitled to a refund of Kshs.3,592,663/65 from the Defendant?**
- 8. Whether the Defendant is entitled to Kshs.1,518,673/55 the credit balance in his account as at 31<sup>st</sup> December, 2002.**
- 9. Whether the Defendant is entitled to interest on the credit balance (Kshs.1,518,673/55) in his account at 12% (court rates) from 31<sup>st</sup> 2002 to date.**

**10. Whether the defendant's claim for defamation is statutory barred. If not how much is payable to the Defendant as general damages.**

**11. Who is entitled to costs?**

In addressing the above issues, I find that both parties are in agreement that the Defendant deposited a foreign cheque No.18292 for US\$. 67,400.00 with the Plaintiff. The Plaintiff was responsible to the Defendant for collection, clearing and payment of the Defendant's aforesaid cheque. However, the payment to the Defendant could only be effected if the necessary funds were available. For some short period, the Plaintiff was made to believe that the cheque had been cleared in Citibank, New York. However, this was later reversed on the ground that the cheque was a forgery. The probability of the matter is that after the 21 days "incubation period" had elapsed, the Plaintiff and its bankers in New York had reason to assume that all was well and that the cheque would be paid. At that moment in time, the Plaintiff allowed the Defendant to withdraw the sum of Kshs.3,592,663.65 only to be told later that the cheque was a forgery.

There is no time limit within which a crime should be detected, and it can be detected long after payment has been effected as happened in this case. Forgery is a serious crime and where a cheque is discovered to be a forgery, it does not confer on the drawer any rights to payment and it does not deprive the bank on which the cheque is drawn to any rights they may have in the funds in the account.

The Defendant went to great lengths to establish that exhibit No.5 was not the one he deposited in his account. However, it is significant that said exhibit bore all the particulars which he had given about his cheque. It had serial No.18292; it was dated 29<sup>th</sup> October, 2002, and drawn on WORTH NATIONAL BANK, P.O. BOX 13699, FORT WORTH, TEXAS; and it was drawn by SOUTHWESTERN SERVICES, who allegedly were the Defendant's customers, directing payment of sixty seven thousand, four hundred dollars to the order of Julius Kulundu of Bental Ltd., Nairobi, Kenya. It is my mind boggling as to how the Plaintiff could have obtained another cheque bearing such an uncanny semblance to the one deposited by the Defendant.

PW1 explained that when a customer deposits a cheque, the usual practice does not involve him in signing at the back and giving his name and identification number as alleged by the Defendant. Rather, that procedure is resorted to when one is withdrawing the money but not when depositing a cheque. Bearing in mind, once again, the standard of proof required in civil matters as opposed to criminal matters, I find that the cheque produced by the Plaintiffs as the exhibit No.5 is, on a balance of probability, the same one that the Defendant deposited on 4<sup>th</sup> November, 2002. And since it was declared a forgery by the Bank upon which it was drawn, it is a nullity and the Defendant is not entitled to payment of its proceeds. Consequently, the Defendant is not entitled to withdraw the balance of Kshs.1,518,673/55. On the contrary, it is the Plaintiff who is entitled to a refund of Kshs.3,592,663/65 from the Defendant. That answers issues 4, 5, 6, 7, and 8 of the agreed issues.

On account of the above considerations, I find that the Defendant is not entitled to any damages for alleged defamation. Apart from failing to prove the allegation, the claim has long since been time barred. I accordingly make the following orders –

- 1. That judgment be and is hereby entered for the Plaintiff against the Defendant for Kshs.3,592,663.65.**
- 2. Interest thereon at Court rates from the date of judgment till payment in full.**
- 3. The Defendant's counterclaim and claim for damages for defamation are hereby dismissed with costs.**

Orders accordingly.

**DATED and DELIVERED at NAIROBI this 31<sup>st</sup> day of January, 2012.**

**L. NJAGI**  
**JUDGE**