



CHESILYOT ENTERPRISES LTD..... PLAINTIFF

- VERSUS -

NATIONAL BANK OF KENYA LTDDEFENDANT

JUDGMENT

1. By a plaint dated 23rd December 2003, the plaintiff prayed for judgment to compel the plaintiff to release all monies held in a fixed deposit account number 01327 – 106115 – 05. The account was held at the defendant's bank, Kenyatta Avenue branch, Nairobi. The plaintiff also prayed for accrued interest under the terms of the deposit. In addition, the plaintiff sought a declaration that the defendant bank has no right to the monies or interest in the account.

2. The bedrock of the plaintiff's claim is two pronged: failure of duty by the bank to its customer, the plaintiff; and breach of contract between the bank and its customer over the handling of the account. The fixed deposit at the material time and as pleaded in the plaint was for Kshs 33,596,083.55. The plaintiff's case is that the defendant has withheld the sums and purported to hold them against non-existent guarantees or to apply the credit sums to settle other unrelated accounts. The plaintiff contends that this is not only against their contract but unlawful. The defendant denies all of those claims and as particularized in its statement of defence dated 2nd February 2004. In a synopsis, the defendant's case is that it holds no credit sums in the account for the plaintiff; and that it has rendered a full account. It prays for dismissal of the suit.

3. The plaintiff called one witness, Alice Chepkurui Ng'ok. She is a director of the plaintiff company. The plaintiff produced a bundle of documents dated 1st December 2011 (plaintiff's exhibit 1) and relied also on her witness statement dated 1st December 2011 filed in court on the same date. She testified that the relationship between the parties dates back to 5th August 1992 or thereabouts when Chesilyot Enterprises opened a sole proprietorship account at the defendant's bank. There were 3 separate accounts. A fixed deposit account number 01327 106 115 – 05, a loan account number 220 – 075 – 166 and a current account number 021 – 075 – 166. As at 31st December 1998, the plaintiff had overdrawn the current account by Kshs 964, 173. On the same date, she deposited into her fixed deposit account Kshs 24,500,000. That was meant to reduce the overdraft.

4. On 15th October 1996, the plaintiff took a loan of Kshs 2,986,947 to pay for the overdraft. It was to be repaid by 30th September 1998 with interest of Kshs 828,266. The plaintiff's evidence was that the loan was repaid by 31st December 1998. On that date the correct account should have been a nil balance on the loan; Kshs 683 in the current account; and a credit of Kshs 23,535,144 in the fixed deposit account. The plaintiff stated that the defendant, without any explanation, debited her current account with Kshs 10,258,452 in a period of 5 years. The defendant has refused to correct the entry. The plaintiff filed an interlocutory application for redress on 14th October 2009. In the meantime, the parties agreed to carry out an independent audit which the plaintiff says confirmed her position. The witness testified that the defendant declined to accept the findings.

5. The plaintiff's business partly related to supply of bulk commodities to the government or government

agencies in Kenya. On 30th May 1994 the plaintiff applied to purchase 2,500 metric tonnes of white maize at a unit cost of Kshs 8,700 from Crown Agents for and on behalf of the Government of Kenya. The plaintiff did not win the tender. The witness testified that the plaintiff later made a verbal offer to buy 5000 metric tonnes of maize at Kshs 40,000,000. A 20 % deposit had to be paid as a condition precedent. She says she paid Kshs 8,000,000. The bank had issued a guarantee for Kshs 40,000,000. The plaintiff states that the bank did not amend it to read Kshs 32,000,000. In any event, she testified that the guarantee would still have been rejected “because a guarantee was only needed for maize already bonded in a warehouse in Mombasa”. It was her evidence that the correct guarantee is the one dated 8th July 1994 which was rejected. The plaintiff was emphatic that the bank did not issue the guarantee and as a result she lost the consignment. The defendant would thus not be entitled to a lien on the fixed deposit.

6.The plaintiff also contests liability of a sum of Kshs 14,153,654.05 arising out of the transaction and alleged to be owed to Kenya Government or interest of Kshs 7,680,199.20. She also denied issuing a 90 day guarantee or a 90 day performance bond for maize shipped on 15th August 1994 with a maturity date of 14th November 1994. She contested the claim by the bank that it issued a guarantee for the sum of Kshs 32,000,000 on 12th July 1994 for 5000 metric tonnes of white maize from a company, Cargill of South Africa. It is the plaintiff’s evidence that the defendant is holding its money under a mistaken belief that the defendant issued a guarantee dated 15th August 1994. Reference was made to a letter dated 2nd July 2003 in which the defendant informed the Permanent Secretary, Ministry of Finance, that the guarantee had expired due to effluxion of time.

7.On 25th August 2003, the plaintiff requested the bank to uplift the fixed deposit of Kshs 33,596,083.55 in account 01327 – 106115 – 05. The defendant refused. Hence the prayers sought in the suit.

8.The defendant called one witness John Kibet Tarus. The witness produced two volumes of documents (Defendant’s exhibit 1) and also relied on a statement made on 16th January 2012 filed in court on even date. The witness testified that the plaintiff is not the holder of the disputed account. The plaintiff here is a limited liability company whereas the defendant’s records show the account holder is a business name.

9.The witness sought to demonstrate that the bank does not owe the plaintiff any money. The witness separated the transactions into five: The fixed deposit account; the guarantee for maize shipment; the bond or guarantee for Kshs 14,400,000 to Co-operative bank for purchase of fertilizers; another bond of Kshs 29,596,000 to the Government on 18th January 1994 for purchase by the plaintiff of 4000 metric tonnes of fertilizer; and lastly the loan for the unauthorized overdraft of Kshs 2,986,947.

10.The witness testified that the fixed deposit account earned interest that was transferred to the plaintiff’s current account. But the defendant had a lien over the principal sum to cover any liabilities for the five transactions I have highlighted. The defendant states that it issued a bond of Kshs 32,000,000 to support the purchase of maize from Crown Agents.

11.A demand by a third party was made to the bank for Kshs 14,163,654.05. The plaintiff contested it. It became the subject of separate litigation in High court cases 1295 of 1995 and 1550 of 1995. In High court case 2258 of 1995 *Crown Agents Vs National Bank* for example, a decree was made against the bank for Kshs 14,163,654.50 together with interest calculated at 7,680,199.20 and costs of Kshs 170,000. The bank paid and debited the fixed deposit account. The plaintiff having participated in the litigation, the defendant contends that the plaintiff cannot resile from the decree.

12.The defendant stated that it was duty bound to honour its guarantee of Kshs 14,400,000 to Co-operative Bank of Kenya. That guarantee related to support to the plaintiff for purchase of 1000 metric tonnes of DAP fertilizer for that sum. A demand was rendered. The bank paid on 14th November 1994.

13.Regarding the guarantee to Treasury Development of the Government of Kshs 29,596,000 the defendant stated that no formal demand was rendered. However, by a consent recorded in Court on 5th

July 2005, the contingent liability was removed from the defendant's books. The consent also allowed the defendant to retain sufficient sums to cover any liabilities that may be outstanding.

14. Lastly, the loan on the overdraft of Kshs 2,986,947 granted on 15th October 1996 was to be a lien on the fixed deposit. At that date the fixed deposit stood at Kshs 26,593,466.35. The defendant has rendered an account of the fixed deposit from 1994 to 2009; a summary of the loan and current account; the transactions on bonds or guarantees particularly with Crown Agents; and bank statements on the current accounts. On a full reconciliation, the banks evidence is that all the payments out of that account were legitimate and others were in accordance with appropriate court decrees. In the end, the defendant stated it has in fact overpaid the plaintiff by Kshs 459,079. That amount was first paid on 22nd March 2007 and again in error or mistaken belief on 19th November 2009.

15. The plaintiff and Mrs. Alice Ng'ok in particular were said to be quarrelsome; that she made vicious attacks and threats to bank officials; and kept on changing her position on the accounts. For example, she made criminal complaints of theft from her accounts and threatened personal violence on the Managing Director of the bank. The bank has also spent considerable time and resources in defending the many cases and interlocutory applications. The defendant prayed for dismissal of the suit.

16. I have heard the rival arguments. After considering the evidence, the pleadings and submissions, I have formed the following opinion. The relationship between the parties is founded on a legal contract of a banker and a customer. It is not contested that the defendant is a limited liability company duly authorized to conduct the business of a bank under the Banking Act. The rights and duties of the parties are thus regulated by the law and the terms and conditions governing the accounts held by the plaintiff at the defendant's bank. At the heart of the suit is the issue whether the bank, in breach of its contractual or fiduciary duties to the customer, misapplied, stole or lost the plaintiff's monies.

17. I note that the evidence led by the plaintiff went far beyond the substratum of the pleadings in the plaint. The plaint is dated 23rd December 2003. It has not been amended. The principal claim in the plaint is set out at paragraphs 4,6,7,9 and 10 of the plaint. It is there pleaded as follows;

4. On or around 21st May 1993 the Defendant Bank issued a Bank Guarantee in favour of the Government of Kenya fertilizer supply task force for Kshs 29,596,000 reference KKK/BILLS/26/594. The Guarantee was issued at the request of the Plaintiff and it was to enable the Plaintiff service a tender award for the purchase and supply of 4000 metric tons of fertilizer.

6. The Defendant Bank however failed to forward the guarantee to Bank Indosuez as required on time as a result of which the guarantee was time barred and could not therefore and was not indeed honoured by Bank Indosuez.

7. As a direct consequence of the aforesaid failure by the Defendant to forward the guarantee on time, Bank Indosuez refused to issue to the Plaintiff a letter of release of the consignment as a result of which the tender award to the Plaintiff was nullified.

9. Vide its letter dated 2nd July 2003 addressed to the Permanent Secretary Ministry of Finance, the Defendant admitted that the guarantee had expired on 8th November 1994 owing to effluxion of time.

18. The defendant did not object to evidence being led on matters that went beyond the pleaded claim. It was the defendants view and submission that all transactions relating to all the accounts be fully ventilated in the interests of justice. From a technical and strict legal standpoint, evidence inconsistent with the pleading should not have been allowed. However, in view of the overriding objective of the court to do substantial justice, and the provisions of article 159 of the constitution and sections 1A and 1B of the Civil Procedure Act, the court admitted the evidence.

19. The hub of the plaintiff's claim is the bank guarantee pleaded at paragraph 4 of the plaint to Treasury for Kshs 29,596,000. It was for purchase by the plaintiff of 4000 metric tonnes of C.A.N fertilizer. The

plaintiff's evidence is that the guarantee was not made to Bank Indosuez within the prescribed time. The latter did not in turn issue the plaintiff with a letter of release. Although the plaintiff pleaded at paragraph 8 of the plaint that it returned the guarantee to the defendant bank, it failed to provide such evidence. Nevertheless, I have studied a letter dated 2nd July 2003 addressed to the Permanent Secretary, Ministry of Finance. In it, the defendant concedes that the guarantee expired on 8th November 1994. Fundamentally no demand on the guarantee was made. The defendant's position is that the original guarantee has never been returned to it. However on 5th July 2005, a consent order was entered in this suit cancelling that guarantee. Upon that cancellation, it ceased to be a fetter on the fixed deposit held by the bank. The matter however does not end there. The defendant's case is that the fixed deposit was still held in lien for other liabilities of the plaintiff to the bank. I will now interrogate that a little more.

20. The first alleged liability relates to the bank guarantee of Kshs 32,000,000 to Crown Agents. As stated earlier, and this is material, the guarantee has been the subject of 3 other suits: HCCC 1295 of 1995 Chesilyot Enterprises Vs National Bank of Kenya Limited; HCCC 1550 of 1995 National Bank of Kenya Limited Vs Chesilyot Enterprises Limited and Crown Agents; and HCCC 2258 of 1995 Crown Agents Vs National Bank of Kenya Ltd.

The first suit has not been prosecuted by the plaintiff. The second suit was an interpleader by the bank to determine who between the plaintiff and Crown Agents was entitled to the balance of the value of the guarantee. The bank was withholding a balance of Kshs 14,153,654.05 to Crown Agents on grounds of a dispute between the latter and the plaintiff. Upon full hearing, the court, on 17th June 2004, dismissed the action. The court held there was no merit in the interpleader and that the bank had no right to withhold the sums.

21. I have found that there were two stages of the tender for the maize consignment and which partly explains the disagreement between the parties. Initially, the Government of Kenya, through the Treasury, appointed Messrs Crown Agents to import a consignment of white maize from South Africa. The plaintiff bid for 2,500 metric tonnes. This is clear from the tender form exhibited at page 383 of the defendant's bundle. That application was to be supported by a bond or guarantee for Kshs 217,500 being 1% of the tender amount. I have seen the plaintiff's indemnity dated 7th June 1994. The plaintiff provided the details of its bank as National Bank of Kenya account 021 – 075 – 166 Chesilyot Enterprises. The plaintiff gave an irrevocable undertaking to indemnify the defendant for any liability under the guarantee. The offer would seem to have been increased to 5000 metric tonnes and the bank issued a guarantee reference KKK/BILLS/27/500 for Kshs 40 million. The consignment, expected in June did not reach the plaintiff. The transaction failed. The original bond was cancelled.

22. From the evidence, Crown Agents later offered the plaintiff 5000 metric tonnes at Kshs 8000 per metric tonne of white maize. I have seen a letter from Crown Agents dated 11th July 1994 to the plaintiff. It was a condition precedent that the plaintiff pays 20 % of the cost which was Kshs 8,000,000. The bank was to provide a guarantee for the balance of Kshs 32,000,000. The consignment was to reach the plaintiff in August the same year. I have seen the defendant's guarantee addressed to Crown Agents dated 12th July 1994. There are two references: KKK/BILLS/27/503; and KA/GG 27/20. It is for Kshs 32,000,000. I have also seen a banker's cheque for the 20 % deposit of Kshs 8,000,000 purchased by the plaintiff from the defendant bank. The plaintiff had alleged that there was double payment of that amount. I have not seen any such evidence. The wording of the guarantee has followed the draft instructions by Crown Agents. It is also clear that the guarantee was at some point amended to read Kshs 32,000,000.

23. The plaintiff contested that fact in these proceedings and questioned the validity of the amended guarantee. However I have studied the judgment in HCCC 1550 of 1995 National Bank of Kenya Limited Vs Chesilyot Enterprises Limited and Crown Agents. There is a passage in the judgment confirming that the guarantee was amended on 2nd September 1994 to correct an error in the words to read "thirty two million". I am also satisfied that the defendant provided an express indemnity to Crown Agents to pay on demand "all payments, losses, costs and expenses" incurred by them in the transaction. From the documentary evidence before me, the maize was delivered on the contract by Cargill International S.A.

Antigua. Although the plaintiff insists that this consignment was not the one guaranteed by the bank or at all, I have not seen cogent evidence of a separate transaction or payment. What is clear is that the plaintiff received a consignment of maize. And the plaintiff was experiencing financial difficulties in paying the supplier. The plaintiff later sold all the maize albeit at a loss. This is clear from the plaintiff's letters dated 24th November 1994 and 6th December 1994 for example. There are letters dated 25th and 29th August 1994 from Crown Agents forwarding importation documents for the maize consignment to the plaintiff. In the end there is a paucity of evidence from the plaintiff to show that it had sourced and paid separately for the consignment or that the consignment was independent from that guaranteed by the defendant bank.

24. I agree with the plaintiff that there are errors in the documentation. The date of importation is given as 2nd June 1994. It would seem the true date is 2nd August 1994. There is also the invoice dated 29th July 1994 from Cargill International S.A. Antigua to the plaintiff for GBP 457,500 to the plaintiff and the accompanying import declaration forms. These have cast a little doubt. The problem is that the plaintiff has not shown an independent contract for a separate consignment of white maize. The contract between Crown Agents and the plaintiff dated 2nd August 1994 at clause 4 leaves me in no doubt that this is the same transaction. Any further doubt is removed by the correspondence from the plaintiff acknowledging the transaction and indebtedness to the bank. Good examples are the plaintiff's letters dated 24th November 1994 and 6th December 1994. This court is now enjoined to do substantial justice to the parties. It would defeat the ends of justice to let the plaintiff off on grounds of technical defects or erroneous dates in the guarantee. As consideration has passed, it would lead to unjust enrichment. I have thus come to the conclusion that the defendant issued a valid guarantee on behalf of the plaintiff for importation of white maize for Kshs 32,000,000.

25. On 9th December 1994, Crown Agents made a written demand on the bank to honour the guarantee for Kshs 32,000,000. On 10th January 1995, the bank assured Crown Agents that it would meet the guarantee less any amounts already paid by the plaintiff. The plaintiff was emphatic that the bank should not pay the guarantee. The shortfall was Kshs 14,163,654.05. This became the subject of the third suit I referred to earlier in HCCC 1550 of 1995, the interpleader, and HCCC 2258 of 1995 Crown Agents Vs National Bank of Kenya Limited. The bank lost the interpleader. In HCCC 2258 of 1995, a decree was made in favour of Crown Agents for the shortfall of Kshs 14,163,654.05. Interest was awarded of Kshs 7,680,199.20 and costs of Kshs 170,000. I find that the total sum of Kshs 22,003,853.25 was payable from the lien held on the plaintiff's fixed deposit account. I am satisfied from the evidence that payment of that sum was made to the lawyers for Crown Agents.

26. The liability of the bank to pay the guarantee was determined in the above suits. The terms of the surety bond issued by the bank to Crown Agents were contractual and binding under clauses 1 b and c. The liability was express. The security for the bank in turn was the fixed deposit account and any other account in credit of the plaintiff. The bank then had a right under the indemnity, the terms of operating the plaintiff's account and the right to set off and combine accounts. I hold that the plaintiff cannot resile from its undertakings under the guarantee.

27. I am persuaded by the passage in Pagets Law of Banking 13th Edition paragraph 29.13 where it is stated:

“Right of bankers of set-off which is right of combination or of consolidation of accounts is but the manifestation of a right analogous to the exercise of the banker's right of lien, a right which is of general application and not in principle limited to account or other similar accounts”

Furthermore, I have noted that the contractual documents underpinning the credit facilities to the plaintiff such as the charge and letters of offer expressly provided for the right of set-off by the bank. A good case in point is clause 5(h) (i) of the charge dated 21st May 1993 by Joseph Arap Ng'ok securing borrowings by the plaintiff from the bank. Under that clause the bank could set-off or combine accounts without notice to the chargor even if the accounts were held at different branches of the bank. Another illustration is the letter of offer dated 15th October 1996 for the overdraft loan. The second last clause at page 2 of the

letter granted the bank “the right to set-off all or any accounts and to consolidate all the securities held on any account...” At paragraph 29.16 of *Pagets Law of Banking*, supra, it is stated that the banker may combine two current accounts at any time without notice to the customer even though the accounts are maintained at different branches.

28. I now turn to the term loan. The plaintiff disputes the debit or offset of Kshs 9,727,052 made on 30th September 2003. The plaintiff does not seriously contest that in the year 1996, she overdrew her current account number 021 075 166. Indeed, the matters relating to this unauthorized overdraft were not pleaded in the plaint. On 16th January 1996 the plaintiff formally applied for an overdraft of Kshs 3,000,000. It was to finance the “unauthorized overdraft of Kshs 2,400,000 and Kshs 600,000 for some urgent demand” that had arisen. That letter by the plaintiff was express that it was pledging interest on the “current deposit of Kshs 1,225,000; a motor vehicle KAC 866 M and a house on LR Nairobi/Block/72/152 Ngei, Nairobi whose title was held at the bank under the charge I referred to. The repayment was at the rate of Kshs 373,684 per quarter.

29. For some unexplained reason, the bank was recovering the lesser sum of Kshs 124, 456 per quarter. Although the plaintiff claimed that a sum of Kshs 17,000,000 was transacted through her current account, the evidence shows that no direct payment of the loan on overdraft was made. Rather, there were book entries made of Kshs 124, 456 per quarter. So that although the plaintiff questions why the bank debited the accounts with the lower installments, she did not satisfy me from the bank statements that any payments were made. Any doubt is removed by the plaintiff’s letter of 25th July 1996 praying for more time and accommodation. There are similar letters dated 30th August 1996 and 9th April 1998.

30. I have looked at the original bank statements in the defendant’s bundle. I have also studied the statements in the plaintiff’s bundle at pages 1 to 86. I am satisfied that as at 30th September 2003, the amount due on the overdraft loan was Kshs 9, 727, 052.10. Nevertheless, the bank readjusted the sum to Kshs 7, 705, 000 after granting the plaintiff credit of Kshs 1, 300, 000 and Kshs 995, 885. 35. The bank stated it did so *gratis*. That was the evidence of John Kibet, the bank’s witness. In the process, it ended up paying the plaintiff the sum of Kshs 459, 079 twice: on 22nd March 2007 and 19th November 2009. An underlying current at the time was deterioration of the bank – customer relationship. So bad was the relationship that Mr. Tarus testified that Mrs. Alice Ng’ok physically assaulted Reuben Marambii, the Managing Director of the bank. The plaintiff’s director was convinced the bank was stealing her money. She blamed him and thought the plaintiff was being treated badly because of the tribe of its directors. In a letter dated 8th March 2004, Mrs. Ngok called Marambii “an animal in human clothes” and a “thief”. She promised to “play dirty”. In a handwritten note received at the bank on 2nd May 2003, she said she would “destroy” Marambii “completely”. So I think it was not entirely gratuitous: the bank was under sustained duress. In the end, I am satisfied that the bank was entitled to set off the debt amount of Kshs 7, 705, 000 from the credit in the fixed deposit account.

31. The plaintiff takes up cudgels on rates of interest, bank charges and costs incurred by the bank in recovering the debt. Those matters were again not pleaded in the plaint. The plaintiff’s learned counsel has raised those matters at great length in the written submissions. Interest charged was impugned for want of contract or conformity with the Banking Act.

32. Parties are bound by commercial agreements and must keep their part of the bargain. It is not the true province of the courts to rewrite contracts for parties. See *Morris & Company Vs Kenya Commercial Bank* [2003] 2 E A 605 and *National Bank of Kenya Limited Vs Pipeplastic Samkolit and another* [2001] KLR 112.

33. I have then looked at clause 2 (a) in the charge registered on 17th September 1993. It allowed the bank to recover commissions and other “usual bank charges, legal costs (on a full indemnity and advocates and own client basis) and other costs, charges and expenses and together with interest”. I am referring to the charge made by Joseph Arap Ng’ok on 21st May 1993 over Nairobi, Block 72/152 and registered in favour of the bank on 17th September 1993. That is the Ngei house that the plaintiff pledged further to

support the overdraft loan. I have also studied the letter of offer for the overdraft loan dated 15th October 1996. It provided for interest at the rate of 28% per annum on monthly rests calculated on daily balances. The bank reserved the right to amend the rate of interest with notice to the borrower. The plaintiff did not lead evidence to show the rates of interest charged were usurious, unconscionable or against the law. Its counsel, as stated, did so in the written submissions. Those submissions were not underpinned by cogent evidence to show the bank charges, costs or interest were not contractual or were against the law. The substratum of that argument also collapses for failure of pleading in the plaint.

34. In a synopsis, I find that at the inception, the fixed deposit account number 0132710611505 stood at Kshs 42,212,580 or thereabouts. The deposit had been built over time. Those were the aggregate deposits excluding interest made into the account between 1994 and 2003. The amount kept on fluctuating. Some of the original deposits originated from a company known as Super Expo Limited for supply of 4000 metric tonnes of fertilizer. It is common ground that between the years 1998 and 2002 it stood at Kshs 24,500,000. That is the figure acknowledged by the plaintiff in its letter of 28th January 1999, August 11th 2000 and as late as 19th April 2002. There was in addition accrued interest of Kshs 7,002,007.15. So that as late as 15th February 2007, the plaintiff's lawyers were demanding Kshs 32,398, 531.10 which was not too far off the mark. The key payments out of that deposit were Kshs 22,003,853.25 paid to Crown Agents comprising Kshs 14, 153, 654.04 as principal, interest of Kshs 7,680,199.20 and costs of Kshs 170,000. Those payments were backed by a court decree that I mentioned. There was then a further debit of Kshs 7,705,000 being recovery of the overdraft loan that I dealt with earlier.

35. The balance of Kshs 2, 686, 905.60 was released to the plaintiff on the following dates: on 11th January 2005, Kshs 2,000,000; on 6th September 2005 Kshs 596,740.60; and the balance of Kshs 90, 065 on 8th April 2009. That arithmetic reconciles the fixed deposit account which was the primary claim in the suit. On the evidence and a balance of probabilities, I thus find that the bank does not owe the plaintiff any monies. It is in fact the plaintiff who owes the defendant the sum of Kshs 459, 079 that was paid twice or erroneously on 22nd March 2007 and 19th November 2009. But as the bank did not set up any counterclaim, I have no legal platform to order such payment. On a preponderance of the evidence, I have then reached the conclusion that the plaintiff has failed to establish its claims against the defendant.

36. Lastly, I have studied the account opening forms of the plaintiff. The account was opened by Chesilyot Enterprise. It was a business name registered under the Registration of Business Names Act on 20th February 1991. The proprietors or partners were Joseph Arap Ng'ok and Mrs. Alice Chepkurui Ng'ok. The account opening forms exhibited at pages 3, 4 and 5 of the defendant's bundle are for a "sole proprietorship account" on 5th August 1992. The preamble in the charge dated 21st May 1993 describes the borrower as Chesilyot Enterprises. It is not clear when and at what point the plaintiff became a limited liability company. Certainly, the plaintiff did not lead evidence to show it operated an account at the bank in the name of Chesilyot Enterprises Limited. But as early as 18th August 1992, it was describing itself as a limited company. So much so that the letter of offer from the bank dated 30th November 1992 was addressed to Chesilyot Enterprises Limited. Virtually all correspondence that is material was under the hand of Mrs. Alice Ng'ok. The defendant thus contends that the person who has instituted the suit is not the proper plaintiff. The plaintiff has not produced the certificate of incorporation or memorandum and articles of the company. The plaintiff contends in its submissions that the defendant has admitted the description of the parties at paragraph 3 of its defence. That is so. But it still leaves the court in a blind spot. Parties are bound by their pleadings. As the matter stands now, I have no clear cut evidence that the plaintiff is a limited liability company or that it maintained an account with the defendant in that name. I have then entertained serious doubts that the present plaintiff can maintain the suit. That however is now water under the bridge because I have found the plaintiff's claim in the plaint lacks merit. For all the above reasons, I hereby dismiss the plaintiff's suit.

37. Costs ordinarily follow the event. They are also at the discretion of the court. The defendant conceded that it wanted a closure to this matter in a just and fair manner. On 31st January 2012 the plaintiff had closed its case after brief testimony by Mrs. Alice Ng'ok. When the defendant's learned counsel rose to cross-examine, he stated he was not sure that the plaintiff had exhausted all the issues in the suit. The

plaintiff's counsel had withdrawn from the suit. The defendant's counsel offered to have the plaintiff's case re-opened and to give an opportunity to the plaintiff to instruct new counsel. New counsel was instructed. The plaintiff's case commenced *de novo*. As I stated at the beginning, there have been a series of cases between the parties on various aspects of their banking relationship. Earlier in the judgment, I referred to evidence of a rapidly deteriorating relationship ending in physical and verbal abuse by Mrs. Alice Ng'ok against bank officials. I also referred to some *ex gratia* adjustments by the bank on debit interest to the plaintiff's loan account. The plaintiff has lost this suit now. In the interests of justice and to bring this chapter to a close, the order that commends itself to me is that each party shall bear its own costs.

It is so ordered.

DATED and **DELIVERED** at **NAIROBI** this 7th day of August 2012

G.K. KIMONDO
JUDGE

Judgment read in open court in the presence of

Mr. Achach for the Plaintiff.

Mr. Rachuonyo for the Defendant