



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

Civil Case 211 of 2002

ARISTOCRATS FOREX BUREAU LTD PLAINTIFF

VERSUS

NATIONAL BANK OF KENYA LTD. 1ST DEFENDANT

ANIL SHEIKH.....2ND DEFENDANT

J U D G M E N T

The Plaintiff, a Limited Liability Company was carrying on a Foreign Exchange Bureau at Wilson Airport Nairobi and maintained a bank account with the 1st Defendant Bank's Hill Branch in Nairobi. The 2nd Defendant on the other hand, was the Plaintiff's client who was introduced to them by one **Shawn Berrett** in 1998.

By a plaint filed in court on 20th February, 2002 the Plaintiff has brought this case against both Defendants. It is the Plaintiff's case that from 30th April 1998, to 16th June, 1998, the 2nd Defendant cashed various cheques in foreign currency to the tune of Kshs.3,705,775. The Plaintiff's case was further that it deposited the said cheques with the 1st Defendant who were its bankers for collection. These various cheques were drawn on Midland Bank, based in London, United Kingdom. The Plaintiff averred that the 1st Defendant represented to it that the collection of the cheques would be effected ad clearance of the same finalized within 21 days on the date on which they were banked. The Plaintiff averred at paragraph 9 of the plaint that by reason of said mutual understanding the 1st Defendant offered direct credit to the Plaintiff in respect of each of the cheques. The Plaintiff avers that all the cheques deposited with the 1st Defendant were dishonoured and that the 1st Defendant proceeded to debit its account with them.

The Plaintiff, in paragraph 14 to 15 of the plaint avers that the 1st Defendant failed in its duty of care to the Plaintiff and or failed to exercise due diligence and was negligent in making giving direct credit. The Plaintiff has particularized the 1st Defendant's servants and or agents negligence at paragraph 16 of the plaint as follows:

- i) Effecting payment against cheques received for collection before the same were actually cleared.
- ii) Failing to exercise any or any reasonable care to ensue that the cheques were collected promptly through the accepted clearing channels.

- iii) Failing to exercise any or any reasonable diligence to ensure presentment of the said cheques within reasonable time.
- iv) Failing to give any or any prompt notice of dishonour of the said cheques when it knew or ought to have known that the same had been dishonoured.
- v) Informing and/or willfully misrepresenting to the Plaintiff that the said cheques were in order when the 1st Defendant well knew or ought to have known that the same would be dishonoured.
- vi) Failing to make any or any adequate inquiries which would have disclosed the fact that the said cheques had been fraudulently drawn before making, or offering to make, any payment thereon.

The Plaintiff has pleaded to fraud in the alternative, and has particularized the fraud at paragraph 17 of the plaint as follows:

- (i) Willfully, in collusion with the 2nd Defendant with the object of defrauding the Plaintiff, delaying the presentment of the said cheques for collection.
- (ii) Conspiring and/or colluding with the 2nd Defendant with the object of defrauding ad injuring the Plaintiff in its credit by making payments before prior clearance of the said cheques.
- (iii) Failing to forward the said cheques for collection until all the amounts had been paid to the 2nd Defendant.
- (iv) Wrongfully and maliciously debiting the Plaintiff's current account with the amount of the said cheques.
- (v) Failing and/or maliciously neglecting to give the Plaintiff the requisite notice of dishonour in time.
- (vi) Failing and/or maliciously avoiding to give any assistance, or maliciously withholding any assistance, to the Plaintiff in its endeavours to investigate and apprehend the 2nd Defendant.

The Plaintiff seeks loss and damage particularized at paragraph 19 of the plaint as follows:

PARTICULARS OF LOSS AND DAMAGE

- (a) Amount paid on dishonoured cheques.....Kshs.3,705,775.00
- (b) Interest on overdrawn account.....Kshs. 301,006.00
- (c) Interest on borrowed funds.....Kshs.2,733,333.33
- (d) Investigation expenses..... Kshs. 85,000.00

TOTAL.....Kshs.6,825,114.33

The Plaintiff seeks judgment against both Defendants jointly and severally in the following terms.

- a) A declaration that the 1st Defendant has wrongfully debited the Plaintiff's said account with the amount of Kshs.3,705,775.00 and that the said sum of Kshs.3,705,775.00 is due and owing by the Defendants to the Plaintiff.
- b) Damages for conspiracy to defraud the Plaintiff in its trade.
- c) Payment of the sum of Kshs.6,825,114.33

d) Costs of this suit

The 1st Defendant filed its defence on 4th April 2002 in which he admits the description of the parties and the fact that indeed the Plaintiff deposited the suit cheques. The 1st Defendant however denies that it made any representation that the cheques would be collected within 21 days from the date the cheques were banked with it since the collection depended on the cooperation of the foreign bank and that 1st Defendant had no control over the said bank. The 1st Defendant denies making any representation in relation to the duration the foreign bank would take in clearing the cheques.

In reply to paragraph 9 of the plaint the 1st Defendant denied it gave direct credit to the Plaintiff pending the collection of the said cheques on any mutual understanding.

The 1st Defendant averred that the said direct credit was given on condition that if the cheques were returned unpaid, the Plaintiff would bear the full consequences and effects of such dishonour. In further reply to paragraph 9, the 1st Defendant pleaded at paragraph 7 of its defence as follows:

7. In further reply to paragraph 9 of the plaint, the 1st Defendant avers that:

- (a) It could not make direct credit on the strength of the personal cheque of the 2nd defendant when it had no previous dealing with the said 2nd defendant.
- (b) It never gave a mutual understanding nor believed for a second that the credit was given on the strength of the cheques deposited.
- (c) It is a banking custom and trade usage in Kenya to give some of a bank's customers direct line credit for foreign cheques and later on credit or debit the account once the fate of the foreign cheques are known, and the 1st defendant merely undertook the clearance of the said cheques on behalf of the plaintiff and made no presentation or gave no assurance as the final fate of the cheques.

The 1st Defendant admitted paragraphs 15 of the plaint that the said cheques were forged and/or fraudulently drawn but averred it was a stranger to the averment that the cheques were sold to the Plaintiff by the 2nd Defendant.

The 1st Defendant in answer to paragraph 14 and 15 of the plaint averred as follows:

10. In reply to paragraphs 14 and 15 the 1st Defendant avers that:

- (a) It denies that it paid any of the said cheques or acted in excess of its authority in paying the said cheques for the issue of paying really does not arise.
- (b) The plaintiff clearly misunderstood the function of the 1st Defendant as its banker.
- (c) The amount in paragraph 14 is material in that it brings out the malafide intention of the plaintiff.
- (d) It debited the plaintiff's account on the strength of the reason why a direct credit was given to the plaintiff when the cheques were yet to be collected.
- (e) The Plaintiff fails to appreciate and is willfully deceitful in that payment of the cheques were made directly to itself and not to a third party.

The 1st Defendant also denied the particulars of negligence and of fraud given in paragraph 16 and 17 of the plaint. The 1st Defendant denies liability for loss and damage particularized at paragraph 19 of the plaint.

The 1st Defendant averred further that the Plaintiff's claim was incompetent *abinito* having been based on a forged cheque.

In an amended defence filed on 16th April, 2002, the 1st Defendant prayed that the plaint be dismissed with costs to the Defendant.

The 2nd Defendant did not file any defence nor enter any appearance despite service with the summons and the plaint. An *ex parte* judgment was entered against him on 16th July, 2004.

The parties in this case did not agree on the issues for determination by the court. The facts of the case are not in dispute. The Plaintiff received nine cheques from the 2nd Defendant and banked them with the 1st Defendant for collection. The cheques were in foreign currency and were drawn on the account of the 2nd Defendant at Midlands Bank, PLC London, UK. It is not in dispute that the 1st Defendant granted the Plaintiff direct credit for the value of the said cheques at its request.

The cheques amounting to USD 64,950 were all returned unpaid. The issues which arise from this case, are basically;

1. Whether the 1st Defendant owed a duty of care to the Plaintiff regarding the cheques and whether it acted negligently and or breached the said duty as pleaded in paragraph 16 of the plaint
2. Whether the Plaintiff and the 1st Defendant had an agreement to the effect having given direct credit to the first Defendant would be held liable for the value of the cheques, if they were forged and or whether the 1st Defendant had a duty not to advance direct credit against the said cheques.
3. Whether the 1st Defendant acted fraudulently, maliciously or in collusion with the 2nd Defendant as pleaded in paragraph 17 of the Plaintiff.
4. Whether the Plaintiff is entitled to recover interest on overdrawn account and on borrowed funds.
5. Whether the Plaintiff is entitled to recover investigation expenses.

The most important issue and which must be considered first is whether the Plaintiff's claim is in contract or in tort. It is **Mr. Ojiambo's** submission that the Plaintiff did not disclose whether its claim was in contract or in tort and also if in contract whether the 1st Defendant's duty to it was under law or under contract.

Mr. Simiyu addressed this issue in his submissions. **Mr. Simiyu** submitted that the relationship between the Plaintiff and the 1st Defendant was a banker/customer one and was therefore an implied contractual relationship. Counsel submitted that the Plaintiff's claim lay on contractual negligence and that in the circumstances **S.4(2)** of the **Limitation of Actions Act** did not apply.

Mr. Simiyu urged that **S.74** of the **Bills of Exchange Act** applied to this transaction in so far as the instruments under consideration are cheques.

Mr. Ojiambo on the other hand submitted that if the Plaintiff's claim lay in contracts the Plaintiff ought to have pleaded it in the plaint. **Mr. Ojiambo** submitted that in fact the loss claimed in this suit arose out of a contract between the Plaintiff and the 2nd Defendant and that the 1st Defendant ought not to be held liable as he was not a party to that contract.

The evidence adduced by the Plaintiff's two witnesses and the witness called by the Defendant reveal that there was a Banker/Customer relation between the Plaintiff and the 1st Defendant. The relationship between a banker and a customer is a contractual one. The issue before the court related to collection of foreign cheques and therefore both the **Cheques Act Cap 35** and the **Bills of Exchange Act Cap 27**

apply.

Section 3 of the Cheques Act provides protection to a collecting banker. For purposes of this case, Section 3(2) (b) is the relevant provision and it stipulates as follows:

Copy Section 3(2) (b) to end

The 1st Defendant must show that it acted in good faith, without negligence and in the ordinary course of business.

The Plaintiff's case is that the 1st Defendant was negligent in two aspects. The first was to give the Plaintiff direct credit on the nine cheques in issue in this case before they were cleared. Secondly, in delaying delivery of the cheques to the Midland Bank, UK for collection.

Regarding the giving of direct credit, both the Plaintiff and the 1st Defendant admit that such credit was given to the Plaintiff on its request. The Plaintiff has gone further to say that the 1st Defendant ought not to have given direct credit for the cheques and that having done so, it should meet the consequences of the failed or dishonoured cheques. The 1st Defendant contends that it was entitled to give the direct credit on condition the Plaintiff reimbursed it if the cheques were dishonoured.

There is no document or written agreement adduced before this court to show the terms of the agreement regarding the direct credit. There is therefore nothing before court to determine the scope of their relationship.

The question to ask ourselves is whether such terms were implied and that therefore the 1st Defendant owed the Plaintiff a duty of care and should be bound by it.

In **Paget's Law of Banking 13th Ed.**, at page 151 under title *(b) other duties* conditions that would justify an implied term are given as follows:

“(b) Other duties

7.9 It is not uncommon for a customer to assert that the contract between himself and his bank contains an implied term other than a duty of care.

A term will not be implied into a contract unless it satisfies the following conditions (which may overlap):

‘(1) it must be reasonable and equitable;

(2) it must be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it;

(3) it must be so obvious that “it goes without saying”;

(4) it must be capable of clear expression;

(5) it must not contradict any express term of the contract”.

The 1st Defendant submitted that it gave the direct credit to the Plaintiff not to enable it pay the value of the cheques to the presenter as it never knew of him, but because of the long standing relationship the Plaintiff had with it. The 1st Defendant contends that the direct credit did not allow the Plaintiff not to exercise care and caution in dealing with its clients, in this case, the 2nd Defendant.

It is important to bear in mind that the 1st Defendant's relationship with the Plaintiff had been a long

standing one started in 1995, and had pre-existed the relationship between the Plaintiff and the 2nd Defendant. It is therefore correct to find that the direct credit given to the Plaintiff on the cheques in question was not unique to those cheques. The 1st Defendant's evidence to that effect is therefore unchallenged. Indeed, the 1st Defendant's case was that it did not know the 2nd Defendant and was not a party to the relationship between the Plaintiff and the 2nd Defendant.

The other factor to be remembered is the fact that the Plaintiff's own conduct in handling the cheques in question was not above board. The documents relied upon by the Plaintiff as proof the cheques were presented to it by the 2nd Defendant, and paid for in Kenya shillings, shows the lack of care and diligence the Plaintiff exercised.

For instance the 2nd Defendant did not sign for the payments made to him for some of those cheques. In all cases the Plaintiff did not even ascribe a consistent name to the 2nd Defendant. His name is shown as 'E. A. SHEIKH' or AKIL SHEIKH or AKIL SHAKE or SHEIKH AKIL.

It is clear from the Foreign Currency Receipts that the 2nd Defendant's identification, whether passport or identity card number, were never recorded. The address taken was a mere number, was not complete, and did not ascribe any Town or City or Country.

On the issue whether the 1st Defendant was negligent in giving the Plaintiff direct credit on the cheques, I do find that the Plaintiff was unable to prove its case in that regard.

In regard to the delay in sending the nine cheques for collection and whether the 1st Defendant was negligent, section 3 of the Cheques Act provides protection to a Collecting Banker if it acted in good faith, without negligence and in the normal course of business.

Section 74 of the **Bills of Exchange Act** deals with presentation of cheques for payment. **Section 74** stipulates as follows:

“Subject to the provision of this Act

- a) When a cheque is not presented for payment within a reasonable time of its issue, and the drawer or the person or whose account it is drawn had the right at the time of the presentment as between him and the banker to have the cheque paid and suffer actual damage through the delay, he is discharged to the extent of that damage, that is to say, to the extent to which the drawer or person is a creditor of the banker to a larger amount than he would have been had the cheque been paid.*
- b) In determining what a reasonable time is, regard shall be had to the nature of the instrument, the image of trade and of bankers and the facts of the particulars case.*
- c) The holder of a cheque as to which the drawer or person is discharged shall be creditor, in lieu of the drawer or person, of the banker to the extent of the discharge, and of the banker to the extent of the discharge, and entitled to recover the amount from him”*

In addition to the conditions set under the **Section 3** of the **Cheques Act**, **Section 74 (b)** sets other factors which must be considered to determine whether a banker was negligent.

The Plaintiff's case was the 1st Defendant took over 47 days to send the cheques for collection and to report back to the Plaintiff on the results. The evidence adduced by the Plaintiff reveals that the 2nd Defendant took the first cheque for payment on 11th May 1998 and that the Plaintiff banked it with the 1st Defendant and paid the 2nd Defendant all on the same day. By 18th June 1998, when it received the report of the dishonoured cheques, the Plaintiff had paid all nine cheques to the 2nd Defendant. **Mr. Krishna**, PW2, told the court that **Hanyanga**, 1st Defendant and witness had arranged with the Plaintiff

and that there was a mutual understanding that the 1st Defendant would send foreign cheques for clearance within 21 days. **Mr. Simiyu** for the Plaintiff argued that the delay in sending the cheques for collection was unreasonable in the circumstances and that therefore the 1st Defendant should be held liable for the loss suffered.

The 1st Defendant's evidence was that the 1st Defendant acted in the normal course of business. DW1, **Mr. Hanyanga** denied having made any promise, undertaking or mutual agreement that the bank, the 1st Defendant, could clear any foreign cheques within 21 days as alleged. It was his evidence that he could not have made such an arrangement, as he had no control over the forwarding bank. **Mr. Hanyanga** said that his branch had no control over the Head Office, which sent the cheques for collection, and the Midland Bank which was the drawer's bank which cleared them.

Mr. Hanyanga explained further that during the period in question, foreign cheques were few and far between. That the 1st Defendant bank had to wait to obtain enough cheques before sending them for collection, in order to save on costs. **Mr. Hanyanga** said that it was normal practice for the banks to collect sufficient cheques, whether in terms of numbers or value, before sending them for collection.

The 1st Defendant's evidence that during the period in question banks took some time before sending cheques for collection has not been challenged or controverted.

Section 74(b) of the **Bills of Exchange Act** provides that reasonable time should be determined by having regard to the nature of the instrument, the usage of trade and of bankers and the facts of the particular case.

The cheques in question were foreign cheques in foreign currency. They needed to be sent overseas for collection. The facts of the case reveals that the Plaintiff received one cheque each day on 30th April, 5th May, 6th May and 11th May 1998. The information that the cheques were dishonoured was received in 1st July 1998. That was a period of at least 40 days.

Was that period reasonable? The 1st Defendant's evidence was that it was reasonable due to the usage of bankers during the time in question. I think it is also important to bear in mind a few other facts, which affect the issue of reasonableness. The Plaintiff met the 2nd Defendant for the first time on 30th April 1998 and on the same day accepted a cheque in the sum of USD3,500 and cashed it for him. The Plaintiff cashed each of the cheques on presentation by the 2nd Defendant. Bearing in mind the sketchy information the Plaintiff took from the 2nd Defendant and the fact that he was hardly required to acknowledge receipt for the payments, coupled with the fact that the Plaintiff did not wait for the collection of any of the cheques before paying for them, I am not persuaded that the Plaintiff itself exercised care and diligence in handling these cheques. The evidence before court suggests that the Plaintiff was reckless.

Can the Plaintiff blame the 1st Defendant for the loss it suffered? The 1st Defendant has stated that it was unaware for the existence of the relationship between the Plaintiff and the 2nd Defendant. The Plaintiff has not denied this in evidence. If the Plaintiff had informed the 1st Defendant concerning the relationship with the 2nd Defendant, then may be it could remotely be said that the 1st Defendant owed the Plaintiff a duty to advise it to deal with the 2nd Defendant with caution. The 1st Defendant could have been expected to advise the Plaintiff to wait for collection before paying the cheques. That expectation or duty could be said to be an implied term of the contract between it as a banker and the Plaintiff as its customer. In the circumstances, such an implied term can be regarded to be reasonable and equitable. However, where the relationship was kept a secret, and payments were made without exercise of diligence, the Plaintiff cannot turn around and impute a duty on the 1st Defendant. That imputation is unreasonable and inequitable. In any event it was unnecessary for the efficacy of the business between the parties. It is inequitable where the Plaintiff paid a total stranger, on the first acquaintance, out of direct credit given to it by its banker, without disclosing its action to the banker, to require that the

banker, who was all along unaware of the existence of such a transaction, to meet liability for loss suffered directly as a result of the Plaintiff's act. This factor is aggravated when one considers that the payments made by the Plaintiff exceeded its total share capital of Kshs.2 million by over Kshs.1 million.

Conversely, the situation may have been different if the Plaintiff waited for 21 days, which **Krishna** claims was the promised clearance period, before cashing the cheques.

No evidence has been adduced to show that the 1st Defendant acted in bad faith nor was their any evidence adduced to show that what the 1st Defendant did was out of normal banking practice. None of the particulars of negligence pleaded were proved.

The same can be said of the particulars of fraud. The Plaintiff has only adduced evidence to the effect that it deduced that the 1st Defendant must have colluded with the 2nd Defendant because of the delay involved in sending the cheques for collection. As demonstrated, the delay involved has been shown to have been normal practice at the period of time in question, in order to assemble enough cheques to send for collection and in order to reduce costs of sending them overseas. These facts have not been proved to be incorrect or false. On a balance of probabilities, I am persuaded that there was nothing out of practice, irregular or sinister in the delay involved in sending these cheques for collection.

The Plaintiff has pleaded special damages and has contended that it was entitled to claim from the 1st Defendant for the loss it suffered in this transaction.

Mr. Simiyu for the Plaintiff cited the case of **Prof. David Ndeti vs. Daima Bank Limited Milimani HCCC No. 2198 of 2000** in support of its claim. Counsel relies on the finding by **Kasango J.** where she held as follows:

“The evidential burden of disproving that the charges were not contrary to the requirements of the Central Bank of Kenya Act and the Banking Act were squarely on the defendant...instead the defendant ‘threw’ its hands in the air and stated that it was the Plaintiff who alleges to and therefore he has to prove it.”

With due respect to Counsel, this case has no relevance to the instant case. The issue before the Court in the cited case was levy of charges and interest on the Plaintiff's account with the Defendant. In the instant case, the issue is loss suffered by the Plaintiff due to encashment of foreign cheques and whether the Defendant could be held liable for the loss.

Mr. Ojiambo on his part relied on an English case of **BARRET VS. POWER [1854] 9 Exchange 341** where the court held:

“Where two parties have made a contract, which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i.e according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it.”

This case deals with extent to which a party in breach can be held liable. The case sets out a general principal that damages payable should be reasonable or those that reasonably have been in the contemplation of both parties.

The other case cited by the 1st Defendant is a House of Lord's case of **KAUFOS vs. CZARNIKOW LTD [1949] 2 KB 528 (The Victoria Laindry case)** setting out the same general principle. In that case it was held:

“The sole rule as to the measure of damages for any kind of breach of any kind of contract was that the aggrieved party was entitled to recover such part of the damages actually caused by the breach as the

defaulting party should reasonably have contemplated would flow from the breach.”

In regard to the damages claimed in paragraph 19 of the plaint I will consider each seriatim.

Regarding the claim for the amount paid on the dishonoured cheques, the Plaintiff has pleaded Shs.3,705,755/-. The Plaintiff has admitted in evidence that the sum claimed included the sum it deducted as its commission for cashing the cheques. The commission charged was not disclosed. That being the case, even if the Plaintiff proved its case against the 1st Defendant, I would find it difficult to access the sum awardable under this head.

In regard to the claim for interest on overdrawn account in the sum of Kshs.301,006/-, all PW1 said was that the sum was based on a calculation the witness had not carried to court that day. PW1 however stated that the Shs.301,000/- was interest on its account charged by the 1st Defendant for overdrawn account. The statement of account showing the deduction was not produced.

Regarding the claim for interest on borrowed funds amounting to Kshs.2,733,333.33, PW1 told he court that the sum claimed under this head was money borrowed from sister companies. PW1 stated that he had no proof of the alleged borrowing to show to court.

In regard to the claim for investigation expenses of Kshs.85,000/- PW1 said he had no document to support the claim. PW2, **Krishna**, on his part stated that the sum of Shs.85,000/- was the amount used to buy breakfast and lunch for police officers involved in the investigations into the criminal aspect of the case against the 2nd Defendant. PW2 said he bought the food for Police Officers for 2 days while trying to trace the 2nd Defendant.

Mr. Ojiambo objected to the claim being allowed on the basis the monies were not used to pay for investigators but for food during attempts to trace the 2nd Defendant and that the payment was not payable.

The loss and damage claimed under paragraph 19 of the plaint are in the form of special damages. It is trite that special damages should not only be specifically pleaded but also specifically proved. The Plaintiff has not adduced any evidence to specifically prove any of the loss or damage claimed under this head and the claim must fail. Consequently prayer (c) of the Plaintiff's plaint fails in total and is dismissed.

In prayer (a) the Plaintiff sought a declaration that its account was wrongly debited by the 1st Defendant to the tune of kshs.3,705,775/-. This is the sum claimed under the special damages claim, paragraph 19(a) of the plaint. Having failed to show that it suffered any loss to the tune claimed, or that the debit was wrongful, the declaration sought does not lie.

Prayer (d) prays for damages for conspiracy to defraud the Plaintiff in its trade. No evidence as adduced to show that there was ever any conspiracy between the 1st and the 2nd Defendant. This prayer cannot therefore lie.

Having failed to prove its claim, the Plaintiff would not be entitled to any costs or interest as claimed in paragraph (d) and (e) of the plaint. Having come to the conclusion I have of this suit, I find that the Plaintiff has failed on a balance of probabilities to prove its claim against the 1st Defendant as pleaded in the plaint. The Plaintiff's case therefore fails in total and is dismissed with costs to the 1st Defendant.

Dated at Nairobi, this 23rd day of May, 2008.

LESIIT, J.

JUDGE

Read, signed and delivered, in the presence of:

Mr. Simiyu for Plaintiff

C. Ojiambo holding brief A. Ojiambo for the Defendant

LESIT, J.

JUDGE