REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
CIVIL CASE 432 OF 1999

HEBBY ONDIEKI……..……..……..…PLAINTIFF

VERSUS

BARCLAYS BANK OF KENYA LIMITED..……..……..….DEFENDANT

JUDGMENT

In her plaint dated 4th October 1999 the plaintiff claims against the defendant a sum of Kshs.800,000/- with interest at bank rates from 30th July 1999 until payment in full and final settlement is made plus costs of the suit. Her case is that on 30th July 1999 she withdrew a sum of Kshs.800,000/- in cash from National Bank of Kenya Ltd Nakuru Branch and went with it to the defendant's Nakuru East Branch where she maintained a savings, current and optimum accounts with an intention of depositing it in her optimum account. She claims that upon presenting an envelope containing the said sum to one of the cashiers on the first floor of the bank and despite informing him that it was a large sum of money that cashier declined to receive it and instead shouted at her that he was too busy to count such huge sum of money and referred her to another counter. The second cashier, despite the same information being given to him, also declined to receive the money and should at her at the top of his voice demanding that she should queue as the other customers were doing. She claims that as she desperately shunted between the two cashiers, thieves who were lurking in the banking hall snatched her handbag and envelope containing the money and disappeared. She blames her misfortune on the negligence of the defendant's cashiers in failing to accord her priority service that the optimum account holders and customers with large sums enjoyed. She stated particulars of the negligence as including the defendants' cashiers' failure to receive the money immediately or at all and instead shouting at her thus attracting the attention of the thieves; failing to keep confidence that she had a large sum of money to deposit; failing to accord her safety and that of her money while she was in its banking hall and failing to maintain proper and/or sufficient security for the customers in the banking hall thus exposing her to the risk of losing her money .

In its defence the defendant on its part, besides denying that the plaintiff had and intended to deposit the sum of Kshs.800,000/- as claimed, contends that the plaint is bad in law for being inept, ambiguous and does not disclose any or any reasonable cause of action against it. The defendant further denies being negligent as alleged in the plaint or at all and adds that until it received the money from the plaintiff into its custody it owed the plaintiff no duty of care. The defence concludes that if the defendant had the alleged sum, which it denied, then she lost it as a result of her own negligence by failing to take any or any proper care of it.

The evidence in this case was taken by the Hon. Justice Visram who, for personal reasons, later disqualified himself from completing the matter. I am therefore called upon, with the consent of the parties, to proceed and write judgment on the basis of the evidence on record, in accordance with the provisions of **Order 17 Rule 10** of the **Civil Procedure Rules**.

In her testimony, the plaintiff reiterated the averments in her plaint and called two witnesses who testified in support of her case. She testified that in 1996 she became a customer of the defendant by opening a savings account at the defendant's Nakuru East Branch. Due to the large cash banking she was doing, in 1998 the branch manager advised her to open an optimum account which would entitle her to free accident insurance cover, free bank statements and free withdrawals as well as excepting her from queuing for bank services like the holders of the other accounts. Instead she would receive priority service from any of the bank cashiers. Attracted by those advantages she opened optimum account No. 6253778 in 1998 and enjoyed those advantages for some time. The bank cashiers who already knew her treated her courteously and gave her priority whenever she went to the bank.

On 30th July 1999 she said she withdrew Kshs.800,000/= from National Bank Nakuru Branch which she wanted to deposit in her optimum account at the defendant's Nakuru East Branch. She completed a deposit slip, put it together with the money in an A4 size envelope and went straight to one of the cashiers on the first floor of that branch who told her it was not possible to serve her and referred her to next cashier. That other cashier shouted at her asking her why she had not queued like other customers. That surprised her and she stepped aside. As she contemplated on her next move she all over sudden realized that both her handbag and the envelope containing the money had been torn and the money stolen. Her screams attracted the attention of the operations manager of the bank to whom she explained what had happened.

Two people were arrested and later charged and convicted of stealing her money. She produced the National Bank withdrawal slip and bank statement as well as the Barclays Bank deposit slip and bank statement as exhibits. She blames the defendant for failure to accord her the priority service she deserved and to provide her with security hence her claim against the defendant for the lost money.

In cross-examination the plaintiff admitted that the optimum account brochure did not state that customers of that account were exempted from queuing and that in her complaint letter she said she wanted to deposit the money in the current account. She, however, clarified that that was a mistake which arose because the letter was written on her behalf by someone else.

After her testimony the plaintiff called **Esther Annayiru, PW2**, who was in the bank when the plaintiff screamed. Other than seeing the plaintiff's papers fall she did not witness the theft. She also called **George Kisongo, PW3**, the then Executive Officer in charge of the Criminal Registry at the Chief Magistrate's Court at Nakuru who produced the court file relating to **Criminal Case No. 1367 of 1999** in which the people who stole her money were charged and convicted.

On its part the defendant called two of its cashiers who reiterated the averments in its defence. **James Gachahi, DW1**, testified that the optimum account cashiers sat on the ground floor. On 30th July 1999 at about 12.00 noon the plaintiff went to his counter on the first floor and requested to deposit some money. As he was serving another customer he asked her to take her position behind the 30 or so customers who were on the queue but she went away. Later he heard a commotion in the bank but he did not get out of his counter. The other cashier **Francis Muthengi, DW2**, testified that on 30th July 1999 as he was serving a customer with a large deposit at one of the counters on the first floor, a woman he did not know went to his counter and requested to make a deposit. He asked her if she had completed a deposit slip and she said she had not. He asked her to complete one and join the queue. After about 20 minutes he heard a commotion in the bank and saw people running out. He also did not leave his counter.

After calling evidence the parties filed written submissions. In hers the plaintiff summarised the evidence she called and contended that she suffered loss as a result of the defendant's failure to accord her the contractual, common law and statutory duties of care which it owed her. As an optimum accountholder she said the defendant owed her a contractual duty of care to accord her instantaneous and priority service but it failed to do that leading to the theft of the Kshs. 800,000/= that she wanted to deposit. Citing **21 Halsbury's Laws of England 3rd Edition par. 450** and **28 Halsbury's Laws of England p. 49-50** as well as **Section 6(1) of the Occupiers Liability Act** (the Act) and the case of **Maclenan Vs Seager (1917) 86 LJKB 1113** she submitted that where the occupier of a premises agrees for reward that a person shall have the right to enter and use them for a mutually contemplated purpose, then the contract

between the parties, unless it provided to the contrary, contained an implied warranty that the premises would be safe for such purpose. She cited the decision of Lord Denning in **Thornton Vs Shoe Lane Parking Ltd [1921] 2 QB 163 at p. 169** and dismissed the printed terms and conditions relating to optimum accounts **D Ex. 1A** as coming too late after she had opened the optimum account upon the defendant's manager's representations that she would receive instantaneous and priority service.

The plaintiff also cited the case of **Lougher Kenya Safari Lodges & Hotels Ltd [1977] KLR 38** as well as the provisions of **Sections 3 and 4** of the **Act** for the proposition that the defendant owed her the statutory duty of care to secure its premises from lurking thieves masquerading as customers and that the defendant's failure to discharge that duty led to the theft of her money. By posting guards at the door on a regular basis, the plaintiff submitted that the defendant must have foreseen the danger posed by thieves and should have taken greater care. She also relied on the doctrine of Res Ipsa Loquitor and submitted that robbers do not lurk in bank premises where there is proper security.

On the quantum of damages the plaintiff submitted that the evidence she called proved that she lost Kshs. 800,000/= and urged me to decree its payment to her together with interest at bank rates plus costs by the defendant.

In their written submissions, counsel for the defendant relied on the New Zealand High Court decision in **Balmoral Supermarket Ltd Vs Bank of New Zealand (1974) Lloyds Law Reports Vol.2 164** and submitted that the a bank can only be held liable for a customer's money if the property in the money has passed to it. They said in this case the property in the plaintiff's Kshs. 800,000/= had not passed to their client as the plaintiff retained both actual and legal possession of it.

Counsel further submitted that before the plaintiff's claim that the defendant was negligent can be entertained, she must first show that the defendant owed her a duty of care with regard to the Kshs. 800,000/=. Quoting from the said **Balmoral Supermarkets Case** they submitted that the plaintiff having not deposited the money with the defendant, the debtor/creditor relationship had not arisen and the defendant did not therefore owe the plaintiff any duty of care. Consequently, they concluded, the issue of the defendant being negligent does not arise. Even if the defendant owed any such duty of care, they said it was not negligent as alleged or at all. If anything, they said, it was the plaintiff who was negligent by failing to do an inter-bank transfer instead of carrying such a large sum of money across the road from National Bank to the defendant's branch at Nakuru East.

As regards the operation of the optimum accounts, they referred me to the evidence of **Gachahi, DW1**, and the contents of **D Ex. 1A** and submitted that holders of optimum accounts were not absolved from queuing like other customers. In any case, they said, as is clear from the plaintiff's letter dated 2nd August 1999 **D Ex. 1B,** the plaintiff wanted to deposit the money in the current account and not in the optimum account as she alleged in court.

Relying on the case of **Sande Vs Kenya Co-operative Creamaries [1992] LLR 314** counsel concluded that the plaintiff has not proved that she indeed had in her possession the sum of Kshs. 800,000/=. They said the plaintiff could have utilized that amount after withdrawing it before going to the defendant's banking hall. In view of the contents of the plaintiff's letter of complaint **D EX.1B** which states that when **DW2** asked her to complete a deposit slip she stepped aside and contemplated on how to go about getting one, they dismissed the pay-in-slip **Ex. 3** as tailor made for this case. They said that the plaintiff's evidence in the criminal case contradicted her testimony in this case in that whereas in the criminal case she said that she was approached by one of the accused in that case for assistance on how to complete a deposit slip, she never made mention of that in her testimony in this case.

From these submissions and the evidence on record three issues arise in this case for determination. They are:

1. Whether or not the plaintiff had Kshs. 800,000/= which she wanted to deposit in her optimum account at the defendant's Nakuru East Branch;

2. Whether or not the defendant owed the plaintiff a duty of care and if so whether or not it was negligent in the discharge of that duty; and

3. Whether or not the plaintiff is entitled to judgment against the defendant in the said sum as prayed in the plaint.

I have carefully considered the evidence on record and the parties' submissions as summarized above. To start with I agree with the plaintiff that she withdrew a sum of Kshs. 800,000/= from National Bank on the 30th July 1999. That is abundantly clear from the withdrawal slip and the bank statement, **Ex. 1** and **Ex.2 respectively**. Although it cannot be said for sure that the sum of Kshs.250,000/= recovered from one of the accused persons in Nakuru CMCR.C No. 1367 is part of the amount stolen from the Plaintiff, the conviction of the accused in that case with no appeal when considered together with the provisions of **Section 47A** of the **Evidence Act** along with the rest of the evidence in this case leads me to accept the plaintiff's evidence that she indeed had that sum and that she wanted to deposit it in at the defendant's Nakuru East Branch.

I, however, do not agree with her that she wanted to deposit it in the optimum account. This is because as stated by **DW1** and **DW2**, in the Nakuru East branch where the plaintiff maintained her accounts, the optimum account holders were served on the ground floor. The two cashiers were in the current account counters on the first floor and that is where the plaintiff, as she stated in her evidence, went and approached them. My finding on this is further reinforced by the defendant's letter of complaint **Ex.5** in which she stated that she wanted to deposit the money in her current account. If she had mentioned to either of the cashiers that she wanted to make a deposit into her optimum account she could have been asked to go to the ground floor where the cashiers for that account were.

That disposes of the first issue and brings me to the second one which is whether or not the defendant owed the plaintiff a duty of care and if so whether or not the defendant was negligent in the discharge of that duty. The determination of this issue will also dispose of the third issue which is whether or not the Plaintiff is entitled to judgment as prayed in the plaint. I will therefore deal with them together.

I have already said that the plaintiff referred to sections of the Occupiers Liability Act and cited authorities on occupiers' liability. The sections include **Sections 3(1)** and **(2)** and **6(1).** The former states:

" **(1) An occupier of premises owes the same duty, the common duty of care, to all his visitors, except in so far as he is free to and does extend, restrict, modify or exclude his duty to any visitor or visitors by agreement or otherwise.**

(2) For the purposes of this Act, "the common duty of care" is a duty to take such care as in all the circumstances of the case is reasonable to see that the visitor will be reasonably safe in using the premises for the purposes for which he is invited or permitted by the occupier to be there."

And **Section 6(1)** which states:

"**(1) Where persons enter or use, or bring or send goods to, any premises in exercise of a right conferred by contract with a person occupying or having control of the premises, the duty he owes them in respect of dangers due to the state of the premises or to things done or omitted to be done on them, in so far as the duty depends on a term to be implied in the contract by reason of its conferring that right, shall be the common duty of care."**

These provisions together with the case of **Lougher Vs Kenya Safari Lodges & Hotels Ltd [1977] KLR 38**, cited by the plaintiff, mainly deal with the physical state of the premises which we are not concerned with in this case as no issue was raised on that. I reckon the point the plaintiff wanted to make here was that the duty of care expected of the defendant, as stated **Section 6(1),** "**Where persons enter or use...any premises in exercise of a right conferred by contract,… the duty he owes them in respect of dangers due… to things done or omitted to be done on them, in so far as the duty depends on a term to be implied in the contract by reason of its conferring that right,…"** was to

ensure that the plaintiff was , as per Section 3(2), "**in all the circumstances…reasonably safe in using the premises for the purposes for which…[she was] invited or permitted by the occupier to be there."** If I am right in this supposition, then what the plaintiff is telling the court is that the defendant failed to keep its premises safe for banking business. She is, in other words, saying that the defendant failed to keep the premises safe from thieves. But she did not, in both her pleadings and evidence, give details of what the defendant should have done to make them safe.

As I have said no issue was raised of any danger caused by the physical state of the premises. By her own admission the plaintiff said the defendant had posted guards at the door. The plaintiff having not pleaded or stated in her evidence what her expectations with regard to security were, I do not know what else the defendant was required to do to make the premises safer than they were. In the circumstances I find that the defendant's banking hall was safe for the banking business. The defendant did not therefore fail in its duty of care in this regard.

I would now like to deal with the remaining issue of the defendant's duty of care, if any, to the plaintiff as regards the amount stolen.

As was stated in the old English case of **Foley Vs Hill (1848) 2 HL Cas 28** the banker-customer relationship is one of contract. It consists of a general contract which arises when one opens an account with a bank. It also consists of contracts which arise only as they are brought into being in relation to specific transactions or banking services. In other words besides there being a general banker-customer relationship which arises when one has opened an account in a bank, other banker-customer relationships also arise in or from each banking transaction between the bank and the customer.

In general the contract between a banker and a customer is that of a borrower and a lender. The banker undertakes to receive money and to collect bills for its customer's account. The proceeds so received are not held in trust for the customer, but the banker borrows and undertakes to repay them on demand to the customer or to his order. See **Joachimson Vs Swiss Bank Corporation, [1921] ALL ER 92**. That is why the relationship between a bank and a customer is also said to be that of a debtor and creditor.

In this case it is not in dispute that there was a general banker-customer contract or relationship between the parties, the plaintiff having held three accounts with the defendant namely: a savings account, current account and an optimum account. Save for the privileges that the plaintiff claims to have been entitled to in relation to the optimum account, which I will deal with shortly, no issue arose on any of these accounts. The claim in this case is based on a specific transaction of banker-customer relationship that is said to have arisen or was about to arise in connection with a sum of Kshs.800,000/= that the plaintiff wanted to deposit into one of her said accounts.

The New Zealand case of **Balmoral Supermarket Ltd Vs Bank of New Zealand (1974) Lloyds Law Reports Vol.2 164** cited by counsel for the defendant is not binding on me. However, having read its report I find it persuasive. I therefore endorse for adoption in this country as a correct statement of law Justice Mcmullin's observation in that case that:

"…of all relations arising out of the relationship between banker and customer, the debtor and creditor relationship is still the basic principle of banking…. Before such relationship can be created and the bank made a debtor of the customer, circumstances must be shown to exist from which it can be established that the bank became a debtor of the customer."

When does such a relationship arise with regard to specific bank transactions like, in this case the one of depositing the stolen money?

In the above case Justice Mcmullin went on to state, and I entirely concur with him, that the debtor-creditor relationship arises only when a customer has deposited his money with the bank. A deposit is made when the property in the money has passed from the customer to the bank. And the property in the money, in the case of cash, passes from the customer to the bank when the customer has presented the money to the bank cashier and the latter has counted it and handed the stamped deposit slip or issued a

receipt to the customer.

In that case the customer had placed the money on the counter and the cashier was in the process of counting it when robbers stormed the bank and made away with it. Justice Mcmullin held that the bank was not liable to the customer for the stolen money as the property in the money had not passed to the bank. As I have said I entirely concur with this decision. To hold otherwise would not only be wrong but would, in my view, also be ridiculous. This is because a customer can stage the robbery of his own money in the banking hall and seek to hold the bank liable. I do not want to be understood to suggest that this is what happened in this case. There is no evidence to warrant such finding. What I am saying is that, although the plaintiff in this case never even contemplated such thing, there is a possibility of other people doing that if we were to set a precedent that the property in money passes to banks once it is in their banking halls before it is received by them.

Applying this principle to this case, I find and hold that the money having been stolen while still in the possession of the plaintiff, she had not deposited it and the debtor-customer relationship had therefore not arisen between the parties in respect of that sum. It follows therefore that, to that extent, the defendant did not owe the plaintiff any duty of care in respect of that sum.

This finding notwithstanding I am, however, clear in my mind that the facts of this case are distinguishable from the **Balmoral Supermarket case**. The passing of the property in the money is not the only criterion upon which a bank can be held liable to its customers. On the unique facts of this case I find that the defendant owed the plaintiff a duty of care and was, to some extent, to blame for the plaintiff's loss. The plaintiff was, to some extent, also to blame for her own loss. I will illustrate.

The particulars of negligence are stated in the plaint as follows:

(a) Failure to ensure the safety of the plaintiff and the safety of her money within the banking hall.

(b) Failure to receive the plaintiff deposit pursuant to the practice and treatment accorded to the optimum account holders.

(c) Failing to keep confidence that the plaintiff had a substantial amount of money to deposit.

(d) Shouting at the plaintiff thereby alerting the would be thief that she had a substantial amount to deposit.

(e) Failing to receive the deposit without delay thereby giving the thieves a chance to steal the same.

(f) Failing to keep proper and/or sufficient security to the customers at the banking hall and herby exposing the plaintiff to the risk of losing her money."

I have been unable to find in the file for my perusal the optimum account brochure, which was produced as **Ex.5.** However, on the plaintiff's concession in cross-examination I accept the defendant's evidence that according to that brochure the holders of that account, like other customers, were not exempted from queuing for bank services. But that is as far as that brochure went. There is nothing on record to show that the brochure was given to the plaintiff before she opened that account. The defendant did not call its bank manager who advised her to open the optimum account to refute the claim that he told her that the holders of that account were exempted from queuing for bank services.

The plaintiff said, and that is confirmed by both **DW1** and **DW2,** that she went direct to the two of them without queuing. Having previously operated two accounts in the defendant bank, I do not think that she would have had the audacity to jump the queues if she had not been told that holders of optimum accounts were exempted from queuing. In the circumstances I find and hold that the plaintiff was indeed told by the bank manager that one of the privileges of the holders of that account was the exemption from

queuing for bank services and the brochure **DEX 1A** does not avail the defendant – **Thornton Vs Shoe Lane Parking Ltd [1921]2 QB 163**. At any rate it is common knowledge, which I take judicial notice of, that holders of Premier Accounts in the defendant bank are exempted from queuing and I believe the Premier Account is the one which was previously known as the optimum account.

The plaintiff says that when she went to the first cashier, **James Gachahi DW1**, he declined to serve her without assigning any reason for that. That is clearly fallacious because, on her own admission, that witness was, at that time, too busy, I suppose serving another customer whom that witness named as Gilani Supermarket who had a large deposit. He could not therefore have left serving that customer and attended to the plaintiff. As he knew her, I accept his evidence that he politely asked her to go to another cashier. The next cashier, **Francis Muthengi DW 2**, being new at that branch did not know her. I do not believe his evidence that while in the course of counting a large sum of money from another customer he could have asked her if she had completed a deposit slip. I am satisfied and I find that **DW2** did not have another customer before him at that time and that the plaintiff told him that she had a large sum to deposit. He was therefore ready to serve her but on discovering that she had not completed a deposit slip he shouted at her and asked her to complete one and take her position behind the other customers who were already on the queue. In the same vein I also find that, contrary to her contention, the plaintiff had not completed a deposit slip when she went to the counters. If she had, she could not have gone to the "writing desk" where PW1 in the criminal case saw her, or she could have stepped aside and was robbed, to use her own words in the letter of complaint, "while contemplating on how…[to] go for the banking slip." I therefore find that the plaintiff had not completed a deposit slip when she went to the two cashiers. Had she done so she could have been served by DW2. She is therefore equally to blame for her loss.

There is no evidence that anybody followed the plaintiff from National Bank or knew that she had a large sum of money. If the thieves saw her withdraw money from National Bank or knew she had money, they could have waylaid her before she reached the defendant's banking hall. However, by shouting at her I find that that **DW2** attracted attention to her and that occasioned a security breach.

In the circumstances I find that **DW2's** failure to give the plaintiff priority did constitute negligence on the part of the defendant and as I have said the shouting occasioned a security breach. Although she had not completed a deposit slip, and even if she had not intended to deposit the amount in her optimum account, having told him that she had a large sum to deposit, and being right there before him, he should have completed one for her or allowed her to complete one as he counted the money and accepted the deposit. If he had done that she would not have lost her money.

For these reasons I find both parties equally to blame for the plaintiff's loss. I therefore enter judgment for the plaintiff in the sum of Kshs. 400,000/= being half the amount claimed plus costs and interest at court rates from the date of filing of this suit.

DATED and delivered this 3rd day of October, 2008.

D.K. MARAGA

JUDGE.