



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO 761 OF 1988

INTERCOM SERVICES LTD.....1ST PLAINTIFF
INTERSTATE COMMUNICATIONS & SERVICES LTD.....3RD PLAINTIFF
SWIFTAIR (K) LTD..... 2ND PLAINTIFF
KENYA CONTINENTAL HOTEL LTD4TH PLAINTIFF
JAMES KANYITA NDERITU LTD5TH PLAINTIFF

VERSUS

STANDARD CHARTERED BANK.....DEFENDANT

JUDGMENT

I. INTRODUCTION

The substance of the case for the plaintiffs is premised on a bank's responsibility when dealing with the affairs of its customers. That case may summarily be put as follows as pleaded in paragraph 11(c) of the Further Re-Amended Plaint dated September 26, 2000 (hereinafter referred to as "the Plaint"):-

"It was an express and/or implied contractual understanding between the banker and customer, (and in this case as between the 1st, 2nd, 3rd and 4th plaintiffs and the defendant), that the defendant would maintain strict fiduciary mutuality, and confidentiality, in relation to the operations and transactions in the said bank accounts of the 1st, 2nd, 3rd and 4th plaintiffs."

Standard Chartered Bank Ltd, the defendant (hereinafter referred to as "The Bank") did not admit this. In paragraph 12 of its Further Re-Amended Defence dated June 22, 2000 (hereinafter referred to as "the Defence") it stated that "there was no express or implied contractual understanding between the defendant in the terms alleged ..." In the alternative, the Bank averred as follows at paragraph 13 of its Defence:-

"If, which is denied, there was any express or implied contractual understanding as alleged in paragraph 11(c) of the further Re-Amended Plaint, the defendant avers that it was qualified by:-
(i) The defendant's duty not to act contrary to public interest.
(ii) The defendant's right to protect its own interests.
(iii) The defendant's duty to exercise reasonable care in effecting payment of cheques and to make such inquiries as might in the circumstances be appropriate and practical.
(iv) The defendant's duty to act in good faith and without negligence."

Was there any such express or implied contractual understanding between the 1st, 2nd, 3rd and 4th

plaintiffs and the Bank? If so, what are the qualifications to such an understanding? These are indeed the primary issues in this case. They are issues which touch on the relationship between a bank and its customer. This is a matter which is governed by both statute and common law. However, before I go into that, let me, if I may, outline the background of events and matters which took place since this suit was filed. Hopefully, this will enable one understand, at the outset, the circumstances with which the court was faced at the time of writing this Judgment.

The plaintiffs filed this suit on March 1, 1988. Summons to Enter Appearance was not obtained until December 1, 1993. It was served upon the Bank on December 2, 1993. According to a previous Ruling given by my Learned Brother the Honourable Mr Justice Githinji, on May 17, 1995, the summons was served after the relevant period of limitation had expired. The Bank entered appearance on December 14, 1993 and filed its defence on January 14, 1994. However, it was not until July 28, 1997, that the substantive case took off. Despite initial delays, the case did not proceed expeditiously. There were several applications made during the trial. One such significant application related to the limitation period, and to whether the proceedings offended Sections 6 and 8 of the Civil Procedure Act. Submissions on these issues were made on January 14, 1998. The case advanced by the Bank on the issue of Limitation was that the summons were defective for having been served outside the period of limitation. However, after lengthy submissions on both questions, the Learned Judge, then seized of the matter, that is my Brother the Honourable Mr Justice Mbogholi Msagha, dismissed the Preliminary Objection with costs. The Learned Judge was of the view that the delayed service of summons had been sufficiently explained and that in any case the same had been waived by the conduct of the defendant. There was no successful appeal mounted against that decision. That aside, I have chosen to set out these matter to explain the point that when this case came up for hearing, and particularly so when I became seized of the matter, a substantially long period of time had elapsed since the cause of action accrued. The effect of this was that the Bank complained that it “had been highly prejudiced and handicapped in the conduct of its case, due to passage of time and inability to trace both documents and witnesses.” (See page 8 of the Written Submissions dated July 15, 2002, filed by Oraro & Co Advocates on behalf of the Bank.) That is not all. As will be seen later, there were other proceedings of a criminal nature which were mounted against Mr James Kanyitta Nderitu, the 5th Plaintiff (hereinafter referred to as “Mr Nderitu”) and/or his agent and/or the agent of the other plaintiffs which proceedings are closely related with the matters in this case.

Mr Nderitu (PW 12) told this court that during the investigations leading to his criminal prosecution the police raided his offices and took away “all records and all documents, all books of accounts, all banking vouchers and statements, cash books and ledger, all journals and correspondence”. This, Mr Nderitu complained, in one of the Criminal Cases against him, had prejudiced his defence. Mr Joseph Kibiru Ndungu, an archivist at the Nairobi High Court Criminal Archives, was called as PW11. He told this court that efforts to trace exhibits in the criminal cases against Mr Nderitu had been in vain as the same had been released to the police. He produced PEX 31 and PEX 32 being copies of extracts from the relevant registers of exhibits showing the movement of the exhibits in the criminal case against Mr Nderitu. In substance, it is evident that the plaintiffs were put out of possession or control of some material by an extraneous act. The result was that the plaintiffs, on a number of occasions sought to rely, as put by the Bank on page 8 of its submissions already referred to, “on secondary evidence, hearsay and conjecture.” Accordingly, as the case proceeded, there was controversy raised in respect of the different materials sought to be relied on by the opposing parties and the Court was on several occasions faced with objections. Most of those objections were overruled but that then leaves this Court to decide on the importance to be attached to the various pieces of evidence, and the weight that should be attached to the same.

Finally, let me note for record, that I became seized of this rather protracted case in March 2001. By then, the previous trial Judge, the Hon Mbogholi Msagha, had heard 13 of the total 19 witnesses called in this case. Upon his transfer to the Criminal Division of the High Court, the Hon the Chief Justice referred the matter to me. The parties agreed before me to continue the case from where my brother Mbogholi Msagah, J, had left, and hearings resumed in mid-2001. In February, 2002, I was transferred to Nakuru but continued the hearing before me in Nairobi, and concluded the case at the end of July, 2002, only one week before the start of the court’s summer vocation. As I was out of the country on personal leave

during the vacation, the drafting of this Judgment began in earnest only at the end of September 2002. The date originally slated for the delivery of Judgment, that is October 22, 2002, had to be postponed to November 18, 2002. Because of the voluminous nature of this case, and the weighty factual and legal issues raised, it has taken more than the required 42 days to write this Judgment. This, by no means, can be described as an average litigation. A considerable amount of additional time, energy, and dedication have come to bear in bringing this case to fruition.

Let me now set out the nature of relief sought by the plaintiffs. In their plaint, the plaintiffs sought Judgment for the following:-

- “(i) General damages
- (ii) Special damages ... in the total sum of Kshs 609,614,973.90.
- (iii) Costs of the suit
- (iv) Interest on (ii) hereinabove at such rate(s) including Commercial Bank Rates or Treasury Bill as the court deems reasonable, from the date of the suit to the date of payment or such other period(s) as the court thinks fit
- (v) Loss in exchange rates between Kshs 56/- to the US Dollar vis a vis the prevailing rate. The plaintiffs claim damages at the prevailing exchange rate at the date of judgment or payment whichever is higher.”

At the suggestion of the Court, it was agreed by both parties on August 11, 2001, that the case proceed first on the question of liability. That is what this court is concerned with at this stage.

II. FACTS

The material facts in this case are not in dispute. Mr Nderitu was a director of the following companies:-

- (a) Intercom Services Ltd. This is the 1st plaintiff in this case. I shall hereinafter refer to it as “Intercom”;
- (b) Interstate Communications & Services Ltd. This is the 2nd plaintiff in this case. I shall hereinafter refer to it as “Interstate:’
- (c) Swiftair (K) Ltd. This is the 3rd plaintiff in this case. I shall hereinafter refer to it as “Swiftair;; and
- (d) Kenya Continental Hotel Ltd. This is the 4th plaintiff in this case. I shall hereinafter refer to it as “Continental Hotel”.

Those companies were essentially family companies, with Mr Nderitu and his wife, Mrs Hellen Njeri Nderitu, being the only shareholders. It is Mr Nderitu who was the real force behind those companies. He was their Managing Director and this gave him wide authority to deal with their affairs. Of immediate relevance is the fact that Mr Nderitu was the sole signatory to the various accounts maintained by the said companies at the Bank. Those accounts were maintained at the Bank’s branch at Westlands, Nairobi. In its Defence, the Bank gave details of when Mr Nderitu’s companies opened those accounts with it. These were as follows:-

- (a) Intercom opened its account on 17th May, 1985;
- (b) Interstate opened its account on 5th May, 1985;
- (c) Swiftair opened its account on 30th March, 1985; and
- (d) Continental Hotel opened its account on 28th March, 1985. T

he plaintiffs did not dispute this. In fact, Mr Nderitu admitted as much on cross-examination. At the material time, neither Mr Nderitu nor his wife maintained any account of their own (that is in their personal capacities) with the Bank.

What really triggered the events leading to this action is a transaction which took place on 25th May, 1985 involving a cheque for Kshs 17,007,568.25 (hereinafter referred to as “the 17M cheque”) drawn by Kenya Customs & Excise Department (hereinafter referred to as “Customs and Excise”) on its account

with Kenya Commercial Bank at its Branch on Moi Avenue, Nairobi (hereinafter referred to as “KCB – Moi Avenue”). A copy of the said cheque was produced by PW13 as PEX 49. There was no objection taken in respect of that document. That cheque was drawn in favour of Intercom and was deposited into the account of Intercom with the Bank by Mr Nderitu on the material day. As noted earlier, this account was relatively new, having been opened only eight days prior to the deposit of the 17m cheque. Except for two relatively small deposits, this cheque was the first major transaction of its kind on that account. In 1985, this cheque represented a colossal amount of money by any standards. Both parties agree that, on the fact of it, there was nothing wrong or improper about this cheque; only that it was a huge amount in those days.

Mr Nderitu’s evidence is that he received the cheque from Customs and Excise on the evening of May 24, 1985. This was a Friday. That same evening, the manager of the Bank’s branch in Westlands, one Mr Amos Jiro Yiesel (hereinafter referred to as “Mr Yiesel”) visited him at his hotel at Westlands. Mr Nderitu told him about the 17m cheque, Mr Yiesel persuaded him to bank it with the Bank. The Bank did not call any witness to controvert this fact. According to Mr Nderitu, Mr Yiesel was a regular client at his hotel. They had come to know each other and it is Mr Yiesel who had convinced Mr Nderitu to open the accounts for his companies with the Bank’s Westlands Branch. Mr Nderitu confided in Mr Yiesel the details of the 17m cheque. He even showed him the payment voucher drawn to facilitate the payment for which the 17m cheque was made out. This was produced in this court as PEX 1A.

Mr Oraro, who conducted the case for the Bank, complained that that document was not clear and the plaintiffs supplied another document (PEX 1B) which clarified the contents of the payment voucher. Mr H C Kimeriah, whose name appeared on that document as the person who authorized payment of the amount contained in the 17m cheque was called as PW15 and confirmed these matters. According to the payment voucher this amount was being paid for “Incremental Export Compensation payment as per claim No IBC/00018/5/85”. The amount stated in the body of the document was Kshs.17,077,568/25 while at the bottom the figure was stated to be Kshs.17,007,568/25 – a difference of Kshs.70,000/-. The amount stated in words did not tally with the amount shown in figures. The payment voucher stated that payment was to be made to Interstate although the cheque was made out in favour of Intercom. Mr Nderitu’s evidence is that Mr Yiesel called him on the morning of May 25, 1985, that is on Saturday, following their meeting the previous night, and invited him to come over and deposit the cheque the same morning. Mr Yiesel even asked him if he wanted the 17m cheque cleared specially, and Mr Nderitu said that he indeed would like that to happen. On the same day, Mr Yiesel confirmed to Mr Nderitu that he had placed the cheque on special clearance and would advise him of its fate on Monday.

On Monday morning, Mr Yiesel went to see Mr Nderitu at his office and said that “his bosses at the Head Office” ie the Bank’s headquarters wanted to see any document related to the 17m cheque. Mr Nderitu gave him the payment voucher alluded to earlier. On the same day in the evening, Mr Yiesel informed Mr Nderitu that the 17m cheque had been cleared.

Now, it turns out as was stated by the first defence witness (DW1) that Mr Yiesel had talked to him about the 17m cheque on May 25, 1985. DW1 was Mr Naftali Ayodi (hereinafter referred to as “Mr Ayodi”). Mr Ayodi was at the material time employed by the Bank as a chief inspector. Mr Ayodi went ahead to say that at 8.15 am on May 27, 1985, Mr Yiesel called him and asked him to send his inspectors “to help handle this unusual amount”. He said that, according to the Bank’s operating procedures, it was usual that enquiries should be made about unusually large amounts. To support this, he produced DEX 2, which was a copy of the Bank’s Introduction and Explanatory Notes to Branch operating procedures. That document was dated February 1, 1993. Mr Kilonzo, the lead Counsel conducting the trial on behalf of the plaintiffs objected to that document arguing that it was not the one in use at the material time. The court allowed the document to be produced, and it is now incumbent upon the court to decide on its relevance. It was previously observed that this case came up for trial many years after the event. According to Mr Oraro the Bank no longer had the particular document in use at the material time and what is left in the circumstances is to rely on the document which was challenged. I have carefully perused that document and find that there is nothing out of the ordinary in it. It contains nothing more than common sense instructions to employees of the Bank on how to deal with certain situations. Even though they relate to a subsequent period, I am of the view that the provisions of that document or similar provisions obtained at

the material time.

Now, what are the relevant provisions of that document? They provide in pertinent part as follows:-

- (i) “payments to an account of a nature or of an amount inconsistent with the customer’s employment or station of life should be queried;
- (ii) cheques drawn by or in favour of a limited company or firm where paid into the account of an employee or partner or into the accounts of their wives should be queried;
- (iii) where there is any doubt that an item received offered for credit of an account, or for encashment, is the rightful property of the account-holder or the person seeking encashment, the transaction must be queried and need be referred to a senior officer.
- (iv) Unusual cheques, or those for large amounts out of line with the normal run of the account, must be referred.”

It is in line with these provisions that Mr Yiesel decided to refer the deposit of the 17m cheque to Mr Ayodi who, it was said, was senior to the former. Mr Ayodi said that when he got this information, he sent two of his officers to obtain more information about the transaction. Those officers were provided with the payment voucher (PEX 1A) and the cheque (PEX 49). Now, as was seen earlier, there were some discrepancies on the payment voucher. The payment voucher stated that payment was to be made to Interstate yet the cheque was in the name of Intercom. Mr Ayodi noticed this discrepancy and became concerned. It also bothered him that there was the discrepancy in the figures on the payment voucher as pointed out earlier. He was also concerned about the fact that this was a fairly new account, and that the amount being deposited was large. He said that he had been informed by the Bank’s relevant branch that the 17m cheque represented payment for Export compensation. Before referring the matter to Mr Ayodi, Mr Yiesel had made his own enquiries. On May 25, 1985 when Mr Nderitu deposited the 17m cheque with the Bank, Mr Yiesel called Customs and Excise to inquire whether the cheque was valid and genuine. He talked to none other than Mr Kimeriah, who was, as seen earlier, the person who authorized payment of the sum contained in the 17m cheque. At the material time, Mr Kimeriah was the accounts Controller of Customs and Excise. His position gave him authority to do a number of things including the authority to sign cheques drawn on Customs and Excise. In fact, he is one of the persons who signed the 17m cheque.

Mr Kimeriah gave evidence that he knew Mr Nderitu and his first two companies in this case, that is Interstate and Interstate. He said that those companies were involved in exporting goods outside of Kenya. This entitled them to claim export compensation. There was much controversy as to whether this was so but at this stage I would not like to go further into that question as I propose to deal with it much later. All the same, it is important to note that Mr Kimeriah was categorical that he knew Mr Nderitu as his two aforesaid companies. Upon Mr Yiesel’s inquiry, Mr Kimeriah assured him that the cheque was valid for payment. He went ahead to rest his fear that the shortfall in the amount shown in the payment voucher and the amount shown on the cheque had been noticed and that payment for the shortfall would follow shortly. That was not the only inquiry Mr Yiesel had made with Customs and Excise. It appears that he had made a prior inquiry with another officer of Customs and Excise. This inquiry was also made to a person who was directly linked with the 17m cheque – Mr Kimeriah’s co-signatory. This was Mr John Moses Ngugi, who was called as PW2. Mr Ngugi assured Mr Yiesel that the 17m cheque was valid and that the difference in the amount on the payment voucher and on the cheque was “a mere clerical error.” Mr Ayodi confirmed in his testimony that indeed Mr Yiesel had talked to Mr Kimeriah. The Defendant called Mr Donald Aluoch Bolo (DW2) who was an officer at the Office of the President’s Personnel Department to state that Mr Kimeriah was no longer employed with the government at the time he gave evidence in this case contrary to his assertion. This was raised, I think, to challenge his credibility but I am satisfied that his general evidence on the matter in issue is credible as it accords with the testimony of the other witnesses.

What did Mr Ayodi do in the circumstances? He decided to inquire about “the discrepancies” with the Central Bank of Kenya (hereinafter referred to as “the Central Bank”). He did this because he “knew export compensation was handled by the Central Bank”. He wanted to ascertain whether intercom was indeed an exporter. There was something else that prompted Mr Ayodi to make inquiries of the Central

Bank. He found it unusual that there were no sufficient funds to clear the cheque. He said that from his experience the government would not issue a cheque until “funds were in place”. All the same he admitted that Mr Kimeriah had informed Mr Yiesel that sufficient funds would indeed be “in place” presumably by the time the cheque was presented to the bankers of customs and Excise, that is KCB – Moi Avenue. When he first called the Central Bank he talked to a Mr Karani, who asked him to contact the “Mother Department” at the Central Bank. This was the Exchange Control Investigation Department at the Central Bank. At the “Mother Department”, Mr Ayodi spoke to a Mr Ongoro. He said that at this point he did not know Mr Ongoro as a person but only knew that the latter “was at Central Bank”. Mr Ayodi said that he called Mr Ongoro to enquire whether Mr Nderitu (read his companies) was, (were)(a) genuine exporter. He did not say what Mr Ongoro told him but said that the latter sent “two officers” who went to his office and took away the 17m cheque and the payment voucher. They also took away other confidential documents such as account opening forms and signature cards. These officers took those documents to Mr Ongoro who, according to Mr Ayodi, decided to go to the Bank’s Westlands branch to investigate. He said that he accompanied Mr Ongoro and his team to the Bank’s said branch so as to introduce them to the staff.

Under cross-examination, Mr Ayodi admitted that at the time he first made a report to Central Bank (that is when he talked to Mr Karani) the Bank had already received the amount of the 17m cheque on account for Intercom. Mr Ayodi in his letter dated June 10, 1985 to the Senior Executive Director of the Bank confirmed that the 17m cheque was advised paid at about 11.30 am on May 27, 1985. That letter was produced by Mr Ayodi as PEX 54. Mr Oraro did not object to the admission of that document but wanted it noted that it was “a privileged document obtained illegally.” It is true that the document is marked as “Strictly Private & Confidential”. However, most of what is contained therein was restated before this court and the evidence on these matters would still stand whether or not that document is taken into account. What is relevant in this case is that at the time Mr Ayodi made a report to the Central Bank, the 17m cheque had been cleared, and the same had been credited to the account of Intercom.

It has already been seen that Mr Ayodi accompanied Mr Ongoro and his team when they went to the Bank’s Westlands branch. Mr Ayodi said that when they got there, Mr Yiesel was out for lunch. They traced him at Mr Nderitu’s hotel and went back with him to the Bank’s Westlands branch. At the Bank’s Westlands branch Mr Ayodi left Mr Yiesel with Mr Ongoro and his team. These officers noted, among other things that the 17m payment had been “tampered with,” in that Kshs.360,000/- had been withdrawn therefrom and that Kshs.15,000,000/- had been transferred from that account to the account of Swiftair on the same day. This had been done on Mr Nderitu’s instructions to the Bank on May 28, 1985, despite the fact that according to Mr Ayodi, the Westlands Branch had been instructed not to tamper with the said account. Mr Nderitu’s further instructions to the bank to transfer Kshs.15,000,000/- from the account of Swiftair to the credit of the account of Swiftair with Investment & Mortgages Ltd, never in fact materialized, as we shall see later.

What was the result of Mr Ongoro’s investigations? As things turned out, Mr Nderitu was arrested and charged in the Subordinate Court with several counts of obtaining by false pretences contrary to Section 313 of the Penal Code. This was in Nairobi CM Criminal Case No 1716 of 1985 (*Republic v James Kanyitta Nderitu*) (hereafter referred to as “the Criminal Trial”). The record of that trial and the subsequent appeal to this court, that is Criminal Appeal No 539 of 1988 (*James Kanyitta Nderitu v Republic*) were produced in this Court by consent as Exhibit 1. Those charges related to the 17m cheque. What ensued was a lengthy trial that lasted for more than 30 months. A total of 71 witnesses were called by the prosecution. At the end of the prosecution case, the trial magistrate (JLA Osiemo, PM (as he then was) found that Mr Nderitu had a case to answer and put him to his defence. After the defence case, the trial magistrate gave his Judgment on April 22, 1988 by which he convicted Mr Nderitu as charged and sentenced him to serve 3 years imprisonment on each count. The sentences were to run concurrently. Mr Nderitu was aggrieved by that decision and appealed to this court. His appeal was allowed by my Learned Brothers The Honourable Mr Justice Mbaluto and The Honourable Mr Justice Oguk on April 30, 1992. What should be noted about that trial is that most of the prosecution witnesses called from the Customs and Excise – which was in real sense the complainant, exonerated Mr Nderitu, and expressly refuted that he was guilty of the wrong doing alleged. Some of those witnesses were called by the plaintiffs in this case. These were as follows:-

(a) Mr James Muhia Kahiga. Mr Kahiga was PW1 in this case. He was PW4 in the criminal trial. He was at the material time responsible for approving Export Compensation claims to exporters. He said that he was the one who approved the claim for which the 17m cheque was issued. That claim was made for Interstate. He maintained that that claim was genuine. "I was satisfied that all documents were in order before my approval. They were checked by my officers. I also checked and verified and I was satisfied," he said. Although the claim was in favour of Intestate, he said that the Cheque in settlement thereof was drawn in favour of Intercom on the instructions of Mr Nderitu. This was not unusual, he said.

(b) Mr John Moses Ngugi. Mr Ngugi was PW2 in this case. He was PW1 in the criminal trial. His testimony has been considered earlier in this Judgment. In addition to that, it was the testimony of this witness that the amount claimed was Kshs.17,077,568.25. The shortfall on the cheque of Kshs.70,000/- was, according to him, a clerical error. This is what he told Mr Yiesel when the latter made inquiries in respect of the 17m Cheque. He maintained that he did not find anything wrong with the 17m cheque which, as was seen earlier, was signed by him and Mr Kimeriah.

(c) Mr Harrison Charles Kimeriah. Mr Kimeriah was PW15 in this case. He was PW3 in the criminal trial. His testimony has been considered in detail elsewhere in this Judgment. To reiterate, he was the other cosignatory to the 17m cheque. He is the one who authorized payment for the amount for which the 17m cheque was issued. He said that the payment was due to Interstate but the cheque was made in the name of Intercom at Mr Nderitu's request.

(d) Finally there was Mr Joseph Christopher Ngatia. Mr Ngatia was PW17 in this case. He was PW57 in the criminal trial. He manned the computer section which dealt with the Export Incremental Compensation. He told this court that this process was done by a computer. The compensation was calculated using the software programmes designed by the World Bank. He gave the following testimony:-

"The material fed in the computer was from original straight-run (this was the primary process relevant to the matter in issue). The source was from the exporters – already on the system. Data was done by our staff under me. The programmes were designated to accept the export data. Each exporter was given a code which was used to access information. The Programmes did not require any more information from exporter. Exporters were supposed to bring in a claim form. The claim form was designed by Customs. The exporter had to complete the form and bring to my section. Upon receipt of the form, I would personally go to the computer section and feed in the code number of the claimant. The computer would find the base year and work out the entitlement and produce a final draft – authority to pay."

He also said that he was the "Checking Officer". "The effect of my stamp is to confirm that I had checked the final draft ... I had no complaint with Interstate. They were entitled to compensation", he said.

Now, it would appear that at the time the matters in this case arose, Mr Nderitu was facing other criminal charges, presumably in respect of the primary process I have referred to. This was CM Criminal Case No 4139 of 1984 referred to by Justices Mbaluto and Oguk in their Judgment, HC Criminal Appeal No 539 of 1988 aforesaid. He was acquitted in that case.

Before that, there were other cases being CM Criminal Case Numbers 2772 of 1984 and 3253 of 1984 whereby one was withdrawn by *nolle prosequi* and the other dismissed for not disclosing any offence. The latter two cases have no relevance to this case but I only mention them as they had been considered by my Learned brothers who decided HC Criminal Appeal No 539 of 1988.

In his testimony, Mr Nderitu said that after his trial in CM Criminal Case No 1716 of 1985, the Customs and Excise Officers who declined to give evidence against him in that case were charged in KIAMBU Criminal Case No 2449 of 1986. He said that a *nolle prosequi* was entered. To support this, he relied on PEX 41 which was a copy of the record of the proceedings for August 22, 1991, in the case against the Customs & Excise Officers in question. I have looked at that document and I find that it does not accord

with Mr Nderitu's testimony here. It must be remembered that he was acquitted on appeal on April 30, 1992, whereas the case against the customs and Excise Officers aforementioned was terminated as stated on August 22, 1991. This is prior to Mr Nderitu's acquittal and it cannot be said that the case against the Customs & Excise Officers was only determined upon his acquittal. However, nothing substantial turns on that point.

It is also a matter of record that on May 28, 1985, one Zephaniah Wainaina Githiri, a Superintendent of Police attached to the Central Bank's Investigations Branch at Nairobi appeared before a Magistrate (J L Ole Kipury) seeking an order to restrain Swiftair from tampering with the money (Kshs.15,000,000/- it had on its account with the Bank) until investigations were complete. This was duly granted in Misc Application No 112 of 1985. On that same day, in the same case, an order was granted to investigate the accounts of Mr Nderitu's companies held with the Bank. The same officer once again appeared before the same Magistrate on May 29, 1985, in the same case and was granted an order restraining the Directors of Mr Nderitu's companies "from tampering with the money (the balance of Kshs. 1,647,568.25 in the account of Intercom with the Bank) until investigations are completed" (See PEX 33). Mr Nderitu's Companies were aggrieved by those orders and moved to this Court on May 30, 1985 and successfully sought leave in HC Misc Cause No 168 of 1985 to apply for an order of *certiorari* to remove into this court and quash the Magistrate's orders under reference (See PEX 23B). They succeeded in quashing those orders on August 6, 1985 (See PEX 23C).

That was not the end of things. On July 17, 1985, the Commissioner of Customs and Excise sued Mr Nderitu and his Companies seeking to recover Kshs.28,392,613.25 in HCCC NO 2156 of 1985. This also arose from a claim based on the funds which consisted in the 17m cheque. On August 7, 1985, the Attorney General who was appearing for the Commissioner of Customs and Excise filed an application seeking to attach before Judgment the sum claimed in the suit which was then held by the plaintiffs in their accounts with the Bank. On August 7, 1985, this Court granted the application *ex parte* pending the *inter partes* hearing. (See PEX 23D). That order was confirmed on August 22, 1985, pending the hearing and determination of the suit. (See PEX 23E). Mr Nderitu and his Companies did not relent. They appealed to the Court of Appeal. There were several appeals, that is Civil Appeals Nos 109, 110, 111, 112, and 113 of 1985. These were subsequently consolidated. On November 26, 1985, the parties entered a consent and the following orders were recorded:-

1. "The attachment order of August 22, 1985, be and is hereby lifted.
2. The amount of fifteen million (Kshs.15,000,000) in the account of M/S Swiftair Kenya Ltd be transferred to a fixed deposit account in the joint names of the Commissioner of Customs and Excise and James Kanyitta Nderitu in the Standard Bank PLC Moi Avenue, Nairobi and not to be disposed off until further order of the High Court.
3. Kshs.1,665,069/20 (one million six hundred and sixty five thousand sixty nine and twenty cents) in the account of M/S Intercom services be and is hereby released to the appellants
4. All the accounts of the appellants in the Standard Bank PLC Westlands Branch, Nairobi be and are hereby opened for operation by the appellants.
5. The stay of execution in Nairobi High Court Misc Cause No 168 of 1985 be and is hereby lifted.
6. Civil Appeals Nos 109 to 113 of 1985 inclusive be and are hereby withdrawn.
7. Each party do bear its own costs."

Ms Valerie Onyango (PW4) who represented the Attorney General in both the Judicial Review case and the suit by the Commissioner of Customs and Excise confirmed these matters. There are some things which she said in this case which I must state for reasons which will become apparent later. She said that no one from Customs and Excise was willing to swear an affidavit in the Judicial Review case as the people she dealt with said there was nothing fraudulent. She faced similar problems in the other suit as well. In those circumstances, she was compelled to use police officers to swear the necessary affidavits "As Customs Officials did not co-operate saying nothing was wrong." Ms Onyango also said that when the relevant matters in this case first came to the office of the Attorney General, Mr Yiesel was with the three officers whom she met on the occasion. She came to meet and talked to Mr Ayodi on several occasions during the proceedings that ensued. She said that HCCC No 2156 of 1985, was withdrawn with the blessing of Customs and Excise. According to PEX 25 which was a letter dated November 25, 1992,

the Commissioner of Customs and Excise wrote to the Attorney General in the following words:-

“This is one of those cases where although we have no doubt a crime was committed, production of unchallengeable evidence becomes virtually impossible. I would therefore suggest that you look to a settlement where the government recoups something apart from paying no costs.”

Mr Nderitu said in his testimony, and this was not controverted, that two applications were made to this Court in HCCC No 2156 of 1985 for the release of Kshs.3,000,000/- and Kshs.1,000,000/- on two occasions when “life became difficult.” Both applications were granted by this Court but the application in respect of the Kshs.1,000,000/- was overturned on appeal. Mr Nderitu said that the Court of Appeal ruled that no more funds were to be released until both the civil and criminal cases connected with the sum in dispute were disposed of.

How were those matters finally resolved?

On December 2, 1992, the parties in HCCC No 2156 of 1985, that is the Commissioner of Customs and Excise and Mr Nderitu and his Companies named herein had the following order recorded by Consent:-

1. “THAT this suit be and is hereby marked as settled with no order as to costs
2. THAT the funds in the joint account of ... (the Commissioner of Customs and Excise) and ... (Mr Nderitu) in standard Chartered Bank, Moi Avenue ... be and is hereby ordered released to ... (Mr Nderitu) forthwith.
3. THAT the sum involved is Kshs.25,422,778/45 plus any interest due todate.”

That is the historical background of this case. The plaintiffs’ case may be conveniently divided into two:- one being with respect to Mr Nderitu’s companies and the other being Mr Nderitu’s own case. This is because the companies were customers of the Bank while Mr Nderitu as an individual was not a customer at the material time. The case for the companies is that the report made by the Bank’s officers to the Central Bank’s Fraud Investigation Department was in breach of the fiduciary relationship between the plaintiffs and the Bank.

That the said breach resulted in the companies bank accounts being frozen and “thereby causing considerable and enormous financial difficulties and hardships resulting in the closure of he business of ... (Intercom, Interstate and Swiftair). (See paragraph 17 of the Complaint). Mr Nderitu’s case is that his arrest in his official capacity as the Managing Director of his companies resulted in the restriction of his freedom of movement “by reason of the bail terms and conditions thereby crippling the day to day running and operations of the plaintiffs”.

Based on the extensive evidence of witnesses available in this case, the following facts have emerged clearly:-

- (a) Mr Nderitu’s companies maintained various accounts with the Bank at the material time;
- (b) Mr Nderitu did not maintain any personal account with the Bank at the material time;
- (c) When Mr Nderitu deposited the 17m cheque with the Bank, the Bank’s officers made inquiries with the following persons or institutions:-

- (i) Customs and Excise
- (ii) KCB – Moi Avenue, the bankers of Customs and Excise, and
- (iii) Central Bank of Kenya. It is clear that the first report was made to an officer of Central Bank with subsequent inquiries being directed to the Exchange Control Investigation Department, which was referred to in testimony as the “Mother Department”. In fact, the general evidence shows that although this was a “Department” of the Central Bank, it was manned by police officers. Mr Ayodi knew this, or ought reasonably to have known this because of his position at the Bank. He knew of Mr Ongoro, a Police Officer attached with the Central Bank. It is clear to this court that Mr Ayodi meant and intended to direct these inquiries to the police based at the Central Bank. Clearly, following his inquiry and report,

a major investigation began.

(d) As a result of these inquiries, Mr Nderitu was prosecuted in the criminal case alluded to earlier. The inquiries also led to the other cases which resulted in the accounts of Mr Nderitu's companies being frozen as stated earlier.

The plaintiffs also called some of the police officers who were at the material time employed by the Kenya Police and attached to the Central Bank's Exchange Control Investigation Department. These were Mr Zaperio Bundi (PW13), Mr Araka James Oyamo (PW14) and Mr Joseph Ngala Chai (PW16). These were the police officers who were involved in the investigations leading to Mr Nderitu's prosecution in the CM Criminal Case No 1716 of 1985 aforesaid. They were also called as witnesses in that case. Their general testimony before that court and in this court was somewhat contradictory and in some instances inconsistent as to whether Mr Nderitu's companies had carried out any exports to entitle him to the amount contained in the 17m cheque. This matter was picked out in detail by the Bank's counsel and received a lengthy address in the written submissions filed on behalf of the defendant and I propose to deal with it at a later stage. For now, it is sufficient to note that these latter witnesses namely Oyamo, Chai and Bundi were police officers and that the Bank's officers addressed their inquiries to the Police.

III. ISSUES

There were two sets of issues filed. The first one was filed on November 14, 1995 and was signed only by the advocates then on record for the plaintiffs. The issues in that set were as follows:-

1. "Whether the defendant;
(a) acted recklessly and negligently;
(b) was in breach of bank-customer relationship;
(c) had any interest, other than as banker, in the instrument giving rise to this suit;
(d) had a duty, other than to the plaintiffs, to anybody else in the instrument sued on.
2. Whether the plaintiffs are entitled to damages, in respect of what and how much against the defendant.
3. Who is to bear the costs of the suit."

The second set of issues is dated November 30, 1995 and was signed by the advocates then on record for both the parties. The stated issues in the second set were as follows:-

1. "Whether the 5th plaintiff was the Managing Director of the 1st, 2nd, 3rd and 4th plaintiffs;
2. Whether there was an express contractual understanding between the defendant and the 1st, 2nd, 3rd and 4th plaintiffs and if so what were the terms of this express contractual understanding;
3. Whether the express contractual understanding was qualified as outlined in paragraph 5 of the Defence;
4. Whether the defendant's servants and/or agents informed the police that they suspected the cheque submitted by the 1st plaintiff was unlawfully obtained;
5. Whether the defendant was lawfully justified to make enquiries so as to fulfill its duty to protect itself and others from fraud or crime and whether this inquiry was in breach of a banker-client relationship;
6. Whether the defendant owed all or any of the plaintiffs a fiduciary duty, and if any was owed, did it breach its fiduciary duty;
7. Whether the 5th plaintiff was charged in Criminal Case No 1716 of 1985 in his official capacity as The Managing Director of the 1st, 2nd, 3rd and 4th plaintiffs;
8. Whether the 1st, 2nd, 3rd and 4th plaintiffs' business:-
(a) was rendered inoperative as a result of the 5th plaintiff's prosecution,
(b) suffered damages as a result of this prosecution;
9. Whether the 5th plaintiff was subsequently acquitted;
10. Whether the freezing of the bank accounts of the 1st, 2nd, 3rd and 4th plaintiffs caused them considerable and enormous financial difficulties and hardships resulting in the closure of their business as alleged and whether they suffered damage and loss;

11. Whether service of summons and plaint on the defendant five and a half years after institution of the suit:-
 - (i) Is contrary to the provisions of Section 4(1) of the Limitation of Actions Act (cap 22) and 21/2 years after the prescribed limitation period.
 - (ii) Is an abuse of the process of the court and unlawful,
 - (iii) Is scandalous and/or may prejudice embarrass and delay the fair trial of this suit;
12. Whether the amended plaint discloses a cause of action:-
 - (i) by the 5th plaintiff against the defendant,
 - (ii) by the 1st, 2nd and 4th plaintiffs against the defendant;
13. Whether demand and notice of intention to sue was given to the defendant by the plaintiffs; and
14. Whether the plaintiffs are entitled to general damages.”

Looking at the two sets of issues, and considering the whole case presented before me, I am of the view that the second set encompasses the real questions in dispute between the parties. It is detailed and accepted by both parties. It was also later in time and I take it that by executing the same, both parties intended to relegate the earlier set which was executed by the advocates then on record for the plaintiffs only.

A number of these issues have already been resolved either on account of admission, or for not having been controverted or they relate mainly to “factual issues” or matters of record which speak for themselves. For the sake of clarity, let me go through the issues that have already been resolved.

To start with issue number (1) above. In its defence, the Bank denied knowledge or notice to the effect that Mr Nderitu was 50% shareholder of Intercom, Interstate, Swiftair and Continental Hotel but this was conceded by its advocates in the written submissions filed on its behalf. The next issue is number (4) above. It has been seen that the enquiry made to the Central Bank was in fact an inquiry to the police since the department concerned was in fact manned and staffed by police officers. It cannot be otherwise when one considers the fact that the Bank had treated the whole case from the beginning as a criminal act. It is no wonder that in the civil proceedings that ensued the Attorney General relied a great deal on the testimonies of the police when the real aggrieved party – Customs and Excise appeared not to be interested in the matter. As to issues numbered (7) and (9), it has already been seen that indeed Mr Nderitu was charged, convicted and sentenced in Criminal Case No 1716 of 1985 but later acquitted in HC Criminal Appeal No 539 of 1988. As to issue number (11) above, I would say that the same is now mute in view of the decision of my Learned Brother the Honourable Mr Justice Mbogholi Msagha given in respect of the preliminary objection by the Bank referred to at the beginning of this Judgment. The remaining issues represent the substance of the case before this Court. They constitute the real questions in controversy between the parties. Those questions can only be answered after careful consideration of the law applicable to the facts of this case. That is indeed what I now propose to do.

VI. THE LAW

The Counsel who prepared the written submissions filed on behalf of the parties did extensive research on the issues before this court. To them, I express my gratitude for a job well done.

It is common ground in this case that the Bank was a collecting banker in respect of the 17m cheque. The law discussed here shall therefore be limited as much as possible to such a banker. However, it may be appropriate at some point to offer a comparison on the rights and responsibilities of a paying banker. The law governing the protection of a collecting banker is found in section 3(2) of the Cheques Act (Cap 35) which provides as follows:-

- “3(1) ...
- (2) Where a banker in good faith and without negligence and in the ordinary course of business:-
- (a) receives payment for a customer of a prescribed instrument to which the customer has no title or has a defective title, or
 - (b) having credited the customer’s account with the amount of a prescribed instrument to

which the customer has no title or a defective title, receives payment of the instrument for himself;

the banker does not incur any liability to the true owner of the instrument by reason only of his having received payment of it; and a banker is not to be treated for purposes of this subsection as having been negligent by reason only that he has failed to concern himself with the absence of, or irregularity in, endorsement of a prescribed instrument of which the customer in question appears to be the payee.”

Section 2(1) of the same Act defines a “prescribed instrument” to mean:-

“(a) a cheque...”

Section 3(2) of Cap 35, while giving protection to a collecting banker, appears to also define the responsibility of such a banker when dealing with a cheque drawn in favour of its customer and its responsibility to the true owner of such a cheque. The true owner in these matters is the person who is, in fact, entitled to the proceeds of the cheque. The person in whose hands the cheque is remains a holder thereof in due course. The language of section 3(2) above is clear as relates the responsibility of the collecting banker to the true owner of a cheque. The banker is required to act with due care taking into account the interests of the true owner of the cheque. Both counsel for the parties were in agreement that this was a statutory obligation imposed on bankers. That is in view of the fact, as argued by the plaintiff’s advocates, that there is no contractual relationship between the collecting banker and the true owner of a cheque.

What is the extent of such duty and how does it qualify a banker’s responsibility to his customer?

The duties imposed on a collecting banker to the true owner of a cheque may be summarized as follows:-

- (a) the banker must act in good faith;
- (b) the banker must act without negligence, and
- (c) the action must be in the ordinary course of business;

Once the collecting banker fulfils these duties to the true owner of a cheque, he cannot thereafter be held liable for any loss to the true owner where he receives payment for the sum of the cheque. This matter was considered in the case of *Marfani & Co Ltd v Midland Bank Ltd* [1968] 2 All ER 573. The facts in that case were as follows. Mr Anwar Kureshy, a Pakistani, was employed by the plaintiff company. He was instructed to draw a crossed cheque for Sterling Pounds 3,000 in favour of a London firm called Eliazzade which was duly executed by the Plaintiff company’s Managing Director. Thereafter, Mr Kureshy went to a branch of the Defendant bank where considerable business was done by Pakistanis. He called himself Eliazzade and sought to open an account in that name. He told the securities officer who had authority to open new accounts, that he was thinking of going into business as a restaurateur, signed the particulars required by the bank with the name Eliazzade, and gave two restauranters as referees. He paid in Sterling Pounds 80 on January 24, 1966, to open the account and said that the majority of the funds would come later. The following day he paid in the Sterling Pounds 3, 000 cheque which he had endorsed in the name of Eliazzade together with sterling pounds 35 9s 6d in cash. The bank had the cheque specially cleared the same day without being asked to and credited the proceeds to the new account in the name of Eliazzade, although they would not have allowed the account to be operated without a satisfactory reference. On January 26, 1966 the bank was visited by Mr Ali, one of the referees, a Pakistani, who had been known to the bank since 1961. Mr Ali had had an account with the bank for some years and had previously introduced satisfactory customers to the bank. He told the bank’s Branch Manager that Eliazzade, as Mr Kureshy was known to both of them, had been known to him “for some time”. He was not asked how long. Mr Ali also told the bank that he believed that Eliazzade intended to start a restaurant and that in his opinion Eliazzade was alright for the conduct of a bank account. Mr Ali had in fact known Mr Kureshy for only a month as a customer at his restaurant and was in no position to vouch for his trustworthiness or even his identity. The other referee did not respond to the bank’s inquiry. Payments out of the account started a few days after Mr Ali’s reference was given. All the money in that

account was withdrawn in the course of the first week of February, 1966 and Mr Kureshy left for Pakistan. The plaintiff company brought an action for conversion of the Sterling Pounds 3000 cheque against the defendant bank. The Court of Appeal held that the bank had, on evidence, acted in accordance with the current practice of bankers and had discharged the onus of proving that they had acted without negligence. In that court's view the reference of Mr Ali was sufficient and the fact that the bank had not asked for any identification or inquired as to Mr Kureshy's employment was not lack of care in view of Mr Ali's reference concerning him. The rule established in that case is that a banker must act with reasonable care to protect the interests of the true owner of a cheque. This, it was said, will depend on the current banking practice. In delivering the leading Judgment of the court in that case Diplock, LJ said as follows at page 578:-

“At common law one's duty to one's neighbour who is the owner, or entitled to possession, of any goods is to refrain from doing any voluntary act in relation to his goods which is a usurpation of his proprietary or possessory rights in them. Subject to some exceptions ... it matters not that the doer of the act of usurpation did not know, and could not by the exercise of any reasonable care have known, of his neighbour's interest in the goods. This duty is absolute, he acts at his peril. [A] banker's business, of its very nature, exposes him daily to this peril. His contract with his customer requires him to accept possession of cheques delivered to him by his customer, to present them for payment to the banks on which the cheques are drawn, to receive payment of them and to credit the amount thereof to his own customer's account, either on receipt of the cheques themselves from the customer, or on receipt of actual payment of the cheques from the banks on which they are drawn. If the customer is not entitled to the cheque which he delivers to his banker for collection, the banker, however, innocent and careful he might have been, would at common law be liable to the true owner of the cheque for the amount of which he receives payment, either as damages for conversion or under the cognate cause of action, based historically on *assumpsit*, for money had and received. [S]o strict a liability, so absolute a duty, on bankers would have discouraged the development of banking business. It was progressively mitigated by statute ... by Section 4 of the Cheques Act 1957”.

The provisions of section 3(2) of our Cheques Act are in material respects similar to s 4(1) of the English Cheques Act under consideration in the *Marfani* case. It is, therefore, true that a banker's duty to the true owner of a cheque is no longer absolute but qualified by statute. The qualification the statute creates does not give the banker a carte blanche in dealing with his customers cheque but by necessary implication creates a conflict with the banker's duty to his customer (See *Lloyds' Bank Ltd v Chartered Bank of India Australia and China*[1928] All ER REP 285). Yet at the same time the statutes giving the duty confer upon the bank a privilege which affords it a defence to say that it acted “in good faith and without negligence.”

According to Diplock, LJ in the *Marfani* case the statutorily qualified immunity conferred on collecting bankers was intended to substitute for the absolute duty owed at common law by a banker to the true owner of a cheque. The duty now on the banker is “to take reasonable care to refrain from taking any such step which he foresees, or ought reasonably to have foreseen, was likely to cause loss or damage to the true owner” (Per Diplock, LJ at pp 578-9). What is the exact responsibility placed on a banker in respect of a cheque? According to Diplock, LJ, the banker's responsibility is to ensure that “his own customer's title to the cheque delivered to him for collection is not defective” (See p 579). The banker must ensure that no other person is the true owner of the cheque. There is no doubt that in determining this a banker may be required to make certain inquiries. What inquiries may he make? This will depend on current banking practice. “What the court has to do is to look at all the circumstances at the time of the acts complained of, and to ask itself were those circumstances such as would cause a reasonable banker possessed of such information about his customer as a reasonable banker would possess, to suspect that his customer was not the true owner of the cheque” (Per Diplock, LJ, in *Marfani* at p 579 and *The London Bank of Australia Ltd v Kendall* 28 CLR 401). According to *Marfani* a banker's duty to the true owner of a cheque commences at the time the cheque is delivered to him by his customer and “continues until the time that the banker allows his customer to use the money”. (See page 580).

Let me now turn to the banker's responsibility to its own customer vis a vis the true owner. The Learned

Author of *Paget's Law of Banking* (5th Edition) (1947, London) states at page 295 that a banker's only contractual obligation is to his own customer. He argues that outside of the duties imposed by the statute, there is no relation between the collecting banker and the true owner of a cheque giving rise to a duty on the part of the former to the latter. In his view, the use of the word "negligence" in the statute is, in a sense, an anomaly. The true exposition of the matter is that given by Denman, J and the Court of Appeal in *Bissell & Co v Fox Brothers & Co* (1884) 51 663, varied (1885), 53 LT 193, 3 Digest 241, 684. "The duty is a purely statutory one imposed on the banker in favour of the true owner, and the negligence consists in the disregard of his interests, apart from those of the customer", he says. In other words, the collecting banker does not in fact owe any duty to the true owner of a cheque save that if he acts without good faith and with negligence he will hold himself liable to the true owner of the cheque. It is, therefore, an assumed duty only to avail the banker the protection afforded to him by the statute. But in the nature of things, it is from the standpoint of the true owner that all questions of negligence contemplated under the statute must be viewed. In this respect Mackinon, LJ, said as follows in *Penmount Estates Ltd v National Provincial Bank, Stanley Moss & Pitcher (Third party)*. The Law Times (Vol 173) NOV 24, 1945 344 at p 346

"A collecting banker owes no contractual duty to the payee of a third-party cheque drawn on another bank, and when it is said that the bank have to establish that they have received payment in good faith and without negligence, that must mean negligence as regards the interests of the payee of the cheque."

The situation then creates a conflict between the duty, taken to be so, of the banker towards the true owner and the duty to his own customer. This is a conflict which must be solved carefully for "It might be an awkward matter for the banker to manifest suspicion of his own customer, but if he refrained from acting on such suspicion, he might easily render himself liable to the true owner, as having neglected his duty to him" (See p 296 of *Paget's Law of Banking*). It has already been seen that a collecting banker is entitled to make inquiries according to the current banking practice – but that does not entitle it "to be abnormally suspicious." (per Mackinon, LJ in *Penmount* supra at p 346)). According to the Learned Judge in that case, extreme suspicion might hamper reasonable dispatch of monetary transactions.

When may a banker make enquiries with respect to a cheque presented to him by customer for collection? According to Hutchison, J in *Thackwell v Barclays Bank Ltd* [1986] 1 All ER 676 it may be necessary to make an inquiry where the circumstances in which the cheque is presented for collection are unusual and out of the ordinary course of business. The Learned Authors of *Chalmers and Cruet on Bills of Exchange Cheques and Promisory Notes* (15th Ed) (1998), London) give the example where a customer opens an account with a small sum followed by payment in of a cheque for a large amount. He went on and said as follows at page 740:-

"The payment in of a number of "third party" cheques, that is to say, cheques originally made payable to a third party and purporting to be endorsed, especially if followed by withdrawal of the proceeds in cash, may also excite suspicion ... Even the payment in of a single third party cheque for a large amount may sound a warning, having regard to what is known of the customer's business. And grounds for suspicion arising from other circumstances may be enhanced if cheques are paid in for amounts disproportionate to the position known to be held by the customer. But sudden fluctuations in the account are not necessarily of any significance."

Otherwise the relationship of a banker and his customer is based on contract. (See *N Joachimson (A Firm Name) v Swiss Bank Corporation* [1921] All ER REP 92). It is an implied term of that contract that the banker will not divulge to third persons, without the express or implied consent of the customer, either the state of the customer's account, or any of his transactions with the bank or any information relating to the customer acquired through the keeping of his account, unless the bank is compelled to do so by order of a court, or the circumstances give rise to a public duty of disclosure or the protection of the banker's own interests requires it." (See paragraph 240 of *Halsbury's Laws of England* (Fourth Edition – Reissue) Volume 3(1)(1989), London) at page 200 and *Robertson v Canadian Imperial Bank of Commerce* [1990] LRC (Common) 35). In discussing the bank's duty of non-disclosure, Bankes, LJ, said as follows in *Tournier v National Provincial and Union Bank of England Ltd* [1923] All ER Rep 550 at p 555.

“The privilege of non-disclosure to which a client or a customer is entitled may vary according to the exact nature of the relationship between the client or the customer and the person on whom the duty rests. It need not be the same in the case of the counsel, the solicitor, the doctor, and the banks though the underlying principle may be the same. The case of the banker and his customer appears to me to be one in which the confidential relationship between the parties is very marked. The credit of the customer depends very largely upon the strict observance of that confidence.”

Scrutton, LJ, on his part said as follows at page 558 on the question:-

“... I have no doubt that it is an implied term of a banker’s contract with his customer that the banker will not disclose the account or transactions relating thereto of his customer except in certain circumstances ... [I] think it clear that the bank may disclose the customer’s account and affairs to an extent reasonable and proper for its own protection as in collecting or suing for an overdraft; or to an extent reasonable and proper for carrying on the business of the account as in giving a reason for declining to honour cheques drawn or bills accepted by the customer, when there are insufficient assets; or when ordered to answer questions in Law Courts; or to prevent frauds or crimes.”

Atkin, LJ in the same vein said as follows at page 560 and 561:-

“Is there any term as to secrecy to be implied from the relation of banker and customer? I have myself no doubt there is. Assuming that the test is rather stricter than Lord Watson’s require and is not merely what the parties as fair and reasonable men would presumably have agreed upon, but what the court considers they must necessarily have agreed upon, it appears to me that some term as to secrecy must be implied. The banks find it necessary to bind their servants to secrecy; they communicate this fact to all their customers on their pass book; and I am satisfied that if they had been asked whether they were under an obligation as to secrecy by a prospective customer, without hesitation they would say ‘Yes’ ... I come to the conclusion that one of the implied terms of the contract is that the bank enter into a qualified obligation with their customers to abstain from disclosing information as to his affairs without his consent, and I am confirmed in this conclusion by the admission of counsel for the bank that they do, in fact, consider themselves under a legal obligation to maintain secrecy ... (the obligation) must extend at least to all the transactions that go through the account and to the securities, if any given in respect of the account ... [O]n the other hand; it seems to me clear that there must be important limitations upon the obligation of the bank not to divulge such information as I have mentioned. It is plain that there is no privilege from disclosure enforced in the course of legal proceedings. But the bank is entitled to secure itself in respect of liabilities it incurs to the customer or the customer to it, and in respect of liabilities to third parties in respect of the transactions it conducts for or with the customer. It is difficult to hit upon a formula which will define the maximum of that obligation which must necessarily be implied. But I think it safe to say that the obligation not to disclose information such as I have mentioned is subject to the qualification that the bank has the right to disclose such information, when, and to the extent to which it is reasonably necessary for the protection of the bank’s interests, either as against their customer or as against third parties in respect of transactions of the bank for or with their customer or for protecting the bank or persons interested or the public against fraud or crime.”

In my view, the protection talked about in the foregoing matter would include the protection availed to the bank by section 3(2) of the Cheques Act as discussed earlier. The limitations discussed by the Learned Judges in *Toumier* would then involve the qualifications of a banker’s responsibility to his customer when dealing with a cheque presented to him for collection by the customer. These have been discussed earlier. The contract between the banker and his customer imposes on him a duty of non-disclosure on the one hand while Parliament gives him protection on the other. Section 3(2) of the Cheques Act confers upon the banker a privilege akin to the one available to professional persons like lawyers and doctors. When the section offers protection, the banker cannot be required, save in the situations already discussed, to make disclosure.

Who may the banker make inquiries to? He cannot inquire with the whole world. In the case of collecting a cheque for his customer, I think he is entitled to inquire with the true owner of the cheque to avail himself the statutory protection already discussed. Who is the true owner of a cheque? He is the person who would be kept out of his money were the proceeds of the cheque paid out to the wrong person. Where the cheque is not a forgery the true owner is the intended payee or indorsee of the cheque or the bearer of it. On the other hand, if the cheque is forged, the true owner is the drawer thereof. That being the case, a collecting banker has different responsibilities from the paying banker. The responsibilities of the paying banker when dealing with a cheque are outlined in section 4 of the Cheques Act and Section 80 of the Bills of Exchange Act (Cap 27) which provides protection for such banker. Section 4 of the Cheques Act reads as follows:-

‘4(1) where a banker, in good faith and in the ordinary course of business, pays a prescribed instrument drawn on him to banker, he does not in doing so incur any liability by reason only of the absence of, or irregularity in, endorsement of the instrument and –

- (a) in the case of a cheque, he is deemed to have paid it in due course; and
- (b) in the case of any other prescribed instrument, the payment discharges the instrument.

(2) A prescribed instrument which is not endorsed but which appears to have been paid by the banker on whom it is drawn is evidence that the payee has been paid by the banker the sum of money specified in the instrument.”

Section 80 of the Bills of Exchange Act on its part provides as follows:-

“80. Where the banker, on whom a crossed cheque is drawn, in good faith and without negligence pays it, if crossed generally, to a banker, and if crossed specially, to the banker to whom it is crossed or his agent for collection being a banker, the banker paying the cheque, and, if the cheque has come into the hands of the payee, the drawer, shall respectively be entitled to the same position as if payment of the cheque had been made to the true owner thereof.”

Section 2(2) of the Cheques Act specifically provides that it is to be read and construed, subject to subsection (1) which is irrelevant for the present purposes, as one with the Bills of Exchange Act.

That being the case, it was argued on behalf of the Bank that the obligation of a “clearing” (read collecting) bank to the true owner was higher than that of a paying bank. That the Bank was under greater responsibility as the collecting bank to make inquiry than KCB Moi Avenue as a paying bank. It was put as follows at page 36 of the Written Submissions filed on behalf of the Bank on July 13, 2002:-

“One notes that while a paying bank’s obligation in respect of a cheque presented by another bank is only to act in good faith, in paying the other bank, the obligation of the clearing (I assume the collecting) bank is to act in good faith and without negligence.”

The Bank’s counsel appears to have read the Cheques Act on its own without taking into account the relevant provisions of the Bills of Exchange Act. The Cheques Act only talks of the paying bank acting “in good faith”. The Bills of Exchange Act on its part requires the paying bank to act in good faith and without negligence.” When the Cheques Act is read and construed with this Act, it is apparent that a paying bank is under an obligation to act “in good faith and without negligence” as much as the collecting bank. In fact, the authorities discussed do not make a material distinction of this responsibility between the two banks when dealing with a cheque. The only difference in these matters is who should prove lack of good faith and the existence of negligence. In the case of a collecting bank the banker is the one to show that it acted in good faith and without negligence. In the case of a paying banker, the responsibility is upon the customer to show that the bank acted *mala fides* and without reasonable care. This does not of itself make the duty of one lesser or greater to that of the other. The authorities appear to treat the responsibility more or less the same, except, as I have indicated, the difference relates to the burden of proof. This is what Parker, LJ, meant when he said at p 440 in *Lipkin Corman (a firm) v Karpnale Ltd & another* [1992] 4 All ER 409, as follows:-

“In addition to cases relating to a collecting banker being sued in conversion and those relating to a paying banker sued for breach of contract raise different considerations. In the former class of case it is for the banker to establish that he collected without negligence, in the latter the burden is on the customer to prove negligence.”

When liability for negligence is not disproved in the case of a collecting banker and when it is proved in the case of a paying banker, they then stand in the same position: they lose the statutory protection availed to them under the Acts under consideration. What the authorities say is that the banker cannot, so to speak, “shut his eye” and expose the true owner of a cheque and still claim the statutory protection under consideration. In *Karak Rubber Co Ltd v Burden & Others* (No 2) [1972] 1 All ER 1210, it was held that although a bank was obliged to pay on demand a cheque which was in proper form and backed by adequate funds, it did not follow that a paying bank was under an absolute unqualified duty to pay without inquiry. It was said that a banker is under a contractual duty to exercise such care and skill as would be exercised by a reasonable banker. This care and skill includes, in appropriate circumstances, a duty to make inquiries before paying. Is this not a similar duty imposed on a collecting bank? Brightman, J, said as follows at page 1231:-

“In my view the Achilles heel of the bank’s argument, both in the *Selangor* case and in the case before me, is that it is not, and never reasonably could be, asserted that a paying bank with certain knowledge that the authorized signatories are misapplying the company’s funds may nonetheless rely on their signatures. If that is axiomatic, and, it was conceded so to be in the case before me, it seems utterly irrational to suppose that a bank has an unqualified duty to pay and no duty to inquire despite deep suspicion, approaching but falling short of certainty, that the funds are being misapplied. Once a bank disclaims the untenable position of being in all cases an automatic cash dispenser, whatever the circumstances, there is no rational stopping place short of a contractual duty to exercise such care and skill as would be exercised by a reasonable banker in similar circumstances. And that care and skill must rationally include, in appropriate circumstances, a duty to enquire before paying.”

The authorities on this question are numerous and I have read all those supplied by both counsel and they are all clear on the matter. The banker owes a duty to his customer which duty is qualified by statute requiring the banker to act in good faith and without negligence to prevent loss to the true owner of a cheque when dealing with the same. Otherwise, where everything is proper a banker’s primary responsibility is to his customer. This responsibility is wide according to the nature of the contract between them. One of these responsibilities and with which the court is presently concerned is that the bank undertakes to receive money and to collect bills for its customer’s account (See *N. Joachimson (A Firm Name) v Swiss Bank Corporation* [1921] All ER Rep 92). In the old case of *Bodenham v Hoskins* [1843-60] All ER Rep 692 at p 694 Kindersley, V C, said as follows:-

“I entirely agree with the many observations that have been made by counsel for the defendants, that as between banker and customer, in a naked case of banker and customer, the banker only looks to the customer in respect of the account opened in that customer’s name. Whatever cheques that customer chooses to draw the banker is to honour. He is not to inquire for what purpose the customer opened the account; he is not to inquire what the moneys are that are paid into the account, and he is not to inquire for what purpose the moneys are drawn out of the account. That is the plain general rule as between banker and customer.”

V. ANALYSIS AND CONCLUSION

So, then, having outlined the facts extensively as I have found them, and having considered the relevant law, let me now analyse these facts in relation to the applicable law to determine whether the Bank is liable to any or all of the Plaintiffs.

If I may, let me summarize the material facts, in their simplistic form, for a better understanding and illustration.

On one Friday in 1985, Mr Nderitu receives a cheque for Kshs.17m drawn by Customs & Excise in favour of his Company, Intercom. That night the Manager of the Bank's Westlands branch visits him. He is shown the cheque, and persuades Mr Nderitu to deposit the same in his Bank. Mr Nderitu agrees to do so. It is a large amount, a very large amount indeed by any standards, especially in 1985. So, on Saturday morning, Mr Nderitu goes to the Bank, fills out a deposit slip, and hands in the cheque, for deposit into the account of Intercom, his family company. The account is new, having been opened only eight days prior to this event. However, in accepting the deposit, the bank teller asks no questions, and demands no papers or information. To him or her the cheque is proper on the face of it.

On Monday morning, the Bank Manager phones Mr Nderitu. His superiors think this deposit is unusual, and asks Mr Nderitu if he could provide some documentary proof of payment. The Bank has no business asking for "proof" at this stage but does so. Mr Nderitu is not obliged to provide documents, but does so. He gives them the payment voucher.

The Bank notices, what it considers, are some significant discrepancies on the payment voucher – the amount shown in "words" does not tally with the amount shown in "figures"; there is a small shortfall in the payment according to the payment voucher, and the payment is endorsed to Intercom, although the actual beneficiary is Interstate, another of Mr Nderitu's family companies. This raises eye brows at the Bank. Meanwhile, on that same day, the Bank receives the Shs.17m payment from KCB, the paying bank. It deposits the money in Intercom's account, and even allows Mr Nderitu to "use" most of the funds. Mr Nderitu made one small payment, and transferred Shs.15m, to the account of another of his family companies, Swiftair, in the same Bank.

Meanwhile, the Bank, convinced that this is an unusual transaction, begins a series of inquiries. It begins with KCB, who says the 17m cheque is fine, and actually makes the payment. Not being satisfied, it phones the Customs & Excise and speaks to the first signatory of the cheque. He assures them of the legitimacy of the cheque. Still not being satisfied, it seeks to speak to the second signatory who is also the head of the Finance Department, who also assures them that the cheque is legitimate. The Bank continues to harbour a nagging suspicion, and decides now to speak to a police officer in the fraud section of the Central Bank of Kenya. That is when all hell breaks loose, and the rest is history.

The question that is uppermost in the mind of this court is whether the Bank, in the face of what everyone agrees was an unusual transaction, was entitled to make inquiries about the cheque.

My unequivocal answer is "yes", most definitely "yes". A bank is under a duty to act with reasonable care, to protect the interests of the true owner of the cheque, as per their banking practice. In this case, it simply had no choice, but to make inquiries. It receives a cheque that is unusually large, for deposit in an account that is unusually "new", supported by a voucher that has glaring and unusual discrepancies. So what is it supposed to do?

However, the most fundamental issue before this court is the extent to which such inquiries can and should be made. How far can a bank go in its pursuit to find the "truth"? Where do you draw the line?

So, was the bank entitled to make the enquiries that it did, and in the process make the disclosures that it did?

All the authorities on the question lay down the rule that there are situations in which a banker may have to inquire into the operations of its customer's account. These authorities say that the relationship of a banker and its customer is founded on trust. This is essential to the efficient conduct of business. Where that trust is eroded it may be very difficult for business to thrive and for people to conduct their business effectively. The case put forward by the Bank was that the 17m cheque represented a statutory payment made by a government agency, implying accordingly, that a higher duty of care was owed. To my mind, this is an academic distinction. It makes no difference who the drawer of the cheque is.

It makes no difference for what purpose it was drawn. The concern of any banker when collecting a cheque for its customer is limited to ensuring that the customer is in fact entitled to it. To ensure that it

shall not expose itself to liability to the “true owner” of the said cheque. It is not for the banker to assume the role of an investigator of its customer’s affairs, or to turn itself into the policeman of this nation.

To repeat what Kindersley, V-C said in *Bodeham v Hoskins* at p 694, the bank is not entitled “to inquire for what purpose the customer opened the account; he is not to inquire what the moneys are that are paid into the account, and he is not to inquire for what purpose the moneys are drawn out of the account”. The bank has a duty to keep the affairs of his customer private unless he is compelled by an order of the court or for his protection or to prevent commission of a crime. As concerns prevention of commission of crime it is not the same thing as saying that the bank can be the investigator of his customer’s affairs.

What happened in this case was very unfortunate indeed. The Bank collected money on behalf of its customer **and allowed him to make use of it**. It had made inquiries to the drawer of the cheque in issue who assured it that everything was fine. It did not stop there. It then chose to make inquiries to what the plaintiff’s counsel properly referred to as third parties. This was despite the fact that the cheque in question was proper on the face of it. The Bank had also been assured by Customs and Excise – the drawer of the said cheque, that it was proper. As to it being drawn in the name of Intercom this had also been explained to the Bank. There is sufficient evidence that Mr Nderitu as the Director of Interstate had expressly authorized this change. That was all the Bank was entitled to concern itself with. But I may even go further and state that KCB – Moi Avenue, the paying bank, did not have any problem honouring that cheque. Then, why should the Bank have had any more concern?

The case advanced by the Bank was that the payment for which the 17m cheque was drawn was in respect of export compensation to which Mr Nderitu’s companies were not entitled. That this amount was in respect of “exports” that were never made. Great attention was drawn on The Local Manufacturers (Export Compensation) Act (Cap 482) (Repealed) to show that Mr Nderitu’s Companies were not eligible for such compensation. In my view, it is unnecessary for this court to investigate that matter. This Court cannot turn itself into a tribunal to investigate whether a fraud was committed on the Government. That was for the Criminal Court to do so, and Mr Nderitu was eventually found innocent of any wrong doing. Here, the Bank was dealing with a cheque presented to it by its customer. In the normal course of things, it is not usual that in so doing the customer must give the banker a copy of the payment voucher for such a cheque. When the Bank received the cheque in question, it was duly concerned. It made inquiries with its customer, the drawer of the cheque and the paying banker. Upto this point, there is no serious complaint that the Bank acted out of line. It is the inquiry made to the Fraud Section of the Central Bank that gave rise to this case. That enquiry was in fact directed at the police. It may well be that the Bank owed a civic responsibility to ensure that no crime was committed but it does not lie in the mouth of the Bank to rely on such an argument to defeat its responsibility to its customer. The nature of the relationship created between a banker and its customer, as was seen earlier, rests majorly on trust. That the customer should be confident that his affairs with the bank shall not be exposed without his consent or in the special circumstances where the duty of non-disclosure does not apply. The bank has not shown to my satisfaction that it was entitled to disclose the affairs of its customers in this case to the police. As matters stand, it abdicated its responsibility as a banker and assumed the role of an investigator of the affairs of its customers. This had a catastrophic effect on its customers. Even if it is taken for a moment that the Bank was entitled to make the enquiries that it did, that right arose with respect to the 17m cheque. When the Bank collected the proceeds of that cheque on behalf of Intercom the Bank’s responsibility to the true owner continued but it came to an end when it allowed the customer to make use of that money. This was when it paid cheques drawn on Intercom’s account utilizing sums consisted in the 17m cheque and transferred the amount of Kshs.15,000,000/- to the account of Swiftair. Unfortunately, the Bank went on making inquiries after that. The Bank went far, much too far and was way out of line. It is, therefore, liable to those that it hurt, and caused damage to.

Now let me turn to the question of liability to Mr Nderitu personally. It was argued that because Mr Nderitu was not a customer of the Bank at the material time, he was not entitled to any claim; that liability, if any, attaches only to the customers of a Bank and to no one else. Here the circumstances are very different. The evidence before me is overwhelmingly clear that the plaintiff companies were private family companies that were legal outlets of Mr Nderitu’s business empire. He was in fact the sole signatory of the Bank accounts. He was the only person that the Bank dealt with, and the only person

whose instructions they followed. He was infact the alter ego of the plaintiff companies.

The Bank has not shown that it dealt with, or intended to deal only with the corporate entities, and not the individual who was really behind those companies. For example, the bank has not produced any corporate resolutions that it sought from Mr Nderitu in carrying out the latter's instructions. Secondly, the Bank's own conduct in freezing the accounts of Swiftair, a separate legal entity, further demonstrates that the Bank was treating this as Mr Nderitu's account, rather than a separate corporate account. If it was otherwise, the Bank would have had no recourse to the funds already paid to, and deposited in, the account of a separate legal entity. Clearly, the Bank made no distinction between Mr Nderitu and his family companies. The evidence is that the Bank dealt with, and always intended to deal with, Mr Nderitu personally. It, therefore, must have had, or ought to have had, Mr Nderitu in contemplation as the person who will suffer, or is likely to suffer damages arising from any of its unlawful or irregular actions.

In the nature of things, the Bank should have foreseen that interfering with the accounts of Mr Nderitu's companies would not only affect the business of those companies but Mr Nderitu's business as well. Mr Nderitu's case is not, as was advanced on behalf of the Bank, based on malicious prosecution but on the effect of the Bank's action in this case which resulted in the loss for which the action was brought. The Bank is liable to Mr Nderitu personally, as it is to his corporate entities for any losses sustained as a consequence of the Bank's unlawful acts.

It does not matter to me that Mr Nderitu and his companies subsequently negotiated how the moneys which had been frozen were to be dealt with. It is the first action of the Bank which put the plaintiffs' moneys in jeopardy contrary to the Bank's duty to them that matters. The subsequent negotiated settlements, if they are anything to go by, have greatly mitigated the Bank's liability in this case. The Bank's first action led to the plaintiffs being denied an opportunity to utilize money which the plaintiffs had banked with the Bank. Were it not for the negotiated settlement in the suit where the plaintiff's accounts were frozen the plaintiffs were bound to incur more losses for which the Bank would have been liable.

As for Continental Hotel although there was no pleading on the particulars of loss and damage suffered by Continental Hotel, it would appear that no real damage was occasioned to that plaintiff. This, however, is not the same thing as saying that the Bank is not liable to that party. The Bank's action was unlawful and the law is clear that for every breach of a right there must be a remedy. Without deciding the matter conclusively, there can be no doubt that the Bank is liable to Continental Hotel for the breach of its duty in this case. As there was no pleading as to the exact loss suffered, I think that is a proper case for the award of nominal damages. That shall be considered when the case will come up for assessment of damages.

All in all, I have come to the conclusion that the Standard Chartered Bank, the defendant in this case, in dealing with the Shs.17m cheque acted in an abnormally suspicious manner, pursuing its inquiries about the cheque rather recklessly and relentlessly with impunity, and in total disregard of the interests of its customers, causing them enormous damage.

I have no doubt that the Bank went too far, much too far, than was reasonably expected of it, and it must now be held responsible for the consequences of its actions. In the circumstances, I find that the Bank is liable to the plaintiffs for the loss sustained by them as a result of the Bank's breach of its duty not to disclose the affairs of its customers.

Accordingly, I enter judgment on liability in favour of the plaintiffs against the defendant with costs to be based on the quantum which shall be determined at the next stage of this trial. I direct that the case now be set down for the assessment of damages before any Judge of the High Court in Nairobi.

Dated and delivered at Nairobi this 18th day of November , 2002

A.R.M VISRAM

JUDGE