REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

CIVIL CASE NO 826 OF 1999

KITUI TOBACCO DISTRIBUTORS LIMITED ……..…….. PLAINTIFF

VERSUS

BARCLAYS BANK OF KENYA LIMITED…….. DEFENDANT

JUDGMENT

Sometime towards the end of the year 1997 a company known as British American Tobacco Kenya Limited or BAT Kenya Limited or simply BAT received a cheque number 000075 sometimes referred to as cheque number 75 for Kshs 1,7000,000/= from a client company identified as Kitui Tobacco Distributors Co Ltd, the plaintiff in this suit. Since that cheque was payable to BAT Kenya Limited, the company banked it in its account at the Industrial Area Enterprise Road Branch of the defendant bank. That cheque subsequently bounced and was returned to BAT Kenya Limited who apparently returned it to the drawer.

On 9th December 1997 the same cheque was received again by BAT Kenya Limited from the drawer. About the same time the same drawer identified by BAT Kenya Limited as Kitui Tobacco Distributors Co Ltd, a long time valuable client, drew another cheque in favour of BAT Kenya Limited and gave the cheque to the company BAT. It was cheque number 000079 sometimes referred to as cheque number 79. It was for Kshs 1,650,458/=.

The two cheques then in the hands of BAT Kenya Limited were on 23rd December 1997 banked together by BAT Kenya Limited in its account at the Industrial Area, Enterprise Road Branch of the defendant bank, which under special arrangement with BAT Kenya Limited, gave BAT Kenya Limited instant value.

The defendant bank had the advantage of being the receiving bank at the time of banking by BAT Kenya Limited at the Enterprise Road Branch and being the paying bank at its Kitui Branch where the plaintiff operated its account number 1064993 the account on which the two cheques were drawn. Once the defendant bank received the two cheques, therefore, subsequent transactions were internal transactions and that may explain why BAT Kenya Limited on banking the two cheques with the defendant, the defendant gave instant value of the cheques to BAT Kenya Limited.

The defendant knew both clients namely BAT Kenya Limited and the plaintiff and would even give the plaintiff overdraft facilities upto Kshs 4,000,000/=. The circumstances suggest that both BAT Kenya Limited and the plaintiff were the defendant's good and valuable customers. Unfortunately, however, after the defendant had given BAT Kenya Limited instant **value** for the two cheques at the defendant's Enterprise Road Branch in Nairobi, the two cheques were, among other things belonging to the defendant,

lost in a highway robbery when the things were being transported by road from Nairobi to the defendant's Kitui Branch.

Those two cheques have, therefore, not been produced in the Court during the hearing of this suit. They were being sent to the Kitui Branch of the defendant bank for the purpose of debiting the plaintiff's account number 1064993 aforementioned. The robbery took place on 31st December 1997. That means that the intended debiting at Kitui was going to be done within a reasonable time. But after that robbery the defendant took 18 months to remember debiting the aforesaid – plaintiff's account with the amount of money in the two cheques. The cheques having been lost were not there and have never been there. The delay of 18 months, up to 9th June 1999, not having been satisfactorily explained, the plaintiff is relying on that delay and the absence of the two cheques, among other reasons, to prosecute this suit.

The plaintiff is saying that the two cheques were to be presented for payment at the Kitui Branch of the defendant bank and that since the cheques did not reach there, they have never been presented up to this day and the defendant had no right or lawful excuse to debit the plaintiff's account as it did. The plaintiff goes on to say that when the two cheques got lost, the defendant failed to follow the legal procedure available to the defendant and BAT Kenya Limited, and relying on section 6 of the Bills of Exchange Act, it is the plaintiff's case that when the cheques got lost during a highway robbery between Nairobi and Kitui, the defendant should have alerted BAT as the holder for value, and as payee. The defendant bank should have reversed the credit entry in the payee's account. BAT should have contacted the plaintiff to be put on guard regarding the loss and thereby to countermand payment or presentation due to the loss arising from the robbery. The plaintiff would have replaced the lost cheque with new ones of the same tenor upon being given security by the payee to indemnify the plaintiff against all persons and claims whatever in case the cheques alleged to have been lost should be found again. If the plaintiff declined to re-issue fresh value to the payee, he could be compelled by legal action.

On the issue of lapse of time, the plaintiff relying on section 74 the first 15 words of paragraph (a) and the whole of paragraph (b) contested the defendant's position that the defendant was a holder of the cheques.

According to the plaintiff, the defendant was only a collector of the cheques and the cheques were to be presented at Kitui. It was submitted that for decades the practice in Kenya has been that a cheque is valid six months from the date of issue. Thereafter, the cheque becomes stale, invalid and bad for value or payment. I was urged to take judicial notice of the notoriety of this fact and practice pursuant to section 74 (b) of the Bills of Exchange Act; so that even if the lost cheques were available to the defendant bank when the plaintiff's account in Kitui was debited the transaction would be invalid because the cheques, issued before but banked on 23rd September 1997, were stale and invalid for payment on 9th June 1999, over 18 months from the date of issue. According to the plaintiff, therefore, the defendant is liable for applying and illegally using stale cheques, which were not even there, to debit the plaintiff's account, more than 18 months after they were drawn and lost.

From the pleadings and evidence before me therefore, the plaintiff came to Court firstly, because the plaintiff claimed it did not know who BAT Kenya Limited was; secondly because the plaintiff claimed it did not draw the two cheques in this suit as those cheques did not even belong to it; thirdly, because the plaintiff claimed it was entitled to a notice of the defendant's intention to debit the plaintiff's account at Kitui but the defendant had debited the account without having given such a notice and fourthly, the plaintiff came because it claimed that the cheques the basis of the defendant's debits to the plaintiff's account, were stale cheques and that even if they were not stale, they had been stolen and were not presented for payment at Kitui.

Since the defendant paid BAT Kenya Limited, the plaintiff prays that:-

(a) There be a declaration that the defendant was not entitled to debit the plaintiff's account No 1064993 with the sums of money in the two cheques.

(b) An order that the defendant do forthwith reverse the debit entries made on 9th June 1999 against the plaintiff's account No 1064993 in the sums in the two cheques.

Concerning the first contention, the evidence of PW1 Evans Mwanzui Ngava, the Director of the plaintiff company, and the evidence of DW2 Gibran Mwasi Mbela, the defendant's Marketing Finance Administration Manager, leave no room for any dispute. The position is settled that the plaintiff knows BAT Kenya Limited very well and that the two have been doing business for a long time, BAT Kenya Limited being the plaintiff's supplier of merchant goods on credit. Concerning the second contention, therefore, the Court has the evidence of PW1 Evans Mwanzui Ngava again, the evidence of DW1 Araka James Yamo and the evidence of DW2 Gibran Mwasi Mbela which sufficiently show that the two cheques were drawn by the plaintiff and belonged to the plaintiff.

More important is the evidence of the plaintiff's Director Evans Mwanzui Ngova. Having told the Court; in his evidence in chief, that he used to issue cheques to BAT Kenya Limited on account of goods supplied to the plaintiff by BAT Kenya Limited on credit, and having claimed that on this occasion he could not remember what happened, in cross examination he told the Court that he had not checked his cheque book's counterfoils to see whether the two cheques had been issued to him. He saw them in his bank statement entry dated 5th December 1997 cheque number 000075

for Kshs 1,700,000/= later shown to have been dishonoured. Later he said

"It is true I had issued a cheque to BAT for Kshs 1,700,000/=".

With respect to the second cheque, the witness was shown a letter dated 28th January 2000 addressed to M/s Kaplan and Stratton, Advocates by Mr Kiragu, BAT Kenya Limited Company Secretary and this is what I recorded from the witness:

"I know him as the company secretary. The letter is about HCCC No 826/99 which is this case. I read the letter. It is saying I issued the two cheques in question to BAT Kenya Limited. The letter says they presented the two cheques to the defendant who, under the arrangement with BAT gave instant value. I do not see any reason why Mr Kiragu should lie about that. It shows those cheques were received from the plaintiff and I do not doubt that. I am not doubting that letter. I now know I issued those cheques. I admit having issued the cheques Mr Kiragu is referring to in that letter. Issued for the goods BAT had supplied to the plaintiff on credit. My concern is how the cheques could have been paid some 18 months after issuing."

The letter from Mr Kiragu is defendant's exhibit 1. Having said the above the plaintiff's director later admitted that the two cheques number 000075 and number 000079 for Kshs 1,700,000/= and Ksh1,650,458/= respectively were from a cheque book previously issued to him by the defendant bank. Mr Evans Mwanzui Ngava admitted having applied for the issue of a cheque book using a cheque book ordering voucher produced as defence exhibit 3 dated 23rd August 1997. A cheque book containing leaves with serial numbers 000061 to 000120 was issued to him. Cheque number 75 from that cheque book was first presented by BAT to the defendant on the 5th of December 1997 and initially returned unpaid on 6th December 1997 and Mr Evans Mwanzui Ngava explained why the cheque was unpaid. An entry in the defendant's exhibit 6, a ledger of Kitui Tobacco Account number 1064993 of the plaintiff, shows that, that cheque was returned and was given to BAT Kenya Limited who, on 23rd December 1997 presented it again or re-banked it in their account at the defendant's Enterprise Road Branch. It was banked together with the second cheque number 79 and that was when the defendant gave instant value (give the depositor value of the cheques before clearance) for the two cheques to BAT, Kenya Limited, it is said "under arrangement" between the defendant and BAT Kenya Limited.

It was after that, that the two cheques were lost in a robbery while the cheques, among other things, were being transported from Nairobi to Kitui. To go back to the second contention, therefore, I find that the evidence of the plaintiff's director put together with the evidence of the two defendant's witnesses is overwhelming and leaves no dispute to the fact that the two cheques belonged to the plaintiff and the plaintiff drew them in favour of and gave them to BAT Kenya Limited. The plaintiff having finished labouring under those two contentions based on facts, the plaintiff turned to put alot of emphasis on the remaining two contentions both based on the technicalities of the law. The plaintiff stated during cross examination:

"I do not deny I issued those two cheques. But my case is that proper procedure was not followed as the two cheques should have been returned to me and should not have been paid out of time 11/2 years. True I owed BAT Ksh 3.3 million. I paid them by the cheques mentioned in that letter by Mr Kiragu. It is the debit of that money which drove me out of business."

This leads to the third contention in which the plaintiff is claiming it was entitled to a notice of the defendant's intention to debit the plaintiff's account at Kitui and that the defendant failed to give such a notice. It appears to me that although this was advanced by the plaintiff as a reason why the plaintiff filed this suit and, therefore, as a contention between the plaintiff and the defendant, no evidence was led and, therefore, no clear submissions were made to establish that claim. It seems to have been submerged into the evidence and submissions about the fourth claim. Otherwise I expected clear evidence and thereafter submissions on the law setting out the requirement for a notice. That evidence is not there. Moving to the fourth claim, and this is to the effect that the cheques, the basis of the defendant's debits to the plaintiff's account, were stale cheques and that even if they were not stale, they had been stolen and were not presented for payment at Kitui, there is substantial evidence and submissions on each side raising a number of issues as each side, Mr Maseki and Mr Mwangi representing the plaintiff and Mr Fred Ojiambo representing the defendant bank, tended to emphasize this part of the case. I may not do justice to all that information but I will do my best to make myself understood – in an effort not to unnecessarily use my time in writing this judgment.

As Mr Ojiambo put it, the real questions to be answered are these: Was the defendant bank entitled to have debited the plaintiff's account to the value of the two cheques notwithstanding that the cheques were lost before reaching the Kitui Branch of the defendant bank? In any event, could the defendant bank do so 18 months after the drawing date of each cheque?

While the plaintiff's answers to those two questions are in the negative, the defendant's answers are in the affirmative. My humble view is that the defendant having given immediate value to BAT Kenya limited upon the depositing of those two cheques, the defendant became a holder for value of the cheques in question and was entitled to look upon the plaintiff for payments in accordance with the tenates of those cheques. Section 27(2) of the Bills of Exchange Act states:

"Where value has at any time been given for a bill the holder is deemed to be a holder for value as regards the acceptor and all parties to the bill became parties prior to that time."

Subsection (3) of that section adds:

"Where the holder of a bill has a lien on it, arising either from contract or by implication of law, he is deemed to be a holder for value to the extent of the sum for which he has a lien."

As the holder for value, the holder has a right to look to the drawer for payment. The defendant was a holder for value. He had the right to look to the plaintiff, the drawer, for payment. But more than that, the defendant as a holder for value, had a lien for the amount of money represented in those cheques. The defendant is a banker and this was, therefore, a banker's lien. *Halsbury's Law of England,* Third Edition Volume 2 page 210 paragraph 390 says this about the nature of lien:

"The general lien of banks is part of the law merchant as judicially recognized, and attaches to all securities deposited with them as bankers by a customer, or by a third person on a customer's account, and to money paid in by, or to the account of, a customer unless there is contract, express or implied, inconsistent with the lien. The lien is not limited to fully negotiable securities, but has been held to cover share certificates, an order to pay a particular person a sum of money, and a policy of insurance."

In paragraph 391 which shows when lien attaches, it is added:

"Whatever the nature of the securities, the lien only attaches when they have come to the banker's hands, *quo* banker, in the way of his business. Either because the receipt of securities or valuables for safe custody is not part of the ordinary business of banking, or because receipt for such purposes involves an

implied contract inconsistent with the assertion of lien, the lien never attaches to securities or articles in the banker's hands for safe custody. Nor does the lien attach to any money or security known to the banker to be affected by a trust or not to be the actual property of the customer, or to money paid in by a third person under mistake of fact."

At page 212 of the same paragraph it is stated

"The banker's lien extends to bills and cheques paid in for collection, unless the receiving banker has notice that the bills are the property of such customer. Where bills, notes, or cheques pass from a customer to a banker, a question of fact arises whether the banker takes them for collection subject to the lien, or as transferee, so as to become absolute holder for value. Where he takes them for collection the banker is, however, holder for value to the extent of the lien, and has full beneficial interest to that extent, and can sue for the full amount, holding any surplus over the customer's indebtedness as trustee for him. Where he holds as transferee, lien is excluded, but he has the ordinary rights of a holder for value, and can sue for the full amount irrespective of the customer's indebtedness, and without having to account for any balance received by him in excess of such indebtedness."

As to when lien accrues, the relevant commentary is in paragraph 392 where it is stated:

"No lien arises in respect of an advance of a specified amount made for a definite period until the arrival of the due date, as there is no debt owing till then; nor can the banker retain monies of the customer against bills discounted by him for the customer, but not yet due, except in the case of the customer's bankruptcy."

By drawing each cheque the plaintiff was thereby authorizing the defendant bank to pay the payee named in each cheque the sum of money mentioned in that cheque. There is no evidence that that authority was countermanded at any time. The plaintiff sent the cheque to BAT Kenya Limited, the payee. The payee had to be paid by the defendant, the person authorized by the plaintiff to pay the payee. The payee, therefore, took the two cheques to the defendant's Enterprise Road Branch where the payee's account was and deposited the two cheques into the payee,s said account so that the defendant could be able to pay the money to the payee. That is sometimes called presenting the cheques for payment. BAT Kenya Limited presented the two cheques to the defendant bank for payment by the defendant to BAT Kenya Limited.

The defendant bank was both the collecting bank and the paying bank through its Enterprise Road and Kitui Branches. The defendant bank was bound to pay cheques drawn on it under section 73 (1) of the Bills of Exchange Act, Chapter 27 Laws of Kenya which states:

"A cheque is a bill of exchange drawn on a banker payable on demand."

Section 75 of the same Act says that the duty and authority of a banker to pay a cheque drawn on him (the banker) by his customer are determined by

"(a) Countermand of payment;

(b) notice of the customer's death."

In "*Guide to Negotiable Instruments And The Bills of Exchange Acts* – by Dudley Richardson, Sixth Edition, page146, commenting on the revocation of a banker's authority under the English section similar to our section 75 above mentioned, the writer states that besides the two occasions already mentioned, there are other occassions when a banker's authority to pay is terminated:-

"(a) Notice of lunacy of customer;

(b) Notice of presentation of a bankruptcy petition against him;

(c) Making of (Bankruptcy) Receiving Order (in the case of a company, notice of its winding up);

(d) Assignment of balance by customer;

(e) Service of garnishee order attaching the whole of the balance;

(f) Notice that his customer is an undischarged bankrupt;

(g) Notice of a breach of trust (eg, if it appears fairly certain that the cheque in question, drawn by a trustee, is a withdrawal of money to be used otherwise than for the purpose of the trust);

(h) Notice of defect in the presentor's title – this must obviously entail refusal to pay since a banker must pay in good faith."

But where the customer's credit balance is insufficient to cover the cheque or where the payment of the cheque would increase the customer's indebtedness above the agreed maximum, the banker can pay or dishonor the cheque as he pleases. He concludes:

"It should always be borne in mind that the banker has a duty to pay his customer's cheques (unless circumstances such as those above operate), and a refusal to pay without adequate reason will mean the banker's liable to his customer or damage to his credit.

But in no circumstances will a banker be liable to the presenter of a cheque for wrongful refusal to pay or, in more technical terms, there is no privity of contract between the drawee banker and the holder of a cheque." Loss of the cheque or lapse of time are not included among the reasons for revocation of a banker's authority. It is not among the occasions when revocation of a banker's authority happens.

I should perhaps emphasize the position by saying that section 69 of the Bills of Exchange Act relates to a cheque which has been issued but got lost before it is presented to a banker. The absence of the term "banker" in that section is significant and, therefore, that section does not apply in this suit before me. Similarly section 74 of the Bills of Exchange Act does not apply and it is significant that the plaintiff is relying on the first 15 words of paragraph

(a) only thereby leaving out almost the whole meaning of that paragraph.

For its proper meaning this is what section 74 paragraphs (a) and (b) say:

"74. Subject to the provisions of this Act:-

(a) Where a cheque is not presented for payment within a reasonable time of its issue, and the drawer or the person on whose account it is drawn had the right at the time of the presentment as between him and the banker to have the cheque paid and suffers actual damage through the delay, he is discharged to the extent of that damage, that is to say, to the extent to which the drawer or person is a creditor of the banker to a larger amount than he would have been had the cheque been paid;

(b) In determining what is a reasonable time regard shall be had to the nature of the instrument, the usage of trade, and of bankers, and the facts of the particular case."

Mr Dudley Richardson's commentary is at page 206 of *"Guide to Negotiable Instruments and Bills of Exchange Acts"* as follows on "stale cheques, overdue cheques etc.":

"It is well known that a cheque bearing a date six months or more prior to its date of presentation to the drawee bank for payment will be dishonoured as 'stale'. Though the drawer of his cheque is liable on his signature for six years, his bank rightly thinks it in his own interests to have second thoughts as to payment and consequently refuses payment. This is no breach of contract since it is the normal course of business. In practice, the holder of the cheque would request the drawer to alter the date or alternatively issue a duplicate, and this request would be hard to refuse since, as we have seen, the drawer is liable on his signature for six years. Even if such a cheque be deemed 'overdue' within the meaning of the Act of

1862, this will not discharge the drawer from his liability; such merely affects the possibility of a transferee being a holder in due course (section 29 of the 1882 Act)". To my mind, therefore, section 74 paragraphs (a) and (b) are not about stale cheques. They are simply about a cheque which is not presented for payment within a reasonable time of its issue depending on the usage of trade and of bankers and the facts of the particular case and as a result the drawer or the person on whose account it is drawn suffers actual damage through the delay. This is simply where presentment is unreasonably delayed resulting into actual damage. That is unlike a stale cheque as a stale cheque is refused payment.

No statutory provisions have, therefore, been brought to my attention governing stale cheques. It seems to me that whether or not a cheque is stale is a matter of fact and not a matter of law. As such that fact has to be proved by the party alleging it and the question of the Court taking judicial notice merely because the cheque in question is six or more months old does not arise.

But if I am wrong to hold that view and in order to give further explanation as to the position of a stale cheque as I see it bearing in mind the commentary just quoted above, it seems to me that a cheque becomes stale, not simply because it is six months or more old, but because a banker has refused to accept it for payment. It is upon that refusal that the cheque becomes stale. Otherwise the drawer of a cheque is liable on his signature for six years. It means that unless and until a banker refuses to accept a cheque for payment, that cheque cannot be said to be stale.

It is for the banker himself to see whether it is in the interest of this customer, the drawer, "to have second thoughts as to payment". If the banker thinks it is in the interest of his customer, the banker will refuse payment and that is when the cheque becomes stale. Otherwise the banker is at liberty to accept the cheque for payment and proceed to pay even if it is more than six months old and such a cheque cannot be said to have been stale. The drawer and/or the payee cannot, therefore, either jointly or severally make their cheque stale when the banker is accepting and paying that cheque and a mere statement from the drawer and or payee that a cheque is stale does not make the cheque stale as, not only is the banker under a contract with the drawer, but he is also under a statutory duty to pay the cheque on demand. That being the position, the two cheques in question in this suit or any of them cannot be said to have been stale as there is no evidence that the defendant bank refused to accept them or any of them for payment. On the contrary there is undisputed evidence that the defendant, the banker, accepted the cheques on 23rd December 1997 when it also gave the cheques instant value thereby crediting the payee's account and proceeding on 9th June 1999 to debit the plaintiff's account with the sum of money in the same cheques. Another point to note is that a cheque becomes stale when presented "to the drawee bank for payment" and that bank refuses payment. It is "the drawee bank" and not "the drawee's bank". Further, it is "the drawee bank" and not "the drawee branch". In the instant case, the drawee bank is the defendant bank. When the two cheques were presented on 23rd December 1997 by BAT Kenya Limited, at the Enterprise Road Branch of the defendant, the two cheques were thereby presented to the drawee bank. They did not have to wait to be taken to the Kitui Branch for them to be said to have been presented to the drawee bank for payment. The two cheques were presented to the drawee bank on 23rd December 1997 at the Enterprise Road Branch. That was the time to see whether the cheques were six or more months old. I have no evidence to show that by that date the cheques were or any of them was six or more months old.

The question of another presentation being intended at the Kitui Branch of the defendant bank is a misleading one and should be rejected as the Kitui Branch is a mere branch of the defendant. No presentation of the cheques was going to be done at the Kitui Branch of the defendant bank. It was the debiting of the plaintiff's account which was to be done for the defendant's record at the Kitui Branch to reconcile with the defendant's record at the Enterprise Road Branch in Nairobi and that was done.

As I stated earlier, the defendant had the advantage of being the receiving bank and the paying bank. The collecting bank and the paying bank. The transactions were internal involving two customers the defendant knew as good and valuable customers to the extent of being confident enough to give the plaintiff over draft facilities up to Ksh 4,000,000/-. The plaintiff's Director, Evans Mwanzui Ngava, told the Court during cross examination:

"True I was borrowing from the defendant through overdrafts. But it was not true that I could not go on

because the bank could not give me more overdraft because I had reached the limits. I subsequently was given over draft limits of 3 to 4 million shillings."

During re-examination the director added:

"My overdraft sometimes went to the limits of Ksh 3 to 4 million."

By the use of the word "I" the witness was referring to the plaintiff company. He was the person behind the working of the plaintiff. The person issuing and drawing the cheques.

Moreover, it should be realized that the plaintiff has sued Barclays Bank of Kenya Limited. As such, that defendant comprises of the headquarters and all branches of the defendant including the Enterprise Road and Kitui Branches. It follows that when a cheque is presented at the Enterprise Road Branch, and not at the Kitui Branch, you cannot rightly say that that cheque has not been presented to the defendant bank and should not be paid. It cannot correctly be said that the defendant bank "purported to debit the plaintiff's account which was not held by" the defendant bank.

The true position is that it is the defendant bank which credited the account of BAT Kenya Limited at the Enterprise Road Branch and debited the plaintiff's account at the Kitui Branch with the amount of money in the two cheques and the defendant bank, having been given authority to do so by the plaintiff and that authority not having been countermanded, had the right to do what it did and not only was that action lawful, its performance did not impose any duty upon the defendant to give a notice to the plaintiff.

Evidence is that BAT Kenya Limited was entitled to be paid that money for goods supplied to the plaintiff on credit and payment was to be done by the plaintiff. BAT was paid the money and is not complaining and has not even been joined by the plaintiff in this suit. If the debit entries made on 9th June 1999 are reversed, BAT Kenya Limited will still remain with the money. The result will be that the plaintiff will have obtained goods on credit from BAT Kenya Limited for the plaintiff to pay. But instead of the plaintiff paying for the goods, the plaintiff will have succeeded in forcing the defendant to pay BAT Kenya Limited for the goods without the plaintiff being under duty to pay any cent either to BAT Kenya limited or to the defendant. Unjust enrichment.

By drawing the two cheques, the plaintiff customer of the defendant, authorized the defendant to pay the payee named in those cheques thereby imposing upon the defendant not only a contractual but also a statutory duty to pay the cheques on demand by the payee at the time the cheques are presented. When the payee presented the cheques to the defendant, therefore, and the defendant accepted them, not only did the defendant have the authority but also the duty to pay the cheques. By virtue of that responsibility alone the defendant acquired a general lien of banks which made the defendant a holder for value to the extent of the lien and could sue for the full amount. When the defendant subsequently proceeded to give instant value to the payee, the defendant in a sense, became a holder for double value and the defendant's entitlement to sue for the full amount became double stronger. The two cheques, having been presented for payment on 23rd December 1997 though subsequently lost in transit from

Nairobi to Kitui in the hands of the defendant who had a lien and had already given instant value and was a holder for value, were not and did not become stale and the defendant rightly looked upon the plaintiff for the full value of the two cheques even 18 months after the cheques had been presented.

To conclude this part of the judgment, I hold the view that the defendant bank was entitled to have debited the plaintiff's account to the value of the two cheques notwithstanding that the cheques were lost before reaching the Kitui Branch of the defendant bank and that, in any event, the defendant bank could do so 18 months after the drawing date of each cheque.

On the whole, therefore, I find that the plaintiff has not yet succeeded in proving its case against the defendant even on the balance of probabilities.

Accordingly the plaintiff's suit herein be and is hereby dismissed in its entirety – with costs to the

defendant.

Dated and delivered at Nairobi this 30th day of November, 2001

J.M. KHAMONI

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J UDGE