



Jumbo Foam Mattresses Limited v Dubai Bank Limited & 2 others (Civil Case 21 of 2014) [2023] KEHC 2357 (KLR) (17 March 2023) (Judgment)

Neutral citation: [2023] KEHC 2357 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CIVIL CASE 21 OF 2014
RE ABURILI, J
MARCH 17, 2023**

BETWEEN

JUMBO FOAM MATTRESSES LIMITED PLAINTIFF

AND

DUBAI BANK LIMITED 1ST DEFENDANT

PHILIP OWALA ODERA ODERO 2ND DEFENDANT

SIMON OKUMU MAJIMBO 3RD DEFENDANT

JUDGMENT

1. This file has been around for quite a while. By an amended plaint dated 12th May, 2015, the plaintiff sought the following reliefs against the defendants jointly and severally:
 - a) Kshs 12,281,217. 50 with interest thereon at court rates from the date hereof until full and final settlement.
 - b) Costs of the suit and interest thereon from the date of judgement until payment in full.
2. The plaintiff pleaded that it is in the business of manufacturing foam mattresses and related products which it sells to various retailers across the country. That sometimes in the year, 2014, its attention was drawn to the fact that cheques paid to them by its customers were collected by unknown individuals. The plaintiff Company launched investigations through the Anti Banking Fraud Unit and discovered that the cheques were deposited into an account held with the 1st defendant's Eastleigh Branch and cheques worth Kshs 12,750,857.50 had been deposited in the said account and withdrawn. That the amount included a cheque drawn in favour of Jumbo Quality Products Limited, the plaintiff's sister company. The plaintiff then issued formal demands to the 1st defendant to cease operations and refund the money so paid out through the account in vain necessitating the filing of this suit.



3. The plaintiff attributed the loss of the cheques to the 1st defendant's negligence in permitting the account to be opened and operated in a suspicious manner.
4. The 1st defendant filed its statement of defence admitting that the account was indeed opened at its Easleigh Branch but denied that it was negligent and or fraudulent in the manner of opening and operation of the account.
5. The 1st defendant contended that it conducted due diligence expected of it as a bank, relating to opening of the account procedures as accepted through practice and trade custom. It therefore prayed for a dismissal of the suit.
6. The 2nd and 3rd defendants neither entered appearance nor filed defence hence judgment was entered against them as prayed in the plaint in default of appearance or defence. The suit proceeded to hearing. PW1, Mr. Jayesh Kumar Patel, the plaintiff's Managing Director adopted his witness statement filed in court as his evidence in chief and testified relying on the documents filed into court which were all produced as exhibits Nos 1-68. PW1 testified that the plaintiff was in the business of manufacturing foam mattresses which are supplied to retailers around the country and payments made via cheques which are collected by the plaintiff's agents.
7. That sometimes on 8/1/2014, their attention was drawn to persons masquerading as its agents collecting cheques and not transmitting them to the plaintiff. On investigation by the plaintiff and its customers, they found that the cheques had been deposited in account number 00811**** at the first defendant's Eastleigh branch which account the plaintiff knew nothing about.
8. Upon discovery, the plaintiff alerted the 1st defendant by way of letters informing it of the activity which didn't elicit any response forcing it to report to the banking fraud investigations unit which established that a total of Kshs 12,750,857.50/= had been deposited and withdrawn from the account including the cheque drawn in favour of Jumbo Quality Products Limited.
9. PW1 asserted that the 1st defendant should have exercised caution before allowing the 2nd and 3rd defendants to open and operate the account by conducting due diligence on the information provided to it by the said defendants. That the 1st defendant's act of ignoring correspondence from the plaintiff shows that the 1st defendant lacked care and was complicit in the fraud.
10. On being cross examined by the 1st defendant's counsel, PW1 stated that the plaintiff used to send its sales representatives to collect cheques from their clients or even its driver, but that the 2nd and 3rd defendants were not their drivers. He stated that the 1st Defendant allowed the 2nd and 3rd Defendants to open an account in the plaintiff's name without verifying on the existence of the company and its directorship from the Registrar of Companies.
11. PW1 further stated that on realizing suspicious transactions, they notified the 1st defendant by letter and the in-charge of Anti Banking fraud unit which investigations were carried out by Central Bank of Kenya because the 1st defendant Bank refused to give the plaintiff access to the fraudulent Bank account. He stated that the account was opened without due diligence, cheques were banked and money was withdrawn all the time within a short time in cash from the said account.
12. The 1st defendant called John Masega Ombasa a Resolution Officer with the Kenya Deposit Insurance Corporation (KDIC) who testified as DW1 after adopting his witness statement as his evidence in chief. He also relied on the documents filed in court which were produced as exhibits 1-13.
13. According to DW1, the 2nd and 3rd defendants approached the 1st defendant Bank with a view of opening an account and were duly notified of the documents required before the account could be



- opened. Among the documents required were 2 passport size photographs, copies of their identity cards, utility bills as proof of address, copy of Kenya Revenue Authority PIN certificates, copies of certificate of incorporation of the company, copies of Articles and Memorandum of Association, signed mandate form and opening balance of kshs 5,000/- and above.
14. The 1st defendant's witness further stated that upon receipt of the required documents, the 1st defendant carried out due diligence and upon being satisfied of the documents so supplied, it proceeded to open the account in the name of Jumbo Foam Mattress Industries Limited which account became active by virtue of being a business account as transactions took place as is usual with such accounts which became active until 24/1/2014 when the bank was served with a motion and warrant from the Banking Fraud Investigations Unit. He testified that the bank did not act fraudulently and was not aware of the cheques being collected from the plaintiff's customers by unauthorized individuals masquerading as the plaintiff's agents.
 15. On cross-examination by the plaintiff's counsel, DW1 stated that the 1st defendant had its own guidelines that help handle criminal activities and money laundering and from the documents presented, due diligence should have been done to verify the authenticity of those documents. That from the documents they got from the Bank, they could not ascertain if the Bank did due diligence and that neither could they tell that the bank verified the authenticity of those documents before opening the account.
 16. DW1 stated that the account was opened on 17th August 2013 while the company in whose name the account was opened existed from 26th May 2009. He stated that the individual Directors who opened the account provided their individual PIN certificates despite it being a mandatory requirement that PIN Certificate for the Business must be presented hence, the witness concession that the opening of the account was irregular.
 17. The 1st defendant's witness stated that clause 4.3.1.3 (d) of the Central Bank of Kenya Prudential Guidelines requires presentation of audited financial statements for corporates at the time of opening of a company account, to help ascertain the company's Financial position while under clause 4.5, it is a requirement to check frequency of large deposits and withdrawals from the opened account.
 18. The 1st defendant's witness stated that it was normal to open the account the same day then the account is flagged until due diligence is completed although in this case, he conceded that the money was deposited a few days later and it was withdrawn from the account.
 19. DW1 further testified that the Bank cleared a cheque drawn in the name of a different company Jumbo Quality Products Ltd through the impugned account holder which act he stated rarely happens and he added that he found that the manner in which the account was operated rather strange.
 20. At the close of the hearing, both parties filed their written submissions.
 21. The plaintiff's counsel submitted that the 1st defendant was reckless in that it ought to have exercised caution before allowing the 2nd and 3rd defendants to open the account by carrying out due diligence on the documents presented to the 1st defendant for purposes of opening he account. That the 1st defendant breached the Standard Banking Regulations more specifically, clauses 4.3 of the Prudential Guidelines which are binding on the 1st defendant because they are issued under Section 33(4) of the [Banking Act](#).
 22. It was submitted that the deposits and withdrawals into and from the said account were unusual yet the 1st defendant failed to notify the Central Bank of Kenya of such suspicious activities in line with the Central Bank of Kenya Prudential Guidelines for Institutions licensed under the [Banking Act](#).



23. It was further submitted that individual banks must conduct a search to verify the information given by the corporate customers seeking to open bank accounts. It was argued that the 1st defendant failed to carry out the search on the 1st and 2nd defendants. That the 2nd and 3rd defendants did not provide a KRA PIN while opening the account for the company account holder which document is a mandatory document for operating businesses in Kenya by corporates.
24. The plaintiff's counsel further submitted that the account was operated in a strange manner such that the 2nd and 3rd defendants could withdraw the money immediately a cheque was deposited and cleared. That there was no single cheque issued to a third party from the said account despite the fact that the alleged company was a manufacturing company. That this anomaly by the 1st defendant violated regulation 4.5.7 of the Prudential Guidelines.
25. On alleged negligent acts of the 1st defendant, the plaintiff's counsel submitted that the plaintiff reported the matter to the 1st defendant by way of a letter delivered on 10/1/2014 asking the 1st defendant Bank to investigate the account but that despite receipt of such information, the Bank did nothing and left the account operational until 24/1/2014. That the 1st defendant Bank was complicit to the fraud. The plaintiff's counsel submitted that even if the plaintiff was not the 1st defendant Bank's customer, the Bank owed it a duty of care as was stated in the case of *Equity Bank (Kenya) Limited v D.O. Ogallob Riara & another* [2019]eKLR.
26. It was further submitted that in the circumstances of the case herein, the 1st Defendant Bank was not only negligent but colluded with the 2nd and 3rd defendants to allow the mischief continue even after the issue the 1st defendant.
27. Submitting on behalf of the 1st defendant, its counsel identified the following issues for determination: whether there was negligence on the 1st defendant's part in allowing the 2nd and 3rd defendants to open and operate the account in the plaintiff's name; whether there was negligence on the plaintiff's part; whether the 1st defendant acted fraudulently in opening and permitting the operations of the account in the plaintiff's name and finally whether the plaintiff is entitled to the reliefs sought.
28. On the first issue, it was submitted that the requirement of providing KRA PIN at the time of opening an account was not mandatory and that neither was there a mandatory requirement that a business must have a KRA PIN and that therefore the documents produced by the 2nd and 3rd defendants sufficed and that the 1st defendant therefore acted prudently in the circumstances. It was submitted that the name in which the account was opened is distinct from the plaintiff and that therefore, the 1st defendant could not contact the plaintiff to confirm whether the individuals were acting on the plaintiff's behalf.
29. On the withdrawal of huge sums of money from the opened Bank account, it was submitted that it is normal for such withdrawals to be done since in some instances, the withdrawals are necessary to support the business. On the 1st defendant's alleged failure to respond to formal demand, it was argued that no such request was made to the 1st defendant.
30. On the second issue, the 1st defendant's counsel argued that the plaintiff by failing to inform its customers of the agents that they could be sending to collect cheques on its behalf, the bank was not negligent and therefore the plaintiff contributed to the loss.
31. On the 3rd issue, it was submitted that there was no evidence that the 1st defendant conspired with the 2nd and 3rd defendants to defraud the plaintiff. That the 1st defendant owed the plaintiff no duty to inform it of the account since the plaintiff and the entity in whose name the account was opened were distinct.



It was also argued that the 1st defendant did not overlook standard banking procedures and regulations. In support of this contention, the cases of *Vijay Morjaria v Nansingh Madhusingh Darbar & another* [2000] eKLR, *Christopher Ndaru Kagina v Esther Mbandi Kagina & another* [2016] eKLR and *Moses Parantai & Peris Wanjiku Ukuru (suing as the legal representative of the estate of Sospeter Mukuru Mbeere (deceased) v Stephen Njoroge Macharia* [2020] eKLR.

32. Lastly, it was submitted on the issue of reliefs sought that the plaintiff had not established on a balance of probability the allegations of negligence on the part of the 1st defendant and therefore the plaintiff was not entitled to the orders sought. The 1st defendant urged this court to dismiss the plaintiff's suit with costs.

Analysis and Determination

33. I have carefully considered the parties' respective pleadings, documentary evidence produced as exhibits and the testimonies of the respective parties' witnesses. I have also considered the submissions as filed. Both parties filed an agreed list of issues on 8/11/2021 identifying the following issues for determination:
- a. Whether several cheques payable to the plaintiff's customers were collected by persons unknown to the plaintiff being unauthorized persons masquerading as the plaintiff's agents.
 - b. Whether the account number 0081169748 was opened with the first defendant at its Eastleigh Branch by the 2nd and 3rd defendants.
 - c. If the answer to issue no 1 and 2 are in the affirmative, what was the value of those cheques and did they include a cheque of Kshs 469,640/= payable to Jumbo Quality Product Limited.
 - d. Whether the amount so banked was immediately thereafter withdrawn by the 2nd and 3rd defendants causing the plaintiff a loss of Kshs 12,750, 857.50.
 - e. Whether the 2nd and 3rd defendants were authorized to open the account, and if not, whether the 1st defendant was negligent or reckless in allowing the 2nd and 3rd defendants to open and operate an account in the name of the plaintiff.
 - f. If the 1st defendant was negligent and reckless in allowing the 2nd and 3rd defendants to open and operate an account in the name of the plaintiff, what are the particulars of such negligence and recklessness?
 - g. Whether the defendant's actions of opening, operating and allowing the operation of an account in the name of the plaintiff was fraudulent. If so, what are the particulars thereof.
 - h. Whether the 1st defendant conducted the requisite due diligence and complied with the rules of the banking industry before allowing the 1st and 2nd defendants to open the subject account and whether it notified the holders of the account of the abnormal operations in keeping with the established trade usage and custom banking practice.
 - i. Was a letter of demand and notice of intention to sue served upon the 1st defendant before the institution of the suit.
 - j. Does this court have jurisdiction to hear and determine this suit?
 - k. Who should bear the costs of the suit.
34. Whereas it appears that some of the issues were contested and some were not, from the issues so filed, the following facts emerge uncontroverted:



- a. Account number 0081169748 was opened at the 1st defendant's Eastleigh Branch by the 2nd and 3rd defendants on or about 17/8/2013 allegedly in their capacity as the plaintiff's directors.
 - b. At the time of opening the account, the 2nd and 3rd defendants presented their individual copies of KRA PIN certificates, copies of national identity cards copies of certificate of incorporation for Jumbo Foam Mattresses Industries Limited and Memorandum and Articles of Association of the company.
 - c. Several cheques were deposited into the account and the money withdrawn immediately thereafter.
 - d. The total amount cleared through the account in the name of Jumbo Foam Mattress Limited was Kshs 12, 750,857.50.
 - e. The cheques deposited in the account were collected from the plaintiff's retailers and banked in the suspect account.
 - f. The 2nd and 3rd defendants were at the time of opening the account not in the employment of the plaintiff and were not authorized to open the account on behalf of the plaintiff or even collect cheques on behalf of the plaintiff company.
 - g. Jumbo Foam Mattress Industries Limited in whose name the account was opened is not the same as Jumbo Foam Mattresses Limited, or even Jumbo Foam Mattresses Industries Limited.
 - h. Final Judgment was entered against the 2nd and 3rd defendants for failure to enter appearance and or file defence.
 - i. The 1st defendant Bank is under liquidation and the plaintiff was granted leave to proceed with the suit against the 1st defendant bank.
35. The main issue for determination is whether the plaintiff proved its case against the defendants on a balance of probabilities and therefore whether it is entitled to the prayers sought in the plaint. I will discuss this issue alongside the questions raised by both parties on the alleged lack of due diligence and or negligence and or fraud by the 1st defendant bank
36. From the pleadings filed herein, the plaintiff asserts that the 1st defendant (the Bank) was negligent in the manner in which the account was opened and or operated in a name similar to that of the plaintiff. Particularly, the plaintiff pleaded the particulars of negligence it attributes to the 1st defendant Bank under paragraph 8 of the plaint as follows:
- a. Failing to verify the correctness and authenticity of the information provided to them by the 2nd and 3rd defendants.
 - b. Failing to carry out due diligence to check the background of the 2nd and 3rd defendants and whether they had any link with the plaintiff.
 - c. Failing to contact the plaintiff to confirm if they had authorized the opening of the account and whether the 2nd and 3rd defendants were authorize agents of the plaintiff.
 - d. Allowing strange and abnormal withdrawal from the account and failing to notify the plaintiff of the same.



- e. Failing to adhere to standard account-opening and operational procedures and guidelines.
 - f. Refusing to respond to formal communication from the plaintiff and failing to act in good time to mitigate the plaintiff's loss.
37. The plaintiff also at paragraph 9 of the plaint attributed various acts by the bank as fraudulent. These are:
- a. Acted fraudulently in conspiring with the 2nd and 3rd defendants to make and present as genuine documents purporting to show that the 2nd and 3rd defendants were officers of the plaintiff authorized to open and operate the account.
 - b. Acted fraudulently in failing to draw the attention of the plaintiff to the fact that the 2nd and 3rd defendants were attempting to open or had opened an account in the plaintiff's name.
 - c. The 1st defendant conspired to defraud the plaintiff by allowing and permitting abnormal withdrawals from the account without notifying the plaintiff.
 - d. The defendants conspired to defraud the plaintiff by deliberately passing and overlooking standard banking procedures and regulations and taking precautions necessary to secure funds in the hands of the bank.
 - e. Ignoring correspondences from the plaintiff regarding the matters complained of.
38. In my view therefore, the first issue to be answered is whether the bank was negligent and or fraudulent in allowing the 2nd and 3rd defendants to open and operate the subject bank account. The other issue is whether the plaintiff has established its case on a balance of probabilities to warrant grant of the orders sought. The two issues will be discussed and determined simultaneously.
39. On the alleged negligence and fraud on the part of the defendants, it is not in doubt that the 1st defendant is a banking institution regulated by the Central Bank of Kenya and offers banking services to the general public. The plaintiff was at the time of the suit not a client to the bank and the question therefore is whether in the absence of customer-bank relationship, the bank owed the plaintiff any duty of care as established by case law.
40. Case law has established that the relationship between the bank and its customers is a contractual one. This was stated in the case of *Equity Bank of Kenya & Another v Robert Chesang* [2016] eKLR where it was held that:
- “A bank has a duty under its contract with its customer to exercise reasonable care and skill in carrying out its part with regard to operations with its contracts with its customers. The duty to exercise reasonable care and skill extends over the whole range of banking business within the contract with the customer. Thus the duty applies to interpreting, ascertaining and acting in accordance with the instructions of the customer...The bank/customer relationship is based on utmost good faith. The bank is also under a contractual duty to diligently handle accounts of a customer, to ensure that funds- deposited on account are available when required by the customer. Any deviation from that understanding



without justifiable reasons which should be communicated to the customer well in advance or immediately, the bank is in breach of a contract with the customer and is liable in damages.”

41. The duty of banker to a third party was aptly captured by Havelock J (as he then was) in *Kenya Grange Vehicle Industries Ltd v Southern Credit Banking Corporation Ltd* [2014] eKLR wherein the learned Judge cited extensively from the English decision in *Marfani & Co Ltd v Midland Bank Ltd* [1968] 2 ALL ER 573 where it was held that:

“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 which are irrelevant for the purposes of the present case, 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.”

42. The matters presented in this suit are similar to those discussed by the Court of Appeal in *Standard Chartered Bank Kenya Ltd v Intercom Services Ltd & 4 others* [2004] eKLR where while considering the duty of care owed by a bank to a third party, it was held that:

“... the learned judge in his judgment I have referred to hereinabove did consider only the inquiry necessary to protect the interest of the true owner of the cheque. In my view, the protection goes further than the true owner of the cheque. I do agree that, generally, the learned judge of the superior court was right that a bank and particularly a collecting bank as the appellant was, owes a duty to its customers to ensure fiduciary, mutuality and confidentiality. He was also right that notwithstanding that duty, a bank has a duty to make inquiries to protect the owner of the cheque, itself and any other that may be affected by the consequences of bank’s negligence.”

43. It is obvious that the plaintiff accuses the 1st defendant bank of being negligent in the manner in which it allowed the account to be opened by the 2nd and 3rd respondents in the name of a ‘company’ whose name was similar but not the same as the plaintiff’s. The plaintiff asserts that the 1st defendant bank was complicit in the fraud that was committed on it by the 2nd and 3rd defendants by failing to establish that the said individuals were not authorized to open the account in the manner it did. That if the bank had conducted due diligence before opening the account, it could have established that the 2nd and 3rd defendants were not the plaintiff’s directors and or agents. The plaintiff further avers that if the 1st defendant bank had conducted a search on the company, it could have established the true directors of the plaintiff.



44. The 1st defendant bank on its part contended that the documents presented at the time of opening the account did not show that the 2nd and 3rd defendants were actually not the plaintiff's employees and that the documents presented for opening the account and the manner the account was operated was in order.

45. In regulating the banking business, the Central Bank of Kenya rolled out prudential measures to guide banks in their dealings with customers. The Central Bank of Kenya Prudential Guidelines for Institutions Licensed under the *Banking Act* CBK/PG/08 was produced by the plaintiff as an exhibit. Under Clause 5.6.1, it is provided that:

“The need for institutions to know their customers is vital for the prevention of money laundering and underpins all other activities.

When a business relationship is being established, the nature of the business that the customer expects to conduct with the institution should be ascertained at the outset to show what might be expected as normal activity. In order to be able to judge whether a transaction is or is not suspicious, institutions need to have a clear understanding of the legitimate business of their customers.”

46. Under clause 5.6.2, it is provided that:

“In all circumstances, any business entity operating within the financial sector requires basic information on its customers. The nature and extent of this information will vary according to the type of business. It shall also depend on whether the business is being introduced by a financial intermediary and the type of customer involved.

An institution should establish to its satisfaction that it is dealing with a person that actually exists. It should identify those persons who are empowered to undertake the transactions, whether on their own behalf or on behalf of others.

When a business relationship is being established, the nature of business that the customer expects to conduct with the institution concerned should be ascertained, so as to determine what might be expected as the customer's normal activity levels. In order to judge whether a transaction is or is not suspicious, an institution needs to have a clear understanding of the pattern of its customer's business as its relationship.”

47. Further, clause 5.6.5 provides that:

- a) To identify the customer and verify that customer's identity using reliable, independent source documents, data or information.
- b) To identify the beneficial owner, and take reasonable measures to verify the identity of the beneficial owner, such that the institution is satisfied that it knows who the beneficial owner is. Enhanced due diligence measures shall be applied to persons and entities that present a higher risk to the institution. For legal persons and arrangements, institutions are required to understand the ownership and control structure of the customer.
- c) Understand and, as appropriate, obtain information on the purpose and intended nature of the business relationship.



- d) Conduct on going due diligence on the business relationship and scrutiny of transactions undertaken throughout the course of that relationship to ensure that the transactions being conducted are consistent with the institution's knowledge of the customer, their business and risk profile, including where necessary the source of funds.”
48. These Prudential Guidelines are issued pursuant to the provisions of section 33 of the *Banking Act* which provides that:
- “4) The Central Bank may issue directions to institutions 20 generally for the better carrying out of its functions under this Act and in particular, with respect to-
- (a) the standards to be adhered to by an institution in the conduct of its business in Kenya or in any country where a branch or subsidiary of the institution is located; and
- (b) guidelines to be adhered to by institutions in order to maintain a stable and efficient banking and financial system.
- (5) A person who fails to comply with any direction under this section commits an offence and shall, in addition to the penalty prescribed under section 49, be liable to such additional penalty as may be prescribed, for each day or part thereof during which the offence continues.”
49. The reasons for citing the above guidelines in extenso is to establish whether the bank in allowing the opening of the account acted within the prudential guidelines which the 1st defendant claims are not mandatory so that it cannot be accused of aiding the opening and operation of the account in the manner in which it was operated.
50. Clearly, under section 33 of the *Banking Act*, adherence to the Guidelines by Banking institutions is mandatory and the failure to comply with the said Guidelines is a criminal offence. The Guidelines require the bank to undertake independent verification of the documents so presented by the intended customer. In the instant case, the 2nd and 3rd defendants presented individual KRA PIN certificates, copies of the national identity cards, their passport size photographs, certificate of incorporation and the Articles and Memorandum of Association for verification by the bank.
51. The plaintiff has faulted the bank for not taking adequate steps to prevent and or mitigate the loss suffered by the plaintiff for example, by failing to conduct a search at the registry of companies.
52. From the above scenario, two aspects ought to be examined to further ascertain whether the bank was indeed fraudulent and or negligent, one is the name in which the account was opened and secondly the name in which the cheques were drawn.
53. Firstly, the account was opened in the name of Jumbo Foam Mattress Industries Limited while the plaintiff is known as Jumbo Foam Mattresses Limited. Cheques drawn in the latter's name and other cheques collected on behalf of the plaintiff but written in the name of Jumbo Foam Mattress Limited were cleared and paid by the 1st defendant bank through the opened account despite the differences and discrepancies in the names in the cheques and the account holder.
54. Thus, had the 1st defendant bank been diligent, it could have detected the anomalies early enough and flagged out the issue by reporting and or conducting further investigations on the opened account.



55. To demonstrate further laxity on the bank's part, a cheque No. 005246 dated 30/12/2013 drawn in the name of Jumbo Quality Products Limited, an entity totally different from the account holder and with no similarity in names with the account holder or the plaintiff herein was cleared by the 1st defendant bank and the amount was withdrawn the same day. This shows that the bank was not diligent enough as required of it.
56. This finding is fortified by the decision in Standard Chartered Bank (*supra*) where it was held that:
- “The onus of establishing circumstances showing absence of negligence is on the banker. It is a matter of defence, does not give a substantive cause of action. The extent of inquiry must be measured by what in the circumstances, a fair minded banker paying due regard to the exigencies of banking business in relation to the person depositing the cheque would consider it prudent to do in order to protect the interest of the true owner and each case must depend on its own circumstances.
57. In this case, the 1st defendant bank did not adduce evidence of the steps it took to verify the authenticity of the documents so presented and or verification of the identity of the individuals purporting to open the account. The 1st defendant bank did not explain how a cheque drawn in favour of Jumbo Quality Products Limited was cleared through the account. Neither did it explain to the satisfaction of this court how cheques drawn in different names from the account holder but with similar names were cleared and paid out immediately to the 2nd and 3rd defendants without the bank asking any questions.
58. The plaintiff asserted that it made a report to the 1st defendant bank notifying it of the fraud but that the bank failed to take action prompting a report to the police, the bank and the in charge, anti-banking fraud unit, Central Bank of Kenya. All these correspondences were produced in evidence as contained at pages 127-133 of the plaintiff's bundle of documents produced as exhibits.
59. In light of the foregoing, I find that the 1st defendant bank was negligent in the manner in which it permitted the subject account to be opened and subsequently how the account was operated. There was every suspicion that could alert the 1st defendant bank that the account was being operated in an irregular and suspicious manner as to raise the 1st defendant bank's antennae that there was something totally amiss with the account holder.
60. My finding is fortified by the decision in Equity Bank (*supra*) where it was further held that:
- “In the instant appeal, the 1st respondent alleged that the appellant bank failed in its duty to ensure that the 2nd respondent did not operate his account in a suspicious manner. That the large cash withdrawals were sufficient signs that something was not normal.
- The CBK Prudential Guidelines provides that for large, frequent or unusual cash deposits or withdrawals - written statement from the customer is required confirming the nature of his/her business activities. In the instant matter, it is not disputed that the 2nd respondent withdrew large sums of cash over the counter e.g. Ksh. 5,800,000/= on 26th July 2008; Ksh. 3,100,000/= and 11,647,000/= both on 9th October 2008 and Ksh. 4,600,000/= on 5th December 2008.
- Despite the express requirement under the CBK Prudential Guidelines, the appellant bank never inquired into the nature of the transaction that the 2nd respondent was engaged in that led to withdrawal of large amounts of cash over the counter. That is not to say that a banker's attitude in carrying out this exercise is to “see no evil and hear no evil...



In this matter, taking into account that the proceeds of cheques drawn in favour of a different entity was being withdrawn in cash in large sums over a short period, we find that there was a sufficient basis for the appellant Bank to be suspicious of the manner in which the 2nd respondent was operating and withdrawing cash from the account. We thus find that the appellant Bank was negligent and violated the CBK Prudential Guidelines and failed to obtain a written statement from the 2nd respondent who was its customer to explain the large sums of cash being withdrawn over the counter. We thus find the trial court did not err in arriving at the conclusion the appellant Bank was negligent and it violated the CBK Prudential Guidelines.”

61. In *Shalimar Flowers Self Help Group v Kenya Commercial Bank* [2016] eKLR, it was stated that:

“All the red flags were waving in this case in my view but the Defendant by not exercising reasonable care and skill, missed or ignored them, thereby allowing the withdrawal, in quick succession, of large sums of money donated to flower workers as commissions. I find on a balance of probability that the Defendant bank was negligent in the manner in which it handled and approved the nine payments and is 100% liable.”

62. The above cited authorities present striking similarity with the instant suit in that large sums of money were being withdrawn immediately a cheque was deposited in the account by either the 2nd or 3rd defendants and cleared. Such examples are Kshs 500,000/- on 5/9/2013, Kshs 400,000/- on 9/9/2013, Kshs 600,000/- on 19/9/2013 and other similar withdrawals running in the period of the existence of the account.

63. Accordingly, I find and hold that the plaintiff has proved on a balance of probabilities that the 1st defendant bank was negligent and failed to conduct due diligence on the persons who opened and operated the suspect account wherein the plaintiff’s cheques were deposited and withdrawn immediately they were cleared without the bank raising any red flag and even after the plaintiff had written to the bank complaining of its cheques being deposited and cleared in an account which was not the plaintiff’s account, the 1st defendant bank ignored those complaints until the investigations were launched spearheaded by Central Bank.

64. On the issue of fraud, it is now trite that fraud must specifically be pleaded and proved. This was the holding in *Demutilla Nanyama Pururmu v Salim Mohamed Salim* [2021] eKLR where the court cited with approval the holding in *Vijay Morjaria s Nansingh Madhusingh Darbar & Another* (supra) where Tunoi, JA. (as he then was) stated that:

“It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must, of course, be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.”



65. The duty of the bank to establish that it was not negligent and or fraudulent in the circumstances of any case was explained by Havelock J in *Kenya Grange Vehicle Industries Ltd v Southern Credit Banking Corporation Limited* (*supra*) where the learned judge stated that:

“In cases such as this, where the Bank is under a duty to make inquiries of its customer regarding a possible breach of trust, the Bank will be found to be in constructive knowledge of the breach of trust if it ‘fails to make the appropriate inquiries.’”

66. The learned judge further stated that:

“...What facts ought to be known to the banker, i.e. what inquiries he should make, and what facts are sufficient to cause him reasonably to suspect that the customer is not the true owner, must depend on current banking practice, and change as that practice changes. Cases decided thirty years ago, when the use by the general public of banking facilities was much less widespread, “may not be a reliable guide to what the duty of a careful banker, in relation to inquiries and as to facts which should give rise to suspicion, is today.

The duty of care owed by the banker to the true owner of the cheque does not arise until the cheque is delivered to him by his customer. It is then, and then only, that any duty to make inquiries can arise. Any antecedent inquiries that he has made are relevant only in so far as they have already brought to his knowledge facts which a careful banker ought to ascertain about his customers before accepting for collection the cheque which is the subject-matter of the action, and so have relieved him of any need to ascertain them again when the cheque which is the subject matter of the action is delivered to him. What the court has to do is to look at all the 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.”

67. Given the circumstances in which the 1st defendant bank cleared cheques drawn in favour of the plaintiff, an entity totally different from the account holder and even the plaintiff’s sister company, this gives credence to the fact that the 1st defendant bank was negligent leading to the loss of monies complained of and therefore the bank cannot escape liability.

68. Having reviewed the pleadings, the evidence and the submissions herein, I am satisfied that the 1st defendant was negligent in the opening of the account and allowing the account to be operated in the manner it was operated. I however find no evidence that the 1st defendant was fraudulent in the circumstances.

69. The next issue is what orders this court should make. It is trite that the burden of proof required in civil cases is on a balance of probability except cases of fraud. The implication of this was explained in *Samuel Ndegwa Waitbaka v Agnes Wangui Mathenge & 2 others* [2017] eKLR where the Court of Appeal held as follows;

12. In Civil cases such as this case, the standard of proof is on the balance of probabilities. This standard means that a court is satisfied an event occurred if the court considers that, on the evidence, the occurrence of the event was more likely than not. In *H (Minors)* [1966] AC 563 at pg 586, Lord Nicholls explained that the test on the balance of probabilities was flexible. Said he,

When assessing the probabilities, the court will have in mind as a factor, to whatever extent is appropriate in the particular case, that the more serious



the allegation, the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability. Fraud is usually less likely than negligence. Deliberate physical injury is usually less likely than accidental physical injury.....

.....Built into the preponderance of probability standard is a generous degree of flexibility in respect of the seriousness of the allegation. Although the result is much the same, this does not mean that where a serious allegation is in issue, the standard of proof required is higher. It means only that the inherent probability or improbability of an event is itself a matter to be taken into account when weighing the probabilities and deciding whether, on balance, the event occurred. The more improbable the event, the stronger must be the evidence that it did occur before, on the balance of probability, its occurrence will be established.

70. From the evidence on record and discussed in the preceding paragraphs, the 1st defendant allowed the opening and operation of the account in circumstances that fell short of the due diligence expected of a banker. The evidence and my finding that the bank failed to undertake its own independent appraisal of the 2nd and 3rd defendants to confirm their genuine identity as well as the documents presented to it for purposes of opening the account in the name of a company not in existence legally shows that the 1st defendant was extremely negligent. It failed to adhere to the Central Bank's Prudential Guidelines which were mandatory as stipulated in section 33 of the *Banking Act*.
71. With the above findings, I find it necessary to comment on the amount claimed by the plaintiff as being due to it. While the plaintiff at paragraph 7 of the amended plaint claimed that the sum of money stolen from it is inclusive of Kshs 469, 640/= cleared through the account was Kshs 12,750,857.50. However, this sum of Kshs 469,640 belongs to Jumbo Quality Products Limited and not the plaintiff. Even though the same was cleared through the said account, I am not satisfied that this sum can be claimed by the plaintiff as the owner of that money is a totally different company, companies being legal entities with capacity to sue and be sued in their own names.
72. I find the sum of Kshs 12, 281,217.50/- is the amount that is rightly due and owing to the plaintiff herein.
73. In the end, I am satisfied that the plaintiff herein has proved on a balance of probabilities that the 1st defendant bank was grossly negligent in the manner that it handled the entire transactions with the 2nd and 3rd defendants, persons who turned out to be fraudsters, leading to the plaintiff losing substantial sums of money where its cheques were collected and deposited and withdrawn from an account opened and operated by the two fraudsters.
74. It is not lost to this court that most recently, I handled a similar dispute between the plaintiff herein and First Community Bank as the same 2nd and 3rd defendants herein wherein the defendants acted in the same manner as was in this case, with the plaintiff losing over 1.2 million in similar circumstances. This was in Kisumu High Court Civil Appeal No. 62 of 2019.
75. In the end, I enter judgement in favour of the plaintiff as against the 1st defendant, 2nd and 3rd defendants jointly and severally in the sum of Kshs 12, 281,217.50/- with interest at court rates from the date of filing suit until payment in full.
76. The plaintiff shall also have costs of this suit and interest on costs applicable from date of this judgment until payment in full.



DATED, SIGNED AND DELIVERED AT KISUMU THIS 17TH DAY OF MARCH, 2023

R.E. ABURILI

JUDGE

