



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**COMMERCIAL & TAX DIVISION**

**CIVIL CASE NO. 366 OF 2001**

**TRUST BANK LIMITED.....PLAINTIFF**

**VERSUS**

**MIDCO INTERNATIONAL (K) LIMITED.....1<sup>ST</sup> DEFENDANT**

**CIEM INVESTMENTS LIMITED.....2<sup>ND</sup> DEFENDANT**

**PIYUSH MANUBHAI PATEL.....3<sup>RD</sup> DEFENDANT**

**PANKANJ VRAJLAL SOMAIA.....4<sup>TH</sup> DEFENDANT**

**AJAY SHAH.....5<sup>TH</sup> DEFENDANT**

**JUDGMENT**

1. By way of the Plaint dated **12<sup>th</sup> March 2001** and filed in court on the same date **TRUST BANK LIMITED** prayed for judgment against the Defendants jointly and severally for:-

- a. **Kshs.165,398,567.00**
- b. **Compound interest on the said sums at the rate of 25% p.a from 1<sup>st</sup> February 2001 until payment in full.**
- c. **General damages for fraud and interest therein.**
- d. **Costs and interest therein.**

2. The suit was opposed by all the Defendants **MIDCO INTERNATIONAL (K) LTD** (the 1<sup>st</sup> Defendant) and **PANKAJ VRAJLAL SOMAIA** (the 4<sup>th</sup> Defendant) filed their Statement of Defence dated **12<sup>th</sup> April 2001**. **PIYUSH MANUBHAI PATEL** (the 3<sup>rd</sup> Defendant) filed his Statement of Defence on **4<sup>th</sup> April 2001** whilst **AJAY SHAH** (the 5<sup>th</sup> Defendant) filed a Defence dated **12<sup>th</sup> April 2001**.

3. On **2<sup>nd</sup> May 2019** **MR OYATSI** Counsel for the Plaintiff informed the Court that they were withdrawing the Plaintiffs claim as against **PIYUSH MANUBHAI PATEL** the 3<sup>rd</sup> Defendant. This was because the said 3<sup>rd</sup> Defendant could not be traced as his whereabouts were unknown and the firm of **KATIKU ADVOCATES** who had been representing the 3<sup>rd</sup> Defendant had been dissolved. I therefore mark the suit against the 3<sup>rd</sup> Defendant as **withdrawn**.

4. Although this suit was filed way back in the year **2001**, the actual hearing did not commence until **May 2019** a full eighteen (18) years after the suit had been filed. The Plaintiff called one witness in support of their case and out of the four (4) Defendants only the 5<sup>th</sup> Defendant testified in Court.

**THE EVIDENCE**

5. **PW1 MICAH LEKEUWAN NABORI** told the court that he was a liquidation agent for the Plaintiff Bank appointed on **4<sup>th</sup> July 2013**. He testifies that Trust Bank was placed in liquidation the year **2001**, and that there had been several other liquidation agents prior to his

appointment. **PW1** relied entirely upon his witness statement dated **30<sup>th</sup> March 2017**. **PW1** told the court that although he did not participate in the events relating to the transaction which form the subject matter of this suit, he based his evidence on his perusal of the relevant documents and records obtained from the Bank.

6. **PW1** states that the 1<sup>st</sup> Defendant was a customer of the Bank and that the Directors of the 1<sup>st</sup> Defendant at the material time were also the Directors of the 2<sup>nd</sup> Defendant, being the 3<sup>rd</sup> and 4<sup>th</sup> Defendants. **PW1** told the court that from his perusal of the documents held at the Bank he was able to establish that the 1<sup>st</sup> Defendant had an outstanding facility with the Plaintiff Bank. The witness referred to a letter dated **6<sup>th</sup> October 1998**, by which the then Statutory manager wrote to the 2<sup>nd</sup> Defendant demanding payment of an outstanding sum of **Kshs.90,808,979.00**.

7. **PW1** testified that on **1<sup>st</sup> October 1997** the Chief Manager of the Banks Moi Avenue Branch and his assistant wrote an internal memo confirming that the 5<sup>th</sup> Defendant (who at the material time was the Chairman of Trust Bank) had given verbal instructions that a sum of **Kshs.65,682,790** be transferred from the account of the 2<sup>nd</sup> Defendant **Ciem Investments Ltd** so as to settle the liabilities of the 1<sup>st</sup> Defendant **Midco International (K) Ltd** leaving a balance of **Kshs.4.7 million** in the account of the 1<sup>st</sup> Defendant.

8. That the amount of **Kshs.65,682,790** which was credited into the account of the 2<sup>nd</sup> Defendant was actually an overdraft facility granted to the 2<sup>nd</sup> Defendant by **Trust Bank Ltd**. This loan to the 2<sup>nd</sup> Defendant was unsecured. The transfer of the funds from the account of the 2<sup>nd</sup> Defendants to the 1<sup>st</sup> Defendant account left a liability of **Kshs.1,369,849.74** outstanding on the account of the 1<sup>st</sup> Defendant and left the account of the 2<sup>nd</sup> Defendant overdrawn to the tune of **Kshs.346,885,655.81**

9. **PW1** alleges that the account opened in the name of the 2<sup>nd</sup> Defendant was a deliberate act and that account was designed to be a special purpose account to be used to credit funds from the Plaintiff Bank which funds would then be transferred to the account of the 1<sup>st</sup> Defendant in order to offset its liabilities. That the sum of **Kshs.65,682,700** which was credited into the 2<sup>nd</sup> Defendants account was actually the plaintiffs money and that this whole transaction was conducted without the 2<sup>nd</sup> Defendant having made any written application for a loan facility as required by law.

10. **PW1** contends therefore that the opening of an account for the 2<sup>nd</sup> Defendant and the alleged book entries in the accounts of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants were designed to and did in fact facilitate or perpetuate a fraud against the Plaintiff Bank creating the false impression that the 1<sup>st</sup> Defendant had cleared its liabilities with the Bank thereby releasing the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants from their obligations to the Bank.

11. He states that the 2<sup>nd</sup> Defendant did not pay off its debt to the bank and instead the company was dissolved. **PW1** claims that the 1<sup>st</sup> Defendant owes the Plaintiff **Kshs.1,369,849,74** whilst the 2<sup>nd</sup> Defendant has a liability of **Kshs.346,885,655.81** with Trust Bank. That Trust Bank was placed under statutory management in **August 1998** and upon discovering this fraud the liquidator decided to file this suit in order to recover the monies owed to the Bank.

12. **DW1 AJAY SHAH** told court that at the material time he was the Executive Chairman of **Trust Bank Limited**. He denies all the allegations of fraud and maintains that all the transactions conducted under his watch accorded with the law and that proper banking practices were at all times adhered to.

13. **DW1** denies having participated in the obtaining of the overdraft facility by the 2<sup>nd</sup> Defendant as he was not involved in day to day running of the Banks affairs. He states that the entire transaction was processed at the Branch level and was duly approved by the **Credit and Executive Management Committee** (hereinafter “**CEMC**”) of which committee **DW1** was **not** a member. **DW1** states that once the liquidator took over at the Plaintiff Bank, he actively assisted in the recovery of debts owed to the Bank which he states is evidence of his good will. According to **DW1** the proper party who the Plaintiff ought to have pursued for this debt was the party who had obtained the credit facility in question being the 2<sup>nd</sup> Defendant. **DW1** further states that the 2<sup>nd</sup> Defendant offered to assign to the Plaintiff Bank fixed deposits worth **Kshs.100 million**, shares in City Bank, or any other alternative security in full settlement of its debt but the Plaintiff declined the offer. Finally, the 5<sup>th</sup> Defendant prays that the suit against him be dismissed with costs.

14. The 4<sup>th</sup> Defendant decided not to call any evidence in the case. Upon the conclusion of oral evidence parties were invited to file their written submissions. The Plaintiff filed its written submissions on **10<sup>th</sup> May 2019** the 4<sup>th</sup> Defendant filed his written submissions on **12<sup>th</sup> June 2019** and the 5<sup>th</sup> Defendant filed his submissions on **8<sup>th</sup> July 2019**. The Plaintiff then filed submissions in reply to the 5<sup>th</sup> defendant’s submissions on **10<sup>th</sup> July 2019**.

#### **ANALYSIS AND DETERMINATION**

15. I have carefully considered the evidence on record as well as the written submissions filed in this matter and the relevant law. It is trite law that the burden of proof in law lies with the party who asserts the existence of a particular fact or set of facts. **Section 107** or set of facts. **Section 107** of the **Evidence Act** provides as follows:-

#### **“107 Burden of proof**

**1. Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts he must prove that those facts exist.**

**(b) When a person is bound to prove the existence of any fact to is said that the burden of proof lies on that person.”**

16. In **Gichinga Kibutha V Caroline Nduku [2018] eKLR**, the Court stated:-

**“It is, therefore, settled law that in civil cases, a party who wishes the court to give a judgment or to declare any legal right dependent on a particular fact or sets of facts, that party has a legal obligation to provide evidence that will best facilitate the proof of the existence of those facts. The party must present to the court all the evidence reasonably available on a litigated factual issue.”**

17. It is alleged that the Defendant deliberately participated a fraud against the Plaintiff Bank. The Particulars of the fraud are set out at **Paragraph 15** of the Plaintiff dated **12<sup>th</sup> March 2001** as follows:-

**PARTICULARS OF FRAUD**

- (a) Opening or causing the Second Defendant to open an account with the Plaintiff to facilitate commission of a fraud upon the Plaintiff.
- (b) Causing the said false book entries to be made in the accounts of the First and Second Defendants.
- (c) Making or causing the said false book entries to reflect payment to the Plaintiff of the sum of **Kshs.65,682,790/=** when they knew that no payment had been made.
- (d) Making or causing the said book entries to be made so as to discharge the First, Third and Forth Defendants from their liability to pay the Plaintiff the said debt and when they knew or ought to have known that the said Defendants had not discharged their obligations to the Plaintiff.
- (e) As for the Fifth Defendant, purporting to grant overdraft facilities to the Second Defendant without any request for such facility from the said Defendant.
- (f) Deliberately flouting the provisions of the Banking Act.
- (g) Cheating the Plaintiff out of the said funds.

18. The Plaintiff alleges that the Defendants acted fraudulently in causing an account to be opened in the name of the 2<sup>nd</sup> Defendant, by causing false entries to be made in the accounts of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants and by falsifying book entries to reflect a payment of **Kshs.65,682,790** to the Plaintiff. Further the Plaintiff contends that the money used to clear the 1<sup>st</sup> Defendants loan was money fraudulently obtained from the Plaintiff Bank itself. As such the only issue that arises for determination in the case is whether the Defendants acted fraudulently in respect of this particular transaction as alleged.

19. **BLACKS LAW DICTIONARY EDITION** defines “**Fraud**” in the following terms:-

**“Fraud consists of some deceitful practice or willful device, resorted to with intent to deprive another of his right, or in some manner to do him an injury. As distinguished from negligence, it is always positive, intentional. As applied to contracts, it is the cause of an error bearing on a material part of the contract, created or continued by artifice, with design to obtain some unjust advantage to the one party, or to cause an inconvenience or loss to the other. Fraud, in the sense of a Court of equity, properly includes all acts, omissions, and concealments which involve a breach of legal or equitable duty, trust, or confidence justly reposed, and are injurious to another, or by which an undue and unconscientious advantage is taken of another.”**

20. In the case of **Davy V Garrett (1878) 7 ch.D.473 at 489**, it was stated as follows:-

**“Where fraud is intended to be charged, there must be a clear and distinct allegation of fraud upon the pleadings, and though it is not necessary that the word fraud should be used, the facts must be so stated as to show distinctly that fraud is charged. The statement of claim must contain precise and full allegations of facts and circumstances leading to the reasonable inference that the fraud was the case of the loss complained of ..... It is not allowable to leave fraud to be inferred from the facts pleaded and accordingly, fraudulent conduct must be distinctly alleged and as distinctly proved. “General allegations, however strong may be the words in which they are stated, are insufficient to amount to an averment of fraud of which any court ought to take notice.”**[own emphasis]

21. Briefly the allegations of fraudulent conduct made by the Plaintiff, against each of the Defendants were as follows:-

(a) **MIDCO INTERNATIONAL (K) LTD**

The 1<sup>st</sup> Defendant who prior to **September 1997** was customer of the Plaintiff Bank owed the Bank the sum of **Kshs.75,28,284.00** in respect of an overdraft facility. It is alleged that the 1<sup>st</sup> Defendant schemed with the other Defendants to defraud the Plaintiff Bank of the amount of **Kshs.65,682,790.00** by causing an account to be opened in the name of the 2<sup>nd</sup> Defendant

(b) **2<sup>nd</sup> Defendant –Ciem Investment Limited**

The accusation against the 2<sup>nd</sup> Defendant is that together with 5<sup>th</sup> Defendant it deliberately opened an account with the Plaintiff solely for the purpose of obtaining an overdraft facility of **Kshs.65,682,790.00**. That the amount of this overdraft facility was then credited into the account of the 1<sup>st</sup> Defendant in order to clear the liability of the 1<sup>st</sup> Defendant to the Plaintiff Bank.

(c) **4<sup>th</sup> Defendant – Pankaj Vrajlal Somaia**

It is alleged that the 4<sup>th</sup> Defendant who was said to be a Director of the 2<sup>nd</sup> Defendant schemed with the other Defendants to perpetrate the fraud through the account opened in the name of the 2<sup>nd</sup> Defendant. It is claimed that the 4<sup>th</sup> Defendant caused books of entries to be made so as to discharge himself from liability to the Plaintiff.

(d) **5<sup>th</sup> Defendant – Ajay Shah**

It is alleged that in his capacity as the Executive Chairman of the Plaintiff Bank, he conspired with the other Defendants to defraud the Plaintiff by granting to the 2<sup>nd</sup> Defendant the said overdraft facility of **Kshs.65,682,790/=**. That said facility was granted to the 2<sup>nd</sup> Defendant without any documentation to support it and without any valid security being offered by the 2<sup>nd</sup> Defendant. That the 5<sup>th</sup> Defendant disbursed the amount of the overdraft by debiting the account of the 2<sup>nd</sup> Defendant and crediting the entire amount into the account of the 1<sup>st</sup> Defendant. This money was never recovered by the Plaintiff because the 2<sup>nd</sup> Defendant did not repay the facility and the company was dissolved soon thereafter.

22. Fraud is an offence that largely requires proof of a person's state of mind. To prove that an act has been done fraudulently requires that the court took into the state of mind of the perpetrator of said Act. In **URMILA w/o MAHINDRA SHAH –VS- BARCLAYS BANK INTERNATIONAL & ANOTHER [1997] KLR** court held that:-

**“to establish fraud a higher standard of proof is required, approaching proof beyond reasonable doubt.”**

23. The Plaintiffs have linked the 3<sup>rd</sup> and 4<sup>th</sup> Defendants to the alleged fraud because the two are said to have been Directors of the 2<sup>nd</sup> Defendant and presumably are deemed to have been involved in and stood to benefit from the fraudulent transactions. In his evidence **PW1** confirmed that contrary to what had been asserted in the Plaint dated **12<sup>th</sup> March 2001**, the 4<sup>th</sup> Defendant had not executed any personal guarantee to secure the debt owed by the 1<sup>st</sup> Defendant and no Guarantee signed by the 4<sup>th</sup> Defendant was produced by the Plaintiff as evidence in this case. Under cross-examination **PW1** states:-

**“The 4<sup>th</sup> Defendant is sued on the basis of his personal guarantee. In my perusal of the Plaintiff's files I have *not come across any guarantee signed by the 4<sup>th</sup> Defendant*. I have not annexed in our bundle of documents any guarantee signed by the 4<sup>th</sup> Defendant. There was no formal written guarantee but the 4<sup>th</sup> Defendant was a Director of the 2<sup>nd</sup> Defendant.”**[own emphasis]

24. By this **PW1** was evidently changing goal posts. Upon realization that the 4<sup>th</sup> Defendant in fact did **not** sign any personal guarantee, **PW1** changes tact and claims that the 4<sup>th</sup> Defendant was sued in his capacity as a director of the 2<sup>nd</sup> Defendant. This allegation also falls flat. A Notification of change of Directors of **CIEM INVESTMENTS LIMITED** (the 2<sup>nd</sup> Defendant) **Pexb4** appearing at Page 3 of the Plaintiff's Bundle of Documents filed on **22<sup>nd</sup> September 2009** reads as follows:-

**“With effect from 26<sup>th</sup> MARCH 1997 AZIM VIRJEE and SAMVIR TRUSTEES LIMITED were appointed as directors of the Company.”**

**2 With effect from 26<sup>th</sup> March 1997 PIYUSH MANUBHAI PATEL and PANKAJ VRAJLAL SOMAIA [the 4<sup>th</sup> Defendant]resigned as Directors of the company**

**3.....”**

25. From this it is clear that in **October 1997** when the fraudulent transactions are alleged to have taken place the 3<sup>rd</sup> and 4<sup>th</sup> Defendants were no longer Directors of the 2<sup>nd</sup> Defendant Company. **PW1** under cross-examination admits as follows:-

**“As at 26/3/1997 the 4<sup>th</sup> Defendant ceased to be a director of the 2<sup>nd</sup> Defendant. The decisions of the 2<sup>nd</sup> Defendant made in September 1997 would have been reached by the new directors...”**

These new directors were **Azim Virjee** and **Samvir Trustees Ltd**. It is they who had the mandate of the account of the 2<sup>nd</sup> Defendant at the time the alleged transgressions occurred. **PW1** later suggests that the 4<sup>th</sup> Defendant was sued because he was one of the original directors of the 2<sup>nd</sup> Defendant. This proposition is laughable and cannot be taken seriously. It is manifest therefore that the Plaintiff erred in suing the 3<sup>rd</sup> and 4<sup>th</sup> Defendants in this suit. In any event no tangible evidence has been adduced to prove the direct involvement of the 3<sup>rd</sup> or 4<sup>th</sup> Defendants in the said transactions. No documents or memos signed by the two have been produced as evidence. In the circumstances neither the 3<sup>rd</sup> or 4<sup>th</sup> Defendant can be held liable for any fraud.

26. With respect to the 5<sup>th</sup> Defendant the allegation against him was that as the Executive Chairman of the Plaintiff Bank he gave verbal

authorization for the account of the 2<sup>nd</sup> defendant to be debited with the sum of **Kshs.65,682,790** and that the funds be credited into the account of the 1<sup>st</sup> Defendant to offset the latter's liability to the Plaintiff bank.

27. The 5<sup>th</sup> Defendant concedes that he was the Executive Chairman of Trust Bank Limited at the material time. However the 5<sup>th</sup> Defendant states that he was not involved in the day to day running of the Bank activities and states further that authorization for such credit and debts was done by the **Credit Executive Committee** of which he was **not** a member. **PW1** confirmed in his evidence that this Committee is normally comprised of independent members of the Bank.

28. A look at the circulation sheet appearing at Page 7 of the Plaintiff's Bundle of Documents filed on **22<sup>nd</sup> September 2009 Pexb8**) shows that it contains proposals to the **Executive Credit Committee**. One **Mr VL Aggrawal** a Committee member remarked as follows:-

**“Liability been credited on authorization of the Executive chairman and to be secured by pledge of shares submitted for confirmation...”**

29. The comments of the Credit Control Department in the same document read as follows:-

**“As per instructions of our executive chairman the branch has debited the account of CIEM INVESTMENTS with Kshs.65,682,790.00 creating an OD [overdraft] and the funds credited to the account of Ms Midco International. We require details of the securities for the OD created Branch action may be confirmed submitted for our examination...”**

The notes at the end of this circulation sheet reads:-

**“The Branch is seeking confirmation herein and further instructions.”**

The above would appear to support the contention that it was the 5<sup>th</sup> Defendant who as Executive chairman of the Bank authorized the transaction in question.

30. However **Pexb10** (Page 9 of the Plaintiff's Bundle) is a memo dated **17<sup>th</sup> October 1997** from the Banks main Branch to the Manager of the Moi Avenue Branch. The memo reads:-

**“RE: CIEM INVESTMENTS LTD – OD KSHS.65,682,790.00.**

**We refer to your memo Man/Adv/ 97/1442/so dated 01/10/97.**

**The ECC has confirmed your action of allowing an OD in above name subject to:**

**(a) Facility: OD-Kshs.65,682,790/=**

**(b) Security:**

- 1) 25% of City Finance Shares**
- 2) Credit Agreement**
- 3) Board Resolution to borrow.**
- 4) Personal Guarantee of Directors**

**(c) Others: Branch to obtain**

- i) Credit report**
- ii) Audited Accounts**
- iii) Personal Financial information on Directors**
- iv) Certificate of registration of the Company.**

**Sanction Ref: ECC 97/1217/ MAN/185**

**Please ensure that all relevant security documents covering the facility are obtained as per securities manual.**

**A checklist of security documents is to be completed and retained on the respective file. A copy of the same is to be sent to us for our records.”**

31. The above Memo was signed by **VL Agarwal** the senior manager and **F.D Liveha** the Deputy Manager of Bank. The Memo implies that the Plaintiff Bank through its Senior Manager and Deputy Manager authorized the transaction in question that is why in the Memo the Bank was seeking security documents to cover the overdraft facility granted to the 2<sup>nd</sup> Defendant. In any event this Memo is indicative of the involvement of the Plaintiff Bank through its management in authorization of the suspect overdraft facility. This belies the assertion by the Plaintiff that the transaction was authorized solely by the verbal instructions of the 5<sup>th</sup> Defendant.

32. In compliance with the requirement that security be supplied for the overdraft facility the 2<sup>nd</sup> Defendant offered to assign its shares with **City Finance Limited** worth about **Kshs.100 Million**. However by its letter dated **6<sup>th</sup> August 1999** at Page 13 of Plaintiff's Bundle of Documents [**Pexb 14**] the Plaintiff rejected that assignment of shares. Why would the Plaintiff Bank decline a perfectly adequate security for the overdraft?

33. A demand letter dated **6<sup>th</sup> October 1998** was written to the 2<sup>nd</sup> Defendant (See page 10 of Plaintiff's Bundle) **Pexb11** which demand letter reads:-

**RE: AMOUNT OWING TO THE BANK IN YOUR ACCOUNT NO.56502-01 KSHS.90,806,979=35**

**Pursuant to this Bank being placed under statutory management by the Central Bank of Kenya the contract between the bank and yourselves has come to an end and all advances to you are to be recalled immediately.**

**Consequently, we hereby demand from you the immediate payment of Kshs.90,806,979=35 being the amount due and payable by you as at 30<sup>th</sup> September 98 to the Bank in respect of advances made to you at your instance and request. This sum is accruing interest at the rate of 39% per annum until payment in full.**

**TAKE NOTICE that if the said sum of Kshs.90,806,979=35 together with interest thereon as aforesaid is not paid in full within seven (7) days from the date hereof, time being of the essence, we shall instruct our advocates to immediately institute legal proceedings against you for recovery thereof without further notice to you and at your risk as to all costs, expenses and other consequences arising from or incidental to such legal action.**

**TAKE FURTHER NOTICE that any payment or proposal for payment of part of the outstanding amount made, if accepted by the Bank shall be without prejudice to the Bank's rights pursuant to this notice.**

**Yours faithfully"**

[own emphasis]

34. This letter refers to a contract between the Bank and the 2<sup>nd</sup> Defendant. Further the letter indicates that the facility was granted to the 2<sup>nd</sup> Defendant **"at your instance and request"**.

35. If the 2<sup>nd</sup> Defendant **requested** the overdraft facility then there ought to have been documentation to support this e.g a letter from the 2<sup>nd</sup> Defendant applying for the overdraft facility and a letter of offer from the Plaintiff Bank. No such documents were produced as evidence in this case. This letter further implies that the Plaintiff Bank and its officers were fully involved in the grant of the overdraft facility to the 2<sup>nd</sup> Defendant which casts doubt on the theory that the facility was granted solely at the instance of the 5<sup>th</sup> Defendant.

Indeed **PW1** under cross-examination by counsel for the 5<sup>th</sup> Defendant states that:-

**"It was the Branch to action the facilitation of this OD facility. I do not know why the 5<sup>th</sup> Defendant was sued..."**

36. **PW1** thereby confirms that the overdraft facility was approved and processed by the Plaintiff Bank. **PW1** who was the Plaintiffs only witness admits that he does not know why the 5<sup>th</sup> Defendant was sued in these proceedings. **PW1** went on to state that:-

**"The overdraft granted to the 2<sup>nd</sup> Defendant was procedurally created but the Branch did not collect all the required documents..."**[own emphasis]

**PW1** here admits that the overdraft transaction was procedural. He blames the Branch for the failure to collect the requisite security documents. I fail to see how the 5<sup>th</sup> Defendant can be held liable for the failures of the Branch officials.

37. The 5<sup>th</sup> Defendant has been accused of verbally authorizing the debit of **Kshs.65,682,790.00** from the 2<sup>nd</sup> Defendant's account and crediting this amount into the account of the 1<sup>st</sup> Defendant. There was no evidence tendered to prove that the 5<sup>th</sup> Defendant gave such verbal authorization. There is no evidence to prove that it was the 5<sup>th</sup> Defendant who himself made or directed to be made the relevant bank entries. There is no evidence from any witness who heard the 5<sup>th</sup> Defendant give such verbal authorization for the transaction and no witness was called to testify that they acted upon the verbal instructions of the 5<sup>th</sup> Defendant. The 5<sup>th</sup> Defendant was neither a Director or Shareholder of the 1<sup>st</sup> or 2<sup>nd</sup> Defendants who were involved in the said transactions.

38. The Plaintiff was a well-established Commercial Bank. It is highly unlikely that transactions involving such large sums of money would be processed on verbal instructions alone. Banks are known to keep meticulous records. One would expect there to have be supporting

documentation for a transaction of this nature.

39. It is manifest that the Plaintiff has failed dismally to prove any of the allegations of fraud against the 5<sup>th</sup> Defendant. The Plaintiff only sued the 5<sup>th</sup> Defendant because he was the Executive Chairman of **Trust Bank** at the material time. It is common knowledge that a chairman of a Bank will not normally be involved with the day to day running of the Banks business. The overdraft facility to the 2<sup>nd</sup> Defendant was fully sanctioned by the Branch. Neither the Manager nor Deputy Manager of the Moi Avenue Branch testified in this matter to state whether or not the 5<sup>th</sup> Defendant directed them to sanction the transaction or to explain how and why they approved the overdraft facility to the 2<sup>nd</sup> Defendant. Accordingly, I find that there is no factual basis to the claims made by the Plaintiff against the 5<sup>th</sup> Defendant.

40. Lastly it is evident that the party who absconded with the Plaintiffs funds was the 2<sup>nd</sup> Defendant. It is curious why the Plaintiffs decided to sue the Defendants on these very tenuous allegations of fraud instead of simply suing the 2<sup>nd</sup> Defendant to recover the monies advanced to it as an overdraft facility.

41. Based on the above, I find that the Plaintiff has failed to prove on a balance of probability the fraud allegations against the Defendants. Accordingly, I dismiss the Plaintiff's suit in its entirety and award costs to the 1<sup>st</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants.

**Dated at Nairobi this 7<sup>th</sup> day of July, 2020.**

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**Justice Maureen A. Odero**