REPUBLIC OF KENYA

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REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CIVIL APPEAL NO 68 OF 2013

BARCLAYS BANK OF KENYA LIMITED ……........................…………..APPELLANT

VERSUS

JOHN PETER NYAGETARI SIMBA (Liquidator of Lakestar

Insurance Co. Staff Retirement Benefits Scheme) in Liquidation...RESPONDENT

JUDGMENT OF THE COURT

This appeal stems from the Judgment and decree of the Chief Magistrate's Court at Milimani Commercial Courts, Nairobi by Honourable T.C. Wamae dated 18/01/2013.

The respondent, JOHN PETER NYAGETARI SIMBA who was the appointed Liquidator of Lakestar Insurance Company Ltd Staff Retirement Benefit Scheme instituted proceedings before the Chief Magistrate's court seeking judgment against the appellant BARCLAYS BANK OF KENYA LIMITED for Kshs 2,400,000, General Damages, costs and interest. The appellant denied the claim stating that it acted in accordance with the instructions and mandate from the customer. The suit was heard and judgment delivered on 18/01/2013 against the appellant for Kshs 2,400,000 and interest at the courts rate. The appellant being dissatisfied with the judgment now appeals to this court on the following grounds:

1. ***The Learned Magistrate erred in fact and in law in finding and holding that the Appellant is liable to the Respondent for the sum of Kenya Shilling Two Million Four Hundred Thousand (Kshs . 2,400,000/=) which had been withdrawn using the subject cheque despite having found that the Respondent's allegation that the Cheque was forged was without merits;***
2. ***The Learned Magistrate erred in fact and in law by failing to or not evaluating the evidence before court and in particular failing to examine the bank statements for the two accounts to understand how the two account were being operated by the customers in which case she failed to realize that there were other transactions prior to and after the cheque in question whereby funds from the Account No.6596094 used to be transferred to No. 5028777.***
3. ***The Learned Magistrate erred in fact and in law in finding and holding that the Respondent had not authorized the Appellant to transfer funds from the Savings Account to the Current Account when in fact the accounts had been opened in auto-transfer mode which allowed the Appellant to transfer funds from the Savings account in case the Respondent sought to withdraw an amount higher than that in the Current account;***
4. ***The Learned Magistrate erred in fact and in law in finding and holding that the Appellant had exceeded its authority and failed to act in the best interests of the Respondent by effecting payment on the cheque of Kenya Shilling Two Million Four Hundred Thousand (Kshs.***

2,400,000/=) when in fact the cheque was properly drawn and signed by all the required signatories;

5. ***The Learned Magistrate erred in law and fact by finding that the appellant acted without authority and contrary to the customer`s mandate and yet no evidence was adduced at the trial by the authorized signatories of the two accounts to deny that the Appellant was authorized to effect the auto-transfer to funds between the two accounts.***
6. ***The Learned Magistrate erred in fact and in law in finding and holding that the Appellant had occasioned the Respondent a loss of Kenya Shillings Two Million Four Hundred Thousand (2,400.000/=) by effecting payment on the cheque when in fact none of the authorized signatories and directors of the customer at the time raised any issue on the payment despite the fact that they, were frequently issued with bank statements to indicate the state of their accounts.***
7. ***The Learned Magistrate erred in fact and in law in finding and holding that the Appellant is liable to the Respondent for the amount of the cleared cheque when in fact the Appellant`s action in clearing the cheque was sanctioned by the Respondent`s former directors who had up-to-date knowledge on the status of the Respondent`s accounts.***
8. ***The Learned Magistrate erred in law by granting interest on the said sums of Kshs. 2,400,000 from 16th April 2002 without any such averment in the pleading and contrary to the Respondent`s own submissions.***
9. ***The Learned Magistrate findings are not supported by the evidence adduced at the trial and not supported by the law.***

Mr Khaseke, counsel for the appellant and Mr Manti for the respondent agreed the hearing of the appeal to proceed by way of written submissions. The appellant's counsel duly filed their written submissions on 11th November. 2014 but the respondent did not file any submissions as at 18th December, 2014 when the court retired to consider this appeal and write this judgment and this court is now called upon to determine the appeal based on those submissions by the appellant.

In their submissions the appellant submitted on three issues : *1) Whether the Magistrate erred in holding that the Appellant had exceeded his authority and acted contrary to the customer`s mandate, 2) Whether the Magistrate erred in finding that the Respondent had not authorized the Appellant to transfer funds from the Savings account to the current account. 3) Whether the Magistrate erred in finding that the Appellant is liable to the Respondent for the amount of paid out on the cheque and costs for the suit.*

On Whether Appellant exceeded his authority and acted contrary to the customer`s mandate the appellant submitted that it did not exceed its authority and acted within his mandate. It stated that a banker – customer relationship was established when the customer opened up the two bank accounts with the appellant. The appellant explained that at the trial in the lower court, it stated that the customer provided the Appellant with specimen signatures and identity of the specific persons. The duty of the Appellant was to effect payment whenever a duly signed chequewas presented. The appellant also explained that whenever a cheque is presented for payment, the Appellant compares the signature on the cheque with the specimen provided. Upon confirmation that the signature matches, then the appellant would go ahead and effect payment. The appellant relied on **Section 60 (1) of the Bill of Exchange Act** which provides that: *When a bill payable to order on a demand is drawn on a banker, and the banker on whom it is drawn pays the bill in good faith and in the ordinary course of business, it is not incumbent on the banker to show that the endorsement of the payee or any subsequent endorsement was made by or under the Authority of the person whose endorsement it purports to be, and the banker is deemed to have paid the bill in due course, although such endorsement has been forged or made without authority.*

In support of the above provision of the law and position the appellant also relied on *case* of **Rising Freight Limited v Eco Bank Limited Nairobi HCCC No.313 of 2009,** where the court stated that *bill payable to order or demand on a banker is a cheque. It is further stated that to entitle him to Section 60 (1) of the Bills of Exchange Act protection, the banker must pay the cheque in good faith and in the ordinary cause of business. An ordinary banker does not possess the skill and knowledge of a handwriting expert. All that is needed of him is mere comparison of signatures. Further, a bank does not* *have specialized equipment for scrutinizing signatures before payment of a cheque.''*

The appellant submitted that the cheque in this case was presented for payment by one of the signatories of the accounts, Zephaniah J. Ajowi who is also the Managing Director of the customer. The Appellant compared the signature on the cheque and it matched with the specimen. The appellant also submitted that during the trial, DW1 testified that the cheque was signed three times and a call to the insurance company confirmed the cheque was genuine and then proceeded to effect payment.

The appellant argued that the Respondent's argument that the Appellant acted negligently and without authority was found to without is basis by the trial court. This is because the person who presented the cheque for payment (Zephaniah J. Ajowi) was a director of the customer and one of the acknowledged signatories to the two accounts. The appellant further explained that even after the transaction had been carried out; none of the other directors of the customer ever complained about the transaction or alleged any forgery of the signatures. That it was only after the respondent was appointed seven months after the transaction that he started complaining about the transaction. The appellant submitted that it is even more surprising that none of the directors of the customer testified in court to support the Respondent`s contentions.

The appellant also submitted that it presented uncontroverted evidence in court showing how on various occasions when money was withdrawn from the current account, the same amount would automatically be transferred from the savings account to the current account to avoid overdraw of the current account. In all these previous transactions the customer never complained to the appellant about this issue until the appointment of the Respondent.

On the second issue, whether the Respondent had authorized the Appellant to transfer funds from the Savings account to the current account, the Appellant submitted that it had the required authorization to transfer funds from the Savings account to the current account. This is because, according to the evidence of DW1, the accounts were auto transfer link such that when the customer withdraws from the current account, and the funds are to be insufficient, the same amount would be transferred from the savings account to the current account to avoid overdrawing the current account. The appellant stated that from the record of proceedings, the learned magistrate correctly recorded evidence showing that savings account No. 0776596094 was opened on March 11, 2000, whereas the current account No. 5028777 was opened on March 2, 2001. However, that in her judgment, the court reversed the opening dates for the two accounts thereby reaching a wrong conclusion of fact and thus finding liability against the appellant.

The appellant stated that the error of fact is discernible and can be seen when the court interchanged the accounts and the dates on which they were opened thereby reaching a wrong conclusion that the current account was opened prior to the savings account which led the court to form the view that there was no way an auto-transfer would have been made linking the current account to a non-existing savings account. The appellant alleged that the court chose to ignore the evidence of DWI which indicated that the auto-transfer mode had been employed on other transactions and this particular transaction was not unique.

The appellant stated that failure by the Respondent to call any of the previous account signatories to dispute the way the two accounts were operated negates any finding by the trial court that the appellant contravened the Respondent's mandate. The court was referred to the decision in **Kenya Chemical & Allied Workers Union v Bamburi Cement Ltd [2013] eKLR.** The appellant submitted that the auto-transfer mode was reasonable, certain and notorious and that the auto transfer enabled the Respondent to have a constant stream of funds available in their current account when they needed them, it was curtained because when funds became insufficient in the current account, they were automatically drawn from the savings account. That the respondents were furnished with regular statements of both accounts reflecting the transactions; and the auto transfer mode, with regard to the two accounts, had been on-going for over a year before Mr. Zephaniah Juma Ajowi's cheque was presented.

The appellant submitted that the auto transfer mode was an implied term of the contract between the Bank and the Customer. The appellant submitted that the principle was also stated in the case of **Devonald versus Rosser & Sons [1904-07] ALL ER 988** where it was held that *a term, which must be presumed to* *have been in the minds of the parties when they entered into the contract and was necessary to give the transaction the business efficacy which both parties must have intended it should have, must be implied in the contract."*

On the third issue of whether the appellant is liable to the respondent for the amount paid out on the cheque, the appellant submitted that the court having found that there was no forgery and there was no negligence ought to have dismissed the claim, but instead the trial court went ahead to formulate issues that were not germane to the dispute the basis upon which it found in favour of the respondent. The appellant submitted that it cannot be held liable for paying out the cheque since it acted within its authority and in the best interest of the customer.

Having set out the appellant's position in support of the grounds of appeal contained in the memorandum of appeal dated 22nd January, 2013, and having considered the lower court record including the lower court pleadings, evidence, both oral and documentary as produced by both parties, submissions and the Judgment of the learned trial magistrate, I have also perused the written submissions before this court in support of the grounds of appeal all of which carefully considered, the issues for determination by this court are:

1. ***Whether the appellant's actions were within its mandate and or authority granted by the customer?***
2. ***Whether the appellant was entitled to repayment of Kshs 2,400,000***.

This being a first appeal, this court is obliged to abide by the provisions of Section 78 of the Civil Procedure Act to evaluate and examine the lower court record and the evidence before it and arrive at its own conclusion. This principle of law was well settled in the case of **Selle – Vs – Associated Motor boat Co. Ltd (1968) EA 123** where **Sir Clement De Lestang** stated that,

> ***"This court must consider the evidence, evaluate it itself and draw its own conclusions though in doing so it should always bear in mind that it neither saw nor heard witnesses and should make due allowance in this respect. However, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he had clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally (Abdul Hammad Sarif – Vs – Ali Mohammed Solan (1955, 22 EACA 270)."***

And in the case of **Mbogo – Vs – Shah & Another (1968) EA 93**,the court set out circumstances under which an appellate court may interfere with a decision of the trial court as follows:-

> ***"I think it is well settled that this court will not interfere with the exercise of discretion by the inferior court unless it is satisfied that the decision is clearly wrong because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into account and consideration and in doing so arrived at a wrong conclusion."***

Evaluating the evidence, the respondent herein who was the plaintiff in the subordinate court testified as PW1. He testified that he was appointed as the liquidator of the pension scheme. He stated that as aliquidator he had capacity to sue and be sued and that he sought leave of court to sue as required by law. His duty included collecting the scheme's assets and discharging scheme liabilities. He identified two accounts that were held by the appellant, Savings account No. 6596094 and Current Investments account no 077-5028777 both in the name of Lakestar Insurance Co. Ltd Trustee. The first account was used for the pension scheme. On 16/4/2002 money was transferred from this account to the current investment account No. 077-5028777 and paid to Zephaniah Juma Ajowi, the Managing Director of Lakestar Insurance Co. Staff Retirements Benefits Scheme Ltd by cheque of Kshs 2400,000. He stated that the payment was irregular and sought an explanation from the appellant why it had paid out the money without authority from the Pension Scheme. The respondent also testified that the signatories were Hon Ezekiel Barngetuny, Zephaniah Juma Ajowi, Luke Magambo and Christopher Matheka. The *cheque was presented by Zephaniah Juma Ajowi which was duly authorized by the three signatories. He told the court that other signatories denied that they signed the cheque although he did not have any evidence to show that the signatures were forged.*

DW1 a banker with the appellant confirmed that the cheque was presented by Zephaniah Juma Ajowi at the Westlands Branch. The cheque was signed three times and a call to the insurance company confirmed that the cheque was genuine and the same was paid. The said cheque was drawn on account 077-5028777 and since the account did not have sufficient funds, funds were transferred from Account number 6596094. She also stated that there were auto transfer mode instructions of funds from savings account to current account for the same customer. And that the two accounts operated hand in hand. The cheque was paid in on 16/4/2002. She produced a bundle of documents in support of the appellant's defence, which included accounts opening instructions, mandates, bank transaction statements for the two accounts and correspondence between the bank and its customer on the two accounts, among other documents related to the customer's accounts.

In cross examination, DW1 stated that she had joined the bank long after the transaction. Further, that she did not have physical evidence of the instructions on the automatic transfer of funds from the savings account to the current account but that that was the manner in which the two accounts were operated since the savings account was only used for retaining funds whereas the current account is the one that was used for drawing or accessing of funds as shown by the bank statements produced. According to DW1, the subject cheque was paid in the normal course of business between the bank and its customer as there were many transactions that took place before and after the subject transaction. In reexamination, DW1 stated that there was no requirement for a physical authority since the account was opened on auto transfer mode and that the customer never raised any complaint within 15 days.

In her judgment delivered on 18th January, 2013, the trial magistrate found that there was no evidence that the cheque No. 23 used to draw funds was not forged. Secondly, that the current account had no sufficient funds for the material cheque to be honoured, as the account only had Kshs 703.40 cts. Third, that the customer had not authorized the transfer of funds from the savings account to the current account since the bank did not have any evidence to prove that such auto transfer was authorized and that DW1 had conceded in cross examination that it would not have been possible for the accounts to have been opened with an auto transfer mode since account No. 077-5028777 was opened on 2.3.01 while current account number 6596094 was opened on 3.11.00. Further, that the defence witness had conceded that the current account would not have been opened with an auto transfer mode to a savings account that did not exist. Fourth, that the bank contravened the customer's mandate as it did not have evidence that the customer authorized the auto transfer and that the bank should have returned the cheque unpaid since there were no sufficient funds on the current account on which the cheque was drawn and that by transferring funds from the savings account to the current account to clear a cheque the bank acted without authority and contrary to the customer's mandate.

The trial magistrate concluded that therefore the plaintiff was entitled to repayment of Kshs 2.4 million together with costs of the suit and interest.

It is that judgment that provoked this appeal challenging the findings and decision of the learned trial magistrate.

From the foregoing evaluation of the evidence and judgment of the subordinate court, the question is whether the appellant acted within its mandate in paying cheque No 23 for Kshs 2.4 million to the customer's Managing Director Mr Zephaniah Juma Ajowi. The other question that begs is whether the appellant exercised **reasonable skill and care before making the payment.**

The uncontroverted evidence on record shows that the appellant paid the cheque drawn on the current account using funds accessed from the savings account of the same customer and same signatories. Before effecting the said payments, the bank called a Ms Winnie at the customer's office to verify whether it could honour the cheque and the customer confirmed that indeed the payment should be made. The record also confirms that the payee was authorized by the customer

and his signature was verified from the appellant's data. The record further shows that at the time of payment, the payee Mr Zephaniah J. Ajowi was the Managing Director of the customer and he was also authorized to sign the cheque, which cheque was also signed by the rest of the authorized signatories including the chairman Mr Ezekiel Barngetuny and the bank confirmed the cheque to have been signed by all the known signatories of the customer before effecting the payments.

The plaintiff liquidator, undoubtedly, came on board about seven months after the controversial payments and sought an explanation from the bank, after suspecting that the payment may not have been authorized since the current account had no funds and the payments were accessed from the savings account.

I have carefully examined the documents produced by the parties. The record shows that the current account was opened in 2000 whereas the savings account was opened in 2001.

In addition, document No. 16 of the defendant's list of documents at page 3 as filed on 6th June, 2012 shows that the customer authorized the bank on 3rd November 2000 regarding the banks current account(s) to among others:

> ***"1. Honour and comply with all cheques, drafts, bills of exchange, promissory notes, acceptances, negotiable instruments and orders expressed to be drawn, on behalf of the company at any time or times whether the banking account or accounts of the company accepted, made or given are overdrawn or any payment is increased by any payment thereof or in relation thereto or are in credit or otherwise but without prejudice to the Banks' right to refuse to allow any overdraft or increase in overdraft.***
>
> ***2.…………………***
>
> ***Provided any such cheques…orders, instructions, agreements and indemnities are signed by persons holding the under mentioned officers for the time being.***
>
> ***Chairman, Managing Director and Chief Accountant."***

From the above extract, it is clear that the customer gave the bank instructions to honour all cheques presented on behalf of the customer and signed by the signatories mentioned whether the effect would be to overdraw the account and or whether the funds were available or not.

I have also carefully examined the Bank statements fro the savings and current accounts on pages 37, 38 and 39 of the bundle of the defendant's documents, being documents 17, 18 and 19 and I have established that there is no evidence that the monies held in the savings account were ever directly withdrawn by the customer. The debit entries shown in that account are all transfer orders. On the other hand, the direct credit entries in the current account are, other than the cheque deposits, are all transfer orders. My further examination shows that the transfer orders from the savings account No.6596094 all corresponded with the transfer orders reflected in the current account No.5028777. In addition, I have observed that the current account was maintained at zero balance, and any amounts reflected therein were debit balance. In other words, there were no funds held in the current account at any one given time save for the transferred accounts since the minimum balances were zero. Therefore, could the 2.4 million cheque payment on the current account with funds drawn from the savings account have been any different transaction from the rest of the transactions as to raise any suspicion or doubt that it was an authorized transaction?

Section 60 of the Bills of Exchange Act, Cap 27 Laws of Kenya provides : ***"When a bill payable to order on a demand is drawn on a banker, and the banker on whom it is drawn pays the bill in good faith and in the ordinary course of business, it is not incumbent on the banker to show that the endorsement of the payee or any subsequent endorsement was made by or under the Authority of the person whose endorsement it purports to be, and the banker is deemed to have paid the bill in due course, although such endorsement has been forged or made without authority."***

Thus, where a bill is payable, the bank pays it in good faith. In addition, Section 4(1) of the Cheques Act Cap 35 of Laws of Kenya provides that:

> ***"Where a banker, in good faith and in the ordinary cause of business, pays a prescribed instrument drawn on him to a banker, he does not in doing so incur any liability by reason only of the absence of, or irregularity in, endorsement of the instrument and –***
>
> ***a) In the case of a cheque, he is deemed to have paid it in due course; and***
>
> ***b) In the case of any other prescribed instrument, the payment discharges the instrument***
>
> ***(2) A prescribed instrument which is not endorsed but which appears to have been paid by the banker on whom it is drawn is evidence that the payee has been paid by the banker the sum of money specified in the instrument."***

Paget's Law of banking page 403 states that:

> ***"The mandate embodies an agreement which authorizes the bank to pay if given instructions in accordance with its terms. Typically a mandate will list the individuals who have authority to sign cheques or other payment orders and will specify which individuals (if more than one) must sign the order". A bank which acts in accordance with the mandate is duly authorized. But it does not follow that a bank which acts contrary to the mandate is bound to be unauthorized. This is illustrated by*** <u>London Intercontinental Trust Ltd v Barclays Bank Ltd</u>, **(1980) 1** ***Lloyd's Law Reports 241 where the defendant bank had honoured the cheque bearing a sole signature in breach of mandate requiring two signatures. However, the sole signatory had actual authority from the plaintiff's Board of Directors to order the transfer of the sum in question. Accordingly the plaintiff's claim was dismissed."***
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> In **<u>Lipkin Gorman v Karpnale</u> (1992) 4 All ER 409**it was (simply) stated that:
>
> ***"In the civil case of a current account, the basic obligation on the banker is to pay his customer's cheques in accordance with his mandate."***

In **<u>Ross Cranston's Principles of Banking Law, 2nd Edition at p.187</u>**, it is written thus concerning a bank's duty of care:-

> ***"There is long established authority, in the context of bills of exchange, that a bank can be in breach of its duty of reasonable care and skill in failing to make enquiries. Certain transactions are so out of ordinary course that they ought to arouse doubts and put the bank to inquiry. If the bank fails to enquire, it cannot be said to have acted without negligence in converting a bill. The Quince care case applies the principle in another context – the care and skill the bank should exercise in paying money away from a customer's account: it will be liable if it does so knowing that the instruction is dishonestly given by, for example, fraudulent directors of the borrowing company, shutting its eyes to the obvious acts of dishonesty, or acting recklessly in failing to make such inquiries as an honest and reasonable bank would make. Factors such as the standing of the customer, the bank's knowledge of the signatory, the amount involved, the need for prompt transfer, the preserve of unusual features, and the scope and means for making reasonable inquiries may be relevant."***

According to Halsbury's Laws of England, 3rd Edition Volume 2, pg198:

> ***"A banker who in good faith and in the ordinary course of business pays a cheque payable to order drawn on him, to which the person in possession has no title, by reason of endorsement being forged, protected from liability and can debit his customer with the amount to be paid. A thing is done in good faith if it is done honestly, whether it is done negligently or not.***

In **Simba Commodities Limited v Citibank N. A. Civil case no. 236 of 2003 [2013] eKLR** while examining the bank's duty of care the court referred to the decision in **Karak Brothers Company Ltd v Burden(1972) All ER:**

> ***"as to the nature and extent of the contractual duty of care owed by a paying bank to its customer when called on to honour a cheque drawn by the customer; and in particular, in the case of a corporate customer which has given the usual mandate to its bank, to what extent the bank is entitled to place exclusive reliance on the fact that the cheque is signed by the corporation's duly authorized signatories. The conclusion reached by Ungoed-Thomas J was as follows:***
>
> ***'…. 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 within its contract with its customer. The standard of that reasonable care and skill is an objective standard applicable to bankers. Whether or not it has been attained in any particular case has to be decided in the light of all the relevant facts, which can vary almost infinitely. The relevant considerations include the prima facie assumption that men are honest, the practice of bankers, the very limited time in which banks have to decide what course to take with regard to a cheque presented for payment without risking liability for delay, and the extent to which an operation is unusual or out of the ordinary course of business. An operation which is reasonably consonant with the normal conduct of business (such as payment by a stockbroker into his account of proceeds of sale of his client's shares) of necessity does not suggest that it is out of the ordinary course of business. If "reasonable care and skill" is brought to the consideration of such an operation, it clearly does not call for any intervention by the bank. What intervention is appropriate in the exercise of reasonable care and skill again depends on circumstances'.***
>
> ***'As between the company and the bank, the mandate, in my view, operates within the normal contractual relationships of customer and banker and does not exclude them. These relationships include the normal obligation of using reasonable skill and care; and that duty, on the part of the bank, of using reasonable skill and care, is a duty owed to the other party to the contract, the customer, who in this case is the plaintiff company, and not to the authorized signatories. Moreover, it extends over the whole range of banking business within that contract. So the duty of skill and care applies to interpreting, ascertaining, and acting in accordance with the instructions of a customer; and that must mean his really intended instructions as contrasted with the instructions to act on signatures misused to defeat the customer's real intentions. Of course, omnia praesumuntur rite esseacta, and a bank should normally act in accordance with the mandate – but not if reasonable skill and care indicate a different course."***

In **Patel & Ors v Standard Chartered Bank (2001) All ER 66** it was held that where the bank's mandate is held to be ambiguous, it was the duty of the Bank to seek clarification from its customers or it will be held liable. The case emphasize the position that a bank that pays out on a patently ambiguous mandate, without first seeking clarification from its customer, runs the risk of being unable to debit the customer's account.

Applying the above provisions of the law, case law and established principles as espoused in eminent writings on the subject as extracted above to the instant case, the respondent maintained that the bank paid the cheque using funds from savings account without authority and the learned trial magistrate agreed with him to the effects that the bank should have returned the cheque since there were no sufficient funds in the account to draw or honour the cheque. I disagree.

I have examined the documents produced by the appellant and respondent. First, there was no evidence that the transfer orders made prior to this subject transaction were ever physically authorized. There are also transfers after the said subject transaction and still no evidence of physical instructions are available. Secondly, the authorization of 3rd November, 2000 is clear that the bank shall honour all instruments set out therein on behalf of the bank whether or not the

account is overdrawn as long as the signatories are as named in the said authorization. The plaintiff did not tell the court why he did not suspect any of the other transfer orders and only focused on the 2.4 million cheque, yet there were other transfer orders made in the same manner on the two accounts prior and after the 2.4 cheque, which he did not question.In my view, the bank and the customer were operating in the normal course of business when the bank honoured the cheque for 2.4 million presented to it to access the monies held in the savings account of the same customer.

Examining the record, the respondent did not produce any copy of the any mandate to show that the appellant bank *operated outside the normal contractual relationships of customer and banker and that in the circumstances of this case*, the bank should not have paid the customer in the absence of accompanying supplementary authority.

It is my view that the appellant acted honestly and in good faith and without negligence in paying the cheque as presented by one of the signatories to the account, and more so, a serving Managing Director of the customer who had been entrusted with the responsibility of managing the customer's resources. This is not to say that a managing director cannot mismanage resources of an organization, but that circumstances of each case must be looked at in making such a determination and in the circumstances of this case, the plaintiff/respondent did not prove that the bank was negligent.

The cheque was paid in the normal course of business and in accordance with the customer's standing instructions which had not been withdrawn or altered. In addition, there is uncontroverted evidence that the bank inquired from the customer as to whether it should pay the cheque and it only paid after getting a go ahead by getting funds from the customer's savings account, as the current account operated on a negative balance at all times with funds from the savings account servicing the current account where the funds were held.

The appellant bank, in my humble view, cannot be held liable for the payment that was made to the customer's Managing Director.

It was not shown that at the time the cheque was presented and paid to the Customer's Managing Director, Mr Ajowi, who was a co-signatory, any report of fraud or forgery had been made to the bank thereby alerting it to reject any requests for payments drawn from the savings account into the current account.

In addition, nothing prevented the plaintiff respondent herein from calling any of the co-signatories to the account to deny that the withdrawal had been authorized, or that they did not sign that cheque which drew the money.

In this case, I do not find any ground upon which the appellant should be denied the above statutory protections under the Bills of Exchange Act and the Cheques Act as it was not shown that the bank acted in bad faith in paying the cheque to the customer's Managing Director who was a signatory to the account and who was in employment and in the ordinary course of business. And if the issuance of the cheque to the Managing Director by the customer was irregular, the bank, in the circumstances of this case could not have been expected to know since it never received any instruction from the customer not to honour any cheque presented by the MD at that particular time, since it had instructions as I have stated, in the instrument dated 3rd November, 2000 to honour cheques presented on behalf of the customer company whether or not funds were available in the account, and whether or not the account was overdrawn.

From my observation of the character and manner in which the two accounts were operated, I believe the evidence of the appellant bank as adduced by DW1 that the two accounts operated hand in hand and that the bank had standing instructions to transfer funds from the savings account into the current account of the customer for the same to be accessed by the customer since no direct withdrawals are seen in the savings account. It would be unreasonable to expect the bank to have known or to have had reason to know that at that particular time of payment of the subject cheque,

it was inappropriate to source for funds from the alternative account in order to honour the cheque as presented by the signatory, and paid after confirming with the customer.

In my view, if the respondent lost any money then in the circumstances of this case he had the remedy of suing the said Managing Director for recovery of the monies and or report him to the police for investigations as they did. Instead they rushed to sue the bank before investigations were complete to establish whether in the circumstances the bank was party to any fraud that may have been perpetrated by the Managing Director.

No evidence was adduced by the respondent to show that the customer's MD presented a cheque which was had been forged and that the bank failed to exercise reasonable skill and care, in the circumstances. In that regard, I find that the lower court erred in finding that the appellant acted without authority and contrary to the customer's mandate, in the absence of evidence of what that specific mandate and or authority it was, that the bank had gone against.

On whether the respondent was entitled to a repayment of Ksh2, 4000,000 or whether the appellant was liable to refund the same, the lower court found the appellant liable in this amount stating that the appellant exceeded its authority and failed to act in the best interest of the customer and as a result the customer lost Ksh 2,400,000. The record shows that DW1 testified that the cross-transfer of funds was authorized by an auto transfer mode. The respondent did not deny this fact as testified by the appellant's witness. The burden of proof lies on the respondent who alleged that the transfer of the funds from account number 6596094 to account 077-5028777 was not authorized. I agree with the reasoning of the court in **Italian Market Kenya Limited v Fidelity Commercial Bank Ltd & another [2014] eKLR** where the court observed that**:**

> ***"the** <u>Defendant was under a strict duty to carry out the instructions in accordance with the mandate and in case of inadequacy of the mandate to ensure due authorization by the Plaintiff, and that it would exercise reasonable skill and care in so doing</u>. The Defendant had failed to do so. It is the Plaintiff's submission that there was an implied contractual duty on the part of the 1st Defendant to exercise reasonable care and diligence in executing the purported instructions of the directors of the Plaintiff."*

In the circumstances of this matter, and as I have demonstrated above, it was not shown that the appellant failed to carry out the instructions in accordance with the mandate and or that the mandate was inadequate or was ambiguous requiring supplementary authorization by the customer**.** I therefore find that the appellant exercised care and skill in performing its mandate to its customer by paying the cheque which was authorized by the signatories and the Board members. In my view the appellant was not liable to refund Kshs 2,400,000. The lower court therefore erred in holding that the appellant should refund the money to the respondent liquidator.

In the end I find the appeal has merit. I allow it and set aside the judgment and decree of the lower court and substitute it with an order dismissing the respondent's suit with costs.

I also award costs of this appeal to the appellant.

Dated, signed and delivered in open Court in Nairobi this 1st day of July, 2015.

R.E.ABURILI

JUDGE