REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 525 OF 2007

AFRICAN BANKING CORPORATION LTD ..... PLAINTIFF

VERSUS

EQUIP AGENCIES LTD ……..…… RESPONDENT

J U D G M E N T

a) INTRODUCTION

The appeal herein arises from the judgment and decree of Hon. Miss E.N. Maina Ag SPM delivered on 18th May 2007 in Nairobi Chief magistrate's Court Civil Case No. 3467 of 2006 in which she allowed the respondent's claim for Sh. 1,413,380.60 together with interest at court rates from the date of filing suit until payment in full. She also awarded the respondent costs of the suit.

b) BACKGROUND

i) Brief facts of the Case in the Court Below

The respondent sued the appellant claiming for a sum of Sh. 1,413,380.60 being the principal sum in respect of a debit effected on the respondent's account and paid to a third party by the appellant bank on account that a third party had sued the appellant and obtained judgment and decree against the said appellant bank for failure to honour a banker's cheque issued to the third party by the respondent.

The respondents also claimed for general damages for breach of contract and punitive damages together with Sh. 2,000/- special damages for account debiting charges and follow up charges of Sh. 50,000/-

The appellant filed a defence denying the respondent's claim and averred, among others, that the said deductions were occasioned by the defendant/appellant recovering the loss they had incurred following the threatened attachment and sale of their property for stopping a banker's cheque issued to Kirinya Merchants who obtained an exparte decree against the appellant bank for the said amount on account of the said stoppage of the banker's cheque on instructions from the respondents.

The appellant further contended that as the respondent had undertaken in writing to indemnify the appellant for any loss/damage occasioned by the stoppage of the said cheque, the respondent was liable to compensate the bank for the money paid out respecting the material cheque.

ii) Reply to Defence

The respondent filed reply to defence denying all contentions in the defence and including the allegation that the loss/damage arose from or by reason of the maters or things which the respondent had indemnified the appellant.

It further contended that the loss if any was occasioned by the appellants' own wrong default, negligence and failure to enter appearance or file defence in the suit giving rise to the decree.

The respondent also denied ever being requested to give particulars of dealings or circumstances giving rise to stoppage of the cheque and or refusing to supply the same.

It further denied refusing to co-operate or give details or information that would enable setting aside of the alleged decree.

iii) <u>Proceedings and Evidence in the Lower Court</u>

The respondent on 15th June 2006 filed a chamber summons seeking to strike out the appellant's defence for being scandalous, frivolous and an abuse of the court process but the lower court vide a brief ruling delivered on 20th September 2006 dismissed the said application on the ground that it was not the type of suit that could be disposed of at the preliminary stage as there were triable issues to be considered after a full hearing of the main suit.

The respondent called one witness Mr. Diriyesh Patel one of the directors of the respondent company Equip Agencies who gave a detailed sworn testimony, to the effect that they were tenants of Phoenix Property and that they held a bank account No. 00520523 with the appellant bank.

On 31st July 2004 a Mr. Kimani of Kiriiyu Auctioneers went with 5 towing vehicles and about 100 people to the respondent's offices along Mombasa Road to repossess/distress for rent arrears by taking possession of the office equipment and the respondent issued them with a banker's cheque for Sh. 1 million the same day.

When the respondents spoke to Phoenix Property's lawyers Musa & Co advocates, the advocates denied instructing the auctioneers to collect the cheque in their name. The respondent therefore cancelled the cheque and notified the bank and also reported to the police who issued an abstract to the effect that the cheque was demanded by false pretences. He admitted instructing the bank to stop payment of the cheque and providing the bank with an abstract and an indemnity.

According to PW1, he understood the indemnity to mean that if the bank incurred any loss or damage, as a result of the stopped cheque, they would let the respondents know that there was a claim, and not to unilaterally debit the customer's account as they had done.

The witness denied knowing the suit or exparte decree against the bank as no demand was made by the bank who did not also give reasons for not defending the suit. The respondents therefore demanded for crediting of their account with the debit and when the bank refused, they filed suit claiming for the debited amount.

In cross examination, the witness denied that the indemnity contained a requirement of notice before debit is done.

It was further denied that he was ever made aware of the case against the bank for stoppage of the cheque and that neither did the indemnity provide for debiting of the account by the bank.

The appellant called one witness Caroline Mboge, a legal officer for the bank. She testified on oath that the respondents were their customer at the Industrial Area Branch. She conceded that the bank received instructions to stop the banker's cheque and before stopping the said cheque, it sought reasons and indemnity for loss from the customer and upon being shown a police abstract and an indemnity, they effected the stoppage.

Later, they were confronted with a proclamation and decree in CMCC 4501/05 wherein the Kiriiyu Auctioneers had obtained exparte judgment against the bank on account of the dishonoured bankers cheque.

They paid the amount of decree and debited the respondent's account because they had its indemnity. They wrote to the respondents after paying the auctioneers and after debiting the amount.

The customer demanded reversal but the bank maintained its right to debit the account.

She further testified that they could not set aside the exparte decree because the customer did not give them assistance and requisite facts.

That the bank conducted investigations which revealed that the customer had rent arrears owed to Phoenix Ltd in CC 1227/03 so there was no false pretences as alleged when the cheque was stopped.

In cross examination she stated that the basis upon which they paid the amount was irregular but that they sought help of the customer to explain circumstances under which they had issued the cheque but could not get any, besides the court file not being accessible although they never complained to the executive officer concerning the missing file.

iv) <u>Submissions in the Lower Court</u>

The respondent/plaintiff filed written submissions on 19th April 2007 reiterating the pleadings in the plaint and the testimony by the witnesses for the respondent and the appellant.

On the issues and the law, the respondent framed 3 issues for determination by the court based on the pleadings and evidence adduced namely

i) Whether the alleged loss and or damage arose from or by reason of the matters or things which the plaintiff had indemnified the defendant bank.

ii) When does the right to enforce indemnity arise;

iii) Whether the defendant bank acted voluntarily and officiously exposed itself to liability to make payment to the decree holder, Kiriiyu Merchants.

The respondent's answer to the first issue was in the negative for reasons contained in those submissions and more particularly, looking at the evidence as a whole as adduced vis a vis the pleadings and the fact that the indemnity in question does not provide that the bank could, in the event of default, debit the plaintiff's account without reference to the plaintiff customer and that the bank's conduct in the whole circumstances proved negligence, irregular and uncontractual and against the conventional banking practices.

On the second issue of mode of enforceability of the indemnity, the respondent submitted that as there was no suit against the respondent, the bank could not unilaterally debit the account for recovery of the amount paid out to a third party's decree.

Further, that the respondent did not know of the court order in question and it had not been requested to honour any claims in relation to its account with the appellant bank.

The respondent quoted a treatise on the **<u>Law of Contract 14th Edition pg 469</u>** that

> ***"If the creditor sues the surety, the latter may defend himself in that action, by showing that the principal is entitled as against the creditor, to a set off arising out of the same transaction as that from which the liability of the surety arose. And the surety has a right to take proceedings for the purpose of being indemnified against the debt, before he has himself paid anything."***

They also cited **Halbury's Laws of England Volume 20 paragraph 315** as follows:-

> ***"In law an action on a contract of indemnity does not normally lie until the promisee has paid the third person's claim. Where he has paid, the amount so paid constitutes a debt due to him which save in exceptional circumstances he may recover with interest in an action."***

The respondent contended that the appellant should have laid a claim for the amount paid to the third party in satisfaction of decree before attempting to debit the respondent's account.

On the last issue of whether the defendant bank acted voluntarily and officiously and exposed itself to liability to make payment to the decree holder Kiriiyu Merchants, the respondent submitted that the **Law of Restitution 2nd Edition p. 244** applied as follows:-

> ***"To succeed in his claim for recoupment, the plaintiff must satisfy certain conditions. He must show (1) that he has been compelled by law to make the payment, (2) that he did not officiously expose himself to the liability to make payment …"***

It was further contended that the above principle as applied in the case of **Owen – Vs – Tate (1976) CA 402** by the Court of Appeal that the plaintiff who had assumed obligations of a party without the consent of defendants and against their wishes was not entitled to be indemnified by them and that the plaintiff was a volunteer in the circumstances. And that, Per **Scarman L. J,**

> ***"If payment is regarded by law as voluntary, it cannot be recovered … if A voluntarily pays B's debt, B is under no obligation to repay A …"***

It was further submitted that the appellant herein having freely and without request undertaken the risk of liability, they generally had no right to any direct reimbursement, even though they are compelled to make payment.

The respondent accused the appellant of being reckless and therefore they were not entitled to a restitution.

It was further submitted that as the case between the respondent and Phoenix Properties was still pending before the Court of Appeal and as the said Kiriiyu Merchants had been cited for contempt for selling the properties belonging to the respondent in contravention of court orders of the High Court, there was no justification for concluding that the banker's cheque was stopped as a delaying tactic to prevent auctioneers from selling the respondent's equipment.

The appellant/defendant's counsel filed their written submittions on 19th April 2007. The same are dated 17th April 2006 reiterating the denials contained in the defence, and testimony by the witness legal officer of the bank.

They framed 13 issues for determination by the court namely:-

a) Was the act of the defendant in debiting the plaintiff's account irregular, unlawful, non-contractual;

b) Was the said debiting a breach of banker-customer relationship;

c) did the defendant act negligently and without reasonable or probable cause;

d) Was the defendant required to give notice to the plaintiff and make inquiries prior to the debiting;

e) Was the defendant malicious and reckless in debiting the account;

f) Was the defendant served with summons in CMCC 4591 of 2005;

g) Was the plaintiff notified of the existence of the said suit when the defendant became aware of the same;

h) Was the sum of Sh. 1,413,380.60 a loss anticipated and covered by the indemnity signed by the plaintiff;

i) Did the plaintiff refuse to co-operate with the defendant in CMCC No. 4501/05 and was the said co-operation material;

j) Whether the plaintiffs instructed the defendants to cancel the said cheque on grounds that the drawee had obtained the same by false pretences;

k) Whether the drawee really obtained the cheque by false pretences;

l) Is the plaintiff entitled to the prayers sought in the plaint;

m) Who should bear the cost of the suit?

On the law and evidence, the appellant quoted Section 4(1) of the Cheques act Cap 35 of Laws of Kenya which 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 reason (sic) 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 cause; 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."

It was submitted that under Section 3(1) of the Bills of Exchange Act Cap 27 Laws of Kenya, a banker's cheque is an obligation by the bank to pay the payee named thereon and once a banker's cheque is issued it becomes a promise and obligation to pay by the bank and is enforceable as a bill of exchange by the bank.

Counsel also cited Section 38 of the Bills of Exchange Act which entitles a holder of a bill to sue on the bill in his own name and enforce payment against all parties liable on the bill.

Counsel maintained that a bank would only agree to stop a banker's cheque where there is fraud. In their view, the indemnity given covers the loss such as the one in this matter.

It was further maintained that no notice required under an indemnity and that none is required in law and that what the defendant was doing was to enforce an indemnity which it was entitled to fall back on its lien on all securities, goods, credit or other assets in its possession on behalf of the plaintiff.

It was denied that there was any promise to credit the respondent's account following the several meetings intended to resolve the matter amicably.

The appellant relied on the case of **Kitui Tobacco Distributors Ltd – Vs – Barclays Bank of Kenya Ltd** to advance the principle that the general lien of banks attaches to all securities deposited with them as bankers by a customer, or by a third person on a customer's account, and to money paid in by, or to the

account of, a customer unless there is a contract, express or implied, inconsistent with the lien; and that under Section 75 of the Bills of Exchange Act, the duty and authority of a banker to pay a cheque drawn on him (the banker) by his customer are determined by:-

(a) A countermand of payment;

(b) Notice of the customer's death, among other principles

v) Judgment of the Lower Court

The trial magistrate upon hearing the parties evidence found on 18th May 2007 that the appellant bank acted in a manner that compelled it to make the payment. It had at least 7 days within which to take action to challenge the decree but instead it just paid and debited the respondent's account which she held, the respondent was entitled to a refund. On the issue of the pending suits between the respondent and Phoenix Properties, she found that those were matters between the respondent and other parties and not the appellant herein. She further held that the bank ought not to have paid auctioneers on account of an irregular judgment as conceded by DW1 that they were never served with summons to enter appearance. The trial magistrate dismissed the claims for special of Sh. 52,000 as not proven and general damages. She entered judgment for the respondent for Sh. 1,413,380.60 with costs and interest.

vi) The Appeal

Being dissatisfied with the above judgment and decree of the trial magistrate, the appellant bank filed this appeal on 18th June 2007, setting out 11 grounds of appeal to be considered in this judgment.

This being the first appeal, the duty of the court is as espoused in Section 78 of the Civil Procedure Act and as enunciated in the well known Court of Appeal decision of **Sielle – Vs – Associated Motor Boat Co. (1965) EA 123** that

> ***"An appeal to this court from a trial court is by way of a retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put, they are that: this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect.***
>
> ***In particular, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities to estimate the evidence in the case generally."***

The appellant's case on appeal as contained in the 11 grounds of appeal is explained in detail in their submissions filed on 24th November 2010 together with the replying submissions filed on 4th February 2011. They also relied on four decisions as filed in the list of authorities dated 16th November 2010.

The appellant maintains that the respondent did not prove their case against the appellant on a balance of probabilities, that they did not prove that the bank was negligent in paying to the auctioneers the decretal sum as was held in **CA 2841/2000 Benedict Mwazighe – Vs – Bandari Transporters Ltd & Another** and **HCCA 438/2000 Kenya Bus Services Ltd – Vs – David Kanyari Mwangi** that all particulars of negligence pleaded in the plaint and over which evidence was to be adduced to prove each of them on a balance of probabilities had not been proved. He urged that as the burden of proof in civil cases lay on the plaintiff/respondent, the defence had no burden to prove anything.

Based on the case of **Margaret Njeri Muiruri – Vs – Bank of Baroda CA 9/2001**, counsel for the appellant urged the court to find that the trial magistrate erred in relying on or invoking the law without stating the basis upon which she came to the conclusion that she did and that she failed to consider certain relevant matters and thus exercised her discretion wrongly and hence, she erred in principle.

The appellant considers the appeal herein conceded by the respondent's submissions that negligence had not been proved and that the appellant should have paid the claim to the auctioneers and claimed from the respondent for reimbursement which could not happen, as the bank had lien over the funds held by it in the respondent's account with it hence the end result would be the same.

The appellant further considers the submissions that the indemnity was not security, rather a promise to safeguard or hold the appellant harmless against any loss or damage accruing as a result of not paying the banker's cheques and that that promise was not conditional on any ground.

The appellant also adopted all the submissions tendered in the trial court and reiterated the evidence as adduced by the witnesses in court to back all the 11 grounds of appeal.

vii) <u>The Respondent's Submissions on Appeal</u>

The respondent filed their submissions on 18th January 2011 opposing the appeal, reiterating the evidence in the court below, their submissions in the trial court and the authorities relied on therein and maintaining that the trial magistrate was correct in finding that the respondent had proved its case against the appellant on balance of probabilities. They urged the court to dismiss the appeal with costs.

viii) <u>Evaluation of Evidence</u>

From the evidence as a whole on record, it is not disputed that the respondent instructed the appellant to issue a banker's cheque on 31st July 2004 to a third party namely, Kiriiyu Merchants Auctioneers and before the said cheque could be made good, the respondent on 2nd August 2004 instructed the appellant bank to stop the said cheque by presenting a police abstract to demonstrate that the said cheque had been demanded by false pretences. The appellant acted on the customer/respondent's instructions and stopped the payment/encashment of the cheque No. 016753. The police abstract was issued on 2nd August 2004 vide OB No. 25/2/8/2004 by the Officer Commanding Station Industrial Area Police Station. The letter requesting for stoppage and accompanying the police station is dated 2nd August 2004 and titled INDEMNITY, with the following undertaking:

"We hereby confirm, agree and undertake to keep you indemnified and harmless from all claims, losses, demands, actions, damages and charges and expenses whatsoever directly or indirectly paid/to be paid, incurred or sustained by you at any time as a result of not paying the bankers cheque.

Yours faithfully,

For Equip Agencies Ltd A/G No. CD 520523

D.I. Patel ***I.S. Patel***

Authorized signatory ***Authorized signatory"***

The said indemnity was also accompanied by a letter dated the same day signed by the authorized signatories of the respondent company.

On 15th September 2005, the bank (appellants) wrote to the respondents informing them that the appellants had received a court order to pay Sh. 1,413,380.60 together with costs and interest and to that end, they had debited the respondent's account No. 002200000523 with the same amount and asked the respondent to deposit the aforementioned amount into their account.

The respondents responded to the appellants letter of 15th September 2005 on 22nd September 2005 demanding a credit to their account as they were not liable as the cheque demanded was by false pretence as per the police abstract. It is worth noting that the Kiriiyu Merchants had purported to possess the respondent's office equipments on account of rent arrears payable to another party Phoenix Properties and

demanded Sh. 1,000,000/- to be written in their name and upon such cheque being written, the advocates representing Phoenix Properties M/s Muoki & Co informed the respondent that they had not instructed the said auctioneers to collect the said cheque in the auctioneers name hence the cancellation of the cheque and report made to the police.

The appellant claimed that it anticipated the loss which loss was covered by the indemnity signed by the respondent, whereas the respondent claims otherwise and contends that the loss if any was occasioned by the appellant's negligence and recklessness and consequently not covered by the indemnity signed by the respondent.

I have carefully considered the parties' pleadings in the lower court, evidence as adduced both oral and documentary, submissions and authorities cited for and against the claim both in the lower court and in this appeal and in line with the 11 grounds of appeal challenging the decision of the trial magistrate.

ix) Issues for Determination

Although the written submissions are quite lengthy, they are clear and address the following two main issues.

i) Whether the indemnity undertaken by the respondent was absolute and or unconditional and if so, whether the appellant acted lawfully and or was justified in the circumstances in debiting the respondent's account in satisfaction of decree in favour of the third party drawee of the banker's cheque that had been stopped on the respondent's instructions and undertaking to indemnify the appellant for any loss or damage resulting from the act of stopping payment of the cheque.

ii) Whether the respondent proved its case against the appellant on a balance of probabilities and if not, whether the trial magistrate erred in principle in entering judgment in favour of the respondent.

There are also secondary questions as well, flowing from the above two main issues and I will accord them due attention.

Issue 1

It is not in dispute that the respondent issued a banker's cheque to a third party and followed up with instructions to the appellant bank to stop the same on account of the cheque having been demanded by false pretences, and the bank, on satisfying itself that there was a police abstract to that effect, did, before stoppage thereof, obtain an indemnity undertaking from the respondent.

It is further not in dispute that the appellant debited the respondent's account to pay off a sum of money claimed by the drawee of the countermanded cheque when the appellant was faced with execution of decree proceedings.

What is disputed is whether the appellant should have defended the suit giving rise to the decree that led to the debiting of the respondent's account and or whether they should have inquired from or notified the respondent before debiting the latter's account.

In justifying the debit, the appellant's pleaded that the suit giving rise to the decree was determined on the basis of false affidavits of service.

The question this court asks itself is, why did the appellant not challenge that judgment?

Although the appellant alleges that the respondent was unco-operative and for lack of requisite facts, this court finds the evidence and pleadings by the appellant not only at variance and therefore contradictory but unbelievable.

The pleadings in defence allege that the auctioneers came with a decree, warrants of attachment and breaking orders. None of those documents were produced in court by the appellant to prove the allegations.

They therefore remain bare allegations. Further, although it was alleged that the respondent failed to give details for stoppage of the cheque, at page 126 of the record of appeal DW1 testified and stated,

> ***"The bank asked Mr. Patel of Equip Agencies the reason for stopping the cheque and we (sic) told the bank the cheque had been obtained by false witnesses."***

This was the same defence witness who testified that

> ***"A banker's cheque cannot be stopped by any bank (sic) for why good reasons (sic) so we requested for an indemnity exhibit 4 is the indemnity."***

In other words, the respondents on being asked to provide justification for stoppage of the banker's cheque, knowing that it was a bill of exchange on which liability to the bank could accrue for stoppage, the respondent provided justification and it was not until the bank was satisfied that the cheque had been obtained by false pretence as evidenced by a police abstract, that it stopped the cheque. Admittedly, the bank could not stop the cheque but for good reason.

Further, albeit the witness DW1 alleges that the bank investigated and discovered that there was no false pretence alleged by the respondent, there is absolutely no evidence of such investigations.

The defence witness also discounted the pleadings when she testified that *"the auctioneers did not come with the decree but they had a proclamation."*

The pleadings alleged that the auctioneers were accompanied by the police, a breaking order, decree and warrants of attachment.

It is trite law that parties are bound by their pleadings and adduce evidence, that tend to prove what is alleged in the pleadings.

It is further this court's view that the appellant was not under any duty to persuade the auctioneers and the police that it would not pay. The bank ought to have used the legal process to challenge the irregular decree, upon realizing that the judgment was obtained on the basis of *"false affidavits of service."*

Furthermore, the DW1 in her evidence in chief and in cross examination admitted that the auctioneers only had a proclamation and not a warrant of attachment and sale. A proclamation gives the judgment debtor an opportunity to challenge a decree. And even if the auctioneers had a warrant of attachment and sale, no law permits a sale upon taking possession. The auctioneers would still give notification of sale of the attached property with a time frame as provided for under Order 22 Rule 57 of the Civil Procedure Rules.

At page 127 of the record of appeal, the defence witness stated that

> ***"On the same day we wrote to the customer informing them <u>that auctioneers had come to our bank to proclaim</u> and that we had paid and debited their account. The matter did not end there. The customer demanded a reversal of the debit but <u>we told them that in view of the indemnity we had a right to debit the account</u>."***

There is no evidence that the bank debited the respondent's account for non-co-operation on setting aside of the decree, it wrote to the respondent the same day of proclamation so when did it seek such co-operation?

The witness added that, *"we did not set it aside as we did not have the requisite facts."* In my view, the

appellant had all the requisite facts to apply for setting aside the exparte judgment against them. Nothing precluded them from swearing an affidavit denying that they had been served with summons to enter appearance and or plaint in that matter.

Equally, nothing precluded them from filing a defence and seeking to enjoin the respondent as a necessary party or third party to indemnify them based on the indemnity signed by the respondent on 2nd August 2004. There is nothing in the indemnity as produced, to show that the appellant was entitled to debit the respondent's account without recourse to the respondent. There is nothing to show what security was given by the respondent to be realized instantly without due process.

The fact that the appellant purports to have "investigated" to find out whether there was any false pretences in obtaining the said cheque, invites a duty of care on the appellant towards the respondent.

The DW1 on her own admission testified that *"had we known this, we would not have stopped the cheque."*

The appellant alleges that they searched for the court file and failed to trace it in an attempt to set aside the judgment. Having admitted that they debited the account before contacting or informing the respondent, it does not make any sense that this allegation of a missing file is now emerging. This should have been the preliminary steps taken by the appellant before paying the amount out. No communication with the court on the "missing" file was produced.

Therefore, as to whether the indemnity was absolute and irrevocable under any circumstances, the DW1 at page 128 of the record of appeal testified that *"the customer agrees to absolve the banks of any liability depending on the circumstances for instance if the bank is sued, such circumstances must give rise to lawful liability."* In this case, the auctioneer had obtained a decree which the appellant states was irregular, and therefore there was no lawful liability upon which the bank could be compelled to debit the customer/respondent's account.

As I have indicated above, there was nothing in the indemnity that commanded that in case of liability arising, *"we will unilaterally debit the customer's account without recourse to the customer and that we have lien over your funds held in our bank."* The question is, would this so-called lien as submitted by the appellant's counsel still have applied where there were no funds available in the customer's account at the time the said execution of decree was being effected! If that were to be the case, nothing prevented the bank from indicating in the indemnity that the customer would set aside funds as security for enforcement of the indemnity.

My finding is that the bank could still sue to enforce the indemnity where there were no funds as there was no security provided.

In my view, there was no urgency in debiting the respondent's account without reverting to it as the provision of the Auctioneers Rules, 2007 are clear that goods once proclaimed are left in the custody of the judgment debtor for a period of 7 days after which they are attached (taken possession of) and a notification of sale by public auction issued under Order 22 rule 57 of the Civil Procedure Rules.

This court finds the authorities cited by the appellant inapplicable in the circumstances of this case, save for the obvious provisions relating to burden of proof.

Furthermore, nothing prevented the appellant from filing a cross suit by way of a counter claim or set off against the respondent's claim herein. Had they done so, they would have given the court an opportunity to appreciate that they were indeed entitled to an indemnity in the circumstances to any legal process.

Failure to do so estopped them from raising any complaint on appeal alleging that they were entitled to the debited sum as lien to indemnify themselves against claims by third parties, notwithstanding the legality of those claims.

The appellant cannot be heard to say *"I was under no duty to notify you that liability has arisen. I simply fall back on the indemnity, whether that liability is lawful or not."*

It is my most considered view that the bank/appellant breached the bank/customer relationship and obligation when it debited the respondent's account in respect of the decree against the bank, which decree was admitted to be irregular and which could have been challenged successfully.

I am fortified by the **Halsbury's Laws of England 4th Edition Volume 3 (1) paragraph 175** that:-

> ***"Banker paying without authority. Subject to questions of statutory protection, estoppel or adoption, a banker who has paid a cheque drawn without authority or who has paid one in contravention of his customer's order, or, probably, negligently, cannot debit the customer's account with the amount. However, if such a cheque is paid in discharge of the customer's debts, the banker is entitled to take credit for it."***

In this case, there was no conclusive evidence that the respondent owed monies to the third party.

The above paragraph fortifies the law that a bank cannot accept instructions from a stranger with regard to a customer's account, and the bank is entirely liable to a customer if it acts in contravention of or ignorance of its instructions with a customer. Any loss arising from such breach of contract should be borne by the bank in this case, the appellant.

What emerges from the appellant's submissions is that the respondent misrepresented to the appellant that the subject material cheque had been demanded by false pretences. However it should be noted that no claim for misrepresentation or particulars thereof were pleaded and no evidence was adduced to prove the same. This is contrary to Order 2 Rule 10 (1) of the Civil Procedure Rules.

In my view, a banker's cheque being a bill of exchange would be made out of the bank's own account and not on the account of the respondents, as would be in the case with a personal cheque, before invoking the indemnity.

In other words, the appellant bank by accepting to stop the payment of the banker's cheque and requisitioning for an indemnity, equally undertook the risk of paying the banker's cheque should liability arise as a result of such non-payment, in the hope that if a debt arose, it would demand the respondent to make good and reimburse the amount of the debt paid out. However, no automatic right arose to debit the respondent's account without recourse to the respondent.

In **British & North European Bank Ltd – Vs – Zalzstein [1927] All ER 556**, the court held as follows:-

> ***"Although prima facie a credit entry in a customer's passbook was an admission by the bank in his favour, in every case where a mere book entry could be treated as a payment, some other circumstances must be present; e.g. some communication of circumstances to the customer and some action on it by him and alteration in his position; in the circumstances of the present case the defendant was not entitled to regard the credit entries as payments into his account and ignore the debit entries; and therefore, the bank was entitled to succeed."***

As it had been made clear that the material cheque had been procured by false pretence, the appellant was entitled to dishonor the payment of the said cheque until the contrary was proved, and therefore the third party could not purport to benefit from a cheque that had allegedly been obtained by false pretences.

In **Ross Cranston's Principles of Banking Law, 2nd Edition at p.187**, 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."

The relevance of the above writing to this appeal is that it was not a matter of life and death for the appellant bank when it was confronted with auctioneers waving a proclamation. The legal process exists to protect persons from unfair treatment. The bank had reason to question the decree and proceed to challenge its propriety. It was not faced with a situation of honouring the same or otherwise face dire consequences.

Cranston's general view on the customer/bank relationship is endorsed by the finding in the case of **Karak Rubber Company Ltd – Vs – Burden (1972) All ER 1210 No. (2)** in which **Brightman J** extensively examined a banker's duty of care and its contractual duty to the customer to exercise care and skill among others that:-

"Although a bank was obliged to pay on demand a cheque which was in a proper form and backed by adequate funds, it did not follow that a paying bank was under an absolute unqualified duty to pay without enquiry; it was, on the contrary, under a contractual duty to exercise such care and skill as would be exercised by a reasonable banker and that care and skill included, in appropriate circumstances, a duty to enquire before paying."

The court further observed that:-

"As a cheque is by statutory definition and by its own inherent nature a bill of exchange payable to demand, the banker is by the essential nature of the contract between him and his customer prima facie required to pay his customer's cheque on demand. Apart from all else, to dishonor a cheque may defame the drawer or impair his credit. Any gloss on that contract which requires the banker to pay his customers' clear unambiguous and properly authenticated cheque not on demand but (in certain circumstances) only after critical thought and the conduct of an inquisitional exercise, can only arise by implication. A term which finds no expression in a contract is not to be implied unless necessary in a business sense to give efficacy to the contract, that is to say, if it is a term of which it can confidently be predicted that it is obvious that it goes without saying …"

In this case, it is my humble view that it would be utterly irrational to suppose that the appellant bank had an absolute unqualified duty to pay and no duty to enquire from the respondent customer despite a deep suspicion, approaching but falling short of certainty, that the decree before it had been obtained irregularly.

It would further be dangerous and untenable for a bank to put itself in a position of being in all cases an automatic cash dispenser of its customer's money, whatever the circumstances, as there is no rational stopping place short of a contractual duty to exercise such care and skill as would be exercised by a reasonable banker in similar circumstances.

And that care and skill must rationally include, in appropriate circumstances like in this case, a duty to inquire before paying and or debiting a customer's account.

Like in the **Karak Rubber Co. Ltd – Vs – Burden case (Supra)**, I appreciate the simplicity and convenience of the counsel for the appellant's able submissions but on a broader view, expediency is not a persuasive argument for excusing a banker from enquiring in all circumstances short of certainty, when,

off course, enquiry would be needless.

I discern nothing in the cases which have been cited by the appellant that is inconsistent with my conclusion above. None of the cited cases relied on by the appellant in support of its appeal and defence in the lower court were directed towards the type of problem which is before me for a decision. That is, to say, whether, despite the indemnity and primary obligation to pay a cheque on demand, a bank owes to its customer a duty of care which may, in an extreme case, obligate it to question the authority of a court order.

The proper question, in my view, which should be put to a debiting banker and customer, in a case such as the present one, is whether the banker is to exercise reasonable care and skill in transacting the customer's banking business, including making of such enquiries as may, in given circumstances be appropriate and practical if the banker has, or a reasonable banker would have, grounds for believing that the auctioneers, armed with a proclamation and in the company of police officers could be misusing the authority of the court for the purpose of defrauding the bank or otherwise defeating their true intentions.

The **Karak case** in my view has high persuasive authority and I am convinced that it is correct to follow it unless I was convinced that it was wrongly decided.

The bank was convinced that it had not been served with any summons to enter appearance and that it had the right to be heard in the suit giving rise to the decree as it was justified in stopping the cheque, acting on clear instructions of its customers, the respondent, and having believed the customer that there was good reason to stop the said cheque. There was therefore no compelling reason to debit the customer's account on being shown a decree which had been obtained irregularly.

In the **Selangor case (1968) 2 All ER at p.1118, (1968) 1WLR at 1607**, the learned Judge stated

> ***"If enquiry ought to be made, and no enquiry is made, then the weight of authority establishes, in my view, that it is to be assumed that a true answer would be given, and, if no enquiry is made, that negligence is established."***

Therefore, on a balance of probabilities, I am of the opinion that a reasonable banker of reasonable intelligence, undistracted by any anxiety for its own personal position, would have soon learnt that the decree issued against it was challengeable and that the banker would have pleaded indemnity against the respondent who would have been under a duty to justify the counter-manding of the banker's cheque, to expose the alleged fraud.

Where fraud is alleged, it would, in my humble view, entitle a bank to refuse to pay under a questionable decree wherein the bank is sued but no service of summons were effected to enable it defend the suit. And the same position would, in my view, apply to letters of credit or even a performance bond, notwithstanding the strict general rule requiring payment on presentation. And, in my view, therefore, it is only in the absence of fraud that the bank ought to pay.

In addition, the appellant bank had choices of remedies in law, taking into account the customer's allegation of fraud against the third party. No evidence was adduced to prove that there was any lawful or regular judgment against the respondent or appellant making it indebted to settle a claim subject matter of the stopped cheque, and therefore compelling the bank to settle that debt whether as a garnishee or as a holder of an indemnity undertaking. By the appellant's own pleadings, the case CC 4501/05 and whole proceedings in that case had been undertaken by the filing of false affidavits of service so as to obtain judgment, warrants and breaking orders to coerce the defendants to settle the said sum.

Whereas this court appreciates that the purpose of the indemnity is to make good loss incurred by an independent party and the right to enforce the same depends on the terms of the contract, it was not established on the face of it, that the condition, as there was none attached to it, would be to debit the customer's account as soon as some form of liability arose without enquiring on the propriety of that liability.

I see nothing in the respondent's submissions that would persuade me that there was an admission to the bank recovering the money or loss summarily. I emphasize that the parties are bound by their pleadings and the evidence adduced to prove the allegations of facts in those pleadings. And further, that submissions by counsels are not evidence. They are intended to clarify issues and espouse the applicable law and not meant to adduce new evidence based on facts pleaded and or adduced in evidence. I therefore dismiss the contention by the appellant's counsel in their reply submissions to the respondent's submissions.

Accordingly, I find that the indemnity undertaken by the respondent was not absolute and or unconditional and therefore, the appellant was not justified in the circumstances of this case, in debiting the respondent's account in satisfaction of a decree in favour of the third party decree holder and drawee of the banker's cheque that had been stopped on the respondent's instructions.

Issue No. 2

On whether the respondent proved its case against the appellant on a balance of probabilities and if not, whether the trial magistrate erred in principle in entering judgment in favour of the respondent, having exposed the appellant's duty of care to its customer.

I reiterate the law – Section 107 of the Evidence Act Cap 81 Laws of Kenya that whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist, and the burden of proof lies with a party who alleges the existence of any fact.

Section 108 provides that the burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

In the instant case, having considered all the evidence on record, the law and authorities cited by the appellant and respondent in the lower court in support of the pleadings, I am satisfied that the respondent proved their case against the appellant on a balance of probabilities, and that the trial magistrate's findings and conclusions were correct in principle.

I am satisfied on the pleaded facts that the appellant acted negligently and recklessly in paying off the amount as demanded by the auctioneers without questioning the propriety of the said decree. It acted in haste. The expediency exercised without recourse to the respondent was unnecessary. There was no evidence of attachment and even if there was any, and the bank believed that it was a regular decree, hence the need the satisfy it and challenge it later, the bank should have inquired from the customer before debiting the account. It was admitted by DW1 that the auctioneers only had a proclamation and the witness being a lawyer, understood or ought to have understood and advised her client the bank that the Auctioneers Rules and the Civil Procedure Act and Rules do not permit proclaimed goods to be carried away without an attachment/taking of possession warrant, and that there were necessary procedures to be followed in execution of decree that had to be complied with. Rule 12 of the Auctioneers Rules is clear that:-

> ***"Where the auctioneer receives warrants or letter of instruction, the auctioneer shall,***
>
> > ***(a) in case of movables other than goods of perishable nature and livestock,***
> >
> > ***(b) Prepare proclamation in sale Form 2 of the Schedule indicating the value of specific items and the condition of each item, such inventory to be signed by the owner of the goods … and where any person refuses to sign such inventory the auctioneer shall sign a certificate to that effect;***
> >
> > ***(c) In writing, give the owner of the goods seven days notice in sale Form 3 of the Schedule within which the owner may redeem the goods by payment of the amount set forth in the court warrant or letter or instruction;***

(d) <u>On expiry of the period of the notice without payment and if the goods are not to be sold in situ, remove the goods to safe premises for auction</u>."

Although the appellant's appeal is heavily premised on the findings made by the trial magistrate on page 134 of the record of appeal where she found that:-

"… It (the bank) acted in a manner that compelled it to make payment it had at least 7 days within which to take action but instead it decided to pay and forget the whole matter."

I find nothing erroneous in principle in the finding of the trial magistrate as she must have been aware of the provisions of Rule 12 of the Auctioneers Rules 2007 as underlined above and Order 22 Rule 57 of the Civil Procedure Rules.

Albeit it is submitted that the trial magistrate did not consider the evidence and submissions by the appellant and authorities, the ground is baseless on the whole for reasons that the record of appeal – judgment is clear that the trial magistrate did provide an analysis of the evidence as adduced by the plaintiffs' and defence witnesses and at page 134 thereof she clearly stated that:-

"I have considered the evidence and submissions by both sides carefully. I am not persuaded that in the circumstances of this case the bank acted lawfully in debiting the plaintiff's account …"

The authorities cited in support of the submissions were on record. The fact that she did not analyze each authority or bring out an exposition of the submissions, which, as I have stated elsewhere in this ruling are not evidence, cannot be interpreted to mean that she did not consider them in writing her judgment. This was a clear case of enforcement of an indemnity between the bank and its customer. Although the trial magistrate did not belabor delving into the details the way I have done, her style of appreciating the issues, in my view cannot be faulted as I do not find any prejudice having been occasioned to the appellant. It would appear that the appellant expected the trial court to address each of the issues framed by their advocate in the written submissions, which she did not as she was not obliged to do so, having identified the issue for determination. And the same should not be expected of this court.

As I have stated, the evidence on record was clear. However, as I have stated elsewhere in this judgment, the appellant's witness adduced evidence that was contradictory and averse to the pleadings.

Accordingly, I reiterate my finding that there was sufficient evidence, on a balance of probabilities, proving the respondent's claim. No evidence was adduced to counter that evidence by the respondent. The law is not on the appellant's side as espoused herein. The trial magistrate was therefore correct in her findings and I find no reason to disturb or interfere with her findings and conclusions. I accordingly uphold her decision.

The upshot of the above is that the appellant's appeal on all the 11 grounds as contained in the memorandum of appeal dated 15th June 2007 and filed on 18th June 2007 fails and is dismissed with costs to the respondent.

The respondent is also awarded costs of the lower court.

Dated, signed and delivered at Nairobi this 3rd day of December, 2014.

R.E. ABURILI

<u>JUDGE</u>