



**Lim & another v Diamond Trust Bank Kenya Limited & 7
others (Commercial Case E068 & E069 of 2018 (Consolidated))
[2025] KEHC 15992 (KLR) (Commercial and Tax) (7 November 2025) (Judgment)**

Neutral citation: [2025] KEHC 15992 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E068 & E069 OF 2018 (CONSOLIDATED)**

**A MABEYA, J
NOVEMBER 7, 2025**

BETWEEN

**SUN PIL LIM 1ST PLAINTIFF
DAEHAN PHARMACEUTICAL LIMITED 2ND PLAINTIFF**

AND

**DIAMOND TRUST BANK KENYA LIMITED 1ST DEFENDANT
JONG CHAN LEE 2ND DEFENDANT
JONG MIN JAN 3RD DEFENDANT
SIN JUN KIM 4TH DEFENDANT
HEO YOUNG 5TH DEFENDANT
HWANSEOR SEO 6TH DEFENDANT
JAMBO TRADE INVESTMENTS 7TH DEFENDANT
HAEJIN LEE 8TH DEFENDANT**

JUDGMENT

1. Each of the plaintiffs held an account with the 1st defendant bank which were opened in 2015 at the bank’s TRM Thika Branch. The two caused a total sum of Kshs.150,000,000/- to be placed on fixed deposits for a year with the 1st defendant which was to be repaid with interest at agreed rates on specified dates. However, unbeknown to the plaintiffs and without their consent, the 1st defendant liquidated



- and paid out the said amounts to 3rd parties thereby subjecting the plaintiffs to the loss of the said amounts together with interest thereon.
2. The foregoing led to the filing of two suits wherein the said amounts, interest amongst other reliefs were claimed. This judgment is in respect of the said two suits by the plaintiffs, viz HCCC E068 OF 2018 and HCCC E069 of 2018. The two cases were consolidated on 19/6/2023 for the purposes of trial but as regards costs, it was ordered that they shall be considered separately.
 3. In HCCC E068 OF 2018, the case was between the 1st plaintiff against the 1st defendant. However, the 1st defendant counterclaimed against Daehan Pharmaceutical Ltd and Jong Chan Lee as the 1st and 2nd defendant to the counterclaim.
 4. In HCCC No. E069 of 2018, the 2nd plaintiff sued the 1st defendant who counterclaimed against Jong Chan Lee, Jongmin Jang, Si Jun Kim, Heo Young, Hwanseor Seo, Jambo Traders Investments and Haejin Lee.
 5. For purposes of trial and ease of reference, in the order of consolidation, the plaintiff in E068/2018 was made the 1st plaintiff while the plaintiff in E069/2018 became the 2nd plaintiff. The rest of the parties were named as defendants beginning with the common defendant, the 1st defendant.
 6. In HCCC No. E068 of 2018, the 1st plaintiff instituted the suit vide a plaint dated 12/9/2018. She sought judgment against the 1st defendant for Kshs. 56,344,520.55, interest and costs of the suit. It was her case that in October, 2015, she opened a savings account number 5110699001 at the 1st defendant's Thika Road Mall Branch.
 7. That the account was to be operated singly by her. That between 26/10/2015 and 2/11/2015, she deposited a total of Kshs. 55,000,000/- into her said account. A sum of Kshs. 50,000,000/- was placed on fixed deposit under two Certificates of Deposit dated 28/10/2015 and 5/11/2015, with interest rates of 16% and 15%, respectively. The maturity dates were for 26/10/2016 and 3/5/2016, respectively. That in the absence of maturity instructions, the deposits were to be rolled over automatically at the prevailing rate of interest.
 8. That after maturity, she did not receive any status reports or rollover notices. Upon inquiry from the 1st defendant's branch manager, she was met with evasive, misleading and deceptive responses. That production orders issued in Misc. Cri. Appln No. 9 of 2018 requiring the 1st defendant to furnish documents relating to her accounts, were only partially complied with.
 9. That she subsequently discovered that the 1st defendant, its agents and employees conspired to defraud her by prematurely liquidating her fixed deposits of Kshs. 30,000,000/- and Kshs. 20,000,000/- on 2/2/2017 and 13/3/2017, respectively, without her authority.
 10. She enumerated particulars of conspiracy, collusion and fraud against the 1st defendant. These included; liquidating deposits without the original Certificates, relying on forged instructions, failing to verify the true identity of the person presenting such instructions, channeling funds to third-party accounts and entering deceptive information on liquidation applications. That the 1st defendant was negligent in acting on forged documents.
 11. That the proceeds of the liquidation were deposited into an account held by Daehan Pharmaceuticals Limited, from where large daily withdrawals were made across the counter using forged cheques, in contravention of prudential banking guidelines and the [Proceeds of Crime and Anti-Money Laundering Act](#).



12. She therefore claimed against the 1st defendant Kshs. 56,344,520.55 together with interest from 26/10/2016, 3/5/2016, and 4/11/2015 until payment in full, as well as costs of the suit and interest thereon.
13. The 1st defendant filed an amended statement of defence and counterclaim dated 25/11/2021. It admitted the 1st plaintiff holding an account at its Thika Road Mall Branch. However, it contended that prior to opening the account, the 1st plaintiff was introduced to it by Jong Chan Lee, the 2nd defendant, who was her co-director and shareholder in Daehan Pharmaceutical Limited (“the 2nd plaintiff”).
14. That in the account opening forms, the 1st plaintiff indicated that the source of funds to be credited into her account would be the 2nd plaintiff or Safari Park Hotel, where her husband was employed. That she executed the account terms and conditions, including provisions requiring instructions to be in writing or in person and for complaints to be lodged within 28 days of the relevant event.
15. It contended that she directed the 1st defendant not to send correspondence by post or email, and she was therefore required to request information in writing. That the said Jong Chang Lee, made cash deposits totaling Kshs. 55,000,000/- on her behalf into the said account. That he regularly delivered her written instructions including those relating to placement of the funds into fixed deposit.
16. It denied failing to provide statements or information, contending that statements were available upon request and that accurate and honest information was always furnished. It also denied obstructing police investigations, contending that it fully complied with production orders issued in Misc. Cri. Appln No. 9 of 2018.
17. That by undated letters received on 2/2/2017 and 13/3/2017, the 1st plaintiff instructed it to liquidate her fixed deposits under references 0046FDLC153000001 and 0046FDLC153080001 and to credit the proceeds thereof onto the 2nd plaintiff’s account number 0110704001, also held with itself. That these instructions were delivered by Jong Chang Lee who was well known to the 1st plaintiff and had introduced her to the bank and deposited the subject funds.
18. That it verified the signatures on the liquidation instructions against the 1st plaintiff’s specimen signature, confirmed their authenticity by a telephone call made by the branch manager to the 1st plaintiff and was satisfied that the instructions emanated from her. That it was legally bound to honor her instructions and that the funds were credited to a company account in which she was a majority shareholder.
19. It denied any conspiracy, collusion or fraud and maintained that, the withdrawals from the 2nd plaintiff’s account were ordinary transactions supported by properly executed cheques.

Counterclaim

20. By way of counterclaim, the 1st defendant joined the 2nd plaintiff as the 1st defendant to the counterclaim and Jong Chan Lee as 2nd defendant (“Jong Chan Lee”). It sought judgment against them, jointly and severally, for the sum of Kshs. 56,344,520.55, interest thereon at court rates from the date of filing until payment in full and costs of the counterclaim.
21. It contended that the 1st plaintiff held 400 shares in the 2nd plaintiff, while Jong Chan Lee and another shareholder each held 250 shares, whilst a fourth shareholder held 100 shares. That the 2nd plaintiff operated account number 0110704001 with itself at Thika Branch. That the 2nd plaintiff was also introduced and operated through Jong Chan Lee.



22. That pursuant to instructions of the 1st plaintiff delivered by Jong Chan Lee, the 1st defendant transferred a total of Kshs. 56,344,520.55 from her fixed deposits into the 2nd plaintiff's account. That since the 1st plaintiff had denied executing the liquidation instructions and that Jong Chan Lee was a necessary party, the 1st defendant was entitled to indemnity from him and from the 2nd plaintiff.
23. The 1st plaintiff filed a response to the defence and counterclaim dated 26/2/2021. She stated that she had provided both her telephone numbers and those of her husband together with their email addresses as the means of communication by the 1st defendant. She denied relaying any instructions through Jong Chan Lee or authorizing the letters relied upon by the 1st defendant in paragraphs 9 and 10 of its defence.
24. That her's was a personal savings account with no nexus with Jong Chan Lee or the 2nd plaintiff to which the funds were transferred. That crediting the proceeds into the 2nd plaintiff's account was designed to facilitate access to her money by the 1st defendant's agents and servants together with Jong Chan Lee. That the bank manager, Joseph Muraya, who allegedly verified the liquidation instructions, never called her. He was subsequently charged with Jong Chan Lee for the theft.
25. The 2nd plaintiff, sued as the 1st defendant in the counterclaim, admitted having opened account number 0110704001 with the 1st defendant but denied ever making withdrawals from its own account or from the funds belonging to the 1st plaintiff. It maintained that the account opening and fixed deposit formalities were canvassed and arranged by the 1st defendant's own employees and agents, in particular, one Joseph Muraya.
26. It denied knowledge of the transactions alleged in the counterclaim. That any transfer of funds into its account was conspiratorial, fraudulent, unlawful and was effected by the employees and agents of the 1st defendant in collusion with Jong Chan Lee. That the sole purpose of crediting its account with the money was for fraudulent withdrawals without notice to the legitimate stakeholders.
27. It accused the 1st defendant's employees and agents of conspiracy and fraud, including forging signatures, preparing fraudulent transfer instructions, failing to verify transactions with the 2nd plaintiff and, deliberately transferring funds into accounts where fraudulent withdrawals could be executed. That it was not aware of or privy to the subsequent withdrawals from its account, which were facilitated by the 1st defendant's employees in collusion with Jong Chan Lee. That it derived no benefit whatsoever from the funds for they were withdrawn, transferred and paid over to Jong Chan Lee by the 1st defendant. That liability rested with the 1st defendant.
28. On the foregoing basis, the 2nd plaintiff contended that the counterclaim disclosed no reasonable cause of action against it, was vexatious and an abuse of the court process only intended to delay the just determination of HCCC No. E069 of 2018, which was pending between it and the 1st defendant.
29. Jong Chan Lee filed a defence to the counterclaim dated 12/2/2021. He admitted being a shareholder of the 2nd plaintiff and that he introduced it to the 1st defendant when opening account number 0110704001. He denied having deposited the funds or given instructions to place the money in fixed deposit, contending that these processes were canvassed and handled entirely by the employees and agents of the 1st defendant, in particular Joseph Muraya.
30. He denied delivering instructions to deposit or fix the 2nd plaintiff's funds as alleged and contended that, the transactions in question were hatched by the employees of the 1st defendant who conspired to unlawfully withdraw money from the 2nd plaintiff's account and used him to effect their plan. That



the liquidation instructions were prepared and formatted by the said employees, particularly Joseph Muraya.

31. That the transfer of funds to the account of the 2nd plaintiff was part of this arrangement between the 1st defendant's employees and himself, designed to use that account as a conduit for unlawful withdrawals without the knowledge of other directors of the 2nd plaintiff, who was a mandatory signatory.
32. He accused the employees of the 1st defendant of breach of trust, fraudulent intent and conspiracy. He gave particulars of such misconduct, including conspiring to transfer money from the 1st plaintiff's account without her knowledge or consent, preparing and formatting fraudulent liquidation instructions, entering false callback details, knowingly using forged signatures, failing to exercise the duties of a reasonable banker and, conspiring with him to misappropriate funds.
33. That the eventual transfer of funds into the 2nd plaintiff's account was fraudulent and illegal, and that the conspiracy led to criminal prosecution in which both he and the bank's employee were charged, convicted and sentenced. That the 2nd plaintiff did not sign or execute the liquidation instructions and never benefitted from the funds.
34. That the employees of the 1st defendant misrepresented, induced and coerced him into participating in the scheme. That he was promised that the money would be returned once profits from joint ventures were realized, that the loss would be concealed by the bank's staff, that profits would arise from real estate projects, that legal representation would be provided if the matter was discovered and even that he was threatened with elimination if he resisted.
35. On this basis, Jong Chan Lee denied the counterclaim in its entirety and prayed for its dismissal with costs.

HCC E069 of 2018

36. The 2nd plaintiff, a limited liability company incorporated in Kenya, instituted this suit against the 1st defendant through a plaint dated 12/9/2018. It sought judgment for Kshs. 113,600,000/-, interest thereon at court rates from 24/10/2016 until payment in full plus costs of the suit and interest thereon.
37. It contended that on 19/5/2015, it opened Account No. 0110704001 with the 1st defendant at the Thika Road Mall Branch. The account was to be operated jointly by the 2nd plaintiff's two directors, whose specimen signatures were duly provided to the bank.
38. That on 24/10/2015, it deposited Kshs. 100,000,000/- raised from promoters and investors into the said account and instructed the 1st defendant to place the funds on fixed deposit. The 1st defendant accordingly issued three certificates of deposit all dated 28/10/2015 for Kshs. 40,000,000/-, Kshs. 30,000,000/- and Kshs. 30,000,000/-, bearing references 046FDLC152970002, 046FDLC152970003 and 046FDLC152970004, respectively. The certificates carried interest at 16% per annum, with maturity date of 23/10/2016 and provided for automatic rollover in the absence of maturity instructions.
39. That upon expiry of the initial period, it neither received status report nor rollover notices. In December 2017, its Chairperson inquired about the status of the deposits, but the branch manager became evasive and unresponsive.
40. That production orders were issued in Misc. Criminal Appln No. 9 of 2018 compelling the 1st defendant to furnish account documents, but the 1st defendant became obstructive and only partially complied therewith. That its staff conspired with fraudsters to prematurely and fraudulently liquidate



the fixed deposits as follows; Kshs. 30,000,000/- on 8/2/2016, Kshs. 30,000,000/- on 12/7/2016 and Kshs. 40,000,000/- on 26/10/2016.

41. It particularized the fraud and collusion of the 1st defendant and its employees as consisting; liquidating deposits without production of the original Certificates of Deposit, liquidating the deposits without verifying the authenticity of the mandatory signatories, failing to follow the applicable guidelines for liquidation, relying on forged signatures to effect liquidations, knowingly processing fraudulent instructions, receiving unlawful benefits to facilitate premature liquidations and, recording intentionally deceptive information on liquidation applications.
42. That the 1st defendant irregularly honoured several cheques fraudulently drawn against the 2nd plaintiff's account, allowed withdrawals on forged instruments, failed to verify large and suspicious transactions and thereby contravened the *Proceeds of Crime and Anti-Money Laundering Act*.
43. In opposition, the defendant filed a statement of defence dated 25/11/2021. It admitted that the 2nd plaintiff opened an account with it. That at the time of account opening, the 2nd plaintiff presented its memorandum and articles of association which revealed that it had four shareholders, among them Sun Pil Lim, the majority shareholder, and Jong Chan Lee. The 2nd plaintiff applied for and was issued with a cheque book, and further instructed that no correspondence or bank statements were to be sent to it by post or email.
44. That 2nd plaintiff nominated Lim Sun Pil and Lee Jong Chan as the joint signatories to the account and provided their specimen signatures. It also executed the 1st defendant's standard terms and conditions on 19/5/2015. These terms, among others, provided that the 1st defendant would act only on the 2nd plaintiff's duly executed original instructions, that all instructions would be in writing, in person, or by other acceptable means and that any complaints or requests for information had to be made in writing within 28 days of the relevant event.
45. It admitted that the 2nd plaintiff deposited Kshs. 100 million and instructed that it be placed in fixed deposit accounts. The letter of instructions was signed by the two directors and delivered to the bank by Jong Chan Lee.
46. The 1st defendant denied that it was under any contractual duty to send account statements or maturity notices, reiterating that the 2nd plaintiff had expressly requested that no correspondence be sent. That the 2nd plaintiff could only obtain information upon written request, which it did not make until much later, and that when the request was eventually made, accurate information was provided. It denied obstructing investigations and contended that it complied with all lawful production orders issued in respect of the matter.
47. It contended that the fixed deposit accounts were liquidated on the basis of three separate letters of instruction received in February, July, and October 2016 delivered by Jong Chan Lee, who was both a director and a signatory of the 2nd plaintiff. That it verified the signatures against the specimen signatures provided at account opening, confirmed that the proceeds were to be credited to the 2nd plaintiff's own account, and noted that the instructions came through an authorized signatory. It then liquidated the deposits and credited the 2nd plaintiff's account in the ordinary course of business.
48. It denied any conspiracy or fraud and contended that it merely acted on valid instructions from the 2nd plaintiff's authorized representatives. That it was under no obligation to demand the physical Certificates of Deposit before liquidation and that there was no contractual duty to call or contact both signatories where instructions had been properly executed and presented by one of them. It denied receiving any benefit from the transactions or participating in any forgery.



49. That the cheques used to withdraw funds were properly drawn and executed in accordance with the mandate, matched the specimen signatures and were presented by one of the 2nd plaintiff's signatories. It relied on its terms and conditions, which require customers to safeguard their cheque books and relieve the bank of liability where a forgery is perpetrated by a customer's employee, servant, agent or associate.

Counterclaim

50. Together with the defence, the 1st defendant filed a counterclaim in which it reiterated its defence and joined several additional parties as defendants by way of counterclaim. These were customers of the bank and who received funds originating from the 2nd plaintiff's account.
51. It contended that between March 2016 and December 2017, Jong Chan Lee withdrew Kshs. 113,600,000/- from the 2nd plaintiff's account by cheques drawn in his favour. That if he lacked authority to do so, as alleged in the plaint, then he had no title to the withdrawn funds and was liable to refund the same. That substantial sums from these withdrawals were transferred to the accounts of the 2nd to 8th defendant, all of whom had no title to those funds. It provided a breakdown of amounts allegedly received by each of them, ranging from Kshs. 600,000/- to Kshs. 33,630,000/-.
52. It relied on indemnity provisions in its terms and conditions, which obligated customers to indemnify the bank against losses arising from their actions or those of their agents, as well as provisions on lien and set-off. That the 2nd to 8th defendant were liable to refund the sums received.
53. Accordingly, it prayed for the dismissal of the 2nd plaintiff's suit and for judgment against Jong Chan Lee for Kshs. 113,600,000/-, and against the 3rd to 8th defendant for the respective amounts they allegedly received. It also sought interest from 24/10/2016 until payment in full, together with costs of the counterclaim.
54. The 2nd 7th and 8th defendant filed a defence to the counterclaim dated 26/2/2021. They denied liability for the transactions complained of. They contended that the cheque book issued to the 2nd plaintiff was procured secretly through a private arrangement between the employees, agents and servants of the 1st defendant. That the withdrawals and transfers were facilitated by those employees, who also benefitted from the proceeds and therefore the 1st defendant was liable for the acts of its own staff.
55. The 6th defendant denied ever receiving the sum alleged against it. The 8th defendant similarly denied liability, stating that any money she received was from Jong Chan Lee and represented proceeds of legitimate business.
56. They accused the employees of the 1st defendant of breach of trust, willful neglect of duty, fraudulent intent and conspiracy. That those employees misrepresented, induced and coerced them into participating in the scheme.
57. The 1st defendant filed a response to the defence by the 2nd, 7th and 8th defendant. It contended that the terms and conditions governing the accounts were contained in the account opening forms and were applicable to the transactions in question. It denied that any of its employees, agents or servants entered into secret arrangements to issue cheque books to the defendants.
58. That the 2nd defendant had no title to the funds he withdrew and relied on the clauses of the account opening terms which entitled it to indemnity, a right of lien and set-off against the defendants in respect of all funds they received without title. It denied allegations of collusion, inducement or coercion.



Trial

59. Pw1, Sun Pil Lim, adopted her statements dated 12/9/2018, 26/5/2021, 12/9/2018 and 24/8/2021, respectively as her evidence-in-chief. They rehearsed what she had set out in her statement of claim as set out above. She produced the bundles of documents, Volumes 1, 2 and 3, as exhibits.
60. In cross-examination, she stated that she was a director of the 2nd Plaintiff holding 400 shares, while the 2nd defendant held 250 shares. That her husband worked with the 2nd defendant at Safari Park where she had gone to sign the bank opening forms. That the two accounts for the plaintiffs were opened in 2015 when Joseph Muraya (D1w1) showed her where to sign. She could not recall saying “four years.” She confirmed that she signed the DTB terms and conditions where D1w1 directed, after which she left her husband and D1w1 in that office.
61. She further testified that in 2015, her husband selected certain parties to incorporate a company, including Jong Chan Lee as a director. Her husband made a cash deposit of Kshs 10 million, although she did not know who delivered it to the bank. With respect to a cash deposit slip of Kshs 15 million, she stated that she did not know how it landed in her account, as her husband had been handling cash matters. She confirmed that the phone number on the bank opening form was hers, but the email address belonged to her husband. She did not know who indicated that her expected monthly salary was Kshs 30 million.
62. She admitted signing the letter dated 27/10/2015. However, she did not agree with the bank’s position that the form was delivered by the 2nd defendant. She did not know why the deposits were made in different tranches and emphasized that her husband handled all matters concerning the account opening. She denied signing the letter to liquidate the fixed deposit, noting that the signature on the document differed from hers.
63. That Jong Chan Lee was not authorized to transact alone since there was a requirement for two signatories in respect of the 2nd plaintiff’s account. That she was not aware of the 1st defendant’s terms and conditions. She confirmed that Jong Chang Lee admitted to taking her money and was convicted of that offence. She did not know the 4th and 5th defendant.
64. Pw2, Young Kwan Roh, the husband of Pw1, adopted his statement dated 24/8/2020 as his evidence-in-chief. In cross-examination by Mr. Kiragu Kimani SC, he testified that he did not know the 4th and 5th defendant. That the shareholders of the 2nd plaintiff were Pw1, the 2nd, 3rd defendant and Jolly Ouko. He explained that the dispute involved money removed from the plaintiffs’ accounts. That the 2nd plaintiff’s funds originated from him and his wife. He clarified that although he was not a shareholder of the 2nd plaintiff, he managed Safari Park Hotel through his directors. He occasionally interacted with Jong Chan Lee.
65. That the 2nd plaintiff was engaged in importation of medicine and equipment. That Jolly Ouko, a lawyer, incorporated the company, but he did not know her personally. That she had previously been a partner of Mr. Jong Chan Lee. He confirmed that D1w1 was the branch manager of the 1st defendant at Thika Branch.
66. According to him, the account opening was done in his office, and D1w1 came with the filled forms. He was unsure whether the forms contained the terms and conditions relied on by the 1st defendant. That in any event, the terms were never explained to him. He said that it was the decision of the board to institute proceedings against the bank.



67. That the terms of the account were written in very small print. He confirmed that a total of Kshs 100 million was deposited in the 2nd plaintiff's account. He denied ever depositing money at TRM branch. He stated that he had never been to the bank himself and did not know who received monies from his wife's account. He emphasized that his wife did not withdraw Kshs 310,000/- and that he never knew where the money went. He stated that Jong Chan Lee was not allowed to operate the 2nd plaintiff's account and noted that D1w1's name did not appear as a payee on the cheques.
68. That D1w1 came with a withdrawal slip and that he trusted him to convert US dollars to Kenya shillings. He confirmed withdrawing Kshs 300,000/- from his dollar account. When Lee admitted that he had withdrawn all the money, he believed Lee could not have done it alone without D1w1. That his wife held shares on his behalf, and that he was the beneficial owner in the 2nd plaintiff. That although Lee confessed to theft, he did not sue him because all the money went through the 1st defendant. That Lee conspired with D1w1 who shared the proceeds and he blamed the 1st defendant for failing to safeguard the funds.
69. D2w1, Jong Chan Lee, the 2nd defendant, adopted his witness statement dated 18/2/2021 and produced a bundle of documents dated 18/2/2021 as D2Exh1. In cross-examination by Mr. Mwenda, he told the Court that he was charged with theft together with the 1st defendant's branch manager. That he was convicted and served a custodial sentence.
70. He confirmed being involved in opening the 2nd plaintiff's account at DTB TRM, with the account opening forms filled by D1w1. The forms were completed at Safari Park Hotel, where he signed as introducer. He denied being an agent of Sun Pil Lim. That D1w1 liquidated the sums and sent them to his account. That the call-back procedure was manipulated since the number given belonged to him, not Sun Pil Lim. He testified that he forged her signature and presented it to D1w1.
71. He admitted that cheques were issued to him, which he signed in place of Sun Pil Lim, and that he received money at TRM branch either before D1w1 or in front of cashiers. He once attempted to withdraw money at Garden City branch but was refused. He confirmed applying for cheque books for Daehan Pharmaceuticals under D1w1's guidance and transferring Kshs 18 million, from which D1w1 received Kshs 2 million. That he lent D1w1 Kshs 2.4 million and sold him a Mazda Demio. That he applied for a second cheque book without involving Sun Pil Lim.
72. When cross-examined by Mr. Kiragu SC, he admitted taking money from both accounts and signing all liquidation instructions and cheques. He conceded that he had no documentary proof of sharing money with D1w1 but maintained that they shared the proceeds. That D1w1 collected most of the money from the tellers. He admitted forging Sun Pil Lim's signature on cheques and confessed that he stole because he became greedy.
73. In re-examination, he stated that he was unrelated to the plaintiffs and that he was guided by D1w1 in liquidating funds from the 2nd plaintiff to himself.
74. D1w1, Joseph Kihara Muraya, the 1st defendant's former branch manager at TRM, adopted his witness statements dated 7/5/2021 and 4/5/2021, respectively. His testimony was a replica of the defence by the 1st defendant as set out above.
75. In cross-examination by Mr. Mwenda, he confirmed being convicted of conspiracy to defraud and fined Kshs 100,000/-. He stated that he filled account opening forms partially at the plaintiffs' offices. He confirmed that funds were later deposited and withdrawn. That he stamped call-backs but called Pw2 instead of Pw1. He admitted authorizing the liquidation instructions dated 8/2/2016 and 12/7/2016, which were effected by cash withdrawals and transfers. He confirmed that all cheques were written in



- favour of Jong Chan Lee. He admitted that he sent the 2nd defendant forms for liquidation and stated that the Kshs 15 million deposit originated from another DTB account.
76. Cross-examined by Mrs. Odiya, D1w1 stated that he did not know the directors of the 7th defendant or the 8th defendant. That he only assisted Mr. Lee in banking issues and denied being the perpetrator of the loss.
 77. In re-examination by Mr. Kiragu SC, D1w1 explained that the call-back procedure was an internal confirmation process. That although the account belonged to Pw1, he dealt with Pw2, who had authority. That he had never met Pw1.
 78. D1w2, Geoffrey Kamau, adopted his witness statement dated 3/8/2020 as his evidence in chief. He was the front officer at the 1st defendant's TRM Branch. He is the one who processed the transfer of Kshs.18m by Jong Chan Lee on 8/2/2016 from the 2nd plaintiff's account. Jong Chan Lee was very well known to him.
 79. In cross-examination, he stated that he verified signatures on cheques, including cheque number 104. That he relied on the mandate forms and that where a signatory was paying himself, supporting documents were not required.
 80. D1w3, Ruth Jacqueline Muguyu, an assistant manager at the 1st defendant's TRM Branch, adopted her witness statement dated 4/8/2020 and told the Court that when an account is joint, the bank does not need to confirm the instructions if they are signed by both signatories. That the instructions for liquidating Kshs.40m were presented by Jong Chan Lee on 26/10/2016.
 81. In cross-examination, she testified that she never dealt with the directors of Jambo Traders Investments and admitted that the second signatory had never been to the bank.
 82. D1w4, Shelmith Nyawira Maina, an assistant manager at the 1st defendant's TRM Branch since 2013. That D1w1 had gone with blank forms for opening account for the 2nd plaintiff which were later returned by Jong Chan Lee on 26/10/2015 duly filled. That Jong Chan Lee was listed as an introducer and was well known to her. That Jong Chan Lee made two cash deposits of Kshs.15m and Kshs.10m, respectively on 2/11/2015.
 83. D1w5 Reuben Obinga was the TRM Branch Manager at the time he testified. He adopted his witness statement dated 4/8/2020 as his evidence in chief. He reiterated what D1w4 had told the Court.
 84. In cross-examination, he confirmed that Jong Chan Lee signed cheques in the banking hall but that the signature did not match the mandate. He declined to honour such cheques and said the loss could have been avoided had the matter been reported to the police earlier.
 85. D1w5, Peter Koome, a fraud investigator, adopted his statement dated 10/7/2024. In cross-examination, he stated that investigations commenced after a DCI Miscellaneous Application was filed in January 2018 and confirmed that some documents submitted at the bank could not be retrieved.
 86. Dw7, Sunghoon Jeong, adopted his witness statement dated 30/9/2020. In cross-examination, he confirmed that he only supplied goods to Jambo and Ochanlee and not to Daehan Pharmaceuticals yet he received payments from the latter. He did not know Daehan and later discovered that payments received from Daehan corresponded to debts owed by other companies. In re-examination, he clarified that the monies were used to offset a credit facility advanced by Solpia.
 87. Parties filed their respective submissions which the Court has considered.



Analysis

88. I have considered the pleadings, the evidence and the submissions on record. The following issues fall for determination: -
- i. Whether the 1st defendant owed and breached fiduciary and contractual duties in the operation of the 1st and 2nd plaintiffs' accounts.
 - ii. Whether the 1st defendant's employees and agents colluded with fraudsters and/or the 2nd defendant to misappropriate the plaintiffs' funds.
 - iii. Whether the 1st and 2nd plaintiff suffered loss as a result of the 1st defendant's or its agents' actions or omissions and as a consequent, whether they are entitled to recover Kshs. 56,344,520.55 and Kshs. 113,600,000/-, respectively together with interest and damages from the 1st defendant.
 - iv. Whether the 2nd, 7th and 8th defendant received funds without lawful title and are liable to refund the amounts allegedly received by them.
 - v. What orders as to costs?
89. The first issue is whether the 1st defendant owed any fiduciary and contractual duty to the plaintiffs which it breached. It is not in dispute that the 1st defendant is a licensed commercial bank and that both the 1st and 2nd plaintiff opened and maintained accounts with it.
90. By virtue of the banker–customer relationship, the 1st defendant was bound by contractual obligations arising from the account opening documents and the agreed terms and conditions. In addition, the law imposes upon a banker, fiduciary duties to act with utmost good faith, to exercise reasonable care and skill in executing a customer's mandate and to safeguard funds entrusted to it.
91. The plaintiffs alleged that the 1st defendant failed in these duties by permitting unauthorized withdrawals, liquidating fixed deposits without valid instructions, acting on forged instruments and failing to provide accurate information or account statements. They contended that these omissions amounted to breach of contract and fiduciary duty.
92. On its part, the 1st defendant admitted the existence of banker–customer relationship but denied liability. It argued that it acted strictly on instructions apparently signed by the plaintiffs' authorized signatories. That it was under no duty to send periodic statements or notices where the customers had declined correspondence and that any irregularities were the result of the plaintiffs' own employees, agents or co-directors who misused their authority.
93. The principle of fiduciary duty arising out of bank-customer relationship was spelt out by the Court of Appeal in the case of Fidelity Commercial Bank Limited v Italian Market Kenya Limited [2017] eKLR when it held thus;

“We endorse the pronouncement of Brightman J in *Karak Brother Company Ltd v Burden* [1972] 1 All ER 1210, which has been cited with approval in several of our local cases (e.g *Simba Commodities Limited v Citibank N.A*, Civil Case No. 236 of 2003) where the learned Judge stated:-“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...” “... while carrying out the customer’s instruction a bank is under obligation to exercise reasonable skill and care. That skill and care applies to interpreting, ascertaining and acting in accordance with the instructions of the customer.”

94. In *Co-operative Bank of Kenya Ltd v Biwott* (Civil Appeal 18 of 2019) [2022] KEHC 9946 (eKLR), it was held that: -

“The bank-customer relationship is contractual in nature and imposes a duty on the bank to exercise reasonable care and skill in its dealings with the customer ... 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.”

95. According to Black’s Law Dictionary, 11th edition, a fiduciary duty is: -

“a duty of utmost good faith, trust, confidence, and candor owed by a fiduciary (such as an agent or a trustee) to the beneficiary (such as the agent’s principal or the beneficiaries of the trust; ... a duty to act with the highest degree of honesty and loyalty toward another person and in the best interest of the other person- ... Also termed as duty of loyalty, duty of fidelity; duty of faithful service; duty to avoid conflict of interest.”

96. In *Equity Bank Limited & another v Nairobi Robert Chesang* [2016] eKLR the court quoted with approval the *Encyclopedia of Banking Law C.21 Selangor United Rubber Estate Ltd vs. Cradock* (No.3) [1968] 2 ALL ER 1073) where it was stated: -

“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 contracts with its customers. The duty to exercise reasonable care and skill extends over the whole range of banking business within the contract with the customer. Thus, the duty applies to interpreting, ascertaining and acting in accordance with the instructions of the customer.”

97. In view of the foregoing, a bank owes a fiduciary duty to its customers and is obligated to act in good faith with respect to the customer’s account. This is demonstrated in; verification of the authenticity of signatures, to act only on genuine mandates and, to guard against transactions that may be suspicious or inconsistent with the customer’s ordinary course of business. Among the fiduciary duties owed by a bank to its customer is the duty to safeguard the customer’s account and to ensure that the account in question is operated in accordance with the instructions and mandate of the customer.

98. In the present case, the dispute concerns the transfer of substantial sums from the plaintiffs’ accounts through forged instructions and irregular liquidation of deposits. The evidence on record established that Pw1 never issued any instructions for the withdrawals. She testified and remained firm that her signatures on liquidation forms and cheques were forged.

99. Pw2 likewise denied authorizing any withdrawals or benefiting from the proceeds of the unauthorized liquidations and withdrawals. Both witnesses indicated that they expected the 1st defendant to exercise prudence and fidelity in safeguarding the accounts.



100. Jong Chan Lee candidly admitted to forging the 1st plaintiff's signatures and colluding with officials of the 1st defendant to process fraudulent transactions. This admission was further corroborated by the testimony of D1w1, the branch manager, who conceded to manipulating call-back procedures, authorizing liquidation of deposits and acting contrary to the account mandates. Other bank officials also acknowledged that signature discrepancies and irregular mandates were apparent on the face of the documents but nevertheless acted on them as they were well known to Jong Chan Lee.
101. This evidence remained largely uncontroverted. Funds were undeniably withdrawn from the plaintiffs' accounts, and the 1st defendant was unable to demonstrate, on a balance of probabilities, that the plaintiffs ever issued genuine instructions authorizing the subject transactions. On the contrary, the admitted collusion between its own officers and the 2nd defendant, coupled with the bank's failure to enforce the dual signatory mandate and verify the authenticity of instructions, points to grave lapses in the duty of care.
102. It is worthy to note that the transactions and loss in respect of the 2nd plaintiff's account occurred over a long period of time. It is deeply troubling that during this period, numerous cheques were issued and large sums withdrawn over the counter without any alarm being raised by the 1st defendant. The Central Bank of Kenya Prudential Banking Guidelines requires vigilance and continuous monitoring of customer accounts to detect unusual patterns. Obviously, the 1st defendant miserably failed on this one.
103. What is particularly outstanding is the contrast with other branches of the same bank. Evidence was led that when the 2nd defendant attempted to make a withdrawal at a different branch, Garden City Branch, it was declined. This demonstrates that had the 1st defendant's banking staff acted diligently and in good faith and without collusion, the fraudulent scheme could not have succeeded. It is therefore clear and irresistible to conclude that, the losses suffered by the plaintiffs was not as a result of an impenetrable fraud, but because of sheer negligence and complicity between the 2nd defendant and the 1st defendant's own staff who were likewise benefiting from the heist.
104. The Court is therefore persuaded that the 1st defendant failed to exercise the reasonable skill, diligence and good faith required of a prudent banker. This failure directly facilitated the fraudulent withdrawals and resulted in the loss that the plaintiffs suffered. The fine print of terms and conditions in its bank opening forms cannot relieve the 1st defendant of its contractual and fiduciary duty to the plaintiffs in this case.
105. The second issue is whether there was collusion or fraud on the part of the 1st defendant's staff. The plaintiffs pleaded that the fraud was facilitated by the bank's employees. The 1st defendant denied complicity, insisting it merely acted on documents that matched specimen signatures in its possession.
106. D2w1 testified that he forged Pw1's signatures and presented them to D1w1, the 1st defendant's bank manager, who knowingly processed them. He admitted that the call-back procedure was manipulated by using his own number instead of Pw1's. D1w1 confirmed authorizing forged instructions and admitted being convicted for conspiracy to defraud in a criminal case regarding the theft of the subject funds. This was NBI CM's Anti-Corruption Case No. 844 of 2018 Republic vs Lee Long Chan & Anor. D1w5, another bank official, testified that he declined to honour a cheque because the signature did not match, showing that irregularities were visible but were only being ignored by the 1st defendant's compromised staff.



107. The evidence on record showed that there was more than mere negligence. It revealed active collusion by the bank staff in the perpetuation of the fraud. The 1st defendant, through its agents, was complicit in and facilitated the fraud. Having employed dishonest staff, it shoulders their liability.
108. The 3rd issue is whether the plaintiffs suffered any loss as a result of the actions and/or omissions of the 1st defendant. The 1st plaintiff led evidence that withdrawals amounting to Kshs. 56,344,520.55 were effected from her account without authority. Pw1 testified that she did not authorize any of the withdrawals and her signatures on the impugned cheques were forged.
109. The 2nd defendant admitted to forging Pw1's signature and colluding with officials of the 1st defendant in the liquidation of the deposits and the consequent withdrawals. This evidence was not controverted. The 1st defendant argued that the signatures that were presented marched the mandate held in the system. That was not true in that, there was strong evidence that when the 2nd defendant tried to present similar signatures and make a withdrawal at the 1st defendant's Garden City Branch, it was discovered that the signatures were not genuine and he was turned away. The staff at Garden City were comparing the same mandate as those of TRM yet they turned him away.
110. The irresistible conclusion is that, the 2nd defendant was able to perpetrate the massive theft of the subject funds because there was collusion and assistance by the 1st defendant's staff at that specific branch. The 1st defendant did not prove that the transactions were authorized by the 1st plaintiff. On a balance of probabilities, the Court finds that the 1st plaintiff indeed suffered loss of the said amount of Kshs. 56,344,520.55 directly attributable to the 1st defendant's failure to safeguard the account.
111. Similarly, the 2nd plaintiff adduced evidence that fixed deposits worth Kshs. 113,600,000/- were liquidated without its authority. Pw2 confirmed that no instructions were issued for the liquidations of the fixed deposits and that the proceeds were never received by the 2nd plaintiff. The 2nd plaintiff received no benefit at all from the said withdrawals.
112. The 2nd defendant admitted having benefited, together with some of the 1st defendant's staff, from the amounts withdrawn. The evidence demonstrated that the 2nd plaintiff's deposits were unlawfully depleted due to the negligence and collusion of the 1st defendant's staff for whose liability the 1st defendant shoulders.
113. Having found that the funds of both the plaintiffs were stolen through unauthorized transactions facilitated by the 1st defendant's staff, the Court holds that the plaintiffs are entitled to recover the sums claimed. The losses were specific and quantifiable and directly flow from the 1st defendant's breach of fiduciary and contractual duties. The 1st defendant is liable to restitute and refund the same.
114. The next issue is whether the 2nd, 7th and 8th defendant (the said defendant's) received funds without lawful title and are liable to refund the same. The 1st defendant pleaded that following the fraudulent withdrawals from the 2nd plaintiff's account, portions of those funds were transferred into the accounts of the said defendants. It contended that the said defendants had no lawful title to the monies and were under a duty to make restitution of the amounts received.
115. The said defendants denied liability, insisting that any monies credited to their accounts were in respect of legitimate business transactions, and that they were innocent recipients without knowledge of any fraud. They further argued that the losses, if any, were occasioned by the bank's own negligence and collusion by its staff, who facilitated the irregular withdrawals and liquidations.



116. The case of Madhupaper International Ltd & Another v Kenya Commercial Bank Ltd & 2 Others [2003] eKLR, set out the basis for making a claim for restitution as follows: -

- “ 1. Non-voluntary conferment of a benefit, such as through mistake or on account of compulsion, necessity or in ignorance, or due to an unequal condition between the payer and payee;
2. Voluntary conferment of benefit for total failure of consideration;
3. Benefit conferred in consequence of a wrongful act, such as where a trustee benefits from a breach of trust;
4. Ultra vires demand;
5. Abuse of power entrusted to the defendant by Parliament or by a contractual instrument such as debenture or other agreement;
6. Illegitimate use of self-help sanctions;
7. Vindication of equitable title to property.

117. In *Hookway vs Racing Victoria Ltd* [2005] VSCA 310, it was held that: -

“Restitution is not however, a principle which requires, in examining any particular payment, ‘some subjective evaluation of what is fair or unconscionable’; rather recovery depends upon the existence of a ‘qualifying or vitiating factor such as mistake, duress or illegality’”

118. In this case, the evidence on record shows that the withdrawals from the plaintiffs’ accounts were unauthorized and fraudulent. The 2nd defendant and some of the 1st defendant’s staff were the primary beneficiaries of the funds. Some of the subsequent transfers were traced into the accounts of the other defendants.

119. The general rule in restitution is that money paid under a mistake or obtained through fraud is recoverable, unless the recipient can show that it was received for valuable consideration and in good faith. Unless a recipient can demonstrate that he/she gave such consideration and acted bona fides without knowledge of the fraud, he/she is bound to refund such funds.

120. In the present case, the 2nd to 8th defendant did not show that there was any consideration for the said funds and that they were innocent recipients of the same. Accordingly, they are liable to retribute to the 1st defendant the sums traced to their accounts.

121. Accordingly, I find that the plaintiffs have proved their cases against the 1st defendant to the required standard. They have established that the liquidation of their respective deposits and subsequent withdrawals of their funds were unauthorized, fraudulent and effected through collusion between the 2nd defendant and officers of the 1st defendant. The plaintiffs neither authorized nor benefited from the withdrawals. The funds had been placed on deposit on commercial rate of interest. The same is therefore recovered together with interest at commercial rate.

122. The 1st defendant owed both fiduciary and contractual duties to the plaintiffs, which it breached by failing to exercise due diligence, prudence and fidelity in the management of the plaintiffs’ accounts.

123. On the counterclaim, it was clear that the 2nd defendant and certain other defendants in the counterclaim received the proceeds of fraud. There was no evidence that any benefit enured to the 2nd



plaintiff. The actions of the 2nd defendant were wholly fraudulent and perpetrated with the knowledge and collusion of the 1st defendant's staff. No claim by the 1st defendant against the 2nd plaintiff can therefore attach.

124. However, as regards the other defendants, they did benefit from the said funds and were not entitled thereto. They are liable to refund the sums as claimed by the 1st defendant. The 1st defendant cannot claim the entire sum of Kshs.113,600,000/= from the 2nd defendant and claim the other monies from the other defendants. That was part of the monies that was distributed to the other defendants. To order such payment would amount to unlawful enrichment for the 1st defendant. Although there was evidence that the staff of the 1st defendant participated and facilitated the heist, there was no counterclaim by the defendants against the 1st defendant. The Court is therefore unable to award any contributory amounts to the 1st defendant in respect thereof.
125. Accordingly, judgment be and is hereby entered in favour of the plaintiffs against the 1st defendant and for the 1st defendant against the other defendants as follows: -
- a. For the 1st plaintiff against the 1st defendant, Kshs. 56,344,520.55, together with interest at commercial rates from the date of filing suit until payment in full.
 - b. For the 2nd plaintiff against the 1st defendant, Kshs. 113,600,000/-, together with interest thereon at commercial rates from the date of filing suit until payment in full.
 - c. For the 1st defendant against the other defendants as follows: -
 - i. 2nd defendant, Kshs.56,344,520.55 and Kshs.13,620,460/-
 - ii. 3rd defendant, Kshs.24,626,400/-
 - iii. 4th defendant, Kshs.6,000,000/-
 - iv. 5th defendant, Kshs.600,000/-
 - v. 6th defendant, Kshs.7,135,040/-
 - vi. 7th defendant, Kshs.27,988,500/-
 - vii. 8th defendant jointly with the 2nd defendant, Kshs.33,630,000/-.
 - d. The sums in c) above will attract interest at court rate from the date of the suit until payment in full.
 - e. The plaintiffs are awarded the costs of the consolidated suits against the 1st defendant. The 2nd plaintiff is awarded the costs of the counterclaim against the 1st defendant while the other defendants shall shoulder the 1st defendant's costs of the counterclaim.

It is so decreed.

DATED AND DELIVERED AT KISUMU ON 7TH DAY OF NOVEMBER, 2025.

A. MABEYA, FCI Arb

JUDGE

