THE REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL AND TAX DIVISION

HCCOMM CASE NO. 803 OF 2002

AS CONSOLIDATED WITH HCCOMM CASE NO. 804 OF 2002

HON. JUSTICE ALEEM VISRAM

29TH JANUARY, 2026

BETWEEN

SANJITA SHAH.....PLAINTIFF

AND

BANK OF AFRICA KENYA LIMITED.....1ST DEFENDANT

GANSHYAM CHHOTABHAI PATEL……...……2ND DEFENDANT

WILFRED J. KHASHOMI……..3RD DEFENDANT

PALLINDER HOLDINGS LIMITED…….....…….4TH DEFENDANT

JUDGMENT

Introduction and Background

1. These proceedings arise from three related commercial suits filed in 2002, namely HCCC No. 802 of 2002, HCCC No. 803 of 2002, and HCCC No. 804 of 2002, all involving claims against the 1st Defendant arising from transactions undertaken in the mid-1990s. Although closely connected in subject matter, not

all the suits were consolidated. HCCC No. 803 and 804 of 2002, were formally consolidated.

2. HCCC No. 802 was heard separately. This Court had, at an early stage, suggested to the parties that all three matters be consolidated, and proceed as one, given that there was substantial overlap in terms of the issues, and the witnesses who intended to testify in all three matters. That proposal was opposed by the 1st Defendant, who was of the opinion that the matters involved different facts, and ought to be heard separately. As a consequence, the Court directed that the matters be heard one after another sequentially, and on each consecutive day. At the hearing of the matters, the Court found that the witnesses of both parties testified in relation to all three matters during the hearing of HCCC No. 802 of 2002. Moreover, their evidence revealed facts that are relevant and common to all the three suits, in addition to some facts that were unique to each case. Therefore, although HCCC No. 802 of 2002 was not formally consolidated with HCCOMM Nos. 803 and 804 of 2002, the matters were heard sequentially and back to back. With the knowledge of all parties, witnesses testified on overlapping factual and evidentiary issues during the hearing of HCCC No. 802 of 2002. That testimony was expressly adopted and relied upon in the determination of the consolidated suits, namely HCCC Nos. 803 and 804 of 2002, to avoid unnecessary repetition.

3. To clarify, there are however, a number of facts that are unique to HCCC No. 803 and 804 of 2002, such as the specific sum involved; and the instructions said to have been given in relation to that claim, which I will address below. A further procedural feature common to the three cases concerns the participation of the Defendants. Only the 1st Defendant actively participated in the proceedings. The 2nd and 3rd Defendants did not attend or participate in the proceedings and were not present at the hearing. The record shows that they had not attended any mentions, or participated in any applications for several years prior to the hearing of the suit, and had not filed or produced any documentation. It is also important to note that they were joined to the suits at the instance of the 1st Defendant, and not the Plaintiff, whose claim, was against the 1st Defendant alone. It was therefore evident to this Court that the 2nd and 3rd Defendants had lost interest in the matter and had no intention to take part in the proceedings. A ruling was issued to this effect.

<u>Factual Background peculiar to HCCOMM 803 OF 2002</u>

4. The Plaintiff, Sanjita Shah, instituted this suit claiming that between September, 1995, and June, 1996, substantial sums of money were deposited with Credit Agricole Indosuez Limited (formerly Banque Indosuez) ("Agricole" or "the Bank") for placement in fixed deposit accounts in her name. Her case is presented through her appointed attorney, Ketan Doshi, who testified that an

initial sum of Kshs. 118,500,000/- was deposited by way of a banker's cheque drawn in favour of Agricole. The Plaintiff relied on correspondence on Credit Agricole letterhead dated 17th September, 1995, acknowledging receipt of the said sum, and indicating that it was placed on fixed deposit at an agreed interest rate, with a stated maturity date, and maturity value.

5. The Plaintiff further contended that upon maturity of the initial deposit, the principal sum together with accrued interest was rolled over into successive fixed deposits, sometimes with additional sums being paid to top up the deposits. These subsequent sums include amounts of Kshs. 35,616.45/-, Kshs. 35,835.60/-, and Kshs. 461,370/-, which the Plaintiff averred to have been paid on various dates in early and mid-1996. Each rollover or additional payment was said to have been acknowledged by Agricole through letters of acknowledgment specifying the amount held, the applicable interest rate, and the amount to be paid on the expected maturity value.

6. According to the Plaintiff, by June 1996, the total sum held by Agricole on her behalf stood at Kshs. 151,800,000/-, with a corresponding maturity value stated in the Bank's correspondence, fixing the said sum from the 12th June, 1996, to mature on the 10th September, 1996, whereupon the Plaintiff would be paid a sum of Kshs. 165,274,849.30/- inclusive of interest at 36% per annum.

7. The Plaintiff maintained that these deposits were never repaid to her and that interest continues to accrue.

Background peculiar to HCCOMM 804 OF 2002

8. In HCCOMM No. 804 of 2002, the Plaintiff asserted a separate set of transactions, also said to have occurred in 1996. Through the testimony of her attorney, Ketan Doshi, it is stated that the Plaintiff, by way of a Bankers Cheque number 075125 drawn by Kenya Commercial Bank, she paid to the 1st Defendant the sum of Kshs. 44,000,000/- for the purpose of creating a fixed deposit. The Plaintiff contended that Agricole acknowledged receipt of this sum and confirmed that it had been placed on fixed deposit at an agreed interest rate, with a specified amount to paid on the maturity date.

9. Upon maturity of this deposit in May, 1996, the Plaintiff's case is that the principal sum together with the accrued interest was retained by the Bank and combined with two additional Banker's Cheques, namely for the sum of Kshs. 936,022.50/- and for the sum of Kshs. 894,114.50/-, both drawn in favour of Agricole in early June, 1996. The combined sum, stated to be Kshs. 48,800,000/-, is said to have been rolled over into a further fixed deposit, acknowledged by a letter from Agricole dated 10th June, 1996, specifying a new

maturity date and maturity value, and fixing payment for the amount due on maturity from the deposit made on 22nd May, 1996, to mature on 19th August, 1996, whereupon on 20th August, 1996, the Plaintiff would be paid a sum of Kshs. 51,550,848/- inclusive of interest at 30% per annum. The Plaintiff pleads that these sums were never repaid to her and that interest continued to accrue.

Issues for Determination

10. The issues that arise for determination are:

i. Whether the Plaintiff proved that Credit Agricole Indosuez received and acknowledged the deposit claimed?
ii. Whether the acknowledgment constituted an enforceable obligation?
iii. Whether liability, if any, was assumed by the 1st Defendant under Section 9(3) of the Banking Act?
iv. Whether the claim is defeated by limitation, fraud or illegality; and
v. The appropriate reliefs.

Analysis and Determination

11. In arriving at its determination, this Court is guided by the fact that the standard of proof in civil cases is on a balance of probabilities, and that the burden of proof is on the party alleging the existence of a fact which they want the Court to believe. This is anchored in Section 107 (1) and (2) of the Evidence Act (Chapter 80 of the Laws of Kenya) which provides 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 further that:- **When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.** In ***Miller .V. Minister Of Pensions 1947 ALL E.R 372***, Lord Denning aptly summarized the application of the standard in the following terms:-

> ***"That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in criminal cases. If the evidence is such that the tribunal can say: We think it more probable than not; the burden is discharged, but, if the probabilities are equal, it is not. Thus, proof on a balance or preponderance of probabilities means a win, however narrow. A draw is not enough. So, in any case is which the tribunal cannot decide one way or the other which evidence to accept, where both parties' explanations are equally (un) convincing, the party bearing the burden of proof will lose because the requisite standard will not have been attained."***

12. The Court of Appeal in ***James Muniu Mucheru v National Bank of Kenya Limited [2019] KECA 1058 (KLR)*** simply put it that:- ***"Courts will make a finding based on which party's version of the story is more believable."*** Guided by the above, I move to the issues in dispute sequentially.

<u>Proof of Deposit and Acknowledgment</u>

13. The Plaintiff's case was advanced through PW1, duly authorized by way of power of attorney. He testified that the reason he was testifying on behalf of his sister was because, although he is not the Plaintiff, he is the actual person that carried out the subject banking transactions on behalf of the family, and was generally in charge of, and handled all the financial matters for the family, which included his sister. This testimony was not rebutted by way of any evidence on the part of the 1st Defendant.

14. I have evaluated the evidence in respect of each of the consolidated matters and will address each separately below.

HCCOMM NO 803 of 2002: Receipt of Kshs. 118,500,000/-

15. The testimony of PW1 was candid and consistent. He admitted the passage of time since the filing of this matter, and the absence of a copy of the banker's cheque, stating:-

> ***"We advanced a sum of Kshs.118 Million by the Plaintiff… the banker's cheque was prepared. We can't trace the one in favour of Indosuez."***

16. However, absence of a cheque copy is not the end of the matter. PW1 grounded the transaction in the bank's own documentation: He testified that:-

> ***"There is a letter showing the money was received."***

17. He further testified that the transaction was conducted directly with Credit Agricole's officers stating that:- ***"I gave instructions to the bank… the rates of interest offered were dealt with over the phone."***

18. The above testimony is buttressed by a contemporaneous acknowledgment by the Bank. The Plaintiff produced a letter dated 17th September, 1995, written on Banque Indosuez's official letterhead and signed by its officers, expressly acknowledging receipt of Kshs. 118,500,000/-. The letter states, in material part:-

> ***"We confirm having received from you the sum of Kshs. 118,500,000.0/-0 …and on the maturity due date, 16th November, 199,5 will pay you Kshs. 124, 343, 835.60/- "***

19. In my view, this document is critical for several reasons: It emanates from the Defendant Bank itself, not the Plaintiff; it is contemporaneous with the testimony relating to the deposit; it expressly acknowledges receipt of the precise sum in issue; and finally, its authenticity was not disproved by the defence through any form of contemporaneous repudiation. The defence did not lead any evidence whatsoever to show that this letter was forged, fabricated, or repudiated by the Bank at the time.

20. Additionally, the evidence demonstrates internal bank admissions during investigation of the said sums. Evidence of receipt of both Kshs. 118, 500,000/-

and the sum of Kshs. 44,000,000/- is found in the Agricole's own internal investigation records, generated years later and entirely independent of litigation strategy. An internal email dated 17th July, 2002, authored by Credit Agricole's then Mombasa Branch Manager and copied to DW 2, Jane Kilonzo, states in unequivocal terms:-

> ***"Mrs. Sanjita Shah… She claimed Kes. 151,000,000 together with interest. The initial deposit was KES 118,500,000 made on or about September 17, 1995"***
>
> ***And further***
>
> ***"Mrs Sanjita Shah…She claimed 48,000,000 together with interest. The initial deposit was KES. 44,000,000.00 made on March 25, 1996"***

21. The above amounts to a clear admission of receipt on the part of the Bank. Moreover, I find the same is credible because it is an internal factual statement made in the course of a bank investigation. No attempt was made by the defence to explain this admission away as error, conjecture, or misinformation.

22. The 1st Defendant made several further admissions in relation to the receipt of this sum. DW2, Jane Kilonzo, adopted her witness statement but under cross-examination accepted the substance of the Bank's internal documents. She admitted:-

"Page 5 is the internal communication… the bank says that the initial deposit is 118,500,000."

23. Notably, DW2 did not testify that the money was never received. Her position was that it was not retained by the Bank, or was irregularly applied. That distinction matters given that the next issue would be whether or not such retention or application involved the Plaintiff. This has been addressed in the section of the judgment relating to allegations of fraud.

24. A review of the documentation produced by the parties shows that the 1st Defendant served the Plaintiff with a Request for Particulars dated 22nd July, 2022. In the Plaintiff's Reply to Request for Particulars dated 14th January, 2003, the Plaintiff set out details of the banker's cheque in respect of the deposit in question and addressed the fact that she did not have an account at the Bank. At paragraph 2 of the Reply, the Plaintiff stated:-

"The Banker's Cheque dated 22nd November, 1995 is number 013140. The same was issued by Trust Bank Limited, Moi Avenue Branch, Mombasa."

25. Importantly, the Reply further states that:-

"No details of an account are required for the Banker's Cheque dated 22nd Novembe,r 1995, in view of the fact that the said Cheque was a Banker's Cheque issued by Trust Bank Limited and payable to the Defendant."

26. A reading of the above is consistent with the testimony of PW1 and provides some clarity relating to the mechanism of receipt by the Bank. Notably, DW2 did not deny receipt of the funds. When referred to the internal email, she accepted that it reflected in the Bank's records. Her evidence challenged only how the funds were applied, not whether they were received.

27. The documentation is consistent with the primary evidence and the results of the internal investigation as described above, together, on a balance of probability, lead to the conclusion that the funds were in fact transmitted by banker's cheque payable by the Plaintiff to the Defendant in the manner alleged, as opposed to the alternative narrative advanced by the 1st Defendant.

28. Having considered all the above, I am persuaded that the Plaintiff's testimony is, on the whole, more consistent with the documentary record. The version of events appear more probable given the above admissions, the internal Bank confirmation of receipt, and given that the defence did not adduce any evidence to show that the cheque was dishonoured or returned, or produce any contemporaneous evidence to rebut its receipt. To the contrary, the Bank actually issued a contemporaneous written acknowledgment of receipt, and there is no evidence of non-receipt, or refund on the record.

29. Based on the evidence before me, the Plaintiff has discharged its burden to the applicable standard. I find that the Bank received the sum of Kshs. 118,500,000/-.

30. Having found the above, I turn to the next question. Whether or not the acknowledgment letters constituted a valid fixed deposit? The witnesses testified in relation to this issue at the hearing of HCCC. N0 802 of 2002. As stated, that testimony applies. I adopt the reasoning and rationale in HCCC No. 802 of 2002. In summary, that is, the various acknowledgment letters are fixed deposits because the Bank admitted that at the time, there was no fixed format for a fixed deposit certificate, and the format in the acknowledgement letters complied with the applicable criteria to create a fixed deposit. And because there was no evidence to show that the bank officials who issued the acknowledgment letters were not authorized to issue them. The logical conclusion arrived at in HCCC. No 802 of 2002 is applicable here. Namely, that the further letters of acknowledgment are also valid for the same reason.

31. The evidence shows that several deposits were created over a period of time. The documentary trail is as follows: The initial deposit of Kshs. 118,500,00/- was created on 17th September, 1995. The letter states:-

> ***"We confirm having received from you the sum of Kshs. 118,500,000.00 …and on the maturity due date, 16th November, 1995 will pay you Kes. 124, 343, 835.60. "***

32. Upon maturity, the evidence shows that the principal together with accrued interest was retained by the Bank and rolled over. This is found in the letter dated

24th November, 1995 which acknowledges a new deposited sum of Kshs. 125,000,000/. The increase from the original sum is consistent with accrued interest over the initial deposit period. The letter records that the increased amount was again placed on fixed deposit and fixes a new maturity date of 15th January, 1996, with the amount of Kshs.131, 164, 383. 55/- to be paid on the maturity date.

33. The letter dated 5th February, 1996, acknowledges a further increased sum of Kshs. 131,200,000/- stating that the amount was held on a fixed deposit. The document fixes the maturity date at 15th March, 1996, and reflects a continued accumulation of interest rather than withdrawal or reduction of the principal with the sum of Kshs. 138, 964, 164. 40/- to be paid on maturity.

34. A Fourth rollover reflecting accrued interest and fresh deposits is found in the letter dated 22nd April, 1996. The same acknowledges a total deposited sum of Kshs. 139,000,000/- reflecting and indicating that on maturity, 12th June, 1996, the sum of Kshs. 151, 338.630.00/- to be paid to the Plaintiff.

35. The final deposit appears in the letter dated 21st June, 1996, which acknowledges receipt of a total sum of Kshs. 151,800,000/-. The letter states that this amount is held on fixed deposit and fixes the final maturity date at 10th September, 1996, with the sum of Kshs. 165.274, 849.30/- to be paid on maturity. This final figure

reflects: the original principal of Kshs. 118,500,000/-, accrued interest over successive periods, together with the further cash deposits by way of several cheques, as pleaded by the Plaintiff and produced in the Plaintiffs list and bundle of documents.

36. The additional payments to the Bank were addressed by PW1 during both examination and cross-examination. In his sworn evidence, PW1 stated that after each maturity, the Bank retained the matured amount and on certain occasions, he added small sums by cheque to "round off" or top up the deposit. This is captured clearly in the factual narrative adopted in evidence and repeated in submissions which state that: ***"Upon maturity of the deposit on 15th January, 1996, Doshi paid to Agricole the sum of Kshs. 35,616.45/- to add on to the matured sum…"*** He further submitted that ***"Upon maturity of the deposit on 14th March, 1996… paid to Agricole the sum of Kshs. 35,835.60 to add on to the matured sum…"*** And finally: ***"Upon maturity of the deposit on 13th June, 1996… Doshi, vide a cheque dated 19th June, 1996, paid to Agricole the sum of Kshs. 461,370.00/- to add on to the matured sum…"***.

37. PW1 explained the rationale in cross-examination, stating that: "I was issuing the instructions to the bank… I had to have my record… the cash was added to the figure." His testimony was therefore that: the additional cheques were "small,

incremental top-ups", and they were made at or around the maturity**,** not as standalone deposits.

38. In its Defence the 1st Defendant denied that these had been deposited. However, it did not address the same during the hearing. The allegation was raised only in the pleadings. The 1st Defendant did not call any witness of fact or challenge, by way of oral examination the deposits in question. Noting the above, for the sake of completeness, I have addressed my mind to the evidence in relation to the deposits in question.

Deposit of Kshs. 771,651.15/-

39. The 1st Defendant submitted that the deposit for the above sum was credited to a company other than the Bank. The evidence of deposit appears at page 54 of the Plaintiff's trial bundle and at page 4 of the 1st Defendant's list and bundle dated 13th October, 2025. The evidence of the deposit is on the face of it, a Banker's Cheque / Credit Advice issued by Trust Bank Limited. The Payee on the instrument is clear. The cheque is clearly made payable to: "BANQUE INDOSUEZ". The cheque bears the Credit Agricole Indosuez Mombasa Branch stamp, and the certification: "CERTIFIED TRUE COPY OF THE ORIGINAL – CREDIT AGRICOLE INDOSUEZ, MOMBASA BRANCH". Immediately

following this is a Credit Advice issued by Banque Indosuez, stating: "We have credited your account KES 771,651.15". Value date: 23/11/1995.

40. The figure stated above corresponds to testimony in relation to the interest accrued on the original deposit upon maturity in November, 1995, and it explains the movement from Kshs. 118,500,000/- to Kshs. 125,000,000/- as acknowledged in the letter dated 24th, November, 1995. I am not persuaded by the Defendant's allegation that this sum was not paid to the Bank.

Deposit of Kshs. 35,616.45/-.

41. The Defendant submitted that a deposit dated 5th February, 1996, was made by an entity known as Links Hardware and not the Plaintiff. Once again, the 1st Defendant did not call a witness of fact during the hearing to testify in relation to this deposit and it did not cross-examine the Plaintiff on that particular deposit. No evidence was led in respect of the disputed deposit.

42. Moreover, the document produced by the 1st Defendant is not a cheque. It is a document dated 5th February, 1996. The Plaintiff on the other hand, pleaded that it deposited a cheque on 15th January, 1996, and not the date on the document produced by the 1st Defendant. The dates are therefore different. While this cheque has not been produced by the Plaintiff, the sum claimed to have been deposited by the Plaintiff is acknowledged vide the letters of acknowledgment

from the Bank, which also corresponds to the amount the Plaintiff testified was deposited. I therefore find that the Plaintiffs testimony is corroborated by the documentary evidence and is consistent with the evidence on the record as whole. Finally, the 1st Defendant did not produce any evidence to draw a nexus between the company indicated in the document it produced, and the Plaintiff.

Deposit of Kshs. 461,370.00/-.

43. The 1st Defendant submitted that the deposit made on and dated 21st June, 1996, was made by a different company, Links Hardware, and not the Plaintiff. Once again, the 1st Defendant did not call a witness of fact during the hearing to testify in relation to this deposit and it did not cross-examine the Plaintiff on that particular deposit. No evidence was led in respect of the disputed deposit. The 1st Defendant did not produce a cheque. It produced a similar document as its evidence.

44. The Plaintiff's evidence on the other hand was that she deposited a cheque for the same amount but on 19th June, 1996, and not the date shown on the document produced by the Defendant. The Plaintiff produced a copy of the cheque as part of her evidence. The secondary evidence thus corresponds with her testimony. The cheque produced by the Plaintiff expressly states: Banker's Cheque / Credit Advice issued by Trust Bank Limited. The Payee on the instrument is indicated.

The cheque is clearly made payable to: “BANQUE INDOSUEZ”. The facts show that this cheque directly precedes the letter dated 21st June, 1996, in which the Bank acknowledged holding a total of Kshs. 151,800,000/- on fixed deposit, maturing on 9th September, 1996. The documentary sequence supports the testimony that this sum was rolled into the consolidated deposit, as described in PW1’s testimony.

45. Having considered the evidence in totality relating to the various deposits, roll overs, and additional top ups on the part of the Plaintiff, I am satisfied that the Plaintiff has discharged its burden of proof on a balance of probability. I find that that the Plaintiffs version of events is more consistent with the testimony as a whole, and I find the same to be more credible. I say so noting that while not each and every cheque has been produced, the figures and amounts the Plaintiff testified were deposited are consistent with the cumulative result. They are corroborated by the letters of acknowledgment, various cheques provided, and are numerically consistent, adding up to the sums pleaded, and reflected on the whole by the documentary trail. The step by step increases match the acknowledged totals from the Bank and the increments are arithmetically traceable.

HCCOMM NO. 804 of 2002 - Receipt of Kshs. 44,000,000/- and related deposits

46. The Plaintiff pleaded that she deposited with the Defendant the sum of Kshs. 44,000,000/- to be held in a fixed deposit. This pleading is supported by the documentary evidence on record. The Plaintiff produced a copy of the banker's cheque dated 25th March, 1996, for the sum of Kshs. 44,000,000/-, payable to Credit Agricole Indosuez Limited. There is no evidence on record that the cheque was dishonoured or returned unpaid.

47. Additionally, the letter dated 22nd April, 1996, states as follows:-

> ***"…we confirm receipt of Kshs. 44,000,000.00 and on the maturity date of 22nd May 1996… we will pay you 46,169,863."***

48. Additionally, during cross examination DW2, Jane Kilonzo, admitted that:-

> ***"The 44 million came in… and was dealt with."***

49. Finally, evidence of receipt is found in the contents of the internal email dated 17th July, 2002, authored by Credit Agricole's then Mombasa Branch Manager, which I have referred to above, confirming receipt of the said sum.

50. The primary evidence in relation to receipt of this sum is therefore consistent with the documentary evidence produced by the Plaintiff. The admission on the part of the DW2 aligns with the documentary trail. Receipt is positively evidenced and has not been rebutted. To the contrary, the 1st Defence witnesses admitted the

funds entered bank-controlled accounts. I am therefore satisfied that the Bank received the sums of Kshs. 44, 000,000/- in the manner alleged by the Plaintiff.

51. The next issue is whether or not a fixed deposit was created? I adopt the rationale applied to the other letters of acknowledgment and for the same reasons, I find that the letter dated 22nd April, 1996, constituted a fixed deposit.

52. I move to the alleged subsequent "top-ups" and rollovers, culminating in a maturity value of Kshs. 51,550,848/-. The Plaintiff testified, and her supporting documents show that two further sums were deposited. She produced a copy of a cheque for the sum of Kshs. 936,022.50/-, and dated 5th June, 1996, payable to Credit Agricole Indosuez Limited. She further produced a copy of a cheque for the sum of Kshs. 894,114.50/-, and dated 6th June, 1996, also payable to Credit Agricole Indosuez Limited. The two sums add up to the amount of Kshs. 1,830,137.00/-. That sum, when added to the sum of Kshs. 46,169,863/- (previous amount due on maturity) equals the sum of Kshs. 48,000,000/- .

53. The letter dated 10th June, 1996, acknowledges receipt of a new total sum of Kshs. 48,000,000/- which tallies with the above calculation, and confirms that this amount was placed on fixed deposit. The letter fixes the maturity date at 20th August, 1996, stating that upon maturity, the amount to be paid will be Kshs. 51, 550,684. 95/-.

54. I therefore find that the testimony and the documentary evidence produced is consistent with the narrative that the sum increased from the original amount of Kshs. 44,000,000/- placed on deposit to the final figure stated above, and as prayed for. Each step is corroborated by a specific document in the bundle. No evidence of any payment to the Plaintiff has been provided by the 1st Defendant. I am satisfied that the Plaintiff has discharged her burden of proof on a balance of probability in respect of her claim for the above sum.

Enforceability of the Instrument

55. As stated, the letters issued by Credit Agricole Indosuez were in writing, signed by authorised officers, stated a sum certain, a maturity date and an ascertainable interest component. DW1, Rebecca Niwagaba, and DW2, Jane Kilonzo, both accepted that such instruments fall within the definition of promissory notes under the Bills of Exchange Act (Cap 27). Based on the reasons set out above, I find that the acknowledgments constituted enforceable obligations on the part of Agricole.

Successor Liability

56. It is common ground that by Gazette Notice No. 4697 of 2004, Bank of Africa Kenya Limited acquired the assets and assumed the liabilities of Credit Agricole Indosuez with effect from 30th June, 2004. The Gazette Notice states:-

"The Minister of Finance has approved the acquisition of the assets and the transfer and assumption of Calyon (formerly known as Credit Agricole Indosuez) by the Bank of Africa Kenya Limited where such acquisition of the assets and assumption of liabilities are effected on the 30th June, 2004 at 24 hours (midnight)."

57. A plain reading of the said Gazette Notice would suggest that the 1st Defendant assumed all the liabilities of Agricole, and not just "some" or "certain" liabilities. DW 1 clarified that the said Gazette Notice does not list all specific assets and liabilities transferred to the 1st Defendant. She pointed out that the notice ought to be read together with the applicable Acquisition Agreement, which contains full particulars of the specific assets and liabilities that were assumed by the 1st Defendant after acquisition. She admitted that the 1st Defendant is a party to that agreement and confirmed that it has possession of the same. She further confirmed that the said agreement would show as a matter of fact, whether or not the 1st Defendant had assumed this particular liability.

58. Nothing would have been easier than to produce this document. It is not lost on me that the 1st Defendant opted to litigate this matter in full rather than simply produce the agreement in question, which would have put the matter to rest. DW1, in her own words expressly testified *that* ***"this liability could have been proved by showing the agreement".*** The 1st Defendant's failure to produce the same leads me to the inescapable inference that had the agreement in question

been produced, it would have shown that the liability in question had been assumed by the 1st Defendant as part of the acquisition.

59. Finally, because that document is admittedly within the 1st Defendant's possession, and its contents are within its knowledge only, once the Plaintiff alleged, and DW 2 admitted that the same would prove the liability of the 1st Defendant, the evidentiary burden of proof shifted to the 1st Defendant to displace, or rebut those facts. This is consistent with Section 112 of the Evidence Act which provides that:- **In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.** This was not done. The 1st Defendant failed to discharge its burden, and accordingly, I find that the 1st Defendant assumed the Plaintiff's liability in accordance with Gazette Notice No. 4697 of 2004 and from the effective date of 30th June, 2004.

60. The legal effect of the above finding is statutorily underpinned under the provisions of Section 9 (3) of the Banking Act Cap. 488 Laws of Kenya, which stipulates that:- **a Bank to whom the liabilities of another Banking institution are transferred to effectively 'stands in the shoes' of the institution whose liabilities it has acquired, and is liable for the transferring institutions liabilities.**

61. In ***Signature Tours and Travel Limited v National Bank of Kenya Limited [2019] KEHC 6531 (KLR)***, the Court stated the following in respect of the above:-

> "***There is no possibility that the intended takeover of the Defendant by another financial institution will jeopardize the interests of the Plaintiff since the process is properly anchored in law and regulated by sound institutions namely Capital Markets Authority, Competition Authority of Kenya and the Central Bank of Kenya. Under section 9(3) of the Banking Act there are systems to protect parties and claims as assets and liabilities are carried over by the new entity following the takeover or merger and become binding. The relevant law provides as follows . . .***
>
> ***Guided by the above provision of the law, I am satisfied that the Plaintiff's concerns are well taken care of since the new outfit will definitely be a going concern and liable to meet any obligations prior to the change and subsequent structure. The new outfit will definitely address any claims by the Plaintiff should it succeed in the end."***

62. This principle was affirmed in the decision of ***Giro Commercial Bank Limited v Macho Credit Limited [2018] KEHC 10218 (KLR),*** where the Court stated thus:-

> ***"3. The Defendant opposed the application on the grounds that the Defendant entered into contractual relationship with Giro Commercial Bank Limited and not I & M Bank Limited; . . .***

. .5. The Defendant erred to argue that I & M Bank Limited cannot take over this suit because the Defendant had no contractual relationship with the bank. What entitles I &M Bank Limited to seek to take over this suit is the agreement with Giro Commercial Bank Limited for I & M Bank Limited to take over all assets and liabilities of Giro Commercial Bank Limited.

6. That agreement was gazetted in the Kenya Gazette as stated above. Section 9 (3) of the Banking Act Cap 488 provides in part as follows: . . .

. .7. It is clear from the above that I & M Bank Limited by virtue of Section 9 (3) (b) obtained the same rights on the assets and liabilities of Giro Commercial Bank Limited from the moment the transfer transaction came into effect."

63. And in ***George Maina Kingori v The Co-operative Bank of Kenya Ltd. (2013) KLR***, the Court reiterated that:- ***assets and liabilities of Co-operative Merchants Bank Limited had by dint of Section 9 of the Banking Act been assumed by Co-operative Bank Limited.*** The present matter is no different. I find and hold that the 1st Defendant has acquired the liability in respect of the Plaintiff and that it has a legal obligation to remedy the same. The argument that there is no contractual relationship between the Plaintiff and the 1st Defendant therefore fails.

<u>Limitation, Competence, Fraud, and other issues</u>

64. The 1st Defendant raised the issue of limitation by way of a Preliminary Objection at the outset. At the time, this Court ruled that the question of limitation would be dealt with as part of the merits of the case, and would form part of the final judgment.

65. Having found that the 1st Defendant assumed the liability of Agricole, the logical question is (prior to the substitution of the 1st Defendant in place of Agricole) was the suit against Agricole filed in time? The answer is affirmative. The cause of action arose on the maturity dates of the deposits in question. The operative dates are 10th September, 1996, and 20th August, 1996. The suit was filed on 26th June, 2002. This was within the six years period from the accrual of the cause of action. Accordingly, I find and hold that the suit is not time barred by virtue of the limitation period.

66. I move to the allegations of fraud which I have addressed in part above. As stated, these allegations were not substantiated by the evidence adduced at the hearing for several reasons. The most important reason was because no primary evidence was adduced in support of the same. The 1st Defendant did not call any witness as to the fact of the alleged fraud. None of the witnesses present were employed by the Bank at the relevant time, and none had personal knowledge of the events surrounding the alleged fraud. The testimony of the said witnesses did not draw a credible or reliable nexus between the Plaintiff and any of the allegations of fraud

on the part of the 2nd and 3rd Defendants as alleged by the 1st Defendant in its pleadings.

67. Most unusually, a vast number of the documents relied upon by the 1st Defendant in support of its allegations of fraud, were produced by the Plaintiff rather than the 1st Defendant, and after the 1st Defendant opposed a notice to produce originals of the same.

68. Several challenges arise in determining the evidentiary weight of the said documents: first, none of the witness present were familiar or able to speak to the contents of the documentary evidence; second, the authenticity of the documents is questionable given the age, foreign nature in some cases, and the fact that the documents are copies and not originals. None were certified as true copies of originals. Additionally, one of the documents produced appears to have come into being for the purpose of litigation, namely, a letter between Agricole and its law firm, Counsel for the 1st Defendant. No contemporaneous documentary evidence was produced to assist the Court to decipher the credibility, reliability or accuracy of the contents of the said documentary evidence produced. In short, I found that little weight may be attached to the said documentary evidence relating to the alleged fraud.

69. The 1st Defendant addressed the relevance of these documents in submissions only. It is trite that submissions are not evidence. I am unable to accept for

example, that the allegation that the Plaintiff was not a party to the suit, and rather, that the subject dealings were made by the late Lalitchandra P. Doshi, based purely on the pleading and written submission that the 2nd and 3rd Defendants admitted this. Those parties were not present at the hearing and the 1st Defendant did not call any witness to explain or contextualize this assertion. Nor did the 1st Defendant substantiate this allegation during cross examination of the Plaintiff's witness during the hearing.

70. Mere production of documentary evidence and reference to the same by way of submission and pleading is insufficient to discharge the burden of proof in the absence of subjecting that document to oral examination. The pleaded allegation remains a mere assertion until it is supported by sufficient evidence. This is especially the case in circumstances, such as the present, where the 1st Defendant has pleaded fraud. The evidential burden lies with the 1st Defendant to prove the fraud. This was not done.

71. By way of further example, the 1st Defendant produced a document ostensibly a 'statement under inquiry' of the 2nd Defendant without calling any witness to contextualize the contents and explain the relevant of that document, or without testing that document to oral examination. The 1st Defendant did not call the maker, author, or any witness to speak to that statement. This document and many similar documents are of little or no probative value. Documents do not speak for

themselves. They must as a general rule, be explained, contextualized, and connected to the facts in issue by a witness. This was not done in relation to numerous allegations which I have considered and found are not proved for the same reason.

72. Such allegations collapse for want of proof. The Court may not fill that evidentiary void through submissions or conjecture. The 1st Defendant allegation for instance, that the Plaintiff fraudulently procured photocopies of cheques, was never even raised as the trial. As a further example, the production by the 1st Defendant of only a portion of a table, which again, was not subjected to oral examination, and to which no witness explained the importance of, or meaning of to the Court, may not be argued in written submissions in support of a particular proposition. Again, the maker of the statement, or author of the table was not presented to the Court and the material was not subjected to oral examination. To my mind, while this table forms part of the evidentiary record, the same is of little or no probative value. I further note that this position was even held by the 1st Defendant's Counsel. The letter dated 9th August, 2002, between Counsel for the 1st Defendant and Agricole relates to fraudulent activities on the part of Agricole's internal staff only.

73. As I conclude on this point, I reiterate that the simple production of documentation in court does not automatically discharge the duty of a litigant to

discharge the burden of proof to the applicable standard. This was not done. To the contrary, DW2 expressly admitted that she could not speak to the events relating to fraud, she stated in her own words that ***"we did not whistle blow to say that the money had not been provided".*** The testimony is consistent with the Plaintiff's version of events that any fraud that may or may not have occurred was an internal issue between the Bank and its own staff, namely, the 2nd and 3rd Defendants and unrelated to the Plaintiff.

74. Finally, DW 2 evidence further shows that she was aware that Agricole and the 2nd and 3rd Defendants settled the internal matters relating to fraud, which settlement resulted in a consent order between the Bank and the 2nd and 3rd Defendants. She testified that she had no personal knowledge of the terms of the consent but conceded that the parties to the same does not include the Plaintiff.

75. Based on the evidence as stated above, I find and hold that the allegations raised in the pleadings and not contextualized or explained by the witness, including fraud were not substantiated. The 1st Defendant failed to draw a demonstrable nexus between the Plaintiff, and such unlawful actions and allegations.

76. Finally, I address the 1st Defendant's pleading that the Plaintiffs verifying affidavit in respect of the further amended plaint was not notarized in accordance with the law, and accordingly, that the Plaint ought to be struck out on this basis. Beyond pleading this issue, no evidence was led in relation to the same during the

trial by way of oral examination. However, looking at the verifying affidavit in question, it is evident to me that although the address is stated to be Middlesex, in the UK, on the face of the affidavit, it is clear that the same was sworn before a commissioner of oaths in Nairobi on 24th May, 2023. I find that the verifying affidavit was sworn in the accordance with the law.

Interest and remaining prayers

77. The starting point in this matter is that a contractual rate of interest existed between the parties. The rate at that time varied with each deposit, with the last deposit attracting 30% per annum. However, it is also evident to me that the rate was for a fixed deposit, and applicable over a short period of time, three months. Moreover, it is not evident if the parties agreed or intended to extend the same rate after maturity of the deposit, or even to withdraw the funds. In the circumstances, the Court ought not speculate, and ought not write or rewrite a contract between the parties. I do not presume to do so. I find that awarding interest at the contractual rate at that time would also be unrealistic noting that fixed deposit rates are prone to fluctuation and are based on market conditions.

78. Interest is awarded pursuant to Section 26 of the Civil Procedure Act, which give the Court power to exercise its discretion to award interest at court rates for any period both before the institution of the suit, and from the date of filing suit until

payment in full. Guided by the principle that an award of interest ought to provide for restitution without imposing a disproportionate burden on the paying party, I find it appropriate to award interest at the court rate of 14% per annum. Interest shall run from the date of maturity of the fixed deposits until payment in full. That is from 10th September, 1996, in relation to the sum of Kshs. 165.274, 849.30/- arising out of HCCOMM 803 of 2002 until payment in full. And from 20th August, 1996, in relation to the amount of Kshs. 51, 550, 684/- arising out of HCCOMM 804 of 2002 until payment in full.

79. The claim for general damages is dismissed on the basis that the same was not demonstrated.

80. Having succeeded in her claim, the Plaintiff is entitled to costs based on the principle that costs ordinarily follow the event.

Conclusion and Disposition

(a) Judgment is entered in favour of the Plaintiff for the total sum of Kshs. 216,825,697.30/- comprising of Kshs. 165,274,849.30/- arising in respect of HCCOMM 803 of 2002, and Kshs. 51,550,684/- arising in respect of HCCOMM 804 of 2002.

(b) Interest is payable on the sum of Kshs. 165,274,849.30/- at the rate of 14% from 10th September, 1996, until payment in full.

(c) Interest is payable on the sum of Kshs. 51,550,848/- at the court rate of 14% from 20th August, 1996, until payment in full.

(d) The Plaintiff is awarded costs of the consolidated suits, namely, HCCOMM 803 of 2002 and HCCOMM 804 of 2002.

Dated and delivered virtually via Microsoft Teams this 29th day of January, 2026

ALEEM VISRAM, FCIArb

JUDGE

In the presence of;

Court Assistant: Lispa

……..…….....for Plaintiff
…….....for 1st Defendant
……..for 2nd Defendant
……..for 3rd Defendant
……..for 4th Defendant