Diamond Trust Bank Kenya Limited v Mohamed & another (Civil Appeal E074 of 2021) [2023] KECA 436 (KLR) (14 April 2023) (Judgment)

Neutral citation: [2023] KECA 436 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MOMBASA

CIVIL APPEAL E074 OF 2021

SG KAIRU, P NYAMWEYA & JW LESSIT, JJA

APRIL 14, 2023

BETWEEN

DIAMOND TRUST BANK KENYA LIMITED .... APPELLANT

AND

DIAMOND TRUST INSURANCE AGENCY LIMITED .... 1ST RESPONDENT

FUAD MAHAMOUD MOHAMED .... 2ND RESPONDENT

(Being an appeal from the judgment and decree of the High Court of Kenya at Mombasa (P.J. Otieno, J.) dated and delivered on 25th January 2021 in High Court Civil Suit No. 72 of 2012 Consolidated with High Court Civil Case No. 16 of 2011)

JUDGMENT

1. In this appeal, the appellant, Diamond Trust Bank Kenya Limited (the Bank) is challenging the judgment of the High Court at Mombasa (P J Otieno, J) delivered on 25th January 2021 awarding the 1st respondent, Fuad Mahamoud Mohamed (the Customer) Kshs 82,129,963.00 and interest at the rate of 16.25 pa from the date of filing suit until payment in full. The Customer's claim against the Bank's subsidiary the 2nd respondent, Diamond Trust Insurance Agency Limited (the Agency) was dismissed. The Customer has cross appealed the decision of the trial court exonerating the Agency from liability. In the same judgment, the court allowed the Bank's counterclaim against the customer and awarded it Kshs 35,940,514.49 and Kshs 877,753.68 with interest on those respective amounts at 16.25% pa from August 2, 2011, and subject to Section 44D of the *Banking Act*, till payment in full.

2. The relevant background to the appeal, in brief, is that the Customer maintained an account at the Bank's Mombasa Branch. He applied for and was granted banking and loan facilities by the Bank. The first facility was a term loan of Kshs 10,000,000.00 extended to him on the basis of the Bank's letter of offer dated June 11, 2008 for the purpose of enabling the Customer settle a loan owed to Standard Chartered Bank Kenya Limited and renovate 5 maisonettes in Nyali. The second facility was extended

to him on the basis of the Bank's letters of offer dated May 27, 2009 and September 14, 2009 and related to establishment of a term loan of Kshs 21,000,000.00 and renewal and continuance of back-to-back overdraft facility for Kshs 15,000,000.00. The purpose of the term loan was stated to be for settlement of an outstanding loan with Commercial Bank of Africa Limited of Kshs 9,000,000.00 to facilitate release of a security held by that bank and the balance for medium term working capital requirements, while the overdraft facility was for financing the Customer's capital requirements.

3. The third facility, based on the Bank's letter of offer dated February 2, 2010, was a temporary overdraft facility of Kshs 7,500,000.00 to be partly utilized by the customer to regularize overdrawn amount in the existing back-to-back overdraft account and to settle arrears for the existing Hire Purchase and Term loan instalments.

4. The next facility, the subject of the bank's letter of offer dated September 30, 2010 was a term loan facility of Kshs 35,000,000.00 the proceeds of which was to be utilized to liquidate: the existing term loan of Kshs 10,000,000.00 which then had a balance of Kshs 7.116 million; the existing term loan of Kshs 21,000,000.00 which then had a balance outstanding of Kshs 20.219 million; and the existing temporary overdraft facility of Kshs 7.5 million. In effect, it was a consolidation of the previous three facilities into a term loan. Amongst other securities, the Customer charged, by a First Legal Charge and Further Legal Charge his property known as LR No 3420 Sec 1 MN (the property) to the Bank.

5. According to the Bank, the Customer defaulted, and persisted in such default in the repayment of the facilities whereupon it commenced the process of exercising its statutory power of sale to realize its security. To that end, the Bank instructed Garam Investments, Auctioneers, to proceed with the sale and in that regard, the auctioneers issued a 45 days' notice of intention to sell the property dated May 23, 2011 to the customer to recover Kshs 37,561,961.40 and interest. However, according to the customer, the endeavor by the Bank to realize the security was in bad faith, malicious and illegal and was precipitated by the collapse on April 18, 2011 of the premises he had constructed on the property. His relationship with the bank until then, he asserted, was good.

6. In a bid to stop the bank from proceeding with the intended sale of the property, the customer filed suit against the bank before the High Court at Mombasa in Civil Suit No 16 of 2011 seeking judgement for a declaration that a notification of sale dated 23rd of May 2011 was invalid and unlawful and that circumstances had not arisen for the realization of the security comprised in the property. He also sought a permanent injunction to restrain the bank or its agents from disposing of the property. He averred in his plaint that conditional to the facility and on the advice of the agency, he insured the property for Kshs 30,000,000.00 with another of the Bank's "related entities", namely Jubilee Insurance Company Limited.

7. In its defence to that suit, the Bank averred that the intended sale of the property in exercise of its statutory power of sale was lawful; that the customer was in persistent default in making payments toward liquidation of the facilities; that demand notices including statutory notices were issued to the customer between June 2010 and January 2011; and that restraining it from exercising its power of sale would cause it financial harm.

8. With regard to the customer's claim that he insured the property with Jubilee Insurance Company Limited in fulfilment of the bank's conditions on the facility on advice of the bank's related agency, the bank averred that the agency and Jubilee Insurance Company Limited are separate legal entities and carry on their business without any influence by the bank, and that the bank is prevented by law from carrying out, providing or advising on any insurance and did not advice the customer in that regard. The bank counterclaimed against the customer for judgment for Kshs 37,099,091.60 and interest; and a declaration that the notification of sale dated May 23, 2011 is valid and lawful.

9. During the pendency of that Civil Suit No 16 of 2011, in April 2012, the customer instituted a fresh suit, High Court Civil Case No 72 of 2012, against the bank and the agency as the 1st and 2nd defendants respectively seeking judgment against them for: Kshs 103,000,000.00 being "the quantum of loss that he sustained as a result of the collapse of the said building"; general damages for loss of business, and costs.

10. The basis of his claim in Civil Case No 72 of 2012 was that under the terms and condition on which the bank extended the banking facilities to him, there was a condition for the customer to provide insurance in respect of the property securing those facilities; that by reason of the terms in the lending terms and conditions it was the bank which, through the agency "procured, obtained and paid for the insurance cover over the suit property number 3240/Sec. 1/ MN-Nyali and who further renewed the said insurance cover on its due date on the Feb 6, 2011 or thereabouts "; that the bank never disclosed to him prior to the collapse of the building that the policy it had taken "did not include contractor's all risks cover".

11. The customer pleaded that the bank was guilty of deliberate misrepresentation in that it was aware that the property was under construction and was notified of the state of construction; that under the lending terms and conditions the insurance cover required was to include contractor's all risks cover for which the bank debited the customer's account; and that by extending the banking facilities to him, the customer was not in any doubt that all the lending terms and conditions had been complied with.

12. In the alternative, the customer pleaded that the bank was negligent; that the bank engaged the agency and both or either of them were negligent in that they knew that the property was offered as security for the bank facilities and were aware of the lending terms and conditions but opted and chose to take out fire insurance cover to the exclusion of the appropriate contractor's all risks cover; that they never disclosed to the customer the nature of policy taken; and that they failed to do what was expected of them to the detriment of the customer.

13. It was averred that on April 18, 2011, the four-storey building that the customer had built on the property collapsed and was a total loss and that he immediately communicated to the bank which in turn alerted the insurer, Jubilee Insurance Company of Kenya limited (the Insurer); and that the quantum of loss he sustained as a result of the collapse of the building was Kshs 103,000,000.00 which was adjusted by the Insurer's assessor to Kshs 97,975,000.00; that on account of the negligence of the bank and the agency, he could not be compensated by the Insurer and that the nature of cover taken was only communicated to him after the building had collapsed.

14. In their separate statements of defences, the bank and the agency denied the customer's claim maintaining that he does not have a cause of action against them; they denied the alleged misrepresentations and negligence; it was averred that the bank, the agency and the insurer are separate legal entities with distinct legal personalities; that the Agency was an agent of the Insurer, a disclosed principal; that prior to insurance cover being obtained, two quotations, one for Fire and Allied Perils and the other for Contractors' All Risk, were sent to the Customer who selected the former; that contrary to his claim, it was the Customer who procured the insurance cover; that they did not owe the Customer a duty of care as he claimed and were not notified of the state of construction of the property. It was contended that after the collapse of the building, the Customer proceeded to immediately demolish the remnants thereby obstructing investigations into the collapse.

15. The two suits were consolidated and at the trial, evidence was taken from the customer, the sole witness for the plaintiff; Aman Kassam, legal manager testified for the bank; while Tazi Versaji, Chief Executive Officer, testified for the agency.

16. In his judgment, the trial Judge found that based on the lending terms and conditions on the basis of which the Bank extended the facilities to the customer, the type of insurance to be availed by the customer was at the sole discretion of the bank; that what was critical as the object of the insurance was to cushion the Bank in the event the security was destroyed or lost; that the ultimate decision on the type of insurance to be provided resided with the bank and that it did have a hand in the choice and procurement of fire and allied perils cover after the insurer made two quotations. The judge expressed that it is expected that the bank is equipped with skills in all areas of securitization and security perfection and on the strength of the case of *Selangor United Rubber Estate Ltd v Cradoek* (No. 3) 1968) 1WLR 1555 held that the Bank had a duty under its contract with the customer to exercise reasonable care and skill in carrying out its part with regard to operations within its contract with the customer and in particular in deciding what type of security would be most appropriate to safeguard its interests and interests of the customer.

17. Holding the bank liable, the judge stated that it was expected of the bank that in so far as the property offered as security included current and future development, reasonableness demanded that a Contractors All Risks cover was the most appropriate one; and that in failing to exercise its reserved discretion to decide on the most appropriate cover, the bank was negligent and thereby caused damage and loss to the customer when the building on the property collapsed.

18. As regards the quantum of loss, the judge observed that the value said to have been insured under the policy with Jubilee Insurance Company Limited was irrelevant as the policy was not produced and that "it is the sum revealed by the loss adjuster appointed by the insurer that is of help to this court"; and that the loss adjusters report was produced by the agency and was relied upon by the bank and the agency. The Judge stated that the report, "gives a plausible explanation why the loss cannot be Kshs 103,192,500" as had been claimed by the customer before concluding that, "...the sums discounted by the loss adjustor are indeed justifiably done and I do find the report and its verdict to be a credible one which I adopt as the reasonable assessment of the loss" and that "having said so, the sum of loss was adjusted by the expert at Kshs 82, 129,963. That is the sum I find to have been lost by the customer."

19. The bank has challenged the judgment on the grounds that the judge: failed to appreciate that the nature of the loan facility extended to the customer was not a construction loan and the applicable insurance policy was Fire and Allied Special Risks cover; deviated from the terms of the contract; found without any basis that the bank was negligent when in fact it did not, as a financier, have a duty of care to advice the customer on the insurance cover; failed to make a determination whether the agency was a disclosed agent of the bank or of the insurer; failed to find that customer's claim, if any, was against the Insurer; failed to find that the customer breached its duty of utmost good faith by failing to disclose that he was undertaking unauthorized construction; awarded the customer an award in the nature of special damages without proof; relied on an inadmissible loss adjusters report when the maker was not called; failed to appreciate the policy had a limit of Kshs 30,800,000.00; awarding the customer interest on the award at the rate of 16.25% which was not pleaded; declining to grant the bank's claim against the customer for Kshs 280,823.43 and interest under the Insurance Premium Financing Facility; awarding the Bank interest at the rate of 16.25% instead of the contractual rate of 25.75% pa on the awards for Kshs 35,940,514.49 and Kshs 877,753.68 respectively; limiting the interest awarded to the bank under Section 44D of the *Banking Act* while the judgment was not subject to those provisions. The customer in his cross appeal has challenged part of the judgment on grounds that the Judge erred in absolving the Agency from liability.

20. Urging the appeal, learned counsel for bank, Mr Chacha Odera assisted by Mr M Kisinga, learned counsel, submitted that parties are bound by the terms of their contract; that on the strength of the case of *National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & another* [2001] eKLR, it is not

open to a court to re-write a contract between parties; that the Judge deviated from the terms of the written contract between the bank and the customer and failed to appreciate that the nature of the loan facility extended to the 1st respondent was not construction loan; that the purposes of the various facilities extended by the bank to the customer were clearly stated in the respective letters of offer; that having regard to the nature and purpose of the facilities and the lending terms including the terms of the Insurance Premium Financing agreement, a Fire, Burglary and Allied Perils policy cover was the appropriate cover and that is what the Customer applied for and was granted by the Insurer.

21. It was submitted that the Judge wrongly imposed on the Bank a duty to obtain a Contractors All Risk policy in contradiction of the express terms of the contract; that on a proper construction of the contract, it was agreed that Fire, Burglary and Allied Perils policy cover would be adequate to cover the suit property; that by holding that the Bank was under a duty to take a Contractors All Risk policy, the Judge effectively re-wrote the contract between the parties.

22. Citing the case of *Schioler v National Westminster Bank Ltd* [1970] 3 All E R 177, counsel submitted further that the bank was under no duty to give advice to the customer on the nature of insurance policy to take as this goes beyond the ordinary care, skill and diligence expected of a banker; that in any event at the time the loan facility was extended, the property was not under construction as claimed by the customer; and neither is the bank an insurance company. It was submitted that there was no basis, either in contract, or in tort, based on which the bank could be held liable to the customer for the collapsed building and the judge erred in holding otherwise. it was submitted that the customer is an experience businessman who had the benefit of legal advice and cannot feign ignorance of the terms of the contract.

23. Furthermore, it was submitted, that the customer breached his duty of utmost good faith by failing to disclose that the property was under construction; that the judge failed to determine whether the agency was a disclosed agent of the insurer or of the bank; that the judge erred in relying on the Loss Adjusters report as a basis of the award in favour of the customer; that the judge erred in failing to grant the bank's claim against the customer under the Insurance Purchase Financing Agreement on the faulty basis that there was failure of consideration; failed to award the contractual interest rate; and invoked Section 44D of the *Banking Act* when the same was not raised by any party.

24. Learned counsel for the 1st respondent Mr Gikandi Ngibuini appearing with Mr Mwakisha, learned counsel, submitted in opposition of the appeal and in support of the cross appeal. Counsel urged that the security on the basis of which the bank extended banking facilities to the customer was, with the knowledge of the bank, and as captured in the valuer's report an incomplete commercial building denoting that it was under construction; that in the circumstances the bank and the agency ought to have known that the appropriate insurance cover that should have been procured was the Contractor's All Risk policy; that it was only after the collapse of the building on April 18, 2011 when the customer discovered, to his surprise, that the policy subsisting was a Fire and Allied Perils cover and not Contractor's All Risk policy.

25. It was submitted that while the learned trial Judge correctly found the bank liable for the loss suffered by the customer, the trial court should also have found the agency liable; that in the unique circumstances of the case involving the model of finance insurance known as bancassurance, the responsibility, duty to advise on appropriate cover and duty of care on the part of the Bank and of the Agency is heightened as the Customer's discretion is circumscribed and his scope of choice of insurer and the nature of cover is severely constrained; that in this case irrespective of whether the agency was an agent of the disclosed principal, the insurer, it is liable in negligence for failing to advise on the appropriate cover. It was submitted, on the strength of the case of *Hedley Byrne & Co Ltd v Heller and Partners Ltd* [1963] 2

All ER 575, among other decisions cited, that the agency owed a duty of care to the bank and to the customer in offering professional advice.

26. Buttressing the argument that the bank and the agency are liable to the customer, counsel submitted that the provisions with respect to insurance were set out under Clause 7 the Bank's lending terms and conditions on the basis of which the bank extended facilities to the customer; that by virtue of those provisions, the bank appointed the agency to arrange for insurance cover with respect to the security; that the customer established that there was compliance with the lending terms and conditions, including those pertaining to insurance, when the bank released funds to him; that the bank and the agency professed to possess skill and competence in arranging the insurance cover for the customer and they knew or ought to have known the appropriate insurance cover should have been the Contractor's All Risks Insurance policy as opposed to the Fire and Allied Perils cover which they procured.

27. With regard to the complaint that the Judge erred in relying on an inadmissible loss adjuster's report and in awarding the Customer damages in the amount of Kshs 82,129,963.00, counsel submitted that the Bank is estopped from challenging the admissibility of the same having consented to its production; that the award of Kshs 82,129,963.00 based on that report represents the assessed value of the collapsed building which would have been paid had the property been insured under a Contractors All Risks policy which the bank and the agency failed, in breach of their duty, to procure. It was urged that the judge correctly awarded that amount being the loss and damage reasonably foreseeable as a likely result from the acts or omissions of the bank and the agency. In that regard, the English case of *Transfield Shipping Inc v Mercator Shipping Inc* [2009] 1 AC 61 and the decision in *Nkuene Dairy Farmers Cooperative Society & another v Ngacha Ndeiya* [2010] eKLR were cited.

28. It was submitted further that contrary to the contention by the Bank, the learned Judge properly applied the provisions of Section 44D of the *Banking Act* based on the decision of this Court in *James Muniu Mucheru v National Bank of Kenya Limited* [2019] eKLR to the effect that that provision is to be born in mind and factored in computation of amount due by a customer to a bank.

29. Regarding the award of interest, counsel submitted that under Sections 26 and 27 of the *Civil Procedure Act*, the trial court was entitled to make the awards that it did in exercise of its discretion as the bank did not tender any evidence to demonstrate its Base Lending Rates from time to time as stipulated in the letters of offer for the facilities.

30. We have considered the appeal, the cross appeal and the submissions and have reviewed and re-appraised the evidence with a view to drawing our own inferences and conclusions in keeping with our responsibility on a first appeal. See Rule 29(1)(a) of the *Court of Appeal Rules*, 2022 and also the long-standing decision in *Selle & another v Associated Motor Boat Co Ltd & others* [1968] EA 123.

31. Although numerous grounds of appeal are set out in the memorandum of appeal and in the cross appeal there are, in our view, two main issues for determination. First, whether the Judge erred in holding the bank liable for failing to ensure that the security offered by the customer to secure banking facilities was insured under Contractors All Risk cover. Related to that is the question whether the Judge erred in awarding the customer damages in the amount of Kshs 82,129,963.00. Secondly, whether the Judge erred in absolving the agency from liability. Other secondary issues raised relate the application of Section 44D of the *Banking Act* and the interest rates awarded.

32. The relationship between a bank and its customer, according to the authors of *Paget's Law of Banking, 11th edition*, is a "relationship peculiar to banking" which embraces mutual duties and obligations and offers privileges to both parties. The authors state that it is a relationship of contract consisting of a general contract, which is basic to all transactions, together with special contracts which arise only

as they are brought into being in relation to specific transactions or banking services. In the present case, the specific transaction, as already stated, relates to banking facilities extended by the Bank to the Customer on the strength of the customers security, the property, the developments on which property collapsed on April 18, 2011. That resulted in loss to the customer, which the trial court held was attributable to a breach by the bank of its duty of care to the customer in failing to ensure that the property was insured under a Contractors All Risks policy as opposed to the Fire and Allied Perils policy that was in place. In reaching that conclusion, the learned trial Judge expressed that the "banks daily business is the negotiation and grant of facilities involving documentation, all purposed to secure its best interests" which "places upon the bank an expectation that it is equipped with skills in all area of securitization and security perfection". As already indicated, the Judge expressed that to the extent the property the customer offered as security "included current and future development", reasonableness demanded that the Contractors All Risk policy was the most appropriate and that "in failing to exercise its reserved discretion to decide on the most appropriate cover" as the Contractors All Risk policy, the Bank "was negligent and that negligence resulted in the damage and loss being occasioned to the [customer] when the property collapsed while being constructed towards completion".

33. We have already set out above the rival arguments by the parties. It is common ground that the customer applied to the bank and was granted three banking facilities already mentioned on the terms and conditions set out in the respective letters of offer. Those facilities were then consolidated, again subject to the lending terms and conditions, into the facility of Kshs 35,000,000.00 secured by the customer's property LR No 3420 Sec 1 MN.

34. The pertinent Clause 7 of the lending terms and conditions on the basis of which the learned Judge found the bank to have been negligent and therefore liable provides as follows:

> " 7. Insurance
>
> a. the borrower shall provide the bank with the under- mentioned insurance policies as applicable, from an acceptable insurance company.
>
> i. In respect of any construction financed by the "Bank over any immoveable property, contractor's all risks insurance policy during the period of construction to be replaced by insurance covering damage resulting from fire, burglary and all the related special perils e.g flood, earthquake, civil commotion riots, strikes etc upon completion of the construction. Minimum sum insured should not be less than the open market value of the property or the insurance value, whichever is higher.
>
> ii) In respect of any immoveable property to be charged to the Bank Insurance covering but not limited to damages resulting from fire , burglary and all the related special perils e.g floods, earthquake, civil commotion, riots, strikes etc or such other insurance cover as the Bank may at its sole discretion require including but not limited to a contractors all risk insurance policy to be maintained during

the construction period where the said property is subject to construction at present or in future. Minimum sum insured should not be less than the open market value of the immoveable property or the insurance value, whoever is higher.” [Emphasis added]

35. Under Clause 7(a), the obligation to provide insurance resides with the customer who was the borrower. the discretion vested on the bank under that clause relates to accepting or declining the choice of insurer from which the borrower sources the insurance as well as the class of insurance. Meaning that the insurance company from which the insurance is procured as well as the extent of cover should be acceptable to the Bank.

36. Clause 7(a)(i) relates to insurance policies the borrower is required to have in place “in respect of any construction financed by the bank over any immovable property” and stipulates that a Contractor’s All Risk Insurance Policy is required to be in place “during the period of construction” and that upon completion of construction, the Contractor’s All Risk Insurance Policy is replaced by insurance covering damage resulting from fire, burglary and all the related special perils. Pausing there for a minute, it is clear that Clause 7(a)(i) was not applicable to the financing extended by the Bank to the extent that the Bank was not financing construction. we have already set out the purposes for which the bank granted financial accommodation to the customer as set out in the respective letters of offer none of which relate to financing of construction, and there was therefore no obligation on the part of the customer to provide Contractor’s All Risk Insurance Policy under Clause 7(a)(i) of the lending terms and conditions.

37. Clause 7(a)(ii) of the lending terms and conditions on the other hand relates to the insurance policies required of a borrower to have in place in respect of any immovable property to be charged to the Bank. Such insurance policy is required to cover “damage resulting from fire, burglary and all related special perils” although the bank may, at its sole discretion, require other insurance cover

> “ including but not limited to” cover to be maintained “during the period of construction where the said property is subject to construction at the present or in future.” Even assuming for a moment, that the property was under construction at the time the Customer charged it to the Bank, it was entirely at the discretion of the Bank to determine whether insurance cover extending to “damage resulting from fire, burglary and all related special perils” would suffice or whether Contractors All Risks insurance should be in place.

38. The bank was not contractually obliged to demand that the only class or type of insurance cover the customer should provide is Contractors All Risks insurance. It was all up to the Bank to determine, in its sole discretion, whether the Contractors All Risks insurance or cover extending to damage resulting from fire, burglary and all related special perils sufficed. To the extent that the trial Judge construed Clause 7(a)(ii) as requiring that the bank should exercise its discretion by demanding provision of Contractors All Risks insurance to the exclusion of any other, we are persuaded that the trial court effectively re-wrote the terms of the contract between the parties and thereby misdirected itself. [See National Bank of Kenya Ltd v Pipeplastic Samkolit(K) Ltd & anor [2001] eKLR].

39. Even if Clause 7(a)(ii) of the lending terms and conditions were to be construed as imposing a duty on the part of the Bank to have demanded provision of Contractors All Risks insurance cover in respect of the property to the exclusion of any other class of insurance, there is the question whether the property was under construction at the material time. It is evident from clause 7 in its entirety that whether

or not the immoveable property was under construction was a critical and material consideration in determining whether Contractors All Risks insurance would be the appropriate, for it is only during the period of construction when such cover would be required to be replaced, upon completion of the construction, with fire, burglary and all related special perils cover. In other words, a Contractors All Risks insurance cover would not make sense unless the property is under construction.

40. It was urged for the customer that the loss adjuster's report provided proof that the premises were under construction. However, what the maker of that report states in that report is that they took "into account the stage of the construction of the three top floors that were incomplete." Apart from the fact that the report is dated September 12, 2012, years after insurance cover had been taken, it does not attest to the state of the property at the material time when the insurance cover was first taken or when it was renewed.

41. There is then the question of the bank's liability to the customer in tort. in that regard it was submitted for the customer that in the unique circumstances of this case where "the model of finance insurance commonly known as bancassurance" was employed. It was urged that in those circumstances an insured's "choice of insurer, and nature of cover" are severely constrained and his discretion highly circumscribed and that the responsibility and duty of care on the part of the bank and of the agency is heightened. In that regard, the learned trial Judge's holding of the Bank liable was buttressed thus:

> " In coming to this conclusion, I do take notice that the banks daily business is the negotiation and grant of facilities involving documentation, all purposed to secure its best interests. That places upon the bank an expectation that it is equipped with skills in all area of securitization and security perfection."

42. In *Hedley Byrne & Co Ltd v Heller & Partners Ltd [1964] A.C 465*, [1963] 2 All ER 575, the landmark decision of the House of Lords on which counsel for the customer relied, it was established that there can be tortious liability for negligent misstatements where parties are in a special relationship resulting from the defendant's assumption of responsibility towards the plaintiff. Lord Morris expressed in that case that:

> " ...if someone possessed of a special skill undertakes, quite irrespective of contract, to apply that skill for the assistance of another person who relies on such skill, a duty of care will arise."

43. Counsel for the customer urged the court to take judicial notice that under bancassurance model of selling insurance, banks and insurance companies partner so the bank sells the insurance company's products to its clients. No evidence was led in this case that the bank sold the insurance cover to the customer. The evidence was that the agency was housed within the bank and engaged with the customer on behalf of the insurer. No evidence was led to the effect that the bank held itself out as an insurer. In his testimony before the trial court, the customer had this to say:

> " Whenever I borrowed from the defendant [bank], I need to obtain insurance called back assurance (sic) provided by the 2nd defendant [agency] at the banking hall. I would be asked to sign forms provided by the 2nd defendant [agency]"

And later

> " ...it is not true that I was responsible to arrange for the insurance. The "LTC" said it was the bank to arrange. The bank even financed the premium and my account was debited."

44. There was therefore no evidence at all that the bank held itself out as an insurer or made representations to the customer in that regard as having special skills. furthermore, we are not persuaded, as the judge implied, that the bank owed the customer a duty of care in exercising its discretion in determining the extent of cover it would demand from the customer. the purpose of the insurance required by the bank was for the protection of the bank should the insured risks attach to its security. it was not for the protection of the customer. Moreover, quite apart from his contractual obligation to provide insurance as required by the bank in respect of the property to be charged, nothing prevented the customer from taking such other insurance as he would have required. We do not think, as the judge implied, that in exercising its discretion on the cover to be provided by the borrower, the bank was effectively a trustee for the customer.

45. We observe further that the claim by the customer that it was only after the collapse of the building that he became aware of the type of insurance cover on the property is not credible. As early as February 2, 2010 when he accepted the offer for overdraft facilities, under item 10 of that letter of offer, the Bank had stipulated:

> " We already hold insurance cover for the properties detailed I clauses 8(i) and (iii) above from Jubilee Insurance Company Limited, with our interest noted for damage resulting from fire and the entire related special perils, eg earthquake, etc. The policy is in respect of the properties...expires on February 6, 2011. The said policies will be renewed by yourselves prior to expiry. All costs of renewal of the insurance policy will be borne by yourselves."

46. The customer signified his acceptance of those terms and his signature witnessed by an advocate. He cannot belatedly turn around and claim that he knew not the type of insurance cover. Further, under the Policy Schedule to the Insurance Premium Finance Agreement between the customer and the bank which was produced, the type of cover with respect to the policies was clearly indicated as fire policy. The claim that the Customer only discovered the type of cover in place after the collapse of the building is in the circumstances feigned surprise.

47. We conclude, based on the foregoing, that the learned Judge erred in holding the Bank liable for the loss suffered by the customer on account of his building on the property having collapsed.

48. With regard to the bank's counterclaim for Kshs 280,823.43 relating to insurance premium financing, the learned Judge, in rejecting the same stated:

> " On the defense that the sum for insurance was not due, I find that there was sufficient evidence that the same was in deed offered, accepted and disbursed into the plaintiff 's account. However, I have found that there was no evidence of consideration having been furnished. I have said that there was no evidence by way of a proposal form that the plaintiff sought any insurance and none was led to show that there was ever issued any policy. For that reason, I do find for the plaintiff that the sum is not recoverable on account of failed consideration. The claim of Kshs 280,823.43 with interest at 16%pa is not merited and the same is thus dismissed."

49. Having found that the customer had indeed applied for and was granted the financing for the premiums and the same disbursed into his account, the Judge went on to state that there was no

consideration for the same. That flies in the face of the express provision in the Insurance Premium Finance Agreement which provided:

> "In consideration of the Bank agreeing to advance to the Borrower the Premium Amount due to the Insurer..."

50. We turn to the complaint by the bank that the judge erred in failing to award interest at the rates pleaded in the Counterclaim. In that regard, the learned Judge expressed, "I find no contract for the interest claimed at 27.75%". In its letter of offer consolidating the customers facilities into a term loan of Kshs 35,000,000.00, provision was made that:

> "Interest on the Term Loan shall be charged monthly in arrears calculated on a reducing balance basis at the rate which is the aggregate of DTBK's base lending rate from time to time (presently 14.25% per annum) plus 2% per annum ie 16.25% per annum on reducing balance basis or such other basis or rate as may be determined by DTBK from time to time. Any variations in the Base Rate are published in the Daily Newspapers."

51. The Bank did not present evidence of variations in accordance with that provision. We are unable to fault the Judge in that regard.

52. With regard to the cross appeal, the learned Judge, correctly in our view, dismissed the customers claim against the agency for "lack of proof." The particulars of negligence pleaded against the bank and the agency were that being aware of the lending terms and conditions, both or either of them opted and chose to take out a fire insurance cover to the exclusion of the Contractors All Risk cover and that they failed to do what was expected of them. There was no evidence led to demonstrate that the agency was privy to the decision on the choice of cover. On the contrary, the agency pleaded in its defence and led evidence that it obtained and forwarded quotations with respect to both classes of insurance and had no role in the choice subsequently made. We are unable to fault the conclusion by the learned Judge that the claim against the Agency was not established. The cross appeal fails and is dismissed.

53. In conclusion therefore:

    a. We set aside the award in favour of the 1st respondent against the appellant in the amount of Kshs 82,129,963.00.

    b. The cross appeal fails.

    c. We set aside the decision of the trial court dismissing the Bank's counterclaim for claim of Kshs 280,823.43 with interest at 16%pa in respect of premium financing and substitute therefore judgment in favour of the Bank for the said amount.

    d. We uphold the awards in favour of the bank of Kshs 35,940,514.49 with interest thereon at 16.25 % p.a, from the 2/8/2011, and subject to section 44D of the *Banking Act*, till payment in full and Kshs 877,753.68 with interest thereon at 16.25% p.a from 2/8/2011 and subject section 44D of the *Banking Act*, till payment in full.

    e. The appellant shall have the costs of the appeal.

DATED AND DELIVERED AT MOMBASA THIS 14TH DAY OF APRIL 2023

S. GATEMBU KAIRU, FCIArb

....

JUDGE OF APPEAL

P. NYAMWEYA

....

JUDGE OF APPEAL

J. LESIIT

....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR