



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OKWENGU, KIAGE & SICHALE, J.J.A)

CIVIL APPEAL NO. 108 OF 2016

BETWEEN

MEYA AGRI TRADERS APPELLANT

AND

ECO BANK KENYA LIMITED RESPONDENT

(Appeal from the Judgment of the High Court of Kenya at Nakuru (A. Mshila, J.) dated 10th November, 2015

in

Civil Case No. 56 of 2013)

JUDGMENT OF KIAGE, J.A

By this appeal the appellant **Meya Agri Traders Ltd** (the customer) challenge part of the decision of the High Court at Nakuru (Mshila, J.) that dismissed its claim for **Kshs. 10,486,780** and **Kshs. 80,000** bank charges on account of cheques dishonoured by the respondent **Eco Bank Kenya Limited** (the Bank).

The customer had filed suit against the bank, with which it had a corporate account No. 01500xxxxxxxxxx at its Nakuru Branch and an overdraft facility to the tune of Kshs. 20 million, claiming that in breach of the bank's duty to observe reasonable skill and care in and about maintaining the customers' account, the bank permitted one **Joseph Kangethe Njeri, (Joseph)** who was the customers' Finance Manager, to fraudulently draw and deposit various cheques on his or his Mataya Hill Trading Company names, into the customer's account between January 2012 and 2013. Those cheques, amounting to **Kshs. 10,486,700**, were upon presentation for payment, dishonoured. The customer pleaded that the banker had reasonable ground for believing that the said cheques were deposited in fraud and that it was negligent and breached its duties to the customer in failing to communicate the dishonour of the cheques. It particularized the negligence or breach as consisting in;

“(i) Failing to deliver the Image Return Documents to the plaintiff.

(ii) Failing to send notices of dishonour in respect of the said cheques to the plaintiff.

(iii) Failing to inform Mr. Daniel Ngunia or Albert Njuguna who were the contact persons as per the client Profile/KYC form.

(iv) All the cheques totalling to Kshs. 10,486,000 were drawn and signed by the same person who was an employee of the plaintiff over a short period of time and this unusual circumstance should have led the bank to make an enquiry from the plaintiff.

(v) The plaintiff company and the defendant bank are next door neighbours and the defendant knew that the plaintiff sold agricultural goods and it should have informed the plaintiff of the dishonoured cheques so that it does not release the goods.

(vi) Altering the plaintiff's bank statements in order to conceal the fraud and the dishonoured cheques.

(vii) Supplying the plaintiff with 2 different sets of bank statements.

(viii) *Communicating with Mr. Joseph Kangethe Njeri over the dishonoured cheques while very well knowing that he was the drawer of the said cheques.*

(ix) *Colluding and conniving with Joseph Kangethe Njeri to defraud the plaintiff.”*

The customer pleaded further that it deposited various cheques amounting to **Kshs. 1,081,000** but the bank negligently and or on in breach of its contractual obligations refused or failed to present them, to the customer’s loss. Moreover, the customer issued cheques to third parties which were on presentation dishonoured and returned marked “*Insufficient Funds, Refer to Drawer*”, as a consequence of the bank’s failure to present and collect the cheques amounting to **Kshs. 1,081,000** or to notify the customer of the dishonour of the cheques amounting to **Kshs. 10,486,700**. The customer thus claimed to have suffered loss and damage by reason of being greatly injured in its credit and in its trade or business as a company specializing in the business of procurement and distribution of agricultural inputs. It sought damages for libel. The customer’s final claim was for **Kshs. 1,595,721.97** being interest it had to pay to the bank occasioned by the two sums complained about.

The bank filed a written defence in which it admitted the existence of a bank-customer relationship between the parties but denied that there was an implied term of contract that it observe reasonable skill and care in maintaining the customer’s account. It admitted the dishonour of the cheques listed but denied knowledge that Joseph fraudulently drew and deposited them in the customer’s account. It denied the allegations of negligence and/or breach of duty and the particulars thereof pleaded. It averred that the said Joseph was a duly authorized signatory of the customer’s bank account and agent of the customer. It also asserted that it always gave information to the customer’s agent regarding deposit and return of cheques, and that it gave accurate and true statements of account. If the same were manipulated, it was by the customer’s agent. It denied liability for failing to present cheques deposited with it by the customer, stating that such deposit was at the customer’s risk. It admitted the dishonour of the customer’s stated cheques but asserted the dishonour was due to insufficient funds, but without negligence or breach of duty on its part. It blamed any loss suffered by the customer on the customer’s agent’s criminal acts and mounted the defences of contributory negligence and *volenti non fit injuria*. It denied injury to the customer’s credit and any liability for interest paid by the customer, and sought dismissal of the suit.

In time the case proceeded for hearing before the learned Judge with the customer calling two of its directors **Daniel Munywoki Njuguna** (PW1) and **Albert Munywoki Njuguna** (PW2) while the bank called its operations manager **Hanington Njuguna Waweru** (DW1). The learned Judge then delivered the impugned judgment by which she decreed;

“1. That the plaintiff has failed to demonstrate that the defendant was negligent and further failed to prove that the defendant was in breach of its statutory duties and obligations of failing to communicate to it about the fraudulent cheques drawn by Joseph Kangethe Njeri.

2. That the plaintiff has failed to prove its claim for loss of Kshs. 10,456,700 and Kshs. 80,000 penalty that was deducted by the defendant for Joseph’s dishonoured cheques.

3. That an award of Kshs. 1,500,000 is hereby awarded for defamation.

4. That the plaintiff is hereby awarded the sum of Kshs. 1,595,721.97 with interest thereon at 19%.

5. That the plaintiff is hereby awarded the costs of this suit.”

By its memorandum of appeal the customer complains that the learned Judge erred in various respects which can be summarized thus;

(a) Holding that the bank had no obligation to and was therefore not liable under section 74 of the Bills of Exchange Act for not notifying the customer of the 80 dishonoured cheques either by returning them or issuing Image Return Documents of the same.

(b) Holding without sufficient evidence that the bank notified Joseph, the drawer of the dishonoured cheques and that such communication was sufficient yet he was not one of the customers contact persons or agents.

(c) Failing to hold that the bank was negligent and in breach of its statutory duties resulting in or enabling Joseph’s fraud on the customer.

(d) Failing to appreciate and hold that the bank had an obligation to communicate with the two contact persons given in the Known Your Customer (KYC) Forms with regard to the dishonoured cheques.

(e) Holding against the weight of evidence that the customer did not prove its claim from the principal loss of Kshs. 10,486,000 and bank charges of Kshs. 80,000.

The customer thus prayed that the dismissal of its claim for **Kshs. 10,486,000** and **Kshs. 80,000** be set aside and reversed by an order granting the same. It also sought costs.

The bank was also dissatisfied with the part of the decision of the learned Judge that awarded the customer **Kshs. 1,500,000** general damages; the award of **Kshs. 1,595,781.97** and costs of the suit, and therefore sought to have the same set aside on grounds which can be summarized that the learned Judge erred by;

- ***Holding that the customer proved its case for defamation despite the bank’s complete defence of truth, and without third party evidence that the customer’s reputation had been injured.***

- ***Making an unreasonably excessive award of damages in the circumstances.***
- ***Failing to find that the sum of Kshs. 1,595,721.97 was a special damages claim that was not strictly proved.***
- ***Awarding the entire costs to the customer despite failure of its main claim and failing to ward the costs to the bank.***

Prior to the hearing of the appeal the parties' advocates on record filed written submissions. For the customer, the firm of Mutonyi Mbiyu & Co. Advocates first addressed the bank's duty under the Bills of Exchange Act (the Act) to notify the customer of dishonour of cheques. Contending that the customer never received the 80 cheques issued by Joseph or image return documents thereof, counsel stated that the bank's contention that it telephoned the same Joseph to tell him about his dishonoured cheques, and that it sent the customers' bank statements to him, was inadequate for purposes of the Act.

Adverting to an excerpt of the judgment where the learned Judge, following Majanja J's decision in ALFRED SAGWA T/A PAVE AUCTIONEERS vs. NATIONAL BANK OF KENYA LTD [2014] eKLR, held that "the obligation on the banker to either return the dishonoured cheque or IRD to the holder is discretionary," counsel submitted that even though the word 'may' is used in **section 74B (i)** of the Act, its meaning is not discretionary, as that would render the entire provision ineffective and leave the holder helpless. Rather, the word 'may', properly construed, and in context, must be read to mean *imperative*, given the legislative intent. They cited a number of authorities including Black's Law Dictionary 10th Edn P 1127; Maxwell on Interpretation of Statutes 12th Edn P. 234; VELJI SHAHMAD vs. SHAMJI BROS & ANOR [1957] EA 432 and this Court's decision in SONY HOLDINGS LTD vs. REGISTRAR OF TRADE MARKS & ANOR [2015] eKLR, where the Court stated that whether the words 'shall' or 'may' convey a mandatory obligation, or are simply permissive, will depend on the context and the intention of the drafters.

Counsel bolstered that argument by referring to **sections 48 and 49** of the **Act** which impose an obligation on the holder of a cheque to issue a notice of dishonour to the drawer and each endorser of such cheque within given timeliness of an urgent character, and contended that to hold, as did the Judge, that **section 74B (i)** is merely permissive would prejudice the holder who would be unable to comply with **sections 48 and 49**, and thereby unfairly discharge the drawer or endorser of a dishonoured cheque from liability.

It was urged that the bank was negligent and in breach of **section 74B(i)** by purporting to communicate dishonour by telephone, an option not available to a presenting bank, and to Joseph, who was the drawer, instead of giving proper notice to the customer as holder, who was just next door to it. The bank, in exclusively informing Joseph about the bounced cheques, breached its duty of care to the customer which required it to inform the customer's managing director or the contact persons and other signatories. The conduct of the bank's officers smacked of complicity and blatant recklessness in the circumstances. The learned Judge was faulted for erroneously supposing that Joseph could also be contacted by the bank in case of queries about the customer's account yet he was not one of the contact persons provided by the customer, a fact conceded by the bank's witness. It was therefore a misdirection for the learned Judge to find that the customer did not prove its case on a balance of probabilities.

The firm of Mirugi & Co. Advocates for the bank contended that even though Joseph was not an agent of the customer when the account was opened, he was later introduced as a signatory, and the bank was therefore correct to deduce that he had the mandate and authority to transact on behalf of the customer. Citing FREEMAN & LOCKYER vs. BUCKHURST PARK PROPERTIES (MANGAL) LTD [1964] 1 ALL ER 630, counsel contended that the customer was estopped from denying the actual or ostensible authority of its agent when a third party relies on it to its detriment. The bank was therefore right to communicate with Joseph. Moreover, **section 74B** did not require or mandate the bank to communicate the dishonour of cheques to the customer, for which contention reliance was placed on the ALFRED SAGWA case (supra). Had that been the intention of the legislature, it would have used the term 'shall' and not 'may'. The bank therefore was under no obligation to return the dishonoured cheques or images thereof. As regards issuance of the notice of dishonour, counsel relied on **section 49(h)** to submit that notice to Joseph, an agent of the customer, by phone, was sufficient. Reliance was placed on Ms. Parthasary's Cheques in Law and Practice pp 456-460 and **section 49(5)** of the Act for the argument that notice 'may be conveyed by phone' or 'personal communication'. As the customer did not withdraw Joseph's authority, and the bank communicated to him out of good faith and concern for the customer, the customer was estopped from denying such authority. Telephone communication to the said Joseph satisfied the requirement for notice by personal communication under **section 49(e)**.

Since the customer was Joseph's employer, it and not the bank, ought to suffer for the negligence that facilitated his fraud. It is the customer who ought to have been vigilant to do background checks on Joseph, and to sooner discover his fraud since "the [customer] had not authorized the cashing of personal cheque with the cashier and yet Joseph was able to do so for a long time." The customer was equally to bear the loss for Joseph's alteration of statements using an application in his computer. It ought to have put in place measures to counter the fraud. Counsel cited the judgment of Lord Findlay in L.C. JOINT STOCK BANK vs. MACMILLAN & AUTHUR [1918] AC 777 to the effect that "it is the duty of the customer to use reasonable care in issuing mandates and that if the customer chooses to dispense with ordinary precaution because he has complete faith in his clerk's honesty, he cannot claim to throw upon the banker the loss which results the customer must bear the loss as between himself and the banker." Referring to the notification of the authorized agents signed by the customer on 6th February, 2010 in which the customer pledged to indemnify the bank against any loss that may be occasioned by non-delivery of any of the orders by the customer's authorized agents, counsel submitted that the bank could not be held liable for Joseph's fraud.

It was thus contended for the bank that the customer did not prove its claim for the loss of **Kshs. 10,486,000** and **Kshs. 80,000** as it was solely due to the fraudulent acts of the customers' agent, occasioned or aided by the customer's own negligence or dereliction of duty. The ensuing bank charges on account of dishonoured cheques were lawful and within the bank's procedures.

On the cross appeal, the bank's submission was that the customer failed to prove that its reputation had suffered by reason of the dishonoured cheques as it did not call witnesses from its suppliers or business associates to testify to the fact. The learned Judge was therefore wrong to hold the bank liable in libel. The bank communicated with the customer's suppliers in the performance of a legal duty in good faith and without malice and was not liable. Even were there libel, damages in the sum of **Kshs. 1,500,000** was attacked as being inordinately high. Citing BUTT vs. KHAN [1978] eKLR, counsel invited the Court to vary the amount.

Regarding the sum of **Kshs. 1,595,721.97** awarded to the customer, it was complained that as the same was pleaded as interest paid to the bank on account of non-notification of the dishonoured cheques and cheques uncollected, then, the claims on the principal sums having failed, the learned Judge ought not to have granted them. It was further contended that the interest at 19% awarded on the sum of **Kshs. 1,595,721.97** was objectionable on account of its being interest on interest. We were urged to set it aside.

Concluding that the appeal is without merit and the cross-appeal is meritorious, the bank implored the Court to dismiss the former and allow the latter, and that it be granted the costs of both.

The customer's first submission on the cross appeal was that a collecting bank is liable to its customer for damage to the customer's credit as a result of dishonour of a cheque due to delay in its presentation. Reliance was placed on a passage from Page's Law of Banking 12th Edn 562 paragraph 229 in support of that proposition. Such injury to the customers' reputation is presumed by the law without proof of actual damage. This Court's decision in **BANK OF BARODA (KENYA) LTD vs. TIMWOOD PROPERTIES LTD [2008] eKLR** was cited in aid. As the 3 cheques complained of were dishonoured with the words "*Insufficient Funds – Refer to Drawer*", and published to the suppliers and officers of the collecting banks, the customer contended that its reputation was injured and the suppliers declined to supply it with goods on credit, as before, since it could no longer be trusted. It lost its creditworthiness yet at the time those cheques were presented it had an overdraft facility with the bank that should have facilitated the payment of the cheques. The learned Judge was therefore right to find for the customer on the claim in libel. On quantum, the award of **Kshs. 1,500,000** compensation could not be faulted given other decisions such as **BANK OF BARODA** (supra) and **C. MEHTA & CO. LTD vs. STANDARD CHARTERED BANK LTD [2014] eKLR** where **Kshs. 3,000,000** was awarded for loss of business credit and reputation.

We were urged to dismiss the cross appeal with costs.

I have given those submissions careful consideration as well as their highlights of them made before us by **Messrs. Mutonyi and Kahiga Waitindi**, respective learned counsel for the customer and the bank. I have also perused the entire record consistent with our duty as a first appellate court to re-evaluate and reassess the evidence afresh with a view to making our own inferences of fact and arriving at independent conclusions. We proceed by way of re-hearing but with the caution that unlike the learned Judge, we have not had the advantage of observing the witnesses in live testimony. I accordingly make due allowance for that differential. See **Rule 29** of the Court of Appeal Rules; **SELLE vs. ASSOCIATED MOTOR BOAT CO. LTD & OTHERS [1969]**.

From my analysis of the case, it seems to me that the gravamen of this appeal is the interpretation to be accorded to **section 74(B) (i)** of the Act so as to clearly establish the exact contours of a presenting bank's duties, if any towards the holder of a cheque that is dishonoured by non-payment. The relevant provision is in these terms;

“Where a cheque presented for payment in accordance with subsection (1) of section 74 is dishonoured by non-payment, the presenting banker may either-

(a) on its own motion or at the request of the holder, return the cheque to the holder; or

(b) issue to the holder an image return document.”

The learned Judge's interpretation, and which is the subject of great dispute between the parties herein, was that ***“the obligation placed on the banker to either return the dishonoured cheque or an IRD to the holder is discretionary, on its own motion or at the request of the holder.”*** Being of that view, she proceeded to conclude that ***“The Defendant cannot be held liable for failing to notify the plaintiff of the dishonoured cheques under [Act].”***

Having carefully and anxiously considered that provision and the law on both statutory interpretation and the practice of banking, I am unable to agree with the learned Judge. I say so cognizant that the learned Judge's conclusion was more likely that not attributable to the inelegant manner in which the provision itself is couched. The irony is quite apparent that the learned Judge should speak in terms of the ***“obligation being discretionary”***, itself quite an oxymoron. I think, with respect, that to attach such meaning to the provision would be to render it inoperable and otiose.

Parliament cannot have intended to create an obligation and then go ahead in the same breath to render that obligation optional, thereby negating it. It would mean that Parliament acted in vain, which it should not be in its nature to do. Moreover, to hold as did the learned Judge, that issuance of notice under that section is at the discretion of the banker would be tantamount to creating, in addition to the stated options of either returning the dishonoured cheque or issuing an IRD of it to the holder, a third option of ***doing nothing altogether***. It would also mean that even were the customer to request for the cheque, the banker would be entitled to refuse. Both of these scenarios are quite untenable.

For that provision to make sense and not lead to an interpretational absurdity, I am persuaded that it must be read to mean that there is a binding obligation on the part of the banker to forward a dishonoured cheque to its holder. The discretion lies not in the ***whether***, but the ***how*** of forwarding it, in that the banker may forward the dishonoured cheque itself whether of its own motion or at the request of the customer or, in the alternative send an IRD thereof to the customer.

Much as the reading of ***‘may’*** to mean ***‘must’*** appears at first blush to be counter-intuitive, courts have on occasion so held so as to give effect and meaning to the intention of the law maker and also to give due respect to the context in which the words are used. Indeed, no less an authority than **Black's Law Dictionary** (supra) states under the definition of ***‘may’*** that in dozens of cases, courts have held many to be synonymous with shall or must, also in an effort to effectuate what is said to be legislative intent. The learned author of **Maxwell on The Interpretation of Statutes** (supra) in dealing with those two words under the rubrics of ***‘exceptional construction’*** or ***‘modifying language to meet the intention’***, posits that whereas ***“in ordinary usage ‘may’ is permissive and ‘must’ is imperative, and in accordance with such usage the word ‘may’ in a statute will not generally be held to be mandatory, in some cases it has been held that may [has] a compulsory***

force and so [its] meaning has been modified by judicial exposition.”

He cites a number of old cases where ‘may’ has been held to be obligatory, imperative or equivalent to must, including *R vs. ROBERTS [1901] 2K.B.117*; *BAINES vs. WORMSLEY [1878] 47 L.J. Ch. 844* and *SHAW vs. RECKITT [1893] 1 QB 779*. This Court has itself been alive to the need to interpret the word ‘may’ with both the context and the intent of the Legislature in mind, so as not to defeat or subvert the provision falling for interpretation. We need only refer to the following passage from *SONY HOLDINGS LTD vs. REGISTRAR OF TRADE MARKS & ANOR* (supra) to make the point that our holding herein is neither novel nor strange;

“Whether the words ‘shall’ or ‘may’ convey a mandatory obligation or are simply permissive, will depend on the context and the intention of the drafters. The Supreme Court in its advisory opinion *In the matter of The Principle of Gender Representation in The National Assembly and the Senate Application No. 2 of 2012* found that, the use of ‘shall’ in Article 81(b) of the Constitution on the gender-equity rule as used in the context, incorporates the element of management discretion on the part of the responsible agency or agencies. In contrast in *Velji Shahmad vs. Shamji Bros & Propatlal Karman & Co. [1957] EA 432* construing the meaning of the word ‘may’ as used in the former Order XLVI Rule 9 of the Civil Procedure Rules providing that:-

‘An appeal from the decree or order of subordinate court ... to the Supreme Court may be filed in District Registry within the area of which such subordinate court is situate,’

The Court held that in the context, the word “may is mandatory that any appeal from a subordinate court outside Nairobi must be filed in the appropriate district registry:

‘...as to hold otherwise would simply subvert the whole rule for it would mean that an advocate or appellant, to suit their own convenience, could file an appeal in Mombasa from a subordinate court in Kisii or Nairobi.’”

I am of the view that the learned Judge committed a reversible error of interpretation and would hold that the obligation imposed by **section 74(B)(i)** of the Act is mandatory and obligatory.

The next question for determination is whether the bank did comply with and discharge its obligation under the provision just addressed. According to the learned Judge, which the bank has urged before us, there was *de facto* compliance. At paragraph 35 of the judgment the learned Judge stated as follows;

“Nonetheless, the defendant through the testimony of DW1 confirmed that it did notify the plaintiff that the cheques issued to it had been dishonoured. DW1 testified that once the cheques were rejected, the defendant called Joseph on phone and notified him of the fact.”

The first thing to state is that a telephone call about dishonoured cheques cannot amount to a compliance with **section 74B(i)**, which requires return of the actual dishonoured cheque or issuance of an IRD of it to the holder. To that extent, I have no difficulty holding that the learned Judge erred in construing mere information as meeting the obligation imposed by **section 74(B)(i)**.

Any calls made by the bank to Joseph, can only be relevant in the determinant of whether notice of dishonour of the cheque was given in accordance with the provisions of **sections 48 and 49** of the Act. What is clear from **sections 48** is that notice of dishonour of a cheque must be given to the drawer and each endorser, and any drawer or endorser to whom such notice is not given is discharged. **Section 49** sets down the rules for the validity and efficacy of the notice of dishonour required by the preceding section. It is worth noting that under **section 49(a)**, notice of dishonour must be given by or on behalf of the holder of the cheque. The notice under (e) may be given “*in writing or by personal communication*”, while, under (7), the return of a dishonoured bill to the drawer is deemed a sufficient notice of dishonour.

From my reading of these provisions, the obligation to issue a notice of dishonour lies with the holder of the cheque. This, I think, is the reason why it is absolutely important that a presenting bank does return the dishonoured cheque or an IRD thereof, and promptly so, in order that the holder of the cheque may issue appropriate notice, failing which the drawer may be discharged. And it seems quite obvious to me that the rights and interests of the holder and the drawer of a dishonoured cheque are conflicting and adversarial. This understanding is crucial to a determination of the legal consequence of any telephone calls to Joseph by the bank regarding the dishonoured cheques.

As I have already stated, the obligation imposed by **section 74B(i)** is mandatory and required the return of the dishonoured cheques to the customer as holder. This would then have enabled the customer to issue notice of dishonour to the drawer who in this case was Joseph and companies associated with him. The obligation is in express terms and could not possibly be fulfilled by a mere telephone call to the customer, or its servant or agents. As far as **section 74(B)(i)** is concerned, therefore, the telephone calls were of no moment. Thus the arguments made, based on **section 49 (1)** about whether the bank acted reasonably is not informing the customer with whom it actually shared a building, about the 80 dishonoured cheques goes only to the question of the negligence alleged against the bank, as opposed to breach of statutory duty.

Was the bank negligent in all the circumstance of the case? It is submitted for the customer that it was an act of negligence for the bank to communicate the fact of dishonour of the cheques to the drawer thereof, as opposed to the customer’s contact persons that had been provided in the KYC Form. This casual disregard for both the contact information provided and the interest of the customer is what led to the loss running into millions of shillings, in the customer’s view. I think, with respect, that there is some weight in these arguments.

As I have indicated earlier in this judgment, the interests of the drawer of a bouncing cheque and those of the drawee and holder are naturally conflicting, in competition and adversarial. That inevitably means that the presenting bank, being the holder’s banker is essentially an agent of the customer-holder, and once the cheque is dishonoured, it ought to avail the said cheque or IRD of it to its customer. That return of the cheque or an image of it constitutes notice to the customer who then takes whatever action it deems fit as against the drawer of the cheque.

To not avail the bounced cheque, and to also fail to inform the customer that the cheque it was issued with has bounced is doubtless a dereliction of duty on the part of the bank.

To hold that a telephone call to Joseph, who was the drawer of the bounced cheques, was sufficient communication to the customer that the cheques issued to it had been dishonoured by non-payment as we are urged by counsel for the bank, appears to me to be wholly unrealistic and defeatist. It would be a merely ritualistic approval of a mechanistic facial compliance with the need to communicate, while fully cognizant that the communication never really reached the customer, but ended with the very person whose wrongful act the customer needed to be informed of. I am not prepared to accept as sufficient or efficacious such ghost communication.

I have carefully considered two documents filled by the customer when the account in question was being opened back in the year 2010. The first, dated 6th February, 2010 notifies the bank that the person authorized by the customer “to collect balances, bank statement, cheque books, telegraphic transfers’ remittance copies, bankers cheques, or other bank documents etc on [the customers] behalf” were;

NAME	ID No.	SIGNATURE
1. Jemimah W. Njuguna	16xxxxxx	
2. Albert n. Munywoki	11xxxxxx	
3. Peter M. Ngengya	04xxxxxx	
4. Robert N. Ngunia	13xxxxxx	
5. Joseph K. Njeri	23xxxxxx	
6. George O. Opiyo	40xxxxxx	

The authorized agents appended their signatures to the form and then it was signed by the authorized agent at the end of a statement indemnifying the bank “against any loss that may be occasioned by non-delivery of any or all of the above orders [to the customer] by the authorized agent/s.”

It is noteworthy that the Authorized Agents notification form, on which the name of Joseph appears, does not purport that the said agents are the customer’s contact persons, and the bank’s witness admitted as much. Their authority is expressly spelt out: to collect various documents from the bank on behalf of the customer. That is the limit of their authority and the indemnity given by the customer, contrary to the urging by learned counsel from the bank, is limited to any loss that may be occasioned by non-delivery of the listed orders or documents the agents collect. It is by no means a blanket indemnity immunizing the bank from all and sundry liability. The inclusion of Joseph as one of authorized agents cannot, therefore, be an answer to the claim of negligence against the bank. He was an agent of limited, as opposed to general, authority. Moreover, and more critically, he was not one of the persons given to the bank by the customer as a contact person.

In the Client Profile/KYC Form provided by the bank for the customer to fill, part 2 has a four-slot section for contact details requiring the names, as well as the office and mobile telephone numbers of such contacts. The customer provided only two names namely; **Daniel Ngunia** and **Albert Njuguna**, and provided their telephone contacts. The aforesaid Joseph was not provided. It would stand to reason, unless there were any subsequent changes, that the bank was bound to contact or communicate to the customer through these two persons. It is to these two that the bank should have communicated the fact that the cheques drawn by Joseph on his personal or on his Manyatta Hill Trading Company accounts, had been dishonoured.

I find it to be highly improbable that the bank, as a reasonable and responsible banker, would have failed to notice that something was amiss and suspiciously irregular about so many cheques coming from essentially one source over a short period of time were being dishonoured on presentation by the customer, without making any enquiries or otherwise satisfying itself that the customer was aware of the goings-on. Reasonable prudence and attention would have demanded that the bank contact the persons indicated in the KYC form and inform them of the bouncing cheques. Failing to do so, or purporting to comply by making telephone calls to the culprit himself, appears to me to have been nothing less than negligent on the bank’s part and the learned Judge should have so found.

I have considered the old case of **SCHOLFIELD vs. LANDES BOROUGH [1986] AC 514** cited in Cheques In Law and Practice (supra) which was referred to by Mr. Kahiga for the bank, and in particular the passage where Lord Halsbury stated that “If, the customer by any act of his has induced the banker to act upon the document it is quite intelligible that he should not be permitted to set up his own act or neglect to the detriment of the banker whom he has thus misled, or by neglect permitted to be misled.” Counsel relied on this passage to

contend that the customer herein was negligent in putting too much faith in Joseph and is not having done enough to detect and forestall his dishonesty, and that the banker could not therefore be held liable in negligence, as the negligence was in fact the customer's.

The first observation I make regarding this argument and the authorities cited is that they relate to situations where a servant or agent of the customer forges the amount of a cheque and inflates it, or forges the signature of the proper drawer of a cheque as evidenced by the heading of the particular section of the book, which is not the situation we are dealing with in this case. But even were I to accept that the principles enunciated therein with regard to negligence do in fact apply to the case at bar, a holistic reading of the relevant part of the treatise reveals that the authorities do not support the bank's position. The learned author commences discussion of the matter by indicating that "*the bank's defence seems to be estoppel, precluding the customer from settling up the forgery, based on his conduct or negligence.*" He goes on to state, however, that the negligence must be a direct, and not a remote cause of the loss or, as held in SWAN vs. NORTH BRITISH AUSTRALASIAN CO. LTD [1863] 2H& C 175m, "*Negligence to operate as an estoppel must be the proximate cause of loss.*" Indian cases are cited that show that the customer's negligence in keeping cheque books or lack of supervision over an agent who might have opportunities for concealing forgeries committed by him is probably too remote and not the proximate cause of loss, which must fall on the bank. See ABBU CHETTIAR vs. HYDERABAD STATE BANK [1954] IMLJ 566; BIANJILAL ABHIRCHUND vs. SADA SHEO GANESH BHOPATKAR AIR 1944 Nag. 17; ALLAHABAD BANK LTD vs. KUL BHUSHAN AIR 1961 Punj 571.

The author also cites the decision of the New Zealand Court of Appeal in NATIONAL BANK OF NEW ZEALAND LTD vs. WALPOLE & PATTERSON LTD [1975] 2 NZR 7 in which an employee of the respondent company had forged and cashed cheques on its accounts over a period of six years. There was evidence that it had been greatly lax in the maintenance and management of its bank account, which facilitated the forgeries. All that notwithstanding, that court held, that; "*as between banker and customer, the customer is under no duty to exercise reasonable care in the general course of carrying on business to prevent forgeries on the part of his employees.*" All of those cases are in the text cited by counsel for the bank herein, and form part of its bundles of authorities. I think that properly understood, their general thrust and import is that whatever mischief and malfeasance Joseph was about, the facts did not suffice to raise an estoppel against the customer and the bank's negligence was in no wise diminished.

As far as I am concerned the matter is put to rest by a consideration of the unanimous decision of the Privy Council in TAI HING COTTON LTD vs. LIU CHONG BANK [1985] 2 ALL ER. I find it to be of high persuasive authority, providing the legal answer to the bank's assertions that the customer and not itself, should bear the loss occasioned by Joseph's actions in that it failed to, as it were to keep its eyes open, check the statements, and otherwise prevent the fraudulent acts. As all the three holdings of that Court are relevant to the matters under our consideration, I consider them worthy of *in extenso* quotation;

"(1) In the absence of express agreement to the contrary the duty of care owed by a customer to his bank in the operation of his current account was limited to a duty to refrain from drawing a cheque in such manner as to facilitate fraud or forgery and a duty to inform the bank of any unauthorised cheques purportedly drawn on the account as soon as he, the customer, became aware of it. The customer was not under a duty to take reasonable precautions in the management of his business with the bank to prevent forged cheques being presented for payment nor was he under a duty to check his periodic bank statements so as to enable him to notify the bank of any unauthorised debit items, because such wider duties were not necessary incidents of the banker/customer relationship since the business of banking was not the business of the customer but that of the bank, and forgery of cheques was a risk of the service which the bank offered. Furthermore, the obligations owed by banker and customer to one another in tort did not provide the respondent banks with any greater protection than that which they had contracted for, since the parties' mutual obligations in tort could not be any greater than those to be found expressly or by necessary implication in their contract.

(2) In order to impose an express obligation on a customer to examine his monthly statements and to make those statements, in the absence of query, unchallengeable by the customer after the expiry of a time limit, the burden of the obligation and of the sanction imposed had to be brought home to the customer. The banking contracts entered into between the company and the respondent banks did not do that and therefore the company was not in breach of any duty owed by it to the banks. Accordingly, since there was no duty on the part of the company to disclose or act, no question of estoppel arising from mere silence, omission or failure to act could arise. It followed therefore that the appeal would be allowed.

(3) Although the sums wrongly debited to the company's bank accounts were in non-interest bearing accounts, interest was nevertheless recoverable by the company because it had lost the opportunity of placing the money to earn interest as a result of the unauthorised debits made by the banks to the respective current accounts. In the circumstances interest would run from the date when the writ was issued."

I note, with approval, that Kanyi Kimondo, J. arrived at the same conclusion in SANKALE OLE KANTAI T/A KANTAI & CO. ADVOCATES vs. HOUSING FINANCE CO. OF KENYA LTD Nairobi HCCC No. 471 of 2012.

Being of that persuasion, I would find and hold that the bank failed to observe reasonable skill and care in maintaining the customers' account and that its negligence led to the loss of **Kshs. 10,486,000** being the total sum of the 80 cheques that were deposited into the customer's said account but which were all dishonoured. It is also liable to the customer in the sum of **Kshs. 80,000** being the bank charges it levied against the customer for the said cheques. The effect of these findings is that the appeal would succeed.

Turning now to the cross-appeal, I will first address the bank's complaint that the learned Judge should not have granted the claim for **Kshs. 1,595,721.97**. That claim was pleaded at paragraph 15 of the plaint in the following terms;

"The plaintiff avers that as a result of the defendants negligence or breach of contract in failing to inform the plaintiff of the dishonoured cheques totalling to Kshs. 10,486,700 and also in failing to present and collect cheques totalling to Kshs. 1,081,000 it has suffered loss on interest that it has paid to the defendant on the said sums to date amounting to Kshs. 1,595,721.97 and continues to suffer payment of interest to the defendant at bank rates until the determination of this suit which it claims from the defendant."

Particulars of the said sum were pleaded under the head of “Interest Applicable to overdraft Arising From Dishonoured Cheques,” which speaks to the fact that the sum claimed thereunder was inextricably linked to the main claim of **Kshs. 10,486,700** in dishonoured cheques, which I have already addressed at some length. I heard counsel for the bank to say, and there is merit in his argument, that the learned Judge erred in granting the consequential claim having found the main claim to be unmeritorious and dismissed it. I would agree that the second claim for interest was dependent on the main claim based on the bounced cheques and dismissal of the latter would have called for the dismissal of the former as well. My agreeing with the argument does not avail the bank much, however. This is because, having found that the main claim for **Kshs. 10,486,700** ought to have succeeded, the logical consequence is that the claim of **Kshs. 1,595,721.97** must succeed. I would not set aside that which was properly grantable. In upholding this finding I inject the essential dispositive harmony between the two claims.

The final question for my consideration is whether the learned Judge was wrong in finding the bank liable to the customer in defamation and, related to it, the propriety of the quantum of damages she awarded. It was contended on the bank’s behalf that in so far as the customer did not call as witnesses any of its suppliers to testify that they viewed the customer less favourably on account of its cheques to them that the bank refused to honour upon presentation, then it could not succeed in a claim for defamation. For this proposition reliance was placed on a passage from this Court’s decision in DANIEL N. NGUNIA vs. KENYA GRAIN GROWERS CO-OPERATIVE LTD Civil Appeal NO. 281 of 1998 as quoted in C. MEHTA & CO. LTD vs. STANDARD BANK LTD [2014] eKLR to urge that “in a claim for defamation publication is necessary and cannot succeed where only the plaintiff testifies. Another person should testify on the effect of the defamatory statement.”

I think, with respect, that the argument is wholly misconceived. It is noteworthy that in the C. MEHTA case itself, it is only one witness, the plaintiff’s managing director who was called to testify yet Gikonyo, J. went ahead and found defamation against the plaintiff proved, and proceeded to award damages arising from cheques improperly dishonoured. This is properly in keeping with long-established law on the defamatory character of wrongful dishonour of cheques. It is so plainly injurious to the reputation especially of persons engaged in trade, as to be actionable *per se*, without proof of actual loss or damage.

The law on this subject is succinctly restated by the learned authors of Pagets Law of Banking (supra) as follows;

“The credit of a customer may be seriously injured by the wrongful dishonour of a cheque. Yet it is rare that a customer will be able to prove special damage. His claim is for general damages in respect of injury to his reputation.

As regards trading customers, the law presumes injury without proof of actual damage. The special position of traders was recognized by the House of Lords in Wilson v. United Counties Bank Ltd, where, after reviewing the authorities, Lord Birkenhead LC said:

“The ratio decidendi in such cases is that the refusal to meet the cheque, under such circumstances, is so obviously injurious to the credit of a trader that the latter can recover, without allegation of special damage, reasonable compensation for the injury done to his credit.”

Referring to Lord Atkin’s judgment in the former House of the Lords’ decision of SIM vs. STRETCH [1936] 2 ALL ER 1237, the author gives the rationale of this as lying in the fact that where a bank decides to dishonour a cheque, it conveys in many people’s minds that the drawer has no money in his account to meet it, or that he did not draw it in good faith or that he drew it recklessly or in fraud. On the authorities, I am left in no doubt whatsoever that when a bank dishonours a cheque with the words “Refer to Drawer” or their abbreviated form of “R/D” or “Insufficient Funds” or such other terms that falsely call the drawers credit into question, the bank is most definitely liable in libel having thereby defamed the drawer, who is entitled to damages. On liability, therefore, I would hold that the learned Judge was perfectly entitled to find for the customer.

Regarding quantum, the learned Judge awarded the customer **Kshs. 1,500,000** general damages, a sum the bank asks us to find to have been excessive, and so reduce it. It is common ground that an appellate court should be slow to interfere with awards of damages, which are in the discretion of the trial court. As was held in BUTT vs. KHAN [1978] eKLR, and in many cases before and since, an appellate court disturbs an award of damages only if it is so inordinately high or low as to represent an entirely erroneous estimate, as a result of the first instance Judge having proceeded on wrong principles or misapprehended the evidence in some material respect, hence the erroneous sum.

It has not been shown to us that the learned Judge committed any such error, misapprehended any evidence or that the sum of **Kshs. 1,500,000** was so high as to constitute an erroneous estimate. The learned Judge considered that the customer had proposed the sum of **Kshs. 5,000,000** while the bank had proposed **Kshs. 1,000,000**. She considered two judgments cited by the customer, namely; BANK OF BARODA vs. TIMWOODS PRODUCTS LTD [2008] eKLR and the C. MEHTA case (supra), cited by both parties before us, in which the claimants had been awarded **Kshs. 3,000,000** damages for defamation arising from cheques wrongfully dishonoured.

Given that the learned Judge awarded half of what was awarded in the two cases above, I would think that a complaint of the sum awarded being too low would stand a better chance of success, than the one of excess being made by the bank. I find no merit in it.

The upshot of my consideration of the appeal is that it should succeed and the cross appeal should fail. I would therefore set aside the learned Judge’s dismissal of the principal claim of **Kshs. 10,486,700** and substitute it with an order granting the same as prayed. I would also grant the customer the sum of **Kshs. 80,000** claimed being bank charges on bounced cheques.

The customer should have the costs of this appeal and of the cross appeal.

As Okwengu and Sichale, JJ.A, agree, it is so ordered.

Dated and delivered at Nairobi this 5th day of June, 2020.

P. O. KIAGE

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JUDGE OF APPEAL

I certify that this is a true

copy of the original.

Signed

DEPUTY REGISTRAR

JUDGMENT OF OKWENGU, JA

I have had the opportunity to read in draft the judgment of Kiage, JA. in which he has exhaustively re-analysed the facts as testified to in the trial court and addressed the issues raised in this appeal. I am in entire agreement with the exposition of the law and the conclusions he has arrived at. I concur that for the reasons that he has given the appeal should be allowed and the cross appeal dismissed. As Sichale JA is also in agreement the final orders shall be as proposed by Kiage JA.

Dated and delivered at Nairobi this 5th of June, 2020.

HANNAH OKWENGU

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JUDGE OF APPEAL

CONCURRING JUDGMENT OF SICHALE, JA

I have had the advantage of reading in draft the judgment of **KIAGE, JA**. I am in full agreement with his reasoning and conclusions and, therefore, have nothing useful to add.

Dated and delivered at Nairobi this 5th of June, 2020.

F. SICHALE

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JUDGE OF APPEAL