IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MAKHANDIA, KIAGE & ODEK, JJA)

CIVIL APPEAL NO. 133 of 2017

BETWEEN

EQUITY BANK (KENYA) LIMITED.....APPELLANT

AND

DON OGALLOH RIARO.....1st RESPONDENT

ABONG BILDAD ONYANGO.....2nd RESPONDENT

(Being an appeal against the Ruling and Order of the High Court of Kenya at Nairobi (C. Kariuki J.) dated 17th October 2016

in

H.C.C.C No. 299 of 2011)

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JUDGMENT OF THE COURT

1. The appellant, ***Equity Bank (Kenya) Limited***, was caught-up in a fraud perpetrated by the 2nd respondent, ***Abong Bildad Onyango***, who was an advocate of the High Court of Kenya and a customer of the Bank.

2. On or about 1st July 2008, the 1st respondent, ***Don Ogalloh Riaro***, instructed the law firm of Oraro & Co. Advocates to act for him in the purchase of two (2) properties located in Karen in Nairobi namely **LR No. 14971/6** and **14971/9**. The 1st respondent through the firm of Oraro & Co. Advocates conducted an official search at the Lands Office to confirm proprietorship of the two properties. The official search revealed that the owners of the property were ***Mr. Ebrhand Zeyle*** and ***Ms. Ruth Njeri Zeyle***. On the strength of the official search the 1st respondent entered into a Sale Agreement dated 22nd July, 2008 with the purported vendors of the property acting through the law firm of Abong Bildad Onyango, the 2nd respondent herein. It later turned out that the purported vendors were fake and a fraud and ***Mr. Abong Bildad Onyango*** had no instructions or authority from the true owners of the property to sell.

3. In the meantime, the purchase price was agreed as Ksh. 36, 600,000/= (Thirty-Six Million Six Hundred Thousand Only). At all material times, the 2nd respondent herein represented himself as an advocate acting for and on behalf of the vendors.

4. In furtherance of the fraud, the 2nd respondent ostensibly acting as the advocate for the vendors forwarded completion documents to Oraro & Co. Advocates acting for the 1st respondent.

5. In compliance with the Sale Agreement, the 1st respondent paid and deposited a total sum of Ksh. 36,000,000/= to the 2nd respondent. It was a term of the Sale Agreement that the money was to be held by the 2nd respondent's law firm as stakeholder in an interest bearing account pending conclusion of the registration formalities. It was a further term of the Agreement that the money so deposited was to be held in an account with any of the following Banks: Barclays Bank of Kenya; Standard Chartered Bank of Kenya; Kenya Commercial Bank limited or Co-operative Bank of Kenya Limited.

6. It later emerged that the 2nd respondent had banked the entire sum of Ksh. 36,000,000/= in his personal account with the appellant Equity Bank and not as a stakeholder in an interest bearing account or in a client's account with any of the designated Banks.

7. The 2nd respondent had banked the sum of Ksh. 36,000,000/= in a newly opened account at the appellant's Equity Bank located at KNUT House On Mfangano Street in Nairobi. The account was opened in the name of ***Abong Bildad Onyango Advocate*** on 16th July 2008.

8. From the opening of the said account, the Equity Bank records show a pattern of large cash deposits and withdrawals between 22nd July 2008 and 20th December 2008, all being funds that the 1st respondent had availed to the 2nd respondent towards payment of the purchase price.

9. Alas, when the completion documents were lodged at the Lands Office for registration, it emerged that the documents presented were forgeries and that ***Mr. Ebrhand Zeyle*** and ***Ms. Ruth Njeri Zeyle*** who were the registered proprietors of the two properties had neither put up the properties for sale nor instructed the 2nd respondent to act as their advocate.

10. The 2nd respondent advocate, ***Mr. Abong Bildad Onyango***, was charged, tried and convicted for the offence of forgery. He is serving a ten-year term of imprisonment. He was arraigned before the Chief Magistrate's Court in Nairobi in **Criminal Case No. 2019 of 2009**. His appeal to the High Court in Criminal Appeal No. 88 of 2011 was dismissed.

11. Back to the monies paid as purchase price, the 1st respondent avers that the sum of Ksh.36,000,000/= was obtained from him through fraud and false pretences and the appellant's Bank was the recipient of the said funds.

12. Perturbed by the turn of events, the 1st respondent filed a suit against the appellant Bank and the 2nd respondent advocate. The claim against the Bank is that it was grossly negligent in the manner in which it handled the 2nd respondent's account; that the Bank persistently flouted the provisions of the Banking Act and the Central Bank of Kenya Prudential Guidelines. In his plaint, the 1st respondent averred that he suffered loss wholly and or in the most part caused by the negligent acts of the appellant Bank and or its agents and servants.

13. The particulars of negligence pleaded are *inter alia* that the appellant Bank:

> ***(i) Failed to establish methods of prudent customer identification, record keeping and identification of suspicious activities contrary to its mandate as set out in the Banking Act and the Central Bank of Kenya Prudential Guidelines.***
>
> ***(ii) Failed to establish and/or maintain adequate internal control measures which could have assisted in the prevention and detection of suspicious activities relating to the 2nd respondent's account as required by the Central Bank of Kenya Prudential Guidelines.***
>
> ***(iii) Failed to establish appropriate policies and procedures to train its staff to ensure adequate identification of customers and in particular the 2nd respondent so as to determine his sources of funds and the use of the funds.***
>
> ***(iv) Failed to maintain proper identification of the 2nd respondent at the time of opening his account and failed to comply with Central Bank of Kenya Prudential Guidelines.***
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> ***(v) Allowed the 2nd respondent to open an account despite the fact that there was no introducer and or referee.***
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> ***(vi) Allowed the 2nd respondent to deposit cheques into the account of Bildad Onyango Advocate and allowing him to withdraw monies from the subject account despite the fact that the cheques in question drawn by the 1st respondent was in favour of Abong B. O. Advocates or B.O. Abong & Co. Advocates which is separate and distinct entity from Abong Bildad Onyango Advocate the holder of the account.***
>
> ***(vii) As a prudent banker should have raised queries as to the source of large tranches of funds being channeled through the 2nd respondent's personal account and made reasonable inquiries to determine the source of those funds.***

14. The 1st respondent claimed that as a consequence of the appellant Bank's negligence, he lost a total sum of Ksh. 36,000,000/=. Consequently, in the plaint, the 1st respondent claimed as against the appellant and the 2nd respondent, jointly and severally, the loss of Ksh. 36,000,000/=.

15. Before the trial court, the appellant Bank filed a defence dated 10th January, 2012 denying liability to the 1st respondent. In its defence, it was averred:

> ***"(i) The Bank is a stranger to the allegations of fraud and false pretences contained in the plaint.***
>
> ***(ii) The Bank admits the 2nd respondent opened an account at its KNUT House Branch along Mfangano Street in Nairobi.***
>
> ***(iii) The Bank denies it was grossly negligent or at all in the manner in which it handled the 2nd respondent's account.***
>
> ***(iv) The Bank denies it persistently flouted the Central Bank of Kenya Prudential Guidelines.***

(v) The Bank denies in toto any liability to the 1st respondent in whole or part or for the most part as alleged in the plaint.

(vi) The particulars of negligence are denied.

(vii) That the suit does not disclose a cause of action against the appellant Bank.

(viii) The appellant assert that any loss occasioned to the appellant was due to the negligence of the 1st respondent and his advocate in failing to seek evidence from the 2nd respondent advocate as to whether the funds paid towards purchase price was held as stakeholder in an interest bearing account in the identified and designated Banks as per the Sale Agreement.

(ix) That the suit against the appellant Bank is incompetent and an abuse of court process."

16. Upon hearing the parties, the trial Judge entered judgment in favour of the 1st respondent jointly and severally against the appellant and the 2nd respondent who were held liable for the loss occasioned to the 1st respondent.

17. At paragraph 56 of its judgment, the trial court held that the appellant Bank owed a duty of care to the 1st respondent and which duty was breached and as a result of the breach, the 1st respondent suffered loss. On the issue of contributory negligence, the court held that no evidence was tendered to prove negligence on the part of the 1st respondent's advocate.

18. In arriving at his decision, the learned Judge cited the comparative case of **Vitalarie (A General Partnership) -v- Bank of Nova Scotia [2002] OJ No. 4902 (SCJ)** where the Canadian court held that a bank that has reasonable grounds to know of its customer's fraud will be liable to a non-customer if it fails to make reasonable enquiries to uncover or prevent the fraud. The learned Judge also cited the Canadian case of **Dunpont Heating & Air Conditioning Limited -v- Bank of Montreal (2009) CanLII 2906 (ON SC)**, where it was held that a bank may owe some duty of care to a third party that has been affected by its customer's fraud.

19. Aggrieved by the judgment of the trial court, the appellant has proffered the instant appeal citing the following grounds in its memorandum:

"(i) The judge erred in failing to appreciate that the appellant Bank followed due process in the opening of the 2nd respondent advocate Bank account.

(ii) The judge erred in wrongly interpreting Section 82 of the Advocates Act by finding that it does not protect Bank's from liability arising from failure to adhere to Central Bank Prudential Guidelines with regard to making inquiries on accounts held by firms of advocates.

(iii) The judge erred in failing to find that an inquisition on the transactions of an advocate's account would amount to violation of Advocate/Client privilege thus acting illegally and that the said inquisition is prohibited under Section 18 of the Proceed of Crimes and Anti-Money Laundering Act which override the provisions of the Central Bank of Kenya Act.

(iv) The judge erred in failing to find the appellant was not a party to the Sale Agreement and was not advised of the purpose of the funds.

(v) The judge erred in ignoring a binding Court of Appeal decision in Kim Jong Kyu – v- Housing Finance Company Limited & 2 others [2015] eKLR that held that a bank cannot be held liable where it has no knowledge that a deposit made was for the benefit of a particular party thus arriving at per incuriam decision.

(vi) The judge erred in applying the Central Bank of Kenya Prudential Guidelines to the facts of this case with regard to large deposits, withdrawals and inquiries even though it was not alleged that the 1st respondent was being involved in money laundering as the money was not from an illegal source.

(vii) The judge erred in finding that there was causation between the failure to adhere to the Prudential Guidelines and the loss occasioned to the 1st respondent. The judge further erred in failing to find the loss and injury to the 1st respondent was not reasonably foreseeable or proximate as the appellant Bank was not a party to the Sale Agreement.

(viii) The judge erred in failing to appreciate that the Prudential Guidelines did not place a statutory burden of banks and financial institutions to detect fraud.

(ix) The judge erred in finding that the appellant Bank was negligent in the way it allowed the 2nd respondent to withdraw money without making inquiries even though the judge did not state on what grounds should the appellant Bank have known or have reason to suspect the withdrawals was suspicious.

(x) The judge erred in failing to find that the there was no apportionment or contributory negligence on the part of the advocates of the 1st respondent. The judge further erred in failing to find that the 1st respondent's advocate was liable and cause of his loss and misfortune as they did not carry out due diligence to ensure compliance with the Sale Agreement that the funds were placed and deposited in the identified Banks. The 1st respondent's advocates were negligent in failing to confirm the identity of the vendor and how the 2nd respondent advocate came to know of the intention of the 1st respondent to purchase the two properties."

20. At the hearing of the instant appeal, learned counsel Mr. Githumbi holding brief for Mr. Munyalo appeared for the appellant while learned counsel Mr. J. Mbaluto appeared for the 1st respondent. The 2nd respondent who is serving a jail term did not appear. Both counsel confirmed that the instant appeal is between the appellant and the 1st respondent as the 2nd respondent did not appeal against the judgment of the trial court. Both the appellant and 1st respondent filed written submissions and list of authorities in this appeal.

APPELLANT'S SUBMISSIONS

21. In its written submissions, the appellant rehashed the background facts leading to the dispute between the parties. It was urged that the Judge erred in failing to recognise that the appellant Bank followed due process in determining requirements for the 2nd respondent to open his account. That the Judge erred when he held that it was mandatory that financial statements for startup business had to be produced; the Judge erred when he held there was money laundering in the account and that had the financial statements of the 2nd respondent been produced, the fraud and money laundering would have been prevented.

22. Counsel submitted that these findings by the Judge were clearly wrong. That there was no evidence of money laundering tendered before court; that the Judge misapprehended the meaning of money laundering within the provisions of the Prudential Guidelines. That a common thread in money laundering is that the money must be from proceeds of crime that is being cleaned through banks. That the money in this matter was not a proceed of crime as the cheque was properly drawn.

23. It was further submitted the appellant had institutional discretion under Clause 4.3 of the Prudential Guidelines to determine the information required before an account could be opened. That the appellant Bank adhered to all the requirements under the Central Bank of Kenya (CBK) Prudential Guidelines.

24. It was submitted that the Judge erred in finding the appellant Bank negligent in the manner in which it opened the 2nd respondent's account and in how it allowed the said 2nd respondent to operate the account. That the Judge erred in finding that there was negligence on the part of the appellant Bank without first establishing whether the appellant owed a duty of acre to the 1st respondent who was not its customer. Counsel submitted that in opening the account of the 2nd respondent, the appellant Bank owed no duty of care to the 1st respondent. That a bank only owes a duty of care to its customers and is not concerned with the manner in which the customer deals with his account.

That if a customer deals with a third party and suffers loss, the third party recourse is to the customer and not the Bank. Counsel cited the UK House of Lords decision in **Caparao Industries Plc -v- Dickman [1990] UKHL** where it was stated that for liability to arise, the harm must be reasonable foreseeable as a result of the defendant's conduct, and the parties must be in a relationship of proximity and it must be fair, just and reasonable to impose liability.

25. On the issue of foreseeability, the appellant submitted that the 1st respondent was not in their contemplation as a person possibly to be affected by their actions. In essence, the appellant Bank should not be liable for the loss of Ksh. 36,000,000/= since the 1st respondent is a third party of in an indeterminate class to be affected. That the person who could easily have followed whether the money was held as a stakeholder in an interest bearing account is the 1st respondent or his advocate. That the appellant had no obligation to monitor the activities of the 2nd respondent. In support, counsel cited the decision in **Pardhan -v- Bank of Montreal 2012 ONSC 2229 (CanLII)** and **Perre -v-**

Apand Pty Limited [1999] HCA 3612.

26. It was submitted the trial court erred because to impose a duty of care on the appellant Bank, will make banks liable even for venial failures to adhere to the CBK Prudential Guidelines.

27. In support of the instant appeal, the appellant strenuously relied on the provisions of ***Section 82*** of the **Advocates Act. *Section 82 (1)*** and ***(2)*** of the **Advocates Act** provides:

> **"*(I) Subject to this* section, no bank shall, in connection with any transaction on any amount of any advocate kept with it or with any other bank (other than an account kept by an advocate as trustee for a specified beneficiary) incur any liability or be under any obligation to make an inquiry, or be deemed to have any knowledge of any right of any person to any money paid or credited to any such account which it would not incur or be under or be deemed to have in the case of an account kept by a person entitled absolutely to all the money paid or credited to it:**
>
> **Provided that nothing in this subsection shall relieve a bank from any liability or obligation to which it would be subject apart from this Act. (Emphasis supplied)**
>
> **(II) Notwithstanding anything in subsection (1), a bank at which an advocate keeps an account for client's money shall not, in respect of any liability of the advocate to the bank, not being a liability in connection with that account, have or obtain any recourse or right, whether by way of set-off, counterclaim, charge or otherwise, against moneys standing to the credit of that account."**

28. It was submitted that ***Section 82 (1)*** excludes a banker from liability to a third party for failure to inquire into the activities of the advocates account. That it is inimical to impose a duty of care where the plausible implication is to render an Act of Parliament inapplicable. That a key consideration should be whether the Bank would be expected to have in contemplation the indeterminate class of people who might have had business transaction with the 2nd respondent. It was urged that the CBK Prudential Guidelines are neither a legislative nor statutory instrument that create liability when one is expressly exempted by statute as is the case under ***Section 82*** of the Advocates Act. The appellant cited the decision in **Kim Jong Kyu -v- Housing Finance Company Limited** & **2 others [2015] eKLR** where it was stated that a

bank cannot be liable without the knowledge that the deposit was for the benefit of another party. That the proviso in ***Section 82 (1)*** of the **Advocates Act** does not apply to this case as it applies only where there is liability from another obligation. That in this matter, it is not stated where such liability would arise from and how it was not adhered to.

29. On the issue of apportionment for contributory negligence, counsel submitted that the Judge erred in failing to find the 1st respondent and his advocate were negligent in not ensuring that the moneys paid as purchase price were placed in one of the banks identified as per the Sale Agreement.

30. The appellant further submitted that the Judge erred in law in failing to find there was no causation between the actions of the appellant and the loss of money suffered by the 1st respondent. It was urged that even if there was a duty of care, the loss suffered by the 1st respondent was not caused by the appellant's failure to adhere to the CBK Prudential Guidelines. That the Judge erred in not explaining how the breach of duty of care led to the loss. It is trite that not every negligent act by a party leads to a loss **(Statpack Industrises - v- James Mbithi Munyao [2005] eKLR).** That breach of Prudential Guidelines by a bank does not lead to strict liability in which case causation of any loss suffered must be proved. For the foregoing reasons, the appellant urged us to allow the instant appeal with costs.

1st RESPONDENT'S SUBMISSIONS

31. In opposing the instant appeal, the 1st respondent submitted that the appellant Bank was negligent in the manner in which it allowed the 2nd respondent to open, and operate his bank account. Citing dicta in **Dunpont Heating & Air Conditioning Limited -v- Bank of Montreal (2009) CanLII 2906 (ON SC)**, it was submitted that a bank may owe a third party a duty of care if the third party is defrauded by the bank's customer; that the determination of the bank's duty of care requires a factual inquiry into what was done or ought to have been done by the bank in the circumstances measured as against the bank's practices, the practice in the industry and the governing legislation. Counsel submitted that in the instant matter, the circumstances of the case measured against the CBK Prudential Guidelines show the appellant Bank was negligent.

32. The 1st respondent submitted that the evidence tendered in court showed that the 2nd respondent opened an account for legal practice - that this was a personal account. That it was foreseeable that there were persons (i.e. clients, advocates etc.) who may be caused to suffer loss should the account be wrongly operated. That it is such third parties who have a relationship of sufficient proximity being the necessary players in the legal practice for which the account was opened. It was submitted that when the 2nd respondent began withdrawing large sums of cash over the counter e.g. Ksh. 5,800,000/= on 26th July 2008; Ksh. 3,100,000/= and 11,647,000/= both on 9th October, 2008 and Ksh. 4,600,000/= on 5th December, 2008, the appellant Bank ought to have told the 2nd respondent that there was something untoward about such withdrawals – why would an advocate be withdrawing colossal sums of money over the counter from his legal practice account? Due to the unusual large withdrawals over a short period of time, it was submitted that the appellant Bank owed a duty of care to the 1st respondent; that the Bank breached the duty by allowing the 2nd respondent to cart away colossal sums of money from the account; that but for the appellant's negligence, the 2nd respondent would not have been able to use his bank account as an instrument of fraud.

33. The 1st respondent further submitted that the appellant Bank breached the provisions of the Banking Act and the CBK Prudential Guidelines. Of relevance is that the appellant violated Guideline 4.3 which requires a bank to obtain basic information on its customers; that in this regard, the appellant breached the Know Your Customer (KYC) requirements. That the appellant through its witness ***Mr. John Mayuko*** (**DW1**) conceded it did not comply with Guideline 4.3.1.3. That there is no excuse for the appellant's failure to comply with the CBK Guidelines. Counsel cited the case of **Otieno-Omuga & Ouma Advocates -v- CFC Stanbic Bank Limited [2015] eKLR,** where it was held that the CBK Prudential Guidelines are legally enforceable.

34. On ***Section 82*** of the **Advocates Act,** it was submitted that the Section does not provide immunity to the appellant bank from liability to the 1st respondent. Counsel cited the case of **Kenya Grange Vehicle Limited -v- Southern Credit Banking Corporation Limited [2014] eKLR** where it was held that a bank has a duty to make appropriate inquiries about its customers.

35. On apportionment and contributory negligence, it was submitted the Judge correctly found that no evidence of negligence was made out against the 1st respondents advocate who in any event were not parties to the suit; that contributory negligence can only be pleaded against a party to a suit; that a plea of contributory negligence is in itself admission of partial liability.

ANALYSIS and DETERMINATION

36. We have considered the grounds of appeal as well as submission by all counsels and the authorities cited. Being a first appeal, it is our duty to analyze and re-assess the evidence on record and reach our own conclusions. In **Selle -vs- Associated Motor Boat Co. [1968] EA 123,** it was expressed thus:

> **"An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif - v - Ali Mohamed Sholan (1955), 22 E. A. C. A. 270)."**

37. We have identified the following key issues for determination in this appeal:

(a) Whether the trial judge erred in finding that the appellant Bank owed the 1st respondent a duty of care.

(b) Whether the trial judge erred in failing to find that the 1st respondent and his advocate were liable in contributory negligence.

(c) Whether the judge erred in finding that the appellant was negligent and that the said negligence imposes liability upon the appellant to the 1st respondent.

(d) Whether the Central Bank of Kenya Prudential Guidelines are binding and applicable to the facts of this case.

(e) Whether the learned judge properly interpreted and applied the provisions of Section 82 of the Advocates Act and Section 18 of the Proceeds of Crime and Money Laundering Act.

(f) Whether the judge erred in ignoring the decision of this Court in Kim Jong Kyu – v- Housing Finance Company Limited & 2 others [2015] eKLR.

38. In determining the foregoing issues, we restate briefly the undisputed facts of this case. These are that the 1st respondent was not a customer of the appellant Bank and thus there was no direct bank/customer relationship between the two parties; that the appellant Bank was not party to the Sale Agreement in relation to the two properties that were to be purchased by the 1st respondent; that the 2nd respondent opened an account with the appellant Bank; that the 2nd respondent had falsely held himself out as the advocate for the vendor of the two properties mentioned in this matter; that the 2nd respondent did not have authority of the true registered proprietors of the properties to sell the properties; that a fraud had been committed against the 1st respondent; that the entire purchase price paid was withdrawn and misappropriated by the 2nd respondent; and that the 2nd respondent was tried, convicted and sentenced and is now serving a term of 10years imprisonment.

39. In this matter, the 1st respondent pursuant to a Sale Agreement agreed to purchase two properties at a consideration of Ksh. 36,600,000/=. The 1st respondent drew various cheques in favour of ***Abong B. O. Advocates*** or ***B.O. Abong & Co. Advocates***. Of relevance to the contested liability of the appellant Bank, the 2nd respondent had opened a personal account with the appellant Bank under the name of ***Abong Bildad Onyango Advocate***. It later emerged that the cheques drawn by the 1st respondent in the name of the firm of advocates was in fact deposited in the personal account of the 2nd respondent advocate. Upon the said cheques being deposited, monies were withdrawn in cash by the 2nd appellant from the said personal account.

40. The claim of the 1st respondent as against the appellant Bank is that the Bank was negligent in how it opened the 2nd respondent's account; the Bank was further negligent on how it allowed the 2nd respondent to operate the account; that the Bank was negligent in allowing the 2nd respondent to withdraw large sums of money in cash from his account; that the Bank was negligent in not following the CBK Prudential Guidelines and lastly the appellant Bank was negligent in allowing the 2nd respondent to deposit a cheque drawn in the name of a firm of advocates and for the cheques to be deposited into a personal account.

41. Central to the issue of liability of the appellant Bank is the role and place of **CBK Prudential Guidelines**. The Prudential Guidelines place a duty on all licensed banks to make enquiries regarding the legitimacy of funds and transactions. The Guidelines require that a bank should make enquiries on a case by case basis for large, frequent or unusual transfers in relation to the parties and the nature of the transaction.

42. The CBK Guidelines are issued under ***Section 33(4)*** of the **Banking Act**, which empowers the Central Bank to issue guidelines to be adhered to by institutions in order to maintain a stable and efficient banking and financial system. ***Section 33 (4)*** of the **Banking Act** provides:

> **"4) The Central Bank may issue directions to institutions 20 generally for the better carrying out of its functions under this Act and in particular, with respect to-**
>
> > **(a) the standards to be adhered to by an institution in the conduct of its business in Kenya or in any country where a branch or subsidiary of the institution is located;**
> >
> > **and**
> >
> > **(b) guidelines to be adhered to by institutions in order to maintain a stable and efficient banking and financial system.**
>
> **(5) A person who fails to comply with any direction under this section commits an offence and shall, in addition to the penalty prescribed under section 49, be liable to such additional penalty as may be prescribed, for each day or part thereof during which the offence continues."**

43. In this matter, the appellant urged that the trial court erred in relying on the CBK Guidelines which are neither a subsidiary legislation nor a statute. The **Statutory Instruments Act No. 23 of 2013** defines a "statutory instrument" to mean any rule, order, regulation, direction, form, tariff of costs or fees, letters patent, commission, warrant, proclamation, by-law, resolution, guideline or other statutory instrument issued, made or established in the execution of a power conferred by or under an Act of Parliament under which that statutory instrument or subsidiary legislation is expressly authorized to be issued. Going by the definition of statutory instrument, we find that the CBK Guidelines

having been issued pursuant to ***Section 33 (4)*** of the **Banking Act** is a statutory instrument with legal force.

44. In the instant appeal, it was conceded that even if the appellant were in breach of ***Clause 4.3.*** of the **Prudential Guidelines,** the breach did not cause loss or damage to the 1st respondent. This leads us to the issue of liability of the appellant to the 1st respondent and the question of causation, foreseeability and remoteness of the loss suffered by the 1st respondent.

45. On the issue of liability and duty of care owed by the appellant Bank to the 1st respondent, the trial court was guided by comparative jurisprudence. Being so guided, the court arrived at the conclusion that the appellant owed a duty of care to the 1st respondent. The appellant faults the trial court for arriving at this conclusion. Citing the case of **Caparo Industries Plc -v- Dickman [1990] UKHL** it was submitted that it was not proved that the appellant Bank could reasonably foresee that its actions were likely to harm the 1st respondent who was not a customer of the bank; that there existed no relationship of proximity between the appellant and the 1st respondent. Relying on dicta from **Pardhan -v- Bank of Montreal 2012 ONSC 2229 (CANLII)** it was submitted that there was no proximate relationship between the appellant Bank and the 1st respondent who was a third party to the Bank. Several other judicial decisions were cited in support of its submissions that no duty of care was owed by the appellant to the 1st respondent.

46. Given the undisputed facts of this case, did the appellant Bank owe a duty of care to the 1st respondent who was not its customer?

47. In **Tricon International Limited -v- Giro Commercial Bank Limited [2012] eKLR** it was recognized that there is an obligation on banks to make enquiries as mandated by the Prudential Guidelines. In this regard, the quote from Diplock, LJ in the case of **Marfani & Co Ltd -v- Midland Bank Ltd [1968] 2 ALL ER 573** and particularly at page 579 commends itself to us:

> **"What facts ought to be known to the Banker, i.e what inquiries he should make, and what facts are sufficient to cause him reasonably to suspect that the customer is not the true owner, must depend on current banking practice and change as practice changes. Cases decided thirty years ago, when the use by the general public of banking facilities was much less widespread, may not be a reasonable guide to what the duty of a careful banker, in relation to inquiries as to facts which should give rise to suspicion, is today.**
>
> **The duty of care owed by the Banker to the true owner of the cheque does not arise until the cheque is delivered to him by his customer. It is then, and then only, that any duty to make inquiries can arise. Any antecedent inquiries that he has made are relevant only in so far as they have already brought to his knowledge facts which a careful banker ought to ascertain about his customers before accepting for collection the cheque which is the subject matter of the action, and so have relieved him of any need to ascertain them again when the cheque which is the subject matter of the action is delivered to him. What the Court has to do is to look at all the circumstances at the time of the acts complained of, and ask itself were those circumstances such as would cause a reasonable banker possessed of such information, about his customer as a reasonable banker would possess, to suspect that his customer was not the true owner of the cheque."**

48. The decisive fact in this matter is that the 1st respondent drew cheques either in favour of the law firm of ***Abong B. O. Advocates*** or ***B.O. Abong & Co. Advocates***. It was submitted that the cheques were deposited in the appellant's Bank in the personal account of ***Abong Bildad Onyango Advocate*** which was and is a separate and distinct entity from the law firm in whose name the cheques were drawn.

49. Arising from these facts, the appellant Bank was thus a collecting bank. A collecting bank owes a duty of care to the drawer of a cheque to ensure that the payee is actually the person named in the cheque. In this matter, the appellant bank deposited and allowed encashment of a cheque drawn in the personal name of the 2nd respondent. To this extent, we find that the appellant owed a duty of care to the 1st respondent as drawer of the cheque. We are persuaded by dicta in **Richmond Raiders Football Club -v- Richmond Savings Credit Union [1993] BCJ No. 449 (SC)** in which the Bank was found to be negligent for allowing cheques payable to different entities to be deposited in the same account.

50. We are further persuaded by the comparative decision of the Supreme Court of the Netherlands where it was held that banks have a special duty of care not only to their clients but also to third parties; that the duty owed to a third party depends on the circumstances of each case; that under certain circumstances banks will be acting unlawfully if they fail to investigate whether the client is acting in accordance with regulatory legislation. (See **Supreme Court of the Netherlands, 9 January 1998, ECLI:NL:HR:1998: ZC2536, NJ 1999/285 (MeesPierson/Ten Bos), legal finding 3.6.2.).** It was further held that if a bank's investigation shows that the client has acted in violation of regulatory legislation it will, in principle, need to take steps to protect the interests of third parties; that the measures which are appropriate in any specific case will depend on the circumstances of that case.

51. In the instant appeal, the 1st respondent alleged that the appellant bank failed in its duty to ensure that the 2nd respondent did not operate his account in a suspicious manner. That the large cash withdrawals were sufficient signs that something was not normal. We are cognizant of the principle stated in **Halsbury's Laws of England, 4th Edition, Volume 3 at para 136** as follows:

> **"Where a solicitor keeps an account with a bank or a building society, the bank or society does not incur any liability, nor is it under any obligation to make any inquiry, nor is it deemed to have any knowledge of any right of any person to any money paid or credited to the account, which it would not incur or be under or be deemed to have in the case of an account kept by a person entitled absolutely to all the money paid or credited to it and the bank or society does not have any recourse or right against money standing to the credit of the account, in respect of any liability of the solicitor to the bank or society , other than a liability in connection with the account..."**

52. The CBK Prudential Guidelines provides that for large, frequent or unusual cash deposits or withdrawals - written statement from the

customer is required confirming the nature of his/her business activities. In the instant matter, it is not disputed that the 2nd respondent withdrew large sums of cash over the counter e.g. Ksh. 5,800,000/= on 26th July 2008; Ksh. 3,100,000/= and 11,647,000/= both on 9th October 2008 and Ksh. 4,600,000/= on 5th December 2008.

53. Despite the express requirement under the CBK Prudential Guidelines, the appellant bank never inquired into the nature of the transaction that the 2nd respondent was engaged in that led to withdrawal of large amounts of cash over the counter. That is not to say that a banker's attitude in carrying out this exercise is to "see no evil and hear no evil". Of relevance is the banker's duty in processing payments for customers and others that was extensively discussed by this Court **Standard Chartered Bank Kenya Ltd -v- Intercom Services Ltd and 4 others.** ***(2004) eKLR.***

54. In this matter, taking into account that the proceeds of cheques drawn in favour of a different entity was being withdrawn in cash in large sums over a short period, we find that there was a sufficient basis for the appellant Bank to be suspicious of the manner in which the 2nd respondent was operating and withdrawing cash from the account. We thus find that the appellant Bank was negligent and violated the CBK Prudential Guidelines and failed to obtain a written statement from the 2nd respondent who was its customer to explain the large sums of cash being withdrawn over the counter. We thus find the trial court did not err in arriving at the conclusion the appellant Bank was negligent and it violated the CBK Prudential Guidelines. In this context, we are comforted by the persuasive dicta in **Shalimar Flowers Self Help Group -v-Kenya Commercial Bank [2016] eKLR** where it was stated:

> **"60. All the red flags were waving in this case in my view but the Defendant by not exercising reasonable care and skill, missed or ignored them, thereby allowing the withdrawal, in quick succession, of large sums of money donated to flower workers as commissions. I find on a balance of probability that the Defendant bank was negligent in the manner in which it handled and approved the nine payments and is 100% liable."**

55. The appellant further urged that the trial court erred in failing to take into account the provisions of ***Section 18*** of the **Proceeds of Crime and Money Laundering Act (PROCAMLA).** It was submitted that the court failed to appreciate that any inquiries made by the appellant Bank into an advocate's account is prohibited by ***Section 18*** of the Act.

56. ***Section 18*** of **PROCAMLA** provides as follows:

> **"(1) Notwithstanding the provisions of section 17, nothing in this Act shall affect or be deemed to affect the relationship between an advocate and his client with regard to communication of privileged information between the advocate and the client.**
>
> **(2) The provisions of subsection (1) shall only apply in connection with the giving of advice to the client in the course and for purposes of the professional employment of the advocate or in connection and for the purpose of any legal proceedings on behalf of the client.**
>
> **(3) Notwithstanding any other law, a Judge of the High Court may, on application being made to him in relation to an investigation under this Act, order an advocate to disclose information available to him in respect of any transaction or dealing relating to the matter under investigation.**
>
> **(4) Nothing in subsection (3) shall require an advocate to comply with an order under that subsection to the extent that such compliance would be in breach of subsection (2)."**

57. We have considered the relevance and applicability of ***Section 18*** of PROCAMLA to the facts of this case. The Section deals with advocate client privilege. It does not deal with bank customer or bank third party relationship. The Section also deals with advocate client privileged communication. There is no issue of privileged communication between an advocate and client disclosed by the pleadings and evidence on record in this matter. We thus find ***Section 18*** of PROCAMLA is inapplicable to the facts of this case.

58. On the issue of apportionment and contributory negligence, the appellant faults the trial Judge for not apportioning liability or contributory negligence to the 1st respondent and or his advocate. In its submissions, the appellant urged that it was the advocate for the 1st respondent who failed to conduct due diligence to determine if the purchase price was deposited into a stakeholder account in any of the banks identified and designated as per the Sale Agreement. In dismissing the contestation on contributory negligence, the trial Judge observed first, the appellant never enjoined the 1st respondent's advocate to the proceedings and second, no evidence was tendered to prove any aspect of negligence on the part of the 1st respondent's advocate.

59. We have examined the record of appeal and failed to find an iota of evidence led towards establishing apportionment or contributory negligence on the part of the 1st respondent or his counsel. The appellant called a single witness to testify on its behalf namely ***Mr. John Mayuko*** **(DW1)**. The witness did not testify on contributory negligence on the part of the 1st respondent or his advocate. We thus find no fault or error in the conclusion by the trial court that no evidence was led to prove apportionment or contributory negligence.

60. A ground of appeal urged is on interpretation and application of ***Section 82 (1)*** of the **Advocates Act**. It was submitted the trial judge erred in failing to appreciate that ***Section 82 (1)*** of the **Advocates Act** gives relief and immunity to banks in the operation and running of an advocate's account.

61. ***Section 82 (1)*** and **(2)** of the **Advocates Act** provides:

"(1) Subject to this section, no bank shall, in connection with any transaction on any amount of any advocate kept with it or with any other bank (other than an account kept by an advocate as trustee for a specified beneficiary) incur any liability or be under any obligation to make an inquiry, or be deemed to have any knowledge of any right of any person to any money paid or credited to any such account which it would not incur or be under or be deemed to have in the case of an account kept by a person entitled absolutely to all the money paid or credited to it:

Provided that nothing in this subsection shall relieve a bank from any liability or obligation to which it would be subject apart from this Act. (Emphasis supplied)

(2) Notwithstanding anything in subsection (1), a bank at which an advocate keeps an account for client's money shall not, in respect of any liability of the advocate to the bank, not being a liability in connection with that account, have or obtain any recourse or right, whether by way of set-off, counterclaim, charge or otherwise, against moneys standing to the credit of that account."

62. The learned Judge in considering the proviso in **Section 82 (1) of the Advocates Act** stated:

"83. The proviso exposes the bank to the liability and obligation to comply with guidelines and to a duty of care to those who may be affected by operation of such an account."

63. We have considered the trial judge's statement and finding in relation to the proviso in ***Section 82 (1)*** of the **Advocate's Act**. The appellant submitted the interpretation given to the proviso by the trial court renders the policy objective behind ***Section 82 (1)*** of the **Advocate's Act** impotent and inoperable. That the goal of ***Section 82 (1)*** is to provide relief and immunity to banks in relation to advocate's bank accounts. On his part, the 1st respondent cited dicta from the persuasive High Court case of **Kenya Grande Vehicle Limited -v- Southern Credit Banking Corporation Limited [2014] eKLR.**

64. In **Standard Chartered Bank Kenya Ltd -v- Intercom Services Ltd and 4 others (2004) eKLR,** Githinji, JA observed that statutory provisions protecting bankers were intended to mitigate against the strict duty imposed under common law; that the protection is purposed to create an environment where the banking industry would develop **(***See* ***Diplock LJ in Marjani & Company Ltd vs. Midland Bank Ltd (1968) 2 ALLER 573).***

65. In our view, the proviso in ***Section 82 (1)*** of the **Advocates Act** does not absolve a bank from liability in negligence or wanton and deliberate recklessness in relation to the operation of an advocate's account. The obligation to make inquiries on suspicious transactions in an advocate's account is not waived by ***Section 82 (1)*** of the **Advocates Act**. The phrase **"**or obligation to which it would be subject apart from this Act" in the proviso to ***Section 82 (1)*** of the Act must be of some legal effect.

66. In the instant matter, the liability and obligation of the appellant bank to the 1st respondent does not arise from the Advocates Act. It is an obligation arising from circumstances under which the common law imposes a duty of care that a bank owes to a third party. In this context, dicta from the case of **Vitalarie (A General Partnership) -v- Bank of Nova Scotia [2002] OJ No. 4902 (SCJ)** is relevant where it was stated a bank is responsible to a third party if it fails to make reasonable inquiries despite having reasonable grounds of knowing its customer's fraud. We thus find the trial court did not err in its interpretation and application of ***Section 82*** of the Advocates Act.

67. Ultimately, we have considered all the other grounds of appeal urged in this appeal and find that they have no merit.

68. For the foregoing reasons, we find this appeal has no merit and is hereby dismissed with costs.

Dated and delivered at Nairobi this 11th day of October. 2019

ASIKE MAKHANDIA

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

J. OTIENO ODEK

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR