IN THE COURT OF APPEAL

AT ELDORET

(CORAM: E. M. GITHINJI, HANNAH OKWENGU &

J. MOHAMMED, JJ.A.)

CIVIL APPEAL NO. 181 OF 2014

BETWEEN

DANIEL MOSES MAGETO OKEBIRO ……..…..… APPELLANT

AND

STANDARD CHARTERED BANK (K) LTD ……..... RESPONDENT

(Appeal from the judgment of the High Court of Kenya at Kitale,

***(Karanja, J.)** dated 22nd May, 2014*

in

HCCA. NO. 14 OF 2012)

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JUDGMENT OF HON. E. M. GITHINJI, JA.

[1] This is an appeal from the judgment of the High Court of Kenya at Kitale, (J. R. Karanja, J.) whereby the High Court allowed an appeal from the judgment of Senior Principal Magistrate, set aside the judgment and dismissed the appellant's suit with costs.

[2] On 21st July, 2010, the appellant filed a suit against Standard Chartered Bank Kenya Limited *(bank)* in the Chief Magistrate's Court alleging that the bank had unlawfully closed the appellant's Supersave account **No. xxxxxxxxxxx** at its Eldoret branch which had a credit balance of Kshs.1,365,000/= as at 27th November, 1996. The reliefs sought in the plaint were:

> ***"(a) an order that the defendant do re-open the plaintiffs super save account and,***
>
> ***(b) General damages."***

The bank denied in its defence, *inter alia,* that the supersave account had a credit balance of Kshs.1,365,000/= as at 27th November, 1996 and averred, amongst other things, that the appellant operated the supersave account until 1997 when it was closed and the credit balance of Kshs.18,642.30 in

the account transferred to a new flexiLink Account **No. xxxxxxxxxx** with the express and implied consent of the appellant.

The bank further averred that subsequent to that closure of the supersave account and transfer of the credit balances to the new account, the appellant continued to operate the account from 10/6/1999 until 19/3/2007 when it was closed under the terms and conditions governing the account, and, in accordance with banking law and practice and that the relief sought could not be granted as the bank does not hold any money due to the appellant.

Lastly, the bank pleaded that the appellant's claim was time-barred under **section 4** of the **Limitation** of **Action Act.**

[3] At the hearing of the suit, the appellant testified, amongst other things, that when he went to the bank he was given a brochure which contained the terms and conditions of the supersave account which he produced as an exhibit; that it was a requirement that the account should have a minimum of Kshs.200,000/= to earn interest, that upon opening the account, he was issued with a photo card which had no expiry period; that he deposited a lot of money to attract good interest rates; that he never withdrew any money from the account; that on 27th November, 1996 he filled an account balance request form and a bank official indicated that the account had a credit balance of Kshs.1,365,000/= and that in early 2010 he checked his account only to be told that the supersave account did not exist and that there was no money in the account. He further testified that after he made complaints he received from the bank two account statements dated 12/5/1997 and 6/8/1997 showing credit balances of Kshs.16,738/60 and 18,642.30 respectively.

On cross-examination, he testified that he opened the supersave account on 1/10/1996; that he never received statements for the account, that he never checked the account for 14 years and that he was never given notices of the transfer of the account to a new account.

[4] Emily Naliaka - the Operations Manager of the bank (Emily) gave evidence. Her evidence briefly was that the supersave account was closed after the balance fell below the minimum of Kshs.200,000/= and credit balances transferred to an ordinary saving account, that there was a change of banking system and relevant documents could not be retrieved from the archives; that supersave accounts no longer exist; that if the appellant deposited money in the account he could have produced deposit slips and further that she could not tell from which bank the account balance request form emanated and whether the contents of the account balance request were correct.

[5] The trial magistrate made findings of fact, *inter alia*, that:

> ***"(i) the bank did not produce any documentary proof that the supersave account was closed and credit balance transferred to new flexiLink account;***
>
> ***(ii) there was no reasons why an international bank which ought to keep proper records could not retrieve the records to show how the supersave account behaved before closure;***
>
> ***(iii) that the bank did not account for the alleged reduction of the plaintiffs funds of Kshs.1,365,000/=;***
>
> ***(iv) the bank failed in its duty of care;***
>
> ***(v) the bank did not provide documentary proof that supersave product was no longer in operations."***

In the final analysis, the subordinate court granted the prayer for re-opening of supersaver account and awarded the appellant Kshs.200,000/= as general damages.

[6] On appeal by the bank to the High Court, the High Court considered whether or not the appellant

proved that Kshs.1,365,000/= was in credit and said:

> ***"The account balance request (P.Ex.5) indicated that the balance stood at Kshs.1,365,000/= as at 27th November, 1996. However, there was no evidence from the respondent as to when and how the amount was deposited into the account".***

The High Court also considered the contentious issue whether or not the account was regularly closed. It made a finding that the brochure on which the appellant relied for proof of the terms and conditions of the operation of the account was merely an invitation to treat and could not amount to a formal contractual document setting out the terms and conditions of the relation between the parties. The High Court stated:

> ***"At most, the respondent in order to prove his case against the appellant in a satisfactory manner ought to have laid the actual contractual document governing his relationship with the appellant and signed by him and the appellant. His failure to produce such document meant that he was unable to disprove the contention by the appellant that the material account was closed after it was overdrawn and reduced to a balance of Kshs.18,642/50 as at 5th June, 1997 as demonstrated by the bank statement (P.Exh.8(b)"***

Nevertheless, the court made a finding that even if the brochure was considered as a formal contract, the statement *(P.Exh.8 (b)* confirmed that the balance had gone down to Kshs.18,642/30 and that the account balance request *(Ex.5)* which was disputed was not sufficient to disprove the bank statement.

Further, the court made a finding that from the totality of the evidence laid before the trial court, the appellant did not discharge the burden of proof on breach of contract.

Lastly, the court made a finding that the cause of action arose on 5th June, 1997 when the account was closed and that the suit instituted on 21st July, 2010 was barred by limitation.

[7] The grounds of appeal challenge those findings. The appellant also faults the learned judge for failing to evaluate the evidence.

[8]This is a second appeal which is regulated by **Section 72 (1)** of the |**Civil Procedure Act.** According to that section, a second appeal lies to this Court on the following grounds:

> ***"(a) the decision being contrary to law or some usage having the force of law;***
>
> ***(b) the decision having failed to determine some material issue of law or usage having the force of law;***
>
> ***(c) a substantial error or defect in procedure provided by this Act or by any other law for the time being in force, which may possibly have produced error or in the decision of the case upon merits."***

From the grounds of appeal, conditions (b) and (c) above do not apply in this appeal. It is also my view that condition (a) does not apply to the appeal because the dispute relates to banker-customer relationship which is largely dependent on the terms of the contract. In reaching his decision that the appellant failed to prove breach of contract, the learned Judge was guided by the facts disclosed by the evidence. Similarly, in making a finding that the claim was time barred; the Judge was again guided by the evidence.

The appellant did not say in the memorandum of appeal or in the oral submissions that the decision appealed from was contrary to any specific law, contract, evidence, limitation or otherwise.

However, if the appellant's case is that the decision of the Judge was contrary to the law of contract, law of evidence and law of limitation then I say as follows,

[9] The finding that the brochure did not amount to a formal contractual document was erroneous. The brochure contained the terms and conditions on which the supersave account would be opened and operated. One condition was that the balance should not fall below the minimum amount of Shs.200,000/= and that should the balance fall below that amount the bank could notify the holder of the account and ask him to restore the balance.

The brochure invited interested persons to approach the bank and open the account. There was no evidence that another formal contract other than the opening of an account was required. Emily, the bank's witness did not dispute that the terms and conditions contained in the brochure applied to the supersave account opened by the appellant.

The real dispute was whether or not the appellant's supersave account fell below the minimum balance of Kshs.200,000/= and whether it was closed for that reason.

[10] Inspite of the finding that the brochure was not a formal contractual document, the learned Judge considered other evidence and made a finding of fact that the balance had gone down to Kshs. 18,642/30. Thus, despite the error of law, the decision was based on the findings of fact.

The learned Judge particularly considered the evidentiary value of the account balance request dated 27th November, 1996 which indicated that the supersave account had a credit balance of Shs.1,365/= as at that date.

The document does not show the branch of the bank from where it originated nor the name of the bank official who issued it. The appellant stated in the letter dated 27th April, 2010, which he produced as an exhibit at the trial that he opened the account with a deposit of Shs.329, 000.

The appellant stated in his evidence that he deposited a lot of money overtime to earn good interest rates. It is correct as found by the Judge that he did not produce any evidence to show when and how the amount was deposited. Indeed, the appellant did not produce any documentary evidence such as deposit slips or otherwise. It is noteworthy that the account was opened on 1st October, 1996 and the account balance request is dated 27th November, 1996 - an interval of less than two months. The appellant needed to prove by deposit slips that the balance in the account indeed grew from Kshs.329,000/= to Kshs.1,365,000/= in less than two months. The fact that appellant made an inquiry about the account in 2016, 14 years later rendered the account balance request unreliable.

[11] Furthermore, the account balance request is not a copy of an entry of a banker's book within the provisions of **section 176** of the **Evidence Act.** By **Section 176** as read with **section 177 (1)** of the **Evidence Act,** a copy of an entry in ordinary banker's book made *inter alia*, in the usual and ordinary course of banking business is *prima facie* evidence of such entry and matters, transactions and accounts recorded therein. Thus, the account balance request was not *prima facie* evidence that the account balance was Shs.1,365,000/= as at 7th November, 1996.

[12] The record shows that the appellant's advocates issued a notice to produce to the bank requiring the bank to produce various documents including copies of statements of the supersave accounts in question. The bank did not produce them. According to the law, failure to produce entitled the appellant to produce secondary evidence *(copies)* of such documents. The appellant did not produce copies of the statements although Emily, the bank witness, testified that statements were issued on quarterly basis.

The bank gave a reasonable explanation for failure to produce them - that because the banking system had changed and the long lapse of time they could not be retrieved from the archives.

The bank supplied the appellant with two statements after he made an inquiry which showed that by May, 1997 the balance in the account which had been changed to a savings account was Shs.18,642/30.

Those statements are *prima facie* evidence that by the time the supersave account was closed and

converted into an ordinary saving account, the credit balance was below Shs.200,000/=. The appellant admitted at the trial that he operated the converted saving account until it was closed. It is obvious that he had knowledge of when the converted account was closed.

[13] From the foregoing, it is clear, and I find that, although the learned Judge erred in the characterization of the nature of the brochure, the decision was not contrary to the law of evidence and that on the evidence the court reached the correct decision.

[14] If the appellant's case is that the decision was contrary to the law of limitation, there was evidence from Emily that the ordinary savings account to which the credit balance in the supersave account was transferred was related to the supersave account. The appellant pleaded in paragraph 3 of the plaint that the supersave account was given a new account number in April, 1997.

He also admitted in his evidence that he operated the new account until it was closed. The account was closed on or about 19th March, 2004. That is when the banker customer relationship was terminated. The suit was filed on 21st July, 2010. By then the six year limitation period stipulated by **Section 4(1) (a**) of the **Limitation** of **Actions Act** had expired. Thus, the finding of the learned Judge that the suit was time barred was not contrary to the law of Limitation. It was amply supported by evidence.

[15] Lastly, the relief sought by the appellant and granted by the magistrate that the supersave account be re-opened was inappropriate. From the evidence of Emily, the bank no longer operated supersave accounts. Owing to the change of banking system and long lapse of time, the remedy was ineffectual.

[16] For the above reasons, the appeal has no merit and I would dismiss it with costs to the respondent.

As J. Mohammed, JA. agrees, the judgment of the Court is that, the appeal be and is hereby dismissed with costs to the respondent.

Dated and delivered at Eldoret this 1st day of March, 2018.

E. M. GITHINJI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR.

JUDGMENT OF HANNAH OKWENGU, JA.

[1] This is a second appeal originating from the judgment delivered by the Chief Magistrate's Court, in Kitale CMCC NO. 405 of 2010. **Daniel Moses Mageto Okebiro**, who is now the appellant before this Court lodged the suit in the magistrate's Court through a plaint in which he sued **Standard Chartered Bank Kenya Limited**, *(now the respondent).*

[2] In his suit the appellant claimed that since October 1996, he has been a customer of the respondent bank having opened a Supersave Account No. **01-2-03-70873-00-9**; that in 1997 the account was given a new account number **0150317087300;** that as at 27th November, 1996, the supersave account had a credit balance of Kshs. 1,365,000/=; that the appellant has never withdrawn any money from the account to date; that in early 2010, he visited the respondent's branch at Eldoret intending to withdraw money from his account; that he was informed that the said account no longer existed in the bank's system since the same was closed; that as a result the appellant has lost all the money and blames his loss on the respondent's breach of contract, hence the suit seeking general damages and an order for the respondent

to reopen the appellant's supersave account.

[3] The respondent filed a defence to the appellant's plaint, which defence was later amended. In the defence, the respondent admitted that the appellant opened a supersave account with the Bank, but maintained that the appellant only operated the account up to 1997 when with the express and implied consent of the appellant, the supersave account was closed and the credit balance in the account transferred to a new flexilink account. The respondent further contended that at the time the supersave account was closed, the credit balance therein amounted to Kshs. 18,642.30/- and that this was the amount transferred to the new flexilink account. That thereafter the appellant continued to operate the new flexilink account and made cash withdrawals and deposits both at the counter and ATM until 15/3/2004 when the account was closed.

[4] In his evidence the appellant denied being notified of the closure of the supersaver account, or consenting to the opening of the flexilink account, or operating the account as alleged by the respondent.

[5] In her judgment, the trial magistrate found that the respondent was the custodian of the appellant's savings account and all accountable documents; that the respondent failed in its duty of care as it could not account for how the appellant's savings in the account reduced from Kshs.1,365,000/= to Kshs.18,642/30; that the respondent never notified the appellant that his supersave account had been closed as was required by the terms and conditions set out in the brochure that regulated the savings account; and that the respondent was therefore in breach of the contract. The trial magistrate therefore concluded that the appellant's case was proved and awarded him general damages of Kshs. 200,000/-. In addition the trial magistrate ordered the respondent to re-open the appellant's supersave account No. 0150317087300.

[6] Being dissatisfied with that judgment, the respondent preferred an appeal to the High Court. In the appeal the respondent faulted the trial magistrate for ordering the respondent bank to re-open the supersave account when the appellant had not sought an order of mandatory injunction or specific performance; and failing to take into account that the respondent had exhausted all the funds in the supersave account. The respondent also contended that the trial magistrate erred in entering judgment in favour of the appellant, as the suit was time barred under section 4 of the Limitation of Actions Act, Cap 22 Laws of Kenya.

[7] In his judgment delivered on 22nd May, 2014, the learned judge found that a brochure is an advertisement tool that did not amount to a formal contractual document setting out the terms and conditions of a relationship between the parties; that the appellant failed to produce any document signed by him to prove a contractual relationship; and that there was no requirement that the notice to be issued to the appellant as an account holder on closure of his account had to be in writing.

[8] In addition the learned judge further held that the appellant failed to discharge his burden of proof by failing to show that the closure of his account was contrary to any applicable terms and conditions; that the cause of action arose on 5th June, 1997 when the account was closed; and the suit having been instituted on 21st July, 2010, it was instituted well past the statutory limitation period of six years for suits based on contract. The learned Judge therefore allowed the appeal, set aside the judgment of the trial magistrate and substituted thereto an order dismissing the appellant's suit

[9] In this second appeal, the appellant has raised eight grounds. In brief these are that the learned Judge erred: in holding that the brochure containing the terms and conditions was an advertisement tool; in holding that the appellant did not prove his case as he failed to produce a contract duly signed by the respondent and himself; in finding that the appellant's claim was statute barred by the Limitation of Actions Act when the appellant was never notified that his supersaver account had been closed; in finding that withdrawals had been made from the appellant's account and balance reduced to Kshs. 18,642.30/- when the respondent never produced any documentary evidence in support of the withdrawals; in holding that the balance of the account fell below Kshs. 200,000/- when there was no evidence produced of the alleged withdrawals; and that the learned Judge erred in exercising appellate jurisdiction.

[10] The hearing of the appeal proceeded by way of oral submissions. Learned counsel for the appellant Mr. Onyancha argued that there was enough documentary evidence adduced that showed that the brochure produced in evidence in the trial court was the one governing the relationship between the appellant and the respondent; that the learned Judge erred in finding that by failing to produce a signed contractual document the appellant failed to prove the existing relationship between the appellant and the respondent; that the appellant produced evidence that showed that the respondent had confirmed that the balance in his savings account was Kshs. 1,365,000/- and that since he never withdrew the money the same continued to earn interest.

[11] On the issue of the suit being time barred by the Limitation of Actions Act, counsel for the appellant submitted that the cause of action could only arise once it was known that the appellant's account had been deleted from the bank system; and that the respondent never adduced any evidence on when the appellant's account was deleted. Regarding the alleged withdrawal of funds from the account, counsel relied on **section 109** of the **Evidence Act** for the preposition that he who alleges must prove. He argued that the burden was upon the respondent who alleged that the balance in the appellant's account was reduced to Kshs. 18,642/30 due to withdrawals made by the appellant to produce evidence to prove the withdrawals.

[12] Learned counsel, Mr. Magare, while opposing the appeal on behalf of the respondent submitted that the appellant failed to establish that he deposited money with the respondent bank, which was in his account before the account was transferred to the flexilink account; and that the statements produced by the respondent during the trial proved that the money in the account was only Kshs. 18,642/30; On the issue of the suit being time barred, counsel for the respondent asserted that the appellant's account was closed in March 2004, and therefore the appellant's cause of action in contract was statute barred after 2010.

[13] Further, counsel for the respondent submitted that in his pleadings, the appellant did not provide any particulars of fraud or negligence alleged against the respondent in regard to the closure of his account, nor did the appellant establish that there was any breach of contract such as to justify an award of general damages. On the issue of the brochure, the respondent maintained that it was merely an invitation to treat and that the High Court was right in treating it as such. In the end, counsel for the respondent urged the Court to dismiss the appeal and find that the appellant did not prove his case.

[14] As this is a second appeal, ***Section 72 (1) of the Civil Procedure Act, Chapter 21 Laws of Kenya*** restricts this Court to consideration of matters of law only. In accordance with section 72(1) of the Civil Procedure Act, such matters may include the following:

> ***(a) The decision being contrary to law or to some usage having the force of law;***
>
> ***(b) The decision having failed to determine some material issue of law or usage having the force of law;***
>
> ***(c) A substantial error or defect in the procedure provided by this Act or by any other law for the time being in force, which may possibly have produced error or defect in the decision of the case upon the merits.***

[15] In effect the restriction of the Court's jurisdiction to matters of law means that where there are concurrent findings by the two lower courts on matters of fact, this Court has to defer to the findings of the lower courts unless it is established that the findings were erroneous either because the lower court failed to take into account relevant considerations or took into account matters it should not have considered (See ***Kenya Breweries Ltd V Godfrey Odoyo, Civil Appeal No. 127 of 2007; Mark Khan Transporters Ltd v Peter Mbugua [2009] eKLR***). The court can also interfere if the findings of the lower courts were based on a misapprehension of the evidence such as to vitiate the basis of the conclusion.

[16] In this matter the trial court and the first appellate court made concurrent findings that there was no dispute that the appellant opened a supersave account with the respondent and that the account was later

converted to a flexilink account before being closed by the respondent. The two courts were however at variance regarding whether the closing of the account was regular or irregular. This disparity arose from the findings on the terms upon which the account was held, and the obligations arising therefrom. The two courts were also not in agreement in their finding regarding the balance in the account at the time the account was closed.

[17] For the trial magistrate the supersave account brochure produced by the appellant reflected the terms and conditions under which the account was held, but as per the first appellate court, the brochure could not amount to a contractual document setting out the terms and conditions of the relationship between the parties as it was only an advertisement tool, an invitation to treat aimed at inducing the purchase of products being marketed.

[18] The issues that commands itself for determination is the contractual relationship between the appellant and the respondent and the impact of the supersave account brochure in regard to the terms of the contract, and whether there was any breach of contract. In determining these issues it is also necessary to consider who had the burden of proof, and whether the same was discharged. In this regard section 107 of the Evidence Act places the burden of proof on a person desiring:

> ***"any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist."***

[19] In light of the above, the appellant having moved the trial court for judgment in his favour, he had the burden of proof in regard to the existence of facts that established the liability of the respondent. The fact that the appellant was a customer of the respondent and that he had a supersave account was pleaded at paragraph 3 of the plaint and admitted by the respondent at paragraph 3 and 7A of the amended defence. It did not therefore require proof as it was common ground. What was in dispute was the appellant's contention that as at 27th November 1996, the supersave account had a credit balance of Kshs 1,365,000/=; that the account was entitled to a compound interest rate of 12% per annum; that the appellant did not withdraw any money from the account; and that in breach of contract the respondent unlawfully and irregularly closed the account.

[20] As regards the supersave account credit balance, the trial magistrate accepted the account request balance form produced by the appellant in evidence. The form had the respondent's official stamp which showed that the account had a credit balance of Kshs 1,365,000/=, as at 27th November 1996. On his part the learned Judge noted that the form indicated that there was a credit balance of Kshs 1,365,000/=, but appeared not to have given much weight to it as the appellant did not adduce evidence to show when and how the amount was deposited into the account. While I have no doubt that such evidence would have strengthened the appellant's position, the absence of the evidence did not lessen the efficacy of the exhibit produced by the appellant that bore the respondent's stamp and on the face of it showed proof that the respondent had as at 27th November, 1996 indicated the amount of Kshs1,365,000/= as the credit balance in the appellant's account.

[21] At paragraph 7A of the amended defence, the respondent had pleaded that as at 5th June, 1997 the appellant's account had a credit balance of only Kshs 18,642/30. The Banker customer relationship between the appellant and the respondent placed the respondent in a fiduciary capacity with a duty to account in so far as the appellant's funds entrusted into the respondent's care was concerned. The appellant's evidence regarding the credit balance of Kshs 1,365,000/= placed an evidentiary burden upon the respondent to rebut this evidence. Besides the information concerning how the appellant's account was run and how the credit balance of Kshs 18, 642/30 was arrived at, was a matter especially within the knowledge of the respondent, and therefore under **section 112** of the **Evidence Act** the burden was upon the respondent to prove this fact.

[22] On its part the respondent testified through its then Operations Manager, Emily Naliaka who admitted that she did not manage the appellants account at any stage. It followed that her evidence basically relied on information obtained from records in the respondent bank and one would have expected the witness to produce such records.

[23] The respondent's witness did not however produce any documents but relied on the documents that were produced by the appellant. Her evidence was that the respondent closed the appellant's supersave account because it fell below Kshs 200,000/=. In support of this she relied on two account statements that were produced by the appellant as P Exhibit 8(b) & (c) in which the balance of the account was indicated as 18,642/30 as at 5th June 1997. The difficulty with these statements is that as admitted by the witness the statements were incomplete and could not explain how the figure of 18,642/30 was arrived at.

[24] The trial court adjourned the hearing and gave time to the appellant to produce a statement of the respondents account, but none was produced. The respondent was therefore unable to give a proper account of the monies deposited in, and withdrawn from the appellant's supersave account and could not substantiate their defence that the credit balance in the appellant's supersave account was Kshs 18,642/30, and or that it had the right to close the appellant's account because it fell below Kshs 200,000/=

[25] I find that the learned Judge failed to distinguish between the legal burden of proof and the evidentiary burden. The legal burden of proof remained upon the appellant who was the initiator of the suit seeking judgment in his favour. The evidentiary burden shifted to the respondent upon the appellant establishing that he had a supersave account with the respondent; and that as at 27th November, 1996 the respondent had indicated that the appellant's supersave account had a credit balance of Kshs 1,365,000/= and that the respondent purported that the balance as at 5th June 1997 was Kshs 18,642/30. The respondent failed to discharge this evidentiary burden that required it to give an account of the supersave account for the period it was in existence and justify its contention that the credit balance in the account was only Kshs 18,642/30.

[26] Moreover, the learned Judge appeared to have given undue emphasis on the importance of the supersave account brochure in determining the relationship between the parties. This is evident from the following extract from the judgment of the learned Judge:

> ***"At most the respondent in order to prove his case against the appellant in a satisfactory manner ought to have laid down the actual contractual document governing his relationship with the appellant and signed by him and the appellant. His failure to produce such document meant that he was unable to disprove the contention by the appellant that the material account was closed after it was overdrawn and reduced to a balance of Kshs 18,642/30 as at 5th July, 1997 as demonstrated by the bank statement (PExh 8(b))."***

[27] The fact that the appellant was a customer of the respondent holding a supersave account was not in doubt. While the brochure was initially an invitation to treat, the contractual relationship crystalized once the account came into existence. Although the appellant was not able to produce a written contract, the contractual relationship was not in doubt. Indeed both the appellant and the respondent relied on the terms indicated in paragraph 4 to 7 in the brochure regarding the requirement of minimum balance of Kshs 200,000/= in the account and the authority to close the account if the credit balance in the account fell below Kshs 200,000/=. It can therefore be safely concluded that the terms governing the relationship included the terms reflected in the brochure. The learned Judge could not selectively accept the terms in justifying the closure of the account by the respondent while at the same time rejecting the brochure as an invitation to treat.

[28] The final issue that I wish to address is whether the appellant's suit was statute barred pursuant to Section 4 of the Limitation of Actions Act (Cap 22 Laws of Kenya), that provides a limitation period of six years for actions founded on contracts. In this regard the respondent pleaded the defence of limitation in the amended defence, however the trial court did not make any finding on this issue though the trial magistrate noted that as at 3rd July, 1997 the appellant was still enjoying invitation to participate in a supersave account grand draw. During the first appeal, the learned judge found that the cause of action arose on 5th of June, 1997 when the account was closed, and that the appellant's suit that was filed on 21st July, 2010 was statute barred.

[29] The question is when did the appellant's cause of action arise? This is a question whose answer is

dependent on the facts of the case. Although the learned Judge found as a fact that the cause of action arose on 5th June 1997 when the account was closed he did not address the letter dated 3rd July 1997 that was addressed to the appellant by the respondent inviting him to the supersave grand draw. Nor did the Judge address the fact conceded by the respondent that the appellant's account remained in the system after 5th June 1997.

[30] Moreover, it was clear that there was no written notice regarding the closing of the account that was given to the appellant. In this regard the learned Judge contradicted himself by finding that there was no requirement for the notice to be in writing, yet at the same time accepting the respondent's evidence that a notice was issued to the respondent but could not be traced.

[31] Since the respondent wished the court to believe that the appellant's cause of action arose on 5th June 1997 when the account was closed, the evidentiary burden was upon the appellant to establish that the account was actually closed on 5th June 1997, and that the appellant was given notice of the same. In this regard the respondent's evidence fell short of discharging this evidentiary burden. There was no good explanation given as to why the appellant's account remained in the system if indeed it was closed on 5th June 1997. Besides, the explanation that there was a notice forwarded to the appellant but that the same could not be traced due to lapse of time is not plausible. The Banker customer relationship between the appellant and the respondent placed a responsibility on the respondent to keep proper records and it would be unreasonable for a bank of the respondent's caliber not to have an appropriate back up mechanism in place. The fact that the respondent was unable to produce proper records was evidence of a breach of its general duty as a banker.

[32] I find that in arriving at his finding that the cause of action arose on 5th June, 1997, the learned judge failed to take into account material facts, and his conclusion that the appellant's claim was statute barred cannot therefore hold.

[33] I come to the conclusion that the evidence adduced by the appellant was sufficient to prove his case and therefore the learned judge erred in allowing the appeal and dismissing the appellant's suit. Accordingly I would allow the appeal, set aside the judgment of the learned Judge and reinstate the judgment of the trial magistrate to the extent of allowing prayer (a) in the appellant's plaint. Although the trial magistrate awarded Kshs 200,000/= as general damages for breach of contract, I find that the award has no basis in law and would therefore disallow the same. I would further award costs of the appeal in the High Court and in this Court to the appellant. However, as mine seems to be a lone voice my brother and sister judge being of a contrary view, the final orders shall be as proposed by Hon. Githinji, JA.

Those shall be the orders of this Court.

Dated and delivered at Eldoret this 1st day of March, 2018.

HANNAH OKWENGU

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR.