IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MWILU, MAKHANDIA, OTIENO-ODEK, JJ.A.)

CIVIL APPEAL NO. 158 of 2013

BETWEEN

AJAY SHAH..... APPELLANT

AND

DEPOSIT PROTECTION FUND BOARD *as Liquidator of* TRUST

BANK LIMITED (In Liquidation) ..... 1 st RESPONDENT

PRAFUL SHAH ..... 2 nd RESPONDENT

(An appeal from the Ruling and Decree of the High Court of Kenya at Milimani E. Ogola, J.) dated 30 th May 2013

in

H.C. MISC. C. APPL. No. 294 of 2010)

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JUDGMENT OF THE COURT

1. The 1st respondent, *Deposit Protection Fund Board* , (hereinafter abbreviated as DPFB) is the Liquidator of Trust Bank Limited. At all material times in the suit, the appellant and 2nd respondent were Executive Directors of Trust Bank Limited prior to its liquidation.

2. By a Notice of Motion dated 23rd March 2010, the 1st respondent (pursuant to the provisions of *Section 323* and *324* of the Companies Act, Cap 486 of the Laws of Kenya and *Rule 60* of the Companies Rules), filed an application against the appellant and 2nd respondent seeking the following orders:

"(1) A declaration that the appellant and 2nd respondent who acted as Executive Directors

of Trust Bank Limited were knowingly parties to the carrying on of business of Trust Bank (In liquidation) with intent to defraud creditors of the company and for a fraudulent purpose.

(2) A declaration that the appellant and 2nd respondent as Executive Directors of Trust Bank are guilty of misfeasance and breach of trust in relation to the said company.

(3) A declaration that the two Executive Directors were in breach of their fiduciary duties to Trust Bank and allowed or caused Trust Capital Services Limited, in which they had a personal interest, to overdraw its accounts without proper security and thereby the Bank lost over Ksh. 241,442,375.80 as at 16th September 1998.

(4) An Order that the appellant and 2nd respondent jointly and severally are liable to make good and pay Deposit Protection Fund Board as liquidator the sums of Ksh. 1, 549, 591, 424/41 cents (One billion Five Hundred and Forty Nine million, Five Hundred and Ninety One Thousand, Four Hundred and Twenty Four Shillings and cents Forty One) being the amount due in the account of Trust Capital Services Limited as at 28th February 2010 together with interest thereon at prevailing Bank rates from 1st March 2010 to the date of payment in full."

3. The grounds in support of the application are that the DPFB in the course of winding up Trust Bank established that the business of the Bank was carried out with intent to defraud the creditors and for other fraudulent purposes and the appellant and 2nd respondent as Directors were knowingly parties to the said fraud; that DPFB as liquidator further established that the two Executive Directors were guilty of misfeasance or breach of trust in relation to the Bank; that the Bank through the fraud and misfeasance of the two directors lost Kshs.241,442,375.80 as at 16th September 1998 in the account of Trust Capital Services Limited; that the appellant and 2nd respondents are jointly and severally liable to Trust Bank Limited for all losses incurred as a consequence of the said transactions and fraud in the said account of Trust Capital Services Limited.

4. The appellant in reply to the Notice of Motion deposed in an affidavit dated 12th May 2010 that no sum or money was stolen from Trust Bank; that the alleged debt due to Trust Bank Limited is false; that the withdrawal of funds by Trust Capital Services Limited referred to by DPFB giving rise to the alleged debt of Kshs.241,442,375.80 is false as the cheques in issue were not honoured as at 17th September 2008 because the Bank went into Statutory Management and a reversal of the cheques was done; that the DPFB suit is time barred because DPFB knew of the indebtedness of Trust Capital Services Limited since 1998 but failed to file suit. The 2nd respondent in his replying affidavit also deposed at paragraph 12 thereof that reversals were made by DPFB in relation to the alleged indebtedness of Trust Capital Services Limited; that reversal of entries were made because the bankers cheques that had been issued by Trust Bank and which form the basis of the alleged Kshs.241, 442,375.80 indebtedness were never honoured and cleared by the Bank.

5. DPFB in a further affidavit deposed *by Mr. Daniel Muguima* dated 18th May 2010 states that the High Court in HCCC No. 1243 of 2001 *(*Trust Bank Limited -v- Ajay Shah & Others *)* held that Trust Capital Services Limited owed Trust Bank the sums claimed before this Court; that the appellant and the 2nd respondent in the Scheme of Arrangement prepared prior to liquidation admitted owing insider loans to Trust Bank Limited; that the two executive directors admitted in the Scheme of Arrangement that they owed money to the Bank.

6. On the issue of limitation period and that the 1st respondent's claim was time barred; Mr. Muguima denied that the claim was time barred. He deposed that the present cause of action arose in the course of winding up and was commenced pursuant to *Sections 323* and *324* of the Companies Act (Cap 486) and that because the winding up of the Bank is not complete, the claim

and action brought by the liquidator is not time barred; that the liquidation of Trust Bank Limited is yet to be concluded and it is the duty of the liquidator to collect all the assets of the company for distribution to shareholders and the present action is a discharge of a statutory obligation by the liquidator to the creditors and to the Court.

7. Mr. Muguima, further denied that the present action is time barred because the two directors entered the sums due from Trust Capital Services Limited as an unsecured loan and it is only when DPFB was preparing for trial in Nairobi HCCC No. 1243 of 2001 that it emerged that the debt was in fact not a loan transaction but a fraud practiced on the Bank by the appellant and 2nd respondent. He goes on to depose that the cause of action accrues when the fraud is discovered; that under *Sections 323* and *324* of the Companies Act , the liquidator has a statutory right to bring the present cause of action at any time in the course of winding up.

8. *Section 323 (1) (a)* of the Companies Act, (Cap 486) provides as follows:

"If in the course of the winding up of a company it appears that any business of the company has been carried on with intent to defraud creditors of the company or creditors of any other person or for any fraudulent purposes, the court, on the application of the official receiver or the liquidator… may if it thinks proper so to do, declare that any persons who were knowingly parties to the carrying on of the business in manner aforesaid shall be personally responsible, without any limitation of liabilities, for all or any of the debts or other liabilities of the company as the court may direct."

9. On the other hand *Section 324 (1)* of the Companies Act (Cap 486) provides *inter alia*:

"If in the course of winding up a company it appears that any person who has taken part in the formation or promotion of the company or any past or present director, manager or liquidator or any officer of the company has misapplied or retained or become liable or accountable for any money or property of the company or been guilty of any misfeasance or breach of trust in relation to the company, the court may on the application of the ….liquidator… examine into the conduct of the promoter, director…and compel him to repay or restore the money or property or any part thereof respectively with interest at such rate as the court thinks just…."

10. Upon hearing the parties, the trial judge (E. Ogolla, J.) in a ruling delivered on 30th May 2013 granted the declaratory prayers in the Motion. In granting the prayers, the learned judge at paragraph 35 of the ruling expressed himself as follows:

"The respondents must answer to Sections 323 (1) (a) and Section 324 (1) and since no satisfactory answer or explanation or exculpatory evidence has been given, the Notice of Motion application dated 23 rd March 2010 succeeds in its entirety with costs to the applicant."

11. Aggrieved by the ruling, the appellant has lodged the instant appeal citing the following compressed grounds:

"(i) That the judge erred in law in holding that the appellant's defence was based on mere technicalities and that the preliminary objection to jurisdiction was a technical defence and the judge further erred in ordering that the issue of jurisdiction be heard on the hearing of the suit and not before; that the judge erred in law by failing to resolve the issue of jurisdiction and conflict between Section 241 (1) (a) and (c) of the Companies Act (Cap 486) and Section 36 (2) of the Banking Act (Cap 488).

ii. **The judge erred and misdirected himself on the facts and law by holding that there is no evidence to date that a single coin had been repaid by the appellant when there is evidence on record that a total sum of Ksh. 243,187/402.40 was paid by Trust Capital Services Limited to Trust Bank Limited.**

iii. **The judge erred and misdirected himself in holding that the liquidation agent Mr. Daniel Muguima, carried out investigations between 2008 and 2010 and established fraud when no report of such investigation was tendered in evidence and that Mr. Daniel Muguima admitted in cross-examination that the debt was known as early as 25th May 1999.**

iv. **The judge erred in law in finding that the appellant had admitted the debt/loan and the court further erred in relying on the Scheme of Arrangement which commenced on 1st July 1999 and expired on 30th December 2003.**

v. **The judge erred in finding that the Deposit Protection Fund Board was not time barred under the Statute of Limitation; the court further erred in holding that the alleged fraud was discovered between 2008 and 2010.**

vi. **The judge erred in law in finding that the appellant had not given a satisfactory explanation or exculpatory evidence and further erred in shifting the burden of proof to the appellant.**

vii. **The judge erred in holding that the appellant had siphoned or stolen money out of Trust Bank Limited.**

viii. **The learned judge erred in awarding interest at the rate of 15% per annum compounded which was not agreed or pleaded nor was any evidence led that 15% per annum compounded interest was the prevailing rate.**

ix. **The judge erred in law by not sufficiently or all appreciating the effect of Section 44 A of the Banking Act (Cap 488).”**

12. At the hearing of this appeal, learned counsel Mr. Kiragu Kimani teaming up with learned counsel Ngaca D.G. acted for the appellant. Learned counsel Mr. Desterio Oatsi appeared for the 1st respondent while learned counsel Mr. Gitonga Kimani acted for the 2nd respondent. All counsel filed written submissions in the appeal.

APPELLANT’S SUBMISSIONS

13. Counsel for the appellant submitted that in this appeal, there were three critical issues for consideration and determination: these are, the question of limitation of actions; liability of the appellant and the assessment of damages with regard to applicable interest rate as ordered by the trial court. It was emphasized that the 1st respondent’s claim against the appellant is premised on the principal sum of Kshs.241,442,375.80 allegedly due and owing from Trust Capital Services Limited to Trust Bank Limited.

14. Counsel submitted that Trust Bank Limited was placed in liquidation on 16th August 2001 and the 1st respondent is the liquidator; that the 1st respondent instituted the suit against the appellant and 2nd respondent as Executive Directors of Trust Bank Limited and failed to appreciate that a company and its directors have distinct legal personality. On the issue of liability, the appellant’s submission was that the trial court erred in finding that the sum of Kshs.241,442,375.80 was due and owing when the evidence on record demonstrates that the said sum was not due and owing to Trust Bank Limited from Trust Capital Services Limited. The appellant contends that as at 16th September 1998, the sum of Kshs.241,442,376/= had been withdrawn from the Bank and this sum is made up of a total of 24 bankers cheques issued to several business entities by Trust Capital Services Limited; that out of these, cheques valued at Kshs.146,687,42.50 were not honoured by the Bank as the Bank had been placed under statutory management; that because the 24 cheques were not honoured, Trust Bank retained the sum of Kshs.146,687.402/50 which sum was thus neither stolen nor lost by the Bank nor paid to anyone. The appellant contends that the balance of Kshs.94,754,974/= being the difference between Kshs.241,442,376/= and Kshs.146,687.402/50

represented cheques that had been issued much earlier through Trust Capital Services Limited and had been cashed and cleared before Trust Bank Limited was placed under statutory management. That the unpaid Bankers cheques totaling Kshs.146, 687,402.50 were never paid and were returned to the statutory manager who subsequently reversed the Bank entries between 17th February 1999 and 30th June 1999. Details of the cheques that were unpaid and which entries were reversed as the exculpatory evidence proving that the appellant is not indebted to the 1st respondent to the tune of Kshs.146, 687,402.50 were given.

15. It is the appellant's submission that when the principal sum of Ksh. 146,687,402.50 was reversed by DPFB, the said DPFB failed to reverse interest computation in respect of the reversed sums; that the book interest continued to accrue between the issuance of the unpresented and uncashed bankers cheque in 1998 and the reversal in 1999 and to date.

16. The appellant contends that upon reversal of the sum of Kshs.146,687,402.50, a balance of Kshs.94,754,974/= remained outstanding; that this balance was paid by three direct payments made to Trust Bank Limited on 6th May 1999 vide (a) Cheque No. 807351 dated 6th May 1999 for Kshs.31,500,000/=; (b) Cheque No. 807352 dated 6th May 1999 for Ksh.32,500,000/=; and (c) Cheque No. 807353 dated 6th May 1999 for Kshs.32,500,000/=. The total of the three direct payments is Ksh. 96,500,000/=.

17. The appellant further submitted that the net effect of the transactions between the appellant, Trust Capital Services Limited and Trust Bank Limited as at 30th June 1999 is as follows:

> *"**(a) That out of the initial book balance of Kshs.241, 442,376/= (principal sum), Kshs.146, 687,402.50 had been reversed as they were bankers cheques which were not cleared.***
>
> ***(b) That having reversed a total of Kshs.146, 687,402.50 from the principal sum, book reconciliation should have been done to reverse any compounded interest and this was not done.***
>
> ***(c) That the remaining balance of Kshs.94, 754,974/= was covered by three direct payments of Kshs.96, 500,000/= made on 6th May 1999 and that Trust Capital Services Account had a surplus of Kshs.1, 745,025.65."***

18. Based on the foregoing transactions, the appellant submitted that the allegation that the appellant and or Trust Capital Services Limited owe Trust Bank the sum of Kshs.241,442,376/= is false; that the statement of interest computation produced by the 1st respondent before the trial court was false and inaccurate. It was submitted that the trial judge erred both in fact and law in determining whether the loss of the alleged sum of Ksh. 241,442,376/= had been correctly and sufficiently established; that the judge failed to find that the 1st respondent did not submit any rebuttal evidence to prove that the sum of Kshs.146,687,402.50 represented unpaid banker's cheques and that Kshs.96,500,000/= had directly been paid to Trust Bank Limited thereby clearing any and all indebtedness of Trust Capital Services Limited to Trust Bank Limited. Based on the foregoing submission, the appellant contends that the trial court erred in making a liability order under *Section 323* and *324* of the Companies Act . It is the appellant's case that there was no loss of Kshs.241,442,376/= and there was clear exculpatory evidence from the Statements produced by DPFB which evidence was not disputed and rebutted by the 1st respondent itself.

19. On the issue that the 1st respondent's claim was time barred, the appellant submitted that the alleged loss of Kshs.241,442,376/=, if at all, occurred in 1998 and DPFB had not instituted any proceedings against Trust Capital Services Limited; that the Scheme of Arrangement relied upon by DPFB expired on 31st December 2003; that when the Bank was put in liquidation in 2001, all relevant facts were clear and well known to the liquidator as there were clear records for the same; that the Statements put on record by DPFB were in existence and in the possession of the

liquidators since 2001; that the trial judge erred when he stated that "he was satisfied that the liquidation agent who was appointed in 2008 undertook his own investigations and discovered fraud between 2008 and 2010 and since the cause of action accrues from the time when fraud is discovered, the liquidator's suit was not time barred." It was submitted that the trial court did not consider the acknowledgment made by the liquidator that the information had always been available since 1998 and there is no evidence in the form of an investigation report to support the averment that investigations were done; that the learned judge erred in finding that a cause of action filed on 23rd March 2010, 12 years after the information was indisputably available, was correct.

20. The appellant contends that the limitation period for the action brought by DPFB is six years as provided in *Section 4 (1) (d)* of the Limitation of Actions Act ; that breach of the Banking Act provisions prohibiting unsecured facilities to related parties was already established as at 27th March 1999 and the six year limitation period ought to have lapsed in 2005; that the limitation period against the liquidator begins to run when the liquidator is appointed and this was in 2001; that DPFB all along had both the statements and the unpaid cheques; that DPFB did all reversals and that the information necessary to constitute and institute any cause of action was known and available to DPFB as at 17th January 2000.

21. The appellant further submitted that pursuant to *Section 26* of the Limitation of Actions Act , the limitation period starts to run when a party with reasonable diligence could have discovered fraud; that the learned judge erred and misdirected himself by failing to find that there was no evidence of any diligence done by the liquidator and that the information relating to account of Trust Capital Services Limited was available as early as 1999. Counsel submitted that the 1st respondent has neither given a specific date nor indicated when the alleged fraud by the appellant and 2nd respondent was discovered; that as at 2001, the matters and facts upon which the liquidator is placing reliance upon were in existence; that all material evidence has always been in the possession and custody of the 1st respondent and there was no issue of discovery of fraud in 2010.

22. The appellant submitted that the learned judge erred in finding that limitation period based on breach of trust was exempted from Statute of Limitation; that breach of trust is effectively a violation of the requirements of the Banking Act and the limitation for any recovery thereunder is clearly provided under *Section 4 (d)* of the Limitation of Actions Act ; that reliance on breach of trust, in the first instance, is precluded under *Section 20 (2)* of the Limitations of Actions Act which in any event provides for the six year limitation period; that the 1st respondent's claim is founded on non-compliance with the Banking Act and *Section 20 (1)* of the Limitations of Actions Act does not apply. The appellant concluded that the trial court erred in holding that the cause of action presented by the 1st respondents under *Sections 323* and *324* of the Companies Act was not time barred.

23. Another ground of appeal urged by the appellant is that the trial court erred in relying upon extraneous matters in arriving at its decision. The extraneous matters is that the trial judge based his analysis on the premise that the appellant stood in a trust relationship with the customers of Trust Bank Limited while the relationship that actually existed was a debtor/creditor relationship between Trust Bank Limited and its customers. The appellant cited the case of Foley -v- Hill (1948) 2 H.L. Cas 28; 9 ER 1002 in support of the proposition that a Bank-Customer relationship is one of debtor creditor.

24. A further extraneous matter allegedly relied upon by the trial judge is the Scheme of Arrangement. The trial court held that the appellant through the Scheme of Arrangement had admitted personal liability for the debt or misrepresented to the creditors that he was liable for the indebtedness of Trust Capital Services Limited. The appellant submitted that the trial judge did not address his mind to the legal principles applicable before a judgment can be entered based on admissions. The case of Cassam -v- Sachania (1982) KLR 191 was cited to support the submission that there can be no inferral of admission; that an admission must be unambiguous and that a court cannot infer

admission as a result of an interpretive exercise. It was submitted that the alleged admission of indebtedness in the Scheme of Arrangement was neither plain, unambiguous nor unequivocal; that the allegation that personal liability had been admitted was not true and that a scheme of arrangement is an alternative to immediate liquidation and is a rescue plan agreed with the hope of a return to solvency and once a company is placed into liquidation, the Scheme collapses. The appellant submitted that what was signified by the Scheme of Arrangement was that the sum of 246.442,376/= million was a result of an insider related transaction identifiable with the appellant; that the Scheme was a commitment by the directors to use their best endeavours to assist Trust Bank Limited recover sums due from related parties; that there was never an admission of personal liability.

25. The appellant averred that the trial court shifted the burden of proof by failing to ensure that the 1st respondent proved that the sum of Kshs.241,442,376/= was lost through wrongful conduct of the appellant; that there was no objective analysis of the evidence; that the liquidator did not meet the threshold of proof required to impose liability on directors under *Sections 323* and *324* of the Companies Act ; that in finding liability on the appellant, the trial court erred in failing to appreciate that no loss of Kshs.241,442,376/= had taken place and that evidence tendered by the 1st respondent confirmed that Trust Capital Services Limited no longer owed Trust Bank any money.

26. It was further submitted that the learned judge erred in failing to appreciate that the appellant's defence was not mere technicalities; the court erred in failing to appreciate that the defence disclosed exculpatory evidence; the court failed to appreciate that the DPFB's own statement was a satisfactory proof that exculpated the appellant from any liability; as it confirmed that Trust Capital Services Limited no longer owed Trust Bank any monies. As regards of liability, the trial court erred in failing to reconcile the Bank statements tendered in evidence by the 1st respondent and the reversal and direct payments made by Trust Capital Services Limited.

27. The appellant further submitted that the trial court erred in assessing damages and further erred in making the compensatory orders not prayed for by the 1st respondent Liquidator; that pre-judgment and compounded interest and the rate to be applied are substantive matters of fact and law that must be specifically pleaded and proved; that the trial court simply accepted assessment and computations as presented by the 1st respondent without undertaking any independent inquiry or evaluating the principles of law applicable to award of pre-judgment and compounded interest. The appellant submitted that *Section 52 (3)* of the Banking Act stipulates that no institution shall be permitted to recover in any court of law interest and other charges which exceed the maximum permitted under the provisions of the Banking Act or Central Bank of Act ; that *Section 35 (6) (b)* of the Banking Act stipulates that DPFB as a liquidation agent is only empowered to recover interest outstanding as at the date of liquidation i.e. 31st August 2001; that the appellant was compelled to pay interest accrued on the principal sum between 17th September 1998 and 28th February 2010 being a sum of Kshs.1,308,149,048/= which is approximately 542% of the principal sum. The appellant urged us to allow the appeal and set aside in entirety the Ruling of the trial court dated 30th May 2013.

2nd RESPONDENT'S SUBMISSIONS

28. Counsel for the 2nd respondent, supported the appeal and associated himself with submissions by the appellant. He stated that the 1st respondent's evidence before the trial court exonerated the appellant and 2nd respondent from any liability claim; that the banker's cheques giving rise to the alleged indebtedness were unpaid and not cashed and the entries in the Bank Statement were reversed to reflect this truism. It was submitted that the 1st respondent acknowledged that its case was not founded on the Scheme of Arrangement and it was not therefore open to the trial court to rely on the Scheme; that the 1st respondent never proved that the principal sum of Kshs.241,442,376/= was due and owing and consequently there was no legal basis for the trial

court to make compensatory orders or to find the appellant and 2nd respondent liable for any sums of money.

1st RESPONDENT'S SUBMISSIONS

29. The 1st respondent in opposing the appeal focused on whether the 1st respondent's claim against the appellant and 2nd respondent was time barred. He submitted that the appellant's grounds of appeal and submission were misconceived as the appellant had not appreciated the legal nature of proceedings commenced before the trial court by the 1st respondent.

30. Counsel submitted that the proceedings commenced before the trial court were special proceedings under *Sections 323* and *324* of the then Companies Act ; that proceedings under these Sections are statutory and peculiar; that the special nature of the proceedings are that they apply to companies that are being wound up; that time begins to run from the date of commencement of winding up and time lapses upon liquidation of the company; that the proceedings are confined to specific breaches discovered during the liquidation process and that a plain reading of the provisions show the phrase "If in the course of winding up a company it appears…." clearly demonstrates that time does not stop running until the liquidation process is finalized. Counsel submitted that the second feature of the proceedings is that they are investigative in nature and that the court's jurisdiction under *Section 324* is to examine the conduct of a promoter, director or manager to establish whether any of these persons committed breaches under the Section and to compel them to repay or restore the money with interest at such rate the Court thinks just. A further unique feature of the proceedings is that the suit lies against any person who was knowingly a party to the carrying on business of the company fraudulently or with intent to defraud creditors of the company.

31. Counsel cited the book *by L.C.B. Gower on Principles of Modern Company Law, 4 th ed. at pages 114 to 116* where in commenting on the UK *Section 332* which is similar to *Section 323* of the Kenya Companies Act , stated that the Section covers all liabilities, not merely debts and can be invoked against creditors or other participants as well as members; that the Section can only be invoked when the company is being wound up and the applicant has the burden of proving fraud. In relation to UK *Section 333* which is similar to *Section 324* of the Kenya Companies Act , L.C.B. Gower states that an application under the Section may be made by the liquidator against any person guilty of misfeasance or breach of trust in relation to the company and this covers breaches of fiduciary duties.

32. The 1st respondent submitted that the Notice of Motion filed before the trial court was proper and within the confines of *Section 323* and *324* of the Companies Act ; that it is not disputed that the appellant and 2nd respondent were Executive Directors of Trust Bank Limited; that the proceedings were brought against the two as persons who were knowingly party to the continuation of the business of Trust Bank Limited with intent to defraud its creditors or for fraudulent purposes and that all or substantial part of the sums of money that form the subject matter of the suit and appeal were disbursed and lost by the company in liquidation in a space of seven days from 9th September 1998 to 16th September 1998 which was within a week or days before the Bank was placed under statutory management and when the Bank was effectively insolvent; that the appellant has not addressed the issue of huge disbursements of moneys to their own company in a fictitious account and this is deemed to be acceptance of the breach.

33. On limitation period, it was submitted that the appellant erroneously equates the present proceedings as breach of the provisions of the Banking Act and that time begins to run from the date of appointment of the liquidator in 2001. The 1st respondent contended that such submission is misconceived; that the correct position is that the instant proceedings are under *Sections 323* and *324* of the Companies Act and the cause of action is breach of trust or misfeasance; that the provisions of the Banking Act in so far as relates to Trust Bank Limited lapsed when the Bank was placed under statutory management and the relevant and applicable law is the winding up

provisions of the Companies Act; that *Sections 323* and *324* can only be invoked when the company is being wound up and not before and that the liquidator is under statutory obligation to commence proceedings during the winding up process and time stops running at the end of liquidation.

34. On the issue of burden of proof, the 1st respondent submitted that the burden of proof under *Section 323* was to show that the Bank continued to trade while insolvent and that the appellant and 2nd respondent were responsible for this; that the 1st respondent discharged this burden; that the burden upon the liquidator was to show that the appellant and 2nd respondent misapplied the company's money and committed breaches of their fiduciary duties and that the 1st respondent discharged this burden and demonstrated that the appellant led the Bank to incur debts which it could not repay.

35. The 1st respondent reiterated that the appellant and 2nd respondents as bank officers were under a primary duty to protect the deposits of the customers of the Bank.

36. Replying to the submission that the trial court erred in relying on the Scheme of Arrangement, the 1st respondent noted that the Scheme of Arrangement was adopted and sanctioned by the High Court as part of its order to lift the receivership; that the Scheme is dated 26th May 1999; that the appellant actively participated in the preparation of the Scheme, that, the appellant confirmed that Trust Bank Limited was owed a sum of Kshs.241,442,376/= in the account of Trust Capital Services Limited and this is the same amount that forms the subject matter of the suit. Counsel further submitted that the appellant admitted that the Bank had lost Kshs.246.442,376/= through the account of Trust Capital Services Limited; and that the appellant had failed to pay any of the moneys owed to the Bank by Trust Capital Services Limited.

37. On the issue of interest rate, the 1st respondent submitted that *Section 52 (3)* of the Banking Act is aimed at protecting legitimate borrowers and not fraudsters like the appellant; that the appellant fraudulently misrepresented during the Scheme of Arrangement that monies owed by Trust Capital Services Limited was clean and unsecured loan yet in truth it was a fraudulent siphoning out of money from the Bank through a fictitious account. On compound interest, the 1st respondent submitted that it would be unconscionable to deny the creditors of the Bank compound interest because while the appellant was in charge and in control of the Bank, he charged compound interest on the said sum; that the value of the sum of Kshs.241,442,376,00 in 1998 cannot be the same today and the interest rate of 15% is moderate considering the breach or crime committed by the appellant; that the sum awarded by the court of Ksh. 1,549,541,424/= based on 15% interest hardly amounts to adequate compensation to creditors who have waited for justice and compensation from the appellant and 2nd respondents for the last 18 years. Counsel for the 1st respondent urged us to dismiss the appeal with costs.

ANALYSIS AND RE-EVALUATION OF EVIDENCE ON RECORD

38. We have considered the rival submissions by counsel and examined the record of appeal. As this is a first appeal, it is our duty to analyze and re-assess the evidence on record and reach our own conclusions in the matter. (See Selle -vs- Associated Motor Boat Co . [1968] EA 123; Jabane -vs- Olenja, [1986] KLR 661, 664; Ephantus Mwangi -vs- Duncan Mwangi Wambugu (1982-88) 1 KAR 278 and Mwanasokoni vs. Kenya Bus Services (1982-88) 1 KAR 870).

39. There are various critical issues in this appeal. The first is on limitation of actions i.e. whether the 1st respondent's claim is statute barred under the provisions of Limitations of Actions Act. The second is whether the trial court properly evaluated the evidence on the issue of liability of the appellant and 2nd respondent; a third critical issue is whether the sum of Kshs.241, 442,375.80 was lost by Trust Bank Limited on account of Trust Capital Services Limited. The answer to this question is dependent on our re-evaluation of the evidence to determine if the said sum of

Kshs.241, 442,375.80 or part thereof was never encashed and the balance if any, paid to the 1st respondent thereby extinguishing liability of Trust Capital Services Limited and the appellant (as well as 2nd respondent) to Trust Bank Limited. The fourth issue is whether interest is due and owing on cheques that were unpaid, un-cleared and not honoured by Trust Bank Limited and finally whether compound interest is due and payable on and for any sums of money found due and owing.

40. On Our consideration and determination of the issue of limitation period is dependent upon our determination of the question whether the appellant and 2nd respondent had a trust or fiduciary relationship with Trust Bank Limited. The appellant submitted that the trial judge erred in failing to appreciate that the appellant and 2nd respondent were not trustees of the customers or depositors of Trust Bank Limited. It is the appellant's submission that the relationship between a bank and its customers is a debtor creditor relationship. In support of this submission, the appellant cited the case of Foley -v- Hill (1948) 2 HL. Ca 28; 9 ER 1002. The trial court at paragraph 25 of the judgment expressed that "what is clear to me however, is that at all material times relevant to this action, the respondents stood in a trust relationship to the customers of Trust Bank Limited and they were obligated at all times to discharge their duties diligently, transparently and non-fraudulently."

41. We have considered the appellant's submission and entirely agree that the relationship between a bank and its customer is a debtor/creditor relationship. In our view, the trial court erred in not appreciating the nature of the claim lodged by the 1st respondent against the appellant and 2nd respondent under *Sections 323 and 324 of the Companies Act.* The claim is not based on a duty owed by the respondents to the customers of Trust Bank. The 1st respondent's claim is not founded on bank customer relationship; the 1st respondent's suit and claim is premised upon the duty that a director owes to a company. The appellant and 2nd respondents were directors of Trust Bank Limited. It is the 1st respondent's claim that the appellant and 2nd respondent in their capacity as directors of Trust Bank Limited were guilty of misfeasance and breach of trust. The legal issue is the nature of duty that the appellant and 2nd respondent in their capacity as directors owed Trust Bank Limited as a company. The relevant legal question is whether the directors of a company owe any duty to the company and the nature of that duty.

42. In ***Gower's Principles of Modern Company Law, 4 th ed. at page 571*** it is stated:

"…To describe directors as trustees seems today to be neither strictly correct nor invariably helpful. (See City Equitable Fire Insurance Co. (1925) Ch 407 per Romer J. at p.426). In truth, directors are agents of the company rather than trustees of it or its property. But as agents, they stand in a fiduciary relationship to their principal, the company. The duty of good faith which this fiduciary relationship imposes are virtually identical with those imposed on trustees and to this extent, the description "trustee" still has validity. The duties of directors can conveniently be discussed under two heads: (a) fiduciary duties of loyalty and good faith (analogous to the duties of trustee's stricto sensu) and (b) duties of care and skill." (See "Fiduciary Relationships" (1962) C.L.J. 69 and 91963) C.L.J. 119 and "The Director as Trustee" (1967) C.L.J. 83).

43. In *Re Forest of Dean Coal Co. (1879) 10 Ch D 450* , it was observed that since directors are regarded as trustees of company property that has or should have come under their control, the property may be recovered *in rem* from them and from third parties who are not innocent purchasers for value, in so far as it is traceable. In Re Land Allotment CO. [1894] 1 Ch. 616 and in Belmont Finance Corporation -v- Williams Furniture Limited (No. 2) [1890] 1 All E.R , it was held that trustee includes company directors. In Liquidator of West Mercia Safetywear Ltd v Dodd (1988) 4 BCC 30, re Bilta (UK) Ltd [2013] 2 WLR 825, it was held that in situations where the company is an insolvent company, the directors owe a duty to the shareholders and creditors of the company. In Colin Gwyer Marcia Shekerdemian June 2013 & Associates Ltd v London Wharf (Limehouse) Ltd [2003] 2 BCLC 153, Mr. Leslie Kosmin QC (sitting as a Deputy High Court

Judge) put the position as follows (at paragraph 74): 'Where a company is insolvent or of doubtful solvency or on the verge of insolvency and it is the creditors' money which is at risk, the directors when carrying out their duty to the company, must consider the interests of the creditors as paramount and take those into account when exercising their discretion."

44. In *Jetivia* S.A. & Anor v Bilta (UK) Limited (in liq) & Ors [2015] UKSC 23; the UK Supreme Court held that where the directors of a company committed a fraud which caused the company loss, the directors were liable. In dealing with the concept of separate legal identity between a company and directors, the UK Supreme Court observed that there are cases where the minds of the company is not the mind of the directors; "that where a company is making a claim against its directors, the situation is different. Directors owe certain duties to the companies which they serve and in the context of those duties, the acts, knowledge and state of mind of a company must be considered separate from those of its directors. The duties exist for the protection of a company against its directors, so in this context the conduct of the directors must be separated from that of the company."

45. Guided by the persuasive dicta in *Re Forest (supra*) and the authoritative rendition in Gower's Principles of Modern Company Law quoted above as well as guided by the persuasive dicta *In Liquidator of West Mercia Safetywear Ltd (supra)* and *In Colin Gwyer Marcia Shekerdemian (supra),* we are of the considered view that the submission by the appellant that he was not a trustee and did not owe fiduciary duty to Trust Bank Limited has no merit. The issue in this appeal and before the trial court does not involve bank customer relationship but the duty that a director owes to the company. In this context, the case of *Foley (supra) c* ited by the appellant is not relevant to the facts of this case.

46. We find that the appellant and 2nd respondent as directors of Trust Bank Limited were agents of the Bank and owed the bank fiduciary duties of loyalty and good faith (analogous to the duties of trustees *stricto sensu)* and also owed the duty of care and skill in discharge of their duty as directors of the Bank.

47. We now turn to the issue of limitation period. It is the appellant's contention that the limitation had lapsed when the 1st respondent instituted the suit at the trial. In considering the issue of limitation, two fundamental questions must be addressed. First, when a company goes into liquidation, does limitation period begin to run from the date of appointment of the liquidator or does time begin to run from the date of commencement of the winding up? Does time end or lapse upon liquidation of the company. Second, what is the nature of proceedings under Section 323 and 324 of the Companies Act?

48. In the case of Re Lands Allotment Co. (1894) 1 Ch 616 and in Tintin Exploration Syndicate -v- Sandys (1947) 177 L.t.412 , it was held that in claims based upon breaches of their fiduciary duties , directors are equated with trustees as regards limitation of actions and hence claims against them will be barred after six years but no period of limitation applies if there is fraud or if the action is to recover the company's property in the director's possession or a property previously converted to his use.

49. The 1st respondent's claim against the appellant and 2nd respondent is founded on *Sections 323* and *324* of the Companies Act . These sections are activated once liquidation of a company has begun whatever the type of winding up. The Sections are aimed at past breaches of duty owed to the company. The Section covers breaches of fiduciary duties. (*See Re. B. Johnson & Co. (Builders) Ltd. (1955) Ch. 634 C.A.*

50. While urging his appeal, the appellant urged this Court to note that a company is a separate and distinct entity from its directors. While this is legally true, the distinct personality between directors and the company does not apply to a liquidator enforcing the statutory provisions of *Section 323* and *324* of the Companies Act . The Rule in Foss -v- Harbottle (1843) 2 Hare 46 requires the company itself to be the plaintiff in any action commenced for the benefit of the

company and for breach of duty owed to the company. However, a liquidator enforcing Sections 323 and 324 is not handicapped by the rule in *Foss (supra)* and the court may compel the miscreant directors to repay or restore any money misapplied or to pay compensation. *(See Gower's Principles of Modern Company Law, 4 th ed. at page 657).* We find the appellant's submission that the directors are distinct and separate from the company lacking in merit when the action is founded on Section 323 or 324 of the Companies Act. We derive comfort from the dicta in the case of Official Liquidator vs. T.J. Swamy and others - 1992 (73) CompCas 583 in which the Andhra Pradesh High Court held that misfeasance proceedings are proceedings initiated by the official liquidator on behalf of the company (in liquidation). In the Bombay High Court case of Gleitlargor (India) P. Ltd. and H.S. Kamlani, Official Liquidator vs. Mazagaon Dock Ltd. and others - 1985 (57) CompCas 742, it was held that the proceedings initiated by the liquidator for recovery cannot but be on behalf of the company and that the Companies Act does not contemplate his acting in the matter of recoveries excepting as liquidator and excepting on behalf of the company.

51. A critical legal issue in this appeal is whether the 1st respondent's suit is statute barred and from which date should computation of time be made. It is not disputed that the limitation period is six years under *Section 4 (1) (d)* and *(e)* of the Limitation of Actions Act . It is also not in dispute that pursuant to *Section 26* of the Limitation of Action Act , time begins to run when fraud is discovered; it is also not in dispute that the liquidator's right to bring action in his own name commences when a company is placed in liquidation and in the instant case, Trust Bank Limited was placed in liquidation in August 2001.

52. *Sections 4 (1) (d)* and *(e)* and *26* of the Limitation of Actions Act are relevant to this appeal. *Section 4 (1)* provides:

"The following actions may not be brought after the end of six years from the date on which the cause of action accrued:

a. ……

b. ……

c. ……

d. actions to recover a sum recoverable by virtue of a written law, other than a penalty or forfeiture or sum by way of penalty or forfeiture;

e. actions, including actions claiming equitable relief, for which no other period of limitation is provided by this Act or by any other written law."

Section 26 provides:

"Where, in the case of an action for which a period of limitation is prescribed, either:

a. the action is based upon the fraud of the defendant or his agent, or of any person through whom he claims or his agent or

b. the right of action is concealed by the fraud of any such person as aforesaid or

c. the action is for relief from the consequences of a mistake, the period of limitation does not begin to run until the plaintiff has discovered the fraud or the mistake or could with reasonable diligence have discovered it."

53. Having reproduced the relevant Sections of the Limitation of Actions Act , what is the case law on limitation of actions against a liquidator bringing a claim under Sections 323 and 324 of the Companies Act against directors of a company in liquidation?

54. The 1st respondent cited the case of Masonic and General Life Assurance Co. Limited -v- Sharpe [1892] Ch.d.154 in support of its submission that the Statute of Limitations does not apply where there is breach of fiduciary duty or recovery of trust property. The following dicta from the case was cited

> *"Now a director of a company is certainly not a mere agent. It is his duty, amongst other things, to protect the company and to enforce its rights even against himself and the conflict between his interest and his duty when he has misapplied the company's money prevents the statute of limitations from applying to an action brought against him by the company in order to recover such money."*

55. The appellant in converse contends that *Section 4 (d)* of the Statute of Limitations Act applies in cases involving breach of fiduciary or trustees duty.

The UK case of Eurocruit Europe Limited (In Liquidation) [2007] EWHC 1433 (Ch) was cited. The case is in *pari materia* to the legal issue in this appeal.

In the UK case, the liquidator had brought action against a director of a company in liquidation seeking compensation for loss suffered by the company when he was director. The suit was founded on breach of director's fiduciary duty to the company, misfeasance, and lack of care and skill in discharge of director's duty.

The case was premised on a provision similar to *Section 323* and *324* of the Kenya Companies Act . In the UK case, arguments analogous to the 1st respondent's submissions in the present case were made as follows:

> ***"a. That the limitation period for cause of action against a director of a company arises and commences from the date of appointment of the liquidator.***
>
> ***b. That the period of limitation does not lapse so long as the company is under liquidation.***
>
> ***c. The meaning of the phrase "When in the course of winding up…" was considered.***
>
> ***d. Whether the cause of action by liquidator is independent of the cause of action by the company in liquidation thereby attracting a different date for commencement of the limitation period.***
>
> ***e.Whether the suit as filed by the UK liquidator was time barred."***

56. To appreciate the UK's court decision in *Eurocruit Europe Limited (In Liquidation) [2007] EWHC 1433 (Ch),* it is necessary to give the facts of the case which are as follows:

The proceedings relate to the affairs of Eurocruit Europe Limited (In liquidation). The company ceased trading on 21st September 1999 and went into liquidation on 12th October 1999. Mr. Kevin Goldfarb was appointed liquidator on the same day. The only director of the company was Mr. Richard Poppleton. The debts of the company totaled UK Pounds 326,601/= and its assets UK Pounds 22,982/=.

The liquidator brought action against the director for breach of fiduciary duty and the duty of care and skill. The suit was filed on 10th October 2005 and the respondent director pleaded limitation of actions. The liquidator claimed against the director the sum of UK Pounds 303,719/= which is the

exact difference and deficiency between the assets and liabilities of the company. The liquidator in his pleadings stated that the breaches of duty of care and skill continued from January 1999 until the company ceased to exist.

57. The UK Court in addressing the issue of limitation of actions and the powers of the liquidator made the following findings:

> "a. *In a claim by a liquidator proceeding under Section 212 (equivalent to Kenya's Section 323 of the Companies Act) the commencement of liquidation and appointment of the liquidator is the event that confers a right to commence action under the section. Unless and until the company goes into liquidation, there is no scope for the application of the Section and no opportunity for the liquidator to pursue a remedy under the Section.*
>
> *b. The decision in Re Lands Allotment Company (1894) 1 Ch 616 shows that the limitation period against the liquidator starts to run not from the date of appointment of the liquidator but from the date the cause of action arose in favour of the company in liquidation. In Re Lands case , proceedings were brought by the liquidator of a company to compel directors to restore to the company money that they had wrongly invested in March 1885, which was eight years before the proceedings were brought in August 1893. The company had been placed in liquidation in January 1893. Both Wright J. and in the Court of Appeal, it was held that the claim in relation to the March 1885 investment was barred by limitation. (Note: the action was brought under a provision similar to Section 323 of the Kenya Companies Act).*
>
> *c. In Re Farmizer (Products) Limited [1997] 1 BCLC 589 , the effect of the phrase "…if in the course of winding up of a company it appears…." was considered. It was held that the phrase does not mean that limitation period is not applicable to a claim founded on the section; that the phrase "in the course of winding up" does not exclude the Statute of Limitation.*
>
> *d. That there is only a single cause of action, that of the company that can either be brought by the company itself prior to liquidation or by the liquidator; that all that Section 212 does (equivalent to Section 323) is to give the liquidator, if he wishes, the right to bring the claim in his own name. It would be extra-ordinary, therefore, if finding that a claim brought by the company in liquidation against a defaulting director had been successfully non-suited on limitation grounds, the company liquidator could, in effect, ignore that result and advance the self-same claim again but, in his own name, shorn of any risk of a successful limitation defence merely because the claim was brought within six years of commencement of the liquidation."*

58. Applying the foregoing principles, the UK court in Eurocruit Europe Limited (In Liquidation) [2007] EWHC 1433 (Ch), held that the liquidator's claim against the director was statute barred having been brought more than six years from 1999 when the cause of action arose in favour of the company. It was held that the cause of action accrued on the date of the breaches, not when the company went into liquidation. The court held that the nature of a claim in *Section 212* (which is similar to a claim in the Kenyan *Section 323* of the Companies Act) was merely procedural in nature providing alternative means for a company to obtain recompense from a director in breach of his duties. It was held that in substance, in a claim under *Section 212* (equivalent to Kenya's *Section 323* of the Companies Act) the claimant remained the company whether the claim was brought by the company or the liquidator. A claim under the Section did not have a limitation period distinct from that applicable to the underlying claim. If the underlying claim brought by the company was statute barred, as it was here, the same claim but brought by the liquidator would also be statute barred. (See contra UK case of Williams -v- Central Bank of Nigeria [2014] UKSC 10).

59. In the English Companies Act of 1862 proceedings for misfeasance or breach of trust could be instituted, against a director under the then *Section 165* of the UK Companies Act which is

equivalent to *Section 323* of the Kenya Companies Act. Lord Macnaghten in *Cavendish Bentinck v. Thomas Fenn, [1887] 12 App. Cas. 652, 669 (H.L.)* expressed that:

- *The 165th section of the Act of 1862 has often come under discussion, and it has been settled, and I think rightly settled, that that section creates no new offence, and that it gives no new rights, but only provides a summary and efficient remedy in respect of rights which apart from that section might have been vindicated either at law or in equity. It has also been settled that the misfeasance spoken of in that section is not misfeasance in the abstract, but misfeasance in the nature of a breach of trust resulting in a loss to the company . . . . "*

60. Guided by dicta as expressed by Lord Macnaghten, we are of the view that Sections 323 and 324 of the Kenya Companies Act neither create a new cause of action nor create new rights, but only provide a summary and efficient remedy in respect of rights that existed and accrued to a company prior to it being placed in liquidation.

61. In the instant appeal, the 1st respondent urged that the limitation period under *Section 4 (d)* of the Limitations Act did not begin to run because the appellant had concealed his fraudulent activities. The decision of the UK Court of Appeal in Metropolitan Bank v Heiron *(*1880) 5 LR Ex D 319 (not disapproved in this respect in Attorney-General for Hong Kong v Reid *[1994] 1 AC 324)* is an example of the application of the doctrine of fraudulent concealment. The company and its liquidator sought to recover a bribe paid to a director of the bank in return for his assistance in procuring the settlement of a claim of the bank against a third party. The bank's claim was founded on the fraudulent breach of fiduciary duty of its director, who relied on the six year limitation for an action in debt. The bank argued that as its claim was based on a breach of trust, the statute was no bar. The court did not adopt that characterization of the bank's claim but accepted that it was one involving "an equitable debt" (per James LJ at 323) or as founded on a fraud or breach of duty (per Brett LJ at 324 and Cotton LJ at 325). James LJ said of that claim:

"… Courts of Equity have always followed by analogy the provisions of the Statute of Limitations, in cases in which there is the same reason for making the length of time a bar as in the case of ordinary legal demands. In the case of a bribe received, or other profit made by a person in a fiduciary position, there is no doubt that the cestui que trust who is wronged is not barred by any length of time, so long as that wrong is concealed from him by the wrongdoer. *But when the cestui que trust knows of the fact, or knows that the fact is charged, and investigates the case, it is for him to make up his mind whether he will bring proceedings, just as any other creditor has to make up his mind whether he will issue a writ or not, …" As the director's fraud was communicated to a properly constituted meeting of directors of the company more than six years before the action was instituted, the claim was treated as barred on the basis that, applying the statute by analogy, time commenced to run from when that communication to the company occurred.*

62. The India Supreme Court in Ajay G. Podar -v- Official Liquidator of J.S. & W.M. & Ors, Civil Appeal No. 4597 of 2008 held that there is a clear dichotomy between the concept of the "period of limitation" on one hand and the concept of "computation of that period. The period of limitation is required to be computed in accordance with the provisions of the Limitation of Actions Act. The Court noted that the Limitation of Actions Act not only prescribes the period of limitation for different types of suits and applications but also provides for computation. If any period of limitation is to be excluded from the prescribed period of limitation the party has to satisfy the appropriate provisions in the Act. The law of limitation is a procedural law. It is addressed at the commencement of a proceeding. The dichotomy as identified by the Indian Supreme Court applies in the Kenya Limitation of Actions Act, period of limitation is distinct from computation of that period.

63. In our view, in the instant appeal, there is no merit in the contention advanced on behalf of the 1st respondent that by virtue of *Section 323* and *324* of the Companies Act , the period of limitation of does not run simply because a company is under liquidation. It is also not correct to state that time begins to run from the date of appointment of the liquidator or from the date of commencement of

the winding up. Commencement of the winding up only gives the liquidator the legal capacity to institute proceedings in his own name. Commencement of liquidation neither extends nor revives any limitation period; it does not exclude the duration of winding up from computation of the limitation period. Part III of the Kenya Limitation of Actions Act excludes certain circumstances mentioned in *Sections 22* to *30* for computation of the period of limitation. However, *Section 31* explicitly provides that where a period of limitation is prescribed for any action by any other written law, that written law shall be construed as if Part III of the Act were incorporated in it. From the provisions of Section 31, it is clear that the Limitation of Actions Act is incorporated into the provisions of the Companies Act.

64. There are persuasive dicta from the UK cases that are relevant to this appeal. The dicta in Masonic and General Life Assurance Co. Limited -v- Sharpe [1892] Ch.d.154 and in Eurocruit Europe Limited (In Liquidation) [2007] EWHC 1433 (Ch) and The Metropolitan Bank v Heiron (1880) 5 LR Ex D 319 are very pertinent. The Limitations of Actions Act does not state that it is inapplicable to a trustee; the Act does not state it does not apply to a company in liquidation;

> *Section 2 (5)* of the Act envisages application of the Limitation of Action Act even to a company that has been dissolved. *Section 4 (a)* of the Limitation of Action Act envisage its application to actions for account. Numerous cases abound where the limitation period has been held to apply in a suit against trustees or liquidators. The inescapable conclusion is that the Limitation Act applies to actions against trustees or directors of a company. In Re Palmier plc (in liquidation) [2009] EWHC 983 (Ch), the Court held that a claim against a director under *Section 212* (equivalent to *Section 323*) was valid, but for the preference not being made at a 'relevant time' making the preference claim effectively time-barred.

65. Applying the persuasive UK case law to the facts of this case, in our view, the cause of action in favour of Trust Bank Limited against the appellant and 2nd respondent arose at the earliest on 16th September 1998 when the account of Trust Capital Services Limited was overdrawn to the tune of Kshs.241,442,375.80. At the latest, the cause of action arose when the 1st respondent became liquidator of Trust Bank Limited on 31st August 2001. Guided by the principle enunciated in *Re Lands Allotment Company (1894) 1 Ch 616* that the limitation period against the liquidator starts to run not from the date of appointment of the liquidator but from the date the cause of action arose in favour of the company in liquidation and further guided by dicta in *Re Farmizer (Products) Limited [1997] 1 BCLC 589* , to the effect of the phrase "if in the course of winding up of a company it appears " does not mean that limitation period is not applicable to a claim founded on Section 323 and that the phrase in the course of winding up does not exclude the Statute of Limitation; we are of the considered view that the cause of action by the 1st respondent against the appellant and 2nd respondent is time barred since it was commenced more that six years from when the cause of action arose on 16th September 1998.

66. The 1st respondent urged us to find that even if the claim was brought after six years, the limitation period was extended because the alleged fraud by the appellant was concealed and was only discovered after the liquidator conducted investigations between 2008 and 2010. We have considered this submission and we cite the decision in Eurocruit Europe Limited (In Liquidation) [2007] EWHC 1433 (Ch) where a similar submission was rejected. It is trite that the cause of action that a liquidator commences under Section 323 or 324 of the Companies Act is a cause of action that inheres in the company. The cause of action does not change because a liquidator has been appointed. It is only the administration of the Bank which changes. At the commencement of the proceedings, it must then be determined whether the cause of action brought by the liquidator was alive at the time the suit is filed. The 1st respondent submitted that the concealed fraud was discovered when the liquidator was preparing for trial in Nairobi HCCC No. 1243 of 2001 when it emerged that the debt was in fact not a loan transaction but a fraud practiced on the Bank by the appellant and 2nd respondent. We have considered this submission and re-evaluated the same against the evidence on record. It is not indicated when the liquidator was preparing for trial to enable an exact date to be ascertained for computation of the limitation period. There must be a

definite date from which to start computation of the limitation period. A party who alleges a specific date or event must give that specific date or event for purpose of computation of the limitation period. The date from which computation of the limitation period is to start cannot be a date in flux and fluidity; it cannot be an open ended date in continuum. The 1st respondent failed to give a specific date or event from which to start computation; we accordingly find that no evidence exists on record to extend the limitation period to a date upon which the alleged fraud was discovered. In the absence of such evidence, it is our considered view that ordinary rules of computation apply and time begins to run when the contractual cause of action or breach of fiduciary duty arose.

67. A further ground urged in this appeal is that the trial court relied on extraneous matters *to wit* the Scheme of Arrangement. The 1st respondent rebutted that its cause of action was not premised on the Scheme of Arrangement but on *Section 323* and *324* of the then Companies Act . The trial court at paragraph 24 of the judgment expressed that "the appellant and 2nd respondent were party to the Scheme of Arrangement and they provided information that was used in drawing up the Scheme and acknowledged the accuracy of the information contained therein and their liability to the Bank." The 1st respondent submitted that the Scheme of Arrangement contained an admission on the part of the appellant and 2nd respondent that they owed Trust Bank the sum of Kshs.241, 442,376.80.

68. At page 336 of the Record, relevant excerpts from Appendix 11 (d) of the Scheme of Arrangement are reproduced hereunder.

Name of Account	Balance as at 25th May 1999
Trust Capital Services	Ksh. Million 246.4

69. At the foot of appendix 11 (d) the following relevant statements signed by the appellant and 2nd respondent appear: "*The above loans, which are unsecured, have been granted to related parties of the existing directors. The existing directors have agreed to use their best endeavours and assist the Bank in the full recovery of these loans.*"

70. Based on the above statement in appendix 11 (d), the submission by the 1st respondent, is that the appellant admitted owing the sum of Kshs.241,442,376/= million to Trust Bank; that the information contained in the Scheme as depicted in appendix II (d) is to be taken and presumed as accurate. We have considered the 1st respondent's submission on the accuracy of the statement in the Scheme of Arrangement particularly appendix 11 (d). The information in appendix 11 (d) was proved inaccurate by the 1st respondent when it reversed the debit entries of Kshs.146, 687,402/50 made on diverse dates between 9th October 1998 and 30th June 1999 in relation to the account of Trust Capital Services Limited; the three direct credit payments into the account of Trust Capital Services Limited held in Trust Bank in the sum of Kshs.96,500,000/= further disapprove the accuracy of the information contained in the Scheme of Arrangement and appendix 11 (d) thereof. The 1st respondent disproves the accuracy of the information in the Scheme. From it, it is manifest that the information contained in the Scheme of Arrangement is not factual. The purpose of a Scheme of Arrangement is to reconstruct a company while protecting the interest of creditors and shareholders. In the instant case, when one considers that the Scheme in light of the history of the Bank subsequently being placed in liquidation, little confidence can be derived from the contents of the Scheme of Arrangement and consequently we are of the view that the Scheme of Arrangement as approved for Trust Bank Limited carries little or no weight in establishing liability of the appellant and 2nd respondent. We are comforted in so holding as we note the 1st

respondent's submission that its claim is not founded on the Scheme of Arrangement. It is our understanding that the 1st respondent asserts that liability of the appellant and 2nd respondent is not founded on the Scheme of Arrangement. Accordingly, we attach no weight to the Scheme of Arrangement.

71. The next issue for our consideration is the liability of the appellant and 2nd respondent to Trust Bank Limited and by extension their liability to the 1st respondent. The appellant's liability is dependent on the liability of Trust Capital Services Limited to Trust Bank Limited. Both the appellant and 1st respondent concede that the basis of claim against the appellant and 2nd respondent is the principal sum of Kshs.241, 442,375.80 allegedly owed and overdrawn in the account of Trust Capital Services Limited held at Trust Bank Limited as at 17th September 1998. It is not disputed that in the Scheme of Arrangement, this sum is part of the amount reflected as having been disbursed to Trust Capital Services Limited as at 17th September 1998.

72. The 1st respondent contends that the sum of Kshs.241,442,375.80 has not been repaid to Trust Bank Limited by Trust Capital Services Limited which is a company related to the appellant and 2nd respondent. It is the 1st respondent's submission that this sum was lost and the appellant and 2nd respondent having been directors of Trust Bank Limited are personally liable under *Sections 323* and *324* of the Companies Act to make good the loss and compensate Trust Bank Limited. The 1st respondent cites two grounds upon which the liability of the appellant and 2nd respondent arises. The first is admission by the appellant and 2nd respondent in the Scheme of Arrangement and second is the judgment of the High Court in Civil Case No. 1243 of 2001 (Trust Bank Limited -v- Ajay Shah & Others).

73. The appellant and 2nd respondent on their part submitted that the sum of Kshs.241, 442,375.80 was not lost by Trust Bank Limited. Two reasons are advanced for this submission: first that the said sum arises from 24 banker's cheques which were issued by Trust Bank Limited in favour of Trust Capital Services Limited; that the 24 banker's cheques were never honoured by Trust Bank with the consequence that money was never lost by the Bank; that the 1st respondent's presented before the trial court confirms and corroborates that the 24 cheques were never paid. The appellant has itemized the 24 cheques that were never honoured as follows

	Bankers Cheque No.	Amount	Date of Reversal	Where it appears in Annexture "DM3"
1.	809165	3,000,000/=	9/10/1998	Vol.1 Pg.61 (A)
2.	809264	715,406/65	9/10/1998	Vol.1 Pg.61 (A)
3.	83298	25,000,000/=	28/10/1998	Vol.1 Pg.61 (A)
4.	TT	1,000,000/=	31/12/1998	Vol.1 pg.61 (A)
5.	809193	1,300,000/=	17/2/1999	Vol.1 Pg.61 (A)
6.	809293	9,150,000/=	17/2/1999	Vol.1 Pg.60 (B)
7.	809229	6,100,000/=	17/2/1999	Vol.1 Pg.60 (B)
8.	809233	625,952/=	17/2/1999	Vol.1 Pg.60 (B)
9.	809234	570,000/=	17/2/1999	Vol.1 Pg.60 (B)

10.	809240	1,500,000/=	17/2/1999	Vol.1 Pg.61 (A)
11.	809242	437,835/=	17/2/1999	Vol.1 Pg.60 (B)
12.	809263	500.000/=	17/2/1999	Vol. 1 Pg. 60 (B)
13.	809280	5,000,000/=	17/2/1999	Vol.1 Pg.60 (B)
14.	809282	3,000,000/=	17/2/1999	Vol.1 Pg.60 (B)
15.	809200	3,273,063/45	8/6/1999	Vol.1 Pg.60
16.	809201	1,216,307/=	8/6/1999	Vol.1 Pg.59 (A)
17.	809230	2,500,000/=	8/6/1999	Vol.1 Pg.59 (A)
18.	809239	1,338,886/40	8/6/1999	Vol.1 Pg.59 (A)
19.	809244	3,172,169/35	8/6/1999	Vol.1 Pg.59 (A)
20.	809261	2,500,000/=	8/6/1999	Vol.1 Pg.59 (A)
21.	809262	3,900,000/=	8/6/1999	Vol.1 Pg.59 (A)
22.	809274	23,629,261/20	30/6/1999	Vol.1 Pg.59 (A)
23.	809275	23,629,251/20	30/6/1999	Vol.1 Pg.59 (A)
24.	809277	23,629,261.20/=	30/6/1999	Vol.1 Pg.59 (A)
	TOTAL	**146,687,402/45**		

74. The appellant and 2nd respondent further submitted that the total value of banker's cheques that were un-cleared and unpaid was Kshs.146,687,402.45; that in addition to the un-cleared cheques, a further three direct credits totaling Ksh. 96,500,000/= was paid to Trust Bank Limited into the account of Trust Capital Services Limited on 6th May 1999. The itemized direct credits payments

are given as follows:

Bankers Cheque No.	**Amount (Ksh)**	**Date Paid**	**Where it appears in annexture "DM3"**
807351	31,500,000/=	6 May 1999	Vol. 1 pg. 60 & 60B
807352	32,500,000/=	6 May 1999	Vol. 1 pg. 60 & 60B
807353	32,500,000/=	6 May 1999	Vol. 1 pg. 60 & 60B
TOTAL	**96,500,000/=**		

75. We recall that Trust Bank Limited is in liquidation; it is plain that when a Bank is under liquidation, the customer's account is not open for further transaction by the customer. He can neither deposit nor withdraw from that account. However, if the account is in debit or overdrawn, the customer can pay money to the liquidator to clear his debt or reduce the indebtedness. In the instant case, the direct credit payments of Ksh. 96,500,000/= was meant to reduce the indebtedness of Trust Capital Services Limited to Trust Bank Limited.

76. It is the appellant's and 2nd respondent's submission that after the liquidator was appointed, the net effect of the liquidator's credit reversals and direct payments by Trust Capital Services Limited to Trust Bank was to extinguish the indebtedness of Trust Capital Service Limited to Trust Bank Limited; that Trust Capital Services Limited never received Ksh. 146,687,402.45 from Trust Bank Limited and the said sum of Ksh. 146,687,402.45 was neither lost nor stolen from Trust Bank Limited; that a direct payment of Ksh. 96,500,000/= was paid into Trust Bank by Trust Capital Services Limited bringing the total credited sum as Ksh. 243,187,402.45.

77. It is the appellant's and 2nd respondent's submission that a total of Ksh. 243,187,402.45 was reversed or credited into the account of Trust Capital Services Limited, and this sum being greater than Kshs.241,442,375.80 claimed by the 1st respondent, the liability of Trust Capital Services Limited to Trust Bank Limited was extinguished; that there is no money due and owing from Trust Capital Services Limited to Trust Bank Limited; that consequently, the appellant and 2nd respondent do not owe any money to Trust Bank or the liquidator on account of Trust Capital Services Limited.

78. We have perused the record of appeal and submissions by the 1st respondent. We have also examined and analyzed the trial court's judgment. The question in our mind is how did the trial court and the 1st respondent address the issue that Trust Capital Services Limited had paid all monies due and owing to Trust Bank Limited; how did the trial court consider the issue of reversal of the un-cleared and unpaid 24 banker's cheques and the three direct credits paid into Trust Capital Services Limited account held at Trust Bank Limited?

79. The 1st respondent in its written submissions did not address this fundamental aspect of the 24 unpaid banker's cheques that are pivotal to liability of Trust Capital Services Limited to Trust Bank Limited. All that the 1st respondent asserted was that the High Court in Civil Case No.1243

of 2001 (Trust Bank Limited-v- Ajay Shah & Others) had found the appellant liable. The 1st respondent in considering the issue relied on the Scheme of Arrangement and submitted at paragraph 58 of its written submissions that in the Scheme of Arrangement, the appellant had confirmed that Trust Bank Limited was owed a sum of Kshs.246.4million in the account of Trust Capital Services Limited and that this is the same amount that forms the subject matter of claim in this suit.

80. If this assertion by the 1st respondent is to be true, it means that the cause of action had been discovered by the liquidator when the Scheme of Arrangement was made on 25th May 1999. This is fatal to the 1st respondent's assertion that the appellant had fraudulently concealed facts giving rise to the cause of action. The assertion impacts on the limitation period and fortifies our finding that prior to 2001, the 1st respondent as the liquidator had all relevant information and material to institute a claim under *Section 323* and *324* of the Companies Act . It fortifies our finding that the instant claim is time barred.

81. Be that as it may, we have examined the judgment of the High Court in Civil Case No.1243 of 2001 (Trust Bank Limited -v- Ajay Shah & Others). The basis of claim in issue in Case No. 1243 of 2001 and the present case are totally different. In Civil Case No.1243 of 2001 (Trust Bank Limited -v- Ajay Shah & Others) the liability of the appellant in this suit was determined in relation to the account of Paramount Universal Bank Limited. Whereas the name of Trust Capital Services Limited was mentioned in the judgment, no finding was made in regard to the appellant and second respondent's liability to Trust Bank in relation to overdrawn sums in the account of Trust Capital Services Limited. We find that the submissions by the 1st respondent that Civil Case No.1243 of 2001 (Trust Bank Limited -v- Ajay Shah & Others) had determined the liability of the appellant and 2nd respondent to Trust Bank in respect of the sums claimed in this appeal is not supported by the judgment. If the 1st respondent's submission were to be true, the issue of *res judicata* would have arisen.

82. How did the trial court consider the issue of reversals and the direct payments as disclosed in the 1st respondent's Exhibit DM3? We have analysed the trial court's judgment. The trial court did not consider and evaluate this item of evidence. The closest that the court dealt with the issue is at paragraphs 26 to 29 of the judgment. The relevant excerpts are as follows:

"26 . A reference to annexture DM3 by the Plaintiff's liquidator shows that as at 9th September 1998, the said account (Trust Capital Services Limited) was overdrawn in the sum of Kshs.34,057,293/30 and on 16th September 1998, the same account was overdrawn in the sum of Kshs.241,442,376.80. It is evident from the above facts that in a space of 7 days between 9th and 16th September 1998, there was a massive withdrawal of funds from Trust Bank Limited (in liquidation)….

27 . The two respondents obviously owe an explanation to the depositors of Trust Bank Limited. It is difficult not to reach the conclusion that the account was used by the respondents who knew that the Bank was about to collapse as a way of siphoning money out of the Bank.

28 . The respondents have not convincingly denied the factual allegations in this application….

29 . There is no evidence to date that a single coin has been repaid by the Respondents. "

83. We note that the trial court at paragraph 29 of the judgment finds that no single coin had been repaid and that the appellant and 2nd respondent did not convincingly deny the factual allegations in the application. Did the trial court err in arriving at these factual conclusions in light of the contents of Exhibit DM3 particularly the reversals and direct credit payments?

84. It is not in dispute that the Scheme of Agreement was made on 25th May 1999 and the three direct credits into Trust Capital Services Limited account was made on 6th May 1999. The credit reversals were done between 9th October 1998 and 30th June 1999. It is significant to note that the reversals and direct credit payments were done during the period when the 1st respondent as liquidator was in charge and control of the Trust Bank. On record, there is no explanation for the reversal given by the 1st respondent; all that is on record is the submission by the appellant that the reversal was made because the 24 cheques were un-cleared. The 1st respondent has also not disputed that the sum of Kshs.96, 500,000/= was paid into the account of Trust Capital Services Limited in June 1999 after the Scheme of Arrangement was made. The factual issue that bogs our mind is whether the reversal and direct credit payments cleared the indebtedness of Trust Capital Services Limited to Trust Bank Limited.

85. The 1st respondent in its submissions concedes that the basis of claim and liability of the appellant and 2nd respondent is the sum of Kshs.241, 442,375.80. Our re-evaluation of the evidence on record reveals that on balance of probability, the sum of Kshs.241, 442,375.80 was not lost by Trust Bank Limited. Due to the reversals and direct payment into the account, we find that the 1st respondent did not prove on balance of probability that Trust Bank Limited lost the sum of Ksh. 241,442,375.80. The legal and evidential burden to prove loss of Ksh. 241,442,375.80 rested with the 1st respondent. It did not discharge this legal and evidential burden of proof.

86. At this stage it is important to distinguish between liability of the appellant and 2nd respondent for breach of their fiduciary duty to Trust Bank Limited and theirliability for the loss of Ksh. 241,442,375.80 in relation to the account of Trust Capital Services Limited. Before the appellant and 2nd respondent can be held liable for the loss of Ksh. 241,442,375.80, it must be proved that they are liable for breach of their fiduciary duty to Trust Bank Limited. The trial court correctly analysed the issue of liability of the appellant and 2nd respondent for breach of fiduciary duty to Trust Bank Limited but erred in mixing up and treating as one and the same thing. Liability for loss of Ksh. 241,442,375.80 is a factual issue that was not considered by the trial court. It was incumbent upon the trial court to determine as a matter of fact whether Trust Bank Limited lost the sum of Ksh. 241,442,375.80.

87. Noting that the liability of the appellant and 2nd respondent arises from and is dependent on the sum of Kshs.241, 442,375.80 having been lost or stolen from Trust Bank Limited, we find that the trial judge erred and did not properly evaluate the evidence on record in determining the liability of the appellant and 2nd respondent. We find that the 1st respondent contained sufficient evidence exculpatory of the appellant and 2nd respondent. We find that the evidence clearly revealed that on a balance of probability Trust Bank did not lose the sum of Kshs.241, 442,375.80. We therefore set aside the orders of the trial court finding the appellant and 2nd respondent liable to the 1st respondent in the sum of Ksh. 241,442,375.80.

88. Another ground of appeal relates to the award of compound interest and interest at the rate of 15% per annum. In the case of Highway Furniture Mart Limited -v-The Permanent Secretary & Another, EALR (2006) 2 EA 94, it was stated that interest antecedent to filing suit is only claimable where *inter alia* such interest is allowed by mercantile usage which must be pleaded and proved or where there is a statutory right to interest or when an agreement to pay interest can be implied from the course of dealing between the parties.

89. We have examined the Notice of Motion dated 23rd March 2010 filed by the 1st respondent at the High Court. The 1st respondent prayed for interest at prevailing bank rates from 1st March 2010; the date of 1st March 2010 is antecedent to the filing of the suit. The sum claimed in the Motion is Kshs.1, 549,591,424.41 being the amount due in the account of Trust Capital Services Limited as at 28th February 2010. The date of 28th February 2010 is antecedent to the filing of the suit. The parties do not dispute that the sum claimed in the suit of Ksh. 1,549,591,424.41 includes interest

on the principal sum of Ksh. 241,442,376.80.

90. We have established that the 1st respondent made reversals amounting to Ksh. 146,687,402.50 in the account of Trust Capital Services Limited. We believe that the 1st respondent was satisfied that the said sum of Kshs.146,687,402.50 was not due and owing from Trust Capital Services Limited and that is why the same was reversed. In our view, upon reversal of the said sum, no interest was due and owing on this amount. We find that the trial court erred in holding that the sum of Ksh. 1,549,591,424,41cts was due and owing from the appellant and 2nd respondent when the said sum includes interest that is not due and owing as a consequence of the reversals made.

91. In addition, we note that three direct credit payments of Kshs.96, 500,000/= was paid to Trust Bank Limited into the account of Trust Capital Services Limited. Once again, the trial court erred and failed to appreciate that the sum of Ksh. 1,549,591,424,41cts included interest on Kshs.96, 500,000/= which monies had been paid over to Trust Bank Limited on 6th May 1999. In our view, the sum of Kshs.1,549,591,424,41cts prayed for and granted by the trial court is erroneous as it includes interest that is not due and owing. The sum also includes the principal amount of Ksh. 241,442,375.80 in which the liability and indebtedness of Trust Capital Services Limited was not proved on a balance of probability.

92. Further, the 1st respondent's Notice of Motion does not contain a plea for interest at any other rate apart from prevailing bank rate. The prevailing bank rate is not stated. It is not clear from where the trial court obtained the 15% interest rate awarded. Persuasive dicta in the cases of East African Engineering Consultants v Municipal Council of Kisumu Misc Application No 748 of 1996 and HCCC No 500 of 2000 Anab Hussein Arab v Small Enterprises Finance Co. Limited reveal a common thread that simple rate of interest is applicable unless there is a specific court order. In the case of Sempra Metals Ltd v Inland Revenue Commissioners[2007] UKHL 34 , the English House of Lords held that a court has the jurisdiction to award compound interest in the exercise of its equitable jurisdiction. In National Bank of Greece SA v Pinios Shipping Co. No. 1 [1990] 1 AC 637 it was noted that custom and trade usage with regards to calculation of compounded interest as part of a Bank's practice may be applicable. In the Canadian case of Bank of Nova Scotia v Dunphy Leasing Enterprises Ltd. (1991), 83 Alta. L.R. (2d) 289, [1992] 1 W.W.R. 577 (C.A.), aff'd [1994] 1 S.C.R. 552, 18 Alta. L.R. (3d) 2, it was reiterated that:

"…interest should be calculated using the nominal rate method (simple interest) and not the effective rate method (compound interest) unless there is a good reason for importing the reinvestment principle into the contract."

93. In **Pacific Playground Holdings Ltd v Endeavour Developments Ltd. (2002), 28 *C*.P.C. (5th) 85, 2002 BCSC 1491** , Wilson, J in quoting with approval the ruling of Major, J in **Bank of America Canada v Mutual Trust Co.** held:

"There seems in principle no reason why compound interest should not be awarded. Had prompt recompense been made at the date of the wrong the plaintiff would have had a capital sum to invest; the plaintiff would have received interest on it at regular intervals and would have invested those sums also."

94. In **Bank of America Canada v Mutual Trust Co. [2002] 2 SCR 601 Major, J** of the Supreme Court of Canada held that equitable principles allow for interest to be calculated on a compound basis where fairness concerns dictate it. The learned judge went on to hold *inter alia*:

"Simple interest and compound interest each measure the time value of the initial sum of money, the principal. The difference is that compound interest reflects the time-value component to interest payments while simple interest does not. Interest owed today but paid in the future will have decreased in value in the interim just as the dollar example described in paras. 21-22. Compound interest compensates a lender for the decrease in value of all money which is due but as yet unpaid

because unpaid interest is treated as unpaid principal. Simple interest makes an artificial distinction between money owed as principal and money owed as interest. Compound interest treats a dollar as a dollar and is therefore a more precise measure of the value of possessing money for a period of time. Compound interest is the norm in the banking and financial systems in Canada and the Western world and is the standard practice of both the appellant and the respondent.…… Where the parties have earlier agreed on a compound rate of interest, or there are circumstances warranting it, it seems fair that a court has the power to award compound post judgment interest as damages to enable the plaintiff to be fully compensated when the award is finally paid."

95. Having considered case law as to whether compound interest can be awarded by a trial court, we now apply the principles to the facts of the instant case. ***Sections 324*** of the **Companies Act** allow the trial court to award "interest at such rates as the court thinks just." We have examined the ruling of the trial court. In the ruling, the trial court does not explain why it is "just" to award compound interest and interest at the rate of 15% per annum. In the absence of explanation, we are inclined to find that the trial court award of compound interest and interest at 15% per annum was arbitrary and not justifiable.

96. Finally, we need to comment on the issue of burden of proof in relation to the liquidator's claim brought under *Section 323* and *324* of the Companies Act . In the UK case of Mullarkey & Ors v Broad & Anor, High Court (Ch) Bristol *District Registry, Case No: 38 C 05, 3 July 2007, Lewison J* . held that the burden of proof is very much on the liquidator to establish fraudulent misfeasance and the fact that a company director is involved does not change this. The burden of proof is on the claimants to establish the alleged fraudulent misfeasance. The position was well set out by *Lesley Anderson QC* in the case of re Idessa (UK) Ltd [2011] EWHC 804(Ch)*:*

"I am satisfied that whether it is to be viewed strictly as a shifting of the evidential burden or simply an example of the well-settled principle that a fiduciary is obliged to account for his dealings with the trust estate… [counsel for the liquidator] is correct to say that once the liquidator proves the relevant payment has been made the evidential burden is on the Respondents to explain the transactions in question . Depending on the other evidence, it may be that the absence of a satisfactory explanation drives the Court to conclude that there was no proper justification for the payment. However, it seems to me to be a step too far [counsel for the liquidator] to say that, absent such an explanation, in all cases the default position is liability for the Respondent directors. In some cases, despite the absence of any adequate explanation, it may be clear from the other evidence that the payment was one which was made in good faith and for proper company purposes."

Another relevant case is:

"*Re Mumtaz Properties Ltd, Wetton v Ahmed* [2011] *EWCA Civ 610*, where a liquidator claimed for sums which he alleged were owing on directors' loan accounts. There were issues as to, amongst other things, whether one of the respondents had been a de facto director and whether another respondent (referred to as 'Munir') had received the benefit of an item debited to his loan account.

The Court of Appeal said:

"The approach of the judge in this case was to seek to test the evidence by reference to both the contemporary documentary evidence and its absence. In my judgment, this was an approach that he was entitled to take. The evidence of the liquidator established a prima facie case and, given that the books and papers had been in the custody and control of the respondents to the proceedings, it was open to the judge to infer that the liquidator's case would have been borne out by those books and papers. Put another way, it was not open to the respondents to the proceedings in the circumstances of this case to escape liability by asserting that, if the books and papers or other evidence had been available, they would have shown that they were not liable in the amount

claimed by the liquidator. Moreover, persons who have conducted the affairs of limited companies with a high degree of informality, as in this case, cannot seek to avoid liability or to be judged by some lower standard than that which applies to other directors, simply because the necessary documentation is not available."

97. As regards the standard of proof, in **Mutsongar -v- Nyati (1984) KLR 425** it was held:

"Allegations of fraud must be strictly proved and although the standard of proof may be so heavy as to require proof beyond reasonable doubt; a high degree of probability is required, which is something more than a mere balance of probabilities, and it is a question for the trial judge to answer."

98. In the instant case, the trial judge did not evaluate the evidence on record to determine the legal effect of the reversal of debit entries and the direct credit payments made into the account of Trust Capital Services Limited to enable him make a determination whether any liability exists in relation to Trust Capital Services Limited and by extension to the appellant and 2nd respondent. In making this error of evaluation, the trial court erred and failed to adopt the requisite standard of proof in arriving at liability of the appellant and 2nd respondent.

99. The upshot is that we find that the 1st respondent's claim against the appellant and 2nd respondent is time barred. We find that on a balance of probability, the 1st respondent did not prove that Trust Capital Services Limited owed it the principal sum of Ksh. 241,442,375.80 and interest accrued thereon. We find that the trial court did not properly evaluate the evidence on record to determine the legal consequences of the reversal of the sum of Ksh. 146,687,402.50 and the direct credit payment of Ksh. 96,500,000/=. This appeal has merit and we allow the same. The ruling and order of the trial court dated 30th May 2013 and all consequential orders are set aside. It is trite that costs follow the event and this appeal is allowed with costs in favour of the appellant and 2nd respondent.

Dated and delivered at Nairobi this 17 th day of June, 2016

P.M. MWILU

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JUDGE OF APPEAL

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

J. OTIENO-ODEK

……

JUDGE OF APPEAL

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

DEPUTY REGISTRAR