Case Number:	Civil Suit 1243 of 2001
Date Delivered:	30 Jan 2009
Case Class:	Civil
Court:	High Court at Nairobi (Milimani Commercial Courts Commercial and Tax Division)
Case Action:	Judgment
Judge:	
Citation:	TRUST BANK LIMITED v PARAMOUNT UNIVERSAL BANK LIMITED & 2 others [2009] eKLR
Advocates:	Mr. Oyatsi for the plaintiff; Mr. Oginde for the 1st defendant; Mr. Billing for the 2nd defnedant; Mr. Mbugua for the 3rd defendant
Case Summary:	**Banking law** - cheque obtained by fraud -
Court Division:	-
History Magistrates:	-
County:	-
Docket Number:	-
History Docket Number:	-
Case Outcome:	-
History County:	-
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Suit 1243 of 2001

TRUST BANK LIMITED……..….PLAINTIFF

VERSUS

PARAMOUNT UNIVERSAL BANK LIMITED...…….1ST DEFENDANT

AJAY SHAH……2ND DEFENDANT

PRAFUL SHAH……..…….…….3RD DEFENDANT

J U D G M E N T

The Plaintiff Bank has filed this suit against the Defendants to recover Kshs.3, 627,922.50. I will get back to the disparity of the sum being claimed and the sum in the plaint at a later stage. The 1st Defendant is sued as a company carrying on business in Kenya as a Bank. It is the Plaintiff's case that the 1st Defendant Bank came out of a merger between Paramount Bank Limited and Universal Bank Limited, (hereinafter the Banks) both which were carrying on business in Kenya as Banks. The 2nd and 3rd Defendants, Ajay Shah and Praful Shah respectively are described as employees and Executive Directors of the Plaintiff Bank at the material time.

Mr. Oyatsi represented the Plaintiff in this case while the 1st Defendant was represented by Mr. Ogunde, the 2nd by Mr. Billing and the 3rd by Mr. Mbugua.

THE PLEADINGS

The Plaintiff's case is that on the 9th, 11th, 14th, 15th and 16th September, 1998 respectively, with full knowledge of the imminent closure of the Plaintiff Bank by Central Bank, the 2nd and 3rd Defendants who were directors of the Plaintiff Bank, fraudulently caused a run on the Plaintiff Bank by siphoning money out the Plaintiff Bank before its closure, in gross abuse of their positions of trust. The Plaintiff contends that the funds fraudulently siphoned or defrauded out of the Plaintiff Bank included the sum of Kshs.4, 927,792.50 being the total value of seven (7) Bankers cheques drawn on the Plaintiff in favour of Universal Bank Limited and one Banker's cheque drawn in favour of Paramount Bank Limited. The cheques were crossed. The particulars of the cheques are given at paragraph 6 of the plaint as follows:

"6. The Plaintiff states that part of the funds fraudulently siphoned or defrauded out of the Plaintiff Bank included the sum of ~~Kshs.2,989,957.50 cts~~. 4,927,792.50cts being the total value of ~~six (6)~~ seven (7) Bankers cheques drawn on the Plaintiff in favour of Universal Bank Limited and one Bankers cheque drawn in favour of Paramount Bank Limited whish ~~has~~ have since changed ~~its~~ their respective names, to the First Defendant upon merger ~~with Paramount Bank Limited~~. The said cheques were drawn in the names of Universal Bank Limited and Paramount Bank Limited respectively as payee and these cheques were crossed or account payee

cheques.

PARTICULARS

DATE	**CHEQUE NO.**	**AMOUNT**	**PAYEE**
	NO.	**(KSHS)**	
09.09.1998	**809093**	**172,500.00**	**Universal Bank Ltd**
10.09.1998	**809127**	**505,257.50**	**Universal Bank Ltd**
14.09.1998	**809178**	**709,800.00**	**Universal Bank Ltd**
14.09.1998	**809177**	**307,400.00**	**Universal Bank Ltd**
15.09.1998	**809203**	**1,300,000.50**	**Universal Bank Ltd**
16.09.1998	**809242**	**437,853.00**	**Universal Bank Ltd**
16.09.1998	**809240**	**1,500,000.00**	**Paramount Bank Ltd**

The Plaintiff's case is that by reason of these facts, the true owner of the cheques was the Plaintiff as drawer, before their presentation to the 1st Defendant or the Banks. That after presentation, the 1st Defendant or the Banks became the true owners thereof as payees, and the cheques should have been payable only to them.

The Plaintiff contends that the Banks did not negotiate the said cheques nor give value for them. The Plaintiff therefore claims a refund to the value of the said cheques from the 1st Defendant.

At paragraph 13 of the amended plaint, particulars of fraud alleged against the 2nd and 3rd Defendant through which the Plaintiff allegedly suffered damage and loss are pleaded as follows:

"13. By reason of the above facts, the Plaintiff was defrauded of the said funds by the Second and Third Defendants and the Plaintiff has thereby suffered damage and loss.

PARTICULARS OF FRAUD

(a) Engaging in the said acts of intentional deception against the Plaintiff.

(b) Misleading the Plaintiff into issuing the said cheques.

(c) Engaging a device that resulted in loss to the Plaintiff.

(d) Causing the Plaintiff to issue the said cheques without proper mandate when they knew or ought to have known that the Plaintiff could not recover the loss.

(e) Cheating the Plaintiff out of the said funds.

(f) Making false entries in the Plaintiff's Bankers books."

The particulars of the loss are also given at paragraph 14 of the amended plaint as follows:

PARTICULARS OF LOSS

(a) Value of the said cheques ….~~Kshs.2,989,957.50cts~~ Kshs.4,927,792.50

(b) Average compound interest thereon at the rate of 25% from September 1998 to 16th July 2001…. ~~Kshs.2,938,705.36cts~~ Kshs.4,893,140.40

TOTAL ~~Kshs.5,928,662.90cts~~ Kshs.9,820,932.90

The Plaintiff prays for judgment against the Defendants jointly and severally for:

a) ~~Kshs.5, 928,622.90 cts~~ Kshs.9, 820,932.90 cts

b) Compound interest at the rate of 25% p.a. on said sum of ~~Kshs.5, 928,662.90 cts~~ Kshs.9, 820,932.90cts from 17th July, 2001 until payment in full.

c) Costs and interest thereon.

The 1st Defendant in its Amended defence dated 4th October, 2001 has admitted that Paramount Bank limited and Universal Bank Limited were carrying on business in Kenya as Bankers and that they merged to form the 1st Defendant Bank. However the 1st Defendant contends that Universal Bank Limited still exists as a separate legal entity and in the circumstances the Plaintiff's case against the 1st Defendant did not disclose a reasonable cause of action. In the alternative, the 1st Defendant contends that after the merger of Paramount Bank Limited and Universal Bank Limited, the 1st Defendant assumed only certain disclosed liabilities and or obligations which liabilities did not include any of the Banker's cheques in question.

The 1st Defendant denies knowledge that the funds represented by the seven Bankers cheques were fraudulently siphoned or defrauded from the Plaintiff.

In the alternative the 1st Defendant avers that in or about September, 1998 certain customers of Universal Bank Limited presented five cheques, listed at paragraph 6(a) of the 1st Defendant amended defence, drawn on the Plaintiff in favour of Universal Bank Limited to Universal Bank Limited. The listed cheques are:

Date	Cheque No.	Amount
09.9.1998	**809093**	**Kshs. 172, 500.00**
11.9.1998	**809127**	**Kshs. 505, 257.00**
14.9.1998	**809177**	**Kshs. 302, 400.00**
14.9.1998	**809178**	**Kshs. 709, 800.00**
15.9.1998	**809203**	**Kshs.1,300,000.00**

The 1st Defendant contends that the cheques were accepted and or collected by Universal Bank Limited in the ordinary course of business in good faith and without negligence.

In paragraph 6 (c), (d) and (e) the 1st Defendant avers that cheques Nos. 809093 and 809203 were collected on behalf of the Universal Bank Limited customers in the Bank normal and established practice or in accordance with normal and established practice in Kenya. Cheque Nos. 809127, 809177 and 809178 were collected for purchase of foreign exchange by the Banks customers. That cheque Nos. 809242 and 809240 were dishonoured by the Plaintiff upon presentment for collection by Universal Bank Limited and Paramount Bank Limited respectively and that Plaintiff's claim against these last cheques does not lie.

The 2nd Defendant in his amended defence dated 26th September, 2001 denied fraudulently siphoning or defrauding the Plaintiff Bank of sum claimed. The 2nd Defendant denies that the true drawer of the alleged 7 Bankers cheques before presentment was the Plaintiff. The 2nd Defendant denies that there was any breach of the Banking Act. He also denies that the Plaintiff suffered any loss or damages alleged and denies the particulars of damage and loss given in paragraph 14 of the amended plaint.

The 3rd Defendant in his statement of defence dated 29th August, 2001 denies causing a run on the Plaintiff by siphoning or defrauding the Plaintiff of sum of Kshs.2, 989,957.50 as claimed in paragraph 5 and 6 of the amended plaint. The 3rd Defendant denies being the beneficiary of the amount claimed and denies that it was liable to indemnify the Plaintiff. The 3rd Defendant also denies conceiving any idea to defraud the Plaintiff, abusing his position of trust and or drawing any cheque without mandate. He also denies the pleaded particulars of fraud and those of loss and damage. The 3rd Defendant avers further that he was not aware of the alleged transaction and that if any were brought to his attention, he acted on same as an employee of the Bank, in good faith and without knowledge of any irregularity.

THE AGREED LIST OF ISSUES

The Plaintiff and 2nd Defendant filed a list of agreed issues between their two clients on 30th June, 2005, signed by both counsel. The issues raised in the said list are namely:

1. Was the Plaintiff the drawer of the seven (7) Bankers cheques pleaded in the Amended Plaint.

2. Did the Second Defendant fraudulently siphon out of or defraud the Plaintiff Bank, the sum of Kshs.4, 927,792.cts as pleaded in the Amended Plaint.

3. Did the Second Defendant breach the provisions of the Banking Act Cap 488 Laws of Kenya as pleaded in paragraph 12 of the Amended Plaint"

4. Has the Plaintiff suffered loss and damage as pleaded in paragraph 14 of the Amended Plaint and if so, is the Second Defendant liable to pay or compensate the Plaintiff for the said loss and damage.

5. Does the transaction pleaded in the Amended plaint contravene the provisions of S.11 of the Banking Act, Cap 488 Laws of Kenya.

6. Does the suit disclose a valid cause of action against the 2nd Defendant"

7. Which party is liable to pay the costs of this suit"

The Plaintiff filed issues between it and the 3rd Defendant namely:

1. Did the Third Defendant cause a ran on the Plaintiff Bank and siphon out and/or defraud the Plaintiff's funds as pleaded in paragraphs 5 and 6 of the Amended Plaint.

2. Is the Third Defendant a stranger to the claims or averments contained in paragraphs 7, 8, 9 and 10 of the Amended Plaint"

3. Did the Third Defendant abuse his position of trust in defrauding the cheques pleaded in the Amended Plaint"

4. Did the Third Defendant defraud the Plaintiff of its funds or money as pleaded in the Amended Plaint"

5. Did the Plaintiff incur the loss and damage pleaded in the Amended Plaint"

6. Is the Third Defendant liable to compensate the Plaintiff for the said loss and damage together with costs"

7. Which party is liable to pay the costs of this suit"

The Plaintiff's list of issues between it and the 1st Defendant are namely:

1. Did the First Defendant have knowledge that the cheques pleaded in paragraph comprised of funds fraudulently siphoned or defrauded from the Plaintiff"

2. Were the said cheques received by the First Defendant for collection or more they received by the First Defendant as payee.

3. If they were received by the First Defendant as payee, did the First Defendant give any consideration to the Plaintiff for these cheques"

4. If so, did the First Defendant have knowledge of the frauds"

5. Were the said cheques issued by, or obtained from, the Plaintiff by fraud as pleaded in the Amended Plaint"

6. Did the Plaintiff suffer the loss and damage pleaded in the plaint"

7. Is the First Defendant liable to pay the said loss and damage to the Plaintiff as pleaded in the Amended Plaint"

8. Which party is liable to pay the costs of this suit"

The 1st and 3rd Defendants did not file any issues. I adopt those filed by the Plaintiff in respect of their clients and the Plaintiff.

THE EVIDENCE AND SUBMISSIONS BY COUNSEL

The Plaintiff and the 1st Defendant each called two witnesses. The evidence of the Plaintiff's witnesses has established as facts the allegations contained in paragraphs 4, 5, 6, 7, 8, 9 and 10 of the Amended Plaint. In relation to paragraph 6, the said witnesses have clarified that the value of cheque No. 809177 was Kshs.302, 400.00 as pleaded. In addition, it has been clarified by Ms Ngure for the Plaintiff that the Plaintiff Bank received value for Cheque No. 809203, in the sum of Kshs.1.3 million, and therefore that the said cheque was negotiated. The Plaintiff did not incur a loss in respect of this cheque as pleaded. The total value of the cheques that now form the subject matter of this claim under Paragraph 6 of the Amended Plaint is therefore Kshs.3, 627,922.50.That in the circumstances the Plaintiff's case against the Defendants is reduced by the said sum. That is the reason for the disparity between the sum quoted in the Plaint and that disclosed in the evidence of the Plaintiff's witnesses. In his submissions, Mr. Oyatsi urged this court to enter judgement in favour of the Plaintiff in the sum of Kshs.3,627,922.50.

Learned counsel for the Plaintiff submitted, which I accept as the correct position, that the evidence of the two witnesses also established the following facts:

a) That all the cheques in issue in this case were Bankers cheques drawn by the Plaintiff.

b) That the applicant for these cheques was an entity known as Trust Capital Services Limited.

c) That this entity originally maintained account number 25682-01

d) That the signatories to the said account were;

i. Ajay Shah – second Defendant

ii. Praful Shah – Third Defendant

iii. Atul Shah

iv. Pankaj Shah

v. Apul Shah

e) That the subscribers to the Memorandum & Articles of Association of this company are the said Ajah Shah and Praful Shah (Second and Third Defendants) respectively.

f) That Ajah Shah and Praful Shah, the Second and Third Defendants, were at all material times executive directors of the Plaintiff Company.

g) That subsequently, this entity also maintained two accounts in the Plaintiff Bank being accounts numbers 0059811-0001 and account number 0058653-001

h) That it is also shown that when the first debit entry was made on 9th September, 1998,for the first cheque of Kshs.172, 500.00, the account was overdrawn in the sum of Kshs.35, 894,422.60.

i) That as at the time when the last cheque was debited of Kshs.1.5 million on 16th September, 1998 this account was overdrawn to the tune of Kshs.213,308,223.40.

j) That two days later after the last drawing the Plaintiff Bank was placed under Statutory Management.

k) That in a space of seven (7) days between 9th September, and 16th September there was a massive withdrawal of funds from the Plaintiff Bank using this account to the tune of Kshs.177, 413,800.80.

l) That there was obviously a run on the Bank and this account was used by people who knew that the Bank was about to collapse as a way of siphoning money out of the Bank.

m) That notwithstanding that there was no loan or overdraft application between Trust Capital Services Limited and the Plaintiff, in respect of any of these accounts there were massive withdrawal of funds from the Plaintiff in all the three accounts.

n) That in the absence of a loan or overdraft application by Trust Capital Services Limited the said sum of Kshs.213, 308,223.40 had been stolen from the Bank through the above account.

o) That the amount claimed herein was part of the said overdrawing or theft.

p) That in relation to the cheques that form the subject matter of this case, these were drawn and money taken out in the form of Bankers cheques within a week before the Bank was placed under Statutory Management.

q) That the cheques were crossed.

r) That neither Paramount Bank Limited nor Universal Bank Limited endorsed the cheques to a third party.

s) That Paramount Bank Limited and Universal Bank Limited received the value of these cheques.

Mr. Ogunde for the 1st Defendant did not make any comments on the evidence of the Plaintiff. I will get back to the submissions at a later stage.

Mr. Billing for the 2nd Defendant submitted that the Plaintiff's witnesses did not adduce evidence to prove:

a) Any of the allegations in paragraph 5 and 11 of the Amended Plaint.

b) Any breach of section 11 of the Banking Act; that the said section has been amended several times and the Plaintiff did not specify which sub-sections under that section it was relying on; that the section is not a strict liability section and so evidence had to be led to prove breach, which the Plaintiff failed to adduce.

c) That the 2nd and 3rd Defendants were Associates and or Share holders of Trust Capital Services Ltd.

d) That A/C No. 25862-01 had been overdrawn since the evidence of both witnesses was that the account had Nil balance.

Mr. Mbugua for the 3rd Defendant urged the court to find the evidence adduced by the two witnesses' hearsay since none of them were working at the Bank during the period in question.

As earlier stated, the 1st Defendant called two witnesses, Michael Titus Ritho its Credit Officer for 13 years including the period in question, and Timothy Kimani its Legal Consultant since 1st September, 2008. The first witness relied as his evidence on the Replying affidavit of PratapSingh Nagda, a Manager of the 1st Defendant, filed on 14th November, 2001, in answer to the Plaintiff's application for summary judgment. Paragraph 4 of the said affidavit lists the seven cheques which are the subject matter of this case. The same paragraph also gives an analysis of how the 1st Defendant, in whose favour the chequs were drawn dealt with each cheque and on whose instructions. The instructions were in form of letters whose originals the witness was unable to produce. The 1st Defendant was unable to procure the presence of the parties alleged to have given them the instructions despite obtaining witness summons.

The second witness told the court that the 1st Defendant had recently written to their clients Karman Wholesalers, Nyals (K) Ltd and Lord's The Mans Shop, to produce the original letters but that non were produced. He produced the letters as exhibits. Those clients are the same ones that Michael Ritho was referring to in his evidence.

Attempts by the 1st Defendant to produce copies of the letters of instructions from their clients were rejected by the court. The provisions of Part 111 of the Evidence Act are very clear that the contents of a document can only be proved by primary documents except in certain circumstances. The 1st Defendant did not bring itself within the exceptions to that general rule.

Regarding the evidence adduced by the First Defendant Counsel for the Plaintiff submitted that:

a. According to the First Defendant these cheques were delivered respectively, to Paramount Bank Limited and

Universal Bank Limited before their merger, by their customers known respectively as Karman Wholesalers, Lord's Limited and Nyal's (K) Limited.

b. Although the Defendant was given time to call these customers as witnesses in order to corroborate the above allegation, none of these customers was willing to come to court and confirm the above allegations.

c. Two of these alleged customers, Lord's Limited and Nyal's (K) Limited, are in business along Moi Avenue Nairobi. The first Defendant is unable to explain to the court why these customers could not be summoned to appear in court as witnesses.

d. In cross-examination, the First Defendant attempted to rely on the letters attached to its Replying Affidavit of 14th November 2001 written by these customers as evidence to corroborate the First Defendant's allegation that it received the cheques from these customers as a collecting Bank.

The submission by Mr. Oyatsi touching on the evidence of these two witnesses correctly summarizes it.

Mr. Oyatsi urged the court to find:

(i) The plaintiff has established from its Bankers books that no value was received for the said cheques (except for the cheque of 1.3M), from any customer of the Plaintiff and the cheques were drawn against a debit entry in account no. 0059811-0001 of Trust Capital Services Limited.

(ii) That clearly the allegation that the said cheques were purchased for cash is false and a fabrication.

(iii) That Paramount Bank Limited and Universal Bank Limited before their merger received the proceeds of these cheques. The said Banks did not give any consideration for the said value.

(iv) That as was in the case of ***Banque Belge vs. Hambrouck***, this was a clear case of cheques obtained by fraud from the Plaintiff and paid or transferred by the fraudulent holder to Paramount Bank Limited and Universal Bank Limited before their merger to become the First Defendant herein.

(v) That on the basis of the above facts, the cheques pleaded in paragraph 6 of the Amended Plaint were obtained by fraud from the Plaintiff and then transferred by the fraudulent holder to Paramount Bank Limited and Universal Bank Limited without consideration. These Banks acquired no better title to hold them than the fraudulent holder. That relying on the judgment or authority in ***Banque Belge vs Hambrouck [1921] 1 KB 321***, referred to above, the First Defendant is liable to repay the value of the said cheques to the Plaintiff together with interest as prayed.

(vi) That in addition, the above facts clearly prove and demonstrate that the said cheques constitute money stolen from the Plaintiff. The said two Banks, Paramount Bank Limited and Universal Bank Limited received stolen money. On the authority of the judgment in the case of **Barros Mattos Jnr vs. Macdaniels (2004)All ER 299**, these Banks were placed under a legal obligation to hand over the money back to the Plaintiff as the rightful owner. By failing to do so, they unjustly enriched themselves. They are liable to repay the said sum of money to the Plaintiff together with interest thereon as prayed in the Plaint.

Mr. Ogunde for the 1st Defendant submitted as follows:

1. That the Plaintiff claims that it is entitled to recover the proceeds of the cheques from the 1st Defendant in whose favour the cheques were drawn and in the alternative, that it is entitled to recover the proceeds of the cheques from the 2nd and 3rd Defendants.

2. That the basis of this claim against the 1st Defendant is said to be the decision in ***Banque Belge vs. Hambrouk [1921] 1 KB 321*** which is authority for the proposition that if a cheque is obtained by fraud and then transferred by the fraudulent holder, the transferee obtains no better title than the fraudulent holder and equally the true owner of the cheque can make recovery from the transferee.

3. That the basic legal principle that generally if a cheque is obtained by fraud and then transferred by the fraudulent holder, the transferee obtains no better title than the fraudulent holder and equally the true owner of the cheque can make recovery from the transferee, is not disputed by the 1st Defendant.

4. That there are certain circumstances of that case that are however significantly at variance with the instant case which we submit makes the case inapplicable.

5. That a key distinction is that ***Banque Belge*** case cited was on appeal and there was no issue as to whether the cheque in dispute had been taken fraudulently.

6. That the case here is that the Plaintiff is claiming that the 2nd and 3rd Defendants perpetrated a fraud and stole money from the Plaintiff against which cheques were made in favour of the 1st Defendant. Whether in fact there was fraud is in issue in the present case.

7. That on the back of the foregoing it is submitted that the Plaintiff has first and foremost to prove that the cheques in issue were drawn against funds that were stolen.

8. That it is well settled that allegations of fraud must be strictly proved with a high decree of probability (see ***Muhongar Nyati [1984] KLR 425***.)

9. That quite apart from the failure to confront the entity that is clearly at the centre of the alleged fraud in this case there are other factors that we submit should support a finding that fraud has not been proved. The factors are: -

a. 10 years on after the alleged serious fraud there is no indication on the record of this proceedings if the alleged fraud was investigated, the status of such investigation and its outcome.

b. It is submitted that such fraud would ordinarily be the subject of a criminal complaint and prosecution.

10. That it is further submitted that there being no fraud having been proved the principle in **Banque Belge vs. Hambrouk** cannot apply. For that reason alone the case ought to be dismissed.

11. That the 1st Defendant contended that the cheques in issues were regular and proper in every material respect and payment was made against them in the 1st Defendant's ordinary course of business.

Counsel urged the court to find as follows:

(i) That liability cannot attach on a Banker for acting as the 1st Defendant did.

(ii) That the Plaintiff has made serious accusations including that the 1st Defendant has committed the offence of forgery.

(iii) That the issue (of fraud) does not fall for determination here as it was neither part of the claim in the pleadings and therefore evidence to support or discount the claim was not led.

NO EVIDENCE BY THE 2ND AND 3RD DEFENDANTS AND THE EFFECT OF ADDUCING NONE

The 2nd and 3rd Defendants closed their cases without calling a witness. It is trite that where a party fails to call evidence in support of its case, that party's pleadings remain mere statements of fact since in so doing the party fails to substantiate its pleadings. The 2nd Defendant and 3rd Defendant's defence were unsubstantiated and remained mere statements. In the same vein failure to adduce any evidence meant that the evidence adduced by the Plaintiff against the 2nd and 3rd Defendants was uncontroverted and therefore unchallenged. In **AUTAR SINGH BAHRA AND ANOTHER VS RAJU GOVINDJI HCCC NO. 548 of 1998(UR) Mbaluto J.** held:

"Although the Defendant has denied liability in an amended Defence and counter-claim, no witness was called to give evidence on his behalf. That means that not only does the Defence rendered by the 1st Plaintiff in support of the Plaintiff's case stand unchallenged but also that the claims made by the Defendant in his Defence and Counter-claim are unsubstantiated. In the circumstances, the Counter-claim must fail."

I am persuaded that the cited case is a good law and I am guided by it. Following the said case it I do find that the 2nd and 3rd Defendants defences were unsubstantiated and further the Plaintiff's evidence against them unchallenged.

Commenting on the Plaintiff's evidence against the 2nd and the 3rd Defendants and against the Defendants generally, Mr. Oyatsi for the Plaintiff submitted:

aa) That the Second and Third Defendants, who were the shareholders of Trust Capital Services Limited and the authorized signatories of the said account and therefore its agents, have declined to give evidence in this case in order to explain how the said unauthorized overdrawing arose.

bb) That the Second and Third Defendants, as the then most senior officers or Directors of the Plaintiff and also the agents of Trust Capital Services Limited, are the only people who can provide an explanation to this Court as to how these accounts were operated in the name of Trust Capital Services Limited and the disbursement of funds from the Plaintiff through these accounts.

cc) That in the absence of any explanation from them, the said sum of Kshs.213, 308,223.40, having been withdrawn from the Plaintiff unlawfully without an application for a loan overdraft facility was stolen money.

dd) The withdrawal of the said colossal sum of money without a loan application and without security was a fraud on the Plaintiff Bank.

ANALYSIS

The Plaintiff's cause of action against the First Defendant is pleaded in paragraphs 8, 9 and 10 of the Amended Plaint dated 12th September 2001. The cause of action pleaded and relied upon is recovery of money had and received.

The Plaintiff relies on two principles of law. The first principle of law is the one enunciated in the leading case of **Banque Belge vs. Hambrouck [1921] 1 K.B. 321**. At page 321 of the judgment, the court stated the principle as follows;

"If Cheques be obtained by fraud and then transferred by the fraudulent holder to a transferee without consideration, the transferee acquires no better title to hold them than the fraudulent holder had.

If the fraudulent holder or his voluntary transferee pays the cheque into a Banking account, quaere where the

true owner, having a right in equity to follow the proceeds or so much thereof as remains to the credit of the account, can recover the same amount by an action at law against the Bankers or their customer for money had and received."

The second principle is that of restitution as enunciated in the case of **Barros Mattos Jnr. v. Macdaniels [2004] 3 All ER 299** at page 303, the court stated the principle as follows:

"The starting point of the claim is the principle that someone who receives stolen money is placed under a legal obligation to hand it, or an equivalent sum, back to the rightful owner. If he does not, he will be unjustly enriched. The obligation on the recipient is personal. It is not dependent on the stolen money being still in the recipient's hands. As Lord Goof of Chieveley pointed out in Lipkin Gorman (a firm) v. Karpnale Ltd [1992] 4 All ER 512 at 534, [1991] 2 Ac 548 at 580:

"…The mere fact that the [recipient] has spent the money, in whole or in part, does not of itself render it inequitable that he should be called upon to repay, because the expenditure might in any event have been incurred by him in the ordinary course of things"

In such a case, the recipient is still as enriched by the receipt of the stolen money as if he had retained the original coinage in his hands. In a simple case where the recipient has received the money and has done nothing with it, or had merely used it to pay for things which he would have had to pay for out of other resources, there is no reason why the victim of the theft should not recover what is stolen and no reason why the recipient should continue to be enriched. Any such enrichment would be unjust. It should be emphasized that this restitutionary claim can be made against an entirely innocent recipient should continue to be enriched. Any such enrichment would be unjust. It should be emphasized that this restitutionary claim can be made against an entirely innocent recipient."

Mr. Ogunde for the 1st Defendant submitted that while he did not dispute the basic legal principle that if a cheque is obtained by fraud and transferred by the fraudulent holder, the transferee obtains no better title than the fraudulent holder and equally that the true owner of the cheque can make recovery from the transferee (**Banque Belge** Case, supra); the cited case was distinguishable from the instant case. Counsel submitted that the cited case was on appeal and that there was no issue whether the cheque in issue had been taken fraudulently. Mr. Ogunde submitted that whether the cheques in the instant case were taken fraudulently was an issue. Mr. Ogunde submitted further that it was trite that allegations of fraud must be strictly proved and should not be a matter of suspicion or conjecture. For this preposition, counsel relied on the case of **Mutsongar V Nyati (1984)KLR 425** where Kneller J. held:

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

Mr. Ogunde has further argued that many factors in the case supported a finding that no fraud was proved. These, Counsel submitted, included the fact that the entity at the centre of the alleged fraud was not sued; the fact that 10 years on there was no indication whether the alleged fraud was investigated and the results of such investigations; that fraud would ordinarily be the subject of a criminal complaint and investigation.

To answer Mr. Ogunde on the issue of fraud being a subject of criminal complaint; in normal circumstances that is quite true. However this is not an ordinary case. The court cannot ignore the fact that the parties involved are similar in each entity. The Plaintiff Bank shared the same directorship as the Trust Capital Services Ltd, which was the entity at the centre of the scum and which entity was not sued. At the same time, the 2nd and 3rd Defendants were the Directors and subscribers of the two, that is the Plaintiff Bank and the Trust Capital Services Ltd. I agree that a company has a legal identity and personality of its own, however it operates through people. That is why in

the issue at hand the same persons who made decisions and acted for all the entities involved in this case are the same ones who could have raised a complaint. It is foolhardy to expect that they could have filed a complaint in the matter. Maybe a time has come for more diligence to be exercised by the Regulating Authority to ensure that personalities who own and or run Banks are not busy lending to or enriching themselves by opening accounts in their names or in the names of companies they own or are associated with. Or maybe the time has come for the law to be reformed in order to legislate against such business practices. I will state more on this issue and give the reason why I find fraud proved when considering the Plaintiff's case against the 2nd and 3rd Defendant. As will be demonstrated herein below fraud has been proved in this case and therefore the **Banque Belge** principle applies in this case.

The 1st Defendant's case was that the cheques in issue were regular and proper in every material respect and that payments were made against them in the 1st Defendants ordinary course of business. As already stated in this judgment, the 1st Defendant was unable to procure its clients whom it alleged to have given it instructions regarding this matter. He who alleges must adduce evidence to proof that the facts it alleges exist do actually exist. (Evidence Act) The 1st Defendant has not adduced any evidence or produced any documents to prove that indeed it acted in the normal course of business. What is before the court, and which the 1st Defendant admits in part, is that the cheques were obtained from the Plaintiff, then transferred to the 1st Defendant or the Banks by the fraudulent holder without consideration. The 1st Defendant acquired no better title to hold them than the fraudulent holder under the **Banque Belge principle,** and therefore the 1st Defendant is liable to repay to the Plaintiff the value of the said cheques. I also find and hold that having received money fraudulently obtained from the Plaintiff, following the **Barros Mattos principle**, the 1st Defendant unjustly enriched itself and is obligated to restitute to the Plaintiff the value of the said cheques.

The Plaintiff was relying on the argument that the 1st Defendant was involved in forgery and that it relied on forged documents and therefore obstructed justice. With due respect to Mr. Oyatsi, the alleged forged documents were not admitted in evidence and there is no foundation upon which I can so find. That allegation, which the Plaintiff had also pleaded in the plaint was never proved.

The 1st Defendant's averment in its defence that the Universal Bank still existed as a Bank was not supported in evidence. The 1st Defendant also averred that following the merger of Universal Bank and Paramount Bank (the Banks) to form the 1st Defendant Bank, the 1st Defendant assumed only certain disclosed liabilities of the Banks which did not include the cheques in issue. The 1st Defendant, as the party that alleged that these facts existed, had the burden to prove that there were any disclosed liabilities it assumed from the Banks at the time of merger and to show that the cheques in issue were not part of that liability. No such evidence was adduced, whether directly or by implication. That therefore means that the 1st Defendant took over all the liabilities of the Banks.

The Plaintiff relies on the **Banque Belge** principle that the recipient of a fraudulently obtained money acquires no better title than the transferor. The issue whether the 1st Defendant knew that there was fraud involved, does not, in my view arise.

I now turn to the case against the 2nd and 3rd Defendants. The facts adduced by the Plaintiff as against them, and which facts as aforementioned remained uncontroverted were:

a) They were shareholders and the original subscribers to the Memorandum and Articles of Association of Trust Capital Services Limited.

The Counsels for the 2nd and 3rd Defendants submitted that there was no evidence adduced to prove that their clients were shareholders and subscribers to the Trust Capital Services ltd. That is not correct as the Memorandum and Articles of Association for the said Company were P. Exh. 4. Both their clients signed the document as sole Directors and Subscribers of the Company.

b) This entity operated three accounts in the Plaintiff Bank being account numbers 0059811-0001, 0058653-0001 and 25862-01.

The 2nd Defendant's advocate submitted that there was evidence of four Bank accounts but I find that immaterial as the relevant accounts and those involved in this case were the three named herein.

c) They were the authorized Bank signatories for account number 25862.01 and therefore agents of Trust Capital Services Limited.

d) Under the Banking Act, they were Associates of Trust Capital Services Limited.

e) Except the said account number 25862-01, the remaining two accounts were not officially opened in the Plaintiff's books as there are no accounts opening forms or mandate cards.

f) There were massive withdrawals of funds from the Plaintiff's Bank in the three accounts.

g) The Bank had no security for these withdrawals.

h) The cheques that form the subject matter of this case originated from a debit entry in account number 0059811-0001.

i) In a space of seven (7) days between 9th September, 1998 and 16th September, 1998, a week before the Bank was placed under statutory management, there were massive withdrawals from the Plaintiff in this account to the tune of Kshs.177, 413,800.80.

k) That the funds withdrawn from this accounts was stolen money and that the two defendants being the Executive Directors of the Plaintiff Bank and agents of Trust Capital Services Limited had the burden of proof to show they were not aware of the existence of the account or of the unlawful withdrawal from this account or to show the measures they took in order to prevent the theft.

The Plaintiff relies on **section 11 of the Banking Act**, herein after the Act, as the basis of its cause of action against these two Defendants. It is Mr. Oyatsi's submission that where a Bank Officer loots money through a disbursement made to an officer, either as principal or as an agent or on behalf of his associates, in contravention of section 11 of the Act, the officer is deemed to have received the money from the bank and he is under legal obligation to repay to the bank in the same manner as someone who receives stolen money is placed under a legal obligation to restitute it to its rightful owner. Counsel contended further that where a claim of such a nature is made against a Bank Officer, the burden lies on the officer to prove that he was not aware that the contravention took place or that he took necessary steps to prevent it.

Section 11 of the Act stipulates:

"11.(1) An institution shall not in Kenya-

(a) grant or permit to be outstanding any advance or credit facility against the security of its own shares;

Or

(b) grant or permit to be outstanding any advance or credit facility or give any financial guarantee or incur any other liability to, or in favour of, or on behalf of, any company (other than another institution) in which the institution holds, directly or indirectly, or otherwise has a beneficial interest in, more than twenty-five per cent

of the share capital of that company; or

(c) grant or permit to be outstanding any unsecured advances in respect of any of its employees or their associates; or

(d) grant or permit to be outstanding any advance, loans or credit facilities which are unsecured or advances, loans or credit facilities which are not fully secured –

(i) to any of its officers or significant shareholders or their associates; or

(ii) to any person of whom or of which any of its officers has an interest as an agent, director, manager or shareholder; or

(iii) …

(e) grant or permit to be outstanding any advance, loan or credit facility to any of its directors or other person participating in the general management of the institution unless such advance, loan or credit facility,

(f) grant or permit to be outstanding any advances or credit facilities or give any financial guarantees or incur any other liabilities to, or in favour of, or on behalf of, a person mentioned in paragraph (c), (d) or (e) and his associates amounting in the aggregate, for that person and all his associates, to more than twenty per cent of the core capital of the institution;

(g) …

or

(h) grant any advance or credit facility or give guarantee or incur any liability or enter into any contract or transaction or conduct its business or part thereof in a fraudulent, or reckless manner or otherwise than in compliance with the provisions of this Act.

(1A) In relation to conduct contemplated under paragraph (h) of subsection (1) –

"fraudulent'" includes intentional deception, false and material representation, concealment or non disclosure of a material fact or misleading conduct, device or contrivance that results in loss and injury to the institution with an intended gain."

Mr. Billing for the 2nd Defendant submitted that section 11(1) of the Act was not a strict liability section and therefore the Plaintiff was required to adduce evidence to prove the contraventions alleged and in addition show who opened the accounts, who the account holders were, who the signatories were, what securities were given and who approved the facility. Learned counsel submitted further that section 11(1) (g) came into force on 1st January, 1999 by virtue of section 57 of The Finance Act and section 11 (1A) in 2000 and the two were therefore inapplicable. Mr. Billing contended that no such evidence was adduced. Mr. Billing drew the courts attention to the fact that the Bank accounts, the subject matter of the case, did not belong to the 2nd Defendant and that the 2nd Defendant was neither a customer of the Plaintiff Bank nor a beneficiary of the suit cheques.

Mr. Billing urged the court to see HCCC No. 103/01 and HCCC No. 875/01 where the Plaintiff lost the suits for failure to join the principle debtor.

Mr. Mbugua for the 3rd Defendant submitted that the onus of proof lay on the Plaintiff to prove fraud as against the

Defendants and contended further that the standard of proof for said fraud should be beyond a balance of probabilities. Counsel submitted that the principle of strict liability was inapplicable to the case. For these prepositions, the learned counsel relied on the cases of **Muthiku vs. Kenya Cargo Services Limited [1999] KLR 464, Ratilal Gordhanbhai Patel Vhalji Makanji [1957] EA 314**. I have considered both cases and agree with the principles enunciated in them.

Regarding Section 11 of the Act, it was Mr. Mbugua's contention that insider loans and the liability of the Bank officials to indemnify the institution for loss was neither pleaded nor particulars given and that therefore, reliance on section 11 of the Act was misconceived. For that preposition counsel relied on **Viran V. Phoenic of EA Association Company Limited [2004] 2 eKLR.** I have considered the case**.** Mr. Mbugua also submitted that the Plaintiff failed to adduce evidence to prove that the 3rd Defendant had knowledge of the fraud alleged and that he failed to prevent it.

In answer to the issue of the dismissals of the Plaintiff's other suits in HCCC 103/01 and 875/01, Mr. Oyatsi submitted that the Plaintiff had filed appeals against the decisions of Azangalala, J. and Ochieng, J. who heard the said cases. Learned Counsel urged the court to find that by virtue of Order 1 rule 8 of the Civil Procedure Rules and Section 11 of the Act, the Plaintiff had a right to bring the instant action against its two officers. Mr. Oyatsi urged the court to find that the Plaintiff has discharged its burden of proof having adduced evidence to show that it had a right over the money, that the Defendants violated the said right by allowing the Trust Capital Services Limited to overran its account without providing any security.

Regarding the non-admission of various documents by the Defendants, Mr. Oyatsi submitted that the objections raised by he 2nd and 3rd Defendants Advocate in their submissions were made without any basis or foundation as the Defendants did not adduce evidence to challenge the same. In any event, Mr. Oyatsi contended and which submissions I am agreeable with, objections should have been raised at the time of production and not in the final submissions.

To be fair to the Defendants they filed notices of non admission of documents. However the notices were not pursued during the trial of the case. In my view it is rather late in the day for the Defendants to challenge the documents already admitted in evidence during proceedings they fully participated in. In any event and in addition, these exhibits were Bank records which are admissible under sections 176 and 177 of the **Evidence Act** which provide:

"176. Subject to this Chapter a copy of any entry in a Banker's book shall in all legal proceedings be received as prima facie evidence of such entry, and of the matters, transaction and accounts therein recorded.

177. (1) A copy of an entry in a Banker's book shall not be received in evidence under section 176 unless it be first provide that –

(a) the book was, at the time of making the entry, one of the ordinary books of the Bank; and

(b) the book is in the custody and control of the Bank; and

(c) the entry was made in the usual and ordinary course of Banking business; and

(d) the copy has been examined with the original entry, and is correct.

(2) such proof may be given by an officer of the Bank, or, in the case of the proof required under subsection (1) (d), by the person who has performed the examination, and may be given either orally or by an affidavit sworn before a commissioner for oaths or a person authorized to take affidavits."

Under this provision, all the Plaintiff needed to show is that the entries were made from its books, which at the time of making were one of the ordinary books of the Bank, that the books were in the custody and control of the Bank and that the entry was made in the ordinary course of banking business. I am satisfied that the two witnesses called by the Plaintiff to testify for it satisfied fully these requirements.

Whether the Plaintiff's case against the 2nd Defendant and 3rd Defendant can stand depends, *inter alia*, with the interpretation of section 11 of the Act. I must begin by stating that a Plaintiff has a right to choose whom to sue or not to sue, including whether to sue some or all the entities against whom he considers he has a cause of action. It is my view that the Plaintiff had a right to choose to sue some and not all those against whom it felt it had a cause of action. Alternatively the cause of action against the 2nd and 3rd Defendants was different from that against Trust Capital Services Limited. The Plaintiff is still at liberty to pursue that entity so long as it is not time barred. The cause of action against the 2nd and 3rd Defendants is based on the fiduciary duties and positions of both Defendants as director, employees and agents of the Plaintiff Bank. The cause of action against Trust Capital Services Limited on the other hand would be, *inter alia,* for purposes of recovering money had and received. I do find that the Plaintiff's case against the 2nd and 3rd Defendants is sustainable.

The 2nd and 3rd Defendants had a fiduciary duty as directors of the Plaintiff Bank to act as agents of the Plaintiff. In **Halsbury's Laws of England, Fourth Edition 2004 reissue Vol. 7(2)** at paragraph 1083, the duties and liabilities of directors and the test of good faith are described as follows:

"The true position of directors is that of agents for the company. As such they are clothed with the powers and duties of carrying on the whole of its business, subject, however, to the restrictions imposed by the articles and any statutory provisions. The intention of the company may be established by its directors, even if acting informally, depending upon the nature of the matter under consideration, the relative positions of the directors in the company, and generally all the circumstances of the case.

The directors of a company owe a fiduciary duty to act bona fide in what they consider to be the interest of the company (and not for any collateral purpose); and to make full and honest disclosure to the shareholders before they vote on a resolution. The director's obligation to act bona fide in the interests of the company includes an obligation to have regard to the interests of the creditors generally when the company is insolvent or of doubtful solvency or on the verge of insolvency since in such circumstances it is the creditors' money which is at risk. Where the company is part of a group and has its own separate legal identity and its own separate creditors, the directors must continue to act in the interests of the company rather than the group. In the absence of evidence of actual separate consideration of the interests of the company, the proper test is whether an intelligent and honest man in the position of a director of the company concerned could, in the whole of the existing circumstances, have reasonably believed that the transaction was for the benefit of the company. Where a proposal affects the rights of different groups of shareholders as against each other then the directors must not only exercise their powers in good faith in the interests of the company but they must also be exercised fairly as between the different classes or groups of shareholders.

The matters to which the directors of a company must have regard in the performance of their functions include the interests of the company's employees in general, as well as the interests of its members. Accordingly this duty is owed by them to the company (and the company alone) and it is enforceable in the same way as any other fiduciary duty owed to a company by its directors."

The 2nd Defendant and 3rd Defendant have not controverted the Plaintiff's evidence that the cheques in issue in this case were drawn against the Plaintiff's funds by Trust Capital Services Limited, leading to an overdrawing of the latter's account and to a run of the Plaintiff Bank. The Plaintiff's evidence is uncontroverted that no security for the overdrawn sums was given and neither did the said Trust Capital Services Limited have any overdraft or loan facility with the Plaintiff Bank.

The 2nd and 3rd Defendants have argued that the Plaintiff was required to prove that the two Defendants had both the knowledge that the Trust Capital Services Account was being overdrawn and that they failed to prevent it. Plaintiff witness number 2, Caleb Karira, a Computer Expert working with the Plaintiff Bank since 1990 to date, had personal knowledge of the positions held by the 2nd and 3rd Defendants at the Bank. Caleb described the 2nd Defendant as Chairman and the 3rd Defendant as Director of the Plaintiff Bank. In addition it was proved that both were signatories to the Trust Capital Services Limited and were therefore its associates. As Chairman and Director of the Plaintiff Bank, the two Defendants had the duty to carry out the whole of the Plaintiff's business subject to the restrictions imposed by the Articles of the Bank and or any statutory provisions. The fiduciary duty owed included the duty to act bona fide in the interests of the Bank. That fiduciary duty can be proved by direct evidence. In the absence of direct evidence of actual separate consideration by the 2nd and 3rd Defendants of the interests of the Plaintiff Bank, the court should apply the Common Law test. The Common Law test, which is the proper test to apply in order to determine whether the directors acted in the interest of the company, is whether an intelligent and honest man in the position of a director of the Bank could, in the whole of the existing circumstances, have reasonably believed that the transaction was for the benefit of the company. In such circumstances the two Defendants were liable in equity to the Plaintiff Bank as trustees of the Plaintiff. See **Halsbury's Laws of England, Fourth Edition 2004 reissue Vol. 7(2) page 1083, supra.**

In **Belmont Finance Corporation V William Furniture Ltd (no. 2) 1980 1 All ER 393,Court of Appeal**, the court found that Directors were trustees of the Company property under their control; in **Re Exchange Banking Co., Flitcroft's Case (1882) 21 Ch D519** the court found directors of the company liable to repay to the company amounts distributed in dividends paid out of the contributed capital of the company, even though the dividends had been declared by resolutions of the company, simply because the directors knew, but had not informed the shareholders, that there were no profits from which to pay the dividends.

The above cases are of persuasive authority and demonstrate how the courts in England have viewed the nature and extent of the fiduciary duty of directors of companies. In the instant case the 2nd and 3rd Defendants must be considered to have known that drawing the cheques in issue in this case on the Plaintiff could, and did indeed lead to an over run of the Plaintiff Bank. The timing of the six withdrawals, when the Plaintiff Bank was in the red and experiencing liquidity problems as afore stated, and the short intervals in between these withdrawals, that is within a record one week, the two directors cannot be heard to say that they were unaware or could ,with the exercise of due diligence not have known.

Section 11 (1) (c), (d) and (h) apply to this case. These provisions were in operation during the period in issue in this case and not part of the numerous amendments that Mr. Billing talked about. Mr. Billing's submission that section 11 of the Act has been amended severally is true but those amendments related to the other sub-sections. The 2nd and 3rd Defendants were directors and employees of the Plaintiff Bank and signatories and therefore associates of the Trust Capital Services Limited. In permitting the latter to overdraw its account against cheques drawn on the Plaintiff, the 2nd and 3rd Defendants contravened this statutory provision. The section forbids looting of moneys from a bank by its Officers through disbursement to either the Officers themselves or their associates. It has been shown that the two Defendant directors disbursed monies to Trust Capital Services Ltd, a company associated with them in contravention section 11of the Act.

It is clear that section 11 of the Act restricts directors and officers of a Bank from granting or permitting to be outstanding any unsecured advance or credit facility in respect to any of its employees or their associates. With or without direct evidence, applying the Common Law test, I do find and hold that the 2nd and 3rd Defendants granted or permitted unsecured credit to the company in issue, which company was associated with them, in contravention of this law.

The 2nd and 3rd Defendants as directors and employees of the Plaintiff, in the exercise of their powers acted as fiduciary agents of the Plaintiff Bank and therefore owed a duty to the Bank to exercise an independent judgment

accordingly. In allowing Trust Capital Services Limited to overdraw its account, leading to an overrun of the Plaintiff's funds, the two Defendants did not act bona fide in the interest of the Plaintiff. These transactions were not those which, an intelligent and honest person in the position of director could, in the circumstances prevailing at the Bank at the time, have reasonably believed to be of benefit to the Plaintiff Bank. The two Defendants failed in their fiduciary duty to the Plaintiff. The fact that these two Defendants were signatories of, and sole directors and subscribers of Trust Capital Services Limited, must have informed their decision to allow the overdrawing of the Plaintiff's account. I find and hold that the two contravened the clear provisions of section 11 of the Act and should be held liable for the loss suffered by the Plaintiff to the extent claimed and proved in this case.

Regarding the Defendant's advocates arguments that the two Defendants may not have had knowledge of the overdrawing. That argument is not, as shown herein above, tenable and I do not accept it. The Trust Capital Services Limited was, at the time the cheques in question were drawn, overdrawn by an astronomical sum of over Kshs.300,000,000/-. There is no way that these two Defendants, given the evidence adduced and given the peculiar circumstances of this case, and given the fact that they were employees and directors of the Plaintiff Bank, could have failed to know that the account was being overdrawn.

I am satisfied that the 2nd and 3rd Defendant failed in their fiduciary position and duty, and breached their position of trust to the Plaintiff Bank. They failed to act in the best interest of the bank. Adopting the test in **Halsbury's Laws of England**, supra, with and /or in the absence of evidence of actual separate consideration of the interests of the company, the proper test is whether an intelligent and honest man in the position of a director of the company concerned could, in the whole of the existing circumstances, have reasonably believed that the transaction was for the benefit of the company. I do find that applying the tests afore stated, no intelligent and honest person in the position of a director of a company concerned could have reasonably believed that the transactions were for the benefit of the company.

As against the 2nd and 3rd Defendants, I am satisfied that the Plaintiff has proved on a balance of probabilities, particulars of fraud pleaded in the plaint namely, that the two Defendants;

(a) engaged in acts of intentional deception against the Plaintiff

(b) Misled the Plaintiff to issue the said cheques,

(c) engaged in devices that led in loss to the Plaintiff,

(d) Cheating the Plaintiff out of the said funds.

I believe that each of the issues raised by the parties in this case, both in the lists of agreed issues and in their respective submissions, except where I have otherwise stated in this judgment, have been fully addressed in this judgment.

The Plaintiff seeks interest on the sums claimed at the rate of 25% from the date the said sums were obtained to the time the sum is paid in full. Ms. Ngure for the Plaintiff Bank lay a good basis for the interest claimed and even demonstrated that the Bank interest rates prevailing at the time were much higher. I am satisfied that a case has been made for the award of interest in the sum claimed. The rate claimed is modest and the period from which claimed also fair. I will allow this claim as well.

Having come to the conclusions I have in this case, I am satisfied that the Plaintiff has proved its case against the three Defendants on a balance of Probabilities.

I enter judgment for the Plaintiff against the 1st, 2nd and 3rd Defendants jointly and severally as follows:

(a) Judgment in the sum of Kshs.3, 627,922.50

(b) Compound interest on (a) above at the rate of 25% per annum from September 1998 until payment in full.

(c) The Defendants will also pay for the costs of the suit with interest.

I wish as I end by thanking all the counsels in this case for their great contribution, their excellent submissions and all the assistance they so diligently afforded both their clients and this court. I also send my condolences to the 3rd Defendant and the counsels in the case for the demise of Mr. Mbugua whose obituary I saw in the local dailies just before I delivered this judgment.

Dated at Nairobi this 30th day of January, 2009.

LESIIT, J.

JUDGE

Read, signed and delivered, in the presence of:

Mr. Oyatsi for the Plaintiff

Mr. Ogunde for the 1st Defendant

Mr. Billing for the 2nd Defendant

N/A for (Mr. Mbugua) the 3rd Defendant

LESIIT, J.

JUDGE