

IN THE HIGH COURT OF TANZANIA

[COMMERCIAL DIVISION]

AT DAR ES SALAAM

COMMERCIAL CASE NO 84 OF 2006

BIDCO OIL AND SOAP LTD.....PLAINTIFF

VERSUS

SAVING AND FINANCE

COMMERCIAL BANK.....DEFENDANT

TRANS AFRICA FORWARDERS LTD.....THIRD PARTY

JUDGMENT

Mruma, J.

By any standard this matter is indeed old. A brief chronology of some major events will suffice to account albeit, partly for its age.

It was conceived on the 10/11/2006. A defence was entered and recorded on 8/12/2006. Third party procedures and respective pleadings plus other pleadings were complete by 14/5/2007. This is as per minutes of the first pre-trial conference held on 14/5/2007. Mediation was set to take place on the 27/6/2007 and on the same date it was marked to have failed.

At the final pre trial conference held on 24/7/2007, it was unanimously resolved that the trial proceeds with the aid of assessors, and an order summoning them was thereafter made.

On 9/10/2007 a decision to drop the aid of assessors was made, certainly due to their failure to appear on two consecutive dates. Rescheduling of the hearing was set on 13/11/2007 being the commencement date. But it did not take off until 19/6/2008.

The plaintiff's case was closed on the 14/7/2008 and the defence did not commence until the 17/2/2009. There were several objections and adjournments before it continued on the 19/10/2009. After a series of argument as to whether the life span of this matter should or should not be extended continuation of the defence hearing was rescheduled for 16/8/2010. On that date it was re-adjourned again as counsel for the defendant was indisposed. On the 2/9/2010, the third witness for the defence was heard. Thereafter, the matter was adjournment to 11/10/2010 but none of the parties appeared on that date. It was listed to come for necessary orders on the 9/11/2010. The parties appeared on that date but the plaintiff's counsel was absent. It was set for continuation of hearing of defence case on 22/2/2011, but once again it had to be adjourned to 3/5/2011 due to absence of the plaintiff's counsel. Come that date, and upon an application by the plaintiff's counsel and a concession by the counsel for the defendant the time for completion of this matter was extended for further 12 months period from December, 2010 so that it can be completed by December 2011. The closing submissions filing commenced on the 27/7/2011 and ended by the 24/8/2011.

This judgment therefore, though in time long overdue largely on accounts of adjournments and technical catapaults the suit has been undergoing since its conception as demonstrated above.

Now the Claim:

The suit revolves around the claim by the plaintiff against the defendant for **Tshs.66, 414, 835** plus interest from the date of institution of the suit to the date of judgment.

I will recite briefly the relevant factual background history leading to this claim as gathered from the pleadings.

The plaintiff had requested its banker M/S Barclays Bank for the issuance of a banker's cheque for **Tshs.66, 414,835/=** in favour of the Tanzania Harbours Authority (hereinafter referred to "**THA**" being wharfage charges. The cheque was handled by the plaintiff's clearing agent M/s Trans Africa Forwarders (**the "third party"** in this suit). The pleading shows further that the cheque was issued and presented to the defendant's bank for clearance purpose and thereafter the plaintiff's goods were released implying that wharfage charges had been received by THA.

It is alleged further that despite the fact that "**THA**" had no bank account with the defendant the defendant's bank cleared that cheque from the Barclays Bank. After two months, the plaintiff was informed by the "**THA**" that the moneys had not been paid to her and legal action could taken against her. To avoid eminent

legal action, the plaintiff had to pay (from another source) the same amount of monies to **THA**.

Because the first cheque was not paid to THA, it is the plaintiff's belief that the said money in the cheque are still held by the defendant's bank since "**THA** does not have an account with the defendant's bank".

It is also stated that the plaintiff have made several demands for a refund but all in vain, and that the plaintiff has suffered loss due to loss of patronage, reputation and good will against the **THA** and other clients who had confidence in them. For those reasons, the plaintiff is praying for the following orders:-

1. Refund of T.shs **66, 414,835/=** with interests at bank commercial rate from the date of cause of action to the date of judgment.
2. Interest at court's rate from the date of judgment to the date of payment in full.
3. Damages for loss of patronage, reputation and good will of T.shs **50,000,000/=**
4. Costs of the suit and;
5. Any other and further reliefs, as the court may deem fit and just to grant.

The defence against the claim mainly contains denials of the claim in its entirety save for the jurisdiction of this court. At some

stage of the proceedings, the defendant prayed to implead a third party who is said to have handled the said banker's cheque for clearing and collection at the defendant's bank.

Upon being served with the attendant notice, the third party took heed thereto and filed her defence. She denied liability for the missing of the said cheque and instead insisted her having delivered the same to the THA. She went to the extent of stating therein that in fact, having delivered the cheque, receipts were issued and the cargo released. She vehemently asserted her innocence and begged this court to dismiss the proceedings against her.

At the trial, the plaintiff produced four witnesses to testify for her and tendered a total of six exhibits. The defendant called three witnesses in dock and tendered two exhibits. The third party called only one witness who played double roles (he also testified for the plaintiff) and tendered one exhibit.

I will shortly revert to the testimony and evidence tendered in court, but first the issues.

Issues for determination:

Before commencement of the trial a total of 6 issues were drawn and recorded by this court. These were:-

1. Whether the alleged Banker's cheques **No. 131863** for **Tshs.66, 414,834** issued by Barclays Bank (T) Ltd was deposited with the defendant's bank;
2. Whether the defendant sent the said disputed cheque to Barclays Bank (T) Ltd for clearance;
If the answer to issue no. 2 is in the affirmative, whether the defendant was aware of the said payment to the THA
3. Whether payment for the said disputed cheque was made to the defendant;
4. Whether the disputed cheque was delivered by the Third Party to the THA.
 - i. If yes whether the plaintiff can still maintain a valid claim on the same.
 - ii. If not what did the third party do with the said cheque.
5. Whether the plaintiff and the third party are responsible for the alleged loss being complained of by the plaintiff.
6. To what reliefs are the parties entitled to.

Evidence adduced and testimony.

For the plaintiff the first witness was Mr. **Robert Jonathan Msongo (PW.1)** who introduced himself as a Principal Accountant of the plaintiff company. He said that at the plaintiff company he maintains accounts payable and account receivable. With regard to accounts payables, he said that they deal with

supplies and purchase and liabilities whereas in accounts receivables they deal with collections according to the goods delivered. As to payment modes he said that they effect payment to their suppliers through cash, cheques and T.T. transfer (that is transfer through bank accounts).

After that, he went ahead to describe his knowledge of the defendant bank. He said that he knew her and they have a bank account with her.

To his recollection on April, 2006 through a letter dated 28/4/2006(**exhibit P1**), the plaintiff instructed Barclays bank to draw a banker's cheque in favour of the **THA**. He tendered the said cheque with number **131863** (**exhibit PII**).

It is his statements that the plaintiff handed over the cheque to its clearing and forwarding agent (the third party in charge of the cargo) whose duty was to have it presented to the beneficiary (THA), so that THA could release its cargo. The cargo was released therefore the plaintiff believed that the charges had been paid. But, alas! after two months the plaintiff was informed by the third party that no payments had been made to THA in respect of the cargo. The plaintiff sought clarifications from Barclays bank who told them that the said cheque was paid to the defendant's bank.

He continued to tell this court that the matter was reported to the police for investigations. He also said that he had heard that

there was a cheque prepared by Manyata instructing the defendant's bank to pay K.J Communication to whom the plaintiff owed nothing. He vouched as a matter of fact that the plaintiff had no bank account with the defendant's bank.

In cross examination he denied to have personal involvement in instructing Barclays bank regarding the disputed cheque. He said that the instruction letter was signed by one **Sunil Nair** who was stationed in **Kenya**.

Regarding who collected the cheque, PW1 said that it was collected by one **Ketn Patel** who was a cashier at the plaintiff's company. However, he said he has no idea as to who delivered it to the third party. On further cross examination PW1 said that it must have been one of the personnel in the imports department who delivered it to the third party. He also stated that it is impossible for the goods to be released if requisite payments are not made.

On the complaint made to the police, he said that it was filed by an officer of the plaintiff. He also heard that investigations were being carried out and further heard about existence of another cheque in favor of K.J Communications from the plaintiff's legal officer-one **Mdoe**.

He said that he was not aware as to whether the said cheque was deposited with the defendant's bank or not. He said further that the cheque was received by the **THA** because they issued them

with a receipt and released their cargo. On another and final lap of his testimony he averred that the only problem was that the **THA** refused to clear their cargo unless they have paid and for that they were made to pay twice because they were told that first receipts were forged.

PW2 was **Jackson Shilla Moshi** the Director of Operation in the third party company. He confirmed knowing the plaintiff company since 2002 as their customer in clearing and forwarding business.

He stated that he received 8 consignment shipping documents from the plaintiff for clearing which he accordingly logged with the **THA**. The plaintiff prepared a Banker's cheque and handed it over to him together with the bills. According to him, he gave the cheque to his clerk one **Charles Limota** for presenting to the Ports Authority. Having presented it he was issued with port bills with seal showing that the payments have been received. Thereafter the cargo was released. In his bid to prove the release of the 8 consignments he tendered receipts exhibiting the alleged release (**Exhibit PIII**).

He went on to say that after the wharfage was discharge they proceeded to the TRA and paid for duties including VAT whereby the goods were released to the plaintiff. It is his further testimony that after two months elapsed he was called by Ports Authority officer one Mawia who informed him that about two consignments one for 66 Million and another for 46Million were lying at the port

unpaid for. He replied him that they had already paid and had official receipts for the said consignments. He took the receipts to the Ports Authority for counterchecking where it was discovered that the cheque allegedly paid for the release for the consignments was not in the THA's system. The cheque was neither received nor banked. THA denied the seal on the documents to be theirs.

According to PW2 they sniffed forgery and collusion because payments were not made but goods were released. According to him it was resolved to stop payment of the said two cheques and asked the banker to give details of any payments which had been made.

The report from Barclays bank was that T.shs 66,000,000/= cheque was paid to the defendant's bank and T.shs 46,000,000/= had not been cleared. The information he received through the email disclosed that the defendant's bank had cleared the cheque in favour of THA. But upon approaching THA they replied that they did not maintain an account with the defendant.

The Tanzania Harbours Authority advised the plaintiff to claim that amount from the defendant. The plaintiff was made to pay again to the THA the same amount of **Tshs.66,000,000/=**.

Regarding police investigations on the matter he said that the suspects are two and one of them **Peter Kambanga** is his clerk. Another one is **Charles Limota**(who is still at large) and who

disappeared immediately after the Ports Authority phoned him(**PW2**), the last suspect is **Juma Kapaya** of K.J Telecommunications.

Regarding the procedure for paying warfage charges, PW2 said that payments are usually made before commencement of unloading and failure to pay may lead to paying demurrage charges. He said that in relation to the cargo in question, they paid everything well in time before the ship started to discharge.

In his bid to prove that they actually made payments he tendered release orders and receipts which were issued by the TRA (**Exhibit TP.I**). He said that his job ended after taking the cargo to the plaintiff. He said that he had no idea as to how the cheque disappeared from the Ports Authority systems.

On cross examination, he concede that **Sanford Urio** was his Financial Director and conceded that he was the one who handled payment to the Tanzania Harbours Authority but he was not interrogated by the police. He also averred that the two suspects were all his former clerks who used to take the cheques in respect of wharfage charges to the THA and conceded that the goods could not be released if no payments were made. This witness was firm and maintained that the cheques were paid to the Authority.

The third witness for the plaintiff is **Gerald Kamugisha (PW.3)**. He works with Barclays Bank as Head of International Trade

Finance Department formerly in 2006 was an Operations Manager. He stated that he know the plaintiff as their corporate client who maintained several accounts in the bank.

His testimony in relation to the cheque is that; in April 2006 the plaintiff instructed Barclays bank to draw a banker's cheque worth T.shs 66,414,835/= in favour of THA (see **Exhibit PI**), to which they complied.

PW3 identified **exhibit PII**, as the cheque that Barclays issued. It bears cheque number **131863** and manager's cheque account **no.0009100332**. He also identified 12 digits which he said they show it being a manager's cheque. Explaining what the latter is, PW3 said that it is a cheque which is drawn by and belongs to the bank, wherein the drawer and drawee are the same.

The witness said that the payee was THA with instruction that it should be collected by a person with authority. He continued to say that the same was collected by the plaintiff and they signed in the register. According to him, it was their expectations that the cheque could be presented to **THA** for encashment and that after deposit it would be cleared at their bank or through Dar es salaam electronic clearing house(at BOT).

On the clearance procedural compliance, it is his evidence that the cheque was cleared as per the established procedures. He stated that the cheque shows to have been presented to the defendant bank for clearing (as shown by their stamp). Having

been presented for clearance at the bank, it was received and stamped with an in-ward clearing stamp.

He said that thereafter the defendant was supposed to issue a clearing schedule, which she did, and that on that schedule (**Exhibit PIV**), the incumbent cheque was among the listed cheques.

He said that after it was presented, it was kept for two days and thereafter it was cleared hence by implication, the plaintiffs paid the Tanzania Harbours Authority (THA). He went on to tell this court that after two weeks several cheques including **Exhibit P2** were found missing and after follow up they found the cheque to have been cleared, that is why he wrote exhibit PV.

Regarding the second cheque which was from the defendant too, he said that their follow-up revealed that it was presented for clearance by one Manyata. It was a forged cheque. He said that they informed the defendant's Managing Director who conceded that he know the payee.

This witness stated further that **exhibit PII** was a genuine cheque. Accordingly he went ahead and identified a copy of cheque No.131863 for T.shs. 66,414,835/= issued on 28.4.2006, for account No.0009100332 whose payee was K.J Telecommunication and was drawn by one Manyata.

Regarding its authenticity, he ruled out it being Barclays' cheque for the reasons that firstly manager's cheque account number cannot be given to individual customer (Manyata) and that it was not a bankers' cheque.

His further stated that figure no.12 is a bankers' cheque code whereas figure no. 11 is individual cheque's code. On the drawer and supposedly Barclays customer one Manyata, he stated that Manyata was not among their customers. He indentified the similarities and differences between the two exhibits (**Exhibit PII**) and a copy of the said cheque appearing as item **no.1** on the defendant's supplementary list.

On the similarities he identified the following:

- I. The cheque numbers
- ii. Clearing codes.
- Iii. Manager's cheque account number

On differences he identified the following

Manager's clearing code

It was a drawer's as against Manager's cheque

Payees were different, i.e. K.J Telecommunications as against **THA**.

On the dates the cheques were received by the defendant, it is typed by long hand whereas their cheque was typed by using ink.

He further explained that this cheque was never presented to the clearing house though it was on the list in terms of cheque number and amount.

On cross examination he admitted that he could not be 100% sure as to which cheque between the two was received by Barclays bank because he did not prepare them. He admitted further that he never dealt with it.

On the duration of clearing, he said that for the banker's cheque it is one day and the next day the presenting bank must be notified. According to him, since the date on the stamp is **16/5/2006** he would have expected it to arrive on **17/5/2006**. The schedule date, **was 18/5/2006** whereas the date of the copy of the cheque was **17/5/2006**. It was his opinion that under normal circumstance he would have expected it to be presented on the **18/4/2006**.

According to the schedule (**exhibit PIV**), on the 18/5/2006, they received three cheques namely;

1. Cheque number 100016 for 240,000/=
2. Cheque number 101410 for 3000,000/=
3. Cheque number 131863 for Tshs 66,414,835/=

This witness said that he had no idea where the THA maintains her account, and that he did not ask their clerk which cheque he received from the clearing house.

The fourth and last witness to testify for the plaintiff (PW4.), is police investigator in the Criminal Investigations Department (CID) for 8 years Mr. **Venon Malimali Lebolo**. He stated that in **July 2006** he was assigned a case file whose complainant was **PW2**. The complaint was about a missed cheques prepared by Barclays for the plaintiff in favour of the **THA**

According to him, he interrogated two suspects, one of them being **Peter Kambanga** who was one of the **PW2**'s employees responsible for handling the cheques. He said that, the suspect told him that he was given two cheques worth T.shs 46,000,000/= and 66,000,000/= respectively. He was informed that the latter cheque was handed to one Charles Limota.

This witness continued to explain that **Kambanga** told him that while on his way taking the cheques to **THA** he was called by **Charles Limota** who informed him that he (Charles) could take the T.shs 46,000,000/= cheque to the bank, therefore he gave it to him because they trusted each other. After two days he was informed that the 46,000,000/= cheque was not paid but the 66,000,000/= had been forwarded to the defendant for payment.

When he approached the defendant's bank for details of the account which the money was cashed, he was told that they do

not have an account for the THA. Instead, he was given a banker statement (**exhibit PVI**) of 3/8/2006 for K.J Telecommunications. He said that the amount shown on **exhibit PII** which was a cheque payable to **THA** is similar to that on the bank statement and the same, per bank statement was withdrawn in four instalments in a ten days period.

This witness said further investigations on the T.shs 66,000,000/=cheque revealed that K.J Telecommunications was paid similar amount by Manyata investment. He said that the bank gave him a cheque from the central clearing house which was stamped acknowledging its receipt by Barclays. In this respect he identified **exhibit PII** as being the cheque that was handed to him.

He said that he compared that cheque with the one that he had obtained from the defendant's bank (which he had identified as document no.1 on the defendant's list of documents), and said that he discovered several discrepancies.

Explaining the discrepancies he said that firstly, the photostat copy he was given at the defendant's bank was printed by hand, where as the cheque from Barclays was computer printed. That secondly the signatures were different because where as the Barclays cheque had strips on which one could sign on the right side above the strip, the cheque from the defendant had no such strips. Further that thirdly payees were different in that, where as

the payee for the one from Barclays was THA, the one from defendant was K.J Telecommunications Ltd.

He continued to identify the differences that the dates appearing on the cheque from the defendant was 18.2.2001 where as the one from Barclays was dated 14.2.2006. He said that the two were also endorsed differently in that the one from Barclays was endorsed "Manager Cheque, this cheque must bear two authorized signature". The one from the defendant had no such endorsements. Upon showing it to the Barclays, said **PW4**, they said that they did not recognize that cheque from the defendant.

It was his further averments that upon more inquiry to the defendant on who presented that cheque to the bank, they said it was one **Jenny d/o Wambi**, who conceded to have taken the cheque to the Central Bank after it was scrutinized in the **MICR** machine for photocopying purpose (from where the Photostat was taken).He said that he showed her the clearance and the cheque from Barclays and she said that she knew that paper which she had stamped with outward stamp which **exhibit PIV**) and that she insisted that the cheque passed to the Barclays was item I on the defendant's list of documents to rely on.

It was his further statements that during the interrogation he discovered dirty game to have been played and that the cheque deposited with the defendant was forged, and further that there was interception between the central house and the defendant.

He said that this **Jenny** was still at large having jumped police bail and she no longer worked for the defendant due to dismissal in connection with the matter at hand.

He went on to testify that he managed to arrest the owner of K.J. Telecommunications, one **Hussein Kipaya**, who told him that he was being paid by **Manyata Investment** after selling them 5 Motorola walk talkie worth Tshs. 66 Millions. He said that this Kipaya did not show him any document to that transactions and he (**Hussein Kipaya**) could not remember names of the officials of the said Manyata he was dealing with.

He surmised that his investigations reveals that the moneys were paid to K.J. Telecommunications vide the defendant whereat the former had an account.

On further strides this witness testified that he interrogated the THA officer in account section and who denied to have had received any payments. Still on cross examination he confirmed that according to his investigation the document received at the defendant was document number 1 on the defendant's list of documents which shows that it was received on 17/5/2006 with similar amount and number of cheque. He then said that he had formed an opinion that that document number 1 was forged and that the defendants were supposed to send it to BOT.

That was all for the plaintiff's case.

The Defendant's case:

On the defendant's side there were three witnesses to testify. The first one on the list was one **Shakste Tariq Abdulahman (DW1)** who introduced herself as working with diamond trust Bank as an assistant Manager and who prior thereto had worked with the defendant as Supervisor of Operations Department.

She explained that her duties were authorizing accounts opening, custodian of cash safe, authorizing payments in the system for cheques and customer services, and that she knew the bank's customers. She added that they did not maintain an account with the Tanzania Harbors Authority.

On being referred to a rubber stamp on **exhibit PII** she said that it shows that the cheque was received at **teller no.1**. She said that though one of the several stamps indicates savings and finance and the purpose of the stamp being to show that the cheque was paid to savings and finance, it was paid to the THA.

On the internal procedure regarding cheque payment, her testimony was that normally the authorizing officer would be either herself or the Branch manager, but the signature appearing on that cheque was neither hers nor Branch Manager's and alleged that it was forged.

Identifying other defects on the said cheques she said that on the face of it, it shows it was received on the **16/5/2006**, and that it

should be the date it was deposited, which per their procedure, it would have been endorsed on the same date and would appear on the customer's statement of that date.

On being referred to **exhibit PVI** she identified it as a temporary statement for the K.J Telecommunications with entry of 66,414, 835 which was received on **17th May, 2006**. She continued to describe the procedure upon receipt of the cheque that once deposited and authorized the cheque goes to the clearing house at the BOT in the next day morning. She then said that if **Exhibit PII** was received on **16/5/2006** it would have been sent to the clearing house on the **17/5/2006**.

On being referred to document 1 on the defendant's list of documents she testified that K.J Telecommunications was their customer in May 2006. According to her, the stamp on the document showed that the cheque had been received at teller no.1 on the **17/5/2006**. She went ahead to say that assuming that it was received on that date, she could have authorized payment on the same day and it would have been sent to the clearing house on the following day of 18/5/2006.

Upon being referred to **exhibit PII** and document no. 1 in the list defendant's documents, and having identified both of them, said that the one dated **28/4/2006** with number 131863 for THA, though stamped "received" it was never received by the bank. Instead, she said, the one that was paid is that which was

payable to K.J. Telecommunications. In her move to prove receipt and payment of the said cheque she produced a deposit slip to that effect (**Exhibit D1**).

Regarding the processes and transaction that, after receiving such deposit slip, the tellers normally enter the data in the system and prepares the vouchers to him for authorization, where after the cheques are compiled for sending to the clearing processing department whereby all original cheques and BOT files are captured for sending them to the BOT the next day.

Upon cross examination this witness espoused that she holds no banking qualification except that she had completed her Ordinary level education together with computer course. She was referred to **exhibit PII** and document no.1 in the list of documents and said that though the signature on **exhibit PII** resembles hers, it was forged. She said that though they appear to originate from Barclays Bank, it is impossible for a bank to issue two cheques with similarities as the two controversial cheques in question, and conceding that one of them must have been forged, added that the first defendant is the one better placed to tell which one is forged.

She said that the endorsement on **exhibit PII** is made only where a cheque is payable to the defendant bank. Regarding the document no.1 on the list of the defendant's documents, it was

her statement that it was a copy and the original possibly could be in the possession of the Barclays Bank.

Further she was referred to **exhibit PIV** and having identified it, she said that apart from that document there is nothing to indicate that the document no.1 on the defendant's list of documents was received by the Barclays bank. Regarding Jenny Mwambi she conceded to know her and that she was in the clearing department though could not recollect as to whether she was the one who dealt with this issue.

She conceded that it was impossible to issue a cheque without having an account with the particular bank. As regards to the drawer of the document no. 1 she said that it was Manyata co Ltd, though she did not know whether the said Manyata had an account with Barclays. It was her testimony that upon receipt of the cheque, a bank does not know whether the drawer have an account with that particular bank.

She also told this court upon further questions regarding the document no. 1 on the defendant's list of documents that it was payable to K.J Telecommunications and that the same was paid after its clearance . On the liability of such a loss, it was her statements that if the person who was paid is not entitled the bank claims from the payee where as if the bank itself is involved, and then it should pay the money.

On her final lap, through re-examination, she vouched that there is nothing to distinguish between **Exhibit PII and PIV**. She added that had document no.1 been brought to them they could have paid it because K.J Telecommunication had an account with them, but as regards **exhibit PII** she said that it could not be received by them because they had not account with the THA who is the payee therein.

DW2 was one **John Bukombe Kamuli**. He introduced himself as the Forex and deposit officer at the defendant bank. Describing his roles, he said that he opens letters of credit, receives and process shipping documents under letters of credit. As a deposit officer, he said that his roles are to receive cheque deposits, cross check for similarity of the particulars. This is the function, he said, he was performing in the year 2006.

On being referred to document no.1 and **exhibit D1** he recognized them and said that the latter is a deposit slip, which acts as credit to customers account. Expounding on the slip and procedures, he averred that it is a document he receives and examines where after satisfying himself that it tallies; he stamps both, the original and duplicate deposit slip. The cheque, he said, is retained and he uses the deposit slip to deposit the monies into the customer's account. During the process, he said, he prints the vouchers and sends them to his boss for authorization.

He went on to explain that **Exhibit D1** related to the deposit of Cheque no.131863 drawn by Manyata Investment co. Ltd payable to K.J Telecommunications an amount of 66,414,835 and that he received the same on the **17/8/2006**. He vouched further that it was himself who received it from the customer and who also stamped the deposit slip. He said further that the document is the one that relates to document no.1 on the list of documents of the defendant. He gave reasons for their being related that the drawer, the payee, the rubber stamp and the dates are similar.

He also said that **exhibit PII** has same particulars with the deposit slip except the drawer and the payee, the size of the rubber stamp, and that the dates on the rubber stamps are different from the one that he received. He stated further that had **exhibit PII** been brought to the bank, he could not have received it because the THA had no account with them.

He went on to tell this court that after receiving the cheque and deposit slip, he handed them to his supervisor. As regards to the procedure thereafter it was his testimony that the deposit slip is posted in the computer meaning to credit the customer's account with value date payable after either 4 or 7 days. In regard to this cheque, he said that the account number which the credit was given was no.42366-60 which belonged to K.J Telecommunications.

He said that he could not have received exhibit PII because the account number does not belong to THA, and that the account number appearing at the back of **Exhibit PII** is not the same as account number appearing on the deposit slip.

On cross examination this witness stated further that he had a diploma in banking obtained after attending a three years course, and that his boss was one **Shaksite**, whose qualifications were unknown to him. He also admitted that it is not practically possible to issue a cheque to a non customer though depending on the Manager.

Accordingly he went on to posit that the Barclays bank could not have issued a cheque to Manyata investment if they did not maintain an account with them. He said that he did not know whether item 1 in the list of document was cleared or not and further that exhibit D1 could not have been used to receive **exhibit PII**. However he did not remember whether the cheque was cleared or not.

The collecting bank, he said, was the one supposed to clear the check and the receiving bank has to confirm though this is not necessary and that he did not know whether the defendant confirmed before making the payments.

The final witness appearing for the defendant was one **Christopher Kazalla(DW3)**. He is the head of Internal Audit at the defendant bank. He kicked off with explanation of the

procedure of the bank upon customer's presentment of the cheque.

In that regard, his testimony went as follows; number one; the customer must have an account with the bank because the cheque will be credited therein. Then the cheque is registered into their various books and then sent to the BOT clearing house for clearing.

Regarding the registration procedures, he said that the received cheques are entered into registers and there after vouchers are prepared. Customers are credited with their amount and the cheques are taken to the clearing department. At the department a clearing list would be prepared for the cheques received and then the clearing clerk would take that cheque to the clearing house per the list of cheques. On the time taken for processing the cheques, he averred that they would be processed on the same day and go for clearing the next day.

To his recollection, the Tanzania Harbors Authority was never their customer in the year 2006 but K.J Telecommunication was. Upon being referred to the **Exhibits D1, PII** and the document no.1 on the list of defendant document, he recognized them and said that the deposit slip (**exhibit D1**) related to a photocopy cheque (document no.1) payable to K.J Telecommunication.

He said that that cheque number 131863 dated 28/4/2006 for 66,414, 835 was presented at their counter and it was paid to K.J Telecommunications who has an account with them.

On **exhibit PII**, he said that it could not have been accepted to the defendant bank because they do not have an account with the THA. Still on that exhibit the defendant's stamp on it indicated that it was received on the 16 may 2006.

He went ahead and tendered a clearing list (**exhibit D2**), which he said was prepared by the clearing department and sent out for clearing on the **18/5/2006**.

On being referred to the list it was his testimony that it had three cheques, and the rubber stamps appearing at the bottom were for the outward clearing for the saving and finance and the other one for inward clearing for Barclays. He stated further that the said cheques were received by Barclays for inward clearing on the **18/5/2006**.

Upon being asked on the possible date they would have been received at the defendant bank, it was his averment that it could have been previous dates like the **16** or **17/5/2006**. He then reaffirmed with certainty that it was the latter date because normally cheques are sent the next working day.

With respect to the third entry on the list, he said that it related to the **exhibit PII**, which was a Barclays' cheque payable to K.J. Telecommunications.

On cross examination, his were statements that the two different cheques (exhibit PII and document no.1 on defendant list of documents) were different. He conceded that under normal circumstance, a banker cannot issue a cheque to a client who is not its customer.

On being referred to **exhibit PII** he conceded that the payee was supposed to be **THA**. He also conceded the stamps of the defendant appearing overleaf of the said cheque but said that it could not be cleared nor received because of absence of the **THA's** account at the defendant bank.

However, in relation to the document no.1 on the list of documents, he conceded that it was drawn by Barclays and they had cleared it and paid to K.J Telecommunications. With regard to the similarities of the details on the two cheques, it was his testimony that under normal circumstances it could not be possible for Barclays bank to have two different customers with same account number and who were paid on the same date same amount of money and on same cheque.

Regarding the role of a clearing house, **DW3** stated that, it was a mere facilitative role and not checking on the genuiness of the cheques. He said that the procedure is normally that clearing

clerks of different banks exchange their cheques which are drawn to their respective banks for clearance. He added further that the issue of determining whether a cheque is fake or genuine is upon the banks themselves and not the clearing house.

On who had taken the incumbent cheque to the clearing house from the defendant bank, he confirmed that it was one **Jenny Mwambi**, and additionally said that she is the one who know what transpired at the clearing house concerning that cheque.

He averred that the cheque was paid to Manyata investment after the Barclays bank had cleared it and remitted the particular fund to the defendant. Regarding the details of K.J telecommunications who were the defendant's customers, he said that he had no clue as to their place of neither business, nor proprietors because he had no market file concerning those details in court.

He explained further that that upon receipt of a cheque, the customer must also present some supporting documents such as invoice but regarding the cheque in question; it was his testimony that he personally had never seen any document to that effect.

On whether the defendant was prepared to bring the said Manyata investment to prove its having been the right payee of the cheque, it was his reply that that was not in his capacity to state.

Upon further examination he said that he did not know why the third party was enjoined in this suit by the defendant bank. He conceded that they had never paid any monies to the third party and further that a bank cannot issue two cheques which are similar to that extent.

On re-examination he said that there are rules set by the clearing house and any banker cannot opt out of the clearing house. He also averred that for a check received on the **16/5/2006** such as **exhibit PII**, it could have been sent for clearing on the **17/5/2006**, and as regards document no.1 on the defendant's list of documents, he said that it was received on the **17/5/2006** and therefore sent for clearing on the **18/6/2011**.

He said further that the cheque received at the defendant bank on the **17/5/2006** was the one drawn by Manyata Investment and payable to K.J telecommunications, and also that the clearing clerks do check for forgeries of checks just on the face of the cheque itself.

That marked the closure of the defendant case. The counsels have preferred to make their final submissions. I commend them for their industriousness in their submissions. Indeed I have canvassed through them in the course of composing this judgment.

Ashore, I must admit that this is a case of its own kind, which, though not indeed a virgin territory, yet its set of circumstances

places it on its own class. Thus, if one looks closely into its kernel, one might be drawn to hastily conclude, from the cause of action, that indeed it was no case at all to be brought into this court, in this nature as a civil claim. For, where as the intended payee claims to have had not received payments for wharfage charges for which respective goods she has already released, and where as no scintilla of evidence, have been tendered into this court to show that indeed the plaintiff, by the reasons of such theft or forgery (be it as it may) has been forced to and indeed has, paid twice for the said charges, it can be safely concluded onset that indeed, it was no issue to be brought into this court, for the claimant has not so far proved any injury suffered, neither is the victim (**THA** who was the payee of the incumbent cheque, and who has already released the goods on fake/forged payments to her) a party to this suit either as a claimant or beneficiary thereto.

However, for the sake of judicial precedent, I refrain from making such hasty conclusion and I will dig into the issues seriatim.

Accordingly the first issue requires this court to find out whether ***the alleged Banker's cheques no. 131863 for Tshs.66, 414,834 issued by Barclays Bank (T) Ltd was deposited with the defendant.***

The testimonies and evidence brought into this court will be of much assistance to this issue. But before I can embark on this

fact finding mission, I feel urged to find out which, among the two cheques with same numbers, amount and purportedly drawn by the same bank (Barclays), one for the THA and another for K.J Telecommunications, was in fact issued by the said Barclays bank. Thus, it is pertinent to satisfy myself as to which of the two cheques was legally issued by the Barclays bank.

Going by the pleadings, the plaintiff had instructed the Barclays Bank to draw a banker's cheque in favour of the THA. This was corroborated by **PW.1**'s testimony that on the 28/4/2006 vide **exhibit PI** they had indeed done so. It was further confirmed by **PW3(an officer from Barclays)** who said that truly they had been instructed so to do. The cheque itself which was produced in that regard (**Exhibit PII**) was confirmed by the said **PW3** as being actually the one that they had drawn following the plaintiff's instructions.

On the other hand the competing cheque with same number and amount drawn by Manyata Investment for K.J Telecommunications; was disowned by the purported drawer – Barclays. The only evidence in its respect is **exhibit D1** which is a cheque deposit slip, that, according to **DW3**, signifies payment of the payee's moneys.

Further to this, though the defendant sought this court to believe that the said cheque –whose original's whereabouts remained a puzzle throughout the trial, was issued by the same Barclays, the

latter has denied having a client by the name Manyata Investment who could have possibly issued instructions to that effect.

The defendant has failed to bring the said Manyata whose cheque she cleared and purported to encash it to a purported payee; so that the Manyata could prove her being a client to Barclays-say by tendering her relationship details with Barclays, and how did she instruct Barclays to draw such a cheque in that amount. When asked as to why he didn't, **DW2** said that he could not remember who even K.J Telecommunications is because he had no Marketing files with him in court. Nevertheless, the counsel tried to technically avert this through his submissions that the witness either Manyata could have turned hostile. The only question here is how did he determine that he could be hostile without bringing him on the dock?.

Apart from that, all witnesses including the defendant's witnesses have ruled out the possibility of the Barclays drawing one cheque with such similarities as to the amount, and cheque number. The defendant could not produce the original of the said cheque which purportedly was drawn for K.J by Manyata though DW3 said that per the procedure, upon its presentment, they produced the vouchers, credited the amount and retain the original of the cheque.

Such circumstances leaves one plain conclusion that, indeed, the cheque that was legally issued by Barclays bank was that **exhibit PII** with number 131863 for Tshs. 66,414,835 payable to the THA by the plaintiff and hence it is my finding that the purported cheque exhibited vide a deposit thereof (**Exhibit D1**, which is nevertheless back dated from the purported date of receipt of the cheque thereof) with same numbers and amount payable to K.J Telecommunications by Manyata Investment Ltd was never issued by Barclays bank. Thus it was the one which was a result of the alleged forgery if at all there was one.

Having so found and satisfied myself, I will appraise the facts regarding the first issue as it unfolds from the pleadings, testimonies and evidence adduced.

With regard to the depositing of the said cheque (exhibit PII) with the defendant, there are certain facts which greatly points to a positive answer. These are

- the stamp of the defendant on the face of the cheque leaf marked "check received" teller 1"
- the stamp of the defendant overleaf marked "outward clearing" with an authorized signature of the defendant.

Regarding the stamp on the fore of the leaf, the testimony of **DW1** on the procedure of receiving cheques suffices. On being questioned about the meaning of rubber stamp, she said that it

shows that it was received at teller no.1 and that it was paid to defendant.

Further **exhibit PII** is stamped and marked "outward clearing" and shows an authorized signature of the defendant. All these clearly points to the reception of the cheque and presentment of the same to Barclays. Counsels for the parties are alleging fraud on each party. The **DW1** has disowned the signature appearing on the **exhibit PII** but no direct evidence has been adduced to that effect. Further, none of the defendants or third party seriously challenges the depositing of the cheque with Barclays.

On this line, I do not agree with the defendant's witness (**DW1**) and her counsel, that the cheque that was deposited or sent for clearance to Barclays was that of K.J Telecommunications. This is simply due to the fact that there is not credible evidence to prove it.

Instead there is a deposit slip in that respect (which, to me is unreliable because, whereas the stamp bears the received date as "17/5/2006", the slip is dated 16/5/2006, and this variation was never explained in Court). Even the defendant could not call in doc any witness be it Manyata or K.J telecommunication to prove that fact.

Therefore as a matter of fact and I do so find, that the cheque number 131863 for Tshs.66,414,835 for THA was the one deposited to Barclays for clearance.

The second issue is as to whether the defendant sent the disputed cheque to Barclays Bank (T) Ltd for clearance.

I have already found that this particular cheque was deposited at the defendant bank. The purpose for which it was certainly for clearing. On this, the testimony of **PW3** is to the effect that the said cheque was presented for clearance by the defendant. In his bid to prove this fact he referred to the stamps that it bore the outward clearing stamps of the defendant. I did not find and direct and concrete evidence to controvert authenticity of the said stamps despite their oral denials to the same.

I also do not agree with the defendant's allegations that what was actually sent to Barclays for clearance was that for K.J Telecommunications drawn by Manyata. This is for the very same reasons that, firstly no banker can issue a cheque to a person who is not her client, and secondly, it is indisputable to all parties herein that no banker can issue a cheque with same numbers, same amount but to different payees or drawers, and thirdly, where as the cheque issued by Barclays for THA is said to be a Managers cheque, the one purported to be its replica for K.J Telecommunications is an individual cheque which cannot be a managers' cheque. It was neither brought into court to assist on the evaluation on determining the authenticity of these cheques.

As intimated by **PW3**, Barclays had no client by the name of either Manyata or K.J Telecommunications appearing on the other purported cheque.

It is therefore logically and factually true that the only cheque that could have been sent for clearance at Barclays was exhibit PII, and it was accordingly sent by the defendant.

Therefore as to whether the defendant was aware of the payment to THA, I say certainly yes. Thus, since the defendant or her employees were aware that the cheque was in favour of the THA and actually did present it there for clearance as a collecting banker from Barclays, it is vivid, by necessary implication, that the defendant was aware that such proceeds thereof was for THA.

The witnesses have disputed this fact alleging that they could not even have accepted the cheque because the THA had no account with them. I find it very hard to buy such statements. The cheque itself contains the defendant's own stamps, which, apart from mere word of mouth, did not bring any evidence to challenge the same, say bringing the true stamp in this court that were being used apart from the one appearing on the cheque.

No steps had been taken by her for the alleged forgery of her stamps. Apart from that, it is indicated thereon that the payee thereof is THA, and over the leaf it is endorsed an account number which, appears on **exhibit D1** to belong to K.J Telecommunications(On close observation I find there to be a

slight difference in numbers of the accounts , thus the one over Exhibit PII is 42367-0060, the one on exhibit D1 is 42366-060, which a find the difference to be shoddy and calculated to defraud) . One may ask, why one could endorse such account, if at all the payee shown on the face of the leaf had no such account or any at the defendant's bank?

The third issue is whether payment for the said disputed cheque was made to the defendant.

This is vividly clear in the affirmative. The defendant principally do not dispute receiving such payment since they allege to have cleared and collected the cheque for K.J Telecommunication, which, I have already found there to be no such genuine cheque in that respect. Thus, as already shown, and vide the cheque itself, it was for THA and therefore since it followed normal clearance procedure under the auspices of the defendant, it was indeed paid the said amount.

This brings me to the issue no. 4 which is whether the disputed cheque was delivered by third party to THA;

Here lies the most controversial and so the crux of this matter. I must admit that it has greatly exercised my mind, but to decide I must.

It is a trite law that parties in adversarial litigation cannot tie, but only whose evidence is weighty wins. Looking at the evidence and testimonies, it points to the affirmative response to such issue.

Firstly, a stamp at the back of exhibit PII belonging to the THA signifies receipt of the said cheque and which shows that it was taken for clearance. Apart from mere hearsay and allegations of non receipt of the same or forgery of its stamp, nothing credible and concrete has been brought to this court, let alone any THA official, to controvert the receipt of the said cheque or to show that the stamps was forged.

Secondly, there are testimonies of **PW1** and **PW2** corroborating the fact of receipt of the said cheque. They both posited that the cheque was received in that respect and they were issued with sealed receipts of **THA** and the cargo was released. They vouched further that the cargo could not have been released had the cheque not been delivered.

The THA so far has not shown anything in the name of legal action or at least steps towards unraveling the perpetrators of such nature of fraud. This beats common sense, for an organization like THA to witness fraud and forgery on its official instruments and theft of such extent and yet throw the ball to the plaintiff and folds her arms.

The plaintiff has alleged that the same was intercepted on transit to the said THA. To prove it, there are testimonies of **PW2** and

PW4, who both were of the opinion that there was collusion between the employees of the plaintiff, the 3rd party and THA so as to divert the said cheque. **PW1** stated at further stage of the hearing that he was sure that the cheque was delivered though, having been called by THA; they were told that it never delivered and no payments were made.

In as much as circumstantial facts and testimonies may hold true to the issue, yet this court cannot draw a certain inference there from to conclude that the cheque was never delivered to THA.

Thus in absence of direct evidence, say any communication between the THA and the defendant in regard to liability for the consignment, or at least oral testimony of any account department officials of the THA, or at the furthest stretch, the documents (receipts) in regard of the alleged second payment for the consignment- payment which sparkled off this legal battle, it cannot be safely and certainly concluded that the cheque was not delivered.

The only question that still begs is, ***if at all the cheque was delivered to THA, was any payment made in that respect encashed into THA's coffles?*** An answer to this is crucial to form the basis to the sub issue formed to the fourth issue that, ***if the cheque was delivered whether the plaintiff can still maintain a valid claim.***

In this accord, receiving a cheque is quite far and apart from having the proceeds there from. As a matter of fact, it is my finding that no monies were ever received by THA in the tune of the cheque amount that of 66,414,835. This finding is fortified by the following;

Firstly, the cheque which is said to have been cleared and which I have so found (**exhibit PII**), by the defendant was the one that belonged to THA. The defendant did not maintain an account with the THA but yet they received the cheque and proceeded with collection procedures. They have admitted through the testimonies of **DW1, DW2, and DW3** that they could not receive a cheque for the client who has no account with their bank. Yet that is what exactly was done, as per the analysis of the evidence and testimonies above.

More aptly put, they have so far failed evidentially to controvert the allegations that they cleared and encashed the cheque into a wrong payee's account having known that the cheque was fraudulently presented to it.

Secondly, as it has unfolded through the testimonies, the cheque was either swapped by the employees of the organizations involved including the defendant's, the plaintiff's, the third party, and the THA herself.

For instance, one **Kambanga**, who was entrusted with the cheque to have it delivered to the THA, is a prime suspect of the

catapult. Further, another, one Charles who was an employee of **PW2** and who is still at large is also implicated. Not only these, but also, one **Jenny Mwambi**, who is an ex-employee of the defendant and who is said to have been at teller no1 where the incumbent cheque was received and deposited and who actually is said to have dealt with the issue, was charged.

The testimony of PW4 shows that she has since then jumped bail and still at large. Yet, with THA, all the documents including receipts were sealed to show that they were genuine and were issued in respect of the cargo which was released as a sure sign of receipt of payments in that respect.

The net result of the circumstance poses that indeed no cash was received by the said THA, though indeed the cheque, per the evidence and testimony was delivered or at least had passed onto the hands of THA officials who, in turn entered and accessed its system for producing the said receipts.

Now, that being the position, it is plainly true to hold that the plaintiff herein can still maintain a valid claim thereon. This is further due to the following reasons;

If the deposited cheque was **exhibit PII** which was for THA, by the plaintiff and it was cleared by the defendant but not credited into the intended payee (THA) but to some other account unknown to the drawing bank, it is plainly clear that the

defendant is guilty of what is in legal jargons termed as conversion.

Conversion is a tort which is defined to mean an act of willful interference without lawful justification with any chattel in a manner inconsistent with the right of another, whereby that other is deprived of its use and possession. In the present case it involved a cheque, and hence, per common law principles of banking, it attracts strict liability where one is found guilty (**See for instance Ross Cranston in his "Principles of Banking Law" 1967, Oxford**).

In our laws, a party will only be exonerated from liability if he shows that he received the conversion was orchestrated upon his/ her acting in good faith, without negligence and in ordinary course of business(**See section 85(1) of the Bills of exchange Act, Cap.215 R.E 2002**).

Now, on the basis of the facts as unfolding before this court, can it be said that the defendants are exonerated so as to disentitle the plaintiff from maintaining the claim on her cheque?. I say certainly NO!.

In the case of **National oil and another versus Standard Chartered Bank (T) Ltd, commercial case no.97 of 2005(Unreported)**, it was held and found that in case of fraud,

the ownership of the cheque reverts to the drawer thereof. In the present case, fraud has been alleged and indeed there is criminal case on-going. I will not comment on the proceedings thereof.

However, so far as the case at hand is concerned, as I have intimated earlier on, collusion on the part of both the plaintiff's, defendant's and third party's employees together with those of the THA to divert the proceeds from the cheque is vividly discernible. On the side of the defendant herein as a collecting banker, abrogation of his prime duty of conducting her business with care and circumspection, (**see Barclays Bank (plc) Versus Bank of England (1985) 1 AER 385**) is imputed and vividly discernible.

This is due to various discrepancies between the documents tendered as evidence for the defendant together with the testimonies of her witnesses which were either overlooked or never explained and which for that matter casts a heavy shadow of doubt on the veracity of her allegations of having cleared the cheque for K.J Telecommunications.

For instance, **Exhibit D1** is dated 16/5/2006 and it purports to credit the account of K.J Telecommunication in respect of a cheque which was purportedly received on the 17/5/2006(as per the testimonies of DW2, and the stamp appearing on the face of the said exhibit D1.). Whereas his testimony in this regard was that an account is credited on the same day it is received and so

evidenced by a deposit slip, and it is sent for clearing on the next day, this cheque purportedly was received on the 17/5/2006 and sent for clearance on the 18/5/2006, but this was retrospectively credited on the 16/5/2006. This is a total U-turn which begs the question as to how could it be that the cheque received on the 17/5/2006 had its corresponding deposit made a day before

There is yet another discrepancy as between **exhibit PVI** which is a temporary statement of the said K.J Telecommunications. It was tendered on the bid to prove that the amount of 66,414,835 from Barclays in his favour was credited into his account on **the 17/5/2006** when the said cheque was received and deposited. Yet, this does not tally with the date appearing on the deposit slip (**exhibit D1**), and further the testimonies of the DW2, to the effect that a deposit slip is an indication that a client's money has been credited into his corresponding account.

All of the above points to the affirmative answer to the appended sub issue to the fourth issue that indeed the plaintiff can still maintain a valid claim on the cheque the reason being that it had not yet parted from it to the THA because due to fraudulent conversion of the proceeds of that cheque, it was not encashed to the right payee. Thus the ownership of the monies thereof reverts to the owner or the payer. Hence just as DW1 observed in her testimony, the defendant herein should pay the wrongly credited money.

Since I have found in the affirmative to this issue, the second sub issue to the fourth which asks, **what the third party did with the cheque** abates because it could have stood, had my conclusion to the previous been in the negative, and besides , I do not deem it relevant towards resolving the real issues herein.

This end brings me to the ***fifth issue*** which seeks to find out ***whether the plaintiff and the third party are responsible for the alleged loss being complained of by the plaintiff.***

The facts as set out in the plaint are to the effect that the plaintiff had the cheque drawn and sent to the third party who was her clearing and forwarding agent for the purpose of discharging the THA and Tax bills. The facts further reveals that the cheque was sent to THA and eventually the goods in respect of which the charges payable on that cheque were released (PW1's and PW2's testimonies). In such circumstance, I do not see how the plaintiff can be held responsible for the loss. Hence, the answer is partly in the negative in respect of the plaintiff.

As to the third party, it was PW's testimony that he handled the cheque to one Kambanga who was his cheque clerks responsible in delivering cheques to their various payees. He testified further that the said cheque was presented to THA and he vouched that to be true basing on the receipts that he had from the latter,

acknowledging receipt of the said cheque, and further that he had the cargo released after he went to TRA and paid other tax bills.

The plaintiff and the third party cannot be, in such circumstance held responsible for the loss, on the face of the evidence and testimonies as adduced in this Court.

I am oblivious of the criminal cases ongoing (at the time of hearing of this case), and further on various employee including one Charles **Limota and Kambanga** who have been arraigned concerning the fraud and forgeries involved, but since that is in the hands of judicial machinery I deem it to be ***sub-judice*** and therefore this venue not fit for comment thereon.

Further, to me, what appears relevant here is the fact that indeed the incumbent cheque was presented for collecting and it was dully cleared by the defendant herein. Those matters as to who perpetrated the conversion in so far as the cause of action and claim is concerned are to me, irrelevant.

Henceforth, the fifth issue is thus answered in the negative.

Now, to what reliefs are the parties entitled?

I have already found that the plaintiff can still maintain a valid claim upon the wrongly paid cheque. According to the case of **NBC versus Said Ali Yakuti (1989) TLR 119**, the defendant as

a collecting banker had a duty of conducting her business with care and circumspection when performing its role of collecting cheques for her clients.

It has been submitted for the defendant that she received and cleared the cheque in good faith and in normal course of her business relying on section 85(1) of the Bills of Exchange Act, (Cap 235 R.E 2002). With due respect, in the present circumstance, this shield cannot be availed to by the defendant, firstly as per my reasons hereinabove.

Adding thereto, the cheque having been presented at the defendant bank, and having seen that it was intended for the payee who was not her customer and had no bank account for that matter, it was her duty to have it returned to the drawing banker or to the presenter.

That, she did not do. Further, she did not controvert the fact that she cleared a cheque that did not belong to her named customer that of K.J. Telecommunications. In such circumstance, nothing can be inferred to incline to good faith and normal course of business, because, not even the supporting document such as invoice, which, per the testimony of DW3, a presenting customer was supposed to tender, were tendered.

Before I land, let me pose here to revert to my earlier intimation at the outset of this analysis on which I explain the basis of my conclusion and final verdict in this matter.

I have earlier on identified a shortfall on this matter. It relates to the plaintiff's claim, that of paying twice for the cargo. Throughout the trial, the plaintiff has not bothered to prove her payment of the same amount for the second time to the THA. It has not even bothered to adduce evidence of demand of the same by THA say the demand letters or complains of overdue payments.

Apart from that, the THA was never called on dock to dispute the receipts which were tendered in this Court (part of **exhibit PIII**) purporting to be in respect of the first payment which was never effected.

That notwithstanding, it has unfolded before this Court that indeed, the defendant did receive the said cheque number 131863 for the amount Tshs. 66,414,835 for the THA, collected proceeds thereof through the normal collection procedure, and instead had it credited on the K.J Telecommunications and not THA. In this regard, it was better poised to intercept the fraudulent diversion of the monies by whosoever perpetrated the same. Instead, the defendant succumbed to the manipulation blindfoldedly, letting the scam bypass her internal controls and checks mechanisms.

It is on this pad that I proceed to my soft landing and thereby decreeing as hereunder;

1. The defendant shall refund the plaintiff a total of Tshs. **66, 414,835/=** which she collected and wrongly credited into the account of K.J Telecommunications.
2. Interest at commercial rate of 21% per annum shall be chargeable on the above principle sum from the date of filing this suit to the date of this judgment.
3. Further interest at court rate of 7% shall be chargeable on the principal sum awarded from the date of judgment till settlement in full.
4. General damages are refused. No basis was laid down by the plaintiff to justify the grant of such prayer, for always, an award of general damages naturally intends to restore the winning party to its original position as if no injury has occurred. In the present case, the plaintiff has not sufficiently shown how did the loss of patronage occur, or reputation and goodwill, given the nature and circumstances of this case as intimated herein at the outset of my analysis.
5. Claim against the third party is dismissed in its entirety.
6. The plaintiff and the third party in this case shall have their costs of their respective suits.

It is so ordered.


A.R. MRUMA,
JUDGE
21/10/2011

21/10/2011

Coram: Hon. A.R.Mruma, Judge.

For the Plaintiff – Mr. Lyimo for Plaintiff.

For the 1st Defendant } Mr. Rwehumbiza for the defendants.
For the 2nd Defendant }

For the Third Party: Mr. Mlinga for the 3rd party.

COURT: Judgment is delivered today the 21st day of October 2011
in presence of Mr. Lyimo, counsel for the plaintiff, Mr.
Rwehumbiza Martine, Counsel for the defendants and Mr. Mlinga,
counsel for the third party.


A.R. MRUMA,
JUDGE
21/10/2011

11,873 Words.