**Waiguru v National Bank of Kenya**

**Division:** High Court of Kenya at Nairobi

**Date of judgment:** 4 February 1971

**Case Number:** 1579/1969 (73/74)

**Before:** Harris J

**Sourced by:** LawAfrica

*[1] Banking – Banker and customer – Negligence – Failure to credit account – Whether negligence.*

*[2] Damages – Contract – Breach of – Failure by banker to credit customer’s account – Nominal damages.*

**JUDGMENT**

**Harris J:** The plaintiff, an employee in the Department of Lands and Settlement (generally known as “the Lands Department”) at Nairobi drew two cheques on a current account maintained by him with the defendant bank at its branch at Government Road, Nairobi, each cheque being dated 29 September 1969.

On the following day both cheques, having been duly presented to the bank, were endorsed by it with the words “refer to drawer” and payment thereon was refused. The plaintiff claims that there were, in fact, or but for the negligence of the bank would have been, sufficient funds to the credit of his account to enable the cheques to be met, and that as a result of what occurred he has been injured in his credit and reputation and has suffered damage.

The bank admits that the cheques were properly drawn, duly presented and subsequently dishonoured, but denies that such dishonouring was wrongful or in breach of its duty to the plaintiff as his banker, and further denies that there were or ought to have been sufficient funds to enable the cheques or either of them to be met.

It appears that the plaintiff entered the service of the Lands Department in the year 1964 and that shortly afterwards he arranged with the Department that his monthly salary would be paid each month into a branch of another bank, namely, National and Grindlays Bank Limited, where he then maintained a current account. Subsequently in the year 1969, at the request of the Department, he had removed his account from National and Grindlays Bank to the defendant bank.

The procedure followed when the plaintiff sought to become a customer of the defendant bank was that on 20 August 1969 he completed and signed a formal request which (omitting certain irrelevant portions) was in the following terms:

“I have to request that you will open a Current Account in my Name (entitled Peterson Waiguru Kariuki account) and will accept the sum of Shs. 108/ – as an Initial Deposit.

I hereby agree to conform to the rules governing Current Accounts at National Bank of Kenya Limited.

Please send me a statement of my account quarterly and supply me with cheque book of 30 forms.

All correspondence relating to my account is to be addressed to:

Name: Peterson Waiguru Kariuki

Address: Box 30089, Nairobi.

Cheques drawn on my account will be signed in the following manner:

P. W. Kariuki

Full Name: Peterson Waiguru Kariuki.

Profession or Occupation: Civil Servant.”

The practice of the bank (which, as will be seen, was followed in the present case) is for it to prepare, as part of the procedure of opening a current account, a “record card” showing the number of the account, the name, occupation and address of the customer, the date of opening the account and the sum initially lodged to the credit of the account.

A few days after the opening of the account the plaintiff received from the bank a cheque book bearing in the front in print the name “P. W. Kariuki” and the number 1.100.000.35, which was the number allotted by the bank to his account.

Sometime towards the middle or latter part of September 1969, but before the end of that month, he instructed his Department to send his salary cheque each month to the defendant bank. This instruction was in the form of a printed “mandate” with certain blanks filled in by him in ink, dated 26 August 1969, and signed by him. This mandate, which was executed in duplicate, was in the following terms:

“Payment of Salaries, etc, to Banks

I, the undersigned, do hereby request you to pay all sums of money now due or which may hereafter become due to me in respect of salary or allowances to the branch of the National Bank of Kenya Limited, at Government Road Account No. 1.00.000.35 for credit of my account there.

The acknowledgement of the said branch of the Bank shall be your full and sufficient discharge. This authority cancels any other authority given by me prior to this date.”

It will be observed that the number of the account as shown in the mandate was 1.00.000.35 instead of

1.100.000.35, as shown in the bank’s records, and this discrepancy, as will be seen, constituted the starting point of the difficulties which arose between the parties.

The plaintiff handed this mandate to his superior officer, intending it to apply to his September salary, his salary for the previous month having gone through National and Grindlays Bank in accordance with what had been the former arrangement. It is clear that the Department understood this to be the plaintiff’s wish and it proceeded to act upon the mandate in regard to his September salary by including it with the September salaries of other employees which were being dealt with in a similar manner.

A clerk in the salaries section of the department named Mwangi gave evidence to the effect that the practice in the case of employees whose salaries are paid in this way is that, on the 25th or some later day towards the end of the month, the section dispatches by hand to the bank a composite cheque covering their respective salaries for that month. A similar procedure is followed in regard to other employees who maintain accounts in other banks, the aim in each case being to ensure that every employee should receive credit in his bank account for his remuneration before the end of the month to which it relates.

It is necessary now to consider shortly the manner in which these composite cheques are dealt with.

Mr. Nyammo, who has been an employee of the defendant bank since March 1969, said in evidence that towards the end of every month the bank receives with each of these cheques a list, which was referred to as a “salary – list”, containing both the numbers of the various employees’ accounts to be credited and the respective amounts, and that the cheque is there – upon passed to the bank’s clearing department.

This department is responsible for issuing credit slips, one for each employee whose name is on the relative salary list, and these, in the case of current accounts, it passes to the current accounts department where they are posted.

The bank employs a partially mechanised posting system and the clerk in the clearing department operating the machine would or should detect any inconsistency between the particulars shown on a credit slip and those appearing on the customer’s record card. If such an inconsistency should be observed, in the case of a payment made to a Government servant by means of a composite cheque, one of the following three courses would be taken:

(*a*) the amount involved would be returned by cheque to the Government Department which had remitted the money, with a covering letter pointing out that the name of the account indicated by the Department appeared to be incorrect; or

(*b*) the amount involved would be placed in a suspense account pending clarification of the position by either the Government Department or the customer; or

(*c*) the bank would in the exercise of its discretion and after a further scrutiny of the records determine the identity of the account to the credit of which the amount should be placed.

Dealing with the general practice of the defendant bank in its Government Road branch at Nairobi, Mr.

Nyammo said that normally cheques, unless post-dated, are credited within twenty-four hours of presentation and that if a cheque after being credited is dishonoured the bank reverses the entry in the customer’s account. The system operates by means of the clerk in charge of the machine feeding into it each time the appropriate record card and the other information necessitated by the particular transaction to have the entry posted.

He explained that the posting of current account is always deferred by one day so that, in effect, it is one day in arrear. Accordingly a cheque received on the 25th day of a month but dated the 26th would be posted in the customer’s account on the 27th but the posting would be shown as of the 26th. Similarly a

cheque which was both dated and received on the 25th of the month would be posted on the 26th but shown as of the 25th. Although actually posted on the 26th such a cheque could not be drawn against by the customer until the 27th unless the bank was prepared to accept the risk of being dishonoured, a course which was normally adopted only in the case of customers whom the bank knew and considered to be reliable.

The witness said that all completely new customers of whom the bank knows nothing are told verbally by the bank’s clerks every time they make a lodgment of cheques that they may not draw against the lodgment until the cheques are cleared. He agreed that in this context the present plaintiff was a completely new customer but he did not suggest how the warning is conveyed to customers whose salaries are lodged in bulk by their employers as in the present case nor was there any evidence to show that the plaintiff had received such a warning.

Turning to the specific circumstance surrounding the present case Mr. Nyammo said that he remembered the plaintiff’s visit to the bank on 20 August 1969 for the purpose of opening the account in his own name which he gave as “Peterson Waiguru Kariuki”. The plaintiff completed and the witness countersigned the printed request of that date already referred to and the bank thereupon caused to be prepared the customary “record card” the material portions of which read as follows:

Account No. 1.100.000.35

Current Account Department

Constituents Record Card

Name in full: Peterson Waiguru Kariuki

Profession: Civil Servant Min. of Lands & Settlement

Address: Box 30089, Nairobi

Date of Opening Account 20.8.69

Opening Balance Shs. 108/–

Introduction: Mr. J. M. Wairagu (Has an account with us).

Mr. Nyammo agreed that the bank had issued a cheque book to the plaintiff and be identified the two

dishonoured cheques as having come from that book. When shown in court the mandate of 26 August

1969 he said that he had seen similar mandates previously but not the particular one and that so far as he was aware neither a duplicate nor a copy of it had been received by the bank. He said that the handwriting on the mandate appeared to be that of the plaintiff but that the account number given thereon, namely, 1.00.000.35, was not the number of the plaintiff’s account in the bank’s books.

The witness said that the composite cheque, which amounted to Shs. 5,756/75 and included the plaintiff’s salary, together with the relative salary list, were received from the Lands Department on 25 September but that neither the plaintiff’s name nor his account number appeared on the list. He stated that the account number 10000035 appeared on the salary list against the sum of Shs. 1,655/ – and the name “Peterson Kariuki”, but that the bank did not have in its books an account bearing either that name or that number. The composite cheque, post-dated to 26 September, although received the previous day, was cleared on 26 whereupon the several credits represented thereby were transferred to the current accounts department to be there dealt with.

He produced in evidence a photostat copy, admitted by consent, of a “credit slip” bearing the words and figures “Current Account: Credit Peterson W. Kariuki. 1.100.000.35 Account No.”, and recording an amount of Shs. 1,655/ – against the date 26 September 1969, the employer’s name being shown at the foot as “Ministry of Lands and Settlement”. Above the figures 1.100.000.35 there had seemingly been written and scored out another number which appeared to be “1000.36”, and the name “Peterson W.

Kariuki” was so written as to suggest that the letter “W” had not been there originally and had been inserted later. This slip, the witness said, speaking from his knowledge of the practice of the bank originated in the current accounts section having been prepared by a clerk from the details shown on the salary list, and he added that from his examination of the credit slip it seemed clear to him that a wrong number and name had first been inserted with the result that, when fed into the machine, the slip had been “rejected”, after which it was corrected and again fed to the machine by which it was then “accepted”, leading to the plaintiff’s current account being ultimately credited.

Mr. Nyammo further stated from his knowledge of the manner of operation of the bank that the machine operator would have been the first person to discover the inconsistency between the particulars appearing in the salary list (as shown in the credit slip) and the particulars in the bank’s books, and that when this discovery was made some person in authority would have exercised his discretion, corrected the slip, and caused it to be again fed to the machine. The machine operator would not himself have had the authority to make the correction and his duty on observing the error would be to bring the matter to the notice either of the manager or of the officer in charge of current accounts. Both the machine operator and the branch manager as at that time have since left the service of the bank and neither they nor the officer in charge of current accounts was called to give evidence.

The witness said that if one of a number of credit slips sent to the current accounts department could not be accepted by the machine owing to a discrepancy it could not be posted with the others and that in the present case, because of the delay occasioned by having the error put right, the plaintiff’s account unlike those of the other employees on the salary list, was not shown as credited until 30 September.

While admitting the possibility of the two dishonoured cheques having been presented on that same day before the account had been credited he said that if when they were presented the account had already been actually credited with the plaintiff’s share of the composite cheque, the two dishonoured cheques would have been met. He also said that, although he had no knowledge of an arrangement by the committee of Nairobi clearing banks whereby the clearing times in the Nairobi area would enable customers, wishing to draw cash against cheques paid into their accounts, to do so on the second business day after lodgment of the cheques, he was aware that banks are supposed to pay civil servants one day before the end of each month, that everybody is expected to know that, and that such is in fact the practice of the defendant bank.

Counsel agreed that, contributory negligence not having been pleaded, the only issue apart from damages is as to whether the bank was unreasonably slow and therefore negligent in crediting the plaintiff’s account with his share of the proceeds of the composite cheque.

This cheque was received by the bank, together with the salary list, on 25 September and cleared on

26 September. The next step to be taken was the transfer of the transaction to the bank’s current accounts section for the preparation there in manuscript of the several credit slips required in respect of the six separate salary payments which it represented and their onward transmission by that section to the machine operator for posting. Precisely when this transfer and onward transmission took place has not been established but it is clear that on the balance of probabilities it was on the 27th since that was the date upon which the current account of Mr. Wairagu, one of the six other employees named on the salary list, was credited. This day, being a Saturday, was a half-holiday in all Nairobi banks, and since the end of the month was at hand, there was a distinct possibility, as stated by Mr. Nyammo, that the bank’s efforts to investigate and correct the error manifest on the salary list in relation to the plaintiff began on Monday the 29th. It is common case that the bank succeeded in solving the problem as to the identity of the plaintiff’s record card on Wednesday 1 October, on which day it placed the moneys to the credit of the plaintiff’s account, the posting showing the bringing of the moneys to credit on the previous day. The question, then, is as to whether the lapse of time ensuing between Friday 26 September and the following

Wednesday was reasonably necessary to enable the bank safely to post in its books the credit accruing to the plaintiff from the composite cheque.

Perhaps the simplest method of determining the matter is to consider the courses open to the bank when it found itself faced with the problem of locating a home for the insufficiently designated sum of

Shs. 1,655/-. As already mentioned, these courses were three in number, namely, to return the money to the Lands Department whence it had come; to hold it in suspense and communicate with that Department for clarification; or to shoulder the burden of attempting by itself, from its knowledge of the matter and the background circumstances, to elucidate the problem.

Taking judicial notice, as I am bound to do, of the speed with which a solution might have been expected had either the first or second of these alternatives been chosen, I have little hesitation in holding that neither of these two courses of action would have led to the plaintiff’s account in the bank being credited in sufficient time to enable the two cheques with which we are concerned to have been met when presented on 30 September.

It therefore becomes necessary to consider whether the bank, having justifiably adopted the third alternative course, as it did, acted with sufficient diligence and expedition to meet the requirements imposed upon it by the relationship of banker and customer existing between it and the plaintiff.

The general principle, as I understand it, is that although it is the duty of a banker, to whom his customer’s cheque is presented for payment, to pay the cheque forthwith if there are sufficient funds available for the purpose, he will not be liable on a failure to pay, notwithstanding that he had sufficient funds in his hands at the time of presentment of the cheque, unless a reasonable time has elapsed before the presentment to enable the fact of the receipt of funds to become known to him. No question arises here as to the date of presentment by the bank of the composite cheque, and the question at issue turns solely on the failure or inability of the bank to put the plaintiff’s account in funds in sufficient time to enable the two cheques drawn by him and presented on 30 September to be honoured. The criterion is that of reasonableness, and the position would appear to be accurately stated in *Grant on Banking*, 7th

Edn. at p. 87, where the learned editors say in effect that what is a reasonable time for a banker to require to enable the matter of the receipt of funds to become known to him is a question of fact to be ascertained in such case by reference to its particular circumstances including the general magnitude and extent of the business at the bank, the pressure of business at the time or on the previous part of the day in question, and so forth.

Mr. Gautama, for the plaintiff, and having stated at the commencement of his submission that the true issue is then as to whether the bank, having elected not to return the money in question to the Lands

Department, had been unreasonably slow in placing it to the plaintiff’s account and therefore negligent, adumbrated a three-fold proposition to the effect that the court could not decide the question before it without knowing how soon after the receipt of the composite cheque the bank had come to know that part of the amount comprised in it was the property of the plaintiff, that only the bank could establish this fact, and that by virtue of s. 112 of the Evidence Act (Cap. 80) it was the duty of the bank to produce the evidence necessary to enable the question to be decided.

I think, with respect, that Mr. Gautama is over-stretching the effect of the section, for its purpose is to provide that when a fact is specially within the knowledge of any party to the proceedings the burden of proving or disproving the fact lies upon that party. It has not been shown that the bank is now aware or has the means of becoming aware of the precise date upon which it first came to know of the plaintiff’s interest in the proceeds of the composite cheque, and I cannot accept the suggestion that the bank is bound to call as witness its former employees to give evidence on the matter. Apart from the fact that the knowledge of such persons is not now the knowledge of the bank (if, indeed, it ever was), it is at best doubtful to what extent the recollection of such persons as to the matter could be relied upon by the court after the intervening passage of time.

Counsel for the plaintiff also submitted that the fact that a bank is very busy at the end of the month is no excuse for delay nor is a shortage of staff or the fact that 27 September, being a Saturday, was a half holiday, and that if the bank is insufficiently staffed to carry out its duties properly it should not take in further business. The better view, is, I feel, implicit in the passage from *Grant on Banking* to which I have already referred, in addition to which it could not seriously be suggested that the range of duties cast upon a bank by virtue of the relationship of banker and customer involves the making of provision to deal with problems arising from the gross carelessness of others, whether customers or not, such as arose here.

Mr. Gautama next contended, as I understood him, that there could be no suggestion that the inaccurate statement given to the bank by the Lands Department as to the number of the plaintiff’s account had contributed to the delay which occurred on the part of the bank. On the contrary I am satisfied, and so hold, that the delay was occasioned directly by the inaccuracy of that statement and that the critical question is whether the delay so caused was improperly prolonged by the bank, thereby leading to the dishonouring of the plaintiff’s cheques.

Lastly it was submitted that, since the plaintiff’s account was in fact credited with his share of the composite cheque on 1 October (but with effect as of 30 September) an onus lay on the bank to show that the dishonouring of his two cheques on 30 September occurred at a moment of time prior to that of the crediting of the account. I find this somewhat ingenious proposition unacceptable for the reason that the crediting of the account on 30 September was an entirely notional concept to accord with current banking practice, the physical act of posting the credit not having taken place until the following day.

In the early decision in *Marzetti v. Williams*, 1 B. & Ad. 415, it was held that, generally speaking, when a banker, acting as agent for his customer, collects a cheque payable to the latter he must be allowed a reasonable time, consistent with ordinary book-keeping, in which to pass the proceeds to the customer’s current account so as to enable them to be drawn against. The application of that principle to the present case constitutes in substance the issue for decision, namely, was the bank acting unreasonably in failing to place the moneys in question to the plaintiff’s credit at a date earlier than 1 October.

Regard must also be had to the well-recognised rule, illustrated by the House of Lords in *London*

*Joint Stock Bank v. Macmillan*, [1918] A.C. 777, that a banker is entitled to decline unusual risks. As is said in *Paget’s Law of Banking*, 6th Edn. at p. 243,

“It is a fair reading of the contractual obligation that not only shall the customer not impose, but the banker shall or need not undertake, exceptional risks. There are contingencies arising in banking practice, say with regard to indorsements, where, in the interests of banker and customer alike, the only reasonable course is that usually adopted, namely, to ‘postpone’ payment pending enquiries or pending confirmation.”

The relevance of this rule in the present case is readily seen when it is appreciated that were the bank through haste or carelessness to have placed the money to the credit of a wrong account rectification might well have been impossible.

The issue before the court, as already mentioned, is one of fact and falls to be determined in the light of such evidence as has been adduced. It is not denied that the bank employs a partially mechanized system of book-keeping, but none of the authorities cited by counsel dealt with the circumstances surrounding the use of such a method or the difficulties which might then be expected to follow when inaccurate information accompanies a payment to the bank of moneys intended for a customer. Here the bank found itself, though none of its own doing, in a dilemma arising solely from the error committed by a stranger, namely, the Lands Department, in the preparation of the salary list. A delay of some days ensued on the part of the bank in having the error investigated and corrected and then in bringing the moneys concerned to the credit of the plaintiff. During this time the two cheques, drawn by the plaintiff in the fair anticipation that they would be met out of those moneys, were dishonoured. Was the bank’s delay unreasonable? Mr. Muite, for the defendant, referred me to a passage in *Grant on Banking*, 7th

Edn. at p. 87, dealing with the case of *Banks v. Bank of New Zealand* (1902), 22 N.Z.L.R. 572. This passage reads as follows:

“Where the banker has omitted to credit moneys paid in by reason of the fact that a wrong name was inserted in the paying-in slip by the customer, the banker was held not to be liable for the consequent dishonour of a

cheque, although the right name had been entered on the counterfoil stamped by the banker and returned to the customer.”

As counsel rightly says, this decision would appear to be based on facts which for all material purposes are in exact parallel with those in the present case. Unfortunately no copy of the report appears to be available and I am unable with safety to assume that there may not have been some other element, such as a local statutory provision, present there which precludes the decision from being one of general application in this country.

In the present case the only evidence specifically directed to the matter of reasonableness regarding the time factor is that of Mr. Nyammo who said that, speaking as a banker, he would consider the time taken by the bank to bring the moneys to credit of the plaintiff’s account as not unreasonable in the circumstances. Although the evidence of this witness, who is himself an employee of the bank, cannot be described as that of a disinterested person, his testimony was not shaken in cross-examination and no comparable testimony from any other source was adduced by either side.

I have anxiously weighed the evidence adduced in the light of all the circumstances, including in particular the facts that the plaintiff was a new customer of the bank whose account had not previously been fed from the proceeds of such a composite cheque; that the designation of the plaintiff on the salary list by the name of “Kariuki Peterson”, although not entirely incorrect, differed from the form of his name under which he had opened and maintained his account; that his designation by number on the

salary list was manifestly erroneous; that the inevitable result of that manner of designation was to require the bank either to reject out of hand the attempted payment to his account and return the money to the Lands Department, or to assume the burden (whether or not it first placed the money in a suspense account) of endeavouring to trace the identity of the account intended to be credited. In the result I am unable to hold that the plaintiff has discharged the onus resting upon him of establishing negligence on the part of the bank, and the action, accordingly, fails.

It is clear that the plaintiff is not a trader and therefore does not stand in the vulnerable position of such a person whose commercial credit may be seriously jeopardised by the dishonouring of even a single cheque. Special damages are not claimed but the court was invited, in assessing general damages, to include among the relevant factors the disconnection of the plaintiff’s telephone, the intimation by the telephone authorities that they would not accept payment of that particular account by cheque, and the indication given to the plaintiff by his superior officer in the Lands Department that, unless a proper explanation was forthcoming, he would be officially reprimanded and would be deprived of the facility of cashing cheques in the office.

For the defendant it was submitted on the authority of *Flach v. London & South-Western Bank* (1915),

31 T.L.R. 334, that the words “refer to drawer” endorsed on the plaintiff’s cheques in breach of contract were not capable of a libellous meaning, and that, having regard to the decision in *Gibbons v.*

*Westminster Bank Ltd*., [1939] 2 K.B. 882, the plaintiff, not being a trader and not having pleaded and proved special damages, could recover only nominal damages.

*Flach’s* case turned on the right conferred at that time by law upon debtors to defer for a period during the early days of the Great War the payment of certain debts and it has been regarded as a somewhat special case. I am prepared to assume, but without deciding, that the words “refer to drawer” are capable in the context of the present case of bearing a defamatory meaning and to some extent at least bore in fact such a meaning. The question then is as to the nature and quantum of damages.

In *Gibbons*’ case, where a customer of a bank, who was not a trader, sued that bank for breach of contract in wrongfully dishonouring her cheque when her account was sufficiently in funds to meet it, it was held that the plaintiff, not having pleaded and proved special damages, could recover only nominal damages. Mr. Muite very properly stated that he had been informed that there was an unreported decision of Rudd, J. in this country to the contrary effect but that he had been unable to verify his information. Mr.

Gautama was also apparently unable to trace this decision and accordingly I propose to disregard it. [See

*Dogra v. Barclays Bank* (note following).] *Gibbon’s* case is referred to in *Mayne and McGregor on*

*Damages*, 12th Edn. at p. 540, and, notwithstanding that it is a decision of a court of first instance only, I consider that I ought to follow and apply it. The position therefore is that were the plaintiff to be held to have established breach of contract by the bank nominal damages only would be awarded and these I measure at forty shillings.

In order to meet the possibility that the decision in *Gibbons’* case may be held to be inapplicable I shall turn to a consideration of the quantum of actual damage suffered notwithstanding that it has not been made the subject of a claim for special damages.

In regard to the telephone disconnection, the inconvenience which this caused to the plaintiff appears to have been suffered for about three days only commencing some five or six days after 30 September, and apparently no re-connection fee was charged. As a result of the cheque paid to the telephone authorities being dishonoured the plaintiff was required to pay that particular account in cash but there was nothing to suggest that this requirement was made to apply to any subsequent accounts.

The embarrassment suffered by the plaintiff in his place of employment included that resulting from an unpleasant interview with the acting deputy Commissioner of Lands, the details of which I have mentioned. Although I may assume that when the true facts became known to the Department the plaintiff’s record was completely cleared, particularly in view of the fact that the action of the

Department itself had unwittingly contributed to what had happened, there is good reason to suppose that, for a day or two at least, the plaintiff was considerably alarmed and embarrassed.

Apart, however, from the effects of what occurred during or as a result of the discussions which he had with the telephone officials and person in his Department, there is no evidence of the suffering of any damage or loss by the plaintiff as a consequence of the bank’s actions in the matter, and on the assumption that the plaintiff is entitled to damages, I would measure them at Shs. 1,500/-.

For the reasons already stated the action is dismissed with costs.

*Case dismissed.*

For the plaintiff:

*SC Gautama*

For the defendant:

*PK Muite* (instructed by *Waruhiu & Waruhiu*, Nairobi)