



REPUBLIC OF KENYA



KENYA LAW

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Impulse Developers Company Limited v Barkat Developers Limited & 6 others (Civil Case 469 of 2007) [2023] KEHC 24302 (KLR) (Commercial and Tax) (31 October 2023) (Judgment)

Neutral citation: [2023] KEHC 24302 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE 469 OF 2007
A MABEYA, J
OCTOBER 31, 2023

BETWEEN

IMPULSE DEVELOPERS COMPANY LIMITED PLAINTIFF

AND

BARKAT DEVELOPERS LIMITED 1ST DEFENDANT

RUKENYA KABUGUA 2ND DEFENDANT

WILLIAM KAMAU 3RD DEFENDANT

MOHAN MAHESH ALIAS JAGJIT SINGH FLORA 4TH DEFENDANT

NANCY WANJIRU WAIGANJO ALIAS NANCY NDEGWA 5TH DEFENDANT

EQUITY BANK LIMITED 6TH DEFENDANT

BERNARDS MULWA 7TH DEFENDANT

JUDGMENT

1. The plaintiff moved this Court through a plaint dated 11/9/2007. It sought judgment against the defendants, jointly and severally, for Kshs. 6,000,000/- together with interest thereon at prevailing commercial rates of 15% per annum from 21/12/2006 until payment in full, general damages plus costs and interest thereon.
2. The background to the suit is that in November 2006, the plaintiff received an offer, through the 4th and 5th defendants, to purchase L. R. No. 4275/64 from the 1st defendant for Kshs. 60,000,000/-. It paid the deposit of 10% of the purchase price of Kshs. 6,000,000/- on 20/12/2006.



3. On 21/12/2006, the 4th and 5th defendant opened an account with the 6th defendant bank at its Community Corporate Branch and deposited the banker's cheque. The 1st defendant applied for and was granted an advance against the uncleared cheque. The plaintiff contends that the bank breached its duty of care by allowing the 4th and 5th defendant to withdraw the Kshs. 6,000,000/- over the counter, with the help of the 7th defendant.
4. Thereafter, the plaintiff did not receive a signed sale agreement. It discovered that the 2nd to 5th defendant had no authority to sell the property as they had misrepresented that the 1st defendant was the registered proprietor of the property. It conducted official searches at the Lands Registry, at the Companies' Registry and at the Law Society of Kenya which showed that the property was non-existent on the ground and that the title was forged.
5. That the 2nd to 5th defendant were not directors of the 1st defendant, as purported and that the supposed law firm of Nzioka & Company Advocates, that was acting for the 1st defendant, was non-existent. The 2nd to 5th defendant were criminally convicted with obtaining money by false pretenses.
6. On 21/5/2008, judgment was entered against the 1st, 4th and 5th defendant for Kshs. 6,000,000/- while the claim against the 3rd defendant was discontinued on 27/1/2012.
7. The plaintiff's claim against the bank was therefore for conversion of the banker's cheque. The particulars of the claim were that the bank breached its duty of care to the plaintiff by allowing the opening of an account with it in the name of the 1st defendant, depositing of the banker's cheque for Kshs. 6,000,000/- and illegal drawings on the same by persons who were not holders or holders for value.
8. The bank defended the suit vide its defence dated 5/10/2007, in which it denied that it had notice nor was it party to the alleged fraud. It claimed that it was the plaintiff who was negligent by failing to conduct due diligence before issuing the cheque to the 4th and 5th defendant.
9. The 7th defendant filed his defence dated 4/10/2007 in which he denied the claim. He contended that there was no cause of action against him as he was merely the bank's employee and that the plaintiff's loss was due to its own negligence.
10. At the hearing, the plaintiff called its director, William Kabogo Gitau (PW1), who adopted his witness statement dated 27/2/2012. The same reiterated the contents of the plaint as aforesaid, as his evidence in chief, and produced the plaintiff's bundle of documents as PExh1.
11. In cross examination, he confirmed that the plaintiff had been in the real estate business for seven years and that it was represented by advocates in the botched sale transaction. That the plaintiff conducted a search at the Lands Registry to confirm that the 1st defendant was the registered proprietor of the land before releasing the cheque. That a later search showed that the title was given to a different party by the President. However, he admitted that neither search was produced in Court.
12. He admitted that the copy of the cheque did not bear the plaintiff's name nor did it show that it was the 7th defendant who received it. Nonetheless, he blamed the bank for releasing the money the day after the account was opened, before the cheque cleared and for releasing money to the 4th defendant who was in police custody from 2/1/2007.
13. The bank called Steve Gichohi Gichuki (D6W1), the branch manager of its Community Corporate Branch. He adopted his witness statement dated 19/6/2012 as his evidence and produced the bundle of documents as D6Exh1. He stated that the bank complied with the CBK Prudential Guidelines during the account opening and during the drawing of the cheque. This was because it obtained the copies of



- the 4th and 5th defendant's national ID Cards, KRA PIN Certificates, the certificate of incorporation and Memorandum and Articles of Association of the 1st defendant company and an introduction letter from Midtusks Agencies, that held an account with the bank.
14. Thereafter, the bank acceded to the 4th and 5th defendants' request to be paid against un-cleared effects awaiting clearance of the cheque. They withdrew Kshs. 500,000/- on 22nd, 23rd and 28th December, 2006, totaling Kshs. 1,500,000/-. That it was acceptable for the bank to release part of the money on an un-cleared cheque.
 15. He further testified that the said two defendants made subsequent withdrawals of Kshs. 3,000,000/- on 29/12/2006, Kshs. 1,000,000/- on 6/6/2007 and Kshs. 300,000/- on 11/1/2007. He confirmed that the 7th defendant was one of the line managers in charge of credit. That the 7th defendant was not responsible for opening accounts. Although D6W1 denied authorizing payment of the cheque, he confirmed that the 7th defendant had delegated authority to advance monies in respect of un-cleared cheques; that he followed the requisite procedures and that he was not faulted by the bank for the transaction.
 16. In cross examination, D6W1 confirmed that the 4th and 5th defendant did not appear on the official company search dated 16/8/2007 produced by the plaintiff. He claimed that the search was unreliable since the account was opened on 21/12/2006.
 17. He admitted that the bank did not produce an official company search obtained before opening the account although he had earlier on stated that the same had been requested for. He also admitted that the 4th and 5th defendant did not avail the 1st defendant's financial statements for the 3 years preceding the date of account opening, claiming that they were not necessary as the 1st defendant was incorporated on 20/12/2005.
 18. The 7th defendant testified as D7W1. He adopted his witness statement dated 1/10/2012 as his evidence. He testified that he was not involved in the account opening. That before the withdrawals, he did not know the 2nd to 5th defendant or the plaintiff. That the 4th and 5th defendant requested for an advance (overdraft) of Kshs. 500,000/- against the un-cleared cheque and they presented the sale agreement.
 19. That he recommended payment as per the bank policy and the bank authorized the payment. Thereafter, the cheque cleared and there was no reason for suspicion as the other bank confirmed that the cheque was genuine. He told the Court that the request for payment against un-cleared effects was one of the products offered by the 6th defendant and that there was nothing unusual or suspicious about the transaction.
 20. The parties filed their respective submissions which are on record and which the Court has considered. The plaintiff submitted that the bank was liable to it for breach of the duty of care in failing to comply with the Central Bank of Kenya (CBK) Prudential Guidelines. This was in so far as the opening of the impugned account in the name of the 1st defendant and the withdrawal of the sum of Kshs. 6,000,000/- in the banker's cheque deposited in the account was concerned. The plaintiff relied on Guideline 4.3 which obligates banks to identify and verify the identification documents of its customers.
 21. According to the plaintiff, the bank failed to verify that the 4th and 5th defendant were not directors of the 1st defendant. That against Guideline 4.5, the bank failed to obtain a written statement from the customer confirming that the nature of its business that would show its ability to generate that kind of money.



22. It faulted the bank for allowing the 4th and 5th defendant to deposit the banker's cheque for Kshs. 6,000,000/- upon opening of the account and to withdraw a substantial amount thereof across the counter even before clearance of the funds in the banker's cheque. That the explanation by the bank that the withdrawals were based upon an overdraft was unsustainable since there was no loan agreement between them.
23. The cases of *Shalimar Flowers Self Help Group v Kenya Commercial Bank* (Civil Appeal No. 84 "A" of 2016) [2016] eKLR, and *Equity Bank (Kenya) Limited v Don Ogalloh Riario & another* (Civil Appeal No. 133 of 2017) [2019] eKLR, for the proposition that a bank owes a duty of care in the payment of cheques presented to it and that a bank is negligent and in violation of the CBK Prudential Guidelines where it fails to obtain a written explanation on withdrawal of large sums of cash over the counter.
24. That the 7th defendant cannot escape liability on the claim because he assisted the 4th and 5th defendant to withdraw the cash.
25. On its part, the bank submitted that it complied with the CBK Prudential Guidelines and obtained the requisite documents at the account opening. That it normally granted advances against un-cleared effects and that it acted within the law in granting the facility to the 1st defendant for a commission. That the company search relied on by the plaintiff to demonstrate that the 4th and 5th defendant were not directors of the 1st defendant as it was made as at 16/8/2007 was unreliable.
26. The cases of *Beyond Kenya Limited & another v Gulf African Bank Kenya Limited* (Civil Case No.158 of 2009) [2019] eKLR and *Standard Chartered Bank Limited v Intercom Services Ltd & 4 others* (Civil Appeal 37 of 2003) [2004] eKLR were relied on the submission that in all cases of conversion, the bank's duty to act without negligence is given a reasonable construction and that the standard of care required is that to be derived from the ordinary practice of bankers not individuals.
27. The 7th defendant submitted that since no fraud, deceit, misrepresentation, conspiracy was proved against him, then the exception to the general rule that an agent of a disclosed principle cannot be sued, does not arise.
28. The issues for determination are:-
 - a. Whether the 6th defendant owed the plaintiff a duty of care in respect of the banker's cheque for Kshs. 6,000,000/- and whether that duty was breached;
 - b. Whether the 7th defendant is liable as the 6th defendant's employee; and
 - c. Whether the plaintiff's loss was occasioned by contributory negligence on its part.
29. On the first issue, the bank argued that it did not owe the plaintiff any duty of care as it was not its customer and there was no direct bank customer relationship between them. The bank contended that it only owed a duty of care to the payee of the banker's cheque, its customer, the 1st defendant.
30. In, *Equity Bank (Kenya) Limited v Don Ogalloh Riario & another* [Supra] eKLR, the Court of Appeal found that the liability and obligation of the appellant to bank a third party (the respondent) arose from the circumstances under which the common law imposes a duty of care that a bank owes to a third party.
31. In *Marfani & Co Ltd v Midland Bank Ltd* [1968] 2 ALL ER 573, Diplock LJ observed that:-

“The duty of care owed by the Banker to the true owner of the cheque does not arise until the cheque is delivered to him by his customer. It is then, and then only, that any duty to make



inquiries can arise. Any antecedent inquiries that he has made are relevant only in so far as they have already brought to his knowledge facts which a careful banker ought to ascertain about his customers before accepting for collection the cheque which is the subject matter of the action, and so have relieved him of any need to ascertain them again when the cheque which is the subject matter of the action is delivered to him. What the Court has to do is to look at all the circumstances at the time of the acts complained of, and ask itself were those circumstances such as would cause a reasonable banker possessed of such information, about his customer as a reasonable banker would possess, to suspect that his customer was not the true owner of the cheque.”

32. In *Standard Chartered Bank Limited v Intercom Services Limited & 4 Others* [2004] eKLR, the Court of Appeal held that: -

“The onus of establishing circumstances showing absence of negligence is on the banker. It is a matter of defence, does not give a substantive cause of action. The extent of inquiry must be measured by what in the circumstances a fair minded banker paying due regard to the exigencies’ of banking business in relation to the person depositing the cheque would consider it prudent to do in order to protect the interest of the true owner and each case must depend on its own circumstances”

33. In view of the foregoing, the bank’s contention that it could not owe the plaintiff a duty of care since it was not its customer cannot hold. This is because a bank may be liable to a third party who issues a cheque in situations where the common law imposes a duty of care on it, such as where the third party is defrauded by the bank’s customer.
34. Condition 4.3 of the CBK Prudential Guidelines provides that a bank should establish to its satisfaction that it is dealing with a person that actually exists and identify those persons who are empowered to undertake the transactions, whether on their own behalf or on behalf of others.
35. In the present case, the bank submitted that it fully complied with the law both at the account opening and in allowing the cash withdrawals. However, the plaintiff argued that the bank was at fault for allowing the 4th and 5th defendant to open an account in the name of the 1st defendant without verification through a company search. In addition, the bank was faulted for allowing the two to withdraw the money before the cheque cleared and while the 4th defendant was in police custody.
36. The bank’s witness admitted in cross examination that there was no company search that was produced to support the bank’s compliance. If it had carried out due diligence, then the two would have filed the same.
37. The allegation that the documents were forwarded to the bank’s legal department on 13/2/2007 and the deduction of search fees from the 1st defendant’s account on 3/2/2007 is not sufficient evidence that a company search was done. Further, it would have been prudent for the bank to conduct the company search and verification at the account opening stage and in any case, before the withdrawal of the money, which had already taken place.
38. In my view, even though the bank obtained copies of the certificate of incorporation, memorandum and articles of association, company resolution, national ids and PINs for the 4th and 5th defendant and the letter of introduction from Mid Tusks Agencies, these were not sufficient in absence of the company search to confirm the directorship of the 1st defendant. Had the bank obtained the official search at the right time, it would have discovered that the 4th and 5th defendant were not directors of the 1st defendant and had no authority to act on its behalf.



39. A reasonable banker would be expected to do its due diligence on the company to know its real directors before opening of the account. In my view, as a first step towards protection of the true owner of a cheque, it is expected of a reasonable banker to not only satisfy itself of the true identity of a new customer but also gather sufficient information regarding such customer in order to establish whether the person is the person or entity which he, she or it purports to be.

40. In *Beyond Kenya Limited & another v Gulf African Bank Kenya Limited* [2019] eKLR, Makau J. observed that: -

“The bank in carrying out its core business of deposit taking, it is required to open and maintain bank accounts. In discharging its mandate, it is its duty to satisfactorily establish and verify the customer’s true identity and in doing so, it must be alert to the even present danger that after opening of the account, may be used for fraudulent purposes.”

41. Therefore, I find that the bank was negligent in opening the account in the name of the 1st defendant without undertaking due diligence in accordance with the CBK Prudential Guidelines.

42. With respect to the cheque deposit and the cash withdrawals, the banks’ witness indicated that the bank complied with the CBK Prudential Guidelines and obtained all the requisite documents. The 7th defendant also was firm that the 4th and 5th defendant gave the bank a copy of the sale agreement to support their request to withdraw the money. However, neither the bank nor the 7th defendant produced the alleged sale agreement.

43. This is against condition 4.5 of the guidelines which stipulates the minimum acceptable information for determining legitimacy of funds and transactions. I find that the bank was also negligent in allowing the 4th and 5th defendant to withdraw the money without verifying that they were indeed directors of the 1st defendant and had authority to act and without obtaining a copy of the alleged sale agreement.

44. The bank submitted that the plaintiff lacked the locus standi to sue, arguing that its proximity to any loss or damage suffered is non-existent since the banker’s cheque drawn to the 1st defendant, bore the words “A/c William Kabogo Gitau” and not the plaintiff which is a separate and independent legal entity.

45. I am inclined to disagree with this argument because the bank, in the same breath, asserted that it allowed the withdrawals by the 4th and 5th defendant on the basis of an alleged sale agreement, though not produced, which was between the plaintiff and the 1st defendant. Therefore, the bank failed to explain why it received the cheque in the name of William Kabogo Gitau, the plaintiff’s director. Accordingly, I find that the bank breached its duty of care to the plaintiff in respect of the banker’s cheque for Kshs. 6,000,000/- and committed the tort of conversion.

46. As regards contributory negligence, the bank and the 7th defendant submitted that the plaintiff’s loss was due to its own negligence and that it bears full responsibility for the loss. Since conversion is a strict liability tort, contributory negligence is not allowed in defence. I am persuaded by *Boma Manufacturing Ltd v Canadian Imperial Bank of Commerce*, 1996 CanLII 149 (SCC), where the Supreme Court of Canada observed: -

“

“31. The tort of conversion involves a wrongful interference with the goods of another, such as taking, using or destroying these goods in a manner inconsistent with the owner’s right of possession. The tort is one of strict



liability, and accordingly, it is no defence that the wrongful act was committed in all innocence. Diplock L.J. asserted this principle in *Marfani & Co. v. Midland Bank, Ltd.*, [1968] 2 All E.R. 573, at pp. 577-78:

‘... the moral concept of fault in the sense of either knowledge by the doer of an act that is likely to cause injury, loss or damage to another, or lack of reasonable care to avoid causing injury, loss or damage to another, plays no part ...’

If the customer is not entitled to the cheque which he delivers to his banker for collection, the banker, however, innocent and careful he might have been, would at common law be liable to the true owner of the cheque for the amount of which he receives payment, either as damages for conversion or under the cognate cause of action, based historically on *assumpsit*, for money had and received.”

32. The fact that liability for the tort of conversion is strict suggests that the respondent’s submission that the appellants were contributorily negligent must fail. The matter was raised before the Court of Appeal, and was dismissed without reasons. While this argument would be available in an action for negligence, the notion of strict liability involved in an action for conversion is *prima facie* antithetical to the concept of contributory negligence.” (Emphasis added)

47. Similarly, in *Kanyalal Thakurdas, Bankers v The Bombay Cycle Importing* [1972] 1 MLJ 412, the Madras High Court found that: -

“

“13. It is clear from page 169 of the Law of Torts by Section Ramaswami Iyer, Fifth Edition that contributory negligence is not one of the defences open to a defendant in an action for conversion. In *Bapulal v Nath Bank I. L. R.* (1947) Bom. 236: A. I. R. 1946 Bom. 482 at 492 it has been held that, however negligent the true owner may be, it can be no answer by the person who converts the article that he should be let off from his liability because of the negligence of the true owner. It is also pointed out in the same decision that but for the protection afforded to the Bank by Section 131 of the Negotiable Instruments Act, the Bank would have no defence whatever to the claim of the plaintiff.

For the foregoing reasons, we find that the appellants are not entitled to rely on the alleged contributory negligence on the part of the plaintiff-company and committed the tort of conversion ...”

48. I reject the claim against the 7th defendant as he acted as an employee of the bank and cannot be sued as an agent where there is a disclosed principle. I find that there was no evidence that he was personally involved in the fraud.

49. In conclusion, this Court finds that the plaintiff has proved its case against the 6th defendant to the required standard. The Court will not award general damages as Judgment is entered against the 6th defendant as follows: -

- a. Special damages in the sum of Kshs. 6,000,000/- together with interest at 15% per annum from 21/12/2006 until payment in full.
- b. The case against the 7th defendant is dismissed with costs.



c. The plaintiff shall have the costs of the suit against the 6th defendant.

It is so decreed.

DATED AND DELIVERED AT NAIROBI THIS 31ST DAY OF OCTOBER, 2023.

A. MABEYA, FCI Arb

JUDGE

