



Metropole Holdings Limited & another v Access Bank (Kenya) PLC (Commercial Civil Case E365 of 2020) [2022] KEHC 252 (KLR) (Commercial and Tax) (29 March 2022) (Judgment)

Neutral citation: [2022] KEHC 252 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CIVIL CASE E365 OF 2020**

DAS MAJANJA, J

MARCH 29, 2022

BETWEEN

METROPOLE HOLDINGS LIMITED 1ST PLAINTIFF

TERESA C. MAINA 2ND PLAINTIFF

AND

ACCESS BANK (KENYA) PLC DEFENDANT

JUDGMENT

1. Introduction and background

At the time material to this suit, the 1st Plaintiff (“Metropole”) operated a fixed deposit bank account number 210060/****1/0 with the Defendant (“the Bank”) where a banker-customer relationship developed between the parties.

2. The Plaintiffs filed this suit by the Complaint dated 16th September 2020 as amended on 28th September 2020 claiming that in December 2019, the 2nd Plaintiff, Metropole’s director, noticed from Metropole’s bank statement that the bank account had two unauthorized debits of KES. 49,266,767.00 with a narration of a loan repayment in respect of Pinakim Africa Limited (“Pinakim”) and KES. 18,967,110.00 also with a narration of a loan repayment in respect of Samhua Investment Ltd (“Samhua”). The Plaintiffs further aver that on 14th February 2020 they noted another unauthorized debit of KES. 20,857,722.51 with a narration of “loan repayment” which debits were in breach of the duty of care owed by the Bank to the Plaintiffs.

3. The Plaintiffs claim that they had not authorised the withdrawals or any such dealings and they were done without notice to the Plaintiffs or authorization by them. The Plaintiffs accuse the Bank of illegal and irregular actions together with fraud and collusion. Consequently, they claim that they have



suffered loss amounting to KES. 89,071,599.51 which they now claim from the Bank together with interest at court rates from 10th July 2019 until payment in full.

4. In its Statement of Defence dated 2nd February 2021, the Bank states that even though it had a Bank-Customer relationship with Metropole, Metropole is a body corporate with a separate legal personality distinct from its members including the 2nd Plaintiff, hence the relationship does not extend to the 2nd Plaintiff. It therefore states that the 2nd Plaintiff has no cause of action against the Bank.
5. The Bank admitted that even though it owed a duty of care to Metropole, the exercise of such duty of care does not exempt the Bank from realizing any securities issued by Metropole in favour of the Bank to secure any liabilities including facilities advanced to third parties and secured by Metropole. It denies that the impugned debits were unauthorized and states that they were authorized as they were made by the Bank pursuant to a Letter of Set-off duly executed by Metropole's directors including the 2nd Plaintiff.
6. The Bank further explains that at all material times there was an arrangement and/or business relationship between Metropole, Pinakim and Samhua for use of the fixed deposit accounts held by Metropole at the Bank to guarantee loans advanced to the said companies and for which Metropole enjoyed some benefits in terms of payments from the said Companies. That in furtherance of those arrangements, Metropole issued an open Guarantee and a Letter of Set-Off in favour to the Bank which were signed by Metropole's directors hence binding on Metropole.
7. The Bank states that pursuant to the Letter of Set-Off and in consideration of the Bank affording or continuing to afford banking facilities or accommodation on, inter alia, the accounts of third parties guaranteed by Metropole, Metropole agreed that the Bank, in addition to any lien or other rights to which the Bank may be entitled to, may at any time and without notice to Metropole combine or consolidate all or any of Metropole's accounts, whether current, deposit, savings or otherwise; and liabilities and set off or transfer any sum or sums standing to credit of any or more such accounts in or towards satisfaction of any of Metropole's liabilities to the Bank on any other account, whether such liabilities be actual or contingent, primary or collateral, several or joint, with others in partnership or otherwise and whether principal or surety anywhere upon banking account or upon any discount or other account or for any matter or thing.
8. The Bank denies the allegations made by the Plaintiffs and reiterates that the debits were lawfully and regularly made by the Bank pursuant to the Guarantee and Letter of Set-off which had been duly executed by the Metropole's directors including the 2nd Plaintiff. The Bank states that Metropole is bound by the terms of both the open Guarantee and the Letter of Set-Off and is estopped from denouncing its validity or challenging the enforcement thereof.
9. The Bank's avers that Metropole has so far received the sum of KES. 9,500,000.00 from Pinakim and Samhua, being reimbursement for the sums debited on account of the Letter of Set-Off and in consideration of the guarantees to loans advanced to the said companies and that consequently, the claim for loss and damage amounts to unjust enrichment.
10. In its Reply to the Bank's Statement of Defence dated 4th March 2021, the Plaintiffs reiterated their claims and denied that they issued any securities in favour of the Bank to secure any liabilities advanced to third parties. They further averred that the Bank was not entitled to realize any securities as none existed. The Plaintiffs further stated that there was no resolution by Metropole authorizing the guarantees alleged by the Bank and that the alleged Letter of Set-Off is foreign to the Plaintiffs. In any case, they contend that the letter lacks basic features, which makes it suspicious and hence inadmissible in that it does not have a reference/subject and therefore its purpose is not disclosed, it does not have



a date and as such impossible to tell when it was signed if at all, it does not show the names of the company or the directors who signed and that it is not accompanied by a resolution by the directors of the company.

11. The Plaintiffs state that whereas there may have existed a business relationship between Metropole and Pinakim, such relationship does not explain or justify the debits in question and the Plaintiffs reiterate that such debits or any debits at all from a company account have to be authorized in the proper manner in adherence to the law and basic banking practice.
12. After the close of pleadings and pre-trial directions, the matter was set down for hearing. The Plaintiffs called two witnesses; the 2nd Plaintiff (PW 1) who relied on her witness statements dated 16th September 2020 and 28th September 2020 respectively and Wilson Kipkosgey Maina (PW 2), another director of Metropole who relied on his witness statement dated 15th July 2021. The Plaintiffs also filed and relied on the lists and bundles of documents dated 16th September 2020 and 28th September 2020 which were produced and marked as PExhibit 1 and PExhibit 2 respectively.
13. On its part, the Bank called its Legal Officer, Isaac Kelvin Onyango (DW 1) who relied on his witness statements dated 30th June 2021 and 21st July 2021 respectively. The Bank also filed and relied on its lists and bundles of documents dated 2nd February 2021 and 21st July 2021 which were produced and marked as DExhibit 1 and DExhibit 2 respectively.
14. At the conclusion of the hearing, the parties were directed to file written submissions which are now on record.

The plaintiffs' case

15. As stated in the introductory part, the Plaintiffs' case is that the Bank made unauthorized debits on its bank account and that as a result, the Plaintiffs have lost over KES. 89 million at the hands of the Bank which transactions the Plaintiffs now seek the court to find were unauthorized and illegal. PW 1 confirmed that their claim is in respect of the fixed deposit account number 210060/****1/0 in the name of Metropole and that their claim does not relate to any account in PW 1's name. PW 1 further confirmed that the Guarantees are being impugned as they were unsigned and not sealed.
16. PW 1 testified that as per the account opening forms on record, the mandate of the subject account was that either PW 1 or PW 2 could sign but that this was only for withdrawing and depositing money but not for committing Metropole to credit facilities or guarantees. However, PW 1 admitted that from the face of the said forms, there are no instructions prohibiting either of the mandated signatories of the account from committing Metropole to additional commitment and that it was PW 2 who ordinarily operated that account or dealt with the Bank generally on behalf of Metropole. PW 1 further admitted that she signed the Letter of Set-Off and Guarantee in favour of the Bank.
17. PW 2 confirmed PW 1's testimony that he normally operated Metropole's account as he was the active partner but he denied knowledge of the three impugned debits. PW 2 admitted to doing business with Pinakim and Samhua but that he could not produce any evidence as to the nature of the business they conducted and he could not also controvert the averment by the Bank that the companies' business was in respect of securities and guarantees Metropole was extending to the said companies.
18. PW 2 did not dispute that he was the "Mr Wilson" being referred to in Samhua's letter dated 29th May 2018 and that he did write to the Bank in respect of the guarantee being referred to in the letter as evidenced by the letter dated 27th March 2019. PW 2 further admitted the letter by Pinakim which makes reference to him in respect of Metropole guaranteeing a loan of KES. 25 million against the subject fixed deposit account and Metropole's letter dated 3rd July 2018 agreeing to guarantee the



facility of KES. 50 million to Pinakim. PW 2 held his ground that despite these letters that he never authorised the Bank to apply the fixed deposit as guarantee to anyone, or specifically to these two companies.

19. PW 2 further confirmed that the payments made by Samhua and Pinakim to PW 2 and Metropole were done a few days after PW 2 wrote to the Bank guaranteeing the facilities to Samhua and Pinakim against Metropole's fixed deposit account. PW 2, just like PW 1, admitted to signing the Letter of Set-Off and Guarantee but then stated that the Guarantee was incomplete as the Bank was to advise further. When probed by counsel for the Bank about the payments to PW 2 and Metropole by Samhua and Pinakim immediately after the letters by Metropole to the Bank agreeing to guarantee the facilities, PW 2 admitted that he had no evidence that those payments related to different businesses other than for repayment of the guaranteed facilities.
20. PW 2 further testified that there was no resolution to support the Guarantee and that the letter dated 3rd July 2018 was not a letter of guarantee and the payments of KES. 800,000.00 and KES. 600,000.00 by Pinakim and Samhua were not related to that Guarantee.

The bank's case

21. In addition to the Bank's response summarized in the introductory part, DW 1 testified that even though the term loan facility to Pinakim required the inclusion of a resolution by Metropole, no such resolution had been exhibited by Metropole, however, DW 1 stated that the requirement of the resolution was supplemental to the documents the Bank already had.
22. DW 1 further admitted that from the face of the Letter of Set-Off, there is no company name entered neither is there a date for the resolution nor a certified copy of the resolution. DW 1 also admitted that the Guarantee did not indicate how much money could be recovered from the same. DW 1 explained that since the execution part indicates the party executing, there would be no need to keep repeating details of the executing parties and that the reason why there is a blank in the amount guaranteed is because customers never want to limit themselves and that the Bank is not required to force them to fix a figure they are not willing to indicate.
23. DW 1 also did not dispute that the Letter of Offer to Pinakim was not signed on behalf of the Bank and that the Bank was not obliged to ask for all the documents listed in the terms and conditions of the Letter of Offer and as such, there is no evidence the Bank ever asked for Metropole's board resolution.
24. DW 1 further testified and confirmed that the Bank acted on the Letters of Offer to Pinakim and Samhua although the Bank did not sign these letters but that the same were dated. DW 1 further stated that the Letter of Set-Off notifies a customer that the Bank will debit their account and that the advice sought by Metropole from the Bank in agreeing to guarantee the facilities to Pinakim and Samhua were statements, receipts, notifications of transfer of funds and the likes and not a legal opinion.
25. DW 1 summed up his evidence by stating that on the strength of the two letters by Metropole agreeing to guarantee the facilities by the Bank to Pinakim and Samhua, the Guarantee, Letter of Set Off and the terms and conditions applicable to the subject account, the Bank was able to debit Metropole's account.

Analysis and determination

26. I have gone through the pleadings, evidence and submissions of the parties on record. Since the parties filed a statement of agreed issues, I propose to determine each of them and ultimately answer the question whether the Plaintiffs' claim is merited. The parties urged the court to determine;
 1. Whether the 2nd Plaintiff has a locus standi in this suit.



2. Whether there was a fiduciary relationship between the Defendant and the Plaintiffs by virtue of their banker customer relationship.
3. Whether Defendant breached its fiduciary duty and its duty of honesty, fidelity and good faith towards the Plaintiffs in its dealing with the Plaintiffs' Account Number 210060/****1/0.
4. Whether the Plaintiffs issued any Guarantee, Letter of Set Off or securities in favour of the Defendant to authorize the disputed debits of KES. 89,071,599.51.
5. Whether the Plaintiffs suffered a loss of KES. 89,071,599.51 as a result of the Defendant's irregular dealing with its account.
6. Whether the Plaintiffs are entitled to the reliefs sought?
7. Who shall bear costs of this suit?

The 2nd plaintiff's locus standi

27. The Bank submitted that it is a hallowed principal of company law that a company is recognized as a separate legal entity from its members. Hence Metropole, as a body corporate, is separate from its members including the 2nd Plaintiff who cannot claim interest or privity to the contractual relationship between the Metropole as customer and the Defendant as a Banker. The Bank thus submits that the 2nd Plaintiff's claim should be struck out.
28. Even though the Plaintiffs did not submit on this issue, it is common ground and the Plaintiffs admitted that their claim is in respect of the fixed deposit account number 210060/****1/0 in the name of Metropole and that their claim does not relate to any account in the 2nd Plaintiff's name. I do not think it is in dispute that a company, such as Metropole, is at law a different person altogether from the subscribers to the memorandum and the company is not in law the agent or trustee of the subscribers and that as a separate legal entity, it can rightly sue on its own (see *Salomon v Salomon & Co. Limited* [1897] AC 22).
29. Since the 2nd Plaintiff has no claim against the Bank, I find that her involvement and continuance as a plaintiff in this suit was unnecessary and her claim against the Bank is accordingly struck out as there exists no such claim and that she is also struck out as a plaintiff.

Whether there was a fiduciary relationship between Metropole and the Bank

30. As was stated in the introductory part and as admitted by the parties, at the material time, Metropole and the Bank had a customer-banker relationship that was governed by the applicable laws, customs and usages that regulate such relationships. According to *Black's Law Dictionary (11th Ed.)*, a fiduciary duty is "a duty of utmost good faith, trust, confidence, and candor owed by a fiduciary (such as an agent or a trustee) to the beneficiary (such as the agent's principal or the beneficiaries of the trust;... a duty to act with the highest degree of honesty and loyalty toward another person and in the best interest of the other person-....Also termed as duty of loyalty, duty of fidelity; duty of faithful service; duty to avoid conflict of interest."
31. It is now trite that a relationship between a bank and its customer is that of principal and agent and as such, a fiduciary duty that is based on trust arises where a bank has a duty under its contract with its customer to exercise reasonable care and skill in carrying out its part with regard to operations within its contracts with its customers. The duty to exercise reasonable care and skill extends over the whole range of banking business within the contract with the customer (See *Equity Bank Limited & another*



v Robert Chesang Nrb HCCA No. 571 of 2012 [2016] eKLR and *Family Bank Limited v Panda Co-operative Savings and Credit Society* NvshHCCA No. 60 of 2019 [2021] eKLR).

32. I therefore agree with the Plaintiffs that the Bank owed Metropole a duty to exercise reasonable skill and care in interpreting, ascertaining and acting in accordance with its instructions on all matters affecting its account and therefore, a fiduciary relationship did exist between the Metropole as the customer and the Bank as the banker.

Breach of the fiduciary duty

33. Having found that there existed a fiduciary duty between Metropole and the Bank, the next issue for determination is whether the Bank breached this duty in its dealings with Metropole's account.

34. The Plaintiffs' case is that the Bank was in breach of this duty when they made three debits to repay third party loans without the authority of the Plaintiffs and without notifying the Plaintiffs before the debits were made. The Bank did not deny that they made the debits but that the same was done against Metropole's earlier instructions authorizing the Bank to guarantee and use Metropole's account as security for the loans applied for by third parties; Samhua and Pinakim

35. In his testimony, PW 2 did not deny knowledge of these third parties who he admitted were in business with Metropole. He also did not deny authoring the letters dated 9th April 2018, 3rd July 2018 and 27th May 2018 where Metropole agreed to guarantee facilities to Pinakim and Samhua that were to be secured by the fixed deposit sums in Metropole's subject account. Both PW 1 and PW 2 also did not deny signing the Letter of Set-Off and the Guarantee on behalf of Metropole and in favour of the Bank.

36. The Plaintiffs' opposition to the aforementioned letters and securities was that they were not backed by a board resolution and that they lacked basic features such as the subject date, names of signatories, the Company seal and the referenced third parties.

37. I reject this attempt by Metropole to wriggle away from its obligations. I agree with the Bank that whether a company has or has not complied with its internal procedures as to execution of contracts is an internal management issue and cannot afford a defence to a third party dealing with the company. As cited by the Bank, the court in *Ashok Morjaria v Kenya Batteries (1981) Ltd & 2 others* ML HCCC No. 701 of 2002 [2002] eKLR held that once a director executes a contract on behalf the company, the company is bound by the same and if what the director did was within his ostensible authority as director of the company, then the company cannot run away from its obligations because of the reasons cited by the Plaintiffs above.

38. The evidence is clear that Metropole agreed to guarantee the loan facilities to Pinakim and Samhua using its deposits held by the Bank in the subject account. In the Letter of Set-Off, Metropole bound themselves to the terms that in consideration of the Bank affording or continuing to afford banking facilities or accommodation on, inter alia, the accounts of third parties guaranteed by Metropole, Metropole agreed that the Bank, in addition to any lien or other rights to which the Bank may be entitled to, may at any time and without notice to Metropole combine or consolidate all or any of Metropole's accounts, whether current, deposit, savings or otherwise; and liabilities and set off or transfer any sum or sums standing to credit of any or more such accounts in or towards satisfaction of any of Metropole's liabilities to the Bank on any other account, whether such liabilities be actual or contingent, primary or collateral, several or joint, with others in partnership or otherwise and whether principal or surety anywhere upon banking account or upon any discount or other account or for any matter or thing and including all bank charges and interest.

39. From the above, Metropole were aware that the Bank was entitled set off or transfer any sum outstanding to the Bank in respect of third party facilities guaranteed by Metropole and that the Bank



could do so without any further notice to Metropole and to the Bank's satisfaction. I therefore reject the Plaintiffs' evidence that the debits came as a surprise to them or that the same were unauthorized and without notice.

40. The same can be said of the Guarantee which even though the sum guaranteed was not entered, the letters by Metropole agreeing to guarantee the facilities to Pinakim and the facility letters to Pinakim and Samhua give an indication of the sums guaranteed by Metropole and the Plaintiffs cannot escape from their liability under the Guarantee for the reason that the sum guaranteed is not indicated in the Guarantee.
41. It also appears that in executing the Letter of Set Off, Metropole declared that the funds held in all its accounts with the Bank are not held in any fiduciary capacity and Metropole had the complete right to the funds' disposal. Metropole further agreed to notify the Bank in writing if any funds in future lodged in any of Metropole's accounts were subject to any fiduciary duty or Metropole's right of disposal of the sums is subject to any limitation. This term buttresses the conclusion and finding that the Bank did not breach the fiduciary duty it owed Metropole when it debited Metropole's accounts as the said debits were authorized and legal.

Issuance of the Guarantee, Letter of Set Off or securities in favour of the Bank, Loss of Kshs. 89,071,599.51, Reliefs sought by the Plaintiffs and Costs of the suit

42. The findings I have made are sufficient to dispose of the remaining issues as follows. I find and hold that Metropole issued a Guarantee, a Letter of Set Off and securities in favour of the Bank for the facilities the Bank advanced to the third parties; Samhua and Pinakim. Consequently, Metropole did not suffer any loss as the debits were authorized to satisfy Metropole's liability to the Bank owing to the Letter of Set-Off and Guarantee which Metropole bound itself to and which were lawfully executed by its directors PW 1 and PW 2.
43. Since the debits were duly authorized, Metropole is not entitled to the reliefs sought in their amended Complaint dated 28th September 2020. As I had concluded elsewhere in this judgment, the 2nd Plaintiff is not entitled to any relief as she is non-suited. The Plaintiffs claim is therefore dismissed. There is no reason why the court should depart from the general principle that costs follow the event therefore the Plaintiffs shall bear the costs of the suit.

Disposition

44. The Plaintiffs' suit is now dismissed with costs to the Defendant.

SIGNED AT NAIROBI

D. S. MAJANJA

JUDGE

DATED AND DELIVERED AT NAIROBI THIS 29TH DAY OF MARCH 2022.

A. MABEYA

JUDGE

Court Assistant: Mr M. Onyango

Ms Misere instructed by Oluoch-Olunya Advocates for the Plaintiff.

Mr Arwa instructed by Rachier and Amollo Advocates LLP for the Defendant.

