**Waithanji v Barclays Bank Limited (Civil Appeal 104 of 2019)**
**[2022] KEHC 10443 (KLR) (23 June 2022) (Judgment)**

Neutral citation: [2022] KEHC 10443 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT NAKURU**

**CIVIL APPEAL 104 OF 2019**

**HK CHEMITEI, J**

**JUNE 23, 2022**

**BETWEEN**

**SAMWEL KING'ORI WAITHANJI ..... APPELLANT**

**AND**

**BARCLAYS BANK LIMITED ..... RESPONDENT**

***(Being an appeal from the judgment/decree of Honourable, Chief Magistrate J.B Kalo, delivered on 28th May 2018 NAKURU CMCC NO 5 OF 2018)***

## JUDGMENT

1. The matter before the trial court arose from the plaint dated 4th May, 2009 where the appellant averred that his bank account No. 4658762 operated by the respondent was frozen on 9th April 2009 without reference to him. The appellant averred further that the actions by the respondent amounted to breach of a contract and was unlawful.

2. In the pleadings before the lower court the respondent argued that the monies credited to the appellant's account were proceeds not from a commercial transaction but actually part of monies drawn from various alleged fraudulent /illegal transactions that had occurred on 7th April 2009. That as a result of the said fraudulent/illegal transactions, a police investigation was launched, with warrants to investigate various bank accounts including that of the appellant issued by the Chief Magistrate's Court at Nairobi in Misc. Criminal Application No. 295 of 2009 on 7th May 2009, Criminal Case No. 709 of 2009 (Republic of Kenya –vs Edwin Wangondu); Criminal Case No. 772 of 2009 (Republic of Kenya –vs Joseph Kihara Karanja); Criminal Case No. 776 of 2009 (Republic of Kenya –vs Josephat Konzolo & Jareth Njoga) all in the Magistrate's Court at Nairobi and which were still pending for trial and determination. The respondent denied the allegations by the appellant of breach of contract, acting in an unlawful manner and illegally freezing his account.

3. When the matter came up for trial the respondent satisfied the court that it had not frozen the appellant's account while on the other hand the appellant failed to demonstrate any loss suffered as a result of the defendant's actions. The appellant therefore failed to prove his claim against the respondent and thus his suit was dismissed with costs.

4. Aggrieved by the judgement of the lower court, the appellant filed this appeal on two basic grounds, namely; That the Learned Magistrate erred in both law and fact in holding that prayer (ii) of the Plaint amended on 28th May 2009 was not merited; That The Learned Magistrate erred in both law and fact in holding that the Appellant had failed to prove his claim against the Respondent.

5. He prayed that the lower court judgement and the resultant Decree be wholly overturned, his claim in the lower court be allowed in terms of prayer (ii) of the plaint amended on 28th May 2009 and the costs of the appeal and lower court suit be borne by the respondent.

6. Parties were directed to canvass the appeal by way of written submissions.

**Appellant's Written Submissions**

7. The appellant in his submissions identified one of the issues for determination was whether the learned magistrate erred both in law and in fact in holding that prayer (ii) of the plaint amended on 28th May 2009 was not merited. The appellant submitted that the said prayer sought inter alia an order of mandatory injunction directing the respondent to lift the orders freezing his bank account No. 4658762 and reverse all the unilateral entries made by the Respondent in respect of the said account.

8. The appellant submitted further that the trial court erred in law and fact by failing to order that the illegal reversal of Kshs. 4.4 million from his aforesaid account domiciled at the respondent's Nakuru branch be credited into his account, having found that the respondent was not justified in debiting the said account. It is also the appellant's submission that the respondent committed fraud and violated its fiduciary duty to him by reversing the money credited into his account without prior notice to him or a court order. He added that the said position was confirmed by the respondent's witness one Charles Maina during cross-examination at the trial court.

9. In support of his case the appellant placed reliance in the cases of *Viable Deco Solutions Limited v Co-operative Bank of Kenya Limited* [2014] eKLR where the court cited the case of *Benson Odongo Okwiri v Consolidated Bank of Kenya Limited* [200] eKLR, *Equity Bank Limited and Another v Robert Chesang* NRB HCCA No. 571 of 2012 [2016] eKLR and *Viable Deco Solutions Limited v Co-operative of Kenya Limited* [2014] eKLR.

10. The second issue was whether the learned magistrate erred in both law and fact in holding that the appellant had failed to prove his claim against the respondent. The appellant submitted that no evidence whatsoever was tabled to show the origin of the money and how he was implicated in the alleged fraudulent transactions. Additionally, the appellant submitted that the respondent did not plead any particulars of fraud against him and that the trial magistrate in his judgment found that the respondent failed to prove that the money transferred from his account from the account of Joruth Enterprises form part of the money allegedly illegally transferred from account of Kenya Seed Company Limited.

11. He went on to submit that his testimony and evidence tendered proved his case on a balance of probability which the trial court was in agreement with and ought to have allowed his claim. He urged the court to overturn the trial court's decision and allow his appeal as prayed.

**Respondent's Written Submissions**

12. The respondent in its submissions raised the following issues for determination namely, whether the trial magistrate properly exercised his discretion in denying the appellant an order of mandatory injunction directing the respondent to lift the orders freezing the appellant's bank account. It was submitted on behalf of the respondent that during the examination in chief, DW1 had testified that it had not frozen the appellant's said account as pleaded and that it had only reversed funds credited to the appellant's account that were suspected to be the proceeds of crime.

13. It was submitted further for the respondent that the appellant had not met the threshold for granting of a mandatory injunction and thus the trial magistrate had properly exercised his mind in refusing to grant an order for the same. The court's attention is drawn to the case of *Trevy James Oyomba &Another v Oriental Commercial Bank Limited* [2015] eKLR where the court cited the case of *Giella v Cassman Brown & Company Limited, Rafique Ebrahim v William Ochanda t/a Ochanda & Advocates* [2013] eKLR.

14. On the second issue, whether the trial magistrate properly found that the appellant had not proven his claim against the Respondent, it submitted that DW1 testified that on the 7th of April, 2009, Kshs. 100,758,000/= was fraudulently transferred from an account belonging to Narok Seed Company's without express authorization into various accounts held with the said respondent. That DW1 further testified that as a result of the said fraudulent transactions, a police investigation was launched with warrants to investigate various accounts held with it.

15. It is further the respondent's submission that during cross examination of the PW2, PW2 informed the trial court that he had also been charged in a criminal court over the same matter. That therefore in the foregoing circumstances it was well within the law in electing to reverse the transactions in the appellant's bank account as it had reason to believe that the funds were proceeds of crime. It placed reliance in the cases of *James Mweu & Another v Kenya Commercial Bank* [2019] Eklr, *Vitalaire (A General Partnership) v Bank of Nova Scotia* [2002] OJ No. 4902 (SCJ) and *Tricon International Limited v Giro Commercial Bank Limited* [2012] eKLR.

16. In conclusion, the respondent submitted that it had not breached the bank customer relationship between it and the appellant who had failed to prove his claim to the expected standard.

**Analysis and Determination**

17. This being the first appeal, it is this court's duty under section 78 of the *Civil Procedure Act* to re-evaluate the evidence tendered before the trial court and come to its own independent conclusion taking into account the fact that it did not have the advantage of seeing and hearing the witnesses as they testified. This principle of law was well settled in the case of *Selle v Associated Motor Boat Co. Ltd* (1968) EA 123 cited by the appellants where Sir Clement De Lestang (V.P) stated that:

> " An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence

or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally".

18. I have perused the entire record of appeal and considered the submissions by counsel for both parties and there are only two issues for determination in this suit namely; whether the appellant proved his case on a balance of probability and whether the learned trial magistrate erred both in law in holding that the appellant had failed to prove his claim against the respondent.

19. The sequence of events in this matter was not hard to appreciate. The relationship between the appellant and the respondent was a contractual one. The appellant had an account with the respondent and he would operate it with the terms and conditions applicable as per the contract.

20. In the cause of time the appellants account was credited with a sum of Kshs 4.4 million which amount was allegedly deposited by pw2 the director of Joruth Enterprises who told the court that he was paying the appellant for the cereals he had purchased from him. The appellant went ahead to disperse the said amount to his creditors among them one Steven Koskei. Before he could move far the balance in the account was reversed by the respondent without his knowledge and or notice.

21. Upon inquiry he was told that the said money was suspected to have been proceeds from some illegal transaction between the bank employees and PW2. As a result, caught in the cross fire he filed the suit seeking the intervention of the court.

22. As clearly submitted by the parties the trial court found for a fact that the reversal of the amount was irregular but still the court did not fault this action of freezing of the account as the appellant could still go on operating the same.

23. What is also evidently clear is that the whole issue was to do with the loss of Kshs 100 million or thereabouts by Kenya Seed Company Limited through some illegalities or fraud committed by the respondent employees in collusion with other third parties. This resulted in investigation by the police which led to the said account being affected. Later some employees of the respondent as well as PW2 were charged. The criminal case as at the time of hearing the matter was still ongoing.

24. It is instructive to note that the appellant was not a party to the said fraud neither was he called to record any statement or charged in a court of law.

25. What then was the mistake of the appellant.? The trial court found that the account was not frozen and thus it could not issue a mandatory injunction against the respondent. In other words, the appellant had not proved his case against the respondent.

26. Whereas this could be true what is apparent is that the act of reversing the funds in the account was unilateral by the respondent. The appellant could not disperse the sums in it as the same were no longer available. The appellant was not notified at all and only learned when he could not transact. The respondent of course relied on the information given to it by the police. According to the respondent what they did was important as it secured its integrity and those of the other customers. The interest of the larger public was more important than the single client who in this case was the appellant.

27. What is also clear is that the although the paper trail indicates that some money being suspected to be proceeds of crime was between Kenya Seed Company Limited and Joruth enterprises, the appellant was nowhere in the scene. From the evidence on record he was able to demonstrate how he was paid the sum of kshs4.4 million by the said Joruth enterprises. The documents produced were no disputed at all.

28. Was the appellant complicit in the fraud? I don't think so, otherwise he would have been one of the fellows charged by the police in the Milimani criminal court just like pw2. There was no evidence

linking the money in his account and that of Kenya Seed company limited or at all. In any case he was able to establish that he transacted with pw2. If there was any issue, then it was pw2 who was to prove.

29. The crucial question is whether the account was frozen or not. The parties have submitted greatly as to when an account is termed frozen. In my view all that the respondent did was to reverse the transaction and not freezing the account as the appellant during cross examination admitted that he was still able to operate the account.

30. Was the reversal lawful? To the extent that the appellant was not complicit to the illegal transactions as found by the investigative agencies and therefore could not be charged with any known crime, the same was illegal. It was merely based on suspicion. It was done without consulting the account holder. Even for arguments sake, the respondent once it discovered the illegal and suspicious triangle between its employees, Kenya seed company limited and Joruth enterprises limited, it could have simply reversed the amount and credit it to the appellants account.

31. Further, as at the time of writing this judgement, the amount so reversed still belonged to the appellant and not the bank, nor Kenya seed company limited nor Joruth enterprises. Nobody is laying claim to the same. At any rate neither the respondent, Kenya seed company limited nor Joruth enterprises did counterclaim or file any claim respectively against the appellant claiming the said sum in the account or acting fraudulently in any way.

32. This court therefore agrees with the appellant that the trial court although it lawfully found for the appellant should have gone ahead and allowed the suit. The semantics of freezing of accounts in my view did not stop the court from doing what the ends of justice should serve. Looking at the amended plaint it is apparent that even if it was not going to issue prayer (ii) nothing stopped the court from relying on prayer (vi) to ensure that justice was served.

33. The courts should always go beyond and ensure that the substantive justice is served. In this case having found that the route taken by the respondent was unlawful, it should have simply declared that the respondent should reversed the illegality. If the investigative authorities had any issues with the appellant, then it should have gone for him in the usual manner. This would have buttressed the action taken by the respondent.

34. This court agrees of course with the submissions by the respondent that the bank ought to act diligently by securing its customers as was stated in *Karak Brothers Company Limited V. Burden* (1972) 1 ALL ER 1210. The bank nonetheless must also exercise reasonable skill and care so as to ensure that innocent customers are not disadvantaged. To act on mere suspicion alone was not enough. Once the respondent found that the investigative authorities were not interested with the appellant, then it should have reversed the unilateral decision it had taken.

35. In the premises this appeal is allowed as hereunder;

    a. The trials court judgement is hereby set aside entirely.

    b. The respondent within 21 days from the date herein is hereby directed to reverse unconditionally the unilateral entries it made on 9th April 2009 in respect to the appellants account no. 4658762.

    c. The appellant shall have the costs of this appeal as well as at the lower court.

**DATED SIGNED DELIVERED VIA VIDEO LINK THIS 23RD DAY OF JUNE 2022.**

**H K CHEMITEI**

**JUDGE**