



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**COMMERCIAL & TAX DIVISION**

**CIVIL CASE NO. 567 OF 2014**

**DAVID JOSEF MOTION**

**(On his own behalf and the Administrator of the**

**Estate of the Late Josephine Motion) .....PLAINTIFF**

**VERSUS**

**BARCLAYS BANK OF KENYA LIMITED .....1<sup>ST</sup> DEFENDANT**

**HEIDI JANE JUDY BIRD.....2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

(1) By way of the Plaintiff dated **13<sup>th</sup> November 2014** the Plaintiff herein **DAVID JOSEPH MOTION** (suing on his own behalf and as the Administrator of the estate of the Late Josephine Motion) prayed for Judgment jointly and severally against the Defendants for:-

- (a) Reimbursement of the sum of Kenya Shillings Seven Million Nine Hundred and Seventy Two Thousand Nine Hundred and Three and Seventy Cents (Kshs. 7,972,903.70).**
- (b) Damages for negligence and fraud as against the 1<sup>st</sup> Defendant.**
- (c) Damages for fraud and conversion as against the 2<sup>nd</sup> Defendant.**
- (d) Costs.**
- (e) Interest on (a) (b) (c) and (d) above at Court rates from 4<sup>th</sup> June 2007.**
- (f) Any further relief the Court may deem just to grant in the circumstances.”**

(2) The suit was opposed by **BARCLAYS BANK OF KENYA LIMITED** vide their Defence filed on **22<sup>nd</sup> January 2015**. The 2<sup>nd</sup> Defendant **HEIDI JANE JUDY BIRD** also opposed the Plaintiffs claims through the Statement of Defence filed on **2<sup>nd</sup> March 2015**.

(3) The suit was disposed of by way of viva voce evidence. The Plaintiff called **two (2)** witnesses in support of his case, whilst the 1<sup>st</sup> and 2<sup>nd</sup> Defendants each called **one (1)** witness each.

(4) The Plaintiff **DAVID JOSEF MOTION** testified as **PW1**. He relied entirely upon his written Statement dated **13<sup>th</sup> November 2014**. The Plaintiff told the Court that he and the 2<sup>nd</sup> Defendant **Heidi Jane Judy Bird** were step-siblings as they were both the biological children of **Josephine Magdalena Motion** (hereinafter the ‘**Deceased**’) who died domiciled in the Republic of Kenya on **1<sup>st</sup> June 2007**. That upto the time of her demise the Deceased was the holder of Prestige Account No. xxxxxx, with **Barclays Bank of Kenya limited Karen Branch, Nairobi** (hereinafter the **Barclays Account**). The Plaintiff stated that he only came to know of the existence of the **Barclays Account** in the year **2012**. He stated that the 2<sup>nd</sup> Defendant had failed to disclose to him the existence of this Account and rather it was a **Mr. Nzioki** a Tax Consultant who informed the Plaintiff about the existence of the account.

(5) Following the death of the Deceased the Plaintiff sought and obtained a Confirmed Grant of Administration to the estate of the deceased which Grant was issued in his name on **17<sup>th</sup> May 2010**. That despite being aware of the demise of the Deceased, the 2<sup>nd</sup> Defendant having not revealed the existence of the Barclays Account proceeded to withdraw and / or sanction the following withdrawals from the Deceaseds aforesaid **Barclays Account-**

“(a) **Kshs. 3,000,000/- on 4<sup>th</sup> June 2007**

(b) **Kshs. 53,500/- on 6<sup>th</sup> June 2007**

(c) **Kshs. 4,919,403.70 on 23<sup>rd</sup> December 2008.**”

(6) The Plaintiff faults the Bank (the 1<sup>st</sup> Defendant) in that despite having been notified by a letter dated **20<sup>th</sup> June 2007** of the demise of the Deceased, the 1<sup>st</sup> Defendant negligently allowed further transactions on the Deceased’s account and in particular allowed the debit of **Kshs. 4,919,403.70 on 23<sup>rd</sup> December 2008**. The Plaintiff alleges the two Defendants are guilty of negligence, fraud, conversion and misapplication of funds in facilitating the withdrawal of funds from the account of the Deceased **after** her demise.

(7) **PW2 SAMUEL MUNYAO NZIOKI** a Tax Consultant stated that he had been appointed by [**Particulars Withheld**] as their Tax Consultant. **PW2** relied upon his written statement dated **6<sup>th</sup> April 2016**. He stated that he had a good working relationship with the Deceased **Mrs. Josephine Magdalena Motion** the Managing Director of the school, and that in **1977** the Deceased asked him to run the school as she was by then ailing and was living in Mombasa. That by way of a letter dated **2<sup>nd</sup> September 1997** the Deceased authorized **PW1** to operate the Bank Account for the school and that he operated said Account from the year **1997** to the year **2007**. The witness claims that under his stewardship the financial position of the school improved greatly.

(8) **PW1** confirms that in **1998**, the Deceased with his assistance opened a **Prestige Savings Account** Number xxxxxx at **Barclays Bank, Karen Branch**. **PW1** further confirms that the Deceased did grant her daughter **Heidi Motion** (2<sup>nd</sup> Defendant) a mandate to operate her personal account but claims that this was only done to enable the 2<sup>nd</sup> Defendant withdraw funds to cater for the upkeep of the Deceased who was by then seriously sick.

(9) **PW1** told the Court that following the demise of the Deceased on **1<sup>st</sup> June 2007**, he wrote a letter dated **20<sup>th</sup> June 2007** to **Barclays Bank, Karen Branch** informing them of the death of the Deceased and requesting that they close her account. He states that upon perusal of the account documents for the school he discovered that the 2<sup>nd</sup> Defendant had made a withdrawal of **Kshs. 3,000,000/-**, from the account of the Deceased on **2<sup>nd</sup> June 2007** vide cheque **No. 101502**. That this withdrawal was made by the 2<sup>nd</sup> Defendant the day after the Deceased died.

(10) **PW1** told the Court that sometime in **2010** he caught sight of the Certificate of Confirmed Grant in respect of the estate of the Deceased and realized that the Deceased’s personal Bank Account had not been listed in the said Grant. He states that the Plaintiff had no knowledge about the existence of that account until **PW2** informed him of its existence through a letter dated **7<sup>th</sup> February 2012**. **PW2** asserts that the removal of funds from the account of the Deceased **after** her death was illegal and wrong. He therefore supports the Plaintiffs case.

(11) **DW1 CHARLES KAGURA MAINA** was a Senior Forensic Investigation Manger with **Barclays Bank of Kenya Limited** (the 1<sup>st</sup> Respondent). He relied on his Statement dated **25<sup>th</sup> November 2019** as his evidence in chief. **DW1** confirms that the Deceased **JOSEPHINE MOTION** held an account **No. xxxxxxxx** with the Bank at their **Karen Branch**. He states that the Bank received formal notice of the death of the Deceased by way of a letter dated **20<sup>th</sup> June 2007** at which point her account was blocked.

(12) **DW1** denies the Plaintiffs allegations that the withdrawals from the account of the Deceased were done without any justification authority or locus. He asserts that the withdrawals of **4<sup>th</sup> June 2007** and **6<sup>th</sup> June 2007** were done **prior** to the bank receiving notification of the death of the Deceased. That the transfer of **Kshs. 4,919,403.70 on 23<sup>rd</sup> December 2008** was effected pursuant to a Court order dated **18<sup>th</sup> November 2008**, which order had been served upon the Bank.

(13) **DW1** goes on to state that the transactions complained of by the Plaintiff were the subject of investigation by the **Criminal Investigation Department (CID)**. That the Bank was served with a Notice to produce documentation relating to the Deceased’s account in **Kibera CMCC No. 343 of 2013**. However since the said Account was opened way bank in **2009** before the ‘**know your customer**’ period several crucial documents were not traced. That the Bank then referred the matter to its own internal investigator on **15<sup>th</sup> August 2014**.

(14) **DW1** states that the matter then rested and no further action was taken until the 1<sup>st</sup> Defendant received a Demand letter dated **11<sup>th</sup> June 2014** from the Plaintiffs Advocates. The Bank responded to the demand denying any negligence, fraud or breach of contractual duty. The 1<sup>st</sup> Respondent insists that the withdrawals from the Deceaseds account had proper basis and legal sanction. They pray that the Plaintiffs suit against them be dismissed with costs.

(15) The 2<sup>nd</sup> Defendant **HEIDI JANE JUDY MOTION** was a daughter to the Deceased and a step-sister to the Plaintiff. She relied on her written Statement dated **27<sup>th</sup> February 2015** and Further Statement dated **19<sup>th</sup> November 2018**. **DW2** confirms that her late mother held account **No. xxxxxx** with the 1<sup>st</sup> Defendant Bank. She states that by a letter dated **11<sup>th</sup> April 2001**, the Deceased wrote to the Bank making **DW2** a signatory to the said Account and giving her authority to operate the said account on her behalf.

(16) **DW2** explained that having just returned to Kenya she was unable to open her own account and given that she lived with and cared for

her late mother and that they shared household expenses the Deceased saw it fit to grant her a mandate to operate the said account.

(17) **DW2** further states that she was at the time an employee of [**Particulars Withheld**] of which the Deceased was the proprietor and that her salary used to be deposited into this **Barclays Account**. Further that profits from farming activities which she and her late mother undertook together were also deposited into this account.

(18) **DW2** states that the Deceased succumbed to Cervical Cancer on **1<sup>st</sup> June 2007**. That she phoned the Plaintiff to inform him of their mothers passing. That the Plaintiff who at the time was estranged from their mother had not even been aware of her illness. **DW2** testified that all the funeral expenses fell on her including payment for death notification, coffin, flowers, hospital bills, burial permit etc.

(19) **DW2** confirms that she did make withdrawals of **Kshs. 3,000,000/-** on **4<sup>th</sup> June 2007** and **Kshs. 53,500/-** on **6<sup>th</sup> June 2007** from that account and further confirms that a transfer to **Prime Bank Ltd** of **Kshs. 4,919,403.70** was made pursuant to an order issued by **Hon. Lady Justice Ruth Sitati** on **18<sup>th</sup> November 2008** in **HCCC No. 2126 of 2000**.

(20) **DW2** further confirmed that the Plaintiff did obtain a Grant of Letters of Administration to the estate of the Deceased on **17<sup>th</sup> May 2010**. However she states that she has filed a Summons seeking to have the Grant issued to the Plaintiff revoked due to fraud and misrepresentation. That the Summons is the subject of **Nairobi High Court Succession Cause No. 1679 of 2008** which is yet to be determined. The witness states the withdrawals made on the Account in question were not fraudulent but were proper given that she had been given authority to operate the said account by the Deceased. She contends that the present suit is a mere afterthought and has no basis. She prays that the same be dismissed with costs.

(21) Upon closure of the Defence case parties were invited to file their written submissions. The Plaintiff filed the written submissions dated **9<sup>th</sup> March 2020**. The **1<sup>st</sup>** Defendant filed written submissions dated **9<sup>th</sup> June 2020**, the **2<sup>nd</sup>** Defendant relied on her written submissions dated **19<sup>th</sup> August 2020** after which the Plaintiff filed submissions in Reply dated **25<sup>th</sup> August 2020**.

### **ANALYSIS AND DETERMINATION**

(22) I have carefully considered the evidence adduced by all the witnesses in this case, the material / documents filed by the parties as well as the written submissions filed by both Counsel. The **Evidence Act**, places the burden of proof of any fact on the person who wishes to rely on the same. **Section 107** of the **Evidence Act Cap 80, Laws of Kenya** provides as follows:-

#### **“Burden of proof**

**(1) Whoever desires any Court to give Judgment as to any legal or liability dependent on the existence of facts which he asserts must prove that those facts exist.”**

(23) In my view the two questions which arise for determination are as follows:-

- (i) Whether the 1<sup>st</sup> Defendant (Bank) acted negligently and breached its duty of care respect to the operations of the Deceased’s Account.**
- (ii) Whether there is evidence of fraud on the part of the 2<sup>nd</sup> Defendant.**
- (i) Whether there is proof of Negligence and Breach of Duty of Care by the Bank**

(24) The Plaintiff at **Paragraph 11** of the Plaint dated **13<sup>th</sup> November 2014** particularized the allegations of fraud and breach of contractual duty of care on the part of the **1<sup>st</sup>** Defendant as follows:-

- (a) Failing to ensure that no funds were released from the subject account after being notified of the demise of the Deceased.**
- (b) Allowing withdrawals whilst being aware that the funds in the said account were funds in the realm of free property that ought to have been preserved after notification of the demise of the Deceased.**
- (c) Acting in breach of their contractual duty of care by failing to prevent collusion between its officers and the 2<sup>nd</sup> Defendant so as to protect the funds in the Deceased’s account.**
- (d) Acting in breach of their contractual duty of care by failing to ensure the availability of control and protection mechanisms that would with a high degree of certainty protect the deposits in the Deceased’s account against fraud, misrepresentation or other misuse as required by the provisions of the Central Bank of Kenya Prudential Guidelines 2013 CBK/PG/22 (3.2.) that were (and still) binding on the said Defendant.**
- (e) Causing loss both to the estate of the Deceased and the Plaintiff.**

(25) It is common ground that the Deceased held and operated an Account No. **xxxxxxx** at the **Karen Branch of Barclays Bank**. This fact is confirmed by **DW1** who testified on behalf of the Bank. It is also not in dispute that on **9<sup>th</sup> April 2001** the Deceased instructed the Bank to incorporate her daughter (the **2<sup>nd</sup>** Defendant) as a signatory to the said Account. Vide the letter dated **11<sup>th</sup> April 2001** (see **page 15** of

Plaint) the Bank acknowledged and put into effect these instructions (see Annexure **HJJB-1** to the Supporting Affidavit dated **26<sup>th</sup> March 2015**).

(26) It is not in dispute that the Deceased passed away on **1<sup>st</sup> June 2007**. Proof of her demise is provided by the copy of her Death Certificate Serial Number **xxxxxx** annexed at **page 12** of the Plaint. Following the demise of the Deceased the Plaintiff moved to Court and on **14<sup>th</sup> January 2009** obtained a **Grant of Letters of Administration Intestate** in respect of her estate (copy annexed at **page 13** of the Plaint). On **17<sup>th</sup> May 2010** the Grant issued to the Plaintiff was confirmed (copy annexed at **page 14** of the Plaint). I therefore find that the Plaintiff who holds a Confirmed Grant as Administrator of the estate of the Deceased is possessed of the requisite **'locus standi'** to file this suit on behalf of the estate of the Deceased.

(27) The Plaintiff has taken issue with three (3) withdrawals that were made from the account of the Deceased as follows:-

- (a) **Kshs. 3,000,000/- withdrawn on 4<sup>th</sup> June 2007 (copy of cheque dated 3<sup>rd</sup> June 2007 annexed at page 16 of Plaintiff).**
- (b) **Kshs. 53,500/- withdrawn on 4<sup>th</sup> June 2007.**
- (c) **Kshs. 4,919,403.70 withdrawn by way of a Bankers cheque issued to the law firm of Ngatia and Co. Advocates on 23<sup>rd</sup> December 2008 (A copy of the Bankers cheque No. xxxxxx dated 18<sup>th</sup> December 2008 is annexed at page 17 of the Plaintiff).**

(28) The 1<sup>st</sup> Defendant Bank does not deny that the above transactions took place on the Deceaseds Account on the dates indicated. Indeed the Bank Statements annexed at **page 20** of the Plaint reflects the three (3) Debits of **Kshs. 3,000,000/-, Kshs. 53,500/- and Kshs. 4,919,403.70**. However the Bank asserts that they did not receive official communication notifying them of the death of the Deceased until **20<sup>th</sup> June 2007** through a letter written to the Bank Manager **Karen Branch** by one **Mr. Nzioki** a Tax Consultant writing on behalf of The Director **Kilimani Junior Academy** an institution of which the Deceased was the Managing Director. (Copy at **page 22** of Plaint). **DW1** told the Court that upon receiving this formal notification of the demise of the Deceased the Bank immediately blocked her account and did not allow any further transactions to be conducted on the said account.

(29) There can be no doubt that a Bank has a contractual duty to its client to exercise reasonable care and skill. However the duty of care is limited to what can be reasonably foreseen as likely to cause injury to the customer by the action of the bank. The standard of care to be applied is that of a reasonable banker, and each case must be decided on the merits of its relevant facts.

(30) In the case of **KARAK BROTHERS COMPANY LTD –VS- BURDEN [1972] AII ER 1210**, the Court held as follows:-

**“... 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 contract with its customer. The standard of that reasonable care and skill is an objective standard applicable to bankers. Whether or not it has been attained in any particular case has to be decided in the light of all the relevant facts, which can vary almost infinitely.” [own emphasis]**

(31) Further in **ELLINGER’S MODERN BANKING LAW, 4<sup>TH</sup> EDITION**, at **page 639**, the authors summarize a fundamental principle in similar cases as follows:-

**“In all cases of conversion, the bank’s duty to act without negligence is given a reasonable construction. The bank is not expected to assume the role of an amateur detective, and need not be unduly suspicious.”**

(32) Regarding the first two withdrawals complained of ie that of **Kshs. 3,000,000/- and Kshs. 53,500/-** the 1<sup>st</sup> Defendant submits that they committed no fraud or illegality in allowing the said withdrawals as they were acting on the basis of the instructions which the Deceased herself had issued to the Bank giving the 2<sup>nd</sup> Defendant the mandate to operate the account as a signatory.

(33) The relationship between the Bank and its client (the Deceased) is contractual. The Bank has a duty to operate the account on the basis of the instructions (mandate) given to it by the client. This duty is not only limited to specific instructions on mandate which may be issued at the time of opening the account or thereafter from time to time, but will also include various other documents which can be interpreted as instructions to the Bank e.g Standing Orders, Direct Debits, cheques etc.

(34) As stated earlier the Deceased had instructed the Bank that the 2<sup>nd</sup> Defendant be given the mandate to operate her Account. The Bank did not receive formal notification of the death of their client (the Deceased) until **20<sup>th</sup> June 2007**. At the time when the withdrawals of **4<sup>th</sup> June 2007** and **6<sup>th</sup> June 2007** were made the Bank had **not** received any notification of the demise of their client.

(35) Indeed the Plaintiff under cross examination admits that:-

**“When the Kshs. 3.0 million was withdrawn this letter [referring to the letter of 20<sup>th</sup> June 2007] had not reached the bank. Likewise the Kshs. 53,000/- was withdrawn before this letter reached the Bank.”**

The Plaintiff went on to state that:-

**“I confirm that there was no irregularity on the part of the bank in respect of these two withdrawals ....”**

(36) Therefore I find that having received no notice of their clients demise, the Bank was at the time acting totally in line with the instructions given to it by its Client and the mandate on the account. In my view the 1<sup>st</sup> Defendant cannot be faulted for allowing these two (2) withdrawals.

(37) Upon receipt of the formal notification of the demise of their client the Bank immediately blocked her account. This is as it should be. Any instructions given to the Bank regarding mandate would automatically terminate upon the death of the Client. The Bank could only move to block the account once they were notified of the death which they did. The onus lay on the family of the Deceased to move with haste to notify the Bank of the death of the Account-holder. The 2<sup>nd</sup> Defendant admits that she did not formally write to inform the Bank of the demise of the Deceased. Under cross-examination the 2<sup>nd</sup> Defendant says:-

**“I did not formally inform the bank of the death of the Deceased. It was a joint account and I did not see any need to inform the bank ....”**

(38) The assertion by the 2<sup>nd</sup> Defendant that the account held by the Deceased was a joint account is not factually correct. However I will address this later on in this Judgment. The 2<sup>nd</sup> Defendant submits that the death of the Deceased was widely advertised by way of Funeral Announcements in the Daily Newspapers. That in the premises the Bank had ample notice of her death. It is not the duty of the Banks to scour the Daily papers searching for information relating to their Clients. The fact that Death Announcements were placed in the Daily Newspapers did not absolve the 2<sup>nd</sup> Defendant of her obligation to formally notify the Bank of the death of the Principal Account holder. In the circumstances I find that the Bank cannot be held liable for the withdrawals made **before** they were notified of the Deceased’s Death.

(39) Regarding the withdrawal of **Kshs. 4,919,403.70**, these funds were transferred on **23<sup>rd</sup> December 2008** more than **one (1) year after** the Bank had received formal notification of the death of the Deceased. **DW1** told the Court that the Bank sanctioned the removal of this amount from the Deceased’s account because it was presented with a certified Court Order directing that this sum be withdrawn. The duty of the Bank in those circumstances was to make necessary enquiries to establish the authenticity of the Court order. This they did.

(40) In the Canadian case of **A & A JEWELLERS LTD –VS- ROYAL BANK OF CANADA (2001) CAN L.11 2040** the Court stated as follows:-

**“The bank is however not required to engage in an impractically extensive inquiry, nor is it to be held to a standard of perfection. All that is required is that it act reasonably in the circumstances.” (emphasis mine).**

(41) It is trite that Court orders must be obeyed. In the case of **TEACHERS COMMISSION –VS- KENYA NATIONAL UNION OF TEACHERS AND 2 OTHERS [2013]eKLR** it was stated as follows:-

**“A party who walks through the justice door with a Court order in his hands must be assured that the order will be obeyed by those it is directed – a Court order is not a mere suggestion or an opinion or a point of view. It is a directive that is issued after much thought and with circumspection. It must therefore be complied with and it is in the interest of every person that it remains the case. To see it in any other way is to open the door to chaos and anarchy – If one is dissatisfied with an order of the Court, the avenues for challenging it are also set out in the law. Defiance is not an option.”**

(42) In **SHIMMERS PLAZA LIMITED –VS- NATIONAL BANK OF KENYA LIMITED [2015]eKLR**, the Court of Appeal quoted with approval **Romer, L.J.** in **HADKINSON –VS- HADKINSON [1952]ALL ER 567**:

**“It is the plain and unqualified obligation of every person against, or in respect of, whom an order is made by a Court of competent jurisdiction to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or even void. Lord Cottenham, L.C., said in CHUCK –VS- CREMER (1) (1 Coop. temp. Cott 342):**

**“A party who knows of an order, whether null or valid, regular or irregular, cannot be permitted to disobey it ... It would be most dangerous to hold that the suitors, or their solicitors, could themselves judge whether an order was null or valid – whether it was regular or irregular. That they should come to the Court and not take upon themselves to determine such a question. That the course of a party knowing of an order, which was null or irregular, and who might be affected by it, was plain. He should apply to the Court that it might be discharged. As long as it exists it must not be disobeyed.”**

(43) The 1<sup>st</sup> Defendant like any other citizen was obliged to obey the Court order directing the payment of these funds. The order was certified by the issuing Court to be genuine. A copy of the certified order emanating from **HCCC No. 2126 OF 2000 MILDRED MACHANJA T/A LEARN IT –VS- KILIMANI JUNIOR ACADEMY LIMITED** which order was made by **Hon. Lady Justice Ruth Sitati (Retired)** on **18<sup>th</sup> November 2008** as a condition for grant of a stay of execution in respect of the Decree issued by the Court on **8<sup>th</sup> July 2005**, is annexed at **page 10** of the Defendants Bundle of Documents filed on **30<sup>th</sup> September 2016**. The order which was a **consent order** reads inter alia as follows:-

**“(a) ...**

**(b) The credit amount of Kshs. 4,919,403.70 as at 30<sup>th</sup> September 2008 held in Barclays Bank of Kenya Limited, Karen Branch, Account No. xxxxxxxx be transferred to Prime Bank Limited, Hurlingham Branch into the joint names of the Advocates for the Plaintiff and the Defendant ie the firms of Ochieng, Onyango, Kibet & Ohaga and Ngatia & Associates**

**Advocates.**

(c) ....”

The said order was duly certified as genuine on **12<sup>th</sup> December 2014** by the **Deputy Registrar** of the High Court.

(44) Whilst he blames the Bank for facilitating the withdrawal of the **Kshs. 4,919,403.70**, the Plaintiff under cross-examination admitted that he did not himself take any steps to confirm whether or not the Court order which led to the withdrawal of that amount, was genuine or not. Infact the Plaintiff states that:-

**“I am aware of the Court order directing the payment of Kshs. 4.9 million. I do not know if that order was valid. I have not sought to set aside that order ....”**

(45) In the circumstances I find that the Bank cannot be deemed to have been negligent nor can the Bank have been said to have breached its duty of care with respect to the operation of the said account. The Bank was under a duty to comply with a lawful Court order. I therefore find that the Plaintiff has failed to prove the claim against the Bank and accordingly I dismiss the Plaintiffs suit against the 1<sup>st</sup> Defendant and award costs of the suit to the 1<sup>st</sup> Defendant (Bank).

**(ii) Liability of the 2<sup>nd</sup> Defendant**

(46) The Plaintiff particularized the following particulars of fraud against the 2<sup>nd</sup> Defendant;

- (a) Making withdrawals from the Deceased’s account without authority.**
- (b) Making withdrawals from the Deceased’s account after the demise of the Deceased.**
- (c) Fraudulently and with malicious intent acquiring proceeds and/or funds from the Deceased’s account after her demise.**
- (d) Failing to disclose the existence of the subject account to the Plaintiff as required by law.**
- (e) Causing loss both to the estate of the Deceased and the Plaintiff.**

(47) As stated earlier the 2<sup>nd</sup> Defendant was a daughter to the Deceased who upon the instructions of the Deceased had been granted a mandate to operate the account in question. The 2<sup>nd</sup> Defendant confirms that relying upon that mandate of **11<sup>th</sup> April 2001** she did make the withdrawals in question. However the 2<sup>nd</sup> Defendant claims that the said withdrawals were necessitated by the need to obtain funds to cater for the funeral expenses of the Deceased, which she was solely catering for.

(48) It must be remembered that the account in question was opened, held and operated by the Deceased. It was **not** as claimed by the 2<sup>nd</sup> Defendant a joint account. The 2<sup>nd</sup> Defendant in her written submissions claims that in signing the Bank mandate the Deceased effectively vested all the proceeds in the said account to the 2<sup>nd</sup> Defendant for use even **after** the death of the Deceased. Nothing could be further from the truth. A Bank mandate cannot be equated to a Will. There is no evidence that Deceased wrote a Will bequeathing the funds in this account to the 2<sup>nd</sup> Defendant. The Deceased had merely donated to the 2<sup>nd</sup> Defendant a ‘**mandate**’ or (**authority**) as a signatory of the account to operate the account on behalf of the Deceased. The mandate of **9<sup>th</sup> April 2001** (see **page 15** of Plaintiffs Bundle filed on **4<sup>th</sup> December 2014**) only empowered the 2<sup>nd</sup> Defendant to act ‘**on behalf of**’ the Deceased in the operation of the account by drawing and signing cheques. That mandate **did not** convert the account opened by the Deceased into a joint account. The mandate dated **9<sup>th</sup> April 2001** **expired** on **1<sup>st</sup> June 2007** the day when the Deceased died. Therefore there was no survivorship of the account upon the demise of the Account-holder.

(49) Had this been a **joint account** opened in the names of **both** the Deceased and the 2<sup>nd</sup> Defendant then the situation would have been entirely different. In that situation the 2<sup>nd</sup> Defendant could have continued operating the account as a **joint principal holder** of the Account. However as pointed out this was **not** a joint account. The Deceased alone was the Principal Account-holder of the said Account. The 2<sup>nd</sup> Defendant was merely a signatory to the Account and therefore had no authority to continue operating said account upon the demise of the Principal Account-holder.

(50) The question that would arise is whether the mandate donated by the Deceased to the 2<sup>nd</sup> Defendant continued to have effect **after** the demise of the Deceased. The 2<sup>nd</sup> Defendant confirmed that her mother passed away on **1<sup>st</sup> June 2007**. Surprisingly the 2<sup>nd</sup> Defendant continued to operate and transact on the Deceased account even after the death of the Account-holder and more importantly the 2<sup>nd</sup> Defendant took no steps to formally notify the Bank of the demise of the Account-holder. Indeed it was not the 2<sup>nd</sup> Defendant who notified the Bank of the demise of the Deceased. Rather it was a **Mr. Nzioki** a Tax Consultant acting for [**Particulars Withheld**] who conveyed this information to the Bank.

(51) The action of the 2<sup>nd</sup> Defendant of continuing to operate the account **after** the demise of the Deceased amounted to intermeddling with the estate of the Deceased in terms of **Section 45** of the **Law of Succession Act, Cap Laws of Kenya**. In the case of **VERONICA NJOKI WAKAGOTO (DECEASED) [2013]eKLR, Hon. Justice William Musyoka**, held as follows:-

**“The effect of [Section 45] .... is that the property of a dead person cannot be lawfully dealt with by anybody unless such a person is authorized to do so by the Law. Such authority emanates from a grant of representation and any person who handles estate property without authority is guilty of intermeddling. The law takes a very serious view of intermeddling and makes it a criminal offence.”**

(52) The 2<sup>nd</sup> Defendant claimed that her salary was being deposited into this account implying that some of the funds held in the account belonged to her and that she was therefore entitled to make withdrawals from the said account. However no proof has been tendered that indeed the salary paid to the 2<sup>nd</sup> Defendant was deposited into that account. The 2<sup>nd</sup> Defendant further stated that she utilized the funds which she withdrew to cater for her late mothers hospital bill, pay for funeral advert which ran for **three (3) days** to buy coffin and generally to ensure that her beloved mother received a befitting and dignified send off. This may well have been the case. However the 2<sup>nd</sup> Defendant has not availed to the Court any proof that the funds she withdrew were actually utilized to cater for the funeral expenses of the Deceased. No receipts and / or invoices have been availed to the Court as proof of payment by the 2<sup>nd</sup> Defendant of hospital bills and/or funeral expenses. Secondly even if the 2<sup>nd</sup> Defendant required funds to meet such expenses the proper procedure would have been for her as a daughter of the Deceased to apply for **Letters of Administration Ad Litem** to enable her access the funds in the Deceased’s Accounts.

(53) The 2<sup>nd</sup> Defendant had no authority to continue to operate the Deceaseds Account after the demise of the Deceased. She is to be faulted for failing to notify the Bank immediately the Account-holder passed away. In the premises I find that the 2<sup>nd</sup> Defendant is personally liable to the estate of the Deceased for the amounts withdrawn on **4<sup>th</sup> June 2007** and **6<sup>th</sup> June 2007** totalling **Kshs. 3,053,500/-**.

(54) Regarding the withdrawal of the **Kshs. 4,919,403.70**, as stated earlier these funds were withdrawn pursuant to a Court order. The 2<sup>nd</sup> Defendant explained that the said Court orders dated **18<sup>th</sup> November 2008** were issued in **HCCC No. 2126 OF 2000** in which **[Particulars Withheld]** (a school in which the Deceased was a Director) had been sued by a Supplier. The 2<sup>nd</sup> Defendant states that she appealed the decision but was unsuccessful. That one **Mr. Nzioki** the school accountant advised that the funds to pay the Decree be withdrawn from the account of the deceased as the school did not have sufficient funds to settle the Decree. She states that all parties consent to the withdrawal of this sum of **Kshs. 4,919,403.70** to settle the Decree.

(55) Given the fact that this withdrawal of **Kshs. 4,919,403.70** was made to settle a lawful Court order I find that the 2<sup>nd</sup> Defendant cannot be held liable as she did not personally benefit from these funds.

(56) By prayer (c) of the Plaint the Plaintiff sought to be awarded damages for fraud and conversion as against the 2<sup>nd</sup> Defendant. An award of Damages is an exercise in judicial discretion. It is trite law that general damages are not recoverable in cases of alleged breach of contract.

(57) The purpose of an Award of Damages is to put the Plaintiff in the position he would have been had the breach not occurred. In my view this has already been achieved through the monetary award made in favour of the estate of the **Deceased**.

(58) In the case of **DHARAMSHI –VS- KARSAN [1974]E.A**, the Court of Appeal held that general damages are not allowable **in addition to** an award of quantified damages. For this reason I decline to make nay award for damages in this matter.

(59) Finally this Court makes the following orders:-

- (a) **The Plaintiffs suit against the 1<sup>st</sup> Defendant is dismissed in its entirety.**
- (b) **The Plaintiff to pay the costs of the suit to the 1<sup>st</sup> Defendant.**
- (c) **The Plaintiffs suit against the 2<sup>nd</sup> Defendant is partially successful.**
- (d) **Judgment is hereby entered against the 2<sup>nd</sup> Defendant in favour of the estate of the Deceased Josephine Magdalena Motion in the amount of Kshs. 3,053,500/- plus interest at Court rates from the date of this Judgment until payment in full.**
- (e) **Prayer (c) of the Plaint for damages is disallowed.**
- (f) **The Plaintiff and the 2<sup>nd</sup> Defendant will each pay their own costs for the suit.**

Dated in **Nairobi** this **9<sup>TH</sup>** day of **JULY, 2021**.

.....

**MAUREEN A. ODERO**

**JUDGE**