REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 241 OF 2017

LAVINGTON SECURITY LIMITED.....PLAINTIFF

-VERSUS-

CONSOLIDATED BANK OF KENYA.....1ST DEFENDANT

LAVINGTON GUARDS SERVICES LIMITED.....2ND DEFENDANT

EMMANUEL MASWACH CHELIMO.....3RD DEFENDANT

SIMON KIPKORIR TAIGET.....4TH DEFENDANT

JUDGEMENT

1. The plaintiffs herein filed a suit by way of the plaint dated 11th December 2017 and sought for judgment against the defendant in the following manner:

a) Special damages for the money loss of Kshs.179,478.050.29

b) General damages for conversion, fraud, negligence and breach of duty as well as trust.

c) Costs of this suit

d) Interest on a, b and c above at Court rates until payment in full.

e) Any other relief that this Honourable Court may deem fit in the circumstances.

2. The plaintiff pleaded in its plaint that on or about 2nd October 2006 it changed its in initial name from the said **Lavington Security Guards Limited to Lavington Security Limited** which is its current name. The plaintiff contends that it learnt on the 28th of July 2017 through internal investigations that a Company by the name of **Lavington Guards Services Limited** the 2nd defendant herein operated an **account Number 1001xxxxxxxxx** in Koinange street branch and that they also discovered that the 3rd and 4th defendants operated two other accounts in the name and style of Lavington Guards Services at the 1st defendant Bank being **Account No.0120xxxxxxxxx** and **1014xxxxxxxxx** in Harambee Avenue and River Road Branch respectively.

3. The plaintiff further pleaded in their plaint that upon opening the said accounts the 3rd and 4th defendant proceeded to steal cheques addressed in the name of the plaintiff and fraudulently and in conspiracy with the 1st defendant credited the same in favour of the said accounts .

4. It was also pleaded by the plaintiff that as a result by the defendants fraudulent conduct caused the plaintiff to incur a whopping loss totaling ksh.179,478.050/29 as at the date of filing this suit. The plaintiff in paragraph 22 of the plaint listed the particulars of fraud, illegality, negligence, breach of duty and trust as well as gross malafides as follows:

a) Failure to mitigate the possibility of fraudulent activities and wrongfully and illegally accepted, processed and credited cheques drawn in favour of the plaintiff into rogue Account Numbers 1001xxxxxxxxx,0120xxxxxxxxx and 1014xxxxxxxxx.

b) Failure to adhere to the standard Banking Procedure which requires it to ensure that the drawee's name on the cheque must precisely match the account name and there should be no deviations whatsoever while accepting, processing and crediting cheques.

c) The 2nd,3rd and 4th defendants intentionally registered a Company and a Business with a name similar to if not almost identical to the plaintiff's business name in order to carry out their fraudulent transactions against the plaintiff company.

d) Stealing of cheques by the 3rd and 4th defendants in favour of the plaintiff and banking them into their accounts registered in the name of the 2nd defendant and Lavington Guards Services.

e) Registration of company and business name similar to that of the plaintiff by the 3rd and 4th defendants as part of a well-choreographed strategy aimed to cover the fraudulent enterprise that they have been presiding over the 1st defendant.

f) The 1st defendant herein breached standard banking practice and procedure.

5. Upon service of summons, the 2nd defendant entered appearance and filed their statement of defence on 7th February, 2018, the 3rd and 4th defendant jointly filed their statement of defence on 7th February and the 1st defendant filed on 16th March 2018 dated 15th March 2018 to refute the plaintiff's claim.

6. At the hearing of the suit, both plaintiff and the 1st defendant each called one (1) witness to testify in support of their case.

7. Joel Cherono Chebon (PW1) adopted his signed witness Statement as evidence and stated that he is the finance Director of the plaintiff company. He further testified that he filed documents which he produced as PEXH1, 2, 3, 4 and 5. He also relied on the plaintiff's supplementary affidavit which he produced as PEXH6.

8. In cross examination, the witness stated that he is the finance manager as well as the senior accountant of the plaintiff company. PW 1 averred that he discovered that the 2nd defendant had been operating a bank account with the 1st defendant.

9. The witness also stated that the process whereby at the end of 30 days a debt collector who is responsible of collecting cheques and making a follow up on payments visits the client and if the payments are ready the cheques are given to the debtor collector by the customer when they deliver to the office where they are registered in a cheque book register and posted to a statement of account.

10. The witness further stated that the cheques are posted to a statement of account of the customer which clears the invoice that had already been issued and thereafter the cheques are banked. That the bank issues the customer with deposit slips through the person who banks the cheques.

11. It is PW 1's his evidence that the company kept a cheque register and that he could not remember whether the cheque register was produced or requested for. That for the period of three months he has worked in the company, it has been receiving bank statements and that they were not part of the documents requested.

12. He further testified that during the bank reconciliation he discovered the discrepancies on the book and bank balance which they did produce in court. That he did a monthly reconciliation and he discovered the anomaly in 2017.

13. The witness testified that the company had lost to a tune of Kshs.179,478.050/29 but he does not know how this amount was calculated.

14. In re-examination, it is the evidence of the aforesaid plaintiff that at no time did he run an account with Consolidated bank and that he noticed the anomaly three months after joining the company.

15. He further stated that some of the employees were involved in the anomalies, one of them being Mr.Symon Kipkorir the 4th defendant who stole numerous cheques.

16. For the defence, James Simiyu Munyasia (DW1) adopted his witness statement dated 30th November 2020 and stated that he works for Consolidated Bank as a Manager Central Operations. He testified that he had realized that most of the statements provided had zero balances yet there was a claim of some amount not being paid.

17. He further testified that they had requested for reconciliation statements to enable them verify whether the cheques were banked.

18. In cross examination, the DW1 testified that he started working for consolidated bank in September 2013 hence he is conversant with the dispute.

19. He stated that the plaintiff did not discharge the burden of proof because it did not provide the statements. He further stated that he did not meet any of the employees who operated the accounts.

20. It is his evidence that the teller who receives a cheque in the name of **Lavington Security Limited** to be banked in the account of **Lavington guards Services Limited** must raise a query. He further stated that the control of banking a cheque ends at the supervisors desk and an activity could not be detected because there might have been a collusion or pure negligence by the whole staff.

21. He stated that they normally issue banking slip when it receives cheques but no bank slips were issued to **Lavington Security Limited**. He further stated that **Lavington Security Limited** did not operate an account with them hence no statements would not be issued.

22. In re-examination, the witness stated that the internal accounting system of the plaintiff was not good and that they did not have a proper bank reconciliation of accounts. He further stated that the plaintiff also contributed to the negligence.

23. At the close of the hearing, this court invited the parties to file and exchange written submissions. At the time of writing this judgment, only the plaintiff and the 1st defendant had filed their submissions. The learned advocates also each identified the issues for determination.

24. In its submissions, the plaintiff restated that the fraud was discovered on 28th July 2017 and reported the same to DCI Kilimani OB 50/28/07/2017 and later referred to the Banking Fraud Investigation Unit of which the evidence went uncontroverted .They submitted that time thus started running on 28th July 2017 and thereafter it filed this present suit on 11th December 2017 less than 5 months after discovering of the fraud which was therefore within the statutory time.

25. The plaintiff submitted that the bank in discharging its mandate, it is its duty to satisfactorily establish and verify the customers true identity and in doing so, it must be alert to the even present danger that after opening of the account it may be used for fraudulent purposes. In this case the accounts were opened without undertaking any form or type of due diligence as there was no evidence of a search at the Company's registry to establish the identity of its new customer, the 2nd defendant or its physical address or the identities of the Directors and their addresses.

26. On this, the plaintiff's learned counsel relied on several authorities including the Court of Appeal decision in **Standard Chartered Bank Limited v Intercom Services Limited & 4 Others (2004) eKLR**

> "***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"***

27. It was submitted that in so far as the burden of proof is concerned, the Court of Appeal in **Standard Chartered Bank Limited v Intercom Services Limited & 4 Others(supra)** held inter alia that

"***the onus of establishing circumstances showing absence of negligence is on the banker"***

28. It is the plaintiff's submissions that all the defendants are liable for conversion and fraud. The plaintiffs further submitted that there was collusion and actual negligence on the part of the employees of the 1st defendant and that makes the 1st defendant vicariously liable. On this the plaintiff relied on the decision of Court of Appeal for East Africa in the case of **Mungowe v Attorney General of Uganda (1967) EA 17,** cited with the approval in **Tile and Carpet Centre Limited v Kenya Commercial Bank Limited & 2 Others (2020) eKLR**

29. It is submitted that the 2nd defendant opened and maintained the three fraudulent accounts with the 1st defendant's bank. It is also uncontroverted evidence that the 3rd and 4th defendant were directors of the 2nd defendant.

30. The plaintiff contends that to require them to produce a copy of each stolen cheque credited to the fraudulent accounts will render grave injustice because they are stolen and there was no way they would have retained any copies since the same copies were provided to them by the Banking Fraud Unit. The plaintiff therefore prays for judgment against the defendants jointly and severally to the tune of Kshs.179, 478,050/29 being the sum pleaded and proved by the produced statements of accounts for the fraudulent accounts.

31. In reply, the 1st defendant submitted that the substratum of this case is conversion and that the plaintiff particularized acts of collusion and negligence. It is therefore the 1st defendant's submission that some of the aspects of the claim are time barred under the provisions of ***Section 6 (1) of the Limitation of Actions Act*** which provide that all actions in respect of conversion should be brought within 3 years from the date of the alleged conversion or detention. The defendant relied on the case of ***Haron Onyancha v National Police Service Commission & Another (2017)eKLR,*** the court quoted the case of ***IGA v Makerere University (1972) EA*** where the court held as follows:

"A plaint which is barred by limitation is a plaint "barred by law". Reading these provisions together it seems clear to me that unless the appellant in this case had put himself within the limitation period by showing grounds upon which he could claim exemption the court "shall reject" his claim. The appellant was clearly out of time, and despite the opportunity afforded him by the Judge he did not show what grounds of exemption he relied on, presumably because none existed. The Limitation of Actions Act does not extinguish a suit or action itself but operates to bar the claim or remedy sought for, and when a suit is time barred, the court cannot grant the remedy or relief sought."

32. It is the 1st defendant's submissions that the plaintiff merely pleaded fraud without particularizing the acts of fraud and leading evidence on the same. On this, they relied on the case of ***Moses Parantai & Peris Wanjiku Mukuru suing as the legal representatives of the estate of Sospeter Mukuru Mbeere v Stephen Njoroge Mcharia (2020)eKLR*** ,the Court of Appeal stated as follows:

> **" That the allegations of fraud were merely stated in the plaint but not proved and that no evidence was adduced to prove that the respondent participated in any fraud or was aware of any purported fraud when he purchased the suit land."**
>
> **The Black's Law dictionary defines fraud as follows**:
>
> **"A knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his or her**

detriment."

It is a principle of the law that the party who alleges must prove. The appellants alleged that the transfer of the suit land from the deceased all the way to respondent was fraudulent. Did the appellant prove to the required standard the allegations of fraud against Janet, Joseph and the respondent? In the case of **Urmila w/o Mahendra Shah v Barclays Bank International Ltd & another [1979] eKLR**, this Court took the view that the onus to prove fraud in a matter is on the party who alleges it. Similarly, in cases where fraud is alleged, it is not enough to simply infer fraud from the facts. In **Vijay Morjaria v Nansingh Madhusingh Darbar & another [2000] eKLR,** Tunoi JA (as he then was) stated as follows*:*

> **"It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must of course be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and as distinctly proved, and it is not allowable to leave fraud to be inferred from the facts."** Emphasis ours.

33. On whether the plaintiff is liable for contributory negligence, the 1st defendant submitted that it was indeed not possible for the plaintiff to have lost Kshs.179,478,050/29 over a period of 8 years without realizing or even raising any query to its customers for the provision of services and for non-payment of the same by its customers.

34. It is the 1st defendant's submissions that the plaintiff contributed by failing to take reasonable care of cheques drawn by itself as they were stolen from its office. It is also submitted that internal reconciliation for over 8 years and the audit reports failed to raise any anomaly and the bank statements for reconciliation which failed to find out if they had been discrepancy on the cash flow. The defendant therefore suggests the apportionment of liability between the plaintiff and the defendants ought to be assessed at 50% each.

35. On whether the plaintiff had proved the alleged loss of Kshs.179,478.050/=,the 1st defendant submitted that the bank had requested for the precise particulars of the demanded amount as claimed in the plaint dated 11th December 2017 however no particulars or breakdown of the amount claimed by the claimant was provided.

36. I have considered the evidence tendered alongside the rival submissions and authorities relied upon. The following are the issues arising for determination:

i. Whether the suit is statute barred.

ii. Whether the plaintiff is liable for contributory negligence.

iii. Whether the 1st defendant is liable for the negligence.

iv. ***Whether the plaintiff is entitled to the relief sought***.

37. On the first issue, the 1stdefedant pleaded in their defence that the plaintiff's claim was statute barred having been filed eight (8) years after the cause of action arose. This claim was strongly denied by the plaintiff.

38. After analysing the material placed before me, I agree with the plaintiff's position that its claim is founded on fraud, illegality, negligence, breach of duty, trust as well as gross malafides and not collusion as indicated by the 1st defendant. I have gone through the entire *Limitation of Actions Act, Cap 22 Laws of Kenya* (the *Act*) and have not come across any provision that prescribes a time limit for instituting actions based on fraud. *Section 4 (1)* of the *Act* prescribes the limitation period for actions founded on *inter alia* contract and torts and makes no reference to actions based on fraud. *Section 26* of the *Act* makes it clear that even for actions which have a limitation period, if fraud is involved, time does not start running until the date the alleged fraud is discovered. The section is in the following terms:

> **"Where***, in the case of an action for which a period of limitation is prescribed, either—*
>
> ***(a) the action is based upon the fraud of the defendant or his agent, or of any person through whom he claims or his agent; or***
>
> ***(b) the right of action is concealed by the fraud of any such person as aforesaid; or … the period of limitation does not begin to run until the plaintiff has discovered the fraud or the mistake or could with reasonable diligence have discovered it."***

39. It was the PW1 evidence that on or about 28th July 2017 the plaintiff through its internal investigations learnt of the fraud and reported the same to DCI and the Banking fraud Investigation Unit. The plaintiff filed this present suit on 11th December 2017 which was done 5 months after discovering the fraud. Consequently, I do find that time began to run from the date the alleged fraud was discovered and I am satisfied that the claim was not statute barred.

40. It is important to note that claims arising from fraud must be specifically pleaded and strictly proved. *Order 2 Rule 4* of the *Civil Procedure Rules* clearly sets out this position- See also the case of ***Vijay Morjaria V Nansingh Madhusingh Darbar & Another, (Supra).***

41. Regarding the standard of proof, it is now settled that though the standard should not be beyond reasonable doubt like in criminal cases, it should be higher than proof on a balance of probabilities which is the standard of proof in all other civil cases. The Court of Appeal restated this position in **Gladys Wanjiru Ngacha V Teresa Chepsaat & 4 others [2013] eKLR** where it rendered itself thus:

"…Allegations of fraud must be strictly proved: although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required.

It is not enough for the appellant to have pleaded fraud; she ought to have tendered evidence that proved the particulars of fraud to the satisfaction of the trial court. In Mutsonga vs. Nyati (1984) KLR 425, at pg 439, this Court held: "Whether there is any evidence to support an allegation of fraud is a question of fact…''

42. From the perusal of the plaintiff's pleadings, I note that theparticulars of fraud were clearly and specifically set out in paragraph 22 in line with the legal position set out hereinabove.

43. On the second issue, according to the 1st defendant's submissions the plaintiff is liable for contributory negligence because it failed to take reasonable care of cheques drawn to itself, did not follow up on with its customers on any outstanding invoice after the plaintiff had raised the same and the fact that the reconciliation books never revealed any missing cheques being stolen.

44. It is the plaintiff's submission that in cross examination DW 1, stated the cause of action arose as a result of collusion between the 2nd defendant and its employees of the 1st defendant. That at no point did he attribute fault on the part of the plaintiff.

45. It is the plaintiff's submission that no evidence has been led by any defendants to lay any negligence on the part of the plaintiff as all the perpetrators of this fraud are the defendant.

46. In the interpretation of the principles on contributory negligence the court in **De Frias v Rodney 1998 BDA LR 15** held as follows:

"Contributory negligence required the foreseeability harm to oneself. A person is guilty of contributory negligence, if she ought reasonably to have foreseen that if she did not act as a reasonable prudence person she might be hush and in reckoning must take into account the possibility of others being careless. All that is required here is that the plaintiff should have failed to take reasonable care for her own safety. I do not find that the plaintiffs conduct was in any way contributory negligence. In the agony of the circumstances she made an unsuccessful attempt to avoid the conclusion."

47. It is clear from the above that the plaintiff did not contribute to the fraud that had taken place. It was the duty of the bank to ensure their customers' needs and affairs are well taken care of as they normally say the customer is the King.

48. It is clear that the 1st defendant did not take any necessary steps to ensure that for example the tellers counter checked the Cheques before banking them especially when it came to the names of the two companies that were almost similar.

49. It was the plaintiff's submission that the 1st defendant's employees were to blame for the whole fraud as they were not extra careful as they ought to be. In the case of ***Maina Kaniaru & Another v Josephat Muriuki Wangondu, Civil Appeal No.14 of 1989*** *Contributory negligence must be pleaded if the court is to find so but the court has discretion to consider the same if raised in the course of trial.*

50. Upon considering the evidence before this court from both ends, it is my view that the plaintiff is not liable for contributory negligence.

51. On the third issue, according to the plaintiff, the 1st defendant as a bank must be alert even to the present danger that after

opening of the accounts they may be used for fraudulent purposes.

52. That the three accounts were opened without taking any due diligence based on the Central Bank of Kenya Guidelines. The 1st defendant did not file any documents illustrating that they carried out due diligence to establish the true identity of the 2nd defendant, their objectives, nature of their business, shareholders and if it had carried out due diligence then they would have filed the same.

53. The plaintiff relied on the case of ***A & A Jewellers Limited v Royal Bank of Canada (2001) Can LII 24012 (ON CA)*** which was cited with approval by Justice Havelock in **Kenya Grange Vehicle Industries Ltd v Southern Credit Banking Corporation Limited (2014) eKLR JA Moldaver** ruled that:

"In cases such as this, where the Bank is under a duty to make inquiries of its customer regarding a possible breach of trust, the Bank will be found to be in constructive knowledge of the breach of trust if it 'fails to make the appropriate inquiries"

54. On the other hand the 1st defendant submitted that as the collecting bank it is not liable for any negligence as provided for under Section 3 (2) of the Cheques Act, No. 2 of 2002. According to the 1st defendant, the plaintiff did not produce some specific documents within the possession of the plaintiff. The 1st defendant's witness explained the essence of the request of the bank reconciliation would help a client look at his cash flows and confirm whether indeed cheques were banked and cleared.

55. The 1st defendant stated that the fact that the plaintiff did not provide the documents then it tilts in favour of the court making finding that the plaintiff did not prove its case on a balance of

probability.

56. The plaintiffs aver that the said documents were not in their possession and that they were only provided with the same by the Banking fraud Unit after the investigations had been done.

57. In the present case, I find the 1st defendant liable for negligence.

In the first instance, the 1st defendant operated the three accounts for 8 years as all the cheques presented were stolen as they had the name of the plaintiff on the face of its true owner of the cheque.

58. A bank would have indeed done its due diligence on the company before opening of the accounts and also get to know how it was registered, its directors and its physical address before opening the accounts.

59. That in cross examination, DW1 confirmed that there was negligence on the part of employees of the 1st defendant regarding the tellers to ensure that the name on the cheque matched precisely with the customer (account holder).and that this procedure was not followed which lead to their termination of the involved employees.

60. In the case of ***Marfani v Midland Bank Ltd (supra)*** the court held interalia:

> ***"Circumstances would cause a reasonable banker possessed of such information about his customer as a reasonable banker would possess to suspect that his customer is not the true owner of the cheque?"***

61. On the fourth issue, on whether the plaintiff is entitled to the reliefs sought, in my view, its entitled, because they produced the statements of accounts of the fraudulent accounts i.e. PEXH1-5 and that there was no evidence to show that the said cheques belonged to the 2nd defendant reason being they stole the cheques belonging to the plaintiff and banking the said cheques.

62. The plaintiff went further and produced copies of the cheques and deposit slips that were deposited in the 3 fraudulent accounts.

63. Further DW1 admitted that all the statements of accounts produced by the plaintiff were genuine and none of the defendants produced any documents or cheques credited into the 2nd defendant account that belonged to the plaintiff.

64. In the case of **William Kabogo Gitau vs. George Thuo & 2Others [2010] 1 KLR 526** Kimaru J, stated interalia as follows;

> ***"In ordinary civil cases, a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely than not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred."***

65. Having considered the material placed before this court, I find that the plaintiff has proved its claim against the 1st, 2nd, 3rd and 4th defendants. Consequently, judgment is entered in favour of the plaintiff and against the defendants jointly and severally as follows:

i. Special damages kshs.179,478,050/=

to attract interest at court rates from the date of filing suit until the date of full payment.

ii. General damages Kshs.5,000,000/=

to attract interest at court rates from the date of judgment until the date of full payment.

iii. **Costs of the suit**.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 29TH DAY OF OCTOBER, 2021.

.....

J. K. SERGON

JUDGE

In the presence of:

……. for the Plaintiff

……. for the 1st Defendant

……. for the 2nd Defendant