



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & TAX DIVISION

CIVIL SUIT NO. 578 OF 2009

CHARLES ONYANGO ANGUKA & CLEOPHAS OBONYO

t/a JOPIJU ELECTRICAL & GENERAL WORKS.....PLAINTIFF

VERSUS

EQUITY BANK LIMITED.....DEFENDANT

ELISHA OCHIENG OMBERE

t/a JUPIJU ELECTRICAL SERVICES CONTRACTOR.....THIRD PARTY

JUDGMENT

1. The plaintiff filed this suit vide a plaint dated 6th August 2009, seeking for judgment against the defendants for: -

- (a) *A declaration that the defendant's decision to unilaterally freeze the plaintiff's account was wrongful and illegal;*
- (b) *An order or injunction restraining the defendants from implementing their decision to freeze the said account;*
- (c) *An order compelling the defendants to immediately defreeze the said account, and to permit the plaintiff to operate the said account;*
- (d) *Damages for breach of banker customer contract;*
- (e) *Damages for unlawful disclosure of confidential information relating to the said account;*
- (f) *Loss of profits as outlined in paragraph 8 of the plaint;*
- (g) *Damages for slander in the way of the plaintiff's trade or business;*
- (h) *Damages for slander in the way of the plaintiff's profession or calling;*
- (i) *Interest on (d), (e), (f), (g) and (h) hereof at commercial rates of 24% p.a. until payment in full.*
- (j) *Costs of the suit;*
- (k) *Any other relief that the Honourable court deems fit to grant.*

2. It is averred that, the plaintiff is a business partnership registered on or about the 17th April 2009, as evidenced by the certificate of registration produced herein. That, on or about the 20th April 2009, it entered into a contract with a company known as; Brolaz East Africa Limited, vide LPO No. BEA 9443, dated 20th April 2009, for construction of; KPLC lines on; Bima Towers and Karen Mwititu sites. The services were rendered and payment received vide a cheque number [...] dated 30th April 2009, in the sum of; Kshs 296,601. The cheque was deposited into the plaintiff's bank account number, [...] opened on 7th May 2009, at the defendant's OTC branch.

3. However, when the plaintiff went to withdraw the funds thereof, it was unable to and learnt that, the defendant had frozen the account on the basis of a letter dated 22nd May 2009, received from, Njeru Nyaga & Company Advocates, on behalf of the third party herein. That the letter alleged the plaintiff had obtained the cheque fraudulently and/or stolen it.
4. The plaintiff avers that the defendant knew or ought to have known that the allegation was false and/or defamatory to it personally and business reputation. In the alternative, the defendant's wrongful and illegal acts were all calculated to and cumulatively amounted to imputation of; criminal conduct on its the part, which imputation was intended to portray them as unscrupulous and dishonest businessmen with criminal disposition, thereby subjecting it to public scandal, ridicule, contempt and odium.
5. The plaintiff further avers that, the freezing of the account without prior notice and/or a court order was done in an irregular and un-procedural manner and contrary to the law and amounts to breach of the bank-customer relationship between the parties.
6. It is further averred that, subsequently to freezing of the account, the plaintiff's lawyers; Rachier & Amolo Advocates; wrote to the defendant a letter dated; 27th May 2009, demanding the account be opened but the defendant declined to comply and continued to deduct monthly charges illegally.
7. The plaintiff avers that, it has suffered and continues to suffer loss and damages and sustained serious business losses, in that a number of its customers stopped doing business with it and established new business contacts with its competitors. In that regard, it lost a contract, with, Mars Technical Services vide Local Purchase Order (LPO) No. 1068 dated 23rd April 2009 and Brolaz (East Africa) Limited vide LPO No. BEA 9450, dated 20th April 2009. Further, it was unable to supply goods ordered by their customers due to lack of funds following the freezing of the account.
8. Similarly, the defendant breached the duty of confidentiality owed to it, when it responded to and/or acted on the letter from the third party's lawyer. That the information in the demand letter, was confidential pertaining to; the specific bank; branch at which the plaintiff's account was opened, the names of the signatories to the account and the fact that a cheque had been deposited to the said account. That the information was exclusively within the knowledge of the defendant and the plaintiff. No one could access it save for the two parties. As the plaintiff did not divulge the information to the third party, it is assumed that the defendant disclosed the information.
9. However, the defendant filed a statement of defence dated 16th November 2009, and denied the plaintiff's claim. It averred that, any duty owed to the plaintiff; is exercisable with to safeguard its interests as a banking institution.
10. That, on 8th August 2008, the third party herein, opened a business account number [...] at its Harambee branch, under the name of; Jupiju Electrical Service and subsequently, on 7th May 2009, the plaintiff opened a business account number [...], at its OTC branch under the name of; Jopiju Electrical and General Works.
11. On 22nd May 2009, approximately two weeks after the plaintiff opened its account, the branch manager at the OTC branch, received a demand letter from; Njeru Nyaga & Company Advocates, written on behalf of the third party, directing the defendant to, immediately stop any payment and/or withdrawal of funds from the cheque in issue. The letter stated that the third party wanted to establish the circumstances under which the proceeds of the Local Purchase Order (LPO), it was servicing was paid to a different entity.
12. That, five (5) days after receipt of the third party's demand, the branch manager received another demand letter dated; 27th May 2009, from the firm of; Rachier & Amollo Advocates, on behalf of the plaintiff, to the effect that; Brolaz East Africa Limited; had issued the cheque to the plaintiff as payment for services rendered by it. The letter demanded that the suspension of the plaintiff's account be lifted.
13. The defendant avers that, the receipt of the second letter affirmed its belief that indeed, there existed a dispute as to the rightful owner of the cheque, as the second letter claimed that, the suspension of the plaintiff's account was based on malicious and untrue allegations made by the plaintiff's business rivals.
14. The defendant avers that it acted in good faith, when it suspended operations on the plaintiff's account with the intention of verifying the legitimacy of the two entities, in terms of entitlement to the proceeds of the cheque and due to the very grave allegation of fraud, considering the similarity of the plaintiff's and third party's names.
15. That it acted with reasonable care the letter touched on a transaction involving the plaintiff's account. It also acted to avert any unlawful gain and/or unjust enrichment of either party at the expense of the other and to its detriment.
16. In the alternative and without prejudice, any statements made to any third party touching on the affairs of the plaintiff could only be fair comment and in the ordinary nature and course of the defendant's business. However, should the court find otherwise, the defendants will claim indemnity from the third party.
17. However, he third party filed a defence dated 4th October 2010 and confirmed that, it instructed the law firm of; Njeru Nyaga & Company Advocates, to write to the defendant the letter dated 22nd May 2009, as a result of the plaintiff's fraudulent activities and payments by Brolaz East Africa Limited, as aforesaid.
18. That, the plaintiff facilitated the fraud by registering; Jopiju Electrical and General Works, as a business name purposefully to fraudulently receive its payment from; Brolaz East Africa Limited. Further, the plaintiff wrote to Brolaz East Africa Limited, a letter dated; 28th April 2009; purporting to change the third party's details to read; "Jopiju Electrical General Works" instead of the third party's business name; "Jupiju Electrical Services" a fact the plaintiff knew to be false.

19. Similarly, the plaintiff colluded with Brolaz East Africa Limited's employees and/or general manager to change and counter sign a cheque payable to the third party for services rendered by the third party to; Brolaz East Africa Limited to read; Jopilu Electrical and General Works instead of the rightful payee, Jupiju Electrical Services. Further, the plaintiff removed the local purchasing orders and the records of invoices of the third party held by Brolaz East Africa Limited and replaced them with local purchasing orders and invoices of the plaintiff; so as to facilitate payment of the third party's monies to itself.
20. The third party argues that, the plaintiffs had no actual and professional capacity to do the work which is the subject of this suit and for which it received the payment. The plaintiff should prove that, at the time of the work, it was commissioned to do the works and/or it was registered with; Electricity Regulation Board as; Electrical Contractors and with Kenya Power and Lighting Company Limited; as professionals capable of handling the subject contract.
21. Finally, the third party averred that, it cannot indemnify the defendant, as it only acted to stop theft of its funds and would sue Brolaz East Africa Limited for the fraudulent payments. Therefore, the plaintiff's suit should be dismissed with costs and the KShs. 296,601, frozen be released to it.
22. At the close of the pleadings, the case proceeded to full hearing wherein, the plaintiff's case was supported by the evidence of Charles Onyango Anguka, who adopted and relied on the witness statement and documents filed in court on 8th November 2011, whereas the defendant's case was supported by the evidence of; Michael Wambua who also relied on and adopted his witness statement dated 10th December 2017 and the documents filed. The third party did not testify at the trial.
- Basically the parties reiterated the averments in the pleadings.
23. Subsequently, the plaintiff and the defendant filed their final submissions. The plaintiff reiterated that, the defendant had no lawful authority to freeze the account, as it has not produced any court order or cited any provisions or any term stipulated in the General Terms and Conditions opening and operation of the account to prove it had authority to freeze the account.
24. Further the Defendant cannot rely on the Central Bank of Kenya Guidelines, as they are not referred to in the defence or the witness statement nor produced herein. Neither can it allege that, it acted with due care.
25. The Defendant submitted that parties are bound by their pleadings and contract. The court cannot re-write the contract for the parties. The case of; National Bank of Kenya vs Pipeplastic Samkolit(K) Limited (2001) eKLR was relied on. As such the defendant has not discharged the burden of proof required under sections 107 and 108 of the Evidence Act (cap 80), laws of Kenya.
26. That, even if the defendant had authority, it did not follow the right procedure in freezing the account, in that, it failed to make proper inquiry or investigation upon receipt of the alleged demand from the third party. Further, if any inquiry was done, there is no evidence that, it led to a finding of fraud to justify the freezing of the account. The case of; Benson Okwiri Odongo vs Consolidated Bank of Kenya Limited (2008), Eklr., was relied on to argue that, the defendant should have established there was fraud before freezing the account.
27. The plaintiff further submitted that, it was improper to act on instructions of a third party. The case of; Standard Chartered Bank Limited vs Intercom Services Limited & 4 Othes (2004) Eklr was cited. That, it was imperative, a notice should have been given to the plaintiff before or after freezing the account. Further reference was made to the cases of; Kenya Commercial Bank Limited vs Jeremiah Maina & 7 Others (2017) eKLR and Viable Deco Solutions Limited vs Co-operative Bank Kenya Limited, (2014) eKLR.
28. It was argued that, the freezing of the account denied the Plaintiff access to its funds. Reference was made to the case of; Bodenham vs Hoskins (1943), All ER, where it was held that, the bank should not concern itself with the purpose of opening the account or what the money paid therein are for and/or the purpose for which the money was paid.
29. The Plaintiff reiterated that as a result of the aforesaid, the unilateral, unlawful and un-procedural freezing of the account was irregular, improper and illegal, and amounts to a breach of the defendant's duty to exercise all reasonable care to protect its interest. The case of; Karak Brothers Co. Limited vs Broden (1972) All ER, was referred to; argue that the standard applied to the banker's duty of care is objective and should be evaluated based on the circumstances of each case.
30. However, the defendant submitted that a banker is bound to carry out the lawful instructions of the customer including, honouring the customer's cheques to the extent of the funds available. It should protect the true owner of the cheque. The case of; Intercom Services Limited (supra) was relied on. Therefore, the court should consider the circumstances of the case at the time of the acts complained of and find out whether these circumstances would cause a reasonable banker, possessed of such information about its customer, to suspect that the customer was not the true owner of the cheque.
31. The defendant argued that, it is rather suspicious why the plaintiff who is a former employee and business partner of the third party, registered a business name similar to and opened an account with virtually a similar name as that of the third party.
32. The defendant further submitted that, the banks' duty of care extends to a whole range of banking business and includes the interpretation, ascertaining and acting in accordance with the customer's instructions. Thus the decision to suspend the account was reasonable.
33. Further, the duty of confidentiality is not absolute but qualified as held in the case of; Tournier V National Provincial and Union Bank of England (1924) Therefore, the plaintiff's assertion that the defendant disclosed information relating to its account to third parties is baseless, without an iota of justification and amounts to mere hearsay as the plaintiff has failed to substantiate how the defendant breached that duty and who the third parties he is referring to are.

34. Finally, it was argued that the tort of libel involves damage to the reputation of an individual. It is based on the test of right thinking members of the society and there must be proof that the person defamed was shunned. The cases of; Murphy vs Lamarsh (1970) and Eric Omuodo Oungo vs KCB No. 42A of 2015 were relied on.

35. At the conclusion of the case as advanced by the parties, I have considered the evidence adduced and the submissions filed and I find that the following broad issues have arisen for determination:

- a) *Whether the defendant breached banker-customer relationship between it and the plaintiff; by freezing of the plaintiff's account; and/or by the alleged disclosure of confidential information; or*
- b) *Whether the defendant had the legal authority to freeze the plaintiff's account;*
- c) *Whether the plaintiff is entitled to the prayers sought; and*
- d) *Who should bear the costs of the suit.*

36. In relation to the first issue, I find note that generally, the main basis of the banker customer relationship is one of; debtor-creditor as held in the case of; Foley vs Hill (1848) HL. Thus, when a customer pays money into his account, the bank becomes the debtor and the customer the creditor. The money becomes the property of the bank and the bank is merely liable to pay the money to the customer on demand.

37. That relationship is contractual and the parties are bound by the express and implied terms thereof. The implied terms of this relationship were set out in the case of; Joachimson vs Swiss Bank Corporation (1921). In that regard, the terms implied term on the part of the bank were stated in that case to include, the duty to:

- a) *receive the customer's deposits and collect his cheques;*
- b) *comply with written orders, including cheques, issued by its customer, assuming there is sufficient credit in the account;*
- c) *repay the entire balance on the customer's demand at the account holding branch during banking hours;*
- d) *give reasonable notice before closing a customer's account, at least if it is in credit;*
- e) *keep the customer's affairs in total confidence; and*
- f) *take reasonable care when dealing with the customer's instructions.*

38. I find that, there is no dispute herein that, the defendant held bank accounts for both; the plaintiff and the third party as evidenced by the documents produced herein. Therefore, the defendant had a banker customer relationship with both respectively and owed both parties the contractual duties referred to above. In particular, the duty of care and skill.

39. In exercising the duty of care and skill, the greatest risk facing the collecting is that of conversion. Conversion was defined in the case of; Hiort vs Bott (1874) as "unauthorized act which deprives another of his property permanently or for an indefinite time". The most common example is collection of a cheque for a person who has no title to it or a cheque that has a forged or unauthorized essential endorsement.

40. The collecting bank, by facilitating the conversion, even though innocent will be interpreted as a party to the conversion and liable to the true owner. The bank can only rely on the statutory defence under section 3 of the Cheques Act (cap 35) laws of Kenya, if it can prove that it acted without negligence.

41. In that regard the courts has discussed the bank's standard duty of care and held in the case of; Lloyds Bank Limited v E.B Savory and Co. (1933) that: -

"The standard by which the absence, or otherwise of negligence is to be determined, must in my opinion be ascertained by reference to the practice of reasonable man carrying on the business of bankers, and endeavoring to do so in a manner as may be calculated to protect themselves against fraud"

42. In addition, the bank's duty of care and skill extends to the duty of confidentiality. The duty was established in the case of; Tournier vs National Provincial and Union Bank of England (1924) CA where it was held that, a bank owes an implied duty to its customers not to divulge information about its customers to third parties. In that case, Tournier had an overdrawn account with the bank. The branch manager spoke to Tournier's employers in order to find out Tournier's home address. In the process the manager revealed that, Tournier had defaulted on his obligation to the bank and was suspected of being a heavy gambler. Tournier was dismissed from his job and successfully sued the bank for his losses.

43. However, the Tournier's case laid down four exceptions to the duty of secrecy as follow: -

- a) *where disclosure is under compulsion of law;*
- b) *where there is a duty to the public to disclose;*

c) where the interests of the bank require disclosure; and

d) where disclosure occurs with the express or implied consent of the customer.

44. Be that as it may, the main question remains whether; the defendant acted with care and skill by freezing the plaintiff's account and/or denying the plaintiff access to the subject funds. Generally, as regards the bank's duty to pay, when a customer instructs a bank to make a payment, it must carry out the instructions. However, in some circumstances, the bank can refuse to follow instructions and suspend the operation on the account. This is referred to as either suspending, or freezing, an account. It usually means a customer cannot make any transactions.

45. The bank can suspend an account; if there is a dispute about how an account is used or who owns the funds in it. For example, one of the account holders to a joint account may be in dispute with another account holder and ask the bank to suspend the account. Or, a bank may suspend a company account when one director tells the bank he or she is in dispute with another director. The bank may also suspend an account at its own discretion if it becomes aware of a dispute.

46. In such cases, it is not the bank's role to consider or resolve the dispute. The disputing sides must work it out themselves. The suspension will stay in place until that happens. However, a bank should take certain steps when there is a dispute about an account. It must:

a) check whether there is a genuine dispute, and if so;

b) suspend the account in accordance with the account terms and conditions;

c) notify the disputing sides of the suspension and

d) why it has been put in place; and

e) what the disputing parties must do before the bank will lift the suspension (usually reach an agreement and complete a new mandate).

47. A bank may also advise the disputing sides that; they may have to take the matter to court, if they cannot reach an agreement. It does not have to tell account holders before suspending an account. This is mainly to protect the funds in the account. Telling an account holder in advance would give him or her the opportunity to withdraw money. However, a bank must tell the account holder or holders after it has frozen the account, ideally as soon as possible afterwards. This notification extends to every account holder. A bank cannot simply rely on one individual telling the others.

48. Finally a bank can freeze the account when it suspects that the customer is using the account illegally, such as for money laundering. Sometimes a bank also freezes an account in correlation to terrorist financing. This includes receiving suspicious payments from an outside country or depositing large amounts of money suspiciously, which results in the account being flagged. Even gambling can cause a bank to freeze an account if it suspects suspicious activity.

49. Be that as it were, the Consumer Guide for Bankers in Kenya, states under clause 3.5 that: -

“unless there are exceptional circumstances, a bank should not suspend or close an account without giving notice to the account signatory at least fourteen (14) days’ notice.

However, if the bank is required to freeze the account in compliance with statutory requirements or legal obligation, a post freeze notice should be given of the customer promptly”

50. The defendant herein concedes that it received of the cheque in question for collection of the proceeds thereof, thus acting as a collecting bank and/or an agent of the plaintiff. However, when it received the letter dated 22nd May 2009, it owed the plaintiff and/or any potential true owner of the cheque; a duty of care to protect their interest and that of the bank.

51. It is also not in dispute though that, the bank had no court order to freeze the account and neither can it rely on the terms and conditions of account operation to freeze the account. However, it does appear that, the bank froze the account on “suspicion fraud” and was apprehensive that, if it did not act on the third party's letter and paid the proceeds of the cheque to the plaintiff and it turned out that the cheque was obtained fraudulently, it would be sued under the tort of conversion.

52. Indeed, each case must fall on its own facts. The undisputed facts are that, the third party's business name; “Jupiju Electrical Services” was registered on 14th August 2008, while the plaintiff's “Jopiju Electrical and General Works” was registered on 7th April 2009. Therefore, the third party registered its name before the plaintiff's registration. As can be observed the two names are similar especially the first names of; “Jupiju” and “Jopiju” and can for all intent and purpose they can cause confusion.

53. Similarly, it suffices to note as stated herein that, both the plaintiff and the third party held accounts with the defendant. The third party's account was opened first on 8th August 2008, under that name of “Jupija Electrical services” and the plaintiff's account later opened on 7th May 2009, under the name of; “Jopiju Electrical and General works” and therefore once again the bank was duty bound to protect the interest of both parties in relation to any payments made.

54. Be that as it were, as much as the defendant may have acted to protect its interest and of any other party, it should have informed the lawyer of the third party to obtain a court order immediately to support its allegation. It should also have informed the plaintiff of the freezing of the account immediately after the action. There is no evidence that the plaintiff was so informed.

55. However, the second letter from the plaintiff's lawyer convoluted the matter and fortified the defendant's action of the need to withhold the payment. The defendant may have acted hastily but for all intent and purpose; it is a lesser evil to suspend the payment and later be liable for failure to pay than, to pay and later turns out that the payment was fraudulent and the sum is not available or recoverable.

56. The joinder of the third party to the suit did not assist the situation. The true picture of the relationship between the plaintiff and the third party was revealed when the third party filed its pleadings, witness statement and documents. They revealed damning information, that, the plaintiff was a former employee of the third party and there was bad blood and business rivalry between them. The third party did not testify and/or produced the said documents.

57. In that regard, the plaintiff urged the court not to make reference to the same and disregard them. The plaintiff relied on the case of *Kenneth Nyagah Mwige vs Austin Kiguta & 2 Others (2015) eKLR*, which held that documents filed and not produced are merely hearsay and not authenticated. However, it is necessary to appreciate why the third party did not testify. It is purely because the plaintiff settled the claim in favour of the third party.

58. Even then these documents are on record. They were annexed to a replying affidavit filed by; Elisha Ochieng Ombere dated 4th October 2010, in response to affidavit of; Charles Onyango Anguka, sworn in support of the Chamber Summons Application dated 22nd March 2010, where the Applicant was seeking for orders that, the defendant's defence be struck out and judgment be entered in its favour.

59. In that regard, there is a letter from the law firm of; Njeru, Nyaga & Company Advocates addressed to; Brolaz East Africa Limited informing it that, the sole agent authorized to collect cheques on behalf of its client; Jupiju Electrical Services, is Elisha Onyango Ombere and no cheques should be collected by; Charles Onyango Anguka. Apparently the letter was written pursuant to the letter dated 28th April, 2009, written by; Charles Onyango Anguka, as the director of the plaintiff, to the finance director, Brolaz East Africa Limited, entitled "Spelling mistake on our printed invoices".

60. The letter by Charles Onyango Anguka, read in part as follows: -

"This is to bring to your attention the continued spelling mistake that has been inadvertently carried out on and on in all our valuable transaction documents.

We wish to advise that our company name should read "JOPIJU" and not "JUPIJU" as this was an error that was carried over from printers.

Kindly move to correct this anomaly and the same should reflect in all our transaction.

Our correct registration letter has been attached for your attention."

61. Apparently that letter was not copied to the third party despite the fact that the author was aware there was a business entity known as; Jupiju Electrical Services, which had business relationship with the recipient company. Further evidence on record reveal that, matter ended up with the police as evidenced by a letter dated 21st October, 2010, written by Elisha Ochieng to; Mr. Matthews Iteere, the Commissioner of Police, (as he then was). The complaint was in relation to the letter referred to of 28th April, 2009, written Charles Onyango Anguka, the plaintiff's director suspected to be forged. It was transferred to; Gigiri Police Station, and received under reference; CID/C/CRI/6/4/9/VOL. VII 164.

62. The Directorate of Criminal Investigations through a letter dated 17th October 2016 and filed in court on 8th November 2016, and whose contents are not contested confirmed that in fact, this was a case of fraud. Subsequently, the plaintiff; Charles O. Anguka was arrested on account of this attempted fraud in relation the subject cheque and booked vide occurrence book number 11/16/09/2016.

63. It is in this matter that, the plaintiff Anguka, compensated the third party on 28th September 2016 and was released. These facts are in not in dispute especially in regard to the settlement of claim between the plaintiff and the third party.

64. Further evidence reveals that, the plaintiff's and third party's knew each well. It is alleged and undisputed that the plaintiff Charles Onyango Anguka, was an employee of the third party prior to May 2009. Apparently it does appear that before he left the employment, he registered the business name of; "Jopiju Electrical and General works" on 7th April, 2009 and opened the business account a month later on 7th May 2009.

65. In fact, the subject cheque herein was drawn in favour of the plaintiff on 30th April 2009 before the plaintiff opened the bank account on 7th May 2009. It was deposited on 14th May 2009. As per the plaintiff's bank statement, that was the first transaction on the account.

66. From the foregoing, it is clear that the plaintiff's conduct in this matter leaves a lot desired and in that regard, several questions arise; why did the plaintiff choose a name similar to that of third party which was his former employer and open the bank account in the same bank with the third party. Similarly, if indeed Mr Anguka's letter dated 28th April 2009, was genuine and he was entitled to the payments claimed, why did settle the third party's claim before the suit was finalized?

67. In summation I find that, taking into account the circumstances of this case, namely;

a) both the plaintiff and third party were defendant's customers and the defendant owed each a duty of care;

b) that the names of the two entities are generally similar;

c) the plaintiff's account was relatively new and the subject cheque was the first deposit therein;

d) the freezing of the account preserved the funds and that is a lesser evil as compared to where the payment would not have been recovered had it been a fraudulent case.

68. I find that, the defendant was not negligent in suspending payments of the proceeds of the cheque. However, it did not act with care and skill when it failed to issue plaintiff with a post freeze notice. The question that arises is whether; the plaintiff suffered any loss as a result of lack of notice and or access to the funds on the account.

69. In that regard, it suffices to note that; the plaintiff's account was opened on 7th May 2009, and the cheque therein deposited on 14th May, 2009. The letter from; Njeru, Nyaga & Co. Advocates was received on 22nd May 2009. However, the exact date when the account was frozen is not certain; as the parties did not indicate the same in evidence, but presumably upon receipt of the letter dated 22nd May, 2009, and before the plaintiff's letter is dated; 2nd May 2009, complaining over the freezing of account. But the plaintiff did not move to court from that date until 6th August 2009. Therefore, if any loss was suffered, it is restricted to the subject period from the date the cheque matured for payment to the date the suit was filed. However, I have found the defendant was neglect by failure to give post freeze notice, but will revert to the plaintiff's right on the same .

70. The last issue to consider is whether; the plaintiff is entitled to the prayers sought. The first prayer seeks for a declaration order that the defendant's decision to unilaterally freeze the plaintiff's account was wrongful and illegal. I have held the defendant was not negligent in freeing the account, in the circumstances of the case herein. Therefore, that prayer cannot be granted.

71. Similarly, the prayer for an order of injunction to restrain the defendants from implementing their decision to freeze the said account, cannot be granted. The prayer would have been relevant before the account was frozen. Even then, the account was frozen in the year 2009, it has been dormant all the while.

72. However, the prayer seeking for an order to compel the defendants to immediately defreeze the said account, and to permit the plaintiff to operate the said account is reasonable, in that the third party seem to have lost interest in this matter having been compensated, there is no justification for continued freezing of the account, and unless there is a court order to the contrary from a court of higher jurisdiction, or any other lawful cause, the account should be re-opened and plaintiff allowed to access the funds therein.

73. The next prayer relates to the claim for damages for breach of banker customer contract and unlawful disclosure of confidential information relating to the plaintiff's account. I agree with the defendant's submissions that; there is no evidence of breach of the duty of confidentiality and the claim fails and I decline to allow that prayer.

74. The prayer for loss of profits as outlined in paragraph 8 of the plaint is completely unsupported by evidence. I entirely agree with the defendant's submissions that, the plaintiff has completely failed to clearly demonstrate the profits that it would have gained "but for" the alleged breach. That the allegation of loss of business is not specified in the plaint. Further, the plaintiff did not attempt to mitigate the imagined loss of profits, if any.

75. In fact, the plaintiff only alleged in the submissions that it suffered loss of; Kshs 4, 460, 000, without supporting pleadings. Even then the documents referred to at pages 7 to 11 of its bundle of documents are least helpful.

76. The document at page 7, is from Libran Electro Services Limited dated 4th May 2009, and at page 8 from Mars Technical Services Limited. At page 9, is the letter dated 8th May 2009, from Libran Electro Services Limited and another dated 18th May 2009 at page 10. All these letters were written, before the letter of 22nd May 2009, that led to the freezing of the account. Finally, the letter at page 11 dated 27th May 2009, is a demand from the plaintiff's lawyers to the defendant and has nothing to do with loss of business and/or profit. Therefore, that claim cannot be sustained.

77. The plaintiff also claims for damages for slander due to damage to its trade, business, profession and/or calling. Reliance is placed on documents at page 9 of its bundle documents, the document as already stated, pre dates the 22nd May 2009 and therefore irrelevant. It does not disclose any slander. The claim is dismissed.

78. The last prayer seeks for interest on prior prayers as pleaded in the plaint at commercial rates of 24% p.a. until payment in full. That prayer is not allowed in view of the findings on those prayers.

79. Finally, the court has ruled that the plaintiff should have been given post freeze notice. It was not done and amounts to breach of breach of duty of care and/or banker customer relationship that entitles the plaintiff to compensation in damages. However, it is a settled principle of law that "he who goes to equity must go with clean hands" It is on record that, the plaintiff has settled the third party's claim; resulting from the criminal proceeding arising from the subject matter herein.

80. Having done so, the plaintiff compromised the defendant's right of indemnity against the third party. In my considered opinion any award of damages, in favour of the plaintiff, will be against public policy and/or set a dangerous precedent in law, where a party may benefit

from a criminal activity. It may also hinder the banks from being vigilant in execution of its business and protection of the customers' funds. In the circumstances of this case, I shall not award the plaintiff any money; for if the plaintiff is compensated, the defendant may not recover the money from the third party.

81. All in all, I find that the plaintiff has not proved its case on the balance of probability and I dismiss it in its entirety. Taking into account the findings herein, I order that each party should meet its own costs.

82. It is so ordered.

Dated, delivered and signed in an open court this 27th day of January, 2020

G. L. NZIOKA

JUDGE

In the presence of:

Mr. Analo holding brief for Mr. Wakwaya for the plaintiff

Mr. Mwenesi holding brief for Mr. Mutua for the defendant

No appearance for the third party

Dennis.....court assistance