



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI COMMERCIAL & TAX DIVISION

CIVIL CASE NO. 231 OF 2010

JORUTH ENTERPRISES LTD.....PLAINTIFF

-VERSUS-

BARCLAYS BANK OF KENYA LTD.....DEFENDANT

JUDGMENT

1. **JORUTH ENTERPRISES LIMITED** (hereinafter Joruth) was at the material time a customer of **BARCLAYS BANK OF KENYA LIMITED** (hereinafter the Bank). Joruth was operating a bank account No. ***** at the Bank's Queensway Branch, in Nairobi.

2. The Bank's witness, Charles K. Maina, a Senior Manager-forensic at the Bank stated that Joruth opened that account in April 2008. Joruth had two directors namely Joseph Wachira Njuguna (Joseph) and Ruth Wangari Wachira (Ruth). Both of them are sued as defendants, by the Bank in its counter-claim.

3. At the heart of this matter is the sum of Ksh 32,290,000.

4. The case of Joruth, and by extension of Joseph and Ruth is that Joruth was in the business of supplying cereals in Kenya and elsewhere.

5. Further that on or about March 2009 Joruth received an order to supply 11,960 bags of wheat to a company called Nairok Seed Company Limited (hereinafter Nairok). It was the evidence of Joseph that it was agreed that Nairok would deposit Ksh 32,290 into Joruth's account No. 0948214830 at the Queensway branch of the Bank. Joseph said that money was deposited as agreed. On Joseph confirming the deposit of that amount he stated that he requested Joruth's suppliers to release the wheat ordered by Nairok. He also instructed the Bank to make payments out of the account of Joruth for the total amount of Ksh 7.9 million. A few days later, he said that he was informed that Joruth's account had a debit balance of Ksh 21,843,755.45.

6. Joseph said on making further inquiry he was informed that the amount of Ksh 32,290,000 which was in Joruth's account had been reversed. It is Joseph's contention that the said amount rightfully belongs to Joruth.

7. Joruth by this action seeks judgment, against the Bank for Ksh 13 Million, which amount it is alleged was in credit in Joruth's account, with the Bank, when the reversal was made by the Bank. Joruth also seeks judgment against the Bank for Ksh 3 million per month till the "conclusion of the suit" being the amount Joruth alleges it is losing as result of the Bank's reversal of the amount in its account.

8. The Bank through its witness Charles Maina stated that there was reported on 9th April 2009 suspicious transactions by a manager of the Bank at its Enterprise branch. As result of that report, the Bank's witness said investigations were undertaken by the Bank which investigations revealed that Ksh 100,758,000 had irregularly transferred from the account of Kenya Seed Company Limited. Those amounts were credited, by internal credits, to various accounts one of them being Joruth's account, where it was credited with the Ksh 32,290,000. The witness further said:

“The entries had been posted as code 734 (Debit) and 634 (Credit) which would ordinarily be used for sundry posting in internal bank accounts and not transaction in customer's accounts.”

9. It was because of the aforesaid revelation that Joruth's account was reversed with the amount credited in its account.

10. The witness stated that the fraudulent transfer/debit of Kenya seed Company Ltd account was with the assistance of the Bank's staff and

that they were subsequently arrested and charged with the a criminal offence of theft.

11. The Bank's witness stated that Joseph had also been arrested and similarly charged.

12. The Bank has counter-claimed seeking judgment against Joruth, Joseph and Ruth for Ksh 21,990,000 the amount withdrawn at Joruth's bank account after the credit into that account of the amount of Ksh 32,290,000 from Kenya Seed Company Limited.

ANALYSIS AND DETERMINATION

13. The parties filed 30 issues for determination in this matter. I have looked at those issues and I am of the view that the following issues will adequately determine the parties cases before court.

14. The following are the issues I have identified:

- i. Whether the sum of Ksh 32,290,000 was fraudulently credited into the account of Joruth.
- ii. If the answer to (i) is in the positive what orders should the court grant; if the answer to (i) is in the negative what orders should the court grant.
- iii. Who should bear the costs of the suit.

ISSUE (i)

15. The Bank's case is that the amount of Ksh 32,290,000 was part of the proceeds of fraudulent debit, of Ksh 100,758,000 from Kenya Seed Company Account. The Bank produced the bank statements of Kenya Seed Company which reflect that debt on 7th April 2009. There are documents which show that that debit was effected through internal debit. The Bank also produced in evidence internal credit dated 7th April 2009 showing that an amount of Ksh 32,290,000 was credited into Joruth's account on 7th April 2009. The Bank produced in evidence the bank statements of Joruth which reflected that credit on 7th April 2009 of Ksh 32,290,000. That statement of Joruth shows that on 7th April 2009 there were payment made totalling Ksh 7.9. On 8th April 2009 there further payments made from Joruth's account. There is a debit balance as at 16th April 2009, in that account, of Ksh 21,780,733.45.

16. The Bank pleaded in its defence that it was entitled to reverse and trace the amount credited into Joruth's account. This is because it is its case that that amount did not belong to Joruth. The Bank also pleaded that Joseph and Ruth as the directors of Joruth were constructive trustees of the sum of Ksh32,290,000 because that amount did not belong to Joruth.

17. With the evidence of the paper trail showing the debit made in the bank account of Kenya Seed Company and the document supporting the credit made, of those funds, into Joruth's account to the tune of Ksh 32,290,000 the evidential burden shifted to Joruth, Joseph and Ruth to show that the amount credited into that account was not fraudulently credited. In that regard, I am assisted by the court of appeal decision, the case **Mbuthia Macharia v Annah Mutua Ndwiga & another (2017) eKLR** where it was stated:

"[15] Just like the learned trial Judge, we are not persuaded the appellant was able to prove the allegations of fraud regarding the transfer of suit premises to the 1st respondent. The Judge alluded to the provisions of **section 107 of the Evidence Act**, which deals with the burden of proof in any case and aptly stated that it lies with the party who desires any court to give judgment as to any legal right or liability, is for that party to show that the facts which he alleges his case depends upon exist. This is known as the legal burden and we need not repeat, save to emphasize the same principle of law is amplified by the learned authors of the leading Text Book;- The **Halsbury's Laws of England, 4th Edition, Volume 17, at paras 13 and 14**: describes it thus:

"The legal burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party's case. If at the conclusion of the trial he has failed to establish these to the appropriate standard, he will lose.

14 The legal burden of proof normally rests upon the party desiring the court to take action; thus a claimant must satisfy the court or tribunal that the conditions which entitle him to an award have been satisfied. In respect of a particular allegation, the burden lies upon the party for whom substantiation of that particular allegation is an essential of his case. There may therefore be separate burdens in a case with separate issues."

18. Joruth and its directors relied on a letter written under the letterhead of "Nairok Seed Company Limited", by which letter Joruth was requested to supply 11,960 bags of wheat. That letter also confirmed that Nairok Seed Company Ltd had transferred into Joruth's bank account No 0948214830 ksh 32,290,000.

19. Apart from that letter there is no other document which proves that the amount of Ksh32,290,000 was transferred into Joruth's bank account by Nairok Seed Company Ltd. There was no evidence produced to prove that that company Nairok Seed made that deposit.

20. Joseph in evidence stated that on getting that confirmation from Nairok Seed Company of that transfer he immediately embarked on paying suppliers who were to supply the wheat. That is the explanation he gave for the payments effected on 7th and 8th April 2009.

21. No attempt was made by Joseph to have any of those suppliers testify that they indeed did receive the funds and did genuinely supply the

wheat. It is not enough for Joruth to rely on delivery notes when a transaction such the one of supply of wheat is denied by the Bank.

22. It is important to note that the Bank carried out a search of the company called Nairok Seed Company Limited. The search revealed that company was registered on 3rd February 2011 way after the date of the transactions hereof. The registered offices of the company, contrary to the letter head Joruth relies on, shows the Nairok Seed Company Limited offices are on L.R No 209/7411 Tom Mboya Street Nairobi.

23. My finding in the absence of evidence that Joruth obtained the funds from Nairok Seed Company Limited and the Bank having proved that those funds were from the account of Kenya Seed Company **Issue (i)** is found in the positive.

ISSUE (ii)

24. The Bank has proved on a balance of probability that the funds credited into Joruth’s account were fraudulently debited from the Kenya Seed Company Bank Account. Joruth failed to prove otherwise. Indeed Joruth did not prove where those funds came from. The Bank is entitled to judgment as sought in the counter claim. Joruth did not prove its claim.

25. Accordingly I find that the Bank was entitled to invoke the doctrine of tracing stolen property. That doctrine was discussed in the case **Lennox Industries (Canada) Ltd. v. Canada, 1987 CanLII 5321 (FC), [1987] 3 FC 338**, thus:

“To turn now to the plaintiff’s second argument: certain assets, in any event, belong to the plaintiff by virtue of the doctrine of tracing. The starting point is the principle that stolen goods in the hands of a thief, or a trustee who has misappropriated funds, are not his or her property; they remain the property of the person from whom they were stolen. This principle is expressed in Underhill’s Law Relating to Trusts and Trustees, 12th ed. (1970), at p. 243, as follows: "a court of equity covers a party who has obtained property by fraud into a trustee for the party who is injured by that fraud":.....

[14] The moneys stolen or acquired by fraud are thus impressed with a trust and may be followed and recovered by the true owner, unless they are acquired by a bona fide purchaser for value without notice of the theft or fraud. In Banque Belge pour l’étranger v. Hambrouck et al., [1921] 1 K.B. 321 (C.A.) at p. 335, the principle is expressed in the following terms:

If, following the principles laid down in In re Hallett’s Estate, it can be ascertained either that the money in the bank, or the commodity which it has bought, is "the product of, or substitute for, the original thing," then it still follows "the nature of the thing itself." On these principles it would follow that as the money paid into the bank can be identified as the products of the original money, the plaintiffs have the common law right to claim it, and can sue for money had and received.”

ISSUE (iii)

26. The Bank having succeeded in its claim it is entitled to the costs of the suit.

CONCLUSION

27. The Judgment of this Court is as follows:

- a. The claim by Joruth Enterprises Limited is dismissed with costs to Barclays Bank of Kenya Limited.**
- b. Judgment is entered for Barclays Bank of Kenya Ltd jointly and severally against Joruth Enterprises Limited, Joseph Wachira Njuguna and Ruth Wangari Wachira for Ksh 21,990,000 with interest at the rate of 12% per annum from 7th April 2009 until payment in full.**
- c. Barclays Bank of Kenya Limited is awarded the costs of the counter claim.**

DATED, SIGNED and DELIVERED at NAIROBI this 11th day of March 2020.

MARY KASANGO

JUDGE

Judgment read in open court in the presence of

Court Assistant.....Sophie

.....for the Plaintiff

.....for the Defendant