REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & TAX DIVISION

MILIMANI LAW COURTS

HCCC NO. 277 OF 2015

SULTANALI AMIRALI KASSAMANI .....1ST PLAINTIFF

NAZLIN S. KASSAMANI ..... 2ND PLAINTIFF

VS.

APEX AFRICA CAPITAL LIMITED.....DEFENDANT

JUDGMENT

1. Sultanali Amirali Kassamani (Sultanali) and Nazlin S. Kassamani (Nazlin) are husband and wife. They bring this action against a stockbroker, Apex Africa Capital Limited (Apex), following the sale of shares allegedly done without their authority.

2. Through an application dated 9th August 2011 (P Exhibit 1), the couple made a request to open and maintain a securities account with the Central Depository and Settlement Corporation Limited (CDSC) and engaged Apex as their Stockbrokers. This enabled them to trade in shares at the Nairobi Securities Exchange (NSE). The application contained certain details filled in by the applicants and which they rely on for their claim herein.

3. It is common ground that as at 1st November 2014, the couple jointly owned 61,078 ordinary shares in Diamond Trust Bank (DTK) (P. Exhibit 2).They grieve that on diverse dates in the months of November 2014 and December 2014, Apex, without their written authority, fraudulently and/ or negligently sold, allowed the sale of or caused to be sold 53,500 of those shares. In paragraph 7 of the Plaint dated 5th June 2015 and presented to Court four days later, the Plaintiffs set out the particulars of fraud and negligence on the part of Apex.

4. The Plaintiffs claim loss of the 53,500 shares and crave the following prayers;

a) The return or credit of 53,000 shares in Diamond Trust Bank Limited into their securities account.

b) In the alternative, the sum of Ksh. 13,162,759.10/= being the value of the shares in the between 6th November 2014 and 22nd December 2014 or the value if the shares at the date of judgment and payment whichever is higher together with interest thereon at commercial rates until payment in full.

c) General damages.

d) Costs.

5. It has turned out that before commencing these proceedings the Plaintiffs filed a complaint against Apex with the Capital Markets Fraud Investigation Unit. The unit holds statutory mandate to investigate and remedy complaints at the Capital Markets. The first line of defence by Apex is that having elected to pursue that alternative remedy which is active and ongoing, then these proceedings are an abuse of court process.

6. Apex defends the manner in which it sold the shares as being lawful and with the express and or ostensible mandate of the couple. Other than what it maintains as express instructions, Apex asserts that it verified the instructions mandate of the Plaintiffs on each occasion it received instructions which included verification of the CDSC account number. Further that all proceeds of sale were remitted in accordance with the instructions of Sultanali to bank accounts at Barclays Bank PLC, London for the benefit of Sultanali and or both he and Nazlin. In addition, Apex contends that all communication with and instructions from the plaintiffs were made through Sultanali whose identity was

verified by copies of the passports of both Plaintiffs.

7. At the hearing both Plaintiffs testified. For Apex, Mahmood Mansor Hussein Mahmood, an Associate Director of the Stockbroker gave evidence. As will become apparent, the outcome of this matter depends very substantially on documents produced in evidence and what the law makes of them in respect to whether they constituted lawful and proper authority for Apex to act. The oral evidence, as will be relevant in resolving the issues for determination, will be discussed alongside the documentary evidence.

8. While the parties did not present a joint set of issues, what they proposed separately are not dissimilar and can be said to be;

a) Whether the Plaintiff's complaint to CMA ousts the jurisdiction of this Court?

b) Whether the sale of the shares was without the express authority or instructions of the Plaintiffs?

c) Whether the Defendant's conduct was fraudulent and or negligent,

d) If the Plaintiffs have proved their claim then what remedy or measure of damages is available to them,

e) What is the appropriate order as to Costs?

9. The objection on jurisdiction attracts some short comments from this Court. In the Statement of Defence, Apex was emphatic that the Plaintiffs having chosen to file a complaint with the Capital Markets Fraud Investigation Unit and as the complaint was still active then these proceedings are an abuse of court process. It is submitted, on behalf of Apex, that the investigation of fraud and restitution for pecuniary loss is specifically provided within the functions of the CMA and falls within its purview as the specialist authority mandated by Parliament in respect of matters related to Capital Markets. It is argued that the functions of this Court can only be supervisory in line with Article 165 of the Constitution.

10. If this Court were to accept that there is an alternative statutory remedy as proposed by the Defendant, then it also accepts the force of the holding of Mumbi Ngugi J in Rich Productions Limited v Kenya Pipeline Limited [2014] Ekrl where she said;

> 65. The reason why the Constitution and the law establish different institutions and mechanism for dispute resolution in different sectors is to ensure that such disputes as may arise are resolved by those with the technical competence and the jurisdiction to deal with them. While the Court retains the inherent and wide jurisdiction under Article 165 to supervise bodies such as the 2nd respondent, such supervision is limited in various respects which I need not go into here. Suffice to say that it cannot exercise such jurisdiction in circumstances where the parties before it seek to avoid the mechanisms and processes provided by law, and convert the issue in dispute into a constitutional issue when it is not.
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> 66. The petitioner has also premised its case on the jurisdiction of the Court under Articles 165(3)(d)(ii) and 258 of the Constitution, arguing that the Court has jurisdiction to determine "the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution."
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> 67. It is indeed true that the Constitution gives the High Court wide jurisdiction to determine whether any acts said to be done under the authority of the Constitution have been done in violation of the Constitution. However, it is not enough for the petitioner to allege violation of the Constitution. It must go further and demonstrate in what respect there has been a violation of the Constitution.

11. Yet it has to be said that even in its pleadings the Defendant acknowledges that the remedy under the CMA Act is an alternative as opposed to an exclusive remedy. Having pleaded it then it would have been expected that the Defendant would have sought to have this matter struck out or stayed as preliminary step. I have to agree with the Plaintiff's Counsel that as the Defendant fully participated in the hearing up to the close then it is estopped from taking up the jurisdiction issue at the tail end of the proceedings. That in itself will amount to abuse of process. Litigation is not a game of cards in which parties come to the table with some cards facing down to be used as a trump card. A party which pleads an objection to the jurisdiction of a Court on account of an alternative remedy but does not press it and opts to fully participate in a hearing cannot be allowed to torpedo the entire proceedings at the close of hearing by reopening arguments on jurisdiction.

12. The case by the Plaintiffs is hinged on the information in the account opening document dated 9th August 2011 which provided their email address as nazlink@gmail.com. They make the simple argument that in so far the instructions to sale the shares did not emanate from that email address then the instructions could not bind them.

13. For the Defendant it contends that it acted on written instructions of the client as contemplated by Rule 23(2) of the Capital Markets (Licensing Requirements) (General),2002 which reads;

> (2) An "order" for the purpose of this regulation, shall constitute written instructions by a client to a stockbroker as to the security name, quantity, price or price limits and duration or validity of instructions.

14. In this regard the evidence is that the email used to give instructions was drkassamali@gmail.com which belongs to Sultanali. The instructions to sell the shares were all from this address. Some of those instructions are of 5th November 2014, 6th November 2014, 17th November 2014 3:33am, 17th November 2014 12;32pm, 19th November 2014 10;24am. Many of the emails are copied to naizlink@gmail.com. Notice the difference between this address and that provided in the application form (nazlink@gmail.com).

15. It is reiterated for the Defendant that upon receiving the instructions it carried out two verification exercises. First by asking for the account details and second for more recent copies of the Plaintiffs passports. Those were provided. In addition, the signature on the payment instructions on the same as those in the account opening mandate and the passport of Sultanali.

16. There is no controversy that the email provided by both Plaintiffs for use for communication between them and Apex was nazlink@gmail.com (see D exhibit pages 1, 2 and 3). It needs to be noted that although the email address was for Nazlin, even Sultanali provided this address as his email contact. What was the significance, if any, of this contact address?

17. Prior to the instructions that have now proved problematic, the Plaintiffs had never instructed Apex to sale shares. The Plaintiffs are emphatic that their expectation was that for any email instructions to be valid, they needed to be from nazlink@gmail.com. They put forward the case that as the instructions came from another source, then they are invalid.

18. Speaking for Apex, and making reference to the internal forms appearing on pages 2 and 3 of the Defendants bundle of documents, Mahmood stated;-

> "On our internal forms we only have one email address. We relied on these forms in effecting the transactions. We relied on the passport numbers, names of client. From the sight I did not notice that the email used was not the email used in the form."

19. In essence the email address was important as it was one of the pieces of information whose correctness needed to be verified before the instructions were effected. Mahmood later, in re-examination, also stated that, albeit not the only document used, the account opening forms was one of the documents used in verification. The email address was to be found in the form. The conclusion to be reached is that instructions received by email could only be said to be valid if they came from email address nazlink@gmail.com.

20. My finding is fortified by what Mahmood himself said:-

> "We never noticed the email was different. If we had noticed the difference we would have contacted the client by email or telephone to reconfirm."

21. Both sides are agreed that in effecting its client's instructions, Apex as a stockbroker owed the plaintiffs a duty of reasonable care and skill akin to that owed by a Bank to its Customer. And I agree. The nature of this duty has been the subject of repeated judicial discussion and this Court is content to refer to an English decision which was relied on by our Courts in decisions cited by both Counsel. In Karak Brothers Versus Burden & Others (No. 2)[1972]1 W.L.R, Brigtman j observed:-

> "The question accordingly arose in the Selangor case [1968] 1 W.L.R. 1555 as to the nature and extent of the contractual duty of care owed by a paying bank to its customer when called upon to honour a cheque drawn by the customer; and in particular, in the case of a corporate customer which has given the usual mandate to its bank, to what extent the bank is entitled to place exclusive reliance on the fact that the cheque is signed by the corporation's duly authorised signatories.
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> The conclusion reached by Ungoed-Thomas J. was as follows, at p. 1608:
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> ". . . 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. The relevant considerations include the prima facie assumption that men are honest, the practice of bankers, the very limited time in which banks have to decide what course to take with regard to a cheque presented for payment without risking liability for delay, and the extent to which an operation is unusual or out of the ordinary course of business. An operation which is reasonably consonant with the normal conduct of business (such as payment by a stockbroker into his account of proceeds of sale of his client's shares) of necessity does not suggest that it is out of the ordinary course of business. If ' reasonable care and skill ' is brought to the consideration of such an operation, it clearly does not call for any intervention by the bank. What intervention is appropriate in that exercise of reasonable care and skill again depends on circumstances."
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> He continued, at p. 1609:
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> "As between the company and the bank, the mandate, in my view, operates within the normal contractual relationships of customer and banker and does not exclude them. These relationships include the normal obligation of using reasonable skill and care, and that duty, on the part of the bank, of using reasonable skill and care, is a duty owed to the other party to the contract, the customer, who in this case is the plaintiff, and not to the authorised signatories. And it extends over the whole range of banking business within that contract. So the duty of skill and care applies to interpreting, ascertaining, and acting in accordance with the instructions of a customer; and that must mean his really intended instructions as contrasted with the instructions to act on signatures misused to defeat the customer's real intentions. Of course, omnia praesumuntur rite esse acta, and a bank should normally act in accordance with the mandate - but not if reasonable skill and care indicate a different course."

22. The Court is obliged to evaluate the conduct of Apex in the light of the circumstances that existed at the time the supposed instructions were issued and acted upon. It would be unjust to Apex to expect them to have carried a more onerous duty of care and skill than the facts required of them and on other hand unfair to the Plaintiffs if the duty was unreasonably lessened.

23. The Plaintiffs provided Apex with email address nazlink@gmail.com as the email address for both Nazlin and Sultanali. The Plaintiffs were obliged to notify Apex of any change of particulars or information. It is common ground that no such notification was ever made by the Plaintiffs. Further, there is no evidence that prior to the impugned instructions the Plaintiffs had ever communicated to Apex through email.

The evidence of Apex is to the effect that although the instruction emanated from another email address it took comfort in the fact that the email was copied to the contact email of the Plaintiffs.

24. Yet on closer scrutiny, the instructions were copied to naizlink@gmail.com and not nazlink@gmail.com. The instructions were neither given in person nor through telephone and having accepted to receive email instructions, Apex was under duty to verify that the email used was that officially communicated to it as the email of its Clients. Even if Apex can be excused for taking instructions from an entirely different address because it was copied to a known address, still it was duty bound to verify the correctness of the alleged known address. Reasonable care in the circumstances of email communication would in the very least entail verifying the correctness of the known address. While the additional letter **'i'** appearing in the impugned address could escape a casual eye, the duty on Apex required them to be more attentive because to act on the emails had substantial financial implications on the Plaintiffs. A slightly more involved look would have revealed the differences and would have trigged further inquiry as suggested by Mohamood. That is, contacting the Plaintiffs through the correct email address and or telephone to reconfirm the instructions. Only then can Apex be said to have acted with reasonable care.

25. The argument that the verification of the account numbers, signature on the payment requisition form and copies of more current passports of the Plaintiffs exonerated Apex does not prop up the Defence because all these were sent via the email address which this Court has found was not a given address for communication.

26. But before concluding that the instructions acted on by Apex were invalid, one needs to examine the contention by Apex that they were issued by Sultanali from his true email address.

27. It is common ground that email address drkassamali@gmail.com is that of Sultanali. Yet Sultanali denies ever issuing the emails. It was his evidence that he first saw the impugned emails in 2015 when Apex showed him copies. His testimony was that he had no idea that his email was hacked .Further that even after learning of the emails, save for his complaint to the CMA, he neither raised the matter with Google or any other authority.

28. While it may well be that Sultanali never took up the issue with Google, there is no emphatic evidence one way or other as to whether or not he truly issued the instructions. But on the matter at hand, the only email address from which Apex could properly take instructions was nazlink@gamail. By accepting to take instructions outside this arrangement, Apex was inviting trouble and must now live with the consequences that follow the 1st Plaintiffs denial that he was the author of the impugned emails. In reaching this decision, the Court has considered that on the evidence tendered, the accounts into which the proceeds of sale were credited were not opened in the name of Sultanali (see letter of Barclays Bank dated 2nd May 2015). Further there is no evidence that either of the Plaintiffs benefited from those funds.

29. As well in reaching this decision, the Court has also considered the assertion by Apex that the Plaintiffs only raised the claim in January when it would have been aware earlier of the sales through the monthly statements it issued to the Clients. It is true that the statement for November 2014 shows five sales that had happened in that month and that of December 2014 shows another two sales. Only Sultanali was asked questions about the statements. Regarding the earlier statement, his testimony was that he received it via email at the beginning of December 2014 but raised the issue only in 5th January 2015 because that is when he noticed the sales. This explanation was not debunked and I have no reason to disbelieve it.

30. In the end I hold that the Plaintiffs have proved their case on a balance of probabilities. On the remedy, the Plaintiffs submit that they are entitled to a sum of Kshs. 7,101,000/= arrived at from the value of DTB shares of Ksh.115/= as at the date of its submission. They seek another sum of Kshs. 679,450/= being loss of dividends. I would think that the latter claim cannot be awarded not only because it was not pleaded but also because the Plaintiffs sought to prove these damages by providing the evidence in the submissions. This is obviously unconventional and unacceptable.

31. The Plaintiffs also seek General Damages of Kshs. 10,000,000.00/= to compensate it for the erosion in value of the shares from the time the sales were made and the value at the time it made its submissions.

32. The Defendant on the other hand submits that as the Plaintiffs did not tender evidence that they intended to sell the shares at the time of the impugned sale, then they cannot claim for a monetary value of the said shares. It is then argued that they would only be entitled to the return or credit of the shares.

33. Let me examine these rival arguments in the context of the prayers pleaded. The Plaintiffs had sought return of 53,500 shares or in the alternative the value of the shares. As to the value, the Plaintiffs sought the higher of the value between that at the time of the sale and at the date of Judgment. I think that the first order to make is for the Defendant to avail to the Plaintiffs 53,500 shares. That is a return of the shares. That is the primary prayer.

34. But should it be impossible, for whatever reason, for the Defendant to effect that restitution, then the alternative prayer for payment of the value of the shares is justified. The question that follows is how the value should be worked. On this I agree with the Defendant's Counsel that there was no evidence that the Plaintiffs intended to sell the shares either at the time when the impugned sales happened or at any other time. For that reason there can be no reason to work the loss at the value of the shares then. The value, in my view, should be at the time at the time it becomes clear that they will be unable to get back the equivalent number of the sold shares. Of course, another possible loss that the Plaintiffs would have suffered is the loss of any dividends that the shares would have attracted from the date of sale. Yet on this, as noted earlier, the Plaintiffs sought to lead evidence during the submissions and not at hearing.

35. Ultimately I enter Judgment in favour of the Plaintiffs as against the Defendant as follows:-

> 35.1 The Defendant shall within 30 days of this Judgment return or Credit 53,500 shares in Diamond Trust Bank limited into the Securities account of the Plaintiffs.

35.2 In default of order 35.1 above, the Defendant shall on the 31st day of this Judgment pay to the Plaintiffs a sum equivalent to the value of the aforesaid shares, being 53,300 shares in Diamond Trust Bank Limited, on that date.

35.3 Should the payment in 35.2 above not be made as so ordered, the sum shall attract interest at Court rates from the date of default until payment in full.

35.4 The Plaintiffs shall have Costs of the suit

Dated, Signed and Delivered in Court at Eldoret this 28th Day of April 2020

F. TUIYOTT

JUDGE

ORDER

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 17th April 2020, this Judgment has been delivered to the parties through virtual platform.

F. TUIYOTT

JUDGE

PRESENT: