



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**MILIMANI COMMERCIAL & TAX DIVISION**  
**CIVIL SUIT NO. 396 OF 2011**

**DAVID CHEGE KIARII.....PLAINTIFF**

**VS**

**CO-OPERATIVE BANK OF KENYA.....DEFENDANT**

**JUDGMENT**

1. The plaintiff commenced this suit by filing a plaint dated 16<sup>th</sup> September 2011, seeking for judgment against the defendant for;

- a) *A declaration that the defendant's action freezing the plaintiff's account number 0110xxxxxxxxx Nairobi Business Center Branch is unlawful, illegal, null and void'*
- b) *An order directing the defendant, its agency and/or servants to forthwith lift the freeze on the plaintiff's account number 0110xxxxxxxxx;*
- c) *A mandatory injunction be issued to compel the defendant its agents, servants and/or whomsoever to forthwith release the amount of; Kshs. 7,852,578.30 together with interest at commercial rates from 7<sup>th</sup> May 2011 until payment in full;*
- d) *A permanent injunction be issued restraining the defendant's its servants, agents and/or whomsoever from interfering with the plaintiff's operations of account number 0110xxxxxxxxx,*
- e) *Costs of this suit and interest; and*
- f) *Any other orders or further orders that this honorable court shall deem just and fit to grant.*

2. The plaintiff's case is that, at all material times relevant to this suit, he was the defendant's customer operating an account number 0110xxxxxxxxx, domiciled at the defendant's Nairobi Business Center branch. Upon opening the account, he applied and was issued with a debit card and registered to the defendant's internet and/or M- Banking. The service enabled him to inter alia; operate the account through his mobile phone, pay and receive money on-line, and ascertain account balances.

3. On or about the 7<sup>th</sup> of May 2011, on a Saturday at about 2:30pm, he attempted to make an ATM withdrawal at the defendant's Kawangware branch, but his debit card was intercepted and /or withheld.

On Monday 9<sup>th</sup> May 2011, he visited the Kawangware Branch to obtain his card and establish what the problem was but he was advised to liaise with the Nairobi Business Center branch.

4. He visited that branch and upon inquiries, he was ushered into the manager's office, who upon interrogating him, he was locked up. Two people who introduced themselves as the defendants' Head of Security and Risk Department were called and he was then asked to accompany the two to the defendant's head office at Co-operative Bank House, along Haille Selassie Avenue, under the pretext that the two bank officers would assist him get his money.

5. Upon arrival, he was interrogated about his account after which, allegations were made that, this account had been overdrawn by a whooping Kshs 33,000,000. He strongly denied wondering how his account could be overdrawn without prior credit arrangements with the bank. At the conclusion of the interrogations, the defendant prepared and caused him to sign a statement on the promise that, if he did, he would get his money back. However, to date, he is yet to get his money from the defendants.

6. That it has since emerged that, the defendant's acts were a well circulated ploy to blame him for alleged debit transactions that he was a stranger to. As at 7<sup>th</sup> May 2011, when his debit card was intercepted, his account had a credit balance of about Kshs. 7, 852,578.30 and has not made any transaction since. The defendant has without any lawful justification frozen the account, withdrawn his debit card and the M-banking Services.

7. On 14<sup>th</sup> May 2011 the defendant, unlawfully reversed a swift/RTGS transfer of Kshs, 1,000,000 he made to one; Rachel Nduta Muthoni, without his consent or instructions, which action amounts to a blatant violation of the fiduciary duty the defendant owes him. He further avers that, he has never applied for nor been granted any overdraft facility, term loan or any other credit facility by the defendant and thus is a total stranger to the allegation that his account has been withdrawn.

8. He avers that, it defies logic as well are all known banking practices, how a customer who holds a savings account and who has not applied for nor obtained any overdraft facility can have his account in an overdraft position in excess of a sum of; Kshs. 33,000,000. That any debit transaction made when the account has insufficient funds is always declined unless prior arrangements for an overdraft or any other credit facility is made with the bank.

9. That, the defendant in further breach of its fiduciary duty has failed and/or refused to furnish him with a statement of account, an indication that, the freezing of his account is without any lawful justification whatsoever and amounts to infringement of the fiduciary relationship that, exists between him and the defendant and amounts to conversion of his funds.

10. Similarly, the defendant being a bailee of his funds is in breach of its contractual obligations to allow him to access his funds. As a result, he continues to suffer grave prejudice, loss and damage and his business have been adversely affected. However, despite demands and notice of intention to sue having been given, the defendant has failed, refused and/or neglected to pay the aforesaid sum or any sum thereof.

11. The defendant filed a statement of defence and a counter claim, dated 16<sup>th</sup> February 2012, seeking that, the plaintiff's suit be dismissed and/or judgment be entered against the plaintiff for; Kshs. 33,125,903.68, with interest at 20% per annum from 10<sup>th</sup> May 2011 until payment in full. The defendant avers that, the plaintiff's account was designated in Kenya shillings and was operated in accordance with the general terms and conditions issued by the defendant.

12. Upon opening the same, he made several small deposits so that, the account was in credit in the sum of only, Kshs. 31,927.92 as at 28<sup>th</sup> February, 2011. Thereafter, the deposits into the account increased dramatically with no co-relation to the previous conduct of the account and the plaintiff's disclosure of his income and other means.

13. In or about May 2011, the defendant became suspicious about certain un-reconciled debits in its card suspense account. This suspicion resulted into investigations which revealed that, there was a malfunction in the defendant's computer systems, which had been exploited by certain customers to effect online transactions, the cost of which was not debited to their respective accounts. That, after extensive inquiries, the defendant was able to establish that, between October, 2010 and 6<sup>th</sup> May 2011, debits totaling; Kshs 115,869,566.00, transacted by seven (7) customers inclusive of the plaintiff on their debit cards had not debited into their respective accounts.

14. Further analysis of the transactions carried out in respect of the use of the plaintiff debit card confirmed that, all the debits were in respect of internet transactions relating to online gambling and were carried out when the bank's main operating software for banking transactions was offline having been shut down at the end of the day. That indeed the plaintiff confirmed the same during the interview with the defendant's officers. The funds in the plaintiff's account number 0110xxxxxxxxxx, were in fact the defendant's monies and the plaintiff is not entitled in equity to the retain the same as that will amount to an unjust enrichment. The defendant in support of its counter claim, states that, the plaintiff's actions have occasioned it great loss and damage Therefore, the plaintiff is indebted to the defendant in the sum of; Kshs 33,125,903.68 as at 9<sup>th</sup> May 2011, with interest at the rate of 20% per annum.

15. The case proceeded to full hearing where four witnesses testified. The plaintiff relied on his witness statement dated 16<sup>th</sup> September 2011 and all the annexures thereto. He literally reiterated the averments in the plaint. During cross examination, he stated that, he was bound by the terms and conditions of the Bank. He agreed that he used his card for gambling activities. That he was advised by his cousin to open a betting account online. He conceded to have given his bank account particulars to his cousins John Njoroge and Catherine Wambua. He further confirmed that, the Bank statements of his account reflected a win but no evidence of equivalent debit for the bet. He also conceded to an entry of Kshs. 2,900,000 showing that he won a bet of Kshs. 2,900,000 but could not tell how much he placed for the bet and there was no debit entry for that amount.

16. In re-examination, he stated that, though he gave the bank account details, he did not disclose his PIN to the third parties. He reiterated that, if he placed a bet without sufficient funds, the bank could not authorize the payment. He testified that, despite request, the bank did not give him statements to the account.

17. The defendant's case was supported by the evidence of John Murrey who relied on the statements he recorded on 5<sup>th</sup> May 2016 fully. In re-examination, he confirmed that, one could only use a debit account when the account is in credit. That the bank had no prior arrangements with the plaintiff to overdraw the account. He stated that, the plaintiff took advantage of the faulty bank system.

18. The defendant's second witness Edwin Karuri relied on the witness statement dated 9<sup>th</sup> June 2016. In cross examination, he stated that, he undertook the investigation into this matter but he was not aware that Mr. Osero who was also involved in the investigation confirmed bank employees were involved in the matter. However, he could not blame the plaintiff for the system failure.

19. The defendant's last witness David Rotich relied on the witness statement dated 20<sup>th</sup> May 2016. In cross examination, he stated that the Transactional system of the bank failed. The debits were not limiting the account. He blamed the bank reconciliation team for the delay of eight (8) months to detect the system failure.

20. After the hearing, the parties filed their final submissions. The plaintiff's submissions are dated 20<sup>th</sup> May 2019, the defendant's dated 25<sup>th</sup> August 2019 and the plaintiff's rejoinder submissions are dated 17<sup>th</sup> September 2019. In a nutshell, the plaintiff submitted that, the defendant was negligent. That as per the Halbury's Laws of England 4<sup>th</sup> Edition Vol. 3, receipt of money on deposit constitutes the bank being a debtor to the customer depositor and not a trustee. Further reference was made to the case of; Lazarus Masayi Onjallah vs Kenya Commercial Bank (2004) eKLR and Benson Odongo Okwiri vs Consolidated Bank of Kenya (2008) eKLR. Therefore, the bank has breached its duty to pay the customer's according

to instructions given.

21. However, the defendant submitted that, there is no fraud in this matter; it is only that the plaintiff cannot access his account as it is heavily overdrawn. That, if the plaintiff is granted the orders sought, it will amount to unjustified enrichment. The account was properly frozen due to suspicious transaction. The defendant relied on the case of; Benson Odongo Okwiri vs Consolidated Bank of Kenya (2008) eKLR. It was further submitted that the plaintiff is bound by the terms and conditions of the contract. That the court cannot re-write the contract for the parties. The defendant relied on the case of; Hasamuddin Gulamhussein Pothiwalla Administrators vs Kidogo Basi Housing Corporative Society Limited & 31 Others Court of Appeal No. 330 of 2003. Further, the bank is allowed to freeze the account as authorized by the general terms and conditions of the contract between the parties. Reliance was placed on the case of; Mr. Vinoskumar Ramachandran vs The State of Maharashtra Criminal Application No. 4376 of 2009.

22. That the Plaintiff's account had abnormal withdrawals and he can be treated as a holder of a current account. The account was not overdrawn on normal overdraft facility. Hence an implied agreement on the OD or loan facility. The defendant relied on the case of; Maharashtra vs United Construction A.I.R. (1985) Bombay 432 and Rolls Razor Limited vs Cox (1967) 1 ALL ER 397. That, the plaintiff was not entitled to overdraw the account although they could even without prior arrangement be liable to pay back. Reference was made to the case of; Bank of New South Wales vs Laing (1954) 1 ALL ER (1954) A. Further, a customer will be in breach of a contract if he gives instructions to pay where there are insufficient funds as held in the cases of; Lyods Bank PLC vs Independent Insurance Company Limited (2001) 1QB 110, Barclays Bank vs W.I. Simms & Cooke (Southern) Ltd (1979) 3 ALL ER 522, Lyods Bank PLC vs Voller (2002) 2 ALL ER (COMM) 978.

23. However, in rejoinder submissions, the plaintiff reiterated that, he was not involved in any fraud. That, he was also not involved in fraud investigations and similarly there was no order to freeze the account. He relied on the case of; Onjalla (supra) to submit that, the defendant did not prove that the money in the plaintiff's account was deposited there by mistake, in error or belonged to the bank. Finally, it was submitted that, the bank acted high handedly in its failure to fully disclose the reasons for freezing the account and appropriation of the plaintiff's credit balance. Reliance was placed on the case of; Viable Deco Solution Ltd vs Co-operative Bank (K) Limited (2014) eKLR. That the bank was simply negligent and cannot pass buck on its poor and unsuspecting customer. Reliance was held to the case of; Antony Kimani Ngige vs Co-operation Bank of (K) Ltd (2017) eKLR, which was based on similar facts as herein.

24. After filing and highlighting submissions, the court was invited to consider the following issues;-

- (i) *Whether the defendant was justified in freezing the plaintiff's account;*
- (ii) *Whether a saving account is capable of being overdrawn;*
- (iii) *Whether the Defendant has proved its counterclaim,*
- (iv) *Who should bear the costs?*

25. I have considered the evidence adduced, the documents relied and the submissions and I find that, there is no dispute that the plaintiff was the defendant's customer and operated an account number 01109125857700. He was issued with a debit card to operate the account. He also registered and was allowed to utilize the M-Banking and/or internet banking services. It is also not in dispute that among the operational transactions he was engaged therein included on-line betting or gambling. However, the main issues in dispute herein are;-

- (a) *Whether the defendant lawfully froze the plaintiff's account;*
- (b) *Whether at the time of freezing the account, the amount claimed by the plaintiff was in credit to the account;*

(c) Whether the plaintiff is indebted to the defendant in the sum claimed and/or stated herein;

(d) Whether either party has proved its case;

(e) Who will bear the costs of the suit?

26. As regards the first issue, I find that there is no dispute that the defendant froze the plaintiff's account on 7<sup>th</sup> May 2011. The general rule is that, the bank should not cease to do business with a customer except after giving reasonable notice, as held in the case of; *Prosperity vs Llyods Bank (1923)*. However the bank can freeze the account due to suspicious or illegal activities such as money laundering, terrorist financing and fraud. The customer should be notified immediately why the account was frozen and if there was prior notice.

27. It is clear herein that, the bank suspected that the account was being used for suspicious transaction or was inoperative due to the malfunction in the bank's systems. In my opinion, the bank was justified in stopping any further transaction on the account especially debits. However, the bank should have informed the plaintiff immediately of the reason of freezing the account.

28. The next issue to consider is the status of the account as at the date it was frozen. According to the plaintiff, his bank account had a credit balance of Kshs. 7,852,578. However, the defendant's evidence is that, as at 9<sup>th</sup> May 2011, the plaintiff's account was in debit in the sum of Kshs. 33,125,903.73. The question that arises is whether each party has proved through evidence the alleged outstanding balances. The plaintiff produced a bundle of documents dated 2<sup>nd</sup> March 2011 which basically consist of; a transactional receipt, demand letters dated 20<sup>th</sup> May and 17<sup>th</sup> August 2011, a letter dated 1<sup>st</sup> August 2011 he wrote to the defendant and the defendant's letter of 15<sup>th</sup> July 2011 on the outstanding liabilities. The plaintiff did not produce a bank statement to prove the alleged credit balance on the account as at 5<sup>th</sup> July 2011.

29. However, the defendant produced a bundle of documents dated 8<sup>th</sup> February 2012, updated on 4<sup>th</sup> May 2016 in which they included the plaintiff's statement of account dated 9<sup>th</sup> May 2011 entitled "Authorizations history." Similarly, the bank account operational statement was produced in the bundle of documents. Therefore the failure by the plaintiff to produce the statement is not prejudicial to him. I have looked at the account statement and note that the transactional entity of 5<sup>th</sup> May 2011 indicates a balance on the account in the sum of Kshs. 6,792,209.47.

30. On 6<sup>th</sup> May 2011, the account was Kshs. 6,692,057.67 in credit. However, with effect from 9<sup>th</sup> May 2011, several entries were posted on the account. It is evident from the bank statement that these debit entries were posted by the defendant upon what it alleges to have been withdrawal occasioned by system malfunctioning, hence normalization of the account. After posting all the entries aforesaid, the account went into a debit balance of Kshs. 33,124,312.73 as at 30<sup>th</sup> June 2011.

31. The key question therefore is whether the defendant was right in debiting the plaintiff's account with the series of the transactions that eroded the credit balance on the account. I have considered the evidence adduced and I find that, the defendant's witness Mr. John Murrey has given a detailed account in his statement filed and adopted in court on how the payment process is effected in relation to the use of the debit card for acquisition of goods and/or services.

32. At paragraph 21 of the witness statement dated 5<sup>th</sup> May 2016, he gives a detailed account of how the plaintiff's account was operated upon the plaintiff engaging in online gambling. According to the defendant, once the plaintiff logged into the merchant's website, gave the full particulars of his debit card, and approved the transaction, a financial message would be sent to the defendant to authorize the transaction. The defendant would authorize it upon authentication of the details of the account and balances in the plaintiff's account. Thereafter, the defendant would debit the plaintiff's account with the transactional amount paid to gambling sites and credit its suspense account in readiness for the claim by

the Merchants Acquiring Bank through visa.

33. However, due to the fault in the bank's system, the plaintiff's account was not debited. That, credits were received through a different path that did not require the defendant's authorization. In the meantime, the Acquiring Bank and/or Merchants Bank presented to Visa claims for the transaction by the plaintiff and they were paid and the visa debited the defendant's account at Deutsche Bank New York with the respective amounts. Thereafter, the Deutsche Bank New York sent the defendants the file and report from which the defendant posts the amount due to and from each customer in a statement. The defendant witness testified that when the error of not posting the debit was discovered, the bank effected the postings on 9<sup>th</sup> May 2011 leading to the debit balance stated herein.

34. The defendant's witness has annexed a schedule to his statement showing the debits posted to the plaintiff's account upon discovery of the error. I note that, the debits start from the 24<sup>th</sup> December 2010 to 19<sup>th</sup> May 2011. In conclusion, the witness found that, the statement of the plaintiff reflected a total credit balance of Kshs. 6,563,761.60 and a total debit balance of Kshs. 38,485,762.37, giving rise to a balance in debit of Kshs. 31,922,000.77.

35. Having considered Mr. Murrey's evidence in total, I find that the defendant has indeed established that the plaintiff's debit card was used as indicated in the information received from the file and report from the defendant's account with Deutsche New York. The plaintiff has not challenged that information and/or disputed its availability or veracity.

36. The key issue raised by the plaintiff is that, the defendant could not have allowed the account to go into debit without him applying for a loan or an overdraft facility. Further, the defendant could not effect payments to merchants if the account was not in credit. That the system malfunction is just distractions and no explanation is offered for eight (8) months period without determining the system failure.

37. However, it is clear from the evidence that the transactions herein were not based on the normal banking practice where the debits were created in the ordinary course of business. It is not in dispute that the plaintiff operated a savings account and which under normal circumstances an OD would not be allowed on a savings account. It is also a fact that the plaintiff did not apply for a loan and/or an OD and was granted the same. Therefore, the debits arose otherwise as alleged by the defendant and can only be rebutted by contrary evidence.

38. To revert back to the issue of freezing the account, it is evident that upon freeze of the account, the plaintiff wrote to the defendant on 20<sup>th</sup> May 2011 and 17<sup>th</sup> August 2011 to lift the freeze or unfreeze the account and render the account operational. The defendant responded vide a letter dated 15<sup>th</sup> July 2011 stating that the account was Kshs. 33,124,312.75 in debit and was accruing interest at various bank rates and demanded payment within fourteen days of the letter.

39. The plaintiff responded vide a letter dated 1<sup>st</sup> August 2011 denying the liability. It is thus clear that the plaintiff was not given a notice before the account was frozen. It does appear the defendant treated the transactions as suspicious account operations. Be that as it were, as aforesaid, in the given circumstances of this case, the defendant was in order to stop transactions on the account especially debits pending investigations. In that case, I do not find that the freezing of the plaintiff's account was unlawful, illegal and/or null and void.

40. In the same vein, I find that in the given circumstances of this case, the order seeking that the defendant be compelled to forthwith lift the freeze on the plaintiff's account cannot issue. As such, prayers (a) and (b) under paragraph 27 of the plaint are not granted.

41. As regards prayer (c) and (d) thereof, I find that the defendants have proved that there was malfunctioning of its system that occasioned the error herein. After reconciling the transactions on the plaintiff's account, the account went into a debit position. Therefore, whatever credit balance that were in the account claimed herein, was set off against the resulting debit balance. As such, having set off the

account as stated, there is no credit balance on the account against which the court can issue the orders sought for under prayer (c) and (d) and the same is rejected.

42. In that regard, the defendant has proved its claim based on the evidence adduced and therefore I enter judgment in its favour in the sum of Kshs. 33,125,903.68 as prayed for under prayer (a) of the counter claim. But, I decline to grant interest and costs to the defendant on the grounds that; the bank owes the customer a duty to conduct his affairs with reasonable care and skill when carrying out the customers instructions or conducting his affairs.

43. As it relates to electronic payment systems and/or plastic payment systems, as stated under, section 13 of the supply of Goods and Services Act 1982 (UK), the bank is under a duty to:-

*(a) To maintain in working order the equipment it needs to effect payments which it holds itself out as being able to make; and*

*(b) To operate such equipment properly; and*

*(c) To carry out each procedure in the payment process in the time required by, and otherwise in accordance with, the rules of the payment system; and*

*(d) To use appropriate agents where necessary, being agents selected and known for their authorization and competence as well as the efficiency of their equipment and systems; compliance with these criteria should be verified by the paying bank regularly, not just when the paying bank or, if later, the payee bank joins the payment system.*

However, the bank may not be liable in exceptional circumstances: -

*(a) For faults by the paying bank and its systems and equipment which the paying bank could not reasonably be expected to foresee or prevent; and*

*(b) For faults of any kind by the payee bank and its systems and equipment, provided the payee bank had been reasonably selected as the paying bank's agent in the first place (on basis mentioned above)*

44. Therefore, the defendant bank having clearly stated that the plaintiff is not to blame for the error and is not imputing fraud on his part, does not have the legal or moral authority to demand the plaintiff refunds the sum claimed with interest. The events herein took about seven (7) months undetected. That is reasonably a long time; the bank did not offer explanation why it took too long to detect the error. It cannot load what seems to have been negligence on its part on the plaintiff. That disentitles it any interest and costs.

45. The upshot is that, the plaintiff's case is dismissed with no orders as to costs. The defendant's counter claim succeeds in terms of prayer (a) with no orders as to interest or costs.

46. It is so ordered.

**Dated, delivered and signed this 28<sup>th</sup> day of May 2020.**

**G.L. NZIOKA**

**JUDGE**

**In the presence of;**

**Mr. Muthee for the defendant.**

**No appearance for the plaintiff**

**Robert -----Court Assistant**

**Via virtual communication**