



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

CIVIL SUIT NO. 09 OF 2019

AFRICAN BANKING COOPERATION LIMITED.....PLAINTIFF

- VERSUS -

SAHAM ASSURANCE COMPANY LIMITED.....DEFENDANT

JUDGMENT

1. **AFRICAN BANKING CORPORATION LIMITED** (ABC) is a limited liability company carrying on banking business in Nairobi and elsewhere in the Republic of Kenya. **SAHAM ASSURANCE COMPANY LIMITED** (Saham) is also a limited liability company carrying out the business of insurance within the Republic of Kenya.

2. It is not denied, in this case, that ABC was insured by Saham, having taken out a Blanket Insurance Policy (the policy) for the period 20th May 2012 to 19th May 2013. That period of cover was extended and was in place when ABC made a claim in respect to loss it suffered of Ksh 35,883,591.45. That loss was in respect to theft at ABC's head office Treasury Department, it is admitted by the parties that that loss to ABC was a risk which was covered under the policy.

3. In this claim ABC pleaded that despite having provided to Saham all the information Saham had failed, refused and/or neglected to process payment of the sum due to the plaintiff under the policy. On Saham declining to honour ABC's claim ABC filed this case and prays for judgment against Saham for Ksh 35,883,591.45 with interest at commercial rate.

4. Saham denied the claim and pleaded by its defence that on receipt a claim from ABC it instructed an insurance adjustor who on investigating established that indeed theft did occur involving infidelity of an employee **Boniface Wainaina Kabue** (Boniface) sometimes between 4th April 2012 and 20th August 2014. Saham pleaded that the policy had an express special exclusion on employee reference warranty which ABC was in breach. Saham also pleaded that ABC was reckless and/or failed in due diligence in respect to its employee Boniface. Saham pleaded that even if ABC's claim was admitted the liability was limited to Ksh 25 million.

5. ABC's case was supported by the evidence of **Kajuju Marete**, its legal officer.

6. By her evidence she stated that ABC had a blanket insurance policy within Saham. One of the express terms of that policy was that Saham's decision to decline a claim was to exhibit reasonableness. ABC reported and lodged a claim to Saham of the theft of Ksh 35,883,591.45. The theft occurred in ABC's head office Treasury Department. The theft was a risk covered under the policy. Saham was obligated to receive, verify and timely honour the claim lodged. Saham despite having received ABC's claim it had refused and/or neglected to pay the sum due to ABC.

7. Saham's evidence was adduced by two witnesses. The first was **John David Miners**. He is the managing director of Cunningham Lindsey Kenya Limited, insurance loss adjustors based in Nairobi. He investigated the theft at ABC and presented a report to Saham. His report found that on 22nd August 2014 ABC's Chief operating officer received a report by the head of ICT that some transactions at ABC's Treasure Head Office had been modified resulting to credits being made to a customer's account at ABC's Koinange Street branch. Those transactions were confirmed to be fraudulent which it was discovered that those transactions were carried out by Boniface. The fraudulent transactions were carried out for a period of almost 2 ½ years between 4th April 2012 and 20th August 2014. Boniface had an accomplice, **Peter Nyamberi Nyaboga**, who had a bank account at ABC Koinange Street branch. Mr Miners by his report minutely set out how the fraud had been perpetrated. He confirmed that Boniface and his accomplice were arrested and were charged with criminal offence. Indeed the charge sheet was exhibited by ABC showing that the two were charged with the offence of stealing contrary to section 268 (1) as read with Section 275 of the Penal Code.

8. The second witness called by Saham was **Karen Njagi**, its company secretary. She confirmed that ABC had taken out the policy. There was therein an express term under the title '**special Exclusion**'. Under it ABC was required to obtain satisfactory conduct reference of employees and in the event of loss ABC was required to produce those references. This witness stated that Saham's loss adjustor concluded

that ABC had breached the term of the policy entitled **Employee Reference Warranty**. Further that loss adjustor found that ABC had obtained unsatisfactory reference from the previous employer of Boniface, Equity Bank. It was because of that, that Saham informed ABC it would not honour the claim.

ANALYSIS AND DETERMINATION

9. Parties filed their written submissions and supplied the court with authorities. I am indebted to the parties for their industry.

10. Although the parties have formulated several issues for determination, I find that there are two main issues which will determine the controversy between the parties. Those are:

- a. Whether the defendant (Saham) was justified to deny liability under the policy.
- b. Which party will bear the costs.

ISSUE (a)

11. The controversy under this issue is whether ABC complied, in respect to their employee Boniface, with the warranty in the policy which required ABC to obtain satisfactory conduct reference of employees.

12. Boniface was employed by ABC on 15th May 2003 as a management trainee. ABC witness confirmed that Boniface was employed from the university campus and was employed to be trained and to ultimately be management level. Boniface was at ABC's employment up to the time he tendered his resignation by his letter dated 9th January 2009. His last working day was to be on 16th January 2009.

13. Boniface, it has been admitted was employed by Equity Bank from 19th January 2009 until 31st May 2010.

14. The documents before court show that on 8th September 2010 Boniface returned to ABC and was offered a three months contract of employment by ABC. That contract was extended from time to time until 30th May 2012 when his contract was extended without time limit.

15. Saham's contention is that ABC failed to get satisfactory reference before employing Boniface on 8th September 2009. The contention by Saham is that ABC failed to abide by a clause in the policy.

16. The clause Saham relied on to deny liability is as follows:

Special Exclusion

Employee Reference Warranty

- *It is hereby warranted that satisfactory conduct reference of Employees shall be obtained from at least two (2) previous employers, or other reputable references in case of first time employment, covering the previous three years, when recruiting any Employee or in respect of any Employee who has not been working with the insured for three years at the commencement of this insurance and whose duties involve areas of the Insured's operations covered under this policy.*
- *In the event of a loss as defined herein the Insured shall produce such references to the company before becoming entitled to reimbursement under this policy.*

17. When Boniface returned to ABC in September 2009 and sought he be re-employed ABC wrote to his immediate and previous employer, Equity Bank, by letter dated 29th September 2010 seeking confidential reference on Boniface. That letter needs to be reproduced. It is as follows:

"DATE: 29th September 2010

The Human Resource Manager

Equity Bank Ltd

P. O. Box 75104-00100

NAIROBI

Dear Sir/Madam,

RE: CONFIDENTIAL REFERENCE –BONIFACE WAINAINA KABEU

The above subject refers.

As a Bank it is of the utmost importance that we undertake a careful check on all applicants being considered for employment or who are under their probation period.

The above applied to our Bank for a position in Trade Finance Department and has stated that he worked with you from January 2009 to August 2010. Please confirm these dates of employment to the nearest date coupled with additional information required on the associated questionnaire.

We would be grateful if you would complete the questionnaire as soon as possible as employment is subject to satisfactory references.

The information you provide will be treated in strict confidence.

Thanking you in advance for your assistance.

Yours faithfully

S. Musau

Human Resource Department

Encl/

18. Boniface supplied to ABC, his employer ABC, a certificate of Good conduct from the Criminal Investigation Department (CID).
19. Equity Bank seems not to have responded to ABC's letter. ABC by its letter dated 16th December 2010 wrote again to Equity Bank requesting for reference of Boniface.
20. By a letter dated 10th January 2011 Boniface wrote a letter to ABC which, because it is material to the issue under consideration, I will reproduce as follows:

“ January 10,2011

Boniface Wainaina Kabau

P. O. Box 804-00232

Ruiru

To:

The Head of Department

International Division

ABC Bank Ltd

P. O. Box 46452-00100

NAIROBI

Dear Madam,

RE: Statement of Event at Equity Bank Ltd

This is in regards to my suspension and subsequent resignation from Equity Bank Ltd. I wish to state the following:

On 13th May 2010 in the due cause of my duties as an officer of Equity Bank Ltd; I received a call from one of the institution customers enquiring on monies she was expecting via RTGS

I was in a middle of a very long transaction and as I could not have turned away the customer, I keyed in her accounts details on the part Tran I was processing to confirm the balance in her account. I confirmed to her the balance that was in her account and she said that the monies had not been remitted.

At this point I did not get out of the part Tran and start another one. Therefore I continued with the transaction and thus credited the client with Kes 323.000 in error. These funds were supposed to have been credited to one of the Banks GL's. I gave out the transaction for verification and unfortunately the verifier did not realize the error. The client then went ahead to withdraw the funds.

The error was noted on 28th May 2010 during preparation for End month processes by the Risk and Compliance Department while counter-checking transaction of huge amount processed during the month of May as this transaction was for a total of Kes 116,000,000.00.

The reason as to why I was implicated in this case were:

- It was my password that created the transaction*
- I confirmed to have spoken with the client on the material day.*

I was then suspended from my duties pending investigation. However, the case was taken to court where they are trying to investigate whether it was a genuine error or I was part of the error and whether I actually benefited from the error. The case is still pending there are no witnesses apart from the bank officials.

After two months without communication from the bank and their failure to honour the terms and conditions stipulated on their suspension letter, I decided to tender my resignation.

I tried to plead with the bank that it was an error, but they could not hear anything to that effect. Infact this was my first error in my entire banking career for more than 7 years where money was lost.

I wish to assure and promise the management of the bank that this kind of an error or any other type of error will not ever happen at my workplace and where noted I will not fail to escalate the same.

It is my desire and prayer to continue working with the bank and I promise once more my total commitment and dedication to the fulfilment of the banks mission.

Yours faithfully

Boniface Kabeu.”

21. Equity Bank responded to ABC's inquiry on reference of Boniface by their letter dated 19th January 2011 received by ABC on 28th January 2011 as follows:

EQUITY BANK

EBL/HR/01/11/0145

19 January 2011

J Ngoru

Group Head of Human Resource

African Banking Corporation Ltd

P. O. Box 13889-00800

NAIROBI

Dear Ms Ngoru

RE: CHARACTER REFERENCE: BONIFACE WAINAINA KABEU

This is in response to your letter dated 16th December 2010 requesting for a character reference for Boniface Wainaina.

Boniface worked at Equity Bank Ltd from 19th January 2009 until his summary Dismissal on 31st May 2010.

He joined the Bank in the position of Treasury officer, a position he held until his last date of service.

Yours faithfully

EQUITY BANK LIMITED

Rodgers Mungumi

Human Resource Manager.

22. In this case ABC submitted that the court will need to interpret the word ‘satisfactory’ in the clause of the policy, reproduced above. That clause required satisfactory conduct reference of employees be obtained by ABC. ABC’s view is that since the word satisfactory is not defined in the policy it should be given its plain, ordinary and popular meaning. ABC referred to Oxford Dictionary and quoted the definition thereof as:

“good enough for a particular purpose.”

ABC submitted that the policy did not expect it to obtain, good, very good or excellent conduct reference of Boniface.

23. ABC relied on its witness evidence which stated that Equity Bank’s reference of Boniface which did not give details of the summary dismissal and that reference was therefore satisfactory as required under the policy.

24. Saham by its submission was of the view that there were many ‘red flags’ in the reference of Boniface which ought to have alarmed ABC.

25. I have considered those submissions and I am of the view that ABC erred in inviting the court to interpret the single word satisfactory when that word as it appears in the policy was accompanied by other words, namely “satisfactory conduct reference of employee.” In other words, ABC undertook, under the policy, to carry out satisfactory conduct reference of an employee. The question is then did ABC do so.

26. Boniface was re-employed by ABC in September 2009. ABC gave him three months’ contract. In that contract ABC provided:

“confirmation of your employment will be subject to receipt of satisfactory confidential report.”

27. It is after that that ABC requested reference from Equity Bank.

28. What is interesting is that before Equity Bank responded to that inquiry from ABC Boniface wrote the letter reproduced above and alluded to having made an “error” in a transaction at Equity Bank which resulted in financial loss to Equity Bank. Boniface confirmed that he had been taken to court over that loss/error.

29. ABC through its witness stated that because the CID gave Boniface a certificate of good conduct ABC was satisfied that Boniface was not involved in criminal act.

30. That point of view is a fallacy on the part of ABC. ABC has a legal department which would have advised it that **Article 50 (2) (a) of the Constitution** provides that every accused person has a right to a fair hearing which includes the right to be presumed innocent until the contrary is proved. The CID’s certificate of good conduct, in view of that constitutional provision, could not have been expected to reflect the case that Boniface faced, as a result of the loss Equity Bank suffered in his hands until he had been convicted by the court. ABC did not, in as far as its evidence before court is concerned, make inquiry to confirm whether indeed Boniface was facing a criminal case and even up to the year 2014 when the fraud in its bank was discovered there seemed to have been no attempt to follow up and make inquiry about that case. ABC did not also follow up Equity Bank to find out the details of its summary dismissal of Boniface.

31. I have also noted that ABC by its letter to Equity Bank dated 29th September 2010, in inquiring about the reference of Boniface, sent to Equity a questionnaire which it required Equity Bank to fill. ABC made no mention of that questionnaire and one is left wondering whether it was filled by Equity Bank and if so why it was not provided to the court. Was it not produced because it would have been damning to ABC claim against Saham?

32. So to answer ABC, according to the policy it was required to undertake satisfactory conduct reference of Boniface in respect to his employment with Equity Bank. This as will be noted from my discussion above was not done. Of great concern is that ABC allowed Boniface to work in an area where he had access to money transactions, when it would seem from his own admission, he had pending before a criminal court a case which related to financial loss that Equity Bank, his former employer, suffered in a transaction he undertook while in that bank’s employment.

33. Boniface was re-employed by ABC in September 2009. ABC took out its policy of insurance with Saham as from 20th May 2012. In view of that fact that there was a clause where ABC warranted to carry out satisfactory conduct reference of employees’, who had not been in employment for three years, ABC had an obligation at the time of entering into the insurance contract to disclose to Saham the reference it obtained from Equity Bank, on Boniface, and Boniface’s letter where he alleged he had made an ‘error’ while working for Equity Bank and his admission of having a pending criminal case. ABC failed the test of utmost good faith (in latin *uberrimae fidei*). This is a doctrine which requires contracting parties to act honestly and not mislead or withhold critical information from each other. In a Canadian Case **Nelson Marketing International Inc. v Royal & Sun Alliance Insurance Company of Canada 2005 BCSC 772**: this duty was discussed thus:

“The nature and the compass of the duty of utmost good faith and of the affect of fraud in the insured’s presentation of a claim of

loss was closely examined in *Manifest Shipping Company Limited v. Uni-Polaris Shipping Co. Ltd.*, [2001] 1 Lloyd's Rep. 389 (H.L.) [*Star Sea*]..... In his judgment, Lord Clyde noted at para. 4:

“The substance of the obligation which is entailed can vary according to the context in which the matter comes to be judged. It is reasonable to expect a very high degree of openness at the stage of the formation of a contract, but there is no justification for requiring that degree necessarily to continue once the contract has been made.” (Emphasis mine)

*“The nature and the compass of the duty of utmost good faith and of the affect of fraud in the insured's presentation of a claim of loss was closely examined in *Manifest Shipping Company Limited v. Uni-Polaris Shipping Co. Ltd.*, [2001] 1 Lloyd's Rep. 389 (H.L.) [*Star Sea*]..... In his judgment, Lord Clyde noted at para. 4:*

“The substance of the obligation which is entailed can vary according to the context in which the matter comes to be judged. It is reasonable to expect a very high degree of openness at the stage of the formation of a contract, but there is no justification for requiring that degree necessarily to continue once the contract has been made.” (Emphasis mine)

34. ABC had warranted, when it entered into contract of insurance with Saham that it had and would undertake satisfactory conduct reference of its employees.

35. ABC by its submissions attempted, in error in my view, to state that it was entitled to take into account that Boniface worked for it for 6 years before resigning and joining Equity Bank and that accordingly there was no requirement to obtain satisfactory reference of Boniface since the policy of insurance only required such reference for employees who had not been working for ABC three years from the commencement of the policy of insurance.

36. The evidence is clear that there was a break of contract of employment when Boniface resigned. Boniface proceeded to work for another Bank, Equity Bank, for one year before returning to ABC. The previous period of employment cannot be counted in consideration of how long Boniface had worked for ABC. There was a break of contract of employment and the new contract commenced in September 2009. It therefore follows that Boniface was one such employee the clause in the policy required there be satisfactory conduct of reference.

37. It is unfortunate that a legal officer of ABC would testify and state that ABC obtained satisfactory reference of Boniface because Equity Bank's letter did not mention any criminal charge against Boniface, because CID gave a certificate of good conduct and because of ABC work relationship with Boniface.

38. That in my view cannot be termed as satisfactory conduct of reference. There was as Saham's counsel submitted sufficient reason for ABC to be alarmed and to carry out further investigation on the conduct of Boniface while employed by Equity Bank. ABC in this case displayed mechanical process of obtaining Boniface's reference. It does seem the letter of Equity Bank on being received was placed in a file without further ado.

39. The evidence presented to court supports the proposition there was in fact failure of ABC to do as it warranted to do under the policy.

40. ABC submitted that the policy was a standard document and they were not afforded an opportunity to negotiate the terms thereof.

41. I don't know what one is to make of such a submission. Was ABC submitting that the term requiring reference be obtained be disregarded by this court? If indeed that is so I will remind ABC that a court of law cannot re-write a contract of parties: see the case **National Bank of Kenya v Pipeplastic Somkolit (K) Ltd & another (2001) eKLR** thus:

“A Court of law cannot re-write a contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved. There was not the remotest suggestion of coercion, fraud or undue influence in regard to the terms of the charge.

*As was stated by Shah JA in the case of *Fina Bank Limited vs Spares & Industries Limited (Civil Appeal No 51 of 2000) (unreported)*:*

“It is clear beyond peradventure that save for those special cases where equity might be prepared to relieve a party from a bad bargain, it is ordinarily no part of equity's function to allow a party to escape from a bad bargain”.

42. In view of this discussion I find and hold that Saham was justified in denying liability under the policy.

ISSUE (b)

43. The costs as provided under Section 27 of the Civil Procedure Act should follow the event unless the judge shall for good reason otherwise order. There is no good reason why Saham, the successful party, should be denied costs. Accordingly, the costs will be awarded to Saham.

CONCLUSION

44. In the end and in view of the above finding, the plaintiff's case is dismissed with cost.

DATED, SIGNED and DELIVERED at NAIROBI this 28th day of JULY 2020.

MARY KASANGO

JUDGE

Before Justice Mary Kasango

C/A Sophie

For the plaintiff:

For the defendant:

ORDER

This decision is hereby virtually delivered this 28th day of July, 2020.

MARY KASANGO

JUDGE