



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL & TAX DIVISION

HCCC NO. 4077 OF 1994

UNITED AIRLINES LIMITED.....PLAINTIFF

VERSUS

KENYA COMMERCIAL BANK LIMITED.....DEFENDANT

***CONSOLIDATED WITH* IN THE HIGH COURT OF KENYA AT MILIMANI**

CIVIL SUIT NO. 388 OF 1998

KENYA COMMERCIAL BANK.....PLAINTIFF

VERSUS

ELKANA MUGALA ALUVALE.....1ST DEFENDANT

VALENTINE MULIRU WENDO.....2ND DEFENDANT

JUDGMENT

1. On 7th December 1993, Kenya Commercial Bank Limited (KCB or the Defendant) instructed its correspondent Bank, Bankers Trust Company, New York (BTCO) to pay USD 170,000.00 to Royal Bank (RB) of Canada A/c Canadian General Aircraft (**Canadian Aircraft**). Those instructions and its implementation are the source of the dispute between the Bank and its customer United Airlines Limited (United or the Plaintiff).

2. The dollar payment was then equivalent to sum of Kenya Shillings Twelve Million (Kshs.12,000,000/=) which was the loan granted by the Bank to United for the purchase of an aircraft. The grant of the facility was through a letter of offer dated 1.12.92 (Plaintiff Exhibit Page 1).

3. In its case, pleaded in the Further Amended Plaint dated 3rd September 1999, United asserts that the loan money was in control of KCB which took it upon itself and/or with United's concurrence to remit the said sum. United states that it at all time relied on the expertise of the Bank as finance consultants offering foreign currency remittance services to its clients on the best means of transmitting funds overseas and in the precautions to take. In this regard, United contends that it relied on the Bank to act diligently to ensure that the money was not released and/or exposed to Canadian General Aircraft (an Aircraft vendor) or any other person until the aircraft which constituted the Defendant's security had arrived in Nairobi.

4. United pleads that contrary to its expectations and the terms of the loan disbursements, the Bank acted negligently and caused US \$ 170,000 to be paid or released or put to the disposal of Canadian General Aircraft before the subject aircraft was delivered to and received by United. The raft of acts which United contends constitutes negligent conduct on the part of the Bank are:-

i. Failing to use due diligence and appropriate skill and expertise to remit the foreign currency as best as would protect the interests

of the Plaintiff as their customer and themselves as parties interested in the remittance to facilitate the delivery of their security aircraft.

ii. Failing to adhere to and effect the Plaintiff's direct instructions that the remitted foreign currency was not to be paid to the Canadian General Aircraft until the Plaintiff issued further disposal instructions.

iii. Allowing direct credit of the foreign currency remittance to the Canadian General Aircraft before delivery of the aircraft was secured.

iv. Utilizing a mode of remitting funds which the Defendant Bank knew or ought to have known would have an effect of giving direct credit to the Canadian General Aircraft and therefore authority or opportunity to access the remitted sum, before the aircraft was delivered to Kenya or such delivery was secured.

v. Delegating its responsibilities to its agents Bankers Trust Company which the Defendant knew or ought to have known would not undertake the Defendant's responsibilities or obligations with equal contractual obligation to the Plaintiff.

vi. Omitting by itself or by its agents, to place impose or relay a caution along with the foreign currency remittance.

vii. Purporting to relay a caution post remittance and failing to acknowledge, act on and advise the Plaintiff that Royal Bank of Canada does not act on cautions, and/or process foreign currency remittances as a fully automated basis.

viii. Relaying nebulous incoherent garbled resovial telex messages to Royal Bank of Canada which did not solicit action.

ix. Failing to recover funds wrongfully remitted through the Royal Bank of Canada to the Canadian General Aircraft.

x. Failing to protect the interests of the Plaintiff as its customer and its own interests as owner of a debenture over the said aircraft.

5. Things went awry after the payment was made. It is common cause that an aircraft intended to be delivered by Canadian General Aircraft to United was delivered in September 1994. United states that the vendor refused or failed to make delivery on time and that it has not had any benefit of the facility. The fulcrum of United's case is that, by the negligence and conduct on the part of the Bank, it is deemed to have released it from the obligations under the loan agreement and any securities taken.

6. On another front, United states that on several occasions it demanded that KCB cause the money paid to be refunded so as to secure the aircraft or an alternative but KCB has refused and/or neglected to do so.

7. The Plaintiff asserts that as a result of the contract going wrong, it has suffered great loss and damages. Instances of the loss and damages are given. It claims back Kshs.3,651,114/= which it asserts to have paid as repayment instalments from December 1993 to May 1994. It argues that it should never have made the payments. It claims back a total of Kshs.754,538.75 being fees or costs incurred on mobilization, lawyer's fees, policy money and import fees paid for processing, approving and sanctioning of the facility.

8. That in an effort to pursue the release of the aircraft or refund of the money United incurred expenses of Kshs.257,604.95 on travel, accommodation and communication.

9. United states that it has sought Kshs.549,960.05 being interest on the finance at the time of the action. It also seeks Kshs.378,200/= being the costs of insurance on the aircraft.

10. In addition to the monies set out above, United seeks the following declarations and orders against the Bank:-

i. A permanent injunction restraining the Defendant by itself, its representatives servants or agents or any other authorized party from enforcing terms and conditions under any debenture variation debenture, mortgage, chattels mortgage, guarantee or any other agreement or security whatsoever pending the hearing and determination of this suit.

ii. A permanent injunction restraining the Defendant, its servants or agents or any other authorized party from interfering in any manner whatsoever with property, business operations of the Plaintiff pending the hearing and determination of this suit.

iii. A declaration that the hereinbefore stated debenture and variation debenture and the guarantees or any other are null and void inter alia for lack of consideration.

iv. Judgment in Kenya Shillings for an equivalent of US\$ 170,000 based on the Bank exchange rate in Kenya applicable at the actual date of the said remittance together with interest thereon from the date of remittance till payment in full at Bank lending rates but not below the rate chargeable under the purported securities relevant hereto. Alternatively the declaration sought as set out in paragraph 29 30 and prayer (iii) hereof.

v. General damages for loss of use user of the aircraft and loss of income based on the cash flow projection and expected income of Kshs.3,902,500/= per month interest thereon at Commercial Bank rates from the date of filing this action to date of payment in full.

vi. General damages for loss of business reputation owing to inability to carry out and satisfy business contracts in hand at the material time pending arrival of aircraft.

vii. *Costs of this suit and interest thereon at Court rates.*

viii. *General damages for negligence.*

ix. *Such other relief this Honourable Court may deem fit to grant in the circumstances.*

11. The Bank's Defence is that it disbursed the loan of Kshs.12,000,000/= as and when directed by United. It asserts that by a letter dated 23rd November 1993, United expressly directed it to disburse the advance by purchasing US Dollars 170,000 and remitting the same to Canadian General Aircraft, through United's agent, the Royal Bank of Canada. It argues that it was the agent who released the funds to the Canadian General Aircraft before it gave disposal instructions and the Plaintiff must take full responsibility for the action of its agent.

12. An aspect of the Defence which will turn out to be crucial is that the Bank denies being liable for the loss and damage claimed by United and that states that some aspects of the claims are remote.

13. The Bank counterclaims for the sum of Kshs.33,480,950.70 together with compound interest thereon calculated at revisable rates from time to time at 13.75 per annum last applied on 31st March 1998 as being the amount due in respect to the loan. This amount is also sought jointly and severally from Elkana Mugala Aluvale and Valentine Muliru Wendoh. The two had, separately, guaranteed the facility granted by the Bank to United. That is the claim in HCC 388 of 1998 in which the Bank sued the two guarantors and which suit was consolidated with these proceedings.

14. The taking of evidence in this matter was lengthy. Seven witnesses testified. Five for the Plaintiff and two for the Defence. A striking feature of the hearing is that all witnesses but one, Captain Elkana Aluvale, had worked or were working with the Bank. Aluvale is a shareholder and Managing Director of United. The evidence of the witnesses will not be rehashed. Instead, they will be discussed if and when it assists to resolve the very pointed issues in contention. These issues are;

a) Did the Bank fail in its duty by the manner it remitted the sum of US \$ 170,000.00 to BTCO

b) If so, what loss, if any, did United suffer as a result of that failure or breach?

c) If the answers to (a) and (b) are in the affirmative, is United entitled to the prayers sought?

d) If United has failed to prove liability and or loss against the Bank, is the Bank entitled to the Counterclaim and claim in HCC 388 of 1998.

e) What are the appropriate orders as to costs?

15. The gravamen of the Plaintiff's case is that, against its express instructions, KCB paid the purchase price to the vendor of the aircraft before the aircraft was delivered in Kenya. It turned out that during the overhaul of the engines to the aircraft there was a lightning strike and this necessitated some repairs to be undertaken. The repairs were done by an American firm in Texas. Delay of delivery resulted. The evidence of Mr. Aluvale is that at the end of February 1994, Canadian General Aircraft asked for more time to deliver the aircraft.

16. United had to turn to National Bank of Kenya to finance the charges for the engines overhaul to the same aircraft. In the letter of offer dated 21st July 1994 (P. Exhibit Page 185 -187) the purpose of the term loan of Kshs.7,200,000/= was;

“to assist you in the acquisition and installation of two aircraft engines”.

The evidence of Mr. Aluvale is that the engines were paid for in July 1994 and the aircraft arrived in Kenya in September 1994.”

17. In an effort to buttress its case, United repeatedly makes the argument that, in demonstration of the negligent conduct of the Bank, the Bank should not have released the purchase price before the aircraft arrived in Kenya because a specific charge was to be taken over the aircraft. The letter of offer of 1.12.92 (P. Exhibit Pages 1-3) has this provision:-

“No drawdown of the facility will be permitted until all the security documentation has been finalized and registered and the duplicate copy of this letter signed and returned to the Bank. In the event of full or partial drawdown of the facilities being permitted prior to completion of securities, a penal rate of securities, a penal rate of interest at 23% per annum will be charged for the time being.”

18. So, how much faith can United place on this argument? First, I note that the witnesses were divided as to whether or not drawdown of the facilities was permissible before the perfection of the securities. Yet there is unanimity that the letter of offer of 1st December 1992 which was accepted by United is the contract between United and the Bank. The contract speaks for itself and, in the view of this Court, brooks of no ambiguity. The contract expressly contemplates the possibility of full or partial drawdown of the facilities prior to completion of securities and in fact provides for a penal rate of interest in the event of such prior drawdown. It therefore does not take the Plaintiff's case any further to press that it was a breach of contract for payment to be made to the vendor prior to the aircraft been physically present in Kenya. That alone does not demonstrate wrongdoing on the part of the Bank.

19. The Bank is assailed for negligence in carrying out instructions of the client and causing a loss to the customer by failing to act with due care and skill. Case law has beacons out the duty owed by a Bank to its customers on various fronts. This Court is indebted to counsel on

both sides for citing both local and other common law decisions that discusses those duties and this Court is happy to restate a few.

20. Judge J. L Onguto, in Andrew Kiriti Gathii v Equity Bank Limited HCC No. 37 of 2016 (Nairobi Commercial & Tax Division of the High Court), stated as follows in respect to the scope of that duty:-

“31. It is also relatively clear that in modern banking the bank does much more. It receives money on behalf of the customer. It advises the customer. There is thus a fiduciary posture. The bank owes the customer a duty of care both in contract and in tort, even in its ordinary daily business. Thus in Selangor United Rubber Estates Ltd v Cradock (No. 3) [1968] 1 WLR 1555, Lord Ungoes-Thomas stated as follows, as regards a banks duty of care:

“To my mind... 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 relevant facts which can vary almost infinitely”.

32. Evidently, the duty to exercise reasonable care and skill arises concurrently and co-extensively in both contract and tort. All must depend on the circumstances of each case where the bank is accused by its customer, but I must add that the bank ought not to be held too easily to have acted negligently given that the relationship is guided by contract. To hold it liable there is need to show a breach of a contractual duty of care. Caution must also be taken in view of the practical differences between contract and tort claims which include but are not limited to different limitation periods, different rules as to remoteness of damage and a different approach as to contributory negligence.

21. In respect to the customer’s duty to carry out a customer’s instructions two decisions pronounce the nature and extent of that duty. In Barclays Bank Plc v Quincecare Ltd [1992] 2 All E.R. 363 QDB Steyn J (as he then was) rendered himself famously as follows:-

“Certain transactions are so out of the ordinary course that they ought to arouse doubt and put the bank on inquiry. If the bank fails to enquire, it cannot be said to have acted without negligence in converting a bill.”

22. Andrew Burrow QC in the Federal Republic of Nigeria and JP Morgan Chase Bank, NA [2019] EWHC 347 (Comm), elaborates on breadth of that duty:-

“30. To recognize such a duty of enquiry would be in line with sound policy. In the fight to combat fraud, banks with the relevant reasonable grounds for belief should not sit back and do nothing. Moreover the duty of enquiry on banks would not be unduly onerous because it would always be limited by what an ordinary prudent banker would regard as reasonable enquiries in a situation where there are reasonable grounds for believing that the customer is being defrauded.

31. But even assuming that Ms Phelps is correct in her submissions that a bank with the relevant reasonable grounds for belief has a duty of care to make reasonable enquiries, it would be potentially misleading to go on from that to describe the Quincecare duty of care as a duty of care to make enquiries/to investigate. The core of the Quincecare duty is, as Steyn J set it out, a negative duty not to pay while the bank has the relevant reasonable grounds. A positive duty of enquiry/investigation would be additional to that. In any event, a bank, which is acting honestly and without reasonable grounds for believing that its customer is being defrauded, has no duty of care to enquire/investigate. In other words, there is no duty of care to enquire/investigate prior to the point in time when the bank has reasonable grounds for believing that its customer is being defrauded.”

23. The events that have caused sore to United were triggered by its instructions of 23rd November 1993 which reads:-

“United Airlines

23rd November 1993

Dear Sir,

RE: PURCHASE OF FOREIGN CURRENCY – US\$ 170,000.00

We hereby authorize you to purchase, competitively, US Dollar 170,000.00 from the inter-bank market and remit the same to Canadian General Aircraft. Attached please find a copy of the proforma invoice plus other related documents. Wire transfer instructions by T.T to Canada are as follows:-

ROYAL BANK OF CANADA

GLAMORGAN BRANCH

3919A RICHMOND ROAD SW

GALGARY, ALBERTA, CANADA

T3E 4P2

BRANCH NUMBER 15 01879

ACCOUNT NUMBER: 409-488-4 (USD ACCT)

BENEFICIARY: CANADIAN GENERAL AIRCRAFT

ATTENTION: BUSINESS ACCT MANAGER

Yours faithfully,

CAPT EK. ALUVALE CAPT V. WENDOH

MANAGING DIRECTOR DIRECTOR

24. Read alone, these are express instructions by United to the Bank to make the payment of US \$ 170,000 to Canadian General Aircraft. The words are unequivocal and are not conditional. United however says there is a background to those instructions which puts an important context to them.

25. About twenty days earlier, the Bank had written as follows to United:-

“We write to advise that we have agreed to allow utilization of the Kshs.12 Million loan approved last year for the purchase of an aircraft from General Aircraft at a price of U.S \$ 330,000 subject to the relative aircraft being delivered and registered in Kenya and evidence to this effect produced for our record.

All other terms and conditions governing the facility will remain as advised previously.”

26. Mr. Aluvale’s testimony is that prior to United writing the letter of 23rd November 1993, he had on or about that day been invited by KCB for a meeting with Mr. Kioko and Mr. Rachier, a lawyer for the Bank. The purpose of the meeting, it was said, was to deliberate on the best method of transmitting the loan funds to the seller in a manner that secured both United and the Bank. Aluvale asserts that:-

“The Defendant could not have released the funds to the Plaintiff for remittance in any other manner or without its participation since it was concerned about securing its interests. At no time were the funds placed at the control or disposal of the Plaintiff.”

27. He states that Mr. Rachier advised that the funds be wired to New York and be held in an escrow account by Bankers Trust Company N.Y and to be released to the seller of the aircraft only when the aircraft arrived in Kenya. That towards that end, Mr. Rachier was introduced to the vendor and that on his communication, the vendor agreed to the arrangement. That the Bank (here, I presume that reference was to Mr. Kioko) then dictated the letter of instructions to be given by United to the Bank. Hence, the letter of 23rd November 1993.

28. Mr. Rachier was not called to give evidence. On the other hand, Mr. Kioko who gave evidence as PW1 stated as follows:-

“We did not at any time seek any legal opinion regarding mode of transmission of funds.”

29. Elsewhere he testified:-

“I can recollect attending a meeting in the Defendant’s Board Room with Rachier & Kaplan Advocate but I cannot recall what transpired after 7 years.”

30. It would be surprising if the Bank accepted the evidence that attempted to explain the genesis of the instructing letter. Counsel for the Bank argued that the oral testimony was not admissible. And I have to agree.

31. First, the account given by the Mr Aluvale is discounted by Mr. Kioko. Mr. Rachier, said to be the third person in the meeting and who is said to have given the critical advice did not testify. So it is the word of one person against the other. Second, correspondence generated by United at about the time of the meeting makes no reference to the said advice. Had there been such reference then it would help prop up the s story by United

32. Let me say more about the alleged meeting and advice. Mr. Amoko representing the Bank put in substantial effort on this subject. Mr. Aluvale confirmed that the meeting was not recorded in writing and was not referred to by United in any correspondence coming prior to the filing of the suit. He testified:-

“Letter of 23rd November 1993. This was after our meeting with Kioko and Rachier. Those instructions were not in line to the advise given by Mr. Rachier A week later the accounts manager called me and told me that the instructions were not in line with what we had agreed. This is not referred to anywhere in my witness statement or correspondence produced herein. Not referred to in my letter of 7th December 1993.”

33. That said this Court notices the fax message dated 5th October 1993 from Canadian General Aircraft to United in which Canadian writes:-

“5. I have attached draft copies which the seller (vendor) will be willing to execute and ditch express to you. As well, to expedite matters, the seller has agreed to the services of an escrow company in USA Morgan Aircraft title services Inc as the company at which the document may also be deposited.

6. The funds should also be sent to Morgan Aircraft, along with your letter instruction to this company, about what you may require prior to the release of the funds to the vendor.

7. In the event that you are not fully aware of the duties, obligations and responsibilities of such an FAA approved Escrow agent, Morgan Aircraft can upon request, fax you the information you may require about their services.”

34. There is no evidence that the avenue of use of an escrow company was followed through and the letter of 23rd November 1993 would be at odds with that arrangement as it was unequivocal instructions to pay the vendor directly. This Court has to come to the conclusion that there is insufficient evidence that the Bank, either by itself or through its lawyer, made assurances to United that money would be paid into an escrow account.

35. In reaching this conclusion, the Court gives regard to further evidence by Mr Aluvale about a conversation he supposedly had with Mr Kioko. His evidence is that a week later Mr Kioko called him and told him that the instructions were not in line with what they agreed. The following is a short question and answer exchange during cross-examination which the Court thought important enough to capture in verbatim;

“Amoko: Why is there no conversation with Mr. Kioko in your statement (Paragraph 15)?

Aluvale: I did not capture all the things we discussed with Mr. Kioko in my short statement.”

36. The Court finds it unlikely that the supposed conversation around the escrow account, and which was an important cog in United’s case, would be missed out in correspondence written by United after things went wrong and in the written statement of the witness who made the allegations about it at hearing. Could such a crucial matter be taken up for the first time so late in the day?

37. Yet, because of the events that followed, the spirit of United should not be dulled by its inability to prove that the Bank had made assurances about an escrow arrangement. Mr. Aluvale states that prior to the remittance of the funds, he verbally insisted and instructed that a cautionary note be included in the transmission (**P Exhibit 6**) The cautionary note was as follows:-

“Please note: Funds are not to be released to the account of beneficially until we issue further disposal instructions. By order of (B/O) United Airlines Limited.”

38. The evidence is that the Bank acted accordingly and made a telegraphic transfer to BTCO of USD 170,000/= that included the caution (P Exhibit 7). On 10th December 1993 (BTCO)(**P Exhibit 10**) sought clarification from the Defendant Bank on the intent of the caution and the Bank clarified as follows:-

“The following caution is to be relayed along with your payment instructions to the Royal Bank of Canada Quote.

Funds are not to be released to the account of the beneficiary (Canadian General Aircraft) until we issue further disposal instructions.”

39. To be noted is that in this clarification, the Bank states that the funds should not be released until it (the Bank) issues further disposal instructions. This is a material departure from the express instructions of United because the prerogative to issue the disposal instructions had been reserved by United for itself. However, as will be apparent just now, not much may come out of that.

40. The evidence is that BTCO carried out the instructions issued by KCB (P. Exhibit Page 29). In an internal memo dated 11th July 1994 Mr. Nyaguto of the Bank states:-

“(a) You will observe that Bankers Trust on whom the telex payment was addressed relayed the transaction caution to Royal Bank of Kenya.”

41. RBC on the other hand proceeded to credit of the Beneficiary Account with the said sums and explained (P Exhibit 20) its action as follows:-

“WE WISH TO INFORM YOU THAT THE ABOVE MENTIONED P/O WAS A FULLY QUALIFIED PAYMENT. THEREFORE FUNDS ARE CREDITED TO A/C 4094884 CANADIAN GENERAL AIRCRAFT DIRECTLY WITHOUT HUMAN INTERVENTION.”

42. In his evidence, Mr Wamahui, for the Bank witness stated:-

“The Bank was analog. The Banks in USA remitted automatically.”

This seems to explain why the RBC remitted the funds directly into the account of the seller. In addition, the following observation made by Mr. Nyaguto in the Bank’s Internal Memorandum is revealing;

“RBC have stated that the payment received from Bankers Trust Company, New York for US \$170,000/= was fully automated and funds were credited to the beneficiary’s account without human intervention. If funds were to be held by RBC, why was it necessary to quote the beneficiary’s account number? If their account number had not been quoted it is possible that the payment would have been held.”

43. There, my view, lies the crux of the matter. The instructions of the customer were clear to the Bank and restated in the Bank’s remittance advise to BTCO. The wish of the customer, and expressly communicated to the Bank, was that although the money was to be transmitted to the Vendor’s Bank, it was not to be paid to the Vendor without its further instructions. When the Bank chose to transmit the money in a manner that led to the direct remittance of the money to the beneficiary’s account without human intervention and not by order of United, then it failed in its duty of care to the customer. Because of advancement in the technology on money transfers in America, the “withhold” instructions issued by the Bank were ineffectual, sterile and impotent. They could not have been acted upon.

44. And the Bank ought to have known better. In a brochure made available to its Customers, the Bank acclaimed a worldwide network of agents and correspondents, and that it could effectively arrange any type of foreign exchange transaction. The brochure lists the services the Bank offered to its Customers. These included foreign currency remittances. The Bank’s witness testified;

‘The Bank gave advisory to customers on foreign exchange transmission. The plaintiff was entitled to our advisory services in remitting the funds’

45. Simply, the Bank failed United.

46. The next issue is the more difficult to resolve. In paragraphs 10 and 11 of the Further Amended Complaint, United pleads:-

“10. The Plaintiff relied on the expertise of the Defendant as a Banker that the Defendant would act diligently as an expert to ensure that the money is not released and or exposed to the Canadian General Aircraft or any other person until the aircraft which constituted the Defendant’s Security had arrived in Nairobi, but the Defendant did not do so.

11. Contrary to the expectation of the Plaintiff and terms of loan disbursements the Defendant and the Defendant’s correspondences and or agents acted so negligently that they caused the US \$ 170,000/= to be paid or released or put to the disposal of Canadian General Aircraft before the subject aircraft was delivered to and received by the Plaintiff in Nairobi, by reason the Plaintiff has suffered great loss and damage.”

47. In its supplemental submissions to Court, United underscores that its cause of action is based on the Defendant’s failure to remit funds with reasonable care and diligence so as to avoid direct credit into the seller’s account before the subject aircraft was delivered to Kenya.

48. Mr Aluvale’s evidence was that there was an agreement for the purchase of the aircraft between it and Worldjet who was the initial vendor. A deposit paid to Worldjet was forwarded to the new Vendor, Canadian. It is common ground that United did not produce its contract with either Worldjet or Canadian and the Court would not know the respective rights and obligations of the parties including the terms and covenants for delivery of the Aircraft. This attracted heavy weather from counsel for the Bank who, on raising arguments on causation, submitted that liability did not attach on Bank as United had not shown that any injury was suffered as a result of such breach. This would be in tandem with paragraphs 16 and 26 of the Defence.

49. Paragraph 16 reads;

“The Defendant specifically denies that it is liable for the alleged loss and damage claimed in paragraph 13 of the Complaint, which is in any event disputed, and puts the Plaintiff to very strict proof thereof.”

In Paragraph 26 it is pleaded;

“The Defendant states that it is not liable for the claims contained in Paragraph 25, 26 and 27 of the Complaint as the same are too remote and further states that if the alleged loss, which is in any event specifically denied, was in fact incurred by the Plaintiff the same was not as a consequence of any action by the Defendant.”

50. The evidence by Mr. Aluvale was that Canadian General Aircraft failed to release the aircraft thereby putting its business plans in jeopardy and as a result, it lost business planned in anticipation of delivery of the aircraft. It was explained that the delay in delivery was because of repairs to the engines.

51. The case of United is that because of the delay in delivery, the seller asked for an extension of time. Aluvale testified:-

“In April 1993 (4?) we informed the seller that the delay of 3 months was not acceptable and so we gave a deadline of 3rd April 1994. This was by phone.”

He gave evidence that the aircraft finally arrived in Kenya in September 1994.

52. So as to determine whether the Bank ought to be liable for the loss that may have resulted as a consequence of the supposed late delivery of the Aircraft, it was critical, I think, for the Plaintiff to establish when delivery between it and Canadian was agreed and that Canadian breached that agreement. The submission by counsel for the Bank that it was necessary for the Court to be seized of the rights and obligations of the respective parties to the contract of sale of the aircraft is not idle.

53. The only evidence available to the Court regarding the date of delivery was the oral evidence of Mr Aluvale. His testimony was that:-

“The Aircraft was not delivered to me on the due date. When the aircraft did not arrive by 3rd January 1994, I engaged the seller who told me that there would be a delay because of lightning strikes on engine. Promised to deliver by March 1994. We communicated by fax, telephone and email. It was difficult to submit all the communication.”

54. Not one of these communications or the written contract, if any, between the Plaintiffs and Canadian were produced in Court. The importance of those documents was that they would show the contracted date for delivery of the aircraft and what the terms of payment were. If the Plaintiff's case is that it suffered loss and damage because the Bank paid Canadian before the delivery of the aircraft, then United needed to prove that the agreement it had with Canadian was that payment of the aircraft could only be made upon delivery so that the Bank would be held liable for making a premature payment.

55. If there was need for affirmation that the agreed date for delivery of the aircraft as between the United and the Vendor was crucial in establishing the loss incurred by United, then the affirmation came from no less United's own witness. Mr Aluvale stated;

“However it would be fair to charge loss of user from April 1994 as I had granted some indulgence to Canadian upto that period”

This graphically demonstrates the inextricably link between the date agreed for delivery as between United and the Bank and the start off date when any loss would be attributable to the Bank. The evidence led by United on this critical aspect was far too thin as it has not been explained to Court why documentary evidence that would establish it was not availed.

56. Reliance by United on the argument that drawdown could only be permitted when all security documentation was finalized was tenuous. This is because, at the election of the Bank, it could allow full or partial drawdown prior to completion of securities. With respect, United was barking up the wrong tree when it insisted on this proposition as a core theme to its case!

57. Take again the claim by United of monies incurred on the overhaul of the two engines which were finally installed in the aircraft. So as to build its claim for refund of these amounts, there needed to be evidence that, from its contract with Canadian, United was liable for these charges and was forced into the position of paying for them only because of the early payment made by United. Stated differently, United needed to show that risk in the aircraft had not truly passed to it but it paid for the repairs so as to mitigate on a difficulty and embarrassment placed on it by the “premature” payment.

58. In the end the Court is unable to reach the conclusion that there was any loss suffered by United that can be attributed solely or partly to Bank.

59. I turn to consider the counterclaim. In doing so, I do not find any evidence that the sum of USD 170,000/= was not in fact utilized towards the purchase of the aircraft. Micah Mwarania who testified as the second witness of the Bank stated that as at 31st March 1998 United owed the Bank a sum of Kshs.33,484,428.52. The witness produced a copy of a three paged statement in support of that position.

60. Although the Defendant's witness was challenged about the reference in the account numbers 31781252012 appearing on the statements as opposed to 318701252012 which is acknowledged by the United as its account, nothing much may turn on that for two reasons. First, the Bank official alluded to the possibility of an error in transferring the information. Second, in his further statement Mr. Aluvale makes reference to a massive write off of some Kshs.23,000,100/= from the Plaintiff's loan account. He states:-

“The Defendant, seemingly upon realizing its blunders and in recognition of its liability to the Plaintiff, wrote off a total of Kshs.23,000,100 (Kshs.5,889,000 & 17,111,100) from the Plaintiff's account on the 29th April 1997, and as at 30th June 1997 the said account had an overdraw debit balance of Kshs.2,090,477 only. As at 31st March 1999 the Plaintiff's said account had an overdrawn debit of Kshs.2,533,436.10 only. The Defendant's counter-claim for anything over the said amounts is, without prejudice to the Plaintiff's denial of the same, therefore not only misconceived but precluded by the doctrine of estoppel (*See MFI 36 – United Airlines bank statements sheets Nos 15 and 22 (Account Number 317801252012)*.”

61. To be drawn from this evidence is that, before the supposed write off, United owed the Bank about Kshs. 25,000,000/=. This was in April 1997. The Court accepts as plausible that as at 31st March 1998 United owed the Bank a sum of Kshs.33,483,428.52. This is because of the contractual rate of interest provided for in the letter of offer which included a penalty rate on default.

62. The Court reaches that conclusion notwithstanding there was evidence that the statements in proof of the debt were manually generated and not in the usual manner that the Bank produced statements and second, the statements were produced with the help of the Bank's Advocates. I choose to uphold them because the contents of the statements are consistent with the extent of indebtedness that appeared in the normal statements sent to the Customer before the alleged write off. In addition, no material has placed before this Court faulting the veracity of the contents.

63. The more substantial question has to be whether the Bank had written off the loan and is therefore not entitled to anything more than Kshs.2,533,463.10 which appeared on the Plaintiff's statement as at 31st March 1999 (P. Exhibit 36).

64. As to the apparent write off, the witness Miss Mwarania had testified as follows:-

“There is a CBK requirement for passing off bad debts. It is a book entry. It is written off. But it is recoverable from the customer.”

65. I think that the line of Defence taken up by United at the hearing is not available to it in its entirety for at least one reason. United did not specifically plead that a sum of Kshs.23,000,000/= had supposedly been written off from its account and the Bank was precluded by estoppel or waiver from insisting on it. Estoppel or waiver in this regard needed to be specifically pleaded (see Maynard Lusambili V Sarova Hotels [1996] eKLR and Joram Achuku Oyooo v Kenya Fisheries & Research Institute Board of Trustees, Kenya Marine Fisheries Research Institute [2013] eKLR) The only estoppel pleaded by United was that the Bank was barred from any claim whatsoever because it had negligently and recklessly disbursed the facility.

66. Ultimately the Plaintiff's case is dismissed with Costs and Judgment entered for the Defendant against the Plaintiff, Elkana Mugala Aluvale and Valentine Muliru Wendoh jointly and severally for Kshs. 33,480,950.70 with compound interest at 13.75 per annum last applied on 31st day of March 1998. The Defendant shall also have the Costs of the Counterclaim and the main claim in HCC 388 of 1998.

Dated, Signed and Delivered in Court at Nairobi this 26th Day of October 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:

Omollo for Lubullellah for Plaintiff.

Miss Okuta for Amoko for the Defendant.