



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**COMMERCIAL & TAX DIVISION**

**CIVIL CASE NO. 372 OF 2011**

**SAMUEL KAHIRI KARANJA.....PLAINTIFF**

**VERSUS**

**BARCLAYS BANK OF KENYA.....DEFENDANT**

**JUDGMENT**

(1) The Plaintiff **SAMUEL KAHIRI KARANJA** has filed this suit dated **23<sup>rd</sup> August 2011** seeking Judgment against the Defendant for:-

**(a) Kshs. 16,317,424/- together with interest from 1<sup>st</sup> September 2009 until payment in full.**

**(b) Costs of the suit and interest at Court rates till payment in full.**

(2) The Defendant **BARCLAYS BANK OF KENYA LIMITED** filed a Defence dated **6<sup>th</sup> October 2009** in which they prayed that the Plaintiffs suit be dismissed with costs. The hearing of the suit commenced before this Court on **8<sup>th</sup> July 2019**. The Plaintiff called three (3) witnesses in support of its case whilst the Defendant called one (1) witness.

**THE EVIDENCE**

(3) The Plaintiff told the Court that he was a farmer and a business man operating several matatus which plied various routes in Nyahururu and Nakuru. The Plaintiff sought to rely on his written statement dated **23<sup>rd</sup> August 2011**. The Plaintiff told the Court that he held and operated two (2) bank accounts at the **Nyahururu Branch of Barclays Bank of Kenya** being Account Number [Particulars Withheld] and Account Number [Particulars Withheld]. The Plaintiff told the Court that he operated both accounts personally. That he did not have an ATM card and that all his bank transactions were conducted by himself personally over the counter in the banking hall. The Plaintiff also confirmed that he had the sole mandate to operate his two (2) accounts and that he had never authorized any other person to conduct transactions on his accounts on his behalf.

(4) Sometimes in **2009** the Plaintiff began to notice that the funds in his two accounts were decreasing despite his making huge deposits into the accounts from his businesses. Due to his failing health at the time the Plaintiff requested his son to examine his bank statements and compare the same with bank slips indicating the withdrawals that he had made on the two (2) accounts. The Plaintiff realized that some fraudulent debits had been made out of his accounts between **January 2008** and **August 2009**. That there were no debits slips to support the said fraudulent withdrawals. The Plaintiff also realized that some of these suspect withdrawals had been made from his accounts whilst he was away in Nairobi receiving Dialysis treatment.

(5) Once the matter had been reported to the Defendant Bank, they commissioned an investigation into the matter. As a result a bank employee was charged for a criminal offence at the **Nyahururu Law Courts**. The Plaintiff however states that he did not participate in the Criminal trial nor is he aware of the outcome of that Criminal trial. The Plaintiff states that he lost a total amount of **Kshs. 16,317,424/-** due to these fraudulent debits from his bank accounts. He demands a refund of this amount from the bank. The Plaintiff contends that the loss he suffered was occasioned by the defendants negligence and/or breach of duty of care to himself as their client which negligence is particularized in **paragraph 8** of the Plaint as follows:-

**“PARTICULARS OF NEGLIGENCE AND/OR BREACH OF DUTY OF CARE**

**(a) Failing to sufficiently verify the identity of persons making withdrawals from the Plaintiff’s accounts while fully aware that only the Plaintiff could make over-the-counter withdrawals.**

(b) **Allowing its employees to forge the Plaintiff's signature who would thereafter help themselves to the proceeds of the Plaintiff's account.**

(c) **Failing to take sufficient corrective measures to shield the Plaintiff from further losses despite numerous complaints from the Plaintiff that unauthorized withdrawals were being made from his account.**

(d) **Knowingly and/or negligently allowing its workers to make withdrawals from the Plaintiff's account.**

(e) **Failing to put in place sufficient protective measures to ensure that customers' monies, particularly that belonging to the Plaintiff, deposited with it were safe from unauthorized withdrawals."**

(6) **PW2 STEPHEN MAHUGU NDUNG'U** told the Court that he was a son to the Plaintiff. **PW2** sought to rely entirely upon his written statement dated **23<sup>rd</sup> August 2011**. **PW2** testified that he was aware that the Plaintiff operated two bank accounts at the Nyahururu Branch of Barclays Bank, being Account Numbers [Particulars Withheld] and [Particulars Withheld].

(7) **PW2** stated that due to the Plaintiffs advanced age and failing health, he as the Plaintiffs son was involved in the day to day running of the Plaintiff's businesses and that he often accompanied the Plaintiff to the Bank to carry out transactions. **PW2** stated that in the year **2009** the Plaintiff complained that the bank balances in his two accounts did not appear to reflect the amount of the deposits which he was making into the said accounts from his business. The Plaintiff requested **PW2** to go through his bank statements and to make a comparison with the Plaintiffs banking slips. **PW2** conducted the perusal and realized that various suspicious withdrawals had been made between **January 2008** and **August 2009** totalling **Kshs. 16,317,124/-**. The matter was reported to the Defendant who according to **PW2** kept tossing the Plaintiff from office to office. **PW2** later learnt that some of the banks employees had been sacked and had been charged at the **Nyahururu Law Courts**, but states that he is not aware of the outcome of that Criminal process.

(8) **PW3 PETER KIMANI NDUNG'U** is also a son to the Plaintiff. He sought to rely entirely upon his written statement dated **23<sup>rd</sup> August 2011**. **PW3** stated that he together with his elder brother **PW2** assisted the Plaintiff in running his businesses. He confirms that the Plaintiff operated two bank accounts at the **Nyahururu Branch** of **Barclays Bank** being Account Numbers **[Particulars Withheld]** and **[Particulars Withheld]**.

(9) **PW3** told the Court that sometime in the year **2009** the Plaintiff began to complain that the balances in bank accounts did not reflect the deposits which he was making into the said accounts. He requested **PW3** together with his other son **PW2** to go through his bank statement and compare them with the bank deposit slips. After conducting the comparison **PW3** noted some unexplained withdrawals from the Plaintiffs account including withdrawals allegedly made over the counter in **Nyahururu** whilst on the dates indicated the Plaintiff was actually in **Nairobi** undergoing dialysis. That as a result the Plaintiff lost the sum of **Kshs. 16,317,424/-**.

(10) The matter was reported to the Defendant who commissioned an investigation into the matter. Despite demand being made the Defendant made no move to refund the Plaintiffs money. Hence the filing of instant suit.

(11) The Defendant called one (1) witness being **CHARLES MAINA**, the Investigations Manager with the Defendant Bank. **DW1** sought to rely entirely upon his written statement filed on **7<sup>th</sup> October 2011**. **DW1** told the Court that on **2<sup>nd</sup> February 2010** he received a report of complaint from a customer who was disputing alleged withdrawals from his two bank accounts Numbers **027-[Particulars Withheld]** and **027-[Particulars Withheld]** both held at the **Nyahururu Branch** of Barclays Bank. **DW1** also obtained a copy of the Plaintiffs letter of complaint dated **29<sup>th</sup> January 2010** in which the Plaintiff disputed a total of **221** counter withdrawals. **DW1** commenced investigations into the matter and also interviewed the Plaintiff as part of said investigations.

(12) **DW1** stated that the Plaintiff ought to have made his complaint much sooner rather than waiting for six (6) months to complain to the Bank yet he received the bank statements regularly and therefore ought to have noticed if something was amiss. The Defendant contends that the Plaintiffs loss was occasioned by his own negligence which is particularized in **paragraph 10** of the Defence as follows:-

(a) **Failing to notify the Defendant at once or at all of the unauthorized withdrawals despite receiving regular bank statements;**

(b) **Failing to inform the Defendant at once or at all of the unauthorized withdrawals despite receiving notice of the bank balances on subsequent cash withdrawal slips done by the Plaintiff himself;**

(c) **Failing to object to the first or any subsequent bank statement of account which debited such withdrawals within 15 days of such receipt.**

(d) **Failing to take due or diligent care to ensure any discrepancies were reported to the Defendant within 15 days of receipt of statements as per the disclaimer notice thereon.**

(13) Accordingly the Defendant wrote to the Plaintiff the letter dated **12<sup>th</sup> January 2011** denying the Plaintiffs claim and denying any liability for the Plaintiffs loss of **Kshs. 16,317,424/-**. **DW1** urges the Court to dismiss in its entirety the Plaintiffs claim and to award the costs of the suit to the Defendant.

#### **ANALYSIS AND DETERMINATION**

(14) I have carefully considered the evidence adduced in this suit, the submissions filed by both parties as well as the relevant law. It is not in

dispute that the Plaintiff owned and operated two bank accounts with the Defendants **Nyahururu Branch**. The Plaintiff was therefore a **client** of the Defendant Bank. As such the Defendant owed to the Plaintiff as its client a duty to exercise reasonable care and skill in carrying out its operations with respect to the Plaintiffs accounts held with the said Bank. In the case of **KARAK BROTHERS COMPANY LIMITED –VS- BURDEN [1972]ALL ER** it was held as follows:-

***“... 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 stock broker 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 the exercise of reasonable care and skill again depends on circumstances.” [own emphasis]***

(15) The Plaintiff in his evidence told the Court that he personally carried out all his bank transactions over the counter in the Banking Hall. He states that the account mandate provided for himself as the **sole signatory** to the two accounts and states that at no time did he ever authorize any other person to conduct transactions on his behalf. **PW2** and **PW3** the Plaintiffs sons confirm that the Plaintiff operated his account in person. They state that they would only accompany the Plaintiff to the banking hall to assist him fill out forms as his due to his illness and age the Plaintiff’s sight had begun to fail.

(16) The Defendant does not dispute the fact that the Plaintiff had never been issued with an ATM nor is it denied that the Plaintiff conducted his business with the bank in person over the counter in the banking hall.

(17) The Plaintiff told the Court that sometime in the year **2009** he noticed that the balances in his two accounts did not appear to reflect the deposits he had been making into the two accounts. The Plaintiff requested for his bank statements and asked his two sons to compare the withdrawals listed in the statements with the bank debit slips (which the Plaintiff had carefully kept in his custody at his home).

(18) Both **PW2** and **PW3** testified that upon conducting the comparison they noted that some of the withdrawals reflected in the bank statements **were not** made by the Plaintiff. In his bundle of documents filed on **30<sup>th</sup> August 2011**, the Plaintiff has annexed bundles of bank statements from his two accounts as well as bundles of cash withdrawal receipts from the two accounts.

(19) In order to prove that he did not make the disputed withdrawals the Plaintiff has produced in his Supplementary Bundle of Documents filed on **9<sup>th</sup> January 2019**, a list of his appointments at the **Parklands Kidney Centre Dialysis Unit. DW1** under cross-examination admitted that several of the disputed withdrawals were purportedly made at the **Nyahururu Branch** at the same time as the Plaintiff was undergoing Dialysis at the **Parklands Dialysis Unit in Nairobi**. There is obviously no way that the Plaintiff could have been withdrawing money from his accounts in Nyahururu whilst simultaneously undergoing Dialysis in Parklands in Nairobi. Clearly something was amiss. The Plaintiff has produced documentation in support of his claim that **Kshs. 16,317,424/-** was in this manner fraudulently withdrawn from his account.

(20) Indeed in his written statement **DW1** admits that it was apparent that the withdrawals were made while the Plaintiff was attending Dialysis sessions in hospital. **DW1** goes on to suggest that the withdrawals may have been made by the Plaintiff either before or after visiting the Dialysis Centre. However, the time of each withdrawal is noted on the debit slip. The Court takes judicial notice that it takes at least 3 hours to drive from Nairobi to Nyahururu. I was able to observe the Plaintiff as he testified to Court. He was an elderly gentleman who was clearly ailing. It is unlikely that in his condition the Plaintiff would leave a Dialysis session and make a mad dash to the bank in **Nyahururu** to make a withdrawal. I do find that it was not the Plaintiff who made the withdrawals in question from the Nyahururu Branch.

(21) Since it was not the Plaintiff who made the disputed withdrawals from his two accounts the obvious question that arises is who did withdraw these funds from the Plaintiff. Upon receiving the Plaintiffs complaint the Defendant Bank commissioned an investigation into the matter. After being directed by the Court the Defendant did file their **Investigation Report No. 6 of 2010** on **24<sup>th</sup> July 2019**. This report indicates that the hand writing expert confirmed that the signature of the Plaintiff appearing on the debit slips had been forged. That the bank cashiers failed to forward all the withdrawal vouchers thus some were missing. Tellingly one finding reads that:-

**“From the receipts I confirmed that there were dates where the monies were withdrawn from the [Plaintiffs] two accounts while he was at the hospital in Nairobi for Dialysis procedure ...”**

(22) It came out in evidence that one of the bank cashiers was sacked as a result of this incident and was charged with a Criminal offence at **Nyahururu Law Courts**. That employee who is named in the Investigation Report as **M/s Irene Muturi** was implicated for targeting elderly customers such as the Plaintiff and debiting their accounts without their knowledge (see page 7 of Investigation Report). As stated earlier the Plaintiff was an elderly gentleman and was visibly ailing. The Defendant Bank had a duty to protect its clients from exposure to fraud by its agents and employees.

(23) In **FIDELITY COMMERCIAL BANK LIMITED –VS- ITALIAN MARKET KENYA LIMITED (2017)eKLR**, it was observed that the customer is not obligated to be checking its accounts every other day to confirm that the account is safe. As long as a customer keeps his / her end of the bargain by ensuring that he refrains from doing acts that may facilitate fraud or forgery, like not drawing cheques as per the generally accepted instructions given by the bank acting in good faith; and alerting the bank of any inconsistencies in the bank accounts as soon as possible, then the bank is expected to keep the customer’s account safe.

(24) In **BARCLAYS BANK OF KENYA LIMITED –VS- DIANA SAMBO MWASELA [2020]eKLR** the Court observed that:-

**“In light of the foregoing, if the bank allowed dubious, unauthorized transactions to slip through, then it takes the risk of being held accountable to the customer and in the process losing money. The Appellant failed to discharge its duty of care to the Respondent in the manner it maintained the Respondent’s account, it can’t run away from this responsibility. When a customer opens an account with the bank, there is a reasonable expectation on the part of the customer that the bank will apply its skill, expertise and all manner of safeguards to ensure that the customer’s money is safe from unwarranted and unauthorized withdrawals.” [own emphasis]**

(25) I find that the Defendant breached its duty to care to protect the funds entrusted to it by its client (Plaintiff) from the nefarious activities of the banks employees.

(26) The Defendant submits that the Plaintiff was negligent in failing to make his complaint as soon as possible or at least within the 15 days period provided by ..... The Plaintiff retorted that he did not receive bank statements regularly and it was only after obtaining his bank statements from the bank that the anomalies become obvious. The Defendant cannot evade liability by hiding behind this disclaimer. The Defendant is liable for the actions of its employee/agent.

(27) Finally I am satisfied that the Plaintiff has proved its case on a balance of probability. The Plaintiffs suit succeeds and I hereby enter Judgment in favour of the Plaintiff and against the Defendant for **Kshs. 16,317,424/-** together with interest at Court rates from the date of filing of this suit until payment in full. Costs follow the event. I therefore award costs of the suit to the Plaintiff together with interest at Court rates until payment in full. It is so ordered.

**Dated in Nairobi this 18<sup>TH</sup> day of DECEMBER, 2020.**

.....

**MAUREEN A. ODERO**

**JUDGE**