



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MILIMANI (NAIROBI)

COMMERCIAL AND ADMIRALTY DIVISION

CIVIL CASE NO.594 OF 2014

AVENUE HEALTHCARE LIMITED.....PLAINTIFF

VERSUS

CHASE BANK LIMITED.....DEFENDANT

J U D G E M E N T

INTRODUCTION

The plaintiff filed this suit on 06th December 2014 against the defendant seeking the following prayers:-

1. **The sum of kshs 6,966,586.50**
2. General damages
3. Interest at courts rate
4. Costs of this suit

The defendant filed defence on 15th January 2015.

PLAINTIFF'S EVIDENCE

The plaintiff availed one witness Diana Clair Jacobson Patel who is the former executive director of the plaintiff company. She confirmed that she signed witness statement dated 4th April 2016 which was filed on 6th April 2016 and adopted the statement as her her evidence. She also relied on documents filed bundle, which she produced as exhibit 1.

Pw1 testified that the plaintiff never opened an account in chase bank (defendant) and that it maintained an account in Barclays Bank. She testified that she did not know who opened the account in chase bank city centre. She said the photograph in the account opening form is not hers and that the names are not her correct names.

Pw1 further testified that as Annual returns of 31st December 2012, The directors of the plaintiff were as follows:-

1. PW1
2. Nilesh Bhailal Bhai Patel
3. Shakir Merali

Pw1 showed court list of directors and receipt for filing annual returns dated 2nd may 2013 at page 30 and 40 of the bundle of documents respectively.

Pw1 testified that Nilesh Bhailal Bhai Patel is her husband. She testified that the plaintiff did not have a 4th director by the name Soni Nikul Kanibhai and that she does not know a person by that name. She denied having signed a board resolution to open an account at chase bank and that she does not know the person indicated as company secretary. She added that the company secretary was Guy spencer ELMS the

person who signed the 2013 annual returns. That the Identity card used to open the account in defendants ban is not hers and that at the time, she was using passport for identification, as she was not a Kenyan citizen.

She also denied certificate of incorporation used to open the account and that the genuine certificate is the one on page 19 of the plaintiff's documents. She said that the signature of registrar of companies is different from the one they have and that she did not meet with the bank official neither did they approach the bank to open an account. She said that she first met Caroline mutuku in September 2013 when she went to sse in the hospital and informed her that there was a problem with their account. She said at the time she met her, she was shocked to learn that the the account had already been opened. She said that she gave her and her husband gave her their specimen signatures and copy of certificate of incorporation.

Pw1 confirmed that 6.9 million passed through the account and that kshs 700,000 was withdrawn in cash. She showed court cheques deposited in the account, which belonged to the plaintiff. She said that cheques paid through that account are for kshs 6,966,586.50 and that the money never reached the plaintiff. She said that the cheques were received at the hospital but were taken to that account by a member of staff.

Pw1 said that the plaintiff has sued the bank because it to exercise due diligence. She said that the bank was extremely negligent and explicit with fraudsters and that the plaintiff would want the money paid back.

In cross-examination by counsel for defendant, Pw1 testified that Galma Halake was allowed to fill in books of accounts and he would take the checks to Barclays bank to deposit. He said that the plaintiff never realized that some deposit slips were missing. She said it would take time to verify, as at the time, the management was busy opening up a branch in Kisumu. She said that she did not expect a bank in Kenya with strict instructions from central bank to open an account in the manner the chase bank account was opened. She said the chase bank account was opened on 27th June 2016 and they discovered it on 10th September 2013. She said for the 3 months the account operated, the plaintiff did not notice that 17 cheques were missing. She said it was assumed that the cheques were deposited in Barclays bank. She said it could take 2 to 3 months to reconcile the accounts and the account department could not be blamed for it. She stated that the bank colluded to open an account for fraudsters.

DEFENDANT'S EVIDENCE

The defendant availed three witnesses. Pw1 who Works for defendant as legal assistant adopted his witness statement dated 9th July 2018 informed court process for account opening. He said a search to confirm directors of a company in sharia house is one of procedures undertaken before a company account is opened. He testified after the search he presented his report to account opening department through email. He said the manager relations officer pick the information.

In cross-examination, DW1 said that his search revealed directors of plaintiff as follows:-

1. Diana Clair Jacobson
2. Nilesh Bhailabhai patel
3. Amit Niranjana Thakker

DW1 said she never saw the name Soni Niku Karubhai

DW2 who works for the defendant as transactions monitoring manager testified that at the material time, he was the assistant branch manager at city centre branch. He said that his role was to ensure that the relations officer comply with all documentations, which include-

1. Production of account opening documents
2. Being presented with original documents upon meeting with client
3. Ensure that the customer is not in the bank blacklist

He further testified that once he has receives the documents, he looks at original identification documents of the directors to ensure that the officer concerned got original identity card or passport, certificate of incorporation, memorandum and articles of Association, board of directors resolution, pin certificate of the company and passport photographs of the directors.

He informed court that he received all the documents were presented together with certificate of assurance confirming that all the documents were attached. He proceeded to sign thus giving authority to have the account opened subject to company search at the registrar's office.

In cross-examination by counsel for the plaintiff, DW2 confirmed that she personally received documents from Caroline Gakii Moturi who was the relations officer. He relied on documentations presented to her by the said Caroline.

He confirmed that the relations officer is required to meet the customer personally and he believed Caroline complied with the requirement.

He confirmed that some documents have the name Avenue Healthcare Ltd and others Avenue group Ltd and the assumption is that the two names are the same.

He added that it is not mandatory requirement for a person opening an account to be introduced by an account holder; and that he was not aware that Caroline went to ask for specimen signatures from the plaintiff 2 months after opening the account. He concluded that the bank did its best by observing internal controls.

Dw3 the defendant's legal counsel testified that the legal department gives legal advice in respect to compliance with account opening requirements. He testified that the bank complied with prudential guidelines 2013; know your customer and Anti-money Laundering requirements. He said the bank complied with all internal requirements for opening an account; that there is no negligence on part of the bank in opening the account herein.

In cross-examination, DW3 confirmed that the memorandum of Association and Articles of Association are for Avenue Health Care Group and not Avenue Health Care Ltd.

He said the 4th person in the list at page 26 of the documents may be representative as one may be introduced into the account as signatory. He however confirmed that in the board resolution, he is referred to as a director. He informed court that Caroline Muturi resigned from the defendant's employment.

In further cross-examination, DW3 confirmed that there were variations on signatures in the certificate and what the bank relied is a forgery. He further confirmed all the pin certificates have the same date/were issued the same date. He said pin certificate was not a requirement before and there is possibility that the company had not applied for one.

In re-examination, DW3 confirmed that the registrar's signature are not the same and the bank should have been able to tell which one was a genuine document.

ANALYSIS AND DETERMINATION

I have considered evidence adduced by the parties herein. I have also perused the submissions filed and authorities cited.

There is no dispute that persons purported to be directors of Plaintiff Company opened account number 0012078608001 in the defendant's city centre branch. It is not also disputed that plaintiff's 17 cheques for a total of kshs **6,966,586.50** were deposited in the said account.

Evidence adduced by plaintiff is that the said cheques were processed by the bank and money paid out to parties other than the plaintiff; that in the process the plaintiff lost the said amount.

What I consider to be in issue are as hereunder:-

- 1. Whether the defendant exercised due diligence while opening the account 0012078608001 City Centre Branch purported to be plaintiff's;**
- 2. whether the plaintiff is entitled to payment of 6,966,586.50 deposited in the said account and if so from who;**
- 3. whether the plaintiff is entitled to general damages; and**
- 4. whether the plaintiff is entitled to costs of this suit.**

The three defence witness outlined requirements for account opening as captured above. It is not in dispute that it is the bank's responsibility to ensure that the documents presented for account opening are genuine. From evidence adduced opening an account for a company is concerned, the relations officer is required to do a search and confirm who directors of the company are. The officer is also required to ensure that the incorporation certificate was genuine.

Dw2 and DW3 confirmed that the relations officer was required to see and verify the directors of the company in the bank. If this requirement were met, a possibility of opening an account unknown by the plaintiff would not have occurred. In cross-examination by plaintiff's counsel, DW3 confirmed that there is variance in documents presented to the bank with original ones leading to a conclusion that the documents presented to the bank were a forgery.

Plaintiff testified that the relations officer who opened the account went to the plaintiff to ask for specimen signatures on 26th September 2013. This corroborates the plaintiffs assertion that the persons who presented themselves to the bank were fraudsters who forged their signatures.

With the discrepancies noted and confirmed by defendant's witnesses, during cross-examination, there is no doubt that they would have been noted if the bank official involved was diligent in scrutinizing the documents and interviewing the parties before her.

Further, it is evident that there is variance in account name and name of plaintiff. Plaintiff's name is Avenue Health care Ltd whereas the account name is Avenue health care Group ltd. The bank relations officer who opened the account and thereafter bank tellers who received cheques drawn in plaintiff's name should have noted this anomaly.

Central banks prudential guidelines 2013 enjoin banks to exercise due diligence in opening accounts and to know its customer. From the documents availed to court the defendant bank failed to comply with the prudential guidelines, which resulted in loss of funds, by the plaintiff.

From the foregoing, I find that loss of funds by the plaintiff was occasioned lack of diligence on part of the defendant's employees and I proceed to hold the bank responsible for the loss. The plaintiff is therefore entitled to payment of kshs 6,966,586.50 lost from the defendant. The defendant are at liberty to follow the fraudsters for indemnity.

The plaintiff is also entitled to general damages for inconvenience resulting from loss of use of money and having to initiate litigation to recover. I award general damages of kshs 500,000.00

FINAL ORDERS

1. Judgment is entered for plaintiff against the defendant for a total of kshs 7,466,586.50
2. Costs of this suit to be paid by defendant to plaintiff.
3. Interest on 1 above at court's rate from the date of judgment till payment in full.

Judgment dated, signed, and delivered at Nairobi this 14th day of March 2019.

RACHEL NGETICH

JUDGE

In the presence of:

Mr. Wanjohi for the Plaintiff

Mr. Wachira for the Defendant

SophieCourt Assistant