



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MILIMANI (NAIROBI)

COMMERCIAL AND TAX DIVISION

CIVIL CASE NO.158 OF 2009

BEYOND KENYA LIMITED.....1ST PLAINTIFF

CONSERVATION CORPORATION (EAST AFRICA)

HOLDINGS LIMITED.....2ND PLAINTIFF

VERSUS

GULF AFRICAN BANK KENYA LIMITED.....DEFENDANT

JUDGMENT

1. The plaintiffs **AND BEYOND KENYA LIMITED** and **CONSERVATION CORPORATION EAST AFRICAN HOLDINGS LIMITED** through an amended plaint dated 20th June 2016 sued **M/s GULF AFRICA BANK LIMITED** seeking judgment against the defendant for USD 48,556.38 with interest at 24% per annum, cost of the suit with interest at court's rate from the date of judgment until payment in full and any other relief that the court deems fit to grant.
2. The defendant through an amended defence dated 9th August 2016 denied the plaintiff's claim and prayed that the suit be dismissed with costs.
3. At the hearing of the suit the plaintiff called two witnesses, **PW1** Theresia Pereira, who adopted her witness statement as her evidence in chief (**Exhibit P-4**) and produced list of documents Nos. 1 – 80 (**Exhibit P-1, P-3 and P-4**). **PW2** Catherine W.M. Murange adopted her witness statement (**Exhibit P-5**) as her evidence in chief and relied on the list of documents produced by **PW1** as exhibits.
4. The defence called one witness **DW1**, Ahmed Omari who adopted his witness statement (**Exhibit D-1**) as his evidence in chief and list of documents (**Exhibit D-2**) and supplementary list of documents (**Exhibit D-3, D-4 and D-5**).

Plaintiff's Case

5. The plaintiffs claim is that the defendant opened two accounts in the name that resembled the plaintiffs' name using fraudulent documents and cheques payable to the plaintiffs were cleared to those accounts with consequences that the plaintiffs were deprived the sum of USD 48,556.38 which sum the plaintiffs claims from the defendant with interest.

Defendant's Case

6. The defendant admit that sometimes in April 2008 an account was opened under the name of Conservation Corporation Africa (K) Limited but state that was done after conducting all due diligence and upon presentation and identification cards of the Directors of the said company, together with Memorandum and Articles of Association, minutes of meeting of the company and a letter of introduction. The defendant denies any wrong attributed to it or its employees stating it received and collected payment for the cheques in the ordinary course of its business and on discovery that cheques were being fraudulently made out to "*Kichwa Tembo Tented Camp*" it immediately took step to notify the 2nd plaintiff herein and stopped collection of the same. It is defendant's contention that its conduct was above board on this and contends it is not liable for any conversion as urged by the plaintiff's. It is further contended by the defendant it received the monies in good faith and paid them over to the customer before they were claimed by the plaintiff's hence the defendant urges it is not liable to make any restitution to the plaintiffs of the alleged sums or any interest thereof. It further urges it cannot in law be held responsible for a fraud committed on plaintiffs by plaintiffs own employees, servants or agents.

Background

7. The 1st plaintiff was until 12th November 2008 known as "*The Conservation Corporation Kenya Ltd*" but thereafter changed its name to "*And Beyond Kenya Ltd*". The 2nd plaintiff "*Conservation Corporation (East Africa) Holding Limited*" is the 1st plaintiff's holding company and is the registered proprietor of the business name known as "*Kichwa Tembo*".

8. In April 2008, some individuals going by the names of "*Lawrence Kyalo Ndutu*" and "*Thomas Migot Achola*" purporting to be directors of a Phanton entity called "*Conservation Corporation African (K) Ltd*" opened a bank account with the defendant herein, under account name and number the "*Conservation Corporation Africa (K) Ltd*"; Account Number – xxxxxxxx-xx.

9. In May, 2008 a person called John Orwa Odolo, purporting to be the Director of an entity called "*Kichwa Tembo Tented Camp*" opened two accounts with the defendant herein under the names "*Kichwa Tembo Tented Camp*", Account Number – xxxxxxxxx and USD 1520002002.

10. Between April – August 2008, one Judith Mutanu, the plaintiffs' former credit controller, who has since been convicted, stole cheques payable to the plaintiffs. The cheques were deposited and credited into the said accounts being total sum of USD 48,556.38.

11. I have very carefully considered the pleadings, the evidence adduced before me by both parties, witnesses statements and list of documents and written submissions by the plaintiffs dated 11th December 2018; plaintiff's further submissions dated 28th January 2019 as well as the defendant's submissions dated 14th January 2019. From the above the issues for consideration can be summed up as follows:-

a) **Whether the Defendant Bank was negligent in opening the accounts complained of?**

b) **Whether the Defendant Bank is liable for conversion of the plaintiffs money?**

A) Whether the Defendant Bank was negligent in opening the accounts complained of?

12. The plaintiffs contend, that sometime in April 2008, persons not known to the plaintiffs purported to open accounts with the defendant at its Kenyatta Avenue Branch, within the City of Nairobi, being account Number xxxxxxxxxx under the name "*the Conservation Corporation Africa (K) Limited*", purportedly registered under number D 529160 on the 20th June 2001 and account Numbers xxxxxxxxxx and xxxxxxxxxx under the name "*Kichwa Tembo Tented Camp*" purportedly registered under registration number 392322 on the 6th April 2004.

13. The bank in carrying out its core business of deposit taking, it is required to open and maintain bank accounts. In discharging its mandate it is its duty to satisfactorily establish and verify the customer's true identity and in doing so, it must be alert to the even present danger that after opening of the account, may be used for fraudulent purposes.

14. The defendant herein as a bank licenced under the Banking Act, in its operation, it is supposed to strictly be guided by the Central Bank of Kenya Guidelines on proceeds of crime and money laundering (*prevention*) **CBK/PG/08**; guidelines 4.1 (a) which states that;

"A bank is expected to ensure that the management obtain and maintain proper identification of customers wishing to open accounts or make transactions..." Further, Guideline 4.2 (a) makes it mandatory for a bank to verify the identity of a customer when establishing initial business relations."

15. In case similar to Phanton entity called Conservation Corporation Africa (K) Ltd and "*Kichwa Tembo Tented Camp*" the guideline 4.3.1.3 (c) provides; a bank must obtain written confirmation from the customer's previous bank if any to attest to the customer's identity. It was the obligation of the bank during the opening of the two accounts to have sought true identity of the customer's opening the accounts and depositing the cheques namely:- Lawrence Kyalo Ndutu and Thomas Migot Achola, in respect of directors of conservation Corporation Africa (K) Limited and John Orwa Odolo in respect of the director of "*Kichwa Tembo Tented Camp*."

16. **DW1** Ahmed Omari, testified the Bank received documents before opening the two accounts. **DW1** in cross-examination testified that he could not verify whether the documents of registration of the company were issued by the Registrar of Companies and averred as a bank they do not screen or verify the authenticity of certificates purportedly issued by the Registrar. He further confirmed that the Registrar issued a letter confirming the companies for which the bank opened accounts and accepted deposit do not appear in the Registrar data Base. He further admitted the certificates of Registration for both companies were not issued by the Registrar of Companies. He further confirmed that though the persons claiming to be directors of the two separate companies, appeared before the bank, the bank did not check on the authenticity of their National identity cards nor did they compare their names in the identity card and those in their respective pin cards notwithstanding the same have different names. He agreed the dates of Registration of the companies were different in different documents produced by the alleged directors. **DW1** further agreed that thought the cheques were issued before the opening of the two accounts; the bank did not bother to check why the cheques were issued before the opening of the accounts. He further admitted on introduction letters issued by purported Advocate; the bank did not bother to check with **LSK** whether the Advocate Companies issuing the letters existed. **DW1** eventually admitted the Bank had not done due diligence and had it done so, this matter would not be before court.

17. I have considered the defence testimony through **DW1**, and I have no doubt that though the defendant tried to be evasive in responding to the plaintiffs counsel questions he struck me as not a truthful witness. I find from **DW1**'s evidence, the defendant did not only fail to carry out due diligence before and during the opening of the two accounts, but it proceeded on wrong presumption, that it was under no obligation to do due diligence as **DW1** was of the view under cross-examination, that the Bank was not required to verify anything regarding the identity of the customers and authenticity of their documents; which averment, in my view is absolutely wrong.

18. From scrutiny of the documents relied upon by the defendant, in opening and maintaining the two accounts, it turned out that the defendant failed to exercise due diligence; the two accounts were hastily opened without undertaking any form or type of due diligence based

on the CBK Guidelines; the Bank failed to notice the visual, phonetic, fraudulent and confusing similarity between the name "*Conservation Corporation East Africa Holdings Ltd*" and "*Conservation Corporation Africa (K) Ltd*"; "*Kichwa Tembo*" and "*Kichwa Tembo Tented Camp*"; by neglecting to carry out any official search at the Companies Registry to verify the authenticity of certificate of incorporation for "*Conservation Corporation Africa (K) Ltd*" and "*Kichwa Tembo Tented Camp*." The bank further in its negligence, it overlooked a glaring irregularity in the minutes of a meeting purportedly held by the Directors of "*Conservation Corporation Africa (K) Ltd*" when one Nganga who was not present, is said to have participated in the deliberations and discrepancy with regard to the identity of one of the purported directors despite a blatant mismatch in names on **KRA** personal identification number (Pin) certificate Lawrence Kyalo Ndutu and identification card Lawrence Kyalo Nduttu.

19. It is of great concern, that the bank herein failed to inquire from **KRA** about the particulars of the customers as regards anomalies in the forged Pin certificates which were stated to have originated from Domestic Tax Department and Income Tax Department. That notwithstanding "*Conservation Corporation Africa (K) Ltd*" having purportedly been incorporated in 2001, contrary to **CBK** guidelines 4.3.1.3 (e) the defendant did not both to enquire from the previous banking arrangements prior to opening the said account in 2008. The bank did bother to establish the physical address of John Orwa Odolo who supplied an expired tenancy lease agreement dated 2003 – 2004 when the account was being opened in 2008. The Bank did not enquire from **LSK** whether the law firm; "*Ochanda Onguru & Co. Advocates*" and "*Ocharo Momanyi & Co. Advocates*" which purportedly authorized the introduction letters for the Phantom entities actually existed.

20. In the instant suit, there is no dispute that the plaintiffs employee Judith, without 1st plaintiff's authority stole various cheques payable to the plaintiff for aggregate sum of USD 48,556.38 which were deposited into two accounts subject of this suit.

21. From the **DW1's** evidence and his admission that the bank did not carry out due diligence and considering the plaintiffs witnesses statements, I find that the defendant contention that it does not owe any liability to the true owner of the instrument by reason only of having received payment of it to be without basis. I find the defendant's defence incapable of absolving it from liability. It acted in complete disregard of the Banking Act, which guides licensed banks, in that it failed to obtain and maintain proper identification of customers wishing to open accounts or making transactions. It failed to comply with mandatory provisions, requiring a bank to verify the identity of a customer when establishing initial business relations. I find no reason why I cannot find the bank was negligent in the opening of the two accounts and in conducting its business.

22. In the **Court of Appeal in Standard Chartered Bank Limited vs Intercom Services Ltd & 4 others [2004] eKLR** the court expounded on the law as follows:- "The onus of establishing circumstances showing absence of negligence is on the banker. It is a matter of defence, and does not give a substantive cause of action. The extent of inquiry must be measured by what in the circumstances a fair minded banker paying due regard to the exigencies of banking business in relation to the person depositing the cheque would consider it prudent to do in order to protect the interest of the true owner and each case must depend on its own circumstances. (See *London Bank of Australia Ltd vs Kendall* (1920) 28 CLR 410, 411, 417). The standard of care required is that to be derived from the ordinary practice of bankers not individuals. (See *The Commissioner of Taxation vs English, Scottish and Australian Bank Ltd* [1920] AC 683 at page 689 and *Marfani & Co. Ltd vs Mindland Bank Ltd* [1968] 2 ALL ER 573). In the latter case, Diplock LJ said in part at page 579:

"What facts ought to be known to the banker, i.e. what inquiries he should make and what facts are sufficient to cause him reasonably to suspect that the customer is not the true owner, must depend on current banking practice and change as that practice changes. Cases decided thirty years ago, when the use by the general public of banking facilities was less much widespread, may not be a reliable guide to what the duty of a careful banker, in relation to inquiries and as to facts which should give rise to suspicion is today."

23. In **Ellinger's Modern Banking Law, 4th Edition, at page 639**, the learned authors summarize a fundamental principle in cases such as this one as follows:-

"In all cases of conversion, the bank's duty to act without negligence is given a reasonable construction. The bank is not expected to assume the role of an amateur detective, and need not be unduly suspicious."

24. In the case of **Printwell Industries Limited – vs – Barclays Bank of Kenya Limited (2013) eKLR**, Justice Havelock ruled that:

"In my opinion, the Plaintiff has established that there exists a right which has been infringed by the Defendant bank. The Defendant bank was in error in allowing the said Account No. [particulars withheld] to have been opened in the name of Printwell Industries Ltd."

25. Further, in the decision of **A & A Jewellers Limited vs Royal Bank of Canada (2001) Can LII 24012 (ON CA)** which was cited with approval by Justice Havelock in *Kenya Grange Vehicle Industries Ltd vs Southern Credit Banking Corporation Ltd* (2014) eKLR, JA Moldaver ruled that:

"In cases such as this, where a Bank is under a duty to make inquiries of its customer regarding a possible breach of trust, the Bank will be found to be in constructive knowledge of the breach of trust if it fails to make appropriate inquiries."

26. Justice Havelock ruled in the case of *Kenya Grange Vehicle Industries Ltd vs Southern Credit Banking Corporation Ltd* (2014) eKLR that:

"I find the Defendant guilty of negligence in the opening of the said bank account. The Defendant failed to take proper precautions so as to ensure that the holders (signatories) to the said accounts were legally who they said they were. The ostensible company as per the forged certificate of incorporation was formed on 24th December, 2003. Its so-called directors were seeking to open an account for the so-called company eleven (11) months later yet the Defendant failed to even check

whether the same was in operation, where was its premises and other obvious questions that should have been asked."

27. Having considered the defendant's conduct in opening the two accounts in the names of "Conservation Corporation Africa (K) Limited" and "Kichwa Tembo Tented Camp", I find that the bank did not act in good faith but that the bank was negligent by its failure to verify the true identity of the purported Directors of the two companies, and by failing to verify the documents supplied to them before allowing the purported Directors to open the two accounts and further in allowing cheques which had been issued before the opening of the two different accounts to be deposited into the two accounts. The bank was under obligation to make enquiries of the customers regarding the unmatched documents and was negligent in allowing the accounts to be open in face of glaring inconsistencies in various documents produced by the Directors. The bank was totally in error and negligent.

B) Whether the Defendant Bank is liable for conversion of the plaintiffs money?

28. Under this issue, the plaintiff position is that the bank is liable for conversion of the plaintiffs money whereas the defendant is urging the defendant is not liable to the plaintiff for the fraud, that was facilitated by plaintiffs' former employee.

29. In the instant suit, having considered the conduct of the bank in opening the two accounts, I find it would be unjustified for the bank to claim, that it is not liable having acted negligently and in bad faith when opening the two accounts, to which it credited the said accounts with the plaintiff's cheques. The bank in doing so failed to exercise reasonable commercial standards set by law. It failed to verify the identities of the persons, who purported to be directors of the company which opened the accounts. There was total omission of verifying the false documents used by the said persons.

30. In the case of **KwaMashuu Banking vs Standard Bank (1995) (1) SA 377 (D)**, it was ruled that:-

"In the case of a stolen cheque the loss only occurs because of the intervention of the collecting banker. The thief is unable to gain access to the money once he steals a cheque and he is only able to convert the cheque to cash because of the conduct of the collecting bank."

31. Judge Combrinck ruled in the case of **KwaMashu Bakery Ltd vs Standard Bank of South Africa Ltd (supra)** that:-

"As a first step towards protection of the true owner of a cheque, it is expected of a reasonable banker to not only satisfy himself of the identity of a new client but also gather sufficient information regarding such client to enable him to establish whether the person is the person or entity which he, she or it purports to be."

32. The 20th edition of **Clerk & Lindsell** on Torts at paragraph 17-37, opines that:-

"Cheques, negotiable instruments and other securities are considered corporeal property. Their sole value is as choses in action, which cannot be converted. If, however, such physical documents are unlawfully dealt with, as where a cheque is stolen and paid into a bank account controlled by the thief, the person entitled to them may recover full damages based on their value as choses in action."

33. In view of the facts of this case, I find a payment of a cheque to someone who cannot verify the cheque was meant for him or who is not the true owner is not only unlawful and wrong but is an act of conversion. I therefore find the defendant is liable for the loss suffered by the plaintiffs.

34. The plaintiffs seek interest at a rate of 24% per annum. The plaintiff's claim in this matter is for a liquidated amount. No basis has been laid before this court for claiming an interest at a rate of 24%. There was no agreement on the interest rate between the parties at 24% per annum. **Section 26 of the Civil Procedure Act** provides interest rate payable in matters where the claim is for a liquidated amount may be granted from the date of the suit. In absence of an agreed rate of interest in this matter, I find that it would be proper and reasonable to award interest at court rate from the date of the suit.

35. The upshot is that the plaintiffs suit succeeds. I enter judgment for the plaintiffs against the defendant for:-

a) USD 48,556.38 with interest at court rate from the date of filing the suit till payment in full.

b) Costs of the suit with interest at court rate from the date of judgment till payment in full.

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

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J .A. MAKAU

JUDGE