



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI COMMERCIAL & TAX DIVISION

CIVIL CASE NO. 667 OF 1997

KENYATTA NATIONAL HOSPITAL BOARD.....PLAINTIFF

VERSUS

KENYA COMMERCIAL BANK LIMITED.....1ST DEFENDANT

DAIMA BANK LIMITED2ND DEFENDANT

J U D G M E N T

1. The Plaintiff Kenyatta National Hospital Board (hereinafter KNH) is a state corporation established in accordance with Section 3 of the State Corporation Act. It is the largest referral hospital in Kenya.
2. The 1st Defendant, Kenya Commercial Bank Limited (herein after KCB) and 2nd Defendant, Daima Bank Limited (hereinafter Daima) are limited liability companies incorporated under Companies Act and licenced to operate as Bank under the Banking Act Cap 488.
3. At all material time KNH held an account with KCB at its Moi Avenue branch, Nairobi. KNH has brought this case against KCB and Daima, alleging fraud on their part, and seeking judgment against both those banks, jointly and severally, for Kshs.11,538,177.60. KNH also seeks judgment for general damages.

BACK GROUND

4. KNH operated its account with KCB, account No.329-977-2010, at its Moi Avenue Branch Nairobi.
5. On diverse dates KNH issued five cheques, on its KCB accounts, to its various creditors for total amount of Kshs. 11,538,177.60. Those cheques were however not paid to KNH creditors but to Mathenge Investment through its account at Daima. Those cheques were: cheque no. 173308 dated 27th February 1995 for Kshs. 361,965, payable to City Treasure on behalf of City Council of Nairobi; cheque No. 173788 dated 18th April 1995 for Kshs. 3,181,578.55, payable to Minet ICDC; cheque No. 173635 dated 28th March 1995 for Kshs. 2,332,596.55 payable to Minet ICDC; cheque No. 173974 dated 9th May 1995 for Kshs. 2,617,280.85; and cheque No. 224274 dated 7th August 1995 for Kshs.3,044,656.55.
6. The intricacies of exactly how exactly cheques drawn by KNH and payable to its creditors- ICDC or City Treasure, ended up being paid to Mathenge Investment only became clear when the account holder of Mathenge Investment, at Daima, was arrested and charged alongside a clerk of Daima. The evidence of the fraudulent acts, towards those cheques was adduced, at the criminal trial, by the senior sergeant of police Paul Leting. That Police Officer was attached to the Banking Fraud investigation Department. On 8th September 1995 while in the office he was instructed to investigate fraudulent handling of cheques amongst which were KNH cheques. His inquiries led him to find that the KNH cheques were cleared through Daima into the account of Mathenge Investment. His investigation revealed that the cheques drawn through KCB were substituted by other dummy cheques, for similar amount, and the substituted cheque was banked at Daima. However when the Daima cheques were taken to the clearing house the genuine cheques of KNH were taken to the clearing house. Those genuine cheques were cleared for payment by KCB. The money however was credited to Mathenge Investment account at Daima.
7. KCB denied KNH claim. Its case is that it collected the cheques and properly credited Daima with proceeds. That the payment of those cheques were done in the ordinary course of business at the clearing house. KCB specifically denied that it acted fraudulently or negligently.
8. Daima also denied the claim for refund and specifically denied the claim of fraud and negligence.

ANALYSIS AND DETERMINATION

9. The issues that I will consider in this matter are only two:

They are:

a) *Did the Defendants act fraudulently and/or negligently in their handling of the Plaintiff's cheques.*

b) *Who shall bear the costs?*

10. It is not denied that KNH issued the five cheques in question which were payable to its creditors, that is city treasure and Minet ICDC. Those cheques were crossed account payee only. The only party who should have benefited from the proceeds of those cheques, unless they were otherwise endorsed, were the payees. In this case it is accepted by all the parties that KNH did not, nor did the payees endorse those cheques to be paid to any other third party. That notwithstanding those cheques, through Daima, were paid to Mathenge Investment which entity was not the payee addressed in those cheques.

11. The evidence adduced, in this matter shows that KCB and Daima played very different roles in the payment of those cheques.

12. KCB was KNH's banker. The cheques KNH issued were for the account KNH had with KCB. KCB, through its submissions, relied on the passage in Halsbury's Laws of England Vol.3 (1) which discussed the role of a paying bank. That passage is as follows:

"A banker is bound to pay cheques drawn on him by a customer in legal form provided he has in his hands at the time sufficient and available funds for the purpose."

KCB's witness, Leonard Muoki, stated that the subject cheques were presented to it as the collecting bank by Daima at the Central Bank Clearing House. KCB took possession of those cheques for the purpose of processing payment. Once KCB was satisfied that the signatures, on those cheques, were genuine and that they had been signed in accordance with the mandate, held by KCB, and that there was sufficient funds in KNH's accounts, KCB honored those cheques. He stated that the payment of those cheques was done by KCB in the ordinary course of business and not fraudulently or negligently.

13. From the above evidence it is clear that KCB was the paying bank.

14. Daima was the collecting bank of the subject cheques. As stated before evidence was adduced which revealed that the cheques were issued by KNH, and were payable to City Treasurer and Minet ICDC. Those cheques were crossed account payee only. They therefore should only have been paid to City Treasurer or Minet ICD, respectively.

15. In reality however this is what happened. In respect to the cheque of Kshs. 361,965 payable to City Treasure the proprietor of Mathenge Investment banked on 30th March 1995 in his account, with Daima, what the investigating Officer called a dummy cheque, for exactly or more less the same amount that is Ksh.361,965.10. When Daima presented cheques for clearance at the clearing house of Central Bank of Kenya the dummy cheque was substituted for the actual cheque KNH had issued for Ksh.361,965, payable to City Treasure. KCB as the paying bank, on confirming that the cheque was genuine and that the signatures were in accordance with the mandate it held for KNH proceeded to pay Daima. Daima on receipt of that payment credited Mathenge Investment. That procedure was followed in respect to the four other cheques issued by KNH to Minet ICD.

16. It is also evident from the documents presented in court that the proprietor of Mathenge Investment, namely Simon Chege Waweru was criminally charged, alongside the clerk of Daima who took the cheque to the clearing house. They were charged with the offences of stealing contrary to section 275 of the penal code, and the offence of obtaining money by false pretences contrary to section 313 of the Penal code. Simon Chege, the proprietor of Mathenge Investment was convicted of 15 counts, whilst Wilson Kimutai Siima, Daima's clerk was acquitted for lack of evidence.

17. Although Daima's relied on the clerk's acquittal, it needs to be stated that the standard of proof in criminal cases is beyond reasonable doubt. In Civil however it is on a balance of probability.

18. The Plaintiff sufficiently shifted the burden of proof on a balance of probability onto Daima to prove that there was no wrong doing when it received a dummy cheques, it presented KNH cheques to KCB for clearance and once it received that clearance from KCB it paid someone else other than the payee of those cheques, that is Mathenge Investment. Daima did not rebut the evidence presented that the wrongful payment of KNH cheque to a person other than the payee, was not due to its fraudulent and negligent act.

19. The fraudulent and negligent actions of Daima commenced from the time its employee introduced the proprietor of Mathenge Investment in order for him to open an account with Daima, through which account all the cheques of KNH, the subject of this case, were paid. The fraudulent and negligent actions were further committed by Daima's clerk who presented KNH cheques for payment by KCB. As stated before Daima did not rebut the Plaintiff's evidence, and it was not sufficient for Daima to say that its staff were on a frolic of their own. The acts that those members of staff did when opening the account of Mathenge Investment and taking the KNH cheques for clearance was within the duties they were employed to do for Daima. Those acts were not acts for the benefit of the employees. The Plaintiff's claim for general damages fails because the Plaintiff did not sufficiently show how it release its cheques which were eventually paid to the wrong person. That claim will fail.

20. I find and hold that the Plaintiff has proved its case against the 2nd Defendant, Daima. The Plaintiff did not prove any fraudulent or

negligent act by KCB. Having made that finding I will order Daima to pay the KNH and KCB's costs of this suit.

21. There shall be judgment in the following terms:

a) Judgement is hereby entered for the Plaintiff against the 2nd Defendant for Kshs. 11,538,177.60 plus interest at court rate from the date of filing suit until payment in full. The case against the 1st Defendant is dismissed.

b) The 2nd Defendant shall pay the costs of the Plaintiff and of the 1st Defendant.

DATED, SIGNED and DELIVERED at NAIROBI this 30TH day of MAY, 2019.

MARY KASANGO

JUDGE

Judgment Read and Delivered in Open Court in the presence of:

Sophie.....COURT ASSISTANT

.....FOR THE PLAINTIFF

.....FOR THE 1ST DEFENDANT

.....FOR THE 2ND DEFENDANT