



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO. 699 OF 2017**

**CO-OPERATIVE BANK OF KENYA LIMITED.....APPELLANT**

**VERSUS**

**NGERA MUUTHAMI T/A ROZINA TRANSPORTERS.....RESPONDENT**

***(Appeal from the Judgment and order of the Principal Magistrate***

***at Nairobi (Hon. D.W Mburu(Mr)) dated 20<sup>th</sup> February, 2018 in***

***Civil suit No. 4295 of 2013)***

**JUDGEMENT**

**Introduction:**

1. This is an appeal from the Judgment and orders of Hon. D.W Mburu (Principal Magistrate) delivered on 22<sup>nd</sup> February, 2018 at Nairobi where judgment was entered in favour of the Respondent. The Respondent claim was for general damages against the appellant for breach of fiduciary duty and negligence. He was awarded general damages of Kshs. 500,000/= plus costs of the suit. The appellant being dissatisfied with the said judgment filed the instant appeal on the following grounds as per their submissions that the Respondent suit was time barred and secondly that the Respondent did not prove his case on a balance of probability.

**Background:**

2. The genesis of this appeal is the Respondent plaint dated 30<sup>th</sup> May, 2013 and filed on 17<sup>th</sup> July, 2013 seeking general damages from the appellant for breach of fiduciary duty and negligence. The respondent opened and operated account No. 0110\*\*\*\*\* with the appellant and alleged that the Appellant acted out of negligence and breach of contract when without any justifiable reason froze his account. He alleges that the appellant acted without a court order.

3. Additionally, he alleged that the appellant paid out money from his account without his authority or instructions and that they also gave out personal account details to third parties, which information they had been given in confidence therefore amounting to breach of trust and fiduciary duty owed to him by the Appellant bank.

4. Pursuant to the said freezing of his account, the Respondent alleged that he suffered loss of opportunity, was subjected to mental and physical anguish as he was charged in Criminal Case No. 2407 of 2005 at Nairobi Law Courts, which he was later acquitted. Further, he alleged that the appellant despite the High Court in Nyeri HCC No. 108 of 2008 reaching a finding that the money in the said account belonged to him, they continued to freeze the same despite the said orders. It was his main claim that the freezing of his account without any notice to him and neither was it justifiable and therefore claimed damages for breach of contract and negligence.

5. In response to the Respondents allegations, the appellant alleged that they froze the respondent account Number 0110\*\*\*\*\* under the name Rozina Transporters which had the sum of Kshs. 1,955,127/= in line with the terms and conditions of opening account form due to discovery of fraudulent dealings. They allege that the Respondent had another account with them account no. 0110\*\*\*\*\* in the name of Mununga Factory Limited, which the respondent was a signatory and that the amount of Ksh. 2,050,000/= which the suspected originated from this account. They also alleged that they noted there was another account No. 0110\*\*\*\*\* under the name Mununga Tea Factory Limited. And that as a result of the said developments the matter was taken over by the Bank Fraud Investigations Unit where the Respondent was charged in Criminal Case no. 2407 of 2005.

6. Additionally, they allege that the High Court in Civil case No. 108 of 2008 reached a finding that the money belonged to the Respondent and in compliance with the orders released the said amount and unfroze the Respondents account.

7. Further, they denied that they passed the Respondents information to unauthorized third parties arguing that they only passed the information to Bank Fraud police who were the investigating officers in the criminal case facing the Respondent. Furthermore, they denied withdrawing unauthorized funds from the Respondent account.

#### **Submissions:**

8. Both parties filed their written submissions.

9. The appellant filed their written submissions dated 8<sup>th</sup> August, 2019 and filed on even date, where they addressed two grounds of their appeal. The first ground argued by the appellant is as to whether the suit is time barred. In this regard they submitted that the cause of action which is the subject matter of this suit is the freezing of the Respondent account on 21<sup>st</sup> October, 2005, and that the statutory period for filing such claims is six years as provided for under section 4(1) (a) of the Limitation of Action Act Cap 22 Laws of Kenya, therefore in this case the Respondent ought to have filed his claim before or on 20<sup>th</sup> October, 2011. They allege that since the respondent suit herein was filed on 17<sup>th</sup> July, 2013, the same is time barred for being filed outside the statutory limit.

10. They allege that the existence of criminal proceedings against the Respondents did not stop time from running. In this they relied in the cases of *Attorney General & Another vs Andrew Maina Githinji & Another (2016) eKLR (Court of Appeal)* and *Haron Onyanja vs National Police Service Commission & Another (2017) eKLR*.

11. The second issue addressed by the Appellant is as to whether the Respondent proved his case on balance of probability. In this regard they submitted that their action in freezing the Respondent account was in line with paragraph 22 of the terms and conditions attached to the account opening forms, which provided that the bank may freeze a customer's account in case of a dispute or had a doubt for any reason whether or not well founded.

12. It is their case that they froze the Respondent account on suspicion, which they reported to the Banking fraud unit police, and later the Respondent was charged. It is their position their investigation revealed that the Respondent held two accounts with them A/c No. 0110\*\*\*\*\* and A/c No. 0110\*\*\*\*\* in the name of Mununga Tea Factory Limited, and that there was also another account in the name of Mununga Tea Factory Limited A/c No. 0110\*\*\*\*\* with different shareholders from the Respondent. They allege that they discovered that the two companies had different registration numbers arousing their suspicion.

13. They submitted that pursuant to their suspicion, they froze the said account as they were dormant and all of a sudden received the sum of Kshs. 2,050,00/=. They added that the Nyeri High Court in Civil Case No. 108 of 2008 resolved the dispute finding that the money belongs to the respondent, being tax refunds from Kenya Revenue Authority. They submitted that they complied with court orders and unfroze the respondents account.

14. The Respondent through their written submissions dated 2<sup>nd</sup> September, 2019 and filed on 3<sup>rd</sup> September, 2019 equally addressed the issues raised by the appellant. On the first issue as to whether the suit is time barred, he submitted that the freezing of his account subsisted until the filing of the suit in which the appeal herein arose, arguing that only the appellant knew the time they froze his account as he was not notified until the suit in Nyeri High Court No. 108 of 2008 was filed and his being charged in Criminal case No. 2407 of 2005.

15. In addition, he submits that it was prudent for him to await the determination of the above cases before filing the suit as the same determined ownership of the frozen money, which would enable him seek relief from the court. Further, he submitted that the cause action continued even after the Nyeri Court in the above suit determined that he owned the said money as the appellant refused to release the money to him despite the court orders.

16. Furthermore, he submitted that the appellant in breach of the fiduciary duty gave out information in confidence to third parties as late as December, 2008 therefore making the suit to be within the timelines provided for under the Statute of Limitation.

#### **Issues and Analysis:**

17. This being is a first appeal and guided by the provisions of Section 78 of the Civil Procedure Act, this court ought to reevaluate and reexamine the lower court record and the evidence before it and arrive at its own independent conclusion, having regard to the fact that it neither saw nor heard the witnesses as they testified, as was stated in *Selle vs Associated Motor Boat Company Ltd [1968] EA 123* by Sir Clement De Lestang that:

**“This court must consider the evidence, evaluate itself and draw its own conclusion though in doing so it should always bear in mind that it neither heard witnesses and should make due allowance in this respect. However, this court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he had clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or of the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally.”**

18. Additionally, in *Mbogo vs Shah & Another [1968] EA 93*, the court set out circumstances under which an appellate court may interfere with a decision of the trial court as follows:

**“ I think it is well settled that this court will not interfere with the exercise of discretion by the inferior court unless it is satisfied that the decision is clearly wrong because it has misdirected itself or because it has acted on matters on which it should not have acted or because or because it was failed to take into consideration matters which it should have taken into account and consideration and in doing so arrived at a wrong conclusion.”**

19. I have considered the parties pleadings herein, the appellants and respondents submissions and the entire record of appeal, and in my view the following are the issues that arise for determination:-

a) *Whether the Respondents claim was time barred under the Limitation of Actions Act*

b) *whether the appellant proved his case to the required standard*

a) *Whether the Respondents claim was time barred under the Limitation of Actions Act*

20. Potter, JA observed in the case of *Gathoni vs Kenya Cooperative Creameries Limited (Civil Application No. 122 of 1981)* that:-

**“The law on limitation is intended to protect defendants against unreasonable delay in bringing of suits against them. The statute expects the intending plaintiff to exercise reasonable diligence and to take reasonable steps in his own interest.”**

21. Section 4(1) (a) and (e) of the Limitation of Actions Act respectively provides that actions based on contract and actions claiming equitable relief, for which no period of limitation is provided may not be brought after the end of six years from the date on which the cause of action accrued.

22. In *Ajay Shah vs Deposit Protection Fund Board* as liquidator of *Trust Bank Ltd (in liquidation) [2016] eKLR* it was held that “ordinary rules of computation apply and time begins to run when the contractual cause of action or breach of fiduciary duty arose’.

23. In this case, the Appellant has argued that the Respondent suit was time barred as the cause of action which is the freezing of his account happened on 21<sup>st</sup> October, 2005, and pursuant to section 4(1) (a) of the Limitation of Action Act Cap 22 the Respondent ought to have filed his claim before or on 20<sup>th</sup> October, 2011. However, the same was filed on 17<sup>th</sup> July, 2013, which they submit is outside the six year period provided for under the Act.

24. The respondent in response to the appellant claims allege that they were not aware of the specific time the freezing of his account happened, however, it is his case that he saw it prudent to await the conclusion of the suits filed seeking the determination of the ownership of the money in dispute frozen by the appellant, that is the determination of the two suits being Nyeri High Court No. 108 of 2008 and Criminal case No. 2407 of 2005. He submits that it was after acquittal and the finding that the money was his that he filed the suit the genesis of this appeal, and that in his view is when the cause of action arose.

25. Additionally, he submitted that the cause of action subsisted up to 2008 when despite the High Court in the above Nyeri suit found that the money belonged to him, the appellants refused to release or unfreeze his account. Further, he submitted that the appellant as late as December, 2008 gave his information to unauthorized third parties.

26. Considering the above, it is not disputed that the reason the appellants froze the respondent account was because they allege that they suspected that the money in his account might not have been his, and therefore as a result froze his account culminating in Nyeri High Court No. 108 of 2008 and Criminal case No. 2407, which ended up determining that the money actually belonged to the Respondent, a fact not disputed by the appellant.

27. It is therefore apparent that the Respondent cause of action actually depended on a determination of the ownership of the alleged suspected money, and thus it is my finding that the cause of action materialized upon the court determining that the money belonged to the respondent as an otherwise finding would have not given rise to a cause of action.

28. It is my finding that the cause of action though may have arisen in the year 2005 as alleged by the appellant, the same subsisted until the time the appellant totally unfroze the respondent account in late 2008 and therefore the appeal on this ground fails as the suit was filed within the timelines provided for under the Limitation of Action Act, as six years from 2008 takes us to 2014, yet the suit was filed in 2013.

b) *whether the Respondent proved his case to the required standard*

29. In *Encyclopedia of Banking Law C.21 Selangor United Rubber Estate Ltd vs Cradock (No.3) [1968] 2 ALL ER 1073* it was held that:

**“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 contracts with its customers. The duty to exercise reasonable care and skill extends over the whole range of banking business within the contract with the customer. Thus the duty applies to interpreting, ascertaining and acting in accordance with the instructions of the customer.”**

30. A cause of action is a factual situation the existence of which entitles one person to obtain from the court a remedy against another person. In *Read vs Brown (1888), 22 QBD 128*, The court defined a cause of action as:-

**“Every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the court”.**

31. So the question therefore is whether the Respondent is entitled to obtain a remedy from the court against the appellant Bank for what transpired culminating into him being charged as a result of the appellant action and alarm. My answer is in the affirmative. I have considered the various clauses in the bank account opening forms relied by both the appellant and the respondent and I find no reason to

disturb the lower court decision. The Respondent alarm was false and unreasonable in the circumstances and was detrimental to the respondent warranting award of damages.

32. From the record, it seems that the appellant suspicion arose when all of a sudden the respondent account received some huge sum of money, this in my view would not justify the freezing of his account. The bank ought to have taken due diligence by first consulting the respondent before taking such draconian action that culminated in him being charged.

33. In *Thompson vs Commissioner of Police of the Metropolis and HSU vs Commissioner of Police of the Metropolis [1997]2 All ER 762 (at page 771)*, it was held that:-

“Any legal process should yield a successful plaintiff appropriate compensation, that is, compensation which is neither too much nor too little ..... No other result can be accepted as just .... But it serves no public purpose to encourage the plaintiffs to regard a successful libel action, risky though the process undoubtedly is, as a road to untaxed riches. Nor is it healthy if any legal process fails to command the respect of lawyer and layman alike ....”

34. Consequently, the court in assessing damages, the court must strike a proper balance between the demands by litigants and what is fair and reasonable in given circumstances. In the instant case, it is my finding that the sum awarded to the Respondent as damages for the appellant breach is proper and this court finds no reason to disturb the same.

**Conclusion:**

*i. In view of the foregoing, it is my finding that the instant appeal lacks merit and is dismissed with costs.*

**SIGNED, DATED AND DELIVERED IN NAIROBI THIS 29<sup>TH</sup> DAY OF NOVEMBER, 2019.**

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**C. KARIUKI**

**JUDGE**