



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION

CIVIL CASE NO. 354 OF 2013

S. O. OWINO & ASSOCIATES.....PLAINTIFF

-VERSUS-

NIC BANK LIMITED.....DEFENDANT

-AND-

NATIONAL INTELLIGENCE SERVICE

STAFF SUPERANNUATION SCHEME.....THIRD PARTY

JUDGMENT

1. **S. O. Owino & Associates** (the advocates) have filed an Originating Summons dated **12th August 2013** seeking the determination of the following questions:

“a. Whether the defendant should provide the plaintiff with a complete statement of account inclusive of interest from the date of opening of Escrow Call Deposit Account No. CD2-3-270-004931 to date.

b. Whether the sum of Kshs.769,900.45 or any other sum being in the Escrow Account No. CD2-3-270-004931 with the defendant in the joint names of Ochieng, Onyango, Kibet & Ohaga and S.O. Owino & Associates as at 21st August 2012 should be transferred back or reinstated to the said Escrow Call Deposit Account.

c. Whether the sum being in the said Escrow Call Deposit Account No. CD2-3-270-004931 should be transferred to another bank to be agreed upon by the plaintiff and the firm of Ochieng, Onyango, Kibet & Ohaga, Advocates.

d. Whether the plaintiff is entitled to the costs of this suit.”

2. The escrow account referred to in the above questions of the originating summons was opened with **NIC Bank** (the bank). The account was opened in the title of **S.O.Owino & Associates and Ochieng, Onyango, Kibet and Ohaga Advocates**.

3. Those two firms of advocates represented the parties in a land transaction. The advocates represented **Salahidin Properties & Construction Limited** (the vendor) while **Ochieng, Onyango, Kibet and Ohaga Advocates** represented the trustees of National Security Intelligence Service Staff Superannuation Scheme who is the 3rd party in this action (the purchaser).

4. The vendor agreed to sell to the purchaser **LR. No. 4630/24(Original Number 4630/2/16)** situated in **Nakuru**. The agreed purchase price was **ksh 31 million**.

5. It is not denied by all the parties in this case that the purchase price was deposited in the escrow account by the purchaser. It is also not denied that the vendor, because of his religious faith, declined to receive the interest that would be earned from that deposit.

6. The purchase price of **Ksh 31 million** was released to the vendor on completion of the sale transaction. An amount of **ksh 762,900.45** was in the escrow account representing the interest earned from the purchase price.

7. The case brought by the advocates is that the Bank unlawfully released the amount of **Ksh 762,900.45** to the purchaser. It is further that the Bank erred in paying that amount to the purchaser without instructions and their signature. This the advocates said was evidence of

collusion between the purchaser and the firm of *Ochieng, Onyango, Kibet and Ohaga* to steal the money in the escrow account.

8. The Bank's case is that the vendor requested the interest to be earned on the account to be paid to the purchaser. The Bank further pleaded that it is on that basis that the escrow account was opened. It is the Bank's case that after the purchase price was released to the vendor, the advocates failed, refused or neglected to sign any instrument authorising the release of the interest in the account. That because the vendor declined to receive the interest earned on the escrow account, the Bank released that interest in the sum of **Ksh 762,900.45** to the purchaser and because the escrow account had been opened for a specific purpose of banking the sale proceeds once the sales transaction was concluded the Bank closed the account and released the interest to the purchaser. According to the Bank it released the interest in that account to the party that had deposited the money in that account.

9. The purchaser's evidence is similar to the Bank, that is, the vendor declined to have the interest earned in the escrow account. That that interest was earned from money that they, the purchaser, had deposited with the defendant. The evidence of *Wamagata Kairu* on behalf of the purchaser by affidavit in paragraph 14 stated:

“the escrow account was opened especially for the purpose of keeping the purchase price in relation to the conveyancing of the property being purchased by the 3rd party, that transaction has been successfully concluded no apparent reason has been explained by the applicant (Owino advocates) as to why the account should be opened.”

10. Having reviewed the parties evidence and pleadings, I find that the issues that need addressing are as follows:

a. What was the nature of the account that was opened?

b. Who were the signatories?

c. Was the defendant in breach of duty in releasing the interest in that account to the 3rd party or in closing the account.

d. If (c) above is in positive, who can the interest released to the 3rd party be reinstated to?

e. If (d) above is in the positive, should the 3rd party indemnify the Bank?

ANALYSIS AND DETERMINATION

11. On the first issue all parties are in agreement that the account was an escrow account opened for the purpose of depositing the purchase price. *Blacks Law Disctionary 8th Edition* defines escrow account as:

“a bank account, generally held in the name of the depositor and an escrow agent, that is returnable to the depositor or paid to a 3rd person on fulfilment of specific conditions.”

12. In that definition, it would be seen that the money held in an escrow account is held to fulfil a specific condition. What I understand from that statement is that whereas other ordinary accounts are opened for normal purpose of carrying out monetary transactions, and their existence is non ending until one party gives notice to terminate such an account, an escrow account has a limited life span to fulfil certain purpose and once that purpose is fulfilled it ceases to be.

13. The other peculiarity I wish to identify is that although the escrow account, in this matter, had a title of the advocates acting for their respective client in the sale transaction, the account was not opened for the mere purpose of Advocates to operate the escrow account at will. If that was so, why would the bank mandate show that the authorised signatories were *Tom Onyango* and *Hussein Mohammed Yusuf*?

14. That mandate of authorised signatories reinforces my finding that the advocate's names were merely for showing the title of the account.

15. That finding that the account was an escrow account, that is, one that is opened for specific purpose and that the authorised signatories did not include **Owino Advocate**. It follows that Owino advocate has no standing in bringing the action he has brought. The advocates was correct in placing reliance on the case *Catlin vs Cyprus Finance Corporation (London) Ltd. G.F. Catlin (third party) [1982 C.no. 3678]* which held that:

“while the mandate clearly imposed an obligation on the defendants which was owed to the account holders jointly to honour instructions signed by them both, it also imposed an obligation which was owed separately to each of the account holders severally not to honour instructions unless they were signed by each of them; that, accordingly, the plaintiff was entitled to sue the defendants in respect of the several obligation owed to her without joining her husband as a party; and that, since the defendants were in clear breach of the several obligation owed to the plaintiff, she was entitled to the relief claimed.”

16. That case however, does not change the finding of this court that the account was an escrow account with specific purpose and Owino advocate was not owed the duty he claims in this action. The Bank did not breach its duty because it did not owe Owino advocate duty.

17. It follows that the answer to issue **a, b** and **c** above is in the negative and I need not proceed to consider issues **d** and **e**. However, I will mention that the purpose of the escrow account having been achieved, when the purchase price was paid to the vendor, the defendant was not in breach in releasing the interest to the 3rd party the party that had deposited the purchase money.

18. The advocates stated in his submissions that the vendor was entitled to that interest. The vendor has not presented such a case and there is no evidence that the vendor authorised the advocate to prosecute this suit.

19. It follows that ***this claim fails***. Having failed and because costs follow the event, the ***plaintiff shall bear the cost***.

20. In the end this ***case is hereby dismissed*** with ***costs being awarded to the defendant*** and the ***3rd party*** to be paid by the plaintiff. ***It is so ordered***.

DATED, SIGNED and DELIVERED at NAIROBI this 30th day of October, 2018.

MARY KASANGO

JUDGE

Judgment read and delivered in open court in the presence of:

Court Assistant.....Sophie

..... for the Applicant

..... for the Respondent

MARY KASANGO

JUDGE