



**REPUBLIC OF KENYA**

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

**MILIMANI COMMERCIAL & TAX DIVISION**

**CIVIL CASE NO.498 OF 2012**

**COMMERCIAL BANK OF AFRICA LIMITED.....PLAINTIFF**

**VERSUS**

**DANIEL NDUNGU..... DEFENDANT**

**JUDGMENT**

1. **Commercial Bank of Africa Limited** is the plaintiff hereof. It is a Limited liability company carrying on business as bankers in Kenya.
2. **Daniel Ndungu**, the defendant is carrying on business as an advocate.
3. Although the defendant was served on **31<sup>st</sup> October 2018** with a hearing notice, of this case, on **22<sup>nd</sup> November 2018**, the defendant did not attend the hearing and the case proceeded unopposed.
4. The plaintiff's claim is for judgment against the defendant for **Ksh 25,000,000**.
5. The plaintiff's case was led by the evidence of **Eva Njiraini, Pamela Ager, Jacob Owuor Ogola** and **Kennedy Olungo**.
6. The plaintiff's witnesses testified that the firm of Oraro & Company Advocates in the year 2012 was instructed to prepare a transfer, of immovable property in favour of **Kijana Mworira** and **Angela Wanjiku Kamau** (the purchasers). The plaintiff had agreed to lend the purchasers **ksh 25,000,000** to enable them purchase the property.
7. On registration of the transfer and the charge the firm of Oraro & Company wrote to the plaintiff by letter dated **10<sup>th</sup> May 2012**. By that letter the plaintiff was instructed to pay the agreed loan proceeds to the vendor of the property, namely, KN Associates.
8. That letter was received and stamped on **14<sup>th</sup> May 2012** at the plaintiff's legal department. The scanned letter was sent by the plaintiff's legal department to the plaintiff's credit administration unit. Further a photocopy of that letter was physically sent to the plaintiff's administration unit with a request that the sum of **Ksh 25 million** be released in accordance with the instructions of Oraro & Company Advocates.
9. The plaintiff's credit administration unit acted on a letter that had been substituted which gave contrary instruction on who was to be paid the amount of **Ksh 25 million**. Plaintiff paid that amount, as instructed by a substituted letter to the defendant's account with Barclays Bank of Kenya Limited.
10. The original letter of Oraro & Company Advocates instructing the plaintiff to pay KN Associates was produced in evidence. The substituted letter also seeming to be from Oraro & Company advocates instructing the plaintiff to pay the defendant was also produced in evidence.
11. The Real time gross settlement (RTGS) which transmitted the amount of **Ksh 25 million** to the defendant's account was also exhibited in evidence.
12. **Kennedy Olungo** (PW4) is a Senior Forensic Manager of Barclays Bank Kenya Limited. He confirmed that there was a payment, dated **30<sup>th</sup> May, 2012**, of inward remittance of Ksh 25 million in Moi Avenue Branch of Barclays Bank Kenya Limited, in account No. [particulars withheld] in the name of **Daniel Ndungu** and company. He produced the statement of account to prove that remittance.

**ANALYSIS AND DETERMINATION**

13. The evidence adduced patently and clearly shows that the plaintiff paid to the defendant's bank account Ksh 25 million money, as the plaintiff witnesses, testified, was intended to be paid to KN Associates. I have found a useful passage in the case **White Horse Investment Limited v Nelson Havi T/A Havi Company Advocates [2009] eKLR** where the court was considering a claim for money had and received as follows:

**“...section 72 Bullen & Leake & Jacobs 13<sup>th</sup> edition thus:**

*“There are numerous circumstances in which the law will compel a person who has received moneys which in equity belong to another to pay them over to that other. The doctrine rests on the fiction of a promise implied in law. At one time it looked as though this form of action for ‘money had and received’ might be extended to all cases where the court thought it equitable that money should be paid over...”*

14. In law the money wrongly paid into the defendant's account, is recoverable. The defendant cannot successfully resist the plaintiff's claim in the light of the evidence presented before court. There was no consideration for the money paid and accordingly this court finds that the defendant is liable to compensate the plaintiff. Indeed as correctly submitted by **Mr. Fraser**, learned advocate for the plaintiff, the defendant unjustly enriched himself by retaining the amount credited to his account.

15. Accordingly, the judgment of this court is as follows:

***a. Judgment is hereby entered for the plaintiff for Ksh 25,000,000 with interest at court rate from the date of filing suit until payment in full.***

***b. The defendant shall pay the plaintiff's costs of this suit.***

**DATED, SIGNED and DELIVERED at NAIROBI this 29<sup>th</sup> day of November, 2018.**

**MARY KASANGO**

**JUDGE**

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

Court Assistant.....Sophie

..... for the Plaintiff

..... for the Defendant

**MARY KASANGO**

**JUDGE**