



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MERU

H.C.C.C. NO. 21 OF 1997

(CORAM: J. A. MAKAU – J.)

AHMED FARAH RAGESH..... APPLICANT

VERSUS

MARIAM AMIN 1ST DEFENDANT

STANDARD CHARTERED BANK LTD..... 2ND DEFENDANT

JUDGMENT

1. The Plaintiff through an amended plaint dated 27th April 1998, filed on 22.6.1998 sued the defendants claiming judgment against the defendant jointly and severally for Kshs.554,360/= plus interest at bank rates from 10th December 1995 to the date of payment with costs of the suit.
2. The defendants were served with Memorandum of Appearance and upon failure to appear and file defence the plaintiff applied for judgment against the defendant through a request for judgment dated 12th October 2001. That after entry of interlocutory judgment on 31.5.2002 the 2nd defendant applied for setting aside the interlocutory judgment against all the defendants which application was allowed on 18th November 2002.
3. The 2nd defendant filed statement of defence on 2nd December 2012 denying plaintiff's claim and sought the same to be dismissed with costs.
4. The plaintiff filed further amended plaint dated 24th May 2007 seeking judgment against the defendants jointly and severally for an order that the 2nd defendant do transfer the principal sum from the 1st defendant's account into the plaintiff's account, repayment of Kshs.554,360/= plus interest at bank rates from 10th December 1995 to date of payment and costs of the suit.
5. The 2nd defendant filed an amended defence on 15th June 2007 denying liability and particulars of fraud and gave particulars of fraud on part of the plaintiff.
6. The Plaintiff filed reply to the 2nd defendant's amended defence and prayed for judgment against the defendants with costs.
7. **M/s. Mwangi E.G. & Co. Advocates**, appeared for the plaintiff and M/s. D.J. Mbayya & Co. Advocates appeared for the 2nd defendant. That by consent dated 5th November 2007 and filed at the court on 9.11.2007 both Counsel consented to the amount of Kshs.552,860/= deposited in court on 18.11.2002 to be released to both counsel for depositing the same in an interest earning account in joint names of M/s. Mwangi E.G. & Co. Advocates and D.J. Mbayya & Co. Advocates. The consent was later

adopted as an order of the court on 13th April, 2011.

8. When the matter came up for hearing the plaintiff gave evidence and called one witness whereas the 1st defendant did not appear. The 2nd defendant called one witness and at the close of the defence case both Counsel filed submissions.

9. **PW1, Ahmed Farah Rageh**, the plaintiff testified that he was working with the National Cereals Produce Board in 1976 as a Store Clerk and rose up the ranks upto Depot Manager and retired in 1995 after taking early retirement at Nanyuki National Cereal Produce Board Depot. That he proceeded to do private Business. He produced a letter dated 16th January 1995 in which the Board had accepted his early retirement as exhibit P.1. and Certificate of service dated 24th January 1996 as exhibit P.2. He testified that his service benefits were calculated to the tune of Kshs.554,360/=. He identified the payment voucher as MFI – 3. He testified that he received payment through a cheque with forwarding letter addressed to him dated 6.12.1995 being cheque No.145152 dated 30.11.1995. The letter was produced as exhibit P.4 and copy of payments as exhibit P.5.

10. PW1 further testified that he used to have savings account with M/s. Standard Chartered Bank, Ltd, Nanyuki Branch being A/C No. 201839-61002 under the name of M/s. Ahmed Farah Rageh. The plaintiff testified that he did not personally bank the cheque into his account as he got sick while at Nairobi and was admitted at Eastleigh Community Clinic for 10 days. He produced Clinical notes as exhibit P.6.

11. PW1 testified that on 11th December 1995 he was visited by Mariam Amin, the first defendant at Nanyuki who he requested to deposit the cheque No. 145152 into the plaintiff's A/C No.0120183961002, that after Christmas the plaintiff checked his account and found the cheque had not been deposited into his account. The 1st defendant told the plaintiff that she had locked the cheque in her safe but lost the key to the safe promising to deposit it soon but she disappeared. The plaintiff then talked to Standard Chartered Bank Manager at Nanyuki explaining about his cheque. PW1 then engaged the firm of M/s. Ole Kaparo and Malani Advocates who did a letter to the 2nd defendant. Certified copy of the letter was marked as MFI – P7. The 2nd defendant replied to the plaintiff's Advocate's letter stating the cheque was never deposited in the plaintiff's account, the letter was produced as exhibit P8.

12. The plaintiff testified that he sued the Bank because the cheque did not go into his account and as it assisted Mariam Amin misappropriate his funds, as the cheque was crossed cheque, addressed to the plaintiff only. He further stated the 1st defendant's Account, thus Mariam Amin is A/C No. 00284062009 was at the 2nd defendants Bank at Nanyuki. He stated his cheque was wrongfully deposited in the 1st defendant's account on 13.12.1995 and was cleared on the same day. He added that the Bank floated the banking Rules by depositing a crossed cheque into an account of a third party without the plaintiff's written authority. He added that he also sued the 1st defendant Mariam Amin because he had instructed her to bank the cheque into his account but stole the cheque. PW1 produced Bank Statement of Mariam Amin held at Standard chartered Bank Limited at Nanyuki as exhibit 9. He also produced exhibit P. 10, a letter dated 24.11.2003 written to Chief Accountant the National Cereal produce Board enquiring on the whereabouts of the original cheque. A similar letter was written to K.C. Bank on 8.4.2003 exhibit P.11. The original cheque was not traced due to lapse of time as per exhibit P.12 dated 16th April 2003. He also produced a letter dated 30th June 2003 addressed to K.C.B. about the cheque exhibit P.13. and a reply dated 16th September 2003 stating the cheque could not be traced as the records had been destroyed, exhibit P.14.

13. PW1, blamed the bank for failing to safeguard his interest stating the crossed cheque was clear as to who was to be paid as it indicated “**Payee only**” I testified that todate he has not recovered his money praying for orders for payment of his money from the defendants with interest form the date the amount was banked into MARIAM AMINS, the first defendant account with costs.

14. During cross-examination PW1 testified that he knew the 1st defendant as a casual family friend since 1997 and that he trusted her. That he gave her his cheque while he was at hospital with a small note disclosing his account number and which cheque was crossed “**A/C Payee Only**”. On exhibit P.5 he stated a certified copy of the original cheque was not crossed, he however reiterated that the original

cheque was crossed. He testified that this suit was filed in 1997 and that when he discovered that the cheque had not been deposited he was at hospital. That he gave the cheque and a small note disclosing his account number and cheque was crossed. He testified that the suit was filed in 1997 and that is when he discovered that the cheque had not been deposited into his account. He also saw the Bank Manager about the issue who referred him to acting Manager Mrs. Mutua who asked for time to look for the cheque. He concluded by stating the Standard Chartered Bank Limited could not assist him, consequently he filed the instant suit. PW1 denied endorsing the cheque in favour of anyone.

15. On being re-examined PW1 testified that MFI – 3 is dated 20th July 1995.

16. **PW2 Cornel Ngelecey**, Chief Accountant with the National Cereals Board testified that his duties included overseeing finance department, in terms of accounting for all revenue and processing payments as well as preparing the accounts and any other matter relating to accounting. On MFI – 3 he stated it was part of documents he deals with and its purpose was for preparation of cheque in favour of Mr. Ahmed Farah in respect of his final dues upon proceeding on early retirement. The payment he stated was for Kshs.554,360/= through cheque No. 145152 dated 30th November 1995. He confirmed that the document was a true copy of the original and produced MFI-3 as exhibit P.3. He stated he did not see the copy of the cheque. PW2 testified that he is not the marker of the document but knows the marker of the document and that it has a signature of General Manager, Finance and Administration.

17. **DW1, Davis Mbaabu Kajabu**, testified that he works with the Standard chartered Bank Ltd and has worked in different branches. He testified that he knows the plaintiff as a customer of the Standard Chartered Bank Ltd, Nanyuki Branch.

18. DW1 testified that the Bank had been sued over cheque No. 145152 as per exhibit P.5. (Copy of the aforesaid cheque). He said the copy is not a cheque as it has no provisions for the date, Bank and Branch with provisions for stamp duty and it is supposed to show whether it is an open or closed cheque, the provisions for the payee, Bank Code, and name of the drawer. He stated the document (MFI – 5) does not qualify to be a cheque. On exhibit P.9., DW1 stated, it is statement of Bank Account of the 1st defendant for the period running from 1.12.1995 to 30.5.1996 which shows a country cheque deposit banked on 13.12.1995 with value due to mature on 28.12.1995 for Kshs.554,360/=. He stated the cheque number is missing and should have been entered and that the bank was acting as a collecting agent which bank is entitled to do for its customers and to safeguard customer's money everything should be done in good faith for the customer. He stated in depositing a cheque an enquiry should be undertaken stating the operation of account of the first defendant was within the normal operation of business because she used to deposit similar sums, the cheque could not cause doubt. He denied that the bank was fraudulent. He urged “*A/C payee only*” could be transferable and can be negotiated by the drawer or the *endorsee* or *drawee*.

19. DW1, testified in 1995 the practice to transfer “*AC payee only*” cheque was there on assumption that men were always honest.

20. During cross-examination DW1 testified that the 1st defendant was their customer at the time of the incident and that in December 1995 a cheque of Kshs.554,360/= was deposited in her account which is the amount claimed by the plaintiff. That the statement does not show the cheque number whereas exhibit P.5. Showed the cheque number and the amount of Kshs 554,360/=. He added that in 1995 the Banks did not allow co-operation to draw their own cheques but had a leeway to customize other cheques hence exhibit P.5. could not be a cheque. He agreed changes have been made over the years adding the cheque due to plaintiff's payments was to be paid by K.C.B. to the receiving branch being Standard Chartered Bank Ltd. He admitted the money was paid to the 1st defendant.

21. During further cross-examination DW1 testified exhibit P.3. has a relation to the account of the 1st defendant as the deposit of Kshs.554,360/= was by a cheque adding it was duty of the bank to put the particulars of the cheque and that he does not have any particular reason as to why particulars were not entered. He added that they asked for the cheque but KCB could not find it. He admitted the cheque was crossed. In re-examination DW1 testified he stated that the “*A/C Payee Only*” had no significance during

1995.

22. I have very carefully analyzed the pleadings in this case, and have very carefully considered the pleadings, evidence by the plaintiff and the 2nd defendant, the rival submission by both the plaintiff's Counsel and the defendant's Counsel. The issue for consideration in this case on briefly be summed up as follows:-

a) Whether the plaintiff was paid by National Cereal Produce Board a cheque No.145152 KCB Limited Moi Avenue Branch amounting to Kshs.554,360/=?

b) Whether plaintiff has pleaded particulars of fraud against the defendants?

c) Whether on diverse dates between 10th and 15th December 1995 the 1st defendants in connivance collusion of the 2nd defendant fraudulently deposited the plaintiff's cheque No. 145152 KCB Ltd Moi Avenue Branch amounting to Kshs.554,360 into the 1st defendant's account?

d) What relief if any is the plaintiff entitled to?

23. Whether plaintiff was paid by National Cereals Produce Board cheque No. 141152 amounting to Kshs.554,360/= PW1 testified that following his early retirement his benefits were calculated to amount to Kshs.554,360/= and that he was given a payment voucher MFI – 3. The plaintiff testified also that he got cheque dated 6.12.1995 number 145152 with a covering letter dated 30.11.1995 produced as exhibit P4 and copy of payment exhibit P5. Exhibit P4 addressed to the plaintiff Ahmed Farah partly states:-

***“I enclose cheque No.145152 dated 30.11.1995 for Sh.554,360/=*”**

The letter is duly confirmed as a true copy of the original which plaintiff acknowledged receipt by signing. Plaintiff in his evidence confirmed receiving the said cheque. Exhibit P5 confirms the cheque issued to the plaintiff was No. 145152 for Kshs.554,360/=. Plaintiff testified that he gave the 1st defendant the cheque to bank it in his A/C No. 012083961002 but the 1st defendant banked it in her A/C No.0100284062009 with the same bank. The plaintiff testified he pursued with the 2nd defendant Bank and KCB to get the original cheque but he could not as the Same was found to have been destroyed due to lapse of time as per K.C.B's letter exhibit P.12.

24. PW2, Cornel Ngelechey confirmed MFI-3 was prepared by the National Cereals Produce Board to facilitate preparation of cheque for payment of the plaintiff's dues of Kshs.554,360/=. He confirmed payment was made of Kshs.554,360/= through cheque Nos. 145152 dated 30th November 1995. He confirmed payment was effected and produced MFI-3 as exhibit P.3. DW1 stated MFI – 3 was not a cheque and indeed he was right as this was a document as explained by PW2 for enabling preparation of a cheque. The exhibit P.3. quotes the cheque Nos. 145152 for Kshs.554,360/=. DW1 referred to 1st defendant's Bank statement exhibit 9 and confirmed that on 13th December 1995 a country cheque deposit for 554,360/= but it does not have the cheque number. He confirmed the paying Bank was K.C.B. and the amount was paid. In view of the above-evidence from PW1, PW2 and DW1 though the original cheque No. 145152 could not be produced due to lapse of time, I am satisfied that the plaintiff was paid his final early retirement benefits by the National Cereals Produce Board through cheque No.145152 K.C.B. Limited Moi Avenue Branch amounting to Kshs.554,360/=.

25. Whether the plaintiff has pleaded particulars of fraud against the defendant?. The 2nd defendant's Counsel in his submissions has submitted that the particulars of fraud has to be specifically pleaded and particularized urging the plaintiff has only particularized fraud on the part of the 1st defendant alone and as such, he should not be allowed or he is not entitled to bring issue of fraud as against the bank nor has he intimated whether there was negligence on part of the Bank or that the bank acted **malafide** urging the cheque in questions was endorsed by the plaintiff to the 1st defendant with whom they had relationship with.

26. **Order 2 Rule 10 (a) of Civil Procedure Rules** Provides:

(1) Subject to subrule (2), every pleading shall contain the necessary particulars of any claim, defence or other matter pleaded including, without prejudice to the generality of the foregoing-

(a) particulars of any misrepresentation, fraud, breach of trust, wilful default or undue on which the party pleading relies; and

(b) -----

27. I agree that the above mentioned Order makes it mandatory for a party basing his claim on fraud, misrepresentation etc against another to set out the particulars thereof failure whereof it means the court cannot make a determination on unpleaded issue even where evidence has been adduced and recorded save to dismiss the claim based on unpleaded point (**see case of Standard Chartered Bank Ltd V. Interim Services Ltd & 4 Others, Court of Appeal Civil Appeal No. 37 of 2003 [2004] 2KLR**)

28. In the instant case I have perused the pleadings specially the plaintiff's further amended plaint dated 24th May 2007 under paragraph 4 under "particulars of fraud on the defendants" the word 1st is deleted in green as this is not the first amendment. The particulars of fraud are clearly spelt out under paragraph 4 (a) and (b) of the plaint. I therefore find no basis or merits in the 2nd defendant's assertion that the plaintiff has not particularized fraud on the part of the 2nd defendant. The particulars given are against both the defendants. The issue of fraud is properly pleaded and is an issue for determination in this case by this court.

29. Whether on diverse dates between 10th and 15th December 1995 the 1st defendant in connivance collusion of the 2nd defendant fraudulently deposited the plaintiff's cheque No. 145152 KCB Limited Moi Avenue Branch amounting to Kshs.554,360/= in the 1st defendants account? Plaintiff testified that he received cheque No. 145152 forwarded through a letter dated 6.12.1995 and as he was sick and admitted in an hospital he entrusted his cheque with the 1st defendant on 11.12.1995 with instructions to bank the amount in his account. He gave a note to the 1st defendant indicating his account with M/s. Standard Chartered Bank Limited, Nanyuki, Account Number 0120183961002, the plaintiff testified that the 1st defendant did not bank the cheque as instructed. He produced Clinical Notes exhibit P6 to show that he was admitted at Eastleigh Community Clinic, that thereafter Christmas he found the 1st defendant had not deposited his cheque and on enquiry she told him she had locked the cheque in her safe and upon getting it she would deposit the cheque. Plaintiff approached the Branch Manager at Nanyuki but he was not assisted. The plaintiff testified that his cheque was crossed and marked "**Account Payee only**" and he did not endorse it for the 1st defendant or anyone.

30. The plaintiff further stated that the 1st defendant as can be traced from exhibit 9, the 1st defendant's Bank Statement held with the 2nd defendant deposited the cheque referred to as upcountry cheque whose numbers are undisclosed for Kshs.554360/= and was cleared on the same day and the whole sum was paid. DW1 referred to the statement of the 1st defendant for the period from 1.12.1995 to 30.5.1996 and confirmed that on 13th December, 1995 a country cheque deposit was made with a value to mature on 28th December 1995 for sum of Kshs.554360/= but it did not have cheque number noted and insisted the cheque number should have been entered. He claimed the Bank was a collecting bank and was entitled to collect cheques for the customers and that to safeguard customers money everything should be done in good faith and that the account of the 1st defendant was within the normal operation of her business because she used to bank almost similar amount and as such the cheque could not cause doubt.

31. The 2nd defendant counsel relied on a number of authorities which I purposed to deal with herein. The 2nd defendant relied on **Section 3(2) of the cheques Act (Cap 35)** which provides:

"(2) Where a banker, in good faith and without negligence and in the ordinary course of business-

(a) receives payment for a customer of a prescribed instrument to which the customer has

no title or has a defective title; or

(b) having credited the customer's account with the amount of a prescribed instrument to which the customer has no title or a defective title, receives payment of the instrument for himself. the banker does not incur any liability to the true owner of the instrument by reason only of his having received payment of it; and a banker is not to be treated for the purposes of this subsection as having been negligent by reason only that he has failed to concern himself with the absence of, or irregularity in, endorsement of a prescribed instrument of which the customer in question appears to be the payee.”

32. The purpose of the above Section is to protect a collecting Bank but it is clear on the responsibility of the collecting Banker when dealing with a cheque drawn in favour of its customer and its responsibility to the true owner of such a cheque, thus the person entitled to the proceeds of the cheque, the Banker is obligated in such a case to act with due care and diligently taking into account of the intentions of the true owner of the cheque. In summary the duties imposed on a collecting banker to the true owner of a cheque can be summed up as follows:-

i. The banker must act in good faith.

ii. The banker must act without negligence.

iii. The action must be in the ordinary course of business.

33. The onus of establishing circumstances showing absence of negligence is on the banker. The plaintiff in this case received a crossed cheque in his name and stated it was marked “*A/C Payee Only.*” DW1 admitted the cheque was crossed. The plaintiff clearly stated that he did not endorse the cheque in favour of the 1st defendant or anyone. The 2nd defendant did not give circumstances showing why a “*A/C Payee Only*” cheque and/or “*crossed*” cheque in favour of the plaintiff ended up being deposited in an account of the 1st defendant on 13th December 1995 being cheque due to mature on 28th December 1995 but being cleared and paid to the 1st defendant on the same day. The bank to facilitate the fraud went ahead and omitted to quote the cheque number in the 1st defendant's bank statement. The Bank further failed to ensure the cheque was deposited in the account of the plaintiff who was then their customer and flawed all banking procedures relating to Banking and withdrawing the amount before the cheque matured. They failed to exercise due care and diligence expected of Bankers in accordance with ordinary care expected of bankers. The 2nd defendant acted recklessly and carelessly through its employees and was negligent. That though the 2nd defendant was acting in the ordinary course of its business it did as a banker act in good faith and was negligent, so I find and hold.

34. In the case of **Karak Rubber Co. Ltd V. Builders (No. 2) (1972) ALLER 1210, Brighman, J. said in respect of collecting Bank at Page 1226 Paragraph (a):-**

“Where a collecting bank is sued by the true owner of the cheque for wrong payment thereof, the claim is for conversion or for money had and received. There is no contractual relationship between the person who draws the cheque and the bank to which the cheque is handed for collection (unless the collecting bank is also the paying bank) in negligence although not an ingredient of a claim in conversion for money held and received is however a relevant topic because section 82 of the Bills of Exchange Act 1882 and modern counterpart A statutory defence to claims by true owners where a banker has collected a crossed cheque in good faith and without negligence on behalf of a customer who has no title or a defective title.”

35. The 2nd defendant was as collecting bank and also the paying Bank and as a banker for both customers thus the plaintiff and 1st defendant, it called for the bank to exercise due care and diligence as it had accounts for both customers. It should have caused enquiry before releasing the money on the same day to the customer especially when the cheque was not in the name of the depositing customer and when the cheque was cleared before the paying bank had cleared it and before maturing date. I find the bank

did not care nor did it act in good faith. It acted fraudulently through its employees and should be held liable for the loss suffered by then the unsuspecting and an innocent customer, thus the plaintiff herein.

36. I therefore find and hold that on diverse dates between 10th and 15th December 1995 the 1st defendant in connivance collusion of the 2nd defendant fraudulently deprived the plaintiff cheque No. 145152, K.C.B. Ltd, Moi Avenue Bank amounting to Kshs.554,360/= by unlawful causing and/or allowing depositing of the aforesaid cheque in the 1st defendant's account and paying the 1st defendant the same day the whole deposited sum.

37. What relief, if any, is the plaintiff entitled to? The Plaintiff in his further amended plaint dated 27th May 2007 sought an order that the 2nd defendant do transfer the principal sum from the 1st defendant's account into the plaintiff's account. No evidence was adduced by the plaintiff to show that the 1st defendant, account was still operational and had sufficient funds to meet the principal sum claimed. This Court cannot in view of the above make orders in vain. On prayer (b) for repayment of Kshs.554,360/= plus interest at bank rates as from 10th December 1995 to date of payment, it should be noted that the 2nd defendant remitted Kshs.552,860/= on 18.11.2002 to Court which sum was by consent of both Counsel ordered to be released to both counsel to be deposited in an interest bearing account in the joint names of M/s. Mwangi E.G. and Co. Advocates and M/s. J. Mbaya & Co. Advocates on 13th April 2011. In view of the above the amount that the court shall find due to the plaintiff shall attract interest from 13th December 1995 to 12th April 2011 as the sum of Kshs.552,860/= still earn interest by virtue of Counsel's consent adopted by the court as the order of the Court.

38. The upshot is that the plaintiff's claim succeeds and I proceed to make the following orders:-

(a) The defendants are jointly and severally liable to repay Kshs.554,360/= to the plaintiff plus interest at court rates from 13th December 1995 till 18th November 2002 as the 2nd defendant deposited Kshs.550,860/= which was released to both counsel to be held in interest earning A/C in the names of M/s. Mwangi E.G. & Co. Advocates and M/s. J. Mbaya. The said Kshs.550,860= be released to the plaintiff's Counsel after expiry of 30 days from the date of this judgment. The difference of unpaid Kshs.2,860/= shall continue to earn interest from 13th December 1995 till payment in full at Court rates.

(b) Plaintiff is awarded Costs of this Suit with Interest and Costs at Court rates.

DATED THIS 24TH DAY OF JUNE 2016.

J. A. MAKAU

JUDGE

DATED AND DELIVERED AT MERU THIS 20TH DAY OF JULY., 2016.

Delivered in open Court in the presence of:

Mwangi E.G. Advocate: For the Plaintiff.

David John Mbaya Advocate: For the 2nd Defendant

Court Clerk – 1.

2.

BY FRANCIS GIKONYO

JUDGE

ON BEHALF OF:

J. A. MAKAU

JUDGE

BY -----

JUDGE