



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL COURTS
COMMERCIAL & ADMIRALTY DIVISION
CIVIL SUIT NO 404 OF 2008

BENSON ODONGO OKWIRI.....PLAINTIFF

VERSUS

CONSOLIDATED BANK OF KENYA LIMITED.....DEFENDANT

JUDGMENT

INTRODUCTION

1. According to the Plaintiff's Complaint dated 18th July 2008 and filed on 21st July 2008, on or about 12th July 2008, the Defendant who was the Plaintiff's bank unilaterally and without prior warning, notice or just cause, blocked or barred any transaction in Savings Account No 0130350478800 which he was a signatory and Current Account No 0120450478800 which was in the name of his sister, one Roselyne Apiyo Okwiri but which he had mandate to operate on her behalf. At the time, the accounts had a total sum of Kshs 1,222,288/= that was made up as follows:-

a. Current Account No 0120450478800	Kshs 217,403.35
b. Savings Account No 0130350478800	<u>Kshs 1,004,885.45</u>

Kshs 1,222,288.80

2. As a result of the Defendant's breach, the Plaintiff suffered and continued to suffer irreparable loss and damages as funds in the Savings Account No 0130350478800 were obtained from a loan from M/S Njiwa Sacco Limited in which he was a member and were earmarked for the purchase of Motor Vehicle Registration Number KBB 898Z (hereinafter referred to as "the subject motor vehicle") which loan was accruing interest at twelve (12%) per cent to his detriment.

3. The Plaintiff therefore sought judgment against the Defendant for:-

a. **A permanent injunction to restrain the Defendant, its successors, agents, servants and/or employees from blocking, freezing and rendering inactive the Savings Account No**

0130350478800 and Current Account No 0120450478800 where the Plaintiff was a signatory at the Defendant's Bank at Koinange Street Branch, Nairobi.

- b. A mandatory injunction Order compelling the Defendant, its successors, agents, servants and/or employees from blocking, freezing and rendering inactive the Savings Account No 0130350478800 and Current Account No 0120450478800 and avail the Plaintiff's funds deposited therein and further permit the Plaintiff to operate the said Accounts without any hindrance.**
- c. General damages for breach of fiduciary duties.**
- d. Punitive damages for breach of fiduciary duties.**
- e. Costs of the suit.**
- f. Interest on items (c), (d) and € above at court rates.**

4. In a Notice of Motion application dated 18th July 2008 and filed on 21st July 2008, the Plaintiff sought Prayer Nos (a) and (b) herein pending the hearing and determination of the said application, suit, further orders and/or directions by the court. On 23rd October 2008, Kimaru J granted the Plaintiff said orders pending the hearing and determination of the suit. At the time parties proceeded for hearing, only Prayers (c)- (f) were therefore left for determination by the court.

5. On 24th October 2008, the Defendant filed its Statement of Defence dated 8th October 2008 in which it denied that it had acted in flagrant breach of the fundamental banking law, practise and procedure or that it had acted in breach of its fiduciary duties or that its actions were wrongful, unlawful and illegal or that it acted without just cause or it did not issue any notice of its intended actions.

6. The Plaintiff's Witness Statement and that of his sister Roselyne Apiyo Okwiri (hereinafter referred to as "PW 3") were dated and filed on 18th January 2012. There did not appear to be a Witness Statement of David Mutisya (hereinafter referred to as "PW 2") in the court file although the record showed that he did testify. The Plaintiff's Bundle of Documents was dated and filed 30th May 2012 while his written submissions were dated 23rd January 2013 but curiously filed on 22nd January 2013. His Supplementary List of Authorities were dated and filed on 17th September 2014.

7. The Defendant did not file any documents in support of its case. Its written submissions were, however, dated 15th July 2014 and filed on 17th July 2014.

8. Mutava J took the evidence of the Plaintiff, PW 2 and PW 3 on 21st March 2012 when the following were agreed to have been the issues for determination by the court:-

- 1. Whether the defendant had reasonable grounds for halting transactions relating to the said two (2) accounts.**
- 2. In the event that the answer to (1) above was in the negative, what damage was suffered by the plaintiff.**
- 3. Whether the plaintiff was entitled to the prayers in the plaint.**
- 4. Whether the defendant was entitled to the prayers in the defence.**
- 5. Who would bear the costs of the suit.**

9. When the matter came up for cross-examination of PW 3 on 19th September 2012, counsel for the Defendant informed the learned judge that he did not wish to cross-examine her. The Plaintiff closed his case while the Defendant's counsel indicated that he would not be calling any witnesses. The said learned judge directed parties to file their written submissions. Unfortunately, he was transferred before he could deliver his judgment.

10. The matter was allocated to this court when the said learned judge was transferred from the Commercial & Admiralty Division. On 22nd January 2013, counsel for both the Plaintiff and the Defendant informed this court that that they did not wish to have the matter heard *de novo* but that the court could proceed from where the same had reached. This judgment is therefore based on the evidence

and submissions that had been filed by the parties when the said learned judge was seized of the matter.

LEGAL ANALYSIS

11. In his evidence, PW 1 submitted a loan application form from M/S Njiwa Sacco evidencing an application for the sum of Kshs 1,000,000/=, a banking slip showing that he had deposited the monies he obtained from the said Sacco into the Savings Account No 0130350478800 that was in the name of PW 3, photographs of the subject motor vehicle which was being sold for the sum of Kshs 865,000/= and payslips that showed that he was a member of the said Sacco.

12. His evidence was that when he went to withdraw the said sum of Kshs 865,000/=, he was informed that the account had been frozen as it was being investigated by the Banking Fraud Unit. As a result, he lost access to the monies and the subject motor vehicle and also suffered other inconveniences.

13. During cross-examination, he admitted that he used the sum of Kshs 1,000,000/= to purchase another Motor Vehicle Registration Number KBH 265D in April 2009. When he was re-examined he was emphatic that he suffered inconvenience for not purchasing a vehicle in July 2008. The deposit slip on pg 33 of his Bundle of Documents showed that he deposited the sum of Kshs 1,000,000/= on 2nd July 2008.

14. The evidence of PW 2 merely confirmed that the said Sacco was the one that advanced the Plaintiff the sum of Kshs 1,000,000/= while PW 3 confirmed that she had authorised the Plaintiff to run the aforesaid accounts as she was out of the country. In view of the pending prayers relating to the award of general and punitive damages for breach of fiduciary trust, the court did not find their evidence to have been relevant and material as it did not appear to add any value. All that the Plaintiff was expected to demonstrate was how the Defendant breached its fiduciary trust.

15. It was not in doubt as the Plaintiff rightly submitted that the Banking law mandated the Defendant to ensure that he accessed the aforesaid accounts. The fact that the Defendant allowed him to access the said account after the court granted the order on 23rd October 2008 was evident that the Plaintiff was the Defendant's customer. He also exhibited an ATM card in respect of Savings Account No 0130350478800 in which the sum of Kshs 1,000,000/= was deposited and which, the Defendant did not deny issuing. The court did not therefore deem it necessary to engage itself on whether or not there was privity of contract between the Plaintiff and the Defendant an issue that had been raised by the Defendant.

16. The above notwithstanding, the court was more inclined to agree with the Defendant that the Plaintiff could not sue it in respect of Current Account No 0120450478800 as the monies for the subject motor vehicle were not to be withdrawn from the said account. The freezing of the said account did not appear to the court to have had any implication to the purchase of the subject motor vehicle.

17. The court did not also find it necessary to delve into the question whether or not the notice of the freezing of the accounts was issued as one of the agreed facts recorded by the court on 21st March 2012 was as follows:-

“On 14th July 2008, the defendant gave notice to Roselyne Apiyo Okwiri informing her that her accounts were under investigations by the Banking Fraud Department and as such the defendant had opted to halt all operations relating to the said accounts.”

18. In his evidence or written submissions, the Plaintiff did not demonstrate how the freezing of the account caused his loss and the quantification of the loss that he suffered between July 2008 and April 2009 when he purchased Motor Vehicle Registration Number KBH 265D. He did not annex any Agreement for Sale to show when he was to purchase the subject motor vehicle particularly because he was granted the order to access the accounts on 23rd October 2008 and what mitigating factors he took to purchase another vehicle well before April 2009.

19. There was also no evidence that was adduced by the Plaintiff, as pointed out by the Defendant, that

the vehicle he subsequently purchased was more expensive than the subject motor vehicle or that he could not get an alternative motor vehicle immediately or that he had any sentimental value to the subject motor vehicle or that he could not abandon the agreement for the sale of the subject motor vehicle without suffering any loss.

20. The court was more persuaded by the Defendant's arguments that the Plaintiff did not suffer any loss and that if at all he suffered the same, he did not quantify the same. In any event, general and punitive damages are not awardable where there was a breach of contract where the loss can be quantified- **See Habib Zurich Finance (K) Ltd vs Muthoga & Another (2002) 1 EA** and **Securicor Courier (K) Ltd vs Benson David Onyango & Another [2008] eKLR**.

21. The court was also in agreement with the Defendant that punitive or exemplary damages were not payable firstly because there was no law that prevented the banks from freezing its customers' accounts for lawful reason if it was suspected that there was unusual activity in such accounts and secondly, because such damages are only awarded in very limited cases.

22. In the case of **Civil Appeal No 132 of 2001 Bank of Baroda (Kenya) Limited vs Timwood Products Limited** (unreported), the Court of Appeal stated as follows:-

“... He could not have been awarded punitive or exemplary damages because in Kenya such damages are awardable only under two (2) circumstances, namely:-

- i. Where there is oppressive, arbitrary or unconstitutional action by the servants of the government; and**
- ii. Where the defendant's action was calculated to procure him some benefit, not necessarily financial, at the expense of the plaintiff...”**

23. Evidently, the Plaintiff did not show how the Defendant benefited from the sum of Kshs 1,000,000/= at its expense. Its submission that the new jurisprudence in England was to award damages for breach of fiduciary duty as was set out in **Remedies for Breach of Fiduciary Duty- Treatise published by John D. McCamus of Osgoode Hall Law School University** that was relied upon by the Plaintiff was thus clearly distinguishable from the facts of this case and could not apply.

24. There was also no doubt in the mind of this court that the Plaintiff did not plead his claim as required by the law making his claim for breach of trust incompetent. Under Order 2 Rule (1) of the Civil Procedure Rules, 2010, it is specifically provided as follows:-

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

- a. Particulars of any misrepresentation, fraud, breach of trust, willful default or undue influence on which the party pleading relies...”**

25. It was the view of this court that the suit herein would not succeed for the reason that the particulars of breach of fiduciary trust and fraud were not pleaded on the Plaintiff and that further, the Plaintiff did not prove that he was entitled to damages.

26. In this regard, the court associated itself with the observations that were made by Wendoh J in **Molo Mount Mineral Water vs Industrial Development Bank Limited HCCC No 113 of 2004** that was relied upon by the Defendant where she stated as follows:-

“ I do agree with the Court of Appeal's decision in Mbaka Nguru vs James Rakwar CA 133/98 when the court said:-

“ It will suffice to say that the plaintiffs who do not plead their damages properly and who then not prove the same do so as their own risk. They will not get these damages, however, sympathetic the court may feel towards them. The rules of pleading and mode of proof must be adhered to.”

27. Accordingly, having carefully considered the evidence, written submissions and case law in support of the parties' respective cases, the court found that there was no nexus or connection between Prayer Nos (c) and (d) of the Plaint and the body of the Plaint or the evidence that was adduced by the Plaintiff which only lends itself to the conclusion that the suit herein would not succeed against the Defendant.

DISPOSITION

28. For the foregoing reasons, the Plaintiff's Plaint dated 18th July 2008 and filed on 21st July 2008 is hereby dismissed with costs to the Defendant. It was the view of this court that Issue No (4) of the Statement of Agreed Issues was superfluous and need not have been recorded as an issue for determination as there was no Counter-Claim or Set-off that had been pleaded by the Defendant.

29. It is so ordered.

DATED and DELIVERED at NAIROBI this 19th day of January, 2015

J. KAMAU

JUDGE