



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA IN NAIROBI**  
**MILIMANI COMMERCIAL & ADMIRALTY DIVISION**

**CIVIL SUIT NO. 26 OF 2009**

**DYER AND BLAIR INVESTMENT BANK LIMITED.....PLAINTIFF**

**VERSUS**

**EQUITY BANK LIMITED.....DEFENDANT**

**AND**

**THOMAS KABAKI WAMWEA.....THIRD PARTY**

**JUDGMENT**

**Introduction**

1. The current suit was instituted by way of a Plaint dated 15<sup>th</sup> January 2009 and filed on even date. The Plaintiff sought for Judgment against the Defendant for:-
  1. **Kshs. 26,250,250/-**
  2. **Interest on 1 above from 12<sup>th</sup> May 2008 until payment in full**
  3. **Costs and interest thereon.**
2. In opposition to the Plaintiff's suit the Defendant filed a Statement of Defence dated 13<sup>th</sup> February 2009 on 17<sup>th</sup> February 2009. The Defence was then amended on 26<sup>th</sup> February 2009 and filed on 27<sup>th</sup> February 2009.
3. The Plaintiff filed a Reply to the Defence dated and filed on 27<sup>th</sup> February 2009.
4. The Defendant then applied to join Thomas Kabaki as a third party to this suit. The Court granted the Defendant's application and by an Order issued on 3<sup>rd</sup> June 2010, Mr. Kabaki was joined in the suit as a Third Party. The third party filed a Statement of Defence dated 11<sup>th</sup> January 2011 and denied the claim against him.

**The Plaintiff's Case**

5. The Plaintiff's case is that it was a customer of the Defendant and maintained a Business current account number 0180290144352 at the Defendant's branch in NHIF. By a letter dated 12<sup>th</sup> May 2008, purported to be signed by the Chairman and director of the Plaintiff, persons unknown to the Plaintiff instructed the Defendant to debit the Plaintiff's account with the sum of Kshs. 9,860,000/= and to transfer the said sum by Electronic Funds Transfer, to a beneficiary known as

- Abdiwahab Ahmed Nur in an account with Barclays Bank of Kenya Limited. Another letter still dated 12<sup>th</sup> May 2008 instructed the Defendant to debit the Plaintiff's account with the sum of Kshs. 16, 390, 250/- for the purchase of USD 265,000 and the costs of the transaction and further instructed the Defendant to transfer the said sum by Electronic Funds transfer to a beneficiary known as Tac Traders Company Limited in an account with Bank of Baroda Tanzania.
6. It was the Plaintiff's contention that neither did it draw the aforesaid letters nor authorize the transactions on its account and that the signatures on the letters of instruction were forgeries. Further, it was the Plaintiff's contention that it had no knowledge of the beneficiaries to whom the transfers were made.
  7. The Plaintiff's case was that the Defendant had no authority to pay out the moneys and was not entitled to debit the account with the amounts in the letters of instruction. It is on this basis that the Plaintiff claims from the Defendant repayment of the sum of Kshs. 26,250,250/=.

### **The Defendant's case**

8. The Defendant averred that by a letter dated 12<sup>th</sup> May 2008 signed by the Chairman and Director of the Plaintiff, the Plaintiff instructed them to debit its accounts with the sum of Kshs. 9,860,000/- and further instructed them to transfer the said sum by Electronic Funds Transfer to an account with Barclays Bank Limited, to a beneficiary known as Abdiwahab Ahmed Nur. By the same letter, the Plaintiff instructed the Defendant to debit its account with the sum of Kshs. 16,390,250/- for the purchase of USD 265,000 and the costs of the transaction. The Plaintiff further instructed the Defendant to transfer the said sum by Electronic Funds Transfer to an account with Bank of Baroda Tanzania to a beneficiary known as Tac Traders Company Limited. It was therefore the Defendant's case that the letters of instructions were drawn and filed in accordance with the terms and conditions thereof. According to the Defendant the said letters were drawn by the Plaintiff, they were genuine, properly and duly signed by the Chairman and director and constituted authorization of the transactions to the Plaintiff's account.

### **The Third Party's Case**

9. The third party denied that he was at any time contacted by the defendant or any of its officers or that he gave any confirmation or consent in connection with the payments. He also categorically denied signing the letters of instruction. He further relied on Criminal Case No. 807 of 2008, in which one Abdiwahab Ahmed Nur was charged with the offence of forgery and uttering the said letters, and convicted and sentenced in connection therewith.

### **The hearing**

#### **Plaintiff's Evidence**

10. PW 1, Paul Wachira Gathuku, testified that between the 12<sup>th</sup> to 14<sup>th</sup> May 2008 he noted two transactions which the Plaintiff had not authorized. The entries were on 13<sup>th</sup> May 2008 for Kshs. 9, 860,000/= and Kshs. 16, 390,250/=. It was his testimony that he was curious about the transaction since for money to leave the Plaintiff's account they had to ensure that the client's account had money. On the two occasions when the aforesaid entries were made the Plaintiff had not debited any client account. The Plaintiff further testified that the amounts were paid to persons unknown to them.
11. It was his testimony that the letters of instruction were not from the Plaintiff. He pointed out that the letter heads were not of the Plaintiff. He referred the Court to page 2E of the Plaintiff's documents to show the authentic letter head. It was further his testimony that a letter from the Plaintiff would always be accompanied with a cheque. He referred to document 2C as a reflection of a proper transaction from the Plaintiff. It was also his testimony that the chairman was never involved in transactions of exchange rate.
12. PW 1 testified that he wrote to the Defendant on the issue demanding the money debited from their accounts back. However, to date the Defendant has not gotten back to them as regards the investigations of the matter. He further testified that he was aware of the conviction of one

- Abdiwahab Ahmed Nur in relation to the Kshs.9, 860,000/= debited from the Plaintiff's account and that he testified in the criminal proceedings.
13. On cross examination, PW 1 maintained that the letters of instructions did not originate from the Plaintiff. He testified that in dealing with foreign transactions, only specific people would negotiate but that the Defendant was never informed of these people. He further confirmed that the Plaintiff had never shown the Defendant bank what their letter head looked like. He also testified that he did not have any evidence that he told the bank that any authorization to pay was to be accompanied by a cheque.
  14. PW 2, Jimnah Mbaru, testified that he did not sign any of the letters of instructions and that he did not give any instructions for the purchase of the said dollars. He further testified that the two letters did not bear the Plaintiff's letter heads. Secondly it was a practice by the Plaintiff not to put the name of signatories in its letters. It was his testimony that the Plaintiff had dealt with the Defendant for a long time and that they ought to have known that they did not put down names of signatories in their letters. He also testified that as regards the authorization of the transactions, he was never called.
  15. On cross-examination, PW 2 testified that the Plaintiff had given the Defendant bank specimen signatures in the account opening forms. It was his testimony that besides the signatures they did not give any other instructions to the Defendant. He testified that in 2011, 11 of the Defendant's employees who had worked for the Plaintiff between 2008 to 2009 had been sacked for fraud.

### **The Defendant's evidence**

16. DW 1, Joseph Mwaura Kamau, testified that on 12th May 2008 his branch manager gave him 2 instructions emanating from the Plaintiff. These were 2 sets of letters which he was to confirm and then transfer the money. It was his testimony that he tried calling the Plaintiff's telephone number but could not go through. He stated that it was normally the Defendant's practice to verify the instructions on phone. He then decided to call one of the directors of the Plaintiff using a phone on the account application form. The director was Thomas Kabaki Wamwea. He did not pick the phone so he wrote a text message. DW 1 testified that Mr. Kabaki called him and they talked and he gave the details of the instructions. Mr. Kabaki said it was okay and he then authorized the transactions.
17. On re-examination, DW 1 testified that before authorizing payment he confirmed the instructions with the Plaintiff directors.
18. DW 2, Stephen Gichohi, testified that on 12th May 2008 the customer relationship officer received 2 letters of instructions from the Plaintiff which he looked at. He further testified that the said letters were signed by Mr. Jimnah Mbaru and Thomas Kabaki Wamwea being the signatories of the Plaintiff. It was his testimony that he recognized their signatures. He testified that he instructed the operations manager, one Mr. Kamau to proceed with those instructions, which he did according to the mandate. On 18th May 2008, which was on a Sunday, DW 2 received a call from the Finance Manager of the Plaintiff stating that the transactions in question were fraudulent. This was followed by a letter of complaint from the Plaintiff on 19<sup>th</sup> May 2008.
19. On cross examination, DW 2 testified that his role in the matter was to check the signatures, confirm them and hand them over to the operations manager to deal. He confirmed that he had noted certain discrepancies on the letter of instructions including letter head and that names of the signatories had been given.
20. He further testified that the Criminal trial Court found the operations manager, Mr. Mwaura, negligent for the loss of the money by the Plaintiff. Mr. Mwaura was dismissed from the bank soon after the criminal case.
21. DW 3, Margaret Wangeci Wanjohi, testified that on 8<sup>th</sup> May 2008, she received a call from one Jimnah Mbaru who wanted to buy dollars. It was her testimony that she instructed Mr. Mbaru to make the application in writing. She was however not sure whether the Plaintiff applied in writing though the transaction took place on 13th May 2008.
22. DW 4, Julius Turuchui, testified that his duty at the Defendant Bank is to investigate what appears to be internal frauds and report it to the police. As regards this matter he did not have any suspicion that there was internal fraud. His investigations were based on the two letters of complaints from the Plaintiff about the authority of a letter alleged to have come from the Plaintiff

- bank.
23. It was his testimony that when he visited the Plaintiff's offices, he was shown their genuine letter heads which differed from the letter heads in the two letters issued to the Defendant.
24. On re-examination, he testified that it was only on 19th May 2008 that the Defendant received a report that there could have been some anomaly in the transaction. On his part, he did not see any reason to investigate Mr. Joseph Kamau Mwaura as he had done his work as per the mandate and procedure of the bank. He further testified that it was not true that Mr. Joseph Kamau Mwaura was dismissed as a result of this case. He however did not know the circumstances under which he left the bank.
25. It was also his testimony that there was a criminal case arising out of this transaction and that the beneficiary of the fund, Abdiwahab Ahmed Nur was arrested, charged and found guilty, and sentenced.

### **Third Party's evidence**

26. The Third Party testified on his own behalf and also called a Forensic Document examiner to testify.
27. Mr. Wamwea relied on his witness statement filed on **29th February 2012** and adopted it as his evidence. With regard to the two letters dated **12th May 2008**, it was his testimony that the said letters did not have the Plaintiff's letter head or logos. He confirmed that those were not the Plaintiff's letters and that the signatures therein were not his as well as the contents thereof. It was further his testimony that he did not remember being called by Mr. Mwaura in relation to the disputed transaction. He testified that as a director in the bank it was not his duty to confirm the instructions.
28. On cross-examination, Mr. Wamae testified that the allegation that Mr. Mbaru negotiated the forex rates was not true as that was not his work. He further testified that the instructions given to the Defendant regarding the transactions that took place herein were not normal Dyer and Blair instructions.
29. On re-examination, it was Mr. Wamae's testimony that the Plaintiff never gave instructions to the Defendant that they were ready to confirm instructions via telephone calls.
30. The second third party witness was Antipas Nyanjwa, a forensic document examiner. He produced a Forensic Report dated 13<sup>th</sup> September 2012 as an exhibit marked as Third Party – Exhibit Number 1. The report contained his findings on the disputed signatures appearing on the letters of instruction dated 12<sup>th</sup> May 2008. He testified that the signatures purporting to be Jimnah Mbaru's and Thomas Kabaki Wamwea's were forgeries.

### **Submissions**

31. The Plaintiff filed its written submissions dated **9<sup>th</sup> October 2014** on even date. It also filed a reply to the Defendant's submissions on **12<sup>th</sup> February 2015**. The Defendant filed its written submissions dated **29<sup>th</sup> October 2014** while the Third Party filed his submissions dated **5<sup>th</sup> February 2015** on **6<sup>th</sup> February 2015**.

### **Analysis**

32. I have considered the pleadings on record, the evidence of the parties and the written submissions filed by Counsel as well as the authorities cited. Having done so, this Court has established the determination of this matter falls mainly on the question of whether or not the two letters of 12<sup>th</sup> May 2008 constituted authority by the Plaintiff to the Defendant to debit its account in the manner that it did.
33. It is the Plaintiff's case that it neither drew the said letters nor authorized the transactions on its account thereof, and that the signatures on the documents purporting to be letters of instructions were forgeries. The Plaintiff led evidence to this effect. Mr. Mbaru, PW 2, confirmed that he did not sign the letters of instructions in question. He also denied that he made any calls to the

Defendant to negotiate a forex rate for the transaction of USD 265,000. He stated that as chairman of the Plaintiff he would not be involved in such processes as there were bank employees whose job it was to do that. PW 1, the Plaintiff's financial accountant, corroborated this fact by testifying that he was the only one who dealt with the US Dollar accounts and not the Bank's Chairman. He testified that he would have been the one to generate instructions for any transactions on the said accounts and also the one to be called for any confirmation required. He confirmed that he did not generate any instructions on the two transactions in issue.

34. The Defendant denied the claim and asserted that the instructions were proper and that it had in fact obtained confirmation on telephone from one Mr. Kabaki, the third party herein, to carry on with the instructions. Mr. Mwaura, the operations manager in 2008 (DW1) testified that he received the two letters of instructions at around 3.00 pm and confirmed that he was required to call the customer to confirm the instructions. He stated that he tried calling but did not succeed in getting through on the Plaintiff's lines. He thereafter tried to call Mr. Kabaki on his mobile phone, but he did not pick up his call. He then sent him a text message.
35. Mr. Mwaura produced what he referred to as a phone log to indicate that he had sent a text to Mr. Kabaki. However, an official from safaricom testified that the print out was not authorized by safaricom and that they did not keep a record of the contents of their customers' text messages or indeed record their calls. The witness further stated that they maintained records for only 90 days and could not therefore avail any transcripts of any call logs from Mr. Mwaura's mobile number or that of Mr. Kabaki.
36. In the absence of any such documentary evidence to the effect that Mr. Kabaki called the Defendant to confirm the instructions in the disputed letters, it is difficult for this Court to ascertain the veracity or otherwise of the Defendant's position that the said Mr. Kabaki confirmed the disputed letters.
37. The third party categorically denied having signed the two letters of instruction and further denied having been contacted by any officer of the Defendant to confirm the instructions. It was his position that confirming of instructions was the function of the Plaintiff's financial manager. He further stated that the payee of one of the payments in question had in fact been convicted for having committed the fraud.
38. I have perused the Judgment in the Magistrates' Court convicting the said Ahmed Noor. In actual sense, he was charged and convicted of stealing contrary to section 275 of the Penal Code. The Court did not find that he was in any way involved in the fraud that led to the debiting of the Plaintiff's account. The alleged fraudster, one Mr. Abraham Kanzika, as it appears, was not apprehended. That notwithstanding, the criminal proceedings and the evidence before this Court point to one direction; that there was fraud involved with regard to the letters of instruction dated 12<sup>th</sup> May 2008. Though the perpetrators of the fraud have not been positively identified in these proceedings, the circumstances herein lean towards the fact that the Plaintiff did not authorise the transactions in question.
39. The Plaintiff's case is that there were discrepancies regarding the letter head in the disputed letters of instructions. Both PW 1 and PW 2 pointed out to the said discrepancies. According to PW 2, the identities of the signatories was never indicated in their letters of instruction to the bank for obvious security reasons and also because different signatories could execute the letters. The witnesses referred to page 2C of the Plaintiff's bundle as the correct sample of the Plaintiff's letter head.
40. I have perused the letters dated 12<sup>th</sup> May 2008 at pages 1 and 2 of the Plaintiff's bundle of documents as well as the letter at page 2C referred to as the authentic letter from the Plaintiff. Indeed, the letters of instruction are different from the letter at page 2C. The letters of instruction do not have the Plaintiff's logo and the letter head therein is different from the Plaintiff's authentic letter. In addition, the said letters of instructions indicated the names of the signatories which was not normally the case with letters of the Plaintiff.
41. The Defendant ought to have checked and verified the letter head details or better still it should have confirmed the authenticity of the letter in a more official manner. The phone calls made by

Mr. Mwaura appeared rather casual and in my view cannot meet the standards of due diligence and care required of such an office. The Defendant testified that verification of instructions by phone calls was normal. That may have been the position. However in this case, the Defendant called the Plaintiff and the office line could not go through. It then resorted to call one of its directors and when the line went unanswered sent a text. This does not appear as the usual official way of conducting business in a Bank and especially in this matter where the sums of money involved were colossal. In addition, the unexplained sense of urgency in getting the Plaintiff to confirm the instructions is rather curious. It is not clear why Mr. Mwaura did not stick to the official line. Due diligence demanded that the Defendant through its Operations Manager or any other responsible official should have done an email or a letter with regard to confirming the said instructions.

42. The Plaintiff relied on the case of **Selangor United Rubber v Cradock and others** (1968) All ER 1073 in submitting that the Defendant acted negligently and in breach of the duty of care that it owed to the Plaintiff. In the said case it was held that while carrying out the customer's instructions, a bank is under an obligation to exercise reasonable care and skill which applies to interpreting, ascertaining and acting in accordance with the instructions of a customer.
43. In this matter, the Court has established that the Defendant did not exercise reasonable care and skill required in such transactions. *See also; Simba Commodities v Citibank N.A (2013) eKLR.*
44. With regard to the signatures in the letters of instructions, it is the Plaintiff's case that the same were a forgery. As already stated above, the Plaintiff has maintained that the letters of instruction did not emanate from its offices. The Plaintiff pointed out the discrepancies in the letter head of the disputed letters and contended that it did not sign the said letters.
45. The Plaintiff relied on Mr. Julius Turuchiu's (DW 4) evidence. He testified that he conducted investigations to establish the authenticity of the two letters of instructions which had been received by the Defendant. His conclusion was that fraud had been perpetrated. There was also the third party's witness, the forensic document examiner who testified that the signatures on the letters which allegedly gave instructions to the Defendant were forgeries.
46. The Defendant did not satisfactorily rebut this expert evidence. It did not call any rebuttal expert witness of its own. In that case, the Court was inclined to rely on the evidence given by the experts subject to section 48 of the Evidence Act which states as follows:-

**“When the court has to form an opinion upon a point of foreign law, or of science or art, or as to identity or genuineness of handwriting or finger or other impressions, opinions upon that point are admissible if made by persons specially skilled in such foreign law, science or art, or in questions as to identity, or genuineness of handwriting or fingerprint or other impressions.”**

Therefore, this Court finds that on a balance of probabilities, the Plaintiff established that the signatures in the disputed letters of instruction did not belong to its signatories. Subsequently, the third party also proved that the signature appearing on the letters of instruction was not his. This state of affairs show that the defendant was not only negligent in the way it managed the affairs of the Plaintiff's account, but also that the Defendant's officers committed acts of fraud leading to the loss suffered by the Plaintiff. The facts of the matter before the Court show that there was a mixture of fraud and negligence on the part of the Defendant. The Defendant as a Banker owed the duty of care to the Plaintiff as its customer. In the case of **TAI HING COTTON MILLS LTD. VS LIU CHONG HING BANK LTD AND OTHERS** the Court stated as follows:-

**“In the absence of express agreement to the contrary, the duty of care owed by a customer to its bank in the operation of his current account was limited to a duty to refrain from drawing a cheque in such a manner as to facilitate fraud or forgery and a duty to inform the bank of any unauthorised cheques purportedly drawn on the account as soon as the customer became aware of it. The Customer was not under a duty to take reasonable precautions in the management of his business with the bank to prevent forged cheques being presented for payment nor was he under a duty to check his periodic bank statements so as to enable him to notify the bank of any unauthorised debit items, because such wider duties were not necessary incidents of the banker/customer relationship since the business of banking was not the business of the customer**

**but that of the bank, and forgery of cheques was a risk of the service which the bank offered. Furthermore, the obligations owed by banker and customer to one another in tort did not provide the Respondent Banks with any greater protection than that which they had contracted for, since the parties mutual obligations in tort could not be any greater than those to be found expressly or by necessary implication in their contract.”**

In Halsbury’s Law of England 4<sup>th</sup> Edition Volume 3 (1) on the ‘Business of Banking’ at page 141, a customer’s duty in operating current account was analysed as follows:-

**“in operating his current account the customer owes to his bank two duties of care: (1) to refrain from drawing a cheque in such a manner as to facilitate fraud or forgery and (2) to inform the bank of any forgery of a cheque purportedly drawn on the account as soon as he, the customer becomes aware of it.**

**The customer does not owe any wider duty of care in the operation of his current account; and in particular he does not owe a duty of care (a) to take reasonable precautions in the management of his business with the bank to prevent forged cheques being presented to it, or (b) to take such steps to check his periodic bank statements as a reasonable customer in his position would take to enable him to notify the bank of any debit items in the account which he has not authorised.”**

47. In the same volume at page 142 paragraph 163, on the issue of duties of paying banker where cheques are concerned it states:-

**“A banker must not continue to pay cheques without inquiry if a reasonable and honest banker with knowledge of the relevant facts would have considered that there was a serious or real possibility, albeit not amounting to a probability, that the customer was being defrauded or that money was being misappropriated. Failure to inquire would not be excused merely because of a conviction that the answer would be false.”**

48. In the same volume at page 157 paragraph 181 on the issue of payment on forged cheque, it states:-

**“A document in cheque form on which the customer’s name as drawer is forged or placed without authority is not a cheque but a nullity; and unless the banker can establish adoption or estoppels, he may not debit the customer with any payment made on it.**

**The common aphorism that a banker is under a duty to know his customer’s signature is in fact incorrect, even as between the banker and his customer; the principle is simply that a banker may not debit his customer’s account on the basis of a forged signature, since he has in the event no mandate from the customer for doing so.”**

49. I am persuaded by the above authorities and legal texts, and have no doubt that the Plaintiff has established its case on a balance of probabilities, and that the Plaintiff is entitled to the prayers sought in this suit.

## **DISPOSITION**

50. In view of the foregoing, I hereby enter Judgment for the Plaintiff against the Defendant in the following terms:-

1. **Kshs. 26,250,250/-**
2. **Interest at court rates on 1 above from 12<sup>th</sup> May 2008 until payment in full**
3. **The costs of the suit shall be for the Plaintiff and the third party**

That is the Judgment of the Court.

**DATED, READ AND DELIVERED AT NAIROBI**

**THIS 17TH DAY OF APRIL 2015**

**E. K. O. OGOLA**

**JUDGE**

**PRESENT:**

Mr. Ochieng holding brief for M/s Karimi for Plaintiffs

Mr. Akhiha for Defendants

Mr. Mbaluto for Third Party

Teresia – Court Clerk