



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Appeal 630 of 2007

Editorial Summary

1. *Civil Appeal*
2. *Subject of Subordinate court case*

BANK FRAUD

- 2.1 *Appellant original plaintiff: customer*
- 2.2 *Respondent original defendant: bank*
- 2.3 *Appellant approached by bank employee to use appellant's account for an award transaction and to withdraw the same.*
- 2.4 *Appellant obliges and withdraws sum including Ksh. 403,000/- (26th January 2006)*
- 2.5 *Bank on discovering fraud, arrest employee and dismiss him from employment.*
- 2.6 *Employee and customer charged before a criminal case still pending as of civil case but 8th November 2011 acquitted.*
- 2.7 *Customer account debted with sum Ksh. 403,000/- lost by bank.*
- 2.8 *Customer sues bank.*
- 2.9 *Subordinate court after trial, held that the customer be refunded the funds. Bank acted illegally*

20th June 2007.

2.10 *Bank files appeal.*

3. *Memorandum of appeal*

3.1 *Hon. Magistrate erred in law and fact ... as no evidence to support respondent's case result to court to award Ksh. 405,000/-*

3.2 *... failed to consider respondent's admission to court and transferred sum from Ac 099-198-001316.*

3.3 *... failed to consider Ac 099-150-105-950 fraudulently Ksh. 405,000/-*

3.4 *... failed to consider withdrawal Ksh. 612,002/- inclusive of fraudulent Ksh. 405,000/-*

3.5 *... failed to consider respondent did not produce documentation.*

3.6 *... erred in law and fact that there was no special damages pleaded ... to warrant respondent to be awarded any damages.*

3.7 *... erred to consider plaint filed incurably defective.*

3.8 *... prayed for judgment to be set aside.*

4. *Submissions by appellant:*

4.1 *Account was fraudulently opened.*

4.2 *Customer to bank not permitted to engage in fraudulent action.*

4.3 *Admission of withdrawing Ksh. 612,000/- from account*

4.4 *Bank notes ksh. 405,000/- disputed amount.*

4.5 *Amount debted to customer's account to meet shortfall of bank's accounts.*

5. *By Appellant:*

- 5.1 Denial of fraud by customer
- 5.2 The decision of court sound.
- 5.3 Appellant charged in criminal court case
Garissa 172/06 but acquitted for any wrong doing.
- 5.4 Account opened by bank for third party
Ibrahim Dahir Osman had no bank opening account
form, statement or ID card of 3rd party.
- 5.5 No evidence to show funds remitted into
bank account.
- 5.6 Respondent had no knowledge of fraud.
- 6.6 No damages – special or otherwise was pleaded.
- 6.7 Appellant failed to show moneys owed.

6. Held:

Appeal dismissed.

7. Case Law:

NIL

8. Advocates :

- i) *F. G Thuita instructed by M/s Murage Mwangi & Co Advocates for the applicant/respondent*
- ii) *Ratemo Oira instructed by M/s Ratemo Oira & Co Advocates for respondent Appellant.*

KENYA COMMERCIAL BANK APPELLANT/ ORIGINAL PLAINTIFF

VERSUS

ABDINOOR ADEN MOHAMMED RESPONDENT/ ORIGINAL DEFENDANT

(Being an appeal against the Judgment and decree of the SRM's court at Garissa, Hon. Mr D.O. Orimba delivered on 20th June 2007 in Garissa SRM's Case No. 35 of 2006)

J U D G M E N T

I. INTRODUCTION

1. Kenya Commercial Bank Ltd, the appellant here, discovered sometime in the year 2006, at its Garissa branch that a sum of

Ksh. 403,000/- belonging to the CDF Fafi had been stolen and deposited into a Kenya Commercial Bank Account No. 099-150-105-950 belonging to one Ibrahim Dahir Osman (not party to this suit and or appeal).

2. The said account had been opened a week prior to the funds being deposited. The bank then discovered that the said sum of money being Ksh. 403,000/- was then transferred into the account of one Abdinoor Aden Mohammed, respondent herein being No. 099-198-001316. The funds were withdrawn sometime on 27th January 2006 or thereabouts including funds belonging to A.A. Mohamed totaling Ksh. 612,000/-

3. The bank, on its investigations discovered that one of its staff, one Salat Kikuyu was the one who had made an internal transfer from account 099-150-105-950 belonging to Ibrahim Dahir to account 099-198-001316 belonging to A.A. Mohammed, the respondent herein.

4. The employee was sacked and charged in a criminal court at Garissa case number 172/06 together with A.A. Mohammed/respondent.

5. In the meantime, the bank recovered its Ksh. 405,000/- by debting A.A. Mohamed/respondent's accounts. The said respondent protested stating all along that he did not remove the moneys in the account fraudulently.

6. His story was that the bank employee Salat Kikuyu approached him to use his account, a gold account that does not attract bank charges (as stated by the advocate for the respondent from the bar.) The respondent agreed to this. Two days later the bank employee confirmed the money was in the account. He withdrew a total of Ksh. 612,000/- and gave the bank employee Ksh. 405,000/- being that employee's funds.

7. All along, he was not aware that there had been any fraud on the part of the employee. He wrote to the bank to reimburse him the funds withdrawn. The bank stated he waits till the criminal court charges are complete.

8. The respondent filed suit sometime in December 2006 during the pending of the criminal court case. The respondent prayed that the sum of Ksh. 405,000/- be reimbursed to him.

9. In the meantime, the criminal court case was finalized on the 18th November 2012 taking almost 6 years to be complete. The respondent was acquitted of any and all charges before him.

10. The civil suit was finalized on 20th June 2007. The Hon. Magistrate in his judgment found that the Kenya Commercial Bank are liable to refund the funds removed from the respondent's account without authority.

11. It is then that the bank not being satisfied with this decision appeal to this High Court on 19th July 2007.

12. The appeal was admitted for hearing on 6th March 2012 Ang'awa J (Section 79B) and directions under Order 42 r 13 Civil Procedure Rules was heard on 23rd April 2012. The appeal hearing was held on 16th July 2012.

II APPEAL

13. The appellant/bank stated that the Hon. Magistrate erred in law and fact:

13.1 ... as no evidence to support the respondent's case which resulted to court to award Ksh. 405,000/-

13.2 ...failed to consider respondent's admission before court that the sum of Ksh. 405,000/- was fraudulently deposited in his account.

13.3 ... failed to consider respondent's admission to court and a bank employee had come to court and transferred sum of A/c 099-198-001316

13.4 ... failed to consider A/c 099-150-105-950 fraudulently opened to defraud (the bank).

13.5 ... failed to consider the withdrawal of Ksh. 612,000 inclusive of fraudulent sum of Ksh. 405,000/-

13.6 ... failed to consider respondent did not produce documentary evidence.

13.7 ... erred in law and fact that there was no special damages pleaded ... to warrant respondent to be awarded any damages.

13.8 ... erred to consider plaint filed incurably defective.

14. The appellant/bank prayed that the Hon. Judgment and decree of the trial court be set aside together with consequential orders.

15. That the court do grant appellant further or other relief it may deem fit and just.

16. To order the respondent pay costs of appeal.

III SUBMISSIONS BY THE APPELLANT

17. In the submission before this court, the appellant's bank argued, through its advocate that the said account had been fraudulently opened. It is well known that a customer is not permitted to engage in fraudulent action.

18. There was indeed an admission that a sum of Ksh. 612,000/- had been withdrawn from the account including a sum of Ksh. 405,000/- the deposited sum.

19. The amount was duly debited in the respondent's account. The bank recovered Ksh. 405,000/- to meet the shortfall of the bank.

IV SUBMISSIONS BY THE RESPONDENT

20. The respondent denied the allegations of fraud. He stated that the Hon. Magistrate's decision was sound and should be upheld.

21. Whereas the respondent was charged in a criminal court case being Garissa Resident Magistrate Criminal Case 172/06, he was subsequently acquitted for any wrong doing.

22. From the evidence before court by the appellant's witness, the claim that one Shabir Dahir Osman opened account, it is clear that the witness produced no documentary evidence to prove this. There was no bank opening account statement or no card of a third party.

23. There was no evidence to show the funds remitted was actually so done into the account.

24. What was clear, the respondent had no knowledge of fraud.
25. As to the issue of damages or special damages none had been pleaded in the plaint.
26. That the appellant failed to show the funds were due and owing.
27. The respondent prayed the appeal be dismissed.
28. None of the parties herein submitted any case law to support their arguments.

V OPINION

29. From the evidence before the trial court, it was established that indeed fraud had occurred at the bank in which moneys from the CDF Fifa of Ksh. 405,000/- had been stolen and deposited into the account of Ibrahim Dahir Osman. It was further established that those funds found themselves into the respondent's account. The sum of Ksh. 612,000/- was withdrawn and a total of Ksh. 405,000/- was duly paid to one Salat Kikuyu, a bank employee. This same bank employee was the one who had effected the transfer to the respondent's account.
30. According to the respondent, the said bank employee stated the funds were to come from Nairobi. This was not the case and the direct transfer was made within the bank was not known to the respondent.
31. This court on appeal noted the consistency of the appellant's version of account on the whole matter. He wrote letters to the bank giving this same version. That he was not aware of the fraud.
32. The court then believed his story and upheld the findings that he was not connected to the fraud.
33. The bank was correct to raise criminal complaints against the respondent and its bank employee. The criminal court albeit belatedly found the respondent not guilty and acquitted him of all charges.
34. Further investigations as from the bank employee should have been taken on how the funds were dispersed by the said employee.
35. The issue in this appeal is really whether the respondent acted fraudulently and was part and parcel of the syndicate to the fraud.
36. I would find that the said respondent was not fraudulent. Yes he admitted funds were withdrawn and paid to the bank employee, a fact that was true but did he have the knowledge of such fraud? The answer is no he did not.
37. Where it is correct that there was movement of the funds from one account to the other, the same was attributed to the bank employee and not to the respondent, according to evidence.
38. This finding by the Hon. Trial magistrate was correct and disposes off grounds 1 – 5 of the appeal.
39. The second pertinent issue is whether the said bank had a right to recover Ksh. 405,000/- from the respondent's account?
40. The argument by evidence by the appellant's witness is that they had that right to do so. Once they recovered the funds of Ksh. 405,000/-, they required to do no more (apart from their employee being charged then dismissed.)
41. The Hon. Magistrate in his judgment held that the removal of

Ksh. 405,000/- from the respondent's account was unlawful. He went further to rely on the case law of:

Barclays Bank of Kenya – Vs – Jady

(No citation given)

42. Where ***“the customer had a duty to exercise reasonable care in executing written orders so as not to mislead the bank by ambiguous or facilitate fraud or forgery.”*** The Hon. Magistrate went further to state ***“that a customer had a further duty to inform the bank of any forged order, including the duty to notify the bank of unexpected deposits in the customer's account.”***

43. I would uphold the findings that the said trial magistrate found on the basic evidence before him that the respondent acted unlawfully.

44. If that was the case and from the outcome of the proceedings in the magistrate's court, both civil and criminal, the outcome was the respondent was not aware a fraudulent act had been done?

45. The appellants are therefore duty bound to refund the Ksh. 405,000/- taken from the account.

46. As to the grounds 6 & 7, the appellant spoke of an award granted to the respondent. There was no such award granted in damages. There was no damages. There was no pleadings in the plaint for special damages. I would reject these two grounds of appeal.

47. On the 8th appeal ground, that the plaint filed by the respondent was crucially defective. There is no indication that this point was raised before the trial was heard. There is therefore no arguments for this appeal court to consider and to make an opinion or decision from the subordinate court.

48. I hereby find that this appeal has no merits. There appeal herein is dismissed. The decision of the trial magistrate is upheld.

49. There will be costs to the respondent original plaintiff in this appeal. I award costs to the original plaintiff in the subordinate case to be paid by the original defendant.

DATED THIS 19TH DAY OF JULY 2012 AT NAIROBI

M.A. ANG'AWA

JUDGE

Advocates :

- i) *F. G Thuita instructed by M/s Murage Mwangi & Co Advocates for the applicant/respondent*
- ii) *Ratemo Oira instructed by M/s Ratemo Oira & Co Advocates for respondent Appellant.*