



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

**Civil Suit 59 of 1999**

**KILIMANJARO DISTILLERS LIMITED ..... PLAINTIFF**

**VERSUS**

**SAFEPAK LIMITED ..... DEFENDANT**

**AND**

**BIASHARA BANK OF KENYA LIMITED ..... 3<sup>RD</sup> PARTY**

**JUDGMENT**

1. The plaintiff's case as pleaded in the plaint is that the defendant supplied certain goods to the plaintiff for which the plaintiff paid for with a bankers draft No.3809093 (herein after referred to as the 1<sup>st</sup> draft) dated 20<sup>th</sup> September 1995. The goods supplied were for \$8,065 (Eight thousand sixty five dollars). This 1<sup>st</sup> draft was forwarded to the defendant, who acknowledged receipt and banked it with their bankers, the third party herein.
2. However, the defendant represented to the plaintiff that the 1<sup>st</sup> draft was misplaced and requested the plaintiff to forward another bankers draft of similar amount on assurance that they were likely to trace the 1<sup>st</sup> draft in which case they were to refund the amount paid in the 1<sup>st</sup> draft. It is on that basis that the plaintiff issued the defendant with a second bankers draft No.390448 dated 19<sup>th</sup> October 1995 for the same amount of money and for the same goods. The defendant en cashed the second draft and failed to procure the reimbursement of the first draft. The first draft was not refunded to the plaintiff and when the plaintiff raised its concerns with the defendant, there was no follow up. Thus the plaintiff suffered the loss of

\$8,065 which it now claims in this suit with costs and interest from 15<sup>th</sup> September 1995 the date of the 1<sup>st</sup> draft.

3. The defendant in its statement of defence denied liability and alleged that it is the plaintiff who failed to stop payment of the 1<sup>st</sup> draft after they were informed through a fax message that the 1<sup>st</sup> draft had been misplaced. The plaintiff is accused of negligence for failure to cancel the 1<sup>st</sup> draft or stop payment before issuing the second draft. It is also faulted for failure to exercise due care, skill, diligence and competence. The defendant denied liability in total and issued a third party notice to Messrs **Biashara Bank of Kenya Limited** who was enjoined as third party in these proceedings.
4. The third party also denied liability in their statement of defence and denied having been negligent. They pleaded that the 3<sup>rd</sup> party informed the defendant that the first draft was misplaced but the plaintiff failed to stop payment.
5. On the day of the hearing the plaintiff produced bundles of documents namely draft No.390448 dated 19<sup>th</sup> October 1995, draft No.389093 dated 20<sup>th</sup> September 1995. A fax messages from Mr. Shah c/o Safepak Limited the defendant herein, confirming that the first draft was lost in transit and requesting the plaintiff to cancel the 1<sup>st</sup> draft. The deposit slip dated 12<sup>th</sup> October 1995 against which the first draft was issued, the forwarding slip for the 1<sup>st</sup> draft No.390448 dated 1<sup>st</sup> December 1995 against which the second draft was issued. All these documents were produced by consent.
6. Mr. Gautama appearing for the plaintiff contended that under the provisions of order XV11 Rule 1 of the CPR, the facts were not disputed it was not necessary for the plaintiff to start by giving evidence. Thus parties recorded a consent admitting the above set of documents by consent. Counsel for the plaintiff submitted that under order XXV11 of the Civil Procedure Rules, the defendant and the third party admitted the facts alleged by the plaintiff thus the plaintiff did not have to give evidence but relied on the documents which were produced by consent.
7. The defendant gave evidence through **Mr. Tusha Shah** a director, he admitted that the

defendant supplied goods to the plaintiff for which the plaintiff paid the first bankers draft. It was presented to the bank that is the third party in these proceedings. The defendant's account was not credited and the defendant did not know what happened to this draft so they requested the plaintiff to issue another draft as the first draft was being investigated. This witness said that he advised the plaintiff to stop payment of the first draft, meanwhile the defendant received information that the first draft was still being investigated and they faxed this information to the plaintiff informing the plaintiff to stop payment of the 1<sup>st</sup> draft. The defendant contended that they have never received the proceeds of the first draft and they denied liability.

8. The third party also relied on the evidence of **Mr. Gilbert Warema** who was at the time working with the third party. He testified that the 1<sup>st</sup> draft was deposited in the third party bank. It was then picked by City Bank Nairobi who forwarded it to City Bank New York for clearance and they were supposed to credit the account of the third party in New York. However, they did not get the proceeds within the third day of banking. The credit was not reflected in their statement of account which they used to receive daily. They received a message on 21<sup>st</sup> November 1995 informing them that the issue of the draft was under investigation.

9. This witness confirmed that the third party has never been credited with the proceeds of the 1<sup>st</sup> draft. During cross examination Mr. Warema admitted that when a customer banks a banker's draft, the customer ceases to have control over the draft. In this case the defendant would not have had control of the movement of the draft and the paying bank was City Bank in New York. He also confirmed that the account of the defendant was never credited with the proceeds of the first bank draft. He further revealed that the 1<sup>st</sup> bank draft was never dishonored in which case it would have been returned to the defendant. The bankers draft is also issued against cash therefore it is as good as cash.

10. All the parties filed written submissions in support of their respective positions. I have analyzed the evidence which was recorded by **Ondeyo J.**, the pleadings, the documents which were produced in the evidence by consent and the submissions by all the parties. It is not

disputed that the plaintiff issued the first draft which went missing and it was replaced with the second draft. The issue for determination is first of all whether the plaintiff has proved their case to the required standard, and if so, who is liable for the loss of the 1<sup>st</sup> draft. Secondly, was the plaintiff negligent as alleged by failing to stop the payment of the 1<sup>st</sup> draft?

11. The plaintiff has been faulted by the defendant and the third party for failing to prove its case to the required standard or to be precise, for not offering evidence in support of the suit.

According to the provisions of **order XV11 r 1 of the CPR**, it is provided as follows:-

***“The plaintiff shall have the right to begin unless the defendant admits the facts alleged by the plaintiff and contends that either in point of law or on some additional facts alleged by the defendant the plaintiff is not entitled to any part of the relief which he seeks, in which case the defendant shall have the right to begin”***

12. In this case the facts alleged by the plaintiff were not disputed but the defendant contended that the plaintiff was negligent for failure to stop the 1<sup>st</sup> draft. There was nothing wrong with the plaintiff exercising its option for the defendant to give evidence first regarding the additional facts of negligence. The defendant denied and this was supported by the evidence of the third party that their account was never credited with the proceeds of the first bank draft. The third party on the other hand denied that their account was credited with the proceeds of the banker’s draft, so who is answerer able for the 1<sup>st</sup> draft.

13. The plaintiff sued the defendant to whom it paid the 1<sup>st</sup> draft and was told to pay a second draft to replace the misplaced 1<sup>st</sup> draft. The defendant joined the third party to whom they had deposited the 1<sup>st</sup> draft. It is not in dispute that the 1<sup>st</sup> draft was issued to the defendant. The plaintiff having purchased it as per a deposit slip wherein they paid cash and were debited with the sum of \$8,065 and in return they were issued with the 1<sup>st</sup> draft which was paid to the defendant. The defendant admitted that they received the first draft, however their account was not credited thus they requested the plaintiff to issue another draft of a similar amount while the first draft which was misplaced was being investigated.

14. The defendant claims that the plaintiff should have stopped payment, of the 1<sup>st</sup> draft,

although going by the evidence of **Mr. Gilbert Warema** a bank draft is as good as cash. When a customer deposits it with the bank, the customer no longer has control of the draft. In this case it is the defendant who had deposited the 1<sup>st</sup> draft with the 3<sup>rd</sup> party, it is not clear how the plaintiff could have stopped or cancelled the 1<sup>st</sup> draft after purchasing it and paying it to the defendant. Moreover the plaintiff was being advised to stop payment after considerable time had lapsed.

15. The plaintiff had no control over the first draft immediately it was paid to the defendant and it was deposited with the third party. The third party confirmed that the defendant's account was never credited with the proceeds of this 1<sup>st</sup> draft. **Mr. Warema** for the third party also confirmed that the 1<sup>st</sup> draft was also not returned unpaid. The mystery of where the proceeds of the 1<sup>st</sup> draft were paid should be answered by the third party who said it was taken for clearance to City Bank, New York. The third party had a duty of ensuring that City Bank New York credits the account of the defendant with the proceeds of the 1<sup>st</sup> draft, or returns the dishonored instrument so that it could have been returned to the defendant and eventually to the plaintiff.

16. The plaintiff cannot be blamed for failure to stop the bank draft or for issuing the second draft because they were requested to do so to replace the first draft. It is also clear from the evidence that the defendant was not credited with the proceeds of the first draft in which case they could be held liable to pay the proceeds to the plaintiff.

17. From the foregoing, it follows that the third party who handled the first draft last, should explain its whereabouts either as cleared or un cleared instrument. The bank draft was deposited with the third party who claims that it was lost, misplaced or paid to unknown third party and blames the plaintiff for not stopping the payment. This in my view is a contradiction because Mr. Warema gave evidence for the third party confirmed that a bank draft is as good as cash and once paid to the bank, the customer has no more control over the draft.

18. It is the third party who should offer an explanation of the whereabouts of the 1<sup>st</sup> draft. The third party blames, and wrongly so, the plaintiff, in my view they should blame City Bank

New York whom they should have joined in these proceedings. The blame lies with the third party and they should not be allowed to run away from their own responsibility, their own failure to follow the 1<sup>st</sup> draft with the clearing bank. The third party should also not be allowed to shift blame to the plaintiff. Borrowing from the Court of Appeal decision in the case of **Nabro Properties Ltd v Sky Structures Ltd & 2 Others [2002] 2KLR 299**. In particular as per the judgment of **Gicheru JA** at page 31 where his Lordship quoted “ **Brooms Legal Maxims**” ;

*“It is a maxim of law, recognized and established, that no man shall take advantage of his own wrong; and this maxim which is based on elementary principles, is fully recognized in courts of law and of equity, and, indeed, admits of illustration from every branch of legal procedure. The reasonableness of the rule being manifest . . . , we may observe that a man shall not take advantage of his own wrong to gain the favorable interpretation of the law.”*

*It has been applied to promote justice, in various and dissimilar circumstances . . . , we may state the principle upon which (the court of equity) invariably acted, namely that the author of wrong who has to put a person in a position in which he has no right to put him, shall not take advantage of his own illegal act, or, in other words, shall not avail himself of his own wrong.”*

15. Accordingly the responsibility of refunding the plaintiff of \$8,065 lies squarely with the third party. Judgment is entered for the plaintiff against the third party in the sum of \$8,065 with interest at court rates from 15<sup>th</sup> September 1995 until full payment. The third party will also pay the costs of the plaintiff and the defendant.

JUDGMENT READ AND SIGNED ON 12<sup>TH</sup> FEBRUARY 2010 AT NAIROBI.

**M.K. KOOME**  
**JUDGE**