



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT BUSIA

Civil Case 7 of 2008

FRANCIS OKENY OLAKAPLAINTIFF

~VRS~

KENYA COMMERCIAL BANK LTDDEFENDANT

JUDGMENT

The Plaintiff Francis Okeny Olaka in his plaint dated 22/04/08 and filed on 23/04/2008, sues the Defendant Kenya Commercial Bank Ltd for declaratory orders that he is entitled to account in respect of the two bank accounts he holds with the bank, for payment of all dues on his account for payment of all expenses incurred in pursuing the money in the said accounts.

The Defendant failed to enter appearance and file defence. This case has therefore been formally proved with the Defendants' counsel cross-examining the Plaintiff.

The Plaintiff testified that he is a Sudanese national who is a former Minister for Agriculture in the Eastern Equatorial State of Sudan. He has two bank accounts with the Defendants' bank:

- 1) **Savings A/C NO.0117020000753, Village Market Branch, Nairobi.**
- 2) **Visa Card A/C NO.5721089, Card Centre at Sarit Centre, Nairobi.**

The first account is a general purpose savings account which the defendant operated while in Kenya and in Juba, Sudan. The Defendant has another branch in Sudan. As for the second account, the Plaintiff opened it for the purpose of using the funds while in foreign countries. The first case in point which he presented to the bank was to purchase a vehicle at Dubai. He was assured that he could withdraw the cash all at once in Dubai and pay for the vehicle. With that conviction, the Plaintiff traveled to Dubai and identified a vehicle make Land Cruiser which he wanted to buy. When he went to withdraw the funds, he was informed that it was not possible. He contacted the bank in Nairobi and was told by one Irene a manager at Card Centre, Nairobi that he could withdraw the funds at a merchant outlet. This method did not work either and the Plaintiff had to return to Nairobi having spent three days in Dubai.

The Plaintiff on return learnt that some USD dollars 23,000 he had deposited in cash in the savings account had been entered in the bank records as a cheque deposit which had bounced. The issue was sorted out by the bank who credited the Plaintiff's account with the said amount. An unauthorized withdrawal attributed to a bank employee of 5000 dollars was also made good by the bank on demand by the Plaintiff. When the Plaintiff demanded that his two accounts be closed and the funds paid to him, the bank imposed very high account operation costs on the Plaintiff leaving balances which were not agreeable to him. The bank on demand refused to pay the Plaintiff's expenses of USD 9300 incurred while at Dubai and in Nairobi. This led to the Plaintiff filing this suit.

The Plaintiff produced documents to prove that he had two accounts with the Defendant. Bank statements for the relevant period showed the unauthorized withdrawal and return of USD 5000 by the bank or by its employee. The doctoring of records to falsely indicate that the Plaintiff deposited a cheque of USD 23,000 which bounced instead of cash was clear from the bank statements. The money was later returned to the account. The bank told the Plaintiff that its employee had committed the theft of the funds. The bank did not discover these fraudulent acts by its employee until the Plaintiff brought it to their attention. This was a high degree of negligence on the part of the bank which led to the Plaintiff incurring losses and suffering a lot of inconvenience.

The Visa Card Account was opened on advise of the Defendant to facilitate buying of a vehicle at Dubai. This, however, never worked and glaring inefficiency on part of the bank cannot be ruled out. Due to the loss and inconvenience suffered by the Plaintiff, Defendant ought not to have charged any operation costs on the Visa Account. Although the Plaintiff used the account to withdraw small sums of money in Dubai and in Kenya, the account never served the intended purpose. It was not enough to write a letter of apology on the Dubai saga to the Plaintiff as the Defendant did.

From the savings account, the Plaintiff's money USD 23,000 was stolen and returned only after he complained. It was suspected that one of the Defendant's employee who helped the Plaintiff to open the visa account must have committed the said frauds. The bank bears responsibility of the acts of its employee. The customer's interests must be protected at all costs.

The Defendant in its submissions raised the issue of the Plaintiff contradicting paragraph 1 of his plaint which says he resides in Busia. He testified that he lives in Sudan and Australia. The evidence is clear as to the Plaintiff's place of residence. The word "*Busia*" in paragraph 1 must have been a typographical error by his advocate who is based in Busia and mostly represents clients from that place. This is a minor contradiction which does not affect the substance of the Plaintiff's case.

The other issue raised was that special damages comprising of the expenses of the Plaintiff in Dubai and Kenya are not payable because they were not specifically pleaded and proved. I entirely agree with this submission. If the special damages were pleaded as required, the figure would have been in the interlocutory judgment.

I note that there is no prayer in the plaint for general damages although the Plaintiff explains that he suffered loss and inconvenience.

The Defendant is still holding the Plaintiff's funds in the two bank accounts. The Plaintiff had expressed his desire to close the two accounts but failed to agree on the balances with the Defendant. The Plaintiff's evidence in this case is uncontroverted. I find that he has formally proved his case against the Defendant as required by the law. I therefore enter judgment in favour of the Plaintiff against the Defendant in terms of prayer (a) (b) and (d) of the Plaint. In effect, the Defendant will meet the costs of the suit.

F. N. MUCHEMI
JUDGE

Dated, Delivered and Signed at Busia this 2nd day of February 2010.
In the presence of Mr. Ashoya for the Plaintiff.