



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

Civil Case 4725 of 1992

ANIL SHAH.....PLAINTIFF

VERSUS

BARCLAYS BANK OF KENYA LIMITED.....DEFENDANT

JUDGMENT

1. This suit was fully heard by **Mbaluto J**, judgment was reserved on the 9th June 2003 to be issued on notice. However judgment was not delivered perhaps because **Mbaluto J** left the Judiciary. The record shows that this matter was mentioned severally before other Judges. When the parties appeared before me on 9th June 2009, they agreed to file written submissions and highlight them for this court to write a judgment based on the evidence on record, Senior Counsel, **Mr. Gautama** for the plaintiff and **Mr. Ojiambo** for the Defendant finally made oral submissions on the 1st March 2010.

PLEADINGS

2. The dispute relates to a claim by the Plaintiff for a sum of Kshs.3,715,745/= being the equivalent of US\$ 130,000 for bearer certificates which were popularly known as Forex Cs which the Plaintiff purchased in the open market. Sometimes in 1991, the Central Bank of Kenya in an effort to liberalize and boost the foreign exchange, it introduced foreign exchange bearer certificates which could be purchased in the market. The Plaintiff had purchased 13 foreign exchange bearer certificates which were issued by the Central Bank's agent at the time; the defendant. Under the rules governing the issuance of the bearer certificate, the certificate entitled the bearer to repurchase the value in any convertible currency at the rate of exchange prevailing on the date of presentation. The bearer certificate belonged to the bearer thus they were equivalent to cash.

3. On 23rd January 1992, the Plaintiff presented some of those bearer certificates to the Defendant at its Harambee Avenue Branch and requested for a remittance of a sum equivalent to US\$ 130,000 being the value of the Forex Cs to an identified remit tee in London. The Plaintiff paid the Defendant a sum Kshs.3,715,745.00/= in Kenya currency on the remittance of sum of US\$130,000 including the defendants' charges and the commission. The Plaintiff indicated the name of the sender as **Aziz Ibrahim** which is a fictitious name. Four days later, the Plaintiff was called by

the Defendant's manager, and was informed the money was not remitted as the bearer certificates had been stolen from their custody.

4. The Plaintiff contends that the certificates are bearer certificates transferable by delivery. The Plaintiff as holder had acquired them for valuable consideration and in good faith he therefore had indefeasible and a valid title. If the certificates were stolen from the Defendant's custody, the Plaintiff had nothing to do with that. Therefore he sought compensation for the value as well as the premium in Kenya currency at the market price prevailing at the time and interest at the bank rate.

5. The Defendant filed a defence and denied that the Plaintiff had any legal claim as the holder of the bearer certificates which had been stolen. The Defendant admitted that as an agent of Central bank of Kenya, they were in possession of the certificates which had been stolen from the Defendant prior to their being sold to the Plaintiff thus the Plaintiff had no title to them. The Defendant denied having dealt with the Plaintiff but with a person identified as **Aziz Ibrahim**. Further the Defendant claimed that it was acting as the agent of the Central Bank of Kenya who were disclosed principals, thus the Defendant contended that they were prevented from refunding the sum of Kshs.3,715,745/= by an order issued in the Chief Magistrate's Court in Criminal Case No. 1305 of 1992.

6. When the matter came for hearing before **Githinji J**, (as he then was,) the following ruling was issued:

"In prayer No. B (1) of the Plaint at page 5 Plaintiff prays for refund of Shs.3,715,745/=. Mr. Ojiambo states that defendant has been ready and willing to refund the Shs.3,715,745/- without admission of any liability except that the defendant has been unable to release the money because of the order dated 11th March 1992 made in Criminal Case No.1305 of 1992 ordering the bank to retain the money.

Mr. Satish Gautama agrees that the Shs.3,715,745/- be released together with accrued interest without prejudice to the contentious issues.

Now that the Criminal case No. 2155 of 1992 was determined on 15th April, 1998 and the two accused acquitted and as the counsels for the Plaintiff now agree that the Shs.3,715,845 be released to Plaintiff's advocates, the court should order the release of the money.

I accordingly make the following orders:

- 1. Now that the order made on 11th March 1992 in Chief Magistrate's Criminal Case No. 1305 of 1992 has been spent by the acquittal of the accused persons in Chief Magistrate's Criminal Case No. 2155 of 1992 the defendant to release the Shs.3,715,745.00 together with accrued interest to date within 10 days to M/s Satish Gautama, Advocates for the Plaintiff as agreed in court today by the Plaintiff.*
- 2. The above order for the release of the money is made without prejudice to the defendant's defence denying total liability and without prejudice to the Plaintiff's other relief's sought in the plaint.*
- 3. This order for the release of money supersedes the order made by Chief Magistrate in Chief Magistrate's Criminal Case No. 1305 of 1992 on 11th September 1992.*
- 4. Liberty to Plaintiff to fix the suit for Hearing."*

EVIDENCE

7. After the above ruling, the Plaintiff gave evidence in support of his claim. He testified how he purchased some bearer certificates from **Kirti Kent Shah (PW1)** in 1991/1992 which had been issued by Nafex branch of Barclays bank Ltd. On 23rd January 1992, the Plaintiff took US\$130,000 worth of the certificates to Harambee Avenue branch of Barclays Bank, and surrendered them in exchange of Foreign exchange equivalent. After they were confirmed the Defendant took the equivalent and instructed the Bank to remit the money to a payee in London Bank. The only problem is that the Plaintiff indicated that his name was Aziz Ibrahim and a fake address. During cross examination, he maintained that the name of the holder of the bearer certificate did not matter. The certificate belonged to the bearer, and was as good as cash. The Plaintiff also relied on the evidence of **Ntoitha M. Mithiaru (PW3)** who gave evidence on the interest rates which prevailed at the time. He produced various schedules of interest rates from 1993-1999, the rates went as high as 84% at one time.

8. The defence case was supported by the evidence of **James Mudhune Kinyany (DW1)** at the material time he was working as the Defendant's head of Exchange Finance and Foreign Exchange Operations. He confirmed that sometimes in January 1992, he received a call from their Harambee Avenue branch. He was asked to confirm the authenticity of certain forex Cs. He checked with the Nafex which is located within their head office in Moi Avenue and established that there was no inflow of foreign currency to support the subject forex Cs which means they were stolen and taken to the market. During cross examination, this witness confirmed that the forex Cs were stolen from the Bank. Two employees of the Bank were charged with the theft although this witness did not participate in it.

9. However DW1 confirmed that a third Party dealing with the stolen Forex Cs in the secondary market would not know if they were stolen. He also confirmed that at the time individual customers had no access to the Central Bank and forex Cs were supplied to the banks who were acting as agents of the Central Bank.

10. **Joseph Mwangi Nyaga (DW2)** also testified on behalf of the Defendant. He was at the time working as manager Barclays Bank Nafex. He confirmed that DW1 went over to check whether there was an inflow of foreign exchange to support the issuance of the forex Cs, the subject matter of this case. He checked the records and could not see the supporting telegraphic transfer of the foreign currency which confirmed that they were stolen from the Defendant.

11. **Lawrence Odhiambo (DW3)** also testified and said that he was able to establish that the forex Cs were collected by a member of staff from Market Branch called **Stephen Karanja**, although they were never received by the branch. He also found out that an applicant by the name **Aziz Ibrahim** presented himself to Harambee Avenue with forex Cs with a face value of US\$130,000 seeking to remit them to Equatorial Bank PLC. Further enquiries revealed the person who had presented the forex Cs was the Plaintiff. He traced the plaintiff and interviewed him and was not satisfied with the explanation given by the Plaintiff why he had used a pseudo name. The two bank employees who were implicated with the theft of the forex Cs were charged with a criminal offence.

SUBMISSIONS

12. Both parties filed written submissions and also made oral submissions. According to Mr. Gautama for the Plaintiff, the only issue outstanding is ON interest and costs. The Plaintiff has been able to establish his claim against the Defendant that he was the bearer of the forex Cs which he had acquired in the market and could be redeemed in any of the banks which were authorized by the central bank of Kenya. The Plaintiff was not a customer of the Defendant but went to the Defendant to redeem the forex Cs which were as good as cash. The Plaintiff was able to identify the person who sold to him the forex Cs. The person who sold to the plaintiff the Forex Cs gave evidence in this case. If there was fraud, within the bank involving the employees of the bank, the Plaintiff had nothing to do with it. The bank had made use of the Plaintiff's money from January 1992 thus the Plaintiff should be paid interest at the prevailing market rate.

13. On the part of the Defendant, counsel submitted that when the Plaintiff sought to remit the forex Cs and gave a false identity, was indicative of the fact that he was aware that he was dealing with stolen bearer certificates and he therefore concealed his real identity. That is why he disguised his identity so that the forex Cs could not be traced to him. If the transaction was genuine there was no reason why the Plaintiff used a false name. The Defendant is challenging the Plaintiff as holder of the certificates; moreover there was no cause of action against the Defendant who was only acting as an agent of Central Bank of Kenya. The Plaintiff was in possession of a circular and the Central Bank is a disclosed principal thus the Defendant cannot be sued.

14. The Plaintiff also sent a demand letter to the Central Bank of Kenya and there is no reason why he failed to sue the Central Bank of Kenya. The Plaintiff could not establish a credible title to the forex Cs. The funds were withheld because of an order issued by the Chief Magistrate's Court. Subsequently, when the case was finalized, the Plaintiff's money was released together with interest. Counsel argued that there is no justification for seeking interests which would have been paid if the money was invested because the money was held due to fraud, and an order issued by the court.

ANALYSIS OF THE EVIDENCE

15. As noted above, the claim by the Plaintiff was settled as per the order of **Githinji J**, noted above. The only outstanding issue is whether the plaintiff is entitled to interests the rate of interest payable and of course the costs. However, the order for the release of the money was made, on a without prejudice basis especially to the defence. The Defendant denied the plaintiffs case in total, thus the court will have to examine whether the Plaintiff has established his claim for the interest and costs on a balance of probability.

16. Going by the evidence on record, especially the defence witnesses, they confirmed that at the material time, the forex Cs were freely available in the market and they could be acquired by any person wishing to remit foreign currencies. The defence witnesses also admitted that the bearer certificate belonged to the bearer and were as good as cash. Even if the bearer certificates were stolen from the Defendant, a third party acquiring them from the secondary

market had a good title to them.

17. It is evident that the Plaintiff was not implicated in the fraud, in which the employees of the defendant were charged with the theft of the Forex Cs. The plaintiff called the person who sold to him the bearer certificates. The Plaintiff's ownership and title to the forex Cs is challenged by the Defendant only because the Plaintiff used a fake name and address as the remitter. The Plaintiff was cross-examined at length and he maintained that he had no obligation to give the name of the remitter. He was able to explain how he acquired the bearer certificate and identified the person who sold to him. He transferred the forex Cs to the Defendant for value, I have no difficulty in arriving at the conclusion that the plaintiff should be entitled to both the principal sum and the interest.

18. In arriving at that conclusion I am fortified by the holding in the case cited by the Defendant; **Couch v Credit Foncier of England Ltd. (1873) L.R. 80.B. 374, 381, 382.** As per the opinion of Blackburn J,

“It may therefore be laid down as a safe rule that where an instrument is by the custom of trade transferable, like cash, by delivery, and is also capable of being sued upon by the person holding it *pro tempore*, then it is entitled to the name of a *negotiable instrument*, and the property in it passes to a *bona fide* transferee for value, though the transfer may not have taken place in market overt, But that if either of the above requisites be wanting, i.e. if it be either not accustomedly transferable, or, though it be accustomedly transferable, yet, if its nature be such as to render it incapable of being put in suit by the party holding it *pro tempore*, it is not a *negotiable instrument*, nor will delivery of it pass the property of it to a vendee, however *bona fide*, if the transferor himself have not a good title to it, and the transfer be made out of market overt.”

19. When the Defendant accepted the forex Cs, they did not seek the identity of the Plaintiff. This lends credence to the undisputed evidence that the bearer certificates were as good as cash and belonged to the bearer. This also explains why there was no fault found with the Plaintiff when the police investigated the matter and charged the employees of the Defendant with the theft of the forex Cs. Moreover, it was confirmed by the defence evidence that even if the forex Cs had been stolen from the Defendant and taken to the secondary market, a third party like the Plaintiff acquiring them obtained a good title. For that reason, the Plaintiff acquired a good title when he purchased the bearer certificates. Thus the Plaintiff has proved his case on a balance of probability that he should be paid a principal sum, interests and costs.

20. The last issue for determination is the rate of interest to award to the Plaintiff. The amount which was settled was paid with interest calculated at the bid rate of the London Inter Bank, bank rate. Mr. Ojiambo for the Defendant argued that the money was supposed to be remitted in foreign currency therefore that was the interest rate applicable but not the current ruling interest rate applicable to Kenya shillings on the date of the purchase. That may very well be so but it is also important to point out that the money was not remitted in foreign currency; it is being paid to the Plaintiff in Kenya shillings.

21. Under Section 26 (1) of the Civil Procedure Act, it provides;

“Where and in so far as a decree is for the payment of money, the court may, in the decree, order interest at such rate as the court deems reasonable to be paid on the principal sum adjudged from the date of the suit to the date of the decree in addition to any interest adjudged on such principal sum for any period before the institution of the suit, with further interest at such rate as the court deems reasonable on the aggregate sum so

adjudged from the date of the decree to the date of payment or to such earlier date as the court thinks fit.”

I agree with the Plaintiff the interest rates payable should be in Kenya shillings. I have gone through the evidence of PW3 the interest rates fluctuated drastically between 1992 until recently; some of the rates of interest that prevailed were as high as 84% can be termed unconscionable. This is because the purpose of awarding interest is meant to compensate the successful party for not having had the disposal of his money.

22. Those high rates of interests just like compound interests are awarded on a compensatory basis to punish the payer. Due to the instability of the money market at the time, I find the interest rates that were prevailing at the time very uncertain. Taking the circumstances of this case, and also being guided by the courts interest rate, it is not fair to award the prevailing market rates which in my view can not even be ascertained. I will take an average of the court rate and a bit of the market rates in awarding the Plaintiff, interest on the principal sum to be calculated at the rate of 16% per annum. The Plaintiff shall also be entitled to costs which follow the event.

JUDGEMNT READ AND SIGNED ON 30TH APRIL 2010 AT NAIROBI.

M. K. KOOME
JUDGE