



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL COURTS
CIVIL SUIT NO.702 OF 2003

ALFONSO MUSEMBI KILONZI
T/A A. M. KILONZI & CO. ADVOCATES.....PLAINTIFF
VERSUS
KENYA COMMERCIAL BANK LIMITED.....DEFENDANT
J U D G M E N T

The plaintiff filed suit seeking entry of judgment against the defendant on several prayers. He sought a declaration that the undertaking that he had given to the defendant to pay the sum of Kshs.1,830,000/- is null and void and therefore voidable *ab initio*. He further prayed for the court to declare that he was not responsible for any fraud that may have been committed that led to the defendant to lose the said sum of Kshs.1,830,000/-. The plaintiff prayed for a declaration from the court that any monies that he had received pursuant to the subject transaction was pursuant to execution of his clients' instructions in the normal course of his practice and calling as an advocate and was done in good faith without knowledge of any fraud. He prayed to be awarded general damages for wrongful detention. He further prayed to be granted an order of permanent injunction to restrain the defendant from in any way holding him responsible for any fraud that may have resulted from the subject transaction. He asked the court to award him cost of the suit.

On being served, the defendant filed a defence denying that the plaintiff was entitled to be granted the prayers sought in the suit. It was the defendant's case that the plaintiff obtained the said sum of Kshs.1,827,102.90 from the defendant bank after a cheque in respect of the same amount that was payable to the Commissioner of Value Added Tax (VAT) had been fraudulently diverted and deposited in the plaintiff's account. The defendant averred that subsequent to the discovery of the fraud, it was obligated to compensate Fina Bank, the bank from which the amount has been diverted from. The defendant denied the plaintiff's claim that he had received the said amount in his account in the ordinary course of his legal business. It was the defendant's case that the plaintiff was a participant in the fraud that resulted in the loss of the said sum. The defendant lodged a counterclaim and prayed for judgment to be entered in its favour for the said amount of Kshs.1,827,102.90 plus interest at the rate of 22% per annum from 9th April 2003 until payment in full. The defendant urged the court to dismiss the plaintiff's suit with costs and enter judgment for the said sum in its favour as prayed in the counterclaim. The plaintiff filed a reply to the counterclaim. He denied the defendant's claim that he was responsible or was a participant in the fraud that resulted in the loss suffered by the defendant. The plaintiff put the defendant to strict proof thereof. He denied that he was liable to compensate the defendant for the said sum that the defendant is demanding in the counterclaim.

The plaintiff and the defendant having completed the preliminaries including discovery of documents, duly listed the case for hearing. At the hearing of the case, this court heard the evidence adduced by the plaintiff (PW1) and the evidence adduced by Sammy Ndung'u Mutonga, the defendant's Kitui branch manager (DW1) and by Samwel Okero Igonji, a fraud investigator employed by the defendant (DW2). Having read the pleadings filed by the parties herein, and considered the evidence adduced by the witnesses in this case, including the closing written submissions filed on behalf of the plaintiff and on behalf of the defendant, the following are the facts of this case as this court was able to assess: The plaintiff was a holder of a personal account with the defendant's Kitui branch. The plaintiff is an advocate of the High Court of Kenya and practices as such under the name and style of A.M. Kilonzi & Co. Advocates. According to the plaintiff, on 1st April 2003, he received a call from a person who

identified himself as P.M. Musomba. The person informed him that he had made the call on behalf of a company known as Marspons Holdings Company Limited. The person was desirous of engaging the plaintiff to be his advocate to undertake certain conveyancing transactions. It was the plaintiff's testimony that the said P.M. Musomba later introduced to him one Mwova Katindi and Edward K. Muli who were said to be business partners of the said P.M. Musomba. According to the plaintiff, he considered the three as his potential clients. They informed him that they had an interest in investing in real property in Kitui. From the evidence adduced by the defendant, it was apparent that in the discussions that the plaintiff had with the said persons, the plaintiff gave them the information that he maintained a personal account in the defendant's Kitui branch. On 9th April 2003, a cheque of Kshs.1,827,102.90 drawn from Barclays Bank of Kenya, Queensway Branch, Nairobi was deposited in the plaintiff's personal account. The cheque was drawn in the name of A.M. Kilonzi & Co. Advocates. Although the plaintiff vehemently denied that he had knowledge when the said cheque was deposited in his account, this court believed the evidence adduced by the defendant to the effect that it was most improbable that a cheque of such a sum could be deposited in the plaintiff's personal account without his knowledge.

From 16th April 2003, the plaintiff drew several cheques withdrawing various amounts from the said account. According to the plaintiff, he withdrew the said sums of money on instructions from his clients. For instance, he withdrew the sums of Kshs.400,000/- , Kshs.450,000/- and Kshs.650,000/- which he paid in cash to the said P.M. Musomba. What was interesting from the testimony of the plaintiff was that although he claimed that he was dealing with the said P.M. Musomba and his associates in his capacity as an advocate, the plaintiff did not bother to take the particulars of his said erstwhile clients. When investigations were later conducted after the fraud was discovered, the plaintiff was unable to provide useful or any information that would have enabled the defendant or the police to trace the whereabouts of said P.M. Musomba and his associates. In November 2003, the defendant was informed that a cheque for the sum of Kshs.1,827,102.90 which had been drawn in favour of the Commissioner of Value Added Tax (VAT) by a client of Fina Bank known as Bhupco Textile Mills had been diverted into the account of the plaintiff. It was evident from the evidence adduced by the defendant's witnesses, that the said cheque was diverted from the said legitimate account in collusion with some members of staff of the banks involved in the clearing of the particular cheque.

What is not in dispute is that the plaintiff became the beneficiary of the diverted amount that was intended to be paid to the Commissioner of VAT. The plaintiff's explanation that he had dealt with the persons who had paid a visit to his office in good faith in his capacity as an advocate is incredible because in the entire transaction it was clear that the plaintiff's account was used as a conduit through which the fraud was perpetrated. In his alleged dealings with the said alleged clients, it is the plaintiff who went to the bank and withdrew the cash and later paid the alleged clients. If indeed the said persons were genuine clients, why didn't the plaintiff pay them by cheque?

When the defendant's employees confronted the plaintiff with the information that they had secured in regard to how the fraud was committed, the plaintiff offered to refund the money by paying a sum of Kshs.130,000/- by monthly installments until payment in full of the entire amount. The plaintiff accused the defendant of having obtained the said cheques by coercion and by intimidation. It was the plaintiff's case that he had been unlawfully detained by the defendant's employees before he agreed to issue the said cheques. The defendant denied that it obtained the said cheques in the manner alluded to by the plaintiff. Having evaluated the evidence adduced by both parties in this regard, it was clear to the court that the plaintiff issued the said cheques with a view to avoiding been charged with a criminal offence. The plaintiff later changed his mind, reneged on his undertaking and filed the present suit with a view to avoiding liability. The plaintiff was subsequently charged together with another with, *inter alia*, the offence of stealing the said sum of Kshs.1,827,102.90 in **Nairobi Chief Magistrate's Court Criminal Case No.2885 of 2003 Republic vs Alphonse Musembi Kilonzi & Shem Omuga Shiokhunjula**. The plaintiff was tried, convicted and sentenced to serve twelve (12) months imprisonment. Although the plaintiff appealed against conviction and sentence, he served the said sentence before the appeal was heard and determined. The trial magistrate ordered the plaintiff to pay back to the defendant the said sum of Kshs.1,827,102.90.

Upon evaluation the facts of this case, and assessing the decided cases that have been relied on by the parties to this suit, the issues for determination by this court are as follows:

- (i) Whether the plaintiff participated in the diversion of the sum of Kshs.1,827,102.90 from Fina Bank Limited into his personal account at Kenya Commercial Bank, Kitui.
- (ii) Whether the plaintiff had the knowledge that the said sum of Kshs.1,827,102.90 meant for the

payment of taxes to the Commissioner of VAT had been fraudulently misappropriated from Fina Bank.

(iii) Whether the defendant established a case to be refunded the said sum of Kshs.1,827,102.90 by the plaintiff together with interests.

(iv) Who is entitled to costs.

In regard to issue (i), as was apparent from the fact of this case, it was clear that the plaintiff was an active participant in the diversion of the said sum of Kshs.1,827,102.90 that was intended to settle a tax liability by Bhupko Textiles to his personal account. The story put forward by the plaintiff to the effect that the cheque in respect of the said amount was deposited without his knowledge in his personal account at the defendant's Kitui Branch is incredible. This is because upon the said cheque being cleared by the bank, the plaintiff personally virtually withdrew the entire amount of the said sum that was deposited. According to the evidence adduced, the plaintiff withdrew a total sum of Kshs.1.5 million within a span of approximately three weeks. It was the plaintiff's case that he withdrew this sum at the instance of one P. M. Musomba who claimed to be the managing director of a company called Marspons Holding Company Limited. The plaintiff did not explain to the satisfaction of the court why he did not take the particulars of the said P. M. Musomba and associates in order to enable the defendant and the police establish his bona fides. Common sense dictated that the plaintiff takes the particulars of the said P. M. Musomba before he could allegedly pay him in cash on the basis of a signed payment voucher. The plaintiff's explanation that the persons who deposited the cheque into his account at the defendant's Kitui Branch were interested in establishing a real estate business in Kitui did not have a ring of truth in it. This is because, as an advocate, the plaintiff was expected to satisfy himself that the persons who appeared before him were genuine investors who intended to set up a real estate business. This court's evaluation of the evidence adduced leads it to the conclusion that the more likely scenario is that the plaintiff conspired with other persons who were in a position to divert the cheque in respect of the payment made to the Commissioner of VAT by allowing them to use his personal account at the defendant's Kitui Branch. The scheme involved the plaintiff creating a fictitious story that he received the said sum of money in his capacity as an advocate. The manner in which the said amount was disbursed raised doubt to the plaintiff's claim that he was not aware that the transaction was fraudulent. This is because the plaintiff personally withdrew cash from his account and supposedly paid his erstwhile clients.

The more likely reason is that his accomplices required to be paid in cash and not by cheque to conceal their true identity and particulars. From the evidence adduced therefore, it was clear that the plaintiff knew or ought to have known that the nature of the transactions involving the said cheque had a tinge of fraud in it. This court therefore holds that the plaintiff failed to prove, to the required standard of proof on a balance of probabilities that he had no knowledge of the fraud that was being perpetrated through his personal account. It was clear to this court that the plaintiff was an active participant in the scheme to defraud the Commissioner of VAT through the diversion of the particular cheque to his personal account at the defendant's Kitui Branch.

As regard issue (ii) therefore, it is evident that the defendant established to the required standard of proof that it is entitled to be refunded to the said sum of Kshs.1,827,102.90 together with interest as prayed in the counter claim. The defendant established that indeed the plaintiff allowed his personal account to be used for fraudulent purposes. Evidence was adduced which established that it is the plaintiff who personally withdrew the cash from the account. Some of the funds from the account were used by the plaintiff to settle his personal debts. The plaintiff's defence does not therefore hold. The plaintiff was the main beneficiary of the fraudulent transaction. He admitted this fact when he issued post-dated cheques to the defendant to cover the amount that he had withdrawn from his said account. It was evident that the defendant rushed to court to forestall the eventuality of his being held accountable for the said funds. The defendant has therefore established its counter claim to the required standard of proof.

In answer to issue (iii), this court holds that the defendant established to the required standard of proof on a balance of probabilities that it suffered loss as a result of the said fraud that was perpetrated by the plaintiff with other accomplices. It is only just that the plaintiff be compelled to refund the said amount. In the premises therefore, the plaintiff having failed to establish his case to the required standard of proof, the same is dismissed with costs to the defendant. The defendant's counterclaim is allowed. Judgment is entered in favour of the defendant as against the plaintiff for the sum of Kshs.1,827,102.90 plus interest at the rate of 18% per annum from the date the counterclaim was filed until payment in full. The defendant shall have the cost of the counter claim.

DATED AT NAIROBI THIS 3RD DAY OF NOVEMBER, 2010

L. KIMARU
JUDGE