

PAMELA AKINYI OPUNDO PLAINTIFF

VERSUS

BARCLAYS BANK OF KENYADEFENDANT

JUDGMENT

The suit was brought by plaintiff, Pamela Akinyi Opundo, in her capacity as an administratrix of the estate of late Billy Wellington Opundo. The suit was brought against Barclays Bank of Kenya Ltd. and one Lucy Peninah Atieno Opundo. She was a joint administratrix of the estate of the aforesaid deceased. She died later. The grant of Letters of Administration to her was later challenged.

Plaintiff wedded the deceased in church and had therefore her marriage registered under statute while Lucy was earlier cohabiting with deceased. Lucy left 4 children whom deceased and plaintiff looked after. After the death of deceased, the plaintiff agreed to allow Lucy to participate in the administration of estate of deceased.

Then after deceased passed away the plaintiff and Lucy on 1/10/1996 jointly obtained a grant of Letters of Administration. On 27/10/1996 or thereabout, plaintiff and Lucy proceeded to the offices of the defendant along Moi Avenue where the two opened a joint account No.2458715 headed as "Estate of the Late Billy W. Opundo." The account was for receiving the dues of the said estate. It was a joint current account, both signatories to sign for all transactions.

It is admitted in the statement of defence that all cheques were to be drawn, made or signed by both plaintiff and Lucy. The initial deposit was Kshs.2,100,000/=, being the total remittances from deceased's former employer, East African Breweries Ltd. Instructions to the defendant were that the cheque book had to be collected by both present at the same time. This was evidence of the plaintiff. Also PW7 reported that on 24/10/1996, Lucy visited the bank asking for the cheque book and one of the officers called the plaintiff on phone but the plaintiff said she was busy in her office but will come to countersign the requisition. On the day of collecting the cheque book, further evidence is that requisition was never properly signed although the bank had instructed one of the employees "Rose" to ensure both have signed. There was only one signature. The cheque was processed and given to Lucy.

Secondly, the defendant was given instructions that both plaintiffs had to be present during any transaction at the bank. They were both to be present in case of withdrawal. This evidence is not controverted by the defendant. Later plaintiff visited the defendant bank to inquire as to whether the cheque book was ready. But she came to know that it had been collected by Lucy and withdrawals had been made from the said account by cheques signed by Lucy. Within 14 days, total withdrawals totaled Kshs.1,750,000/=.

Plaintiff wrote to Bank Fraud Unit and the police. Lucy was charged in a criminal court and convicted for fraud in respect of that bank account. The suit was filed, the plaintiff suing in her capacity as the administrator of the estate of the late Billy Wellington Opundo. Lucy died on 2/5/2004 as seen in her death certificate No.31685. Suit against her abated and was subsequently withdrawn.

The High Court **Succession Cause No. 1640 of 1996** grant was revoked and the name of Lucy as co-administrator was removed from the rectified grant which is exhibited as "PEX 6".

The defendant's case is that the person who took the money was Lucy who was the wife of the deceased. It should be noted that she was not a lawful wife of deceased since plaintiff was married under statute. However, the defendant states that the said Lucy was a beneficiary and therefore crediting the account with the Kshs.1,750,000/= would be enriching the deceased's estate twice. Whether Lucy was wife of deceased, it is not to be decided with reference to the number of children she had with deceased, but according to law. She was not. And the marriage of plaintiff was monogamous, not polygamous.

Lucy's marriage to deceased was not proved in court.

It is clear therefore, whereas her children were entitled to inherit in their father's estate, Lucy was not entitled in her own right. Her relationship with the deceased was not lawful. This court is of the view that the defendant failed in its duty to take care of the funds of the deceased's estate and in failing to obey the express instructions of the two customers, who indicated that they were to run the account as trustees of all the beneficiaries. And Lucy who was not a beneficiary.

Administrators do not necessarily have to be beneficiaries or spouses although the law provides that spouses and beneficiaries be given priority in the appointment. The plaintiff's counsel has drawn the court's attention to several authorities in support of the plaintiff's case. Firstly, in the book Paget's Law of Banking, 8th Edition, at page 76, Chapter 3 – relation of banker and customer, it is related in the case of **Brewer vs. Westminster** in which fraudulent executor forged the signature of co-executor to cheques on the executor's account which was governed by a mandate authorizing the bank to honour drawings signed by both only, the Court of Appeal said a joint account gave the plaintiff no rights except such as were held by her jointly with the second defendant (co-executor). The second defendant was a necessary party to any action to enforce any rights belonging to account holder under the said joint contract. That statement does not apply here as the co-administratrix was proved as a defendant and later on her demise, her case abated.

The second authority referred to is **Bullion Bank Ltd. vs. Fulchandmanek & Brothers – Civil Appeal No.42 of 1998.** This case the bank debited the respondent's account with amounts in cheques unknown to the respondents. The cheques did not belong to the respondents. The Court of Appeal held that the bank had no authority or mandate from the respondent to pay the amount of those cheques or to debit the amount to the respondents' account.

Thirdly, there is a Ugandan case, a copy of which is supplied by the plaintiff's counsel in which the issue of customer is discussed at length. The signatories were forged. Also the case of **Jackson vs. White & Midland Bank Ltd.**, Lloyd's List Law Reports at page 68. In that case partners held an account jointly the mandate was bank would honour cheques signed by both joint holders. It was held that the bank made agreement with plaintiff and second defendant it would honor the cheques signed by them jointly and also a separate agreement with plaintiff and first defendant severally, that it would not honour any cheques unless he had signed them. Therefore, having honoured cheques not signed by the plaintiff, the bank was liable to the plaintiff for breach of that contract.

The case of **Catlin vs. Cyprus Finance Corporation (London) Ltd. & vs. G.F. Catlen 1 QB [1983]**, the bank's mandate was to honour instructions unless they were signed by each of them, the same principle as in the case of **Jackson vs. White & another** was applied. It was held that the defendants were in clear breach of the obligations owed to her. She was entitled to relief.

Upon an examination of the above authorities, it is clear in this case the defendant bank had entered into agreement with the plaintiff not to honour any instructions unless authorized by both customers and therefore as the bank honoured cheques signed by only one joint holder, the bank is liable. It is no defence to say that the cheques were payable to a beneficiary. She was not aware that she was a beneficiary and there is no evidence that she was. And she was not according to law. The defendant bank did not inquire whether also there were other beneficiaries entitled to the estate.

From the above stated, it is my view and I hold that the defendant bank is liable to the plaintiff by debiting Account No.2458715 with the sum of Kshs.1,750,000/= in breach of the mandate of customers and the judgment is hereby entered for plaintiff against the defendant in sum of Kshs.2,065,000/=, the amount which remained in the account and the unlawful debit plus interest at 14% from the filing of suit to the payment in full and costs of this suit.

It is so ordered.

DATED, SIGNED and DELIVERED at Nairobi this 22nd day of October 2009.

JOYCE N. KHAMINWA

JUDGE