



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

Civil Case 497 of 2004

DR. ZULFIQUAR ALI JAFFERY.....PLAINTIFF

VERSUS

FIDELITY COMMERCIAL BANK LTD.....DEFENDANT

J U D G M E N T

Dr. Zulfiqar Ali Jaffery (hereinafter referred to as the plaintiff), has brought this suit against the defendant Fidelity Commercial Bank Ltd, seeking judgment against the defendant as follows: -

- (a) A declaration that the defendant was negligent and that debits of Kshs.6,690,051.20 should be reversed.
- (b) Payment of Kshs.6,690,051.20 together with interest at court rates from 18th November 2003 until payment in full.
- (c) Costs of the suit on an advocate/client basis and interest thereon at court rates.

The plaintiff's claim against the defendant arises from the banker/customer relationship between the defendant and the plaintiff pursuant to which the plaintiff maintained a fixed deposit account with the defendant. The plaintiff contends that on or about 14th October, 2003, he was attended by the defendant's chief manager one Mr. Abbas, with a view to renewing his fixed deposit account. He learnt that the balance in his account, including the interest was about 12.1 million. Surprisingly at the beginning of November, 2003, the plaintiff was advised that he had no monies in his account, all the monies having been withdrawn. An interim statement was produced which showed that the plaintiff had accumulated a total sum of Kshs.9,178,180.10 which had been drawn over. The statement also reflected a sum of Kshs.6,690,051.20 as having been withdrawn. The plaintiff denied having withdrawn that money or instructing the chief manager or any of the defendant's servants, employees or agents to withdraw such amount from his account.

The plaintiff contends that the defendant's former chief manager Mr. Abbas having fraudulently and without the plaintiff's authority used his position as the defendant's senior bank employee to withdraw all the sums of money in the plaintiff's fixed account was charged with the offence of theft by servant. The plaintiff maintained that the defendant was negligent and in breach of their contract of banker/customer, by failing to safeguard the plaintiff's deposits causing him to suffer loss and damage.

In its defence, the defendant admitted that there was a banker/customer relationship but denied that the

plaintiff made any deposits between 1st January, 2002 and 18th November, 2003 as alleged. The defendant further denied any knowledge of the plaintiff's failure to withdraw any funds from the deposits or any Knowledge of any conversation between the plaintiff and the said Mr. Abbas. The defendant maintained that Mr. Abbas was the plaintiff's personal banker and personal friend and that the plaintiff did his banking business with Mr. Abbas personally and not with the defendant. The defendant therefore denied liability for the actions of Mr. Abbas. The defendant maintained that the banking business done between Mr. Abbas and the plaintiff was tainted with illegality and therefore not actionable by the plaintiff. The defendant further maintained that the plaintiff had made withdrawals from his account as reflected in the statement of account. It was contended that Mr. Abbas was arraigned in court as a thief who had committed a criminal offence and not as an agent or servant of the defendant. It was denied that the defendant was in breach of any contract with the plaintiff or negligent or in breach of any duty of care. It was maintained that any loss or damage suffered by the plaintiff, was as a result of plaintiff's own gross negligence for which the defendant is not liable.

During the hearing of the suit, the plaintiff and one Robert Gacheche, a banker, testified in support of the plaintiff's claim, whilst Kepha Musafari an internal auditor with the defendant testified on behalf of the defendant.

In his evidence, the plaintiff testified that he was the only signatory to his account. He explained that he operated the account for about 2 – 3 years without receiving any bank statements. He enquired about the balance in his account and was informed the balance by Mr. Abbas. Referring to the statement of account for the period 2nd January, 2001, the plaintiff maintained that he did not make any withdrawals from the account. He denied having signed any voucher. The plaintiff claimed the sum of Kshs.6,690,051.20 which is the amount he maintained he paid to the bank.

Under cross-examination, the plaintiff conceded that Mr. Abbas was known to him through his community and that he was an acquaintance as they attended the same mosque. The plaintiff further maintained that he deposited the money in the bank and not with Mr. Abbas. He explained that he trusted the bank and its employees. Plaintiff admitted dealing exclusively with Mr. Abbas and explained that in September, 2003, he went to the UK leaving his deposit slips with Mr. Abbas to renew his fixed deposit. Plaintiff denied having given Mr. Abbas any authority to withdraw money from his account or having colluded with Mr. Abbas. He denied having been negligent though he conceded he was naïve.

Mr. Robert Gacheche a banker employed by Barclays Bank, explained generally how bankers deal with fixed deposit accounts. He explained that when the fixed deposit period is over the money should be paid to the customer unless the fixed deposit is renewed. He explained that the statement shows a record of transaction in the customer's account. He conceded under cross-examination that under normal circumstances a customer takes away the fixed deposit receipts and that it is not normal for a customer to hand over money to bank employees and get nothing for it.

Kepha Musafiri the defendant's internal auditor testified that he investigated the plaintiff's account after plaintiff lodged his complaint. He noted that the account was opened in March, 2001 and that it was a single account. Upon investigating transactions in the account, the witness noted that there was a sum of Kshs.2,926,509 which was paid by a customer one Joghinder Singh Soni for his fixed account but wrongfully credited to the plaintiff's account. On discovery of this anomaly, the entries were reversed. The witness explained that FDR 6419 issued to the plaintiff in respect of this amount was issued in error. He maintained that all the monies deposited by the plaintiff were withdrawn by Mr. Abbas. He contended that since plaintiff was dealing with Mr. Abbas personally, the assumption was that Mr. Abbas recovered the money and paid out to the plaintiff. The witness therefore maintained that the defendant was not liable.

Under cross-examination the defence witness explained that he presumed that it was plaintiff who had withdrawn money from the fixed deposit because the fixed deposit receipts were returned back to the defendant. He acknowledged that the fixed deposit receipts in the defendant's possession did not have the signature of the plaintiff authorizing the withdrawal of the money but explained that it was assumed that it was the plaintiff who had withdrawn the money because he was dealing with the Branch Manager i.e. Mr.

Abbas. He maintained that the defendant was not liable if the forgery was orchestrated by the plaintiff's agent. The witness conceded that Abbas had been charged in court and that the defendant was the complainant in the criminal case in which some of the charges relate to transactions involving the plaintiff's account.

Counsel for the plaintiff filed submissions urging the court to find in favour of his client. He submitted that the banker- customer relationship between the plaintiff and the defendant was not in dispute. He maintained that the plaintiff having been the holder of a fixed deposit account, all monies in credit in the plaintiff's account were monies rightfully due to the plaintiff. Counsel for the plaintiff further submitted that the plaintiff being the only authorized signatory, his contract with the defendant did not allow any person other than the plaintiff to operate his account and withdraw any money. Counsel contended that the defendant's chief manager having used his authority without the plaintiff's mandate to steal money from the plaintiff's fixed deposit account the defendant is liable to the plaintiff. It was submitted that the defendant was in breach of his contractual duty and duty of care to the plaintiff. The court was urged to find that there was no evidence of any collusion between the plaintiff and Mr. Abbas nor was there any evidence of negligence on the part of the plaintiff.

For the defendant it was submitted that the fixed deposits for Kshs.2,951,376.20 was issued to the plaintiff in error as the money was actually deposited by Dr. Soni. The plaintiff was therefore not entitled to that money. With regard to the other fixed deposits it was submitted the plaintiff having surrendered the original receipts to Mr. Abbas it was probable that his instructions were to have the fixed deposits encashed and money handed over to the plaintiff. It was submitted that the plaintiff over trusted Mr. Abbas and in doing so was negligent and cannot turn to the defendant for recompense. The court was urged to find that the defendant was not in breach of any duty of care to the plaintiff nor is the defendant liable for what Mr. Abbas did for the plaintiff at plaintiff's request. It was submitted that the plaintiff was grossly negligent and the court was urged to dismiss his suit with costs.

From the evidence that has been adduced before me, it is clear that there was a banker-customer relationship between the plaintiff and the defendant, and that the plaintiff maintained a fixed deposit account number 3398 with the defendant. Contrary to the normal banking practice relating to fixed accounts involving a fixed sum maturing within a fixed period, it is apparent from the statement of account which was produced by the plaintiff at page 1 of bundle 'A' that there were several deposits made to that account on different dates between March, 2002 and February, 2003. It would appear that although those deposits were in respect of fixed deposit accounts only one account was maintained by the defendant. It is also evident that the plaintiff was dealing with one Mr. Abbas who was the defendant's chief manager. Although the plaintiff testified that the total sum he deposited with the defendant was Kshs.6,690,051.20, the statement (page 1 of bundle 'A') reflected 11 deposits made by the plaintiff as follows:

21 st March, 2002	2,951,376.20
2 nd April, 2002	1,000,000.00
31 st July, 2002	500,000.00
31 st July, 2002	370,000.00
7 th August, 2002	1,233,175.00
23 rd August, 2002	635,500.00
8 th November, 2002	379,477.50
8 th November, 2002	512,807.80

8th November, 2002 262,552.70

13th November, 2002 618,246.75

Total 8,463,135.95

The defendant has only disputed the deposits reflected on 21st March, 2002 which the defendant explains was credited to the plaintiff's account in error. Although the plaintiff maintained that he deposited this money, I am satisfied that the defendant produced appropriate records indicating that that sum of money was in fact deposited by Joghinder Singh Soni. This was sufficient to rebut the plaintiff's oral assertions that the money was deposited by him. I accept the defendant's evidence that the deposit of Kshs.2,951,376.20 reflected on the plaintiff's account was not monies deposited by the plaintiff. As regards the other deposits reflected on the account, I am satisfied that the same were made by the plaintiff. This means that the total amount deposited by the plaintiff was Kshs.5,511,759.75 and not Kshs.6,690,051.20. I have deliberately excluded the sum of Kshs.618,246.75 reflected in the account on 13th February, 2002 as this sum was a roll over figure.

It is apparent from the statement that the monies deposited in the plaintiff's account were paid out on different dates. The plaintiff has denied having received the payments. It is also conceded by the defendant that although the original fixed deposit receipts are in the defendant's possession the same are not signed by the plaintiff to acknowledge any receipt of cash. This is consistent with the plaintiff's evidence that he only handed over the original receipts to Mr. Abbas for purposes of renewal and did not receive any payment in respect of these fixed deposits. The defendant's explanation is that the payments may have been collected by Mr. Abbas on behalf of the plaintiff. There is however nothing to support the defendant's contention. The plaintiff appears to have over trusted Mr. Abbas. This may well have been because of the friendship and over familiarity between the two. There is however no evidence that the banking transactions between the plaintiff and Mr. Abbas were tainted with any illegality. The defendant put Mr. Abbas in a very trustworthy position and the plaintiff as a customer had no reason to doubt the integrity of Mr. Abbas. The fact that Mr. Abbas was charged in court with theft by servant, and that the particulars of the charge included theft of monies from the plaintiff's account, supports the plaintiff's assertions that he did not receive any monies. It is clear that Mr. Abbas used his position in the bank to withdraw monies, during the normal course of business, from the plaintiff's account without the plaintiff's authority. I find that Mr. Abbas was an officer and agent of the defendant and the defendant must be held solely responsible for any fraud perpetrated on the plaintiff by the actions of Mr. Abbas. It is further clear that the defendant did not have proper control mechanism in place and this made it possible for Mr. Abbas to abuse his position of trust without detection. To that extent, the defendant was negligent and was in breach of its duty to the plaintiff to safely secure his deposits.

The upshot of the above is that I give judgment in favour of the plaintiff as against the defendant and declare that the plaintiff is entitled to reversal in respect of the debits in his account to the extent of Kshs.5,511,759.75. I order that the defendant shall pay the plaintiff the sum of Kshs.5,511,759.75 together with interest at court rates from November, 2003 until payment in full. The plaintiff shall further have costs of the suit.

Those shall be the orders of this court.

Dated and delivered this 6th day of October, 2008

H. M. OKWENGU

JUDGE

In the presence of: -

Sehmi H/B for Gichuhi for the plaintiff

Miss Gulenywa H/B for Gitonga for the Defendant