



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA**

Civil Case 491 of 2000

MASTER CONVEYORS LTD.PLAINTIFF

VERSUS

KENYA COMMERCIAL BANK LTD.....1ST DEFENDANT

JOHN B. MUTAVE2ND DEFENDANT

SUSAN M. WAMBUA3RD DEFENDANT

J U D G M E N T

By a plaint dated 14th October 2000, Master Conveyors Ltd. the plaintiff in this matter, sued Kenya Commercial Bank Ltd, Johnrick Mutava and Susan Wambua, the 1st, 2nd and 3rd defendants respectively, in which it prayed for judgment against the defendants jointly and severally for:

- (a) Payment of Kshs.1,340,242/45
- (b) Aggravated/Punitive damages
- (c) Interest at 24% per annum from 24.1.97
- (d) Costs.

The defendants each filed a defence to deny the plaintiff claim.

The plaintiff tendered the evidence of two key witnesses to prove its claim. The first to take the witness box was James Ndungu Mureu (P.W.1). This witness gave details of how he incorporated the plaintiff company. He produced in evidence copies of the Memorandum and Articles of Association. He also produced in evidence a copy of certificate of incorporation of the plaintiff company. From these annexures it is clear that the plaintiff company was incorporated on 22/2/1996. the sub sciences of the plaintiff were listed as James Ndungu Mureu and Grace Wanjiru Ndungu. P.W. 1 told this court that the plaintiff company was engaged in the business of clearing and forwarding. He also stated that being the company's Managing Director he kept all vital documents relating to the incorporation of the company under lock and key. He said he was the only one who could access those documents and never parted with those documents at any time. The documents included the Memorandum and Articles of Association and the Company's certificate of Incorporation. P.W.1 said the plaintiff had employed the 2nd defendant as its accountant. Amongst the duties of the 2nd defendant was to bank Cheques into the plaintiff's bank account No. 0100203644007 held by the National Bank of Kenya

P.W.1 told this court that the plaintiff's former employee, Joseph Kisigei Korir (P.W.2) informed him that the 2nd defendant had opened an account with Kenya Commercial Bank, Town Centre branch in the names of the plaintiff company in which cheques in favour of the plaintiff were secretly banked there. The witness said he carried investigations with the assistance of the Anti-banking Fraud Police. His investigations revealed that account No. 211693692 in the name of a company with a similar name like that of the plaintiff had been opened. P.W.1 obtained more details from the bank which indicated that the 2nd defendant and his wife (3rd defendant) had in their capacities as directors of the "Master Conveyors Ltd." applied to open such an account with Kenya Commercial Bank Ltd. (1st Defendant). The specimen signature forms, the minutes, copies of the identification documents produced in court shows that the 2nd and 3rd defendants had indeed approached the bank (1st Defendant). It is the evidence of P.W. 1 that the 1st Defendant certified copies of the plaintiff's documents without seeing the original in conjunction with the 2nd and 3rd defendants with the intention of defrauding the plaintiff company. P.W.1 also produced in evidence bank statements to show that the bank account was operated and that between 1997 and 1999, a sum to the tune of Kshs.1,340,247/45 which was due to the plaintiff had been swindled through that suspicious account. The documents produced indicate that their execution were witnessed by Mr. Kiume Kioko advocate who apparently appeared as the 2nd and 3rd defendant's advocate in this matter. P.W. 1 however admitted on being cross-examined by Mr. Waweru, the 1st Defendant's advocate, that all the necessary documents required for the opening of an account were presented save that he was of the view that the bank should have been a bit careful to determine the genuinity of the documents by demanding for the originals. P.W.1 further admitted that from the documents presented to the 1st Defendant, it was clear that the 2nd and 3rd defendants were the owners of company who opened a bank account with them.

Joseph K. Korir, (P.W.2) told this court that he was employed as the General Manager of the plaintiff company. He said the plaintiff held no bank accounts with the 1st defendant. He said in the course of his duties he discovered that a cheque which was due from *Inter Ocean E.A. Co. Ltd.* to the plaintiff company had been collected and banked in account No. 211693692 held by the 1st defendant in the plaintiff's yet he knew the plaintiff had no accounts with the 1st defendant. He confirmed the evidence of P.W. 1 which was to the effect that the company had lost a total sum of Kshs.1,340,247/45 through the account held by the 1st defendant for the period covering 1997, 1998 and 1999. P.W. 2 contradicted the evidence P.W. 1 when he said that though P.W. 1 kept the plaintiff company's vital documents relating to its incorporation, the same were accessible to any member of staff.

The 1ST defendant called one Jamal Nassor (D.W.1) to testify. D.W.1 presented documents whose execution were witnessed by Kiume Kioko advocate which were used to open account No.211693692. D.W.1 enumerated the documents to be the memorandum and Articles of Association, certificate of Incorporation, company minutes and the identification documents of the directors. He told this court that all the necessary procedures were followed to open the account. D.W.1 said that no disciplinary action had been taken against the officer who opened the account because he committed no offence. The officer, one Hamisi Mwakiringo was unavailable to testify because he had left the employment of the 1st Defendant on an early retirement arrangement.

The 2nd and 3rd defendants relied on the evidence of the 2nd defendant, Johnrick Mutava (D.W.2). D.W.2 told this court that he was employed by the plaintiff in 1993 and was sacked in 1999. He said that he forwarded his documents and those of his wife at the time of joining the employment of the plaintiff company. He said he suspected somebody could have used these documents without his knowledge to open the aforesaid accounts with the 1st defendant. He vehemently denied the plaintiff's claim. D.W. 2 claimed that P.W. 1 had a grudge against in him in respect of a quarrel over a woman hence he is intended to frame him.

At the end of the evidence learned advocates appearing for the parties were granted leave to file written submissions. They also appeared before this court whereupon they made oral submissions save for the 2nd and 3rd defendants. The parties filed 14 agreed issues which I will deal with them in summary as follows:

There is no dispute that the 2nd defendant was employed by the plaintiff. This fact is admitted by the 2nd defendant (D.W.2) when he testified before this court. The first issue is whether or not the 2nd and 3rd defendants forged the Memorandum and Articles of Association and presented the same to the 1st defendant? The evidence of P.W.1, P.W.2 and D.W. 1 clearly show that the 1st defendant acted on the documents presented to it by the 2nd and 3rd defendants to open an account. The documents appear to bear some similarities with those in the possession of the plaintiff. Some alterations were done on the genuine documents to meet the objective of the presenter. The mystery is who did this and in whose benefit? There is no direct evidence to ascertain the culprit.

However, the law is not toothless, because it provides for proof of certain facts by circumstantial evidence. The evidence of Joseph Kipsigei Korir (P.W.2) is to the effect that employees were accessible to the documents in the Managing Director's office. One of the Senior employees of the company is the 2nd defendant (D.w.2). D.W.2 has not denied the fact that he was accessible to the Managing Director's office. D.W.2 infact alluded that he was framed up by P.W. 1 because of a grudge which arose out of a quarrel between him and P.W. 1 over a female employee. He has not named this female employee. This in my view is not credible. It does not make sense for P.W.1 to steal the plaintiff's documents and open a separate secret account yet the company is his. The only inference I can make is that the 2nd defendant in cahoots with his wife (3rd defendant) planned to open the account for their own benefit that is to essentially steal from the plaintiff company. In the entire defence the 2nd and 3rd defendants have not averred that there was a grudge between P.W.1 and D.W.2. The issue was raised by D.W.2 when giving evidence. I put the 2nd and 3rd defendants on the spot over this issue because the 2nd defendant had the opportunity to access the plaintiff's documents and in any case they stood to gain from the transaction as opposed to anybody else.

The second issue is to whether or not the 1st defendant was privy to the fraud? It is conceded by the parties involved in this dispute that the 1st defendant opened the bank account in dispute. It is the evidence of the 1st defendant through D.W. 1 that it has been its practice to certify documents upon seeing the original. Though the 1st defendant did not call the witness who certified the documents nevertheless I believe D.W. 1 told the truth and his evidence is believable. I say so because there is no allegation that the bank had an interest over the account. *Of what use would the bank have over the account in dispute?* The account only transacted in the sum of about 1,400,000 within a period of 3 years. The bank's witness, D.W.1, from his demeanor appeared to be a straightforward witness. D.W. 1 gave a good explanation as to why Hamisi Mwakiringo was unable to come to court to testify. It is said by then he had voluntarily retired from the bank. In the end I find that the bank was not privy to the fraud and or theft committed against the plaintiff. In view of my finding I hold that the 1st defendant owed no duty of care to the plaintiff. The plaintiff in any case did not offer any evidence to establish the role the 1st defendant played in the fraud save for the fact that it opened the bank account on the basis of the documents presented to it by the 2nd and 3rd defendants. The role of Kiume Kioko , advocate, in this dispute remains unresolved. The documentary evidence tendered puts the learned advocate in an embarrassing position. It was incumbent upon the learned advocate to clear his name which kept on coming up in bad light. The 3rd defendant has intentionally refused to come to court to testify to shed light over this matter. It is not difficult for this court to infer that the 2nd defendant and his advocate, Mr. Kiume Kioko may have influenced her (3rd Defendant) not to come to court lest her evidence may prejudice the 2nd and 3rd defendant's defence.

I observed the demeanor of Mr. Johnrick Mutava as he testified. He appeared to me to be a person who told lies. He was evasive while answering questions. His evidence to say the least is unreliable.

As far as I am concerned the aforesaid issues were the only serious issues which came up for my decision.

On the basis of the evidence, the submissions and the pleadings herein I find that the plaintiff has proved its case against, the 2nd and 3rd defendants to the required standards. I grant it judgment as prayed

in the plaint with costs to the plaintiff. The case against the 1st Defendant was not proved. The same is dismissed with costs to the 1st defendant.

Dated and delivered at Mombasa this 1st Day of March 2007.

J.K. SERGON

J U D G E

In open court in the presence of Mr. Omondi h/b Waweru for the 1st Defendant and in the presence of Mr. Kinyua for the Plaintiff.

N/A Kiumu Kioko.