REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

(MILIMANI COMMERCIAL COURTS COMMERCIAL AND TAX DIVISION)

CIVIL CASE 1938 OF 1996

(Formerly HCCC No. 159 of 1993, Mombasa)

WILFRED GITONGA (T/a Wilkel Traders Co)…….……PLAINTIFF

VERSUS

BARCLAYS BANK KENYA LTD……..DEFENDANT

J U D G E M E N T

This case has had a rather unfortunate history. It was filed at Mombasa as **HCCC No. 159 of 1993**. Hearing started there on 1st February, 1995 before Mbogholi, J. He substantially heard the Plaintiff between that date and 27th October, 1995. It would appear that Mbogholi, J was then transferred to Nairobi, and the file was on 1st July, 1996 forwarded to Nairobi so that he could conclude the hearing. On 25th July, 2000, however, Mbogholi, J disqualified himself from further hearing the matter. On 20th June 2001 Mbaluto, J ordered by consent that hearing of the case do start *de novo.* Hearing commenced before him on that same day. Mbaluto, J heard the Plaintiff between that date and 29th July, 2002 when his case was closed. Mbaluto, J was then transferred to another division and could not finish the hearing. On 11th July, 2003 Mwera, J ordered by consent that further hearing of the suit do proceed before another judge from where it had reached before Mbaluto, J.

The Defendant's case started before me on 31st January, 2006. It closed on 22nd May, 2006. The learned counsels agreed to file written submissions. The matter was fixed for mention on 6th July, 2006 with a view to taking a date for judgment. The Plaintiff filed his submissions on 16th June, 2006. The Defendant filed its submissions on 24th July, 2006. But because of my illness, hospitalization and recuperation in the meantime, judgment could not be prepared and delivered sooner. The delay is regretted.

The Plaintiff's case as per his amended plaint dated 2nd May, 1995 is that, being a client of the Defendant, he approached the Defendant in November, 1992 to handle for him a certain letter of credit whose beneficiary was his business called, WILKEL TRADERS COMPANY. However, the Defendant's employee, servant or agent negligently cancelled the letter of credit. Particulars of negligence are given. The Plaintiff pleads that he suffered loss for which he holds the Defendant vicariously reliable. He

quantifies that loss as:-

(i) Value of the letter of credit……..…… US$ 35,760.

(ii) Loss of profit …….. US$ 11,844.

(iii) Expenses for visibility studies……. US$ 2,000.

(iv) Storage charges and value of

perished goods …….. US$ 32,178.

Total…… US$ 81,782.

The Defendant denied liability and raised a set-off in the defence and set-off dated 14th April, 1993. Although it admitted that account No. 3554404 at the Defendant's Moi Avenue branch, Mombasa is held by Plaintiff, it did not admit that the account was held by him in the name and style of Wilkel Traders Company. It denied that Wilkel Traders Company was its customer or an account holder with it at the material time. All the particulars of negligence set out in the plaint were denied. The Defendant further pleaded that on 24th November, 1992 it received a telex from the Commonwealth Bank of Australia in Sydney requesting it to open an irrevocable and transferable letter of credit for US$ 35,760 in favour of Wilkel Traders Company, but that, as the Defendant did not maintain any account in the name of the said beneficiary and was not aware of any connection whatsoever, if any, between the Plaintiff and the said Wilkel Traders Company, and in execution of its duty as a prudent banker, it returned the said letter of credit to the originating bank with a request that the beneficiary be informed accordingly.

In the set-off the Defendant pleads that the Plaintiff caused and/or contributed to the cancellation of the letter of credit, was negligent and also in breach of his duty to the Defendant. Particulars are given. The Defendant further pleads that as a result of the said negligence and/or breach of duty, the Plaintiff caused, permitted and/or substantially contributed to the return of the letter of credit to the originating bank, and cannot benefit from his own negligence and/or breach of duty. The Defendant finally pleads that it shall seek to set-off against any sum awardable to the Plaintiff any loss or damage to the Defendant resulting from the said negligence and/or breach of duty by the Plaintiff. No particulars of such loss or damage are pleaded.

There is a statement of issues dated 25th May, 1994 filed by the Plaintiff. I do not see in the record any statement of issues filed by the Defendant. At the commencement of the hearing, parties agreed on admission of certain bundles of documents. The Plaintiff's bundle was marked Exhibit A while the Defendant's bundle was marked Exhibit B. Certain other documents were produced in the course of hearing.

The Plaintiff testified. He did not call any other witness. One JAMES KINYANY, an employee of the Defendant testified for the defence. No other witness was called. I have considered their testimonies. I have also considered the written submissions placed on the record on behalf of each party.

The following facts are not in dispute:-

1. The Plaintiff was a customer of the Defendant maintaining a savings account number 3554404 in his own name at the Defendant's Moi Avenue Branch, Mombasa. See pages 29 and 30 of Exhibit 'B'.

2. On 23rd November, 1992 the Defendant received by telex a request dated 20th November, 1992 from the Commonwealth Bank of Australia in Sydney to open a letter of credit for the value of US$ 35,760 in favour of Wilkel Traders Company with a request that the Defendant do advise the beneficiary thereof of the same. A copy of the letter of credit is to be found at pages 27 and 28 of Exhibit A and also at pages 30 and 31 of Exhibit B.

3. The letter of credit was to expire on 14th January, 1993.

4. The letter of credit was irrevocable and transferable. It was also negotiable at any bank.

5. The Defendant did not advise Wilkel Traders Company or the Plaintiff of the letter of credit. On or about 28th November, 1992 it informed the issuing bank that it was unable to handle the letter of credit as the beneficiary did not maintain an account with it. See page 26 of Exhibit B. By telex dated 12th January, 1993 the issuing bank asked the Defendant to cancel the letter of credit, "**subject to beneficiary's consent".** See page 23 of Exhibit B.

I consider the following to be the main issues to be determined in this suit:-

1. Whether the Plaintiff and Wilkel Traders Company were in law one and the same person.

2. If so, whether the Defendant was aware of that fact.

3. Whether the Defendant was obliged in law to advise the Plaintiff or Wilkel Traders Company of the letter of credit.

4. Whether the Defendant owed any duty of care to the Plaintiff or Wilkel Traders Company in respect to the letter of credit. If so, what was that duty?

5. Whether the Defendant was negligent and in breach of any duty of care owed to the Plaintiff or Wilkel Traders Company by not advising of the letter of credit and "returning" the same to the issuing bank.

6. Whether the Defendant's action of "returning" the letter of credit to the issuing bank amounted to cancelling the same.

7. Whether the Plaintiff suffered any loss as claimed or at all.

8. Whether the Plaintiff is entitled to the reliefs sought.

9. Whether the Defendant is entitled to the set-off claimed.

Let us look at these issues.

<u>Issue No. 1:</u> Were the Plaintiff and Wilkel Traders Company one and the same person in law?

Wilkel Traders Company was not a duly incorporated company. It was the Plaintiff's trade name. In law they were one and the same person, that is, the Plaintiff.

<u>Issue No. 2:</u> Was the Defendant aware of the fact that the Plaintiff and Wilkel Traders Company were one and the same person?

To put it another way, did the Defendant know that Wilkel Traders Company was the Plaintiff's trade name and not a limited liability company? In his testimony-in-chief, the Plaintiff said that Wilkel Traders Company is an "**unlimited liability company"**. He operated savings account No. 3554404 with the Defendant's Moi Avenue Branch. The account was opened on 1st July 1987 in the name of WILFRED GITONGA ASHFORD. The documents relating to this account were produced in evidence at pages 29, 30, 31 and 32 of Exhibit B. When opening the account the Plaintiff described himself as:-

"**POLICE OFFICER**

PORT POLICE KILINDINI

DEPARTMENT OF POLICE

BOX 95005 MOMBASA"

It would appear that these particulars were changed with effect from 23rd November 1992, by deleting "**POLICE OFFICER, PORT POLICE KILINDINI"**. A new address was also given as:-

"**WILKEL TRADERS COMPANY**

P. O. BOX 90525

MOMBASA"

There was also a new description of the account holder as:-

"**BUSINESS MAN**

IMPORT EXPORT BUSINESS

OWNS WILKEL TRADERS CO."

The Plaintiff testified that he effected these changes with the advice of one MR. SALIM, an employee of the Defendant, to enable the Defendant to process the letter of credit. He also advised him to open a current account for the same purpose in the name of Wilkel Traders Company. There is no evidence that such account was ever opened.

The evidence before the court shows that Wilkel Traders Company did not maintain an account with the Defendant when the latter received the letter of credit in its favour. The Defendant could not have known that Wilkel Traders Company was the trade name of the Plaintiff who maintained only a savings account with it. It would appear that the difficulty posed by the fact that the Defendant did not know Wilkel Traders Company and thus was not in a position to advise it of the letter of credit was brought to the attention of the Plaintiff by a friendly employee of the Defendant, a Mr. Salim. There was then a flurry of activity – changing particulars of the Plaintiff's savings account and an attempt to open an account in the name of Wilkel Traders Company. However, there is no clear evidence that the Plaintiff properly brought to the attention of the Defendant the fact that Wilkel Traders Company was his trade name. He could easily have done so by an appropriate letter addressed to the Defendant. I therefore hold that at the material times, that is, at the time the Defendant received the letter of credit and at the time that it "returned" it to the issuing bank, it did not know that the Plaintiff (its customer holding a savings account in his name) and Wilkel Traders Company were one and the same person. The Defendant did not know that Wilkel Traders Company was the Plaintiff's business or trade name.

<u>Issue No. 3:</u> Was the Defendant obliged in law to advise the Plaintiff or Wilkel Traders Company of the letter of credit?

Both parties relied on the "**Uniform Customs and Practice for Documentary Credits" (hereinafter referred to as the "UCP")** prepared and published by the International Chamber of Commerce. This is an internationally accepted set of standards governing the use of documentary credits in international trade. It was first published in 1933 and has been revised from time to time. The version I have before me was revised in 1983 and came into force as from 1st October 1983. The UCP appears to have achieved global acceptance. It has the force of law where it has been incorporated into the documentary credit concerned by wording in the credit indicating that such credit is issued subject to the UCP. See Article 1 of the UCP. The subject letter of credit has such wording.

I have perused the 55 articles of the UCP. The Defendant was only an advising bank. Article 8 requires

that the advising bank shall take reasonable care to check the apparent authenticity of the credit which it advises. The Defendant was not authorized or requested by the issuing bank to add its confirmation to the letter of credit; its role was merely to advise the beneficiary of the credit. I can find no article at all in the UCP placing a legal obligation upon the advising bank to advise the beneficiary. It appears that by agreeing to advise, the advising bank will merely be extending a courtesy to the issuing bank and to the beneficiary.

An advising bank may find itself unable to advise the beneficiary for whatever reason. Its duty then would be to so inform the issuing bank without delay. That is what the Defendant did. I therefore find that the Defendant was not obliged in law to advise the Plaintiff or Wilkel Traders Company of the letter of credit.

Issue No. 4: Did the Defendant owe any duty of care to the Plaintiff or Wilkel Traders Company in respect of the letter of credit? If so, what was that duty?

It cannot have escaped the Defendant that the letter of credit was valuable to the beneficiary. The beneficiary was Wilkel Traders Company. This entity was not a customer of the Defendant, and as I have already found, the Defendant did not know that it was the Plaintiff's trading or business name. The Defendant would no doubt have owed to the Plaintiff a duty to advise him of the letter of credit had it known that he was the beneficiary thereof. But it did not know that the Plaintiff was the beneficiary. Wilkel Traders Company, in relation to the Defendant, was a stranger. The Defendant could not, and did not, owe it a duty of care in relation to the letter of credit.

I therefore find that the Defendant did not owe to either the Plaintiff or Wilkel Traders Company any duty of care in respect to the letter of credit.

Issue No. 5: Was the Defendant negligent and in breach of any duty of care owed to the Plaintiff or Wilkel Traders Company by not advising of the letter of credit?

Having found as I already have in respect to issue No. 4, the answer to this issue must be no.

Issue No. 6: Did the Defendant's action of "returning" the letter of credit to the issuing bank amount to cancelling the same?

As already seen, the Defendant was only an advising bank; it was not the issuing bank. It did not have authority to reconfirm the letter of credit. Under Article 9 of the UCP, only the issuing bank could have cancelled the credit. The Defendant merely advised the issuing bank that it was unable to advise the beneficiary because it did not have an account with the Defendant. When it did so the letter of credit was still valid. By, as it were, "returning" the letter of credit the Defendant did not thereby cancel it; nor did that act of "returning" the credit have the effect of cancelling it.

Issue No. 7: Did the Plaintiff suffer any loss as claimed or at all?

The Plaintiff claimed the face value of the letter of credit (US$ 35,760/00), special and general damages. The face value of the letter of credit was the entire cost of the shipment (c.i.f.) that the Plaintiff would have made to Hong Kong. His claimed profit would have been US$ 5,922/00. He has claimed the entire value of the letter of credit because, he says he is obligated to pay his supplier of the sea cucumbers that he was to export. Special damages must be strictly proved. He has not paid his supplier (which therefore means that he has not incurred that loss), and there is no evidence that he is going to. The supplier's claim against him, if there will be one, will be time-barred.

That aside, as already seen, when the Defendant "returned" the letter of credit to the issuing bank it was still valid. With the modern communications that were no doubt available in 1992 (telex, etc) the issuing bank could have easily issued another letter of credit which could have been advised by another bank. There is no evidence that the Plaintiff took appropriate steps to salvage the deal. He did not at all mitigate his loss, and he could easily have done so. I would in the circumstances have awarded him only

the lost profit of US Dollars 5,992/00. All his other claimed losses are too remote and not proved.

Issue No. 8: Is the Plaintiff entitled to the reliefs sought?

Having answered the other issues above as I have, the answer to this issue is no.

Issue No. 9: Is the Defendant entitled to the set-off claimed?

There was no evidence at all offered that the Defendant suffered any loss as a result of the Plaintiff's alleged negligence and breach of his duty to the Defendant. The Defendant is therefore not entitled to the set off claimed.

In the result, the Plaintiff has failed to prove his case against the Defendant on a balance of probabilities. It is hereby dismissed. The Defendant has also failed to prove its set-off against the Plaintiff on a balance of probabilities. It is also hereby dismissed.

As to costs, since both parties have failed in their respective cases against each other, the proper order is that parties bear their own costs of the suit. Those shall be the orders of the court.

DATED, SIGNED AND PRONOUNCED IN OPEN COURT

THIS 28TH DAY OF SEPTEMBER, 2007

H. P. G. WAWERU

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