



**REPUBLIC OF KENYA**

**HIGH COURT OF KENYA AT NAKURU**

**CIVIL SUIT 31 OF 1995**

**WILSON KAISONGO OMAMBIA.....PLAINTIFF**

**VERSUS**

**ESTHER NYANCHAMA OMAMBIA.....1<sup>ST</sup> DEFENDANT**

**EAST AFRICA BUILDING SOCIETY.....2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

The plaintiff filed his original plaint on 25<sup>th</sup> May, 1995. He stated in paragraph 1 of the said plaint that he was the administrator of the estate of the late **Stanley Omambia Ogero** (hereinafter referred to as “*the deceased*”), having obtained letters of administration of the deceased’s estate on 6<sup>th</sup> July, 1994 in Kisumu High Court Succession Cause No. 75 of 1994. Thereafter the defendants filed their statements of defence. Subsequently, an application to amend the plaint was filed on 31<sup>st</sup> October, 1996. All the parties consented to the filing of the amended plaint. The same had been annexed as a draft to the chamber summons seeking leave to amend it. On 28<sup>th</sup> November, 1996 a consent order was recorded in the following terms:-

***“By consent the application dated 31/10/96 be and is allowed. Amended plaint (draft) be and is hereby deemed filed subject to payment of filing fees. Costs of application in cause. Amended plaint has been served. Defendant to be at liberty to file defence to amended plaint within a period of 21 (twenty one) days from the date hereof.”***

The first defendant did not amend her statement of defence but the second defendant filed an amended statement of defence on 28<sup>th</sup> January, 1997.

In the amended plaint, the plaintiff stated that the first defendant was the lawful wife of one Paul Simon Kagiri. He further alleged that the first defendant, in a scheme to defraud the deceased, did on 11<sup>th</sup> August, 1992 falsely and unlawfully obtain another identity card in the names **Esther Nyanchama Omambia**, without first renouncing her known names, **Jane Nyanchama Kagiri**.

The plaintiff further stated that the deceased held a fixed deposit account number 030940 with the second defendant. On 25<sup>th</sup> January, 1993 the deceased renewed the said account which was a single deposit account with a credit balance of Kshs.3,412,671.85 for a further period of one year. The said renewal instructions were given on the second defendant’s printed instruction document. The plaintiff alleged that on diverse dates between 25<sup>th</sup> January, 1993 and 4<sup>th</sup> January, 1994, one **John Kahumba**

**Keru**, an employee of the second defendant, with intent to defraud, forged the document in which the deceased had given his renewal instructions by adding and inserting by pen the following words:-

***“(a) Renew A/C Kshs.3,000,000/- in the names of E. N. Omambia.***

***(b) Please transfer Kshs.3,000,000/- to joint names with my wife A/C (FD) MRS ESTHER NYANCHAMA OMAMBIA ID NO. 3108976/76 and balance transfer to A/C 16267.”***

The said words were alleged to have been so inserted by the said John Kahumba Keru in collusion with the first defendant and without the authority, knowledge and consent of the deceased.

In pursuance of the said fraudulent intention the first defendant in active assistance of the said John Kahumba Keru and/or other employees of the second defendant did on 25<sup>th</sup> January, 1993 or thereafter open a single deposit account number 32567 in her new assumed names, Esther Nyanchama Omambia, it was alleged. Kshs.3,000,000/- was transferred from the deceased's account into the first defendant's account and the balance of Kshs.412,671.85 was credited to the deceased's account number 16267.

The plaintiff further averred that upon opening account number 32567 with funds converted from the deceased's account, the first defendant singly operated the same, continued to renew the fixed deposit until 4<sup>th</sup> January, 1994 when upon its maturity she again in collusion with the said John Kahumba Keru and other employees of the second defendant, purportedly opened a new joint account number 33975 in the names of the first defendant and that of the deceased and had the proceeds in account number 32567 transferred into the new joint account. Between 4<sup>th</sup> January, 1994 and 7<sup>th</sup> January, 1994 the first defendant presented herself to the second defendant as the person solely entitled to the balance in the new joint account and proceeded to draw Kshs.2,000,000/-. It was alleged the said withdrawal was fraudulent and was done with full knowledge of the second defendant's employees and/or agents.

The particulars of the first defendant's fraud were stated as hereunder:-

***“(a) Presenting a false identity card to the second defendant's officials when she knew she had obtained it unlawfully.***

***(b) Pretending that she was the true owner of Kshs.3,000,000/- when she knew she was not.***

***(c) Presenting herself as the only person beneficially entitled to the proceeds of the deceased's account when she knew she was not.”***

The plaintiff further contended that the second defendant's employees/agents were at all material times aware of or in league with or colluding with the first defendant in her fraudulent or deceitful acts. Alternatively, it was alleged that the forgeries complained of which facilitated the opening of the fictitious account and conversion of the deceased's funds and subsequent withdrawal of the same by the first defendant was due to the second defendant's employees'/servants' unprofessional and negligent conduct. Particulars of negligence were set out thereunder. I will revert to the alleged acts of negligence later. As a result of the aforesaid acts, the deceased's estate lost Kshs.3,000,000/-, it was alleged.

The plaintiff prayed for judgment against the defendants jointly and severally for:-

***“(a) A declaration that the balance in fixed joint deposit account No. 34204 is free property of the deceased and belongs to his estate.***

***(b) An order directing the defendants to refund to the plaintiff the sum with interest wrongfully drawn from account No. 030940.***

***(c) An order prohibiting the second defendant from making out any payment in respect of the account in dispute.***

- (d) ***Costs of this suit.***
- (e) ***Interest on (d) above at court rates***
- (f) ***Any other relief that this Honourable court may deem fit to grant.”***

In her statement of defence, the first defendant denied that the plaintiff was the administrator of the estate of the deceased. She stated that she was a wife of the deceased. She further denied all the particulars of fraud attributed to her and added that after she got married to the deceased, she lawfully obtained an identity card in her names, Esther Nyanchama Omambia, with knowledge and consent of her husband, the deceased. She also denied that she induced the deceased to transfer Kshs.3,000,000/- into a single account as alleged by the plaintiff. She stated that on 25<sup>th</sup> January, 1993 she opened a single account No. 32367 in her names with a sum of Kshs.3,000,000/-. The first defendant further stated that the funds in account number 32367 had never been transferred into account number 34204, which she alleged was a third account opened after renewal of the fixed deposit account No. 32367. She was exclusively entitled to all the funds in the said account, she added. She further denied that there was any collusion between her and employees/servants of the second defendant as alleged by the plaintiff. She maintained that the second defendant rightly paid to her the claimed sum of money and urged the court to dismiss the plaintiff's suit with costs.

The second defendant stated in its statement of defence that it had always known the first defendant as Esther Nyanchama Omambia and as the wife of the deceased. It averred that on or about the 25<sup>th</sup> January, 1993, the deceased gave instructions that a sum of Kshs.3,000,000/- be placed in a fixed deposit account in the name of the first defendant. Later on the deceased instructed the second defendant to have the fixed deposit in his name and that of his wife and the balance transferred to his account No. 16267. However, the instructions could not be carried out as the deceased did not have the deposit certificate then. Upon maturity of the said account, the proceeds thereof were transferred on 4<sup>th</sup> January 1994 to a joint fixed deposit account No. 33975 in the names of the first defendant and the deceased. Further, the depositors agreed to abide by the second defendant's rules and it is a term of operation of all its accounts, alternatively, it is a term implied by law, that the survivor of a joint account has the sole right or title to the principal monies and interest deposited, the second defendant stated.

In addition, the second defendant averred that on 8<sup>th</sup> March, 1994 it received instructions from the first defendant's lawyers demanding payment of Kshs.2,000,000/- from account number 33975. A death certificate was produced in respect of the deceased and the first defendant was lawfully paid the sum of Kshs.2,000,000/-. The second defendant denied that it was negligent at all.

During the hearing, the plaintiff, who is also a son of the deceased, testified that sometimes in June, 1994, he received a statement of account from the second defendant. The statement was in the names of the first defendant and the deceased. He was shocked to see the name of the first defendant in the said statement because, according to him, she was not associated with their family at all, she was just a business lady. He therefore decided to go and enquire from the second defendant why the account was in the joint names. He was shown a document (P.Exh.3) which had allegedly been issued on instructions of the deceased. It contained three conflicting instructions to the second defendant as follows:-

1. ***“Renew the F.D. Kshs.3,000,000/- in the name of E. N. Omambia”.***

These were hand written instructions allegedly given by the deceased on 25/1/1993.

***“2. Dear Sir,***

***FIXED DEPOSIT ACCOUNT NO. 4-12-030940***

***NAME: STANLEY OMAMBIA UGERO,***

**FIXED DEPOSIT.**

***I wish to renew the above numbered fixed deposit for a further period of one year. Enclosed herewith is the old certificate for renewal. Please renew the deposit excluding interest.***

***Yours faithfully,***

(signed)

The above instructions were typed in the standard format of a deposit renewal chit and were dated 25/1/1993.

***“3. Please transfer Kshs.3,000,000/- to joint names with my wife, A/C F.D., MRS ESTHER NYANCHAMA OMAMBIA ID NO. 3108976/7 & BAL. transfer to A/C 16267”.***

The instructions in number 3 above were allegedly given on 28/1/1993. The plaintiff stated that the hand written instructions in number 1 and 2 above were not in the deceased's handwriting and it was established by the Criminal Investigations Department that the handwriting was that of an employee of the second defendant. As a result, the second defendant's employee known as Keru Kahumbu and the first defendant were arrested and charged with **forgery contrary to Section 349 of the Penal Code in Criminal Case No. 2035 of 1996** before the Nairobi Chief Magistrate's court. They were also charged with stealing Kshs.3,000,000/- from the account of the deceased at the second defendant's Building Society. After a full trial the two were acquitted of the said charges, although the trial court observed that their acquittal was due to the fact that evidence was tactfully withheld from it.

The plaintiff also testified that the first defendant was the wife of one Simon Paul Kagiri but when she befriended the deceased, she unlawfully obtained a second identity card in the name of Esther Omambia so as to gain access to the deceased's accounts during his life time. He pointed out that she was charged because of that double registration in Criminal **Case No. 12210 of 1995** at Makadara Senior Principal Magistrate's court, Nairobi. She was convicted and fined Kshs.500/-.

The first defendant testified that she got married to the deceased in 1990. She was his third wife. There before she had been married to one Simon Kagiri but he deserted her. Together with Simon Kagiri they got six children, even though he had not paid any dowry. When she got married to the deceased he paid full dowry to her brothers. During the subsistence of her marriage to Mr. Kagiri, she had obtained an identity card in the name **Jane Paul Kagiri**. Thereafter when she got married to the deceased herein, she acquired another identity card in the name, Esther Nyanchama Omambia. Later on she was forced to surrender one of the identify cards.

**Nelson Kingoina Nyangera, PW2**, corroborated the evidence of the first defendant regarding her marital status. He stated that he witnessed payment of dowry by the deceased to the first defendant's family members. That was after Mr. Kagiri had deserted her. **Samson Ogeto, PW3**, a brother to the deceased, also testified that his late brother had lawfully married the first defendant according to the Kisii customary laws, having paid full dowry for her.

Regarding the bank accounts, the first defendant testified that the deceased willingly opened an account for her with the second defendant. He transferred Kshs.3,000,000/- into her account, having introduced her as his wife. After the death of her husband, she went to the Building Society and withdrew Kshs.2,000,000/-. Later she withdrew the balance. She denied having conspired with clerks of the second defendant to withdraw the aforesaid sum unlawfully.

**Thomas Kanana, DW4**, testified on behalf of the second defendant. He was a manager at East African Building Society, now known as Akiba Bank. He joined the second defendant in 1992 and he knew John Kahumba Keru who used to work for the second defendant. According to PW4, the first defendant opened an account with the second defendant on 25<sup>th</sup> January, 1993. It was a fixed deposit account in the sum of Kshs.3,000,000/- for a period of one year. The money was transferred from an existing account of

the deceased, No. 30940. The account had Kshs.3,412,671.85 at the time. The balance of Kshs.412,617.85 was transferred to the deceased's investment account No. 16267. The deceased had given his address as P. O. Box 142 Sotik and that is the same address that was given in the first defendant's account opening forms. However, the address that was stated in the account opening forms for the joint account between the deceased and the first defendant was P. O. Box 434, Keroka.

After the death of the deceased on 29<sup>th</sup> August, 1993, the first defendant, through her advocates, wrote to the second defendant and demanded payment of Kshs.2,000,000/- out of the fixed deposit sum of Kshs.3,000,000/-. However, DW4 was unable to produce a copy of the letter that was allegedly written to them by the first defendant's advocate. The first defendant had stated that she did not instruct any lawyer to demand on her behalf that sum of money. The second defendant paid to her Kshs.2,000,000/- vide cheque No. 683239 dated 7<sup>th</sup> March, 1994. DW4 cited rule 13 of the Society's Rules which states that in respect of joint accounts, upon proof of death of any of the joint holders, the surviving joint holder shall be the only person recognized by the society as having any title to or interest in the joint account and shall be entitled to withdraw the whole or any part of the principal money, see D. Exh. 14. Upon payment of that sum, there was a balance of Kshs.1,650,538.40 that was invested in another fixed deposit account. That money and the accumulated interest thereon was paid to the first defendant following her acquittal in the aforesaid criminal case. DW4 denied that the second defendant had colluded with anybody to defraud the deceased of his money as alleged by the plaintiff.

In cross examination, DW4 admitted that according to the renewal form that was executed by the deceased (D. Exh.3), there were three conflicting instructions as to how the society was to deal with the fixed deposit sum. The witness did not produce the original document. The joint account between the deceased and the first defendant was opened without any account opening forms being completed, DW4 stated. That was contrary to the building society's regulations, he conceded. The second defendant had first renewed the fixed deposit of Kshs.3,000,000/- in the name of the first defendant but later the account was converted into a joint account. The first defendant did not raise any objection about it, DW4 stated.

Parties were unable to agree on the issues for determination and it was by consent agreed that each of them files their separate issues. It was further agreed by consent that written submissions be filed and exchanged. The plaintiff filed its separate issues and the defendants filed a joint list of issues.

Having perused the two lists of issues on record, I believe the issues for determination can be summarized as hereunder:-

1. Whether the plaintiff has locus standi to file this suit.
2. Whether the first defendant was a wife of the deceased, Stanley Omambia Ogero.
3. Whether the deceased gave renewal instructions to the second defendant in respect of his fixed deposit account No. 030940 for a period of one year from 25<sup>th</sup> January, 1993.
4. Whether the deceased instructed the second defendant to have to have Kshs.3,000,000/- in account No. 32367 transferred into a joint account in his name and that of the first defendant.
5. Whether the second defendant carried out the deceased's instructions, if at all.
6. Whether the second defendant owed the deceased a duty of care in dealing with his funds in carrying out any instructions given to it.
7. Whether any of the second defendant's employees forged the documents in which the deceased gave instructions regarding his fixed deposit account No. 030940.
8. Whether the deceased's estate has suffered any loss and damage and if so, who is liable for the same?

I have considered the written submissions and my answers to the above issues now follow:-

1. **Locus Standi.**

The plaintiff is the son of the deceased and he obtained a Grant of Letters of Administration Intestate in respect of the estate of his deceased father on 7<sup>th</sup> July, 1994. That is not in dispute. The only issue that was raised by the defendants regarding the plaintiff's locus standi is that he did not state in his plaint that he was bringing this suit on behalf of the estate of the deceased. While that is so, I am of the view that such an omission is not fatal to the plaintiff's case. I therefore find and hold that the plaintiff has locus standi to file this suit.

2. **Was the first defendant a wife of the deceased?**

From the evidence on record, the first defendant cohabited with Simon Kagiri for a number of years and got six children. According to the first defendant, Mr. Kagiri never paid any dowry and so he did not formally get married to her. The first defendant further stated that Mr. Kagiri never visited her parents. When Mr. Kagiri deserted her, the first defendant met the deceased. He married her, got one child with her, paid dowry for her and formally married her under Kisii customary laws. He accepted parental responsibility of the children which the first defendant got with Mr. Kagiri. He cohabited with her as his wife until his demise. During his burial, the first defendant was introduced as one of the deceased's wives. While it is true that in Nyamira **Senior Resident Magistrate's court Criminal Case No. 136 of 1989** the first defendant stated that Simon Kagiri was her husband, she added that they were separated. In any event, the issue for determination in that case was not her marital status. The first defendant was the complainant in a criminal case where one Rosalia Kerubo Ongaki had been charged with house breaking and stealing. In the circumstances, my answer to the second issue is in the affirmative.

**Third and fourth issues (renewal of the deceased's fixed deposit account).**

It is not in dispute that P. Exh.3 contains conflicting instructions. The deceased had a fixed deposit account No. 030940 which had a principal sum of Kshs.3,000,000/-. It was in his sole name. The original of that exhibit was never produced in these proceedings. The photocopy that was produced was not clear. The original typed instructions contained therein and which were presumably given by the deceased were that the fixed deposit be renewed for a further period of one year. There is a signature appended thereto. It resembles that of the deceased. Just above the typed instructions and the said signature are hand written instructions to the effect that Kshs.3,000,000/- be transferred to a new account which was to be opened in the joint names of the deceased and the first defendant and the balance to the deceased's account number 16267. Then there was a note:-

***"N.B.:Renew the f.d. Kshs.3,000,000/- in the name of E. N. Omambia"***

Below that note were initials said to be those of John Keru Kahumba, an employee of the second defendant. There was no signature of the deceased. Faced with those conflicting instructions, the second defendant did not deem it reasonable to summon the deceased and enquire from him what he actually wanted to be done with his money in the fixed deposit account. The second defendant proceeded to open a fixed deposit account in the first defendant's name alone and later opened a joint fixed deposit account in the names of the deceased and the first defendant. The two account holders were not required to sign account joint opening forms. That was improper and contrary to the normal banking practice, as was admitted by DW4. The joint account was opened on 4<sup>th</sup> January, 1994 whereas the deceased had died on 29<sup>th</sup> August, 1993. The second defendant knew or ought to have known that the deceased was no longer alive. Even after issuing the Kshs.2,000,000/- cheque to the first defendant on 7<sup>th</sup> March, 1994, the second defendant opened a fixed deposit account for the balance of Kshs.1,650,538/- in the joint names of the deceased and the first defendant. The second defendant had been notified by the first defendant's advocate about the death of the deceased. They even had a copy of his death certificate. The second defendant's employees acted fraudulently and/or negligently in the manner in which they dealt with the said accounts. The second defendant breached the duty of care that it owed to the deceased and/or his estate. In **ONJALLAH VS KENYA COMMERCIAL BANK LTD [2004] 1 KLR 702**, the bank was

accused of breach of its contractual obligation to its customer, the appellant, by wrongfully freezing his bank account and paying the monies therein to a third party without reference to its customer. The court held that the bank was liable to repay money that had been paid out under a mistake of fact.

In *HALSBURY'S LAWS OF ENGLAND*, fourth Edition, paragraph 40, the learned editors state as follows:-

***“The receipt of money by a banker from or on account of his customer constitutes him the debtor of the customer. The banker is normally liable to repay only the person from whom he received the money.”***

The editors further state that the bank undertakes to pay any part of the amount due against the written orders of a customer, the relationship being that of agent and principal. The customer is required to exercise reasonable care in giving his instructions to his bankers.

From my observation of P. Exh.3, the second defendant was required to renew the deceased's fixed deposit for a further period of one year. Any other instruction that may have been contained in the said document was suspect and could not be carried out without requiring both the deceased and the first defendant to sign the appropriate account opening forms. The second defendant was under no obligation to honour any ambiguous instructions that may have been given to it by the deceased, if at all. I believe that the deceased was not the author of the other instructions contained in P. Exh.3 that required the second defendant to deal with the fixed deposit in any other way except renewing the same in the deceased's name for one year.

In **Criminal Case Number 2035 of 1996** where the first defendant and John Kahumbu Keru were charged with forgery and stealing, the trial court observed that the second defendant deliberately withheld a lot of information because it was protecting itself ***“as for sure something was not done properly concerning the accounts of the deceased held by them, they knew it, perhaps also they were avoiding another fact, to be asked to repay in case fraud was discovered.”***

The trial court went on to state of the second defendant:-

***“I found EABS has shrouded the operations of these accounts with a lot of secrecy, knowing the 1<sup>st</sup> accused character as portrayed herein, I am almost certain a fraud took place, however the bank had hidden all the material information that could help court determine this in addition to withholding original documents and account opening forms if at all they existed they withheld bank statements of these accounts.”***

From the foregoing, I have dealt with issues numbers 3, 4, 5 and 6.

As to whether any of the second defendant's employees forged the documents in which the deceased gave his instructions, the criminal court found the evidence to be inconclusive and acquitted John Kahumbu Keru. I say no more, having held that there was negligence on the part of the second defendants and/or its employees.

Lastly, I believe the deceased's estate suffered loss and damage. The sum of Kshs.3,000,000/- and the accrued interest thereon was lost due to the aforesaid acts of negligence. A bank is liable for loss of money caused by the negligence or felonious acts of its employees carried out in the scope of their employment; see ***MORRIS VS C. W. MARTIN & SONS LTD [1966] IQB 716 at 737***. Even if the money was unlawfully paid to the first defendant as the deceased's wife, it does not make any difference since a wife can steal from her husband as was held in ***GREEN WOOD VS MARTINS BANK [1933] AC 51***.

In conclusion, I enter judgment for the plaintiff against the defendants jointly and severally and order them to pay the sum of Kshs.3,000,000/- plus interest at court rates from the date of filing this suit until payment in full. The defendants shall also bear the costs of this suit.

DATED, SIGNED and DELIVERED at Nakuru this 20<sup>th</sup> day of December, 2007.

**D. MUSINGA**

**JUDGE**

Judgment delivered in open court in the presence of Mr. Wambeyi holding brief for Mr. Migiro for the plaintiff and Mr. Mongeri for the second defendant and also holding brief for Mr. Mainye for the first defendant.

**D. MUSINGA**

**JUDGE**