



**Alexander Consultants Limited v Development Bank of Kenya Limited (Civil Appeal E443 of 2022) [2024] KEHC 5622 (KLR) (Civ) (22 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 5622 (KLR)

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

**CIVIL**

**CIVIL APPEAL E443 OF 2022**

**WM MUSYOKA, J**

**MAY 22, 2024**

**BETWEEN**

**ALEXANDER CONSULTANTS LIMITED ..... APPELLANT**

**AND**

**DEVELOPMENT BANK OF KENYA LIMITED ..... RESPONDENT**

*(An appeal arising from the judgement of Hon. Kagoni EM, Principal Magistrate, PM, delivered on 25th May 2022, in Milimani CMCCC No. 5780 of 2018)*

**JUDGMENT**

1. The suit, at the primary court, was initiated by the appellant, against the respondent, for Kshs. 569,250.00 being proceeds of a cheque deposited belonging to the appellant, which the respondent paid out to others; and Kshs. 71,250.00 being an amount of deposited cheque plus investigation fees. The appellant also sought an order to have the respondent cease all transactions on the affected account, closure of that account, and interests and costs. The case was that the subject account had been opened in the name of the appellant, without its authority, and funds were deposited into that account that were meant for the appellant, and that the respondent subsequently paid out the received funds to third parties, exposing the appellant to loss. The respondent was accused of acting fraudulently, negligently and in breach of statutory duty in opening the account, and paying out funds from it. The respondent filed a defence, in which it denied liability, and attributed negligence on the appellant for the loss that it suffered.
2. A hearing was conducted. 2 witnesses testified for the appellant, and 1 for the respondent. In the end, judgement was delivered, on 25<sup>th</sup> May 2022. The claim by the appellant was dismissed.
3. The appellant was aggrieved, hence the instant appeal. The grounds, in the memorandum of appeal, dated 24<sup>th</sup> June 2022, revolve around the trial court not appreciating the totality of the issues that had



- been placed before it; finding that there was no re-examination of PW1; finding that the respondent's witness was to be re-examined by the appellant; finding that PW1 had admitted to sending out an email to the respondent; failing to find that the emails dispatched by the appellant were only made for its client and not the respondent; finding that the appellant had failed to provide evidence on communication between itself and the respondent; among others.
4. Directions were given on 25<sup>th</sup> July 2023, for disposal of the appeal by way of written submissions. There has been compliance, by both sides.
  5. The appellant has submitted on only 2 issues: on whether the appellant communicated to the respondent about the cheque in question; and whether the respondent acted negligently in opening the account, and subsequently failed to exercise due care to the appellant. On the matter of communication about the missing or lost cheque, it is submitted that the appellant could not have communicated with the respondent over it as it had no information that the said cheque had been deposited with the respondent. *Kenya Grange Vehicle Industries Limited v. Southern Credit Banking Corporation Limited* [2014] eKLR is cited on the banker's duty of care, upon a cheque being presented to it. On the process of the opening of the account with the respondent, it is submitted that the due process was not followed, and the appellant points at portions of the evidence presented to argue its case. *Kenya Grange Vehicle Industries Limited v. Southern Credit Banking Corporation Limited* [2014] eKLR (Havelock, J) is cited on that score.
  6. The respondent has summarised the grounds of appeal into 4: whether the trial court erred in framing issues for determination; whether the witnesses for the appellant were re-examined; whether the trial court fell into error in declining to find that the respondent did not act negligently or fraudulently; and whether there was an error in finding the appellant was negligent. On the framing of the issues for determination by the trial court, it is submitted that it was within the power of the court to frame and consider issues, and the court was not limited to the issues framed by one party. On the matter of the re-examination of the witnesses by the appellant, it is submitted that the court did not say that the said witness was not re-examined, rather that the appellant did not use the re-examination to clarify issues. On fraud, collusion or negligence on the part of the respondent, it is submitted that no evidence on fraud was adduced, and, therefore, fraud was not strictly proved as required in law. *Kinyanjui Kamau v. George Kamau* [2015] eKLR (Karanja, Warsame & Gatembu, JJA), *Ndolo v. Ndolo* [2008] 1 KLR (G&F) 742 (Gicheru, Omolo & Tunoi, JJA) and *Central Kenya Limited v. Trust Bank Limited & 4 others* [1996] eKLR (Kwach, Tunoi & Pall, JJA) are cited. Regarding proof of negligence, it is submitted that the transactions at the bank were carried out during the ordinary course of business, and all the necessary and standard safeguards during account opening were required and considered. Similarly, upon presentation of the cheque, the respondent acted in accordance with ordinary banking business procedures in making payment. The *Halsbury's Laws of England* Vol. 49 pages 264 and 284 paras 816, 817 and 837; and *Kenya Grange Vehicle Industries Limited v. Southern Credit Banking Corporation Limited* [2014] eKLR (Havelock, J) are cited in that regard. On admission of negligence, recklessness and collusion by the appellant, it is submitted that the trial court found the appellant was negligent on its handling of cheques and how it treated the loss of such cheques. It is submitted that the appellant admitted to not securing its lost cheques, and failed to inform its clients and others of the loss. It is further submitted that the respondent was not made aware of the lost cheques, and that the loss was not reported to the investigative authorities. On the submissions by the appellant not being considered, *Daniel Toroitich arap Moi v. Mwangi Muriithi & another* [2014] eKLR (Mwera, Musinga & Ouko, JJA) is cited, for the submission that written submissions are not of evidential value, and are not to be relied on to discount the evidence available.



7. The appeal is by the appellant. I shall determine it on the basis of the 2 grounds that it has argued in its written submissions: the account opening, and the duty of care that goes with it; and the handling of the impugned cheque transactions.
8. There is ample caselaw on the duty that falls on a bank, at the time it opens an account for a customer, to do due diligence, to obviate the spectre of the account it opens being used as a conduit by fraudsters. In *Kwamashu Bakery Limited v. Standard Bank of South Africa Limited* [1995] (1) SA 377 (D) (Combrinck, J), it was observed that in the normal ordinary course of business, a bank opens and maintains customer accounts, and, in so doing it is expected to satisfactorily establish and verify the true identity of the customer, being alert to the ever present danger that after opening the account, that account could be used for fraudulent purposes. In *Jumbo Foam Mattresses Industries Limited v. First Community Bank & 2 others* [2022] KEHC 16950 (KLR)(Aburili, J), it was stated that a bank has a duty to do customer due diligence, by performing background checks and other screening processes on a customer, for the purpose of properly assessing the level of risk a customer poses before they allow them to open an account. In that case, the court found that the bank had not done that, which the court termed as an act of negligence, which led fraudsters to open and operate an account in the name of the appellant, and to withdraw all the moneys banked into that account using cheques drawn in favour of the appellant.
9. With respect to opening an account in the name of a limited liability company, it was stated in *Impulse Developers Company Limited v. Barkat Developers Limited & 6 others* [2023] KEHC 24302 (KLR) (Mabeya, J), that a reasonable banker would be expected to do due diligence on a company to know its real directors before opening an account in its name. It was held that, on the facts of the case, that had the bank done a search on the directorship of the company, under whose name an account was being opened, it would have established that the persons purporting to open the account were not directors of the company, and had no authority to act on its behalf.
10. In the instant case, the appellant stated that it was not aware of the account that was opened with the respondent in its name, and into which cheques emanating from it were deposited, and cashed. The respondent did not deny opening the account, but argued it did the best due diligence it could do in the circumstances, and it could not take the blame that fraudsters opened and operated an account with it in the name of the appellant. When the authorities cited above are applied to the facts and circumstances of the case herein, it will be obvious, that the respondent did not do sufficient due diligence, for if it had, it would have established that the persons who sought to open that account had no authority from the appellant, and, in the circumstances, the respondent acted negligently. I doubt that there was any evidence of fraud and collusion, on the part of the respondent, but definitely there was negligence. If due care and diligence had been done, the respondent would not have opened that account.
11. The handling of the cheque, which was the basis of the claim, was tied up with the opening of the account. The case by the appellant was that the cheque was among a number that disappeared from its custody, and the respondent countered that the loss, through that cheque, was occasioned by negligence on the part of the appellant, in losing the cheque, and in not informing the respondent about the lost cheques. However, the appellant had no dealings with the respondent, as it did not operate an account with the respondent. There was no basis, therefore, for the appellant to alert it of any loss of cheques which could be cashed at the account fraudulently opened with it. The duty to act with due diligence, which was incumbent upon the respondent, at the time it opened the account, would still bite it at the time it handled the cheque from the appellant, through the fraudulent account. There could be no way of escape for the respondent.



12. In view of the above, it is my finding and holding that the trial court had sufficient material before it, to establish that the respondent owed a duty of care to the appellant, and that it acted negligently, in failing to do due diligence, when it opened the fraudulent account, that was used to milk the sum of Kshs. 569,250.00 from the appellant. I am unable to find evidence that the appellant negligently contributed to that loss. On the claim for Kshs. 71,250.00, no evidence was adduced on it, and there would have been no basis for the trial court to grant it.
13. In the end, I find and hold that the appeal herein has merit, and I hereby allow it. The order, in the judgement of 25<sup>th</sup> May 2022, dismissing the suit at the primary court, in Milimani CMCCC No. 5780 of 2018, is hereby set aside, and it is substituted with an order that judgement is entered in favour of the appellant and against the respondent, for Kshs. 569,250.00, with interests, and that the respondent is ordered to close the account the subject of that suit. The appeal is disposed of in those terms. The appellant shall have costs of this appeal, and at the court below. Orders accordingly.

**DELIVERED BY EMAIL, DATED AND SIGNED IN CHAMBERS, AT BUSIA, THIS 22<sup>ND</sup> DAY OF MAY 2024.**

**W MUSYOKA**

**JUDGE**

Ms. Veronica, Court Assistant, Milimani, Nairobi.

Mr. Arthur Etyang, Court Assistant, Busia.

Advocates

Ms. Aketch, instructed by Michuki & Michuki, Advocates for the appellant.

Mr. Nyboma, instructed by Acorn Law Advocates LLP, Advocates for the respondent.

