



REPUBLIC OF KENYA

IN THE HIGH COURT

AT NAIVASHA

CIVIL APPEAL NO. 60 OF 2019

FAMILY BANK LIMITED.....APPELLANT

VS

PANDA CO-OPERATIVE SAVINGS AND CREDIT SOCIETY.....RESPONDENT

(Being an appeal from the judgment and decree of Hon. E.K. Kimilu, PM

in Naivasha CMCC 496 of 2017 delivered on 22nd October, 2019).

JUDGMENT

Background

1. The appeal is from a judgment of Naivasha Principle Magistrate Hon. E.K. Kimilu delivered on 22nd October 2019 in Civil Suit No.496 of 2019. The Appellant was the Defendant whereas the Respondent was the Plaintiff in the said suit.

2. The claim arose from a Plaintiff filed on 27th July, 2012 seeking the following reliefs;

- a. Ksh. 2, 310,284.20 being interests accrued on the principal amount fraudulently deposited.**
- b. Damages for loss of use and lost opportunity to date.**
- c. Interests on (a) above from the date of filing the suit at court rates and**
- d. Costs of the suit.**

3. In a statement of Amended Defence filed on 7th December, 2017, the Appellant denied being in collusion with its employees or the employees of the Respondent to defraud the Respondent and further that the account of the Respondent was not an interest generating account but a transactional account. That for this reason, the Respondent was not entitled to the reliefs sought.

4. In her judgment, the learned trial magistrate arrived at a finding in favour of the Respondent and adjudged that the actions of the Appellant were fraudulent in depositing the said amounts into another account other than the designated account of the Appellant. Further that there was a breach of a fiduciary duty owed to the Respondent. The court found that the Appellant knowing fully that the business of the Respondent as an interest lending institution was entitled to interest on the amounts fraudulently deposited to the tune of Kshs. 2,310,284.20/- and general damages of Kshs. 500,000/- for lost opportunity plus costs and interest of the suit.

5. The Defendant appealed against this decision citing three (3) grounds of appeal as contained in the Memorandum of Appeal dated 17th November, 2019 which are as follows:

- a. That the learned trial magistrate erred in fact and in law in finding that the Respondent was entitled to KShs. 2,310,284.20/= being interest claimed by the Plaintiff despite evidence being tendered to Court showing that the account held by the Respondent did not ordinarily accrue interest.**
- b. That the learned trial magistrate erred in fact and in law in awarding the Respondent the sum of KShs.2,310,284.20/- as interest despite the fact that the contract binding upon the Appellant and the respondent does not make for provision for**

interest.

c. That the learned trial magistrate erred in law and misdirected herself in fact and law when she awarded the Respondents interests calculated from 27th July, 2017 to 22nd October, 2019 on KShs .2,310,284.20/- being the interest claimed and awarded to the Respondent by the Honourable Court.

Summary of evidence

Plaintiff's case

6. One witness testified for the Plaintiff's case. The Plaintiff is currently the Respondent and it called one witness. **PW1, David Michuki Muigai** was employed by the Respondent company as chairman until the year 2017, a position he held as at time of filing the suit. PW1 testified that on diverse dates between 23/05/2013 and 28/12/2015, the Respondent was a victim of cheques by the collusion of its former auditor and the Appellant's Naivasha Branch employees where forty-five cheques amounting to KShs. 6,030,447/= were re-routed into accounts belonging to the aforementioned auditor and a company registered to the said auditor bearing account numbers 0530000xxxx and 0530000xxxx. PW1 testified that the Respondent owned an account in the branch, number **053000xxxx** which was operated to issue loans to its members.

7. PW1 stated that the former auditor would receive cheques drawn in favour of the Respondent and instead of depositing into account number **0530000xxxx** he channelled them into account numbers 0530000xxxx and 05300000xxxx in his name and a company linked to him. PW1 claimed that that action was illegal as per the Banking Act and Central Bank Act. Further that the said deposits were fraudulent and it amounted to a breach of its fiduciary duty as the re-routing was done without any authorization or consent from the Respondent.

8. It was his further evidence that the Appellant acknowledged the alleged facts and settled the principal amount of the forty five cheques amounting to Kshs.6,030,447/=.

9. PW1 further stated that the settlement of the principle amount was the bare minimum since as a result of the Defendant's earlier breaches over and above the loss of the principle amount, the Respondent suffered loss of use of the said sums.

10. PW1 further stated that the Appellant not only breached banking practices laws but also its contractual obligation to the Respondent which has occasioned loss and damage by virtue of loss of use and the interest accruing therefrom. That the loss of use on the principle has cost the Respondent interest of Kshs 2,310,284.20 that would have been realised from 23/05/2013 to 28/12/2015.

11. In a Plaintiff filed on d27.7/2017, the Plaintiff claimed for the following reliefs

Defendant's case

12. The Defendant in the trial is the current Appellant and it also called one witness. **DW1, Nahashon Njoroge** rehashed the testimony of the Respondent acknowledging that once the Respondent discovered the irregular activities and notified the Appellant. The Appellant then remitted Kshs. 6,030,447/- into the Respondent's accounts.

13. DW1 stated that the Respondent's account held at the Appellant bank did not operate as an interest gaining account but as a current account. He testified that the Respondent was unable to substantiate the alleged loss of opportunity suffered by the Respondent as it did not demonstrate at any given point that that it was unable to transact in its official business as a result of the Appellant's miss posting. He confirmed that indeed there was a miss-posting of cheques amounting to Kshs. 6,030,447/- into third party accounts and that the Respondent did not lodge a complaint of its inability to access funds held in the rightful account.

14. DW1 discredited the allegation of fraud which he defined as consisting of deceitful practice or wilful device resorted to with intent to deprive another of his right on in some manner to do him an injury. DW1 stated that the standard of proof had not been met as was held in **Nairobi Court of Appeal Civil Appeal 33 of 1978 Urmila w/o Mahendra Shah vs Barclays Bank International Ltd & another [1979] eKLR** and in **Muranga Environment & Land Appeal 16 of 2017 Gichinga Kibutha vs Caroline Nduku [2018] eKLR**. Further that fraud must be based on facts and in this regard relied on **Nairobi Court of Appeal Civil Appeal (Application) 185 of 2014-Charles Gathuma Munge vs Peter Icharia Munge & Another [2014] eKLR** which cited the case of **Ratilal Gordhanbhai Patel vs Lalji Makanji (1957) EA 314**. stated that allegations of fraud must be strictly proved but to not the standard of criminal matters where it is beyond reasonable doubt.

15. DW1 further disputed that ant interest on the transferred principal accrued as the account from which the money was moved was not an interest gaining but a current account.

16. On the claim of loss of use of monies, DW1 testified that no loss was incurred as the Respondent was able to access its account and lend money to its members. Further, that no complaint was lodged by the Respondent of inability to transact its official business relating to the accounts in question. Reliance was put on **Nairobi Court of Appeal Civil Appeal 123 of 2017 James Mweu & another vs Kenya Commercial Bank [2019] eKLR** where the appellate court stated that for a claim for loss of business to succeed it was important for the plaintiff to adduce evidence on the nature of business he was transacting and the loss incurred.

17. It was thus the case for defence that the suit ought to be dismissed with costs.

18. The learned trial magistrate entered judgment for the Plaintiff against the Defendant for Ksh. 2,310,284.20 as interest lost for the period of four years, general damages of Ksh. 500,000/ for lost opportunity plus costs and interest of the suit. It is this judgment that gave rise to the

appeal herein.

Submissions

Appellant's submissions

19. The Appellant through M/s Ashtiva Advocates filed written submissions on 22/09/2021. The same are dated 28th August, 2021. The Appellant submitted that the interest calculated on the principal amount was not raised for the period there was miss posting in that it (Respondent) did not inform the bank they have ran short of money. Reliance was put on Section 107 of the Evidence Act where the distillation is that he who alleges must prove. In this regard, the Appellant submitted that the Respondent did not prove that it suffered loss from any loss of interest or that its members approached them for a loan facility and were turned down for lack of funds or that the business was unstable when the principle amount was miss posted.

20. The Appellant further submitted that it was the testimony of the Respondent's chairman that the account was not an interest gaining account but a current account. That the current account was opened pursuant to a contract between the Respondent and its members. As such, the court could not make awards falling outside the scope of the contract entered into by the disputed parties. It relied on **National Bank of Kenya Ltd vs Pipeplastic Samkolit (K) & another [2001] eKLR** where the Court of Appeal stated that it cannot rewrite a contract between the parties. Further that the parties are bound by the terms of their contract unless coercion, fraud or undue influence are proved.

21. The Appellant submitted that the awarding of Kshs. 2,310,284/- on the basis that the Respondent would have lent the money to its members was a misdirection of the trial court. The Appellant closed out by stating that the Respondent did not prove it suffered any loss in the form of interest as claimed or loss of business.

Respondent's submissions

22. The Respondent filed their written submissions on 24/11/2021 through M/s Koceyo & Co. Advocates. Whilst agreeing with the finding of the lower court that it is entitled to Kshs. 2,310,284.20/-, the Respondent echoed the pronouncement of the trial court that, as a Co-operative Credit and Savings Society (SACCO) Limited, its core business is to lend money at interest. That it was deprived its money where it would have gained interest on the principle amount in the four years that the breach was perpetrated by the Appellant.

23. The Respondent mooted the position that the contract that existed between the parties was not with regard to the nature of the account but rather, the basis of the suit was fraud caused by the Appellant on the account of the Respondent which resulted in loss since the nature of the business undertaken by the Respondent was that of lending money to its members for interest. The Respondent submitted that it incurred a four-year loss on the principal amount due to fraud by the Appellant having breached a fiduciary duty to secure the account.

24. Reliance was put on **Naivasha Civil Cause 17 of 2015 Shalimar Flowers Self Help Group v Kenya Commercial Bank [2016] eKLR** where the case of **Civil Case No. 236 of 2003 Simba Commodities Ltd vs Citibank N.A. [2013] eKLR** was cited. It was held that a bank has a duty under contract with its customer to exercise reasonable care and skill and where such skill and care is part and parcel of its operations no intervention is needed in such conduct. The court stated that, should intervention be needed in exercising such skill and care the same would be premised on the set of circumstances.

25. The Respondent submitted that a wrongful action was admitted by the Appellant by the action of refunding the money after a demand and orally when DW1 confirmed the illegality before open court. The Respondent contended that the Appellant was aware of its fiduciary duty towards the Respondent and did nothing to protect the Respondent for four years.

26. The Respondent cited the case of **NBI HC MISC JR.No.205 of 2011- Republic vs Retirement Benefits Appeals Tribunal Ex-Parte Augustine Juma & 8 Others [2013] eKLR** where Majanja J. stated that a breach of trust is demonstrated if its proven and that the law does not inquire into whether the trustee breached the trust innocently, negligently or intentionally, the trustee is liable for the breach regardless. The Respondent contended that the Appellant breached the contractual duty as a trustee by not securing its monies which would have been used by the Respondent in its business endeavours and gained interest if the same were not fraudulently withdrawn by the Appellant.

27. As to whether the Respondent is entitled to Kshs. 2,310,284/- as interest lost in the period of four years, the Respondent stated that as a SACCO its role is to lend money to its members at an interest rate of 12% per annum. It submitted that the trial court soundly found that having lost Kshs. 6,030,447/- which funds were returned after four years, indeed the interest which the Respondent would have earned if the funds were not fraudulently withdrawn were entitled to it. It was its case that the assertion that it never ran out of money despite the miss posting of money was admission of the Appellant's guilt of fraudulently channeling monies meant for its account to other third party's accounts. Reliance was put on the Court of Appeal case of **Ajay Shah vs Deposit Protection Fund Board as Liquidator of Trust Bank Limited (In Liquidation) [2016] eKLR** where it was stated,

“...I am satisfied that whether it is to be viewed strictly as a shifting of the evidential burden or simply an example of the well-settled principle that a fiduciary is obliged to account for his dealings with the trust estate...”

28. The Respondent submitted that the burden of proof to fiduciary duty shifted to the Appellant herein who failed to account for its dealings hence it was just for the court to award the said sums. Further, that the Appellant's argument that the Respondent never ran out of money is indicative of the lack of remorse of the fraud it perpetrated. It was urged that the appeal be dismissed with costs.

Analysis and determination

29. It is now settled principle that the duty of the first appellate court is to reconsider the evidence of the trial court, re-evaluate it and make

its own conclusions. An appellate will not normally interfere with a finding of fact by the trial court unless it is based on no evidence or on misapprehension of the evidence or the trial court acts on wrong principles in arriving at its findings.

30. The Court of Appeal in the case of Selle & Another vs Associated Motor Boat Co. Ltd & Another (1968) EA 123 held that:

“A Court on appeal will not normally interfere with the finding of fact by a trial court unless it is based on no evidence, or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching his conclusion.” (See also LAW JA, KNELLER & HANCOX AG JJA IN MKUBE VS NYAMURO [1983] KLR, 403-415, AT 403).

31. I have considered that evidence adduced before the trial court as well as the respective rival submissions. I have demarcated three issues for determination, namely:

I. Was there breach of a fiduciary duty?

II. Did the breach of fiduciary duty render the Appellant liable to pay damages?

III. Is the Respondent entitled to Kshs 2,310,284.00 on the loss of use of the principal sum for the four years the money was channelled elsewhere?

Was there breach of a fiduciary duty?

32. According to Black's Law Dictionary, 11th edition, a fiduciary duty is:

“a duty of utmost good faith, trust, confidence, and candor owed by a fiduciary (such as an agent or a trustee) to the beneficiary (such as the agent's principal or the beneficiaries of the trust;... a duty to act with the highest degree of honesty and loyalty toward another person and in the best interest of the other person-....Also termed as duty of loyalty, duty of fidelity; duty of faithful service; duty to avoid conflict of interest.”

33. The American decision of Wolf v. Superior Court (2003) 107 Cal.App.4th 25, 29 [130Cal.Rptr.2d 860] defines a fiduciary relationship as ...

“any relation existing between parties to a transaction wherein one of the parties is in duty bound to act with the utmost good faith for the benefit of the other party. Such a relation ordinarily arises where a confidence is reposed by one person in the integrity of another, and in such a relation the party in whom the confidence is reposed, if he voluntarily accepts or assumes to accept the confidence, can take no advantage from his acts relating to the interest of the other party without the latter's knowledge or consent. . . .”

34. In Halsbury's Laws of England, 4th Edition, Volume 3 at paragraph 125 on banker- customer relationship and obligations thereto, it is stated that:

“The characteristic usually found in bankers are:

I. That they accept money from and collect cheques for their customers and place them to their credit;

II. That they honour cheques or orders drawn on them by their customers when presented for payment and debit their customers accordingly; and

III. That they keep current accounts in their books in which the credits and debits are entered.”

35. I would conclude that a fiduciary duty as in the instant case arises where the bank is entrusted wholly with the customer's money and transactions as instructed and that such instructions should be executed to the letter without breaching any of them. It is expected that, in carrying out those instructions, the bank executes them with utmost confidence and honesty and in the best interests of the customer. It is a duty of fair dealing and loyalty. It is a duty of transmitting any necessary information and maintaining good records of all transactions on an account.

36. When the Respondent raised a query on the money in issue, the Appellant returned it to its account. The Appellant was thus by conduct, in admission that it had misrouted the money. That is why it returned it to the Respondent's account. This conduct is indicative that a banker-customer relationship first of all existed and was unfortunately breached by the Appellant who diverted funds meant for the Respondent's account to a third party.

37. It also emerged that the Respondent's former auditor, operated accounts with the Appellant Bank through which the Kshs. 6,030,447/- was channelled to and at the alert by the Respondent, the amount was remitted to the Appellant even before filing of the suit. This shows at the very least, a drawn out breach with poor due diligence on the part of the Appellant. I find it hard to believe that such a breach could go on for four years without the bank noticing. A change of accounts would have done in normal banking practices with proper documentation of the same, which was never tendered by the Appellant. The immediate remitting of the amounts speaks volumes of illegalities being carried out by the Appellant to the detriment of the Respondent.

38. Furthermore, the Appellant in evidence did not give any justification whatsoever for the transfer of the funds from the Respondent's account to a third party's. It only stated that the account from which the money was moved was not an interest earning account for which reason no interests or damages ought to have been awarded. This rejoinder in my view demonstrated impassiveness for the duty the Bank owed to its client. It also demonstrated insensitivity in whatever loss the client may have incurred by not accessing funds it would have otherwise put into better use. Such action amounted to lack of trust and faith in the way the bank operated which strictly speaking amounted to a breach of fiduciary duty.

39. It follows that the first issue passes the test.

Did the breach of fiduciary duty make the appellant liable to pay damages?

40. The answer to this question ties with the first issue for determination. In Civil Appeal 571 of 2012 Equity Bank Limited & another v Nairobi Robert Chesang [2016] eKLR the court stated thus,

“ ...The bank is also under a contractual duty to diligently handle accounts of a customer, to ensure that funds-deposited on account are available when required by the customer. Any deviation from that understanding without justifiable reasons which should be communicated to the customer well in advance or immediately, the bank is in breach of a contract with the customer and is liable in damages.”

41. It is not contested that there was miss posting on the part of the Appellant for amounts totaling to Kshs. 6,030,447/= for four years. It is a glaring finding that it was not until the Respondent raised the concern when in 2017 on 31st March, 2017 that the Appellant remitted the decreed sum of KShs. 6,030,447/= .

42. It stands to reason that the Appellant duly acknowledged that there was an anomaly into which account the moneys were to be deposited and thus a breach of fiduciary duty. As per the **Equity Bank vs Robert Chesang case**(supra), no doubt there was a deviation from the understanding that the Appellant would credit only the Respondent account, account number, 053000008625 held at its Naivasha branch and no other.

43. Further the high court in **Equity bank vs Robert Chesang case**(supra) quoted the **Encyclopedia of Banking Law C.21 Selangor United Rubber Estate Ltd V Cradock (No.3) [1968] 2 ALL ER 1073** where it was stated:

“ A bank has a duty under its contract with its customer to exercise reasonable care and skill in carrying out its part with regard to operations within its contracts with its customers. The duty to exercise reasonable care and skill extends over the whole range of banking business within the contract with the customer. Thus the duty applies to interpreting, ascertaining and acting in accordance with the instructions of the customer.”

44. The fact that the decreed amounts were remitted to the Respondent's designated account after nearly four years shows that there was an unauthorized derogation of instructions as to which account to credit, an issue that is not contested by the Appellant, an action which makes the Appellant liable to pay damages. The Appellant did not tender evidence in showing that the Respondent had switched accounts wherein it directed the contested 45 cheques amounting to Kshs. 6,030,447/-.

45. There is no contestation that the Respondent is and was in the business of lending money to its members at an interest. In as much as the account which the money was posted from was not an interest earning account, it was an account that the Respondent was doing its lending business with. The Kenya Shillings 6,030,447 moved from the account was money which the Respondent would otherwise have used to lend its members and make profits as its usual business. It cannot also be gainsaid that the Respondent noted the movement of its funds when it checked on its account on its usual course of business. This implies that it expected to do business with the said money which was lacking in its account. In sum, the miss posting of the money rendered a loss of opportunity for the Respondent.

46. For the foregoing, the trial court had to award some amount of damages for the loss of use of the money. I therefore dismiss the Appellant's submission that damages were not payable merely on account that the money was not from an interest earning account. Had the Respondent lent that money to a borrower it would have made profits. Damages were the right thing to award in the circumstances as compensation for the loss of use of the money in business. I will not therefore disturb the sum of Kshs. 500,000/- awarded as damages for breach of fiduciary duty.

Is the Respondent entitled to Kshs 2,310,284.00 on the loss of use of the principal for the four years the money was channelled to a third party?

47. It is not contested that there was a breach of fiduciary duty and as such, a breach in law ought to be remedied. I ascribe to the Respondent's cited case of Naivasha Civil Cause 17 of 2015 Shalimar Flowers Self Help Group v Kenya Commercial Bank [2016] eKLR where the Plaintiff sought to recover from the Defendant the sum of Kshs. 2,216,182.00 and in prayer (b) the sum of €43,817 at the exchange rate prevailing at the time of judgment. The Plaintiff's suit was founded on negligence and breach of express and implied contract and obligations on the part of the Defendant having claimed that their several bank accounts with the Defendant Bank at Naivasha saw their funds misdirected by a series of unauthorized cheques between June 2008 and January 2009. The court found the Defendant 100% liable to pay damages in finding that the Defendant did not exercise reasonable care and skill, in allowing the of large sums of money which instruction did not come from the Plaintiff.

48. I find the American Supreme Court case of Howard v Pooler, AD3d, 2020 NY Slip Op 03347 [4th Dept June 12, 2020] insightful as it brings to the fore an aspect of the tort of breach of fiduciary duty that is in my view applicable in this particular case and that is the availability of “disgorgement” of profits from one who breaches a fiduciary duty *even in the absence* of any actual damages as a result of the

breach.

49. Disgorgement as per the Black's Law Dictionary is defined as '*the act of giving up something on demand or by legal compulsion.*' The Howard case (supra) is instructive in that though the Respondent did not evidence actual damages, was found to be still entitled to profits that it would have realized had it had the money it thought it had. The disposition of the Appellant is quite a surprise in its stating that the Respondent did not lack funds and still lent money to its members. In the absence of actual damages, the retaining of KShs. 6,030,447/- by the Appellant and only returned it after four years is an instance where it must be disgorged off its hands.

50. In the Canadian authority of *Semac Industries Ltd. v. 1131426 Ontario Ltd. et al., [2001] O.T.C. 649* the Ontario Supreme Court determined that a bank that knows of a customer's fraud in the use of its facilities, or has reasonable grounds for believing or is put on its inquiry and fails to make reasonable inquiries, will be liable to those suffering a loss from the fraud.

51. The learned trial magistrate calculated the interest on the principal by 12% per annum. The rate of interest was premised on the SACCO's (Respondent) lending rate to its members. It is the profit the Respondent would have earned from the money for the four years. That was the most reasonable rate to apply and I find no fault in it. I will also not disturb that award.

52. From the foregoing, I come to a conclusion that the learned trial magistrate arrived at the right decision both in awarding general damages for loss of use and interests on the amounts moved from the Respondent's account tabulated at 12% per annum. This Appeal therefore lacks merit and the same is dismissed with costs.

53. It is so ordered.

DATED AND DELIVERED AT NAIVASHA THIS 10TH DAY OF FEBRUARY, 2022.

G. W. NGENYE-MACHARIA

JUDGE

1. Mr. Mburu for the Appellant.

2. No appearance for the Respondent.