

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION - MILIMANI

CIVIL CASE NO.427 OF 2010

ALI MOHAMED SUNKAR.....PLAINTIFF

VERSUS

DIAMOND TRUST BANK (K) LTD.DEFENDANT

AND

ZAHRA OSMAN.....1ST THIRD PARTY

MAZEN ROYAL FURNISHERS LIMITED.....2ND THIRD PARTY

J U D G M E N T

1. The Plaintiff Ali Mohamed Sunkar (Ali) is a business man. He operates transport business and is ordinarily based in Mwingi town. The Defendant Diamond Trust Bank Kenya Limited (DTB) is a Limited Liability Company, incorporated under the Companies Act, Cap 486, and carrying on banking business at various branches. The 1st Third Party Zahra Osman (Zahra) is a business woman, running amongst others the company called Mazen Royal furnishers Limited, the 2nd Third Party was married to Ali for 17 years before their divorce in the year 2008.

2. It is admitted by all the parties that Ali opened a bank account on 14th June 2006 at DTB's branch at Capital Center, Mombasa Road Nairobi. He was assigned the account number xxxxxxxxxx, at that branch. In opening that account, he was introduced to the bank by Zahra, his then wife. Zahra was a holder of several accounts at that branch of DTB one of them being account number xxxxxxxxxx.

3. Ali's claim, against DTB is for judgment for Kshs. 12,176,017 which money Ali alleges was debited from his account without his authority. The DTB's documentation shows that the said amount was largely credited into Zahra's account and some amounts into Mazen Royal Furnishers Ltd, Zahra's company. That deposits were made through internal transfers documents, entitled customer's instruction, which documents bear the signature of Ali. Ali has denied having instructed DTB to make the internal transfer and has denied signing those customer's instructions.

4. Ali filed this case against DTB and DTB joined Zahra as the 2nd Third Party.

5. I have considered the parties pleadings, evidence and submissions. Having done so, I believe there are only two issues for determination. They are:

a) Did the Plaintiff authorize the internal transfers the subject of this suit from his account?

b) Who bears the costs?

6. Ali stated that he is a business man running twenty businesses. He is usually based at Mwingi town the headquarters of his business. His bank account with DTB was based at Capital Center. He stated that he never transacted his said account at any other branch other than Capital center. He denied he ever issued cheque to third parties on that account.

7. From the year 2006 to 2009 he did not receive his bank statements of his account with DTB. He would visit his bank, at Capital Center three times a year. He denied having issued instruction to transfer the funds the subject of this case.

8. The transfers he alleges were debited from his account without his authority as follows:

	DATE	AMOUNT (KSHS.)
	101/08/2006	750,000

203/08/2006	2,347,517.80
318/08/2006	1,500,000
429/08/2006	1,400,000
513/10/2006	180,000
611/11/2006	50,000
709/12/2006	550,000
821/12/2006	610,000
906/01/2007	1,883,000
101/02/2007	1,420,000
131/03/2007	140,000
104/09/2006	1,348,500.
TOTAL	12,176,017

9. All those transfers, except the transfer of 3rd August 2006 for Kshs. 2,347,517.80 and one of 1st February 2007 for Kshs. 1,420,000 were in favour of Zahra, the Ali's then wife. The transfer for Kshs. 2,347,517.80 was in favour of Red Cross and the other of Kshs. 1,420,000 was in favour of Mazen Royal Furnishers Ltd. Surprisingly the documents of those two transfers were not availed to the Court.

10. Ali's case is that all the instructions to make the transfers, the subject of his case, were not signed by him. He therefore holds DTB liable for his loss of those funds totaling Kshs. 12,176,017.

11. Ali obtained a report from a handwriting expert by the name S. M. Mweu. In evidence, Mweu stated that he was formerly employed at the criminal investigation Department (CID). He was trained in Birmingham, UK, and Jerusalem, Israel. He had worked as a document examiner for 30 years.

12. He examined the instruction to transfer funds from Ali's account, more particularly the signature on them. Comparing those with known signatures of Ali he said that there was no agreement between the disputed signatures and the known specimen signatures.

13. On being cross-examined, he stated that his examination was of photocopied documents, not the original. He accepted that signatures can vary with passage of time and age of a person. That a signature can also be affected by whether a person is sick or drunk. He accepted that there is a margin of error in examination of writing. Finally, he stated that his fees were paid by Ali.

14. The claim is denied by DTB. Peter Kimani Kanyiri (Kanyiri), an Internal Auditor of DTB confirmed Ali opened an account at the branch of DTB at Capital Center on 14th June 2006. He was aware that Zahra was Ali's wife and it was her who introduced Ali to DTB to enable Ali open his bank account.

15. Kanyiri stated he referred to the bank's terms and conditions which provide as follows:

a) Transactions in Bank statements that are not disputed within twenty eight (28) days of receipt of statement shall be deemed approved by the customer.

b) Such transactions could not thereafter be challenged by the customer any grounds whatsoever, whether lack of mandate, forged or inadequate signature of endorsement of cheques, forged alteration thereof or otherwise.

16. In the view of DTB the claim by Ali is defeated by those terms and conditions because Ali did not dispute the entries in his account within 28 days as provided therein.

17. Kanyiri stated that he received Ali's file, in the bank, with a view to review the matter. On carrying out that review, he made the following findings and recommendation:

- a) *The account had several transactions throughout its history, but the said transactions were not huge in nature;*
- b) *Out of those transactions, only twelve (12) are disputed;*
- c) *These twelve (12) disputed transactions were internal transfers from the Plaintiff's Current Account to accounts operated by the Plaintiff's then wife – Zahra M. Osman – and Mazen Furnishers Limited, a company associated with her;*
- d) *The transfers were supported by customer instructions done on the bank's official stationery for internal transfer;*
- e) *In the accounts of Zahra M. Osman and Mazen Royal Furnishers, where the monies from the twelve transactions were credited, the money was either withdrawn by cash or cheque, used to reduce the debit balances in the other accounts, or utilized for normal business transactions. Thus the funds were utilized by the Plaintiff's then wife and were not merely in-and-out transfers;*
- f) *The transfers were never made to any unknown party;*
- g) *Based on the observations, I came to the conclusion that the transfers were not done to benefit the Bank or its staff. Had the transfers been in-and-out it could imply efforts by the bank or its staff to conceal unfavourable account operations e.g. a continued overdrawn position.*

18. He further stated that the bank's record indicated that Ali expressly authorized the debits to his account. That those debits were internal transfers in favour of Ali's then wife, Zahra. That on presentation of that authority the bank's staff verified Ali's signature and stamped them as confirmation of that authorization.

19. Kanyiri therefore denied DTB debited sums from Ali's account without authority. Kanyiri highlighted some of the transactions the subject of this suit.

20. In respect to the transaction of 3rd August 2006, Kanyiri stated that Ali's then wife, Zahra, deposited cheques from Red Cross for total amount of Kshs. 2,347,517 into Ali's account and in compliance with Ali's instructions similar amount was transferred from Ali's account into Zahra's account.

21. That on 10th November 2006 Ali physically went to his bank and deposited a cheque of Kshs. 1, 403,300. That if the credit to Zahra's account of Kshs. 2,347,517.80 was irregular Ali should have on that date raised a query there and then.

22. That on 16th January 2007, Ali personally made deposit of cheque for the amount of Kshs. 2,683,000, Kshs. 800,000 and Kshs. 1,337,500 and that same day an amount of Kshs. 1,883,000 was transferred from Ali's account into Zahra's account. That even on that occasion Ali did not complain.

23. That Ali also presented himself at the bank on 3rd May 2007 and deposited cheque for the amount of Kshs. 1,220,000. He did not on that occasion, either, raise a query on previous debits of his account.

24. That from November 2006 to May 2007 Ali made several deposits, personally, in his account.

25. On the basics of that evidence Kanyiri stated that it was logical to conclude Ali authorized the debits in his account.

26. Zahra stated that Ali was her husband of 17 years. They had 5 boys. They were divorced on 9th January 2008. Zahra remarried.

27. She stated that Ali, during their marriage borrowed money from her for his transport business. That the payments made into her account, from Ali's account, were reimbursements of those funds borrowed. Zahra termed Ali's allegations as "outright fraudulent". She stated that while they were married Ali never demanded the money he transferred to her account and that it was only when she remarried he, Ali, began to "fight" her "right and left".

ANALYSIS AND DETERMINATION

28. The determination of the issue identified above lies solely on the Court's finding on the signatures which were on the instruction for debit Ali's account.

29. The handwriting expert, Mweu, by his report stated that the signatures on the debits, the subject of this case, did not agree with the specimen signatures of Ali. That they did not agree "in style".

30. No other party adduced evidence of a handwriting expert.

31. The Court of Appeal in the case **ROSE KAIZA V ANGELO MPANJU KAIZA [2009] eKLR** extensively discussed how a Court should deal with handwriting expert's report. This is what that Court stated:

"Where the expert who is properly qualified in his field gives opinion and gives reasons upon which his opinion is based and

there is no other evidence in conflict with such opinion, we cannot see any basis upon which such opinion could ever be rejected. But if a Court is satisfied on good and cogent ground(s) that the opinion though it be that of an expert, is not soundly based, then a Court is not only entitled but would be under a duty, to reject it.”

This Court also held in ASIRA V REPUBLIC [1986] KLR 227 at page 228:-

“6. The most an expert on handwriting can properly say is not that somebody definitely wrote a particular thing but that he does not believe a particular writing was by particular person or that the writings are so similar as to be undistinguishable.

7. It is the duty of a Court to make an examination and satisfy itself whether the handwriting expert’s opinion can be accepted and the Court cannot blindly accept such an opinion. The failure to demonstrate to the Court the features of the so-called disguised handwriting meant that the Court did not itself decide the issue.”

In the course of the judgment in the Asira case the Court stated:

“The art of comparing handwriting is no doubt one in which time and thought are given to the formation of letters and words, and therefore expert status may be accorded to a person versed in such comparisons. But as has been accepted in Wainaina’s case (Namaina V Republic [1978] KLR 11) such an expert is not able to say definitely that anybody wrote a particular thing. The reasoning is based upon the knowledge that handwritings can very easily be forged. Moreover, a person may not write in the same style all the time. The expert is therefore faced with trying to analyse forged writing as well as disguised writing. In cases where there is a problem about the writing it is the duty of the Court to satisfy itself after examination whether the expert’s opinion can be accepted and cannot blindly accept such opinion. In these areas of conflict it is prudent to look for other evidence so that forgery can be excluded on the one hand, and mistaken identification excluded on the other.”

32. It is important to note that Mweu was given photocopies, for re-examination of Ali’s signature. It is not clear to me the viability of an examination of photocopied documents.

33. I did not receive the evidence of Mweu. He testified before Justice Kimondo, before whom this case was part heard. I therefore cannot comment on Mweu’s demeanour.

34. I have, however, very carefully and meticulously examined the signatures on the subject debits and I have compared them with Ali’s account opening documentation.

35. I am aware that Ali stated in evidence that he first saw the terms and conditions form in Court. I do not accept that to be the case. The only reason I can consider, why Ali disowns that form of terms and conditions is because the signature appearing thereof is similar to some of the signatures appearing on the instructions to debit account. The signature appearing on the terms and conditions form is not far from the signature on the instructions to debit dated 1st February 2007, debiting Kshs. 1,420,000 from Ali’s account. Essentially my examinations of Ali’s signature on the documents he admits having signed, marked by Mweu with the letter ‘B’ they seem to be full version of Ali’s signature while some of the signatures in the disputed instructions to debit seem to be short form of a signature. In some cases, the short form signatures have two lines looking like ‘A’ while the full version has many more lines.

36. There is no discrepancy that I can see in the signatures on the instruction to debit form as compared to those which Ali provided as specimen. They are in my view made by the same hand.

37. It is also important to state that, as stated by Kanyiri, Ali made many transactions on his account between the year 2006 and even up to 2010. These transactions are reflected in Ali’s bank statement. The presence of those many transactions does not correlate with Ali’s evidence that he only visited his branch three times a year. It will be recalled the Kanyiri, in his evidence, gave specific instances that Ali attended his branch, personally, carried out transaction, sometimes the days he attended his branch corresponded with the date the debits, he now disputes, took place. It needs to be noted that Mr. Kanyiri was not cross-examined, specifically, on that aspect of his evidence.

38. Ali in evidence stated that he was unaware that Zahra had a bank account, he was unaware that Zahra had a business. He also stated that he never issued cheques to 3rd parties.

39. The witness of DTB confirmed that it was Zahra who introduced Ali to DTB. Such introduction could only have been accepted if Zahra was an account holder. It follows that Ali was not truthful in that regard.

40. Since Ali said he never issued cheques, on his account to third parties, it then must be accepted that all the cheque transactions in Ali’s account were transacted by him personally. I have counted 69 transactions of cash withdrawal on cheque from Ali’s account from 6th September 2006 to 3rd January 2009. There were much more such transactions after January 2009. When those transactions were made on various dates other transactions such as application for banker’s cheque, cheque deposits and debits that are in controversy were carried out. There were cash withdrawals through counter cheques that were made. Counter cheque would only be issued to the owner for the account.

41. There were five occasions that cheque books were issued. Since Ali’s account was a personal account, and not a company account, it can only mean that cheques would only be issued to him personally.

42. For Ali to say that he was unaware of the state of his bank account for some 4 years is unbelievable. It is unbelievable because by his evidence he stated that earnings of his business were credited to that account. What business would fail to regularly check its bank statement to confirm that all the transactions were reflected?

43. All in all, the evidence of Ali that his account was debited without his authority in the years 2006/2007, and that he did not know of these debits because DTB did not supply him with statements until he requested for them in 2009 is rejected. I do find, after careful examination of the documents before, that Ali signed all the instructions to debit and he regularly transacted on his account and could not therefore have failed to discover something untoward in that account.

44. My finding in respect to the first issue is that it was Ali who signed all the instructions to debit his account.

45. It follows from that finding that Ali's claim must and does fail. There is no reason, that I can see, why costs should not, in this case follow the event. Accordingly, Ali shall pay the Defendant's and the third parties costs of this suit.

46. In the end, the judgment of the Court is that the Plaintiff's case is dismissed with costs to the Defendants and to the 1st and 2nd third parties.

Orders accordingly.

DATED, SIGNED and DELIVERED at NAIROBI this 5th day of MARCH, 2019.

MARY KASANGO

JUDGE

Judgment Read and Delivered in Open Court in the presence of:

Sophie.....COURT ASSISTANT

.....COUNSEL FOR THE PLAINTIFF

.....COUNSEL FOR THE DEFENDANT

.....COUNSEL FOR THE 1ST THIRD PARTY

.....COUNSEL FOR THE 2ND THIRD PARTY