



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & TAX DIVISION

CIVIL CASE NO. 1722 OF 1999

CHAPEX LIMITEDPLAINTIFF

VERSUS

KENYA COMMERCIAL BANK LIMITED DEFENDANT

J U D G M E N T

1. **Chapex Limited**, the Plaintiff, during the relevant period to this case, operated two Kenya shilling accounts and foreign currency retention accounts with **Kenya Commercial Bank Limited**, the Defendant. The Kenya shilling account were account numbers, commercial loan account No. 30206651019 and current account No. 239541935.

1. The Plaintiff seeks judgment against the Defendant, in this cause, for:

- a) *Refund of Kshs. 100,000 plus interest at 28% per annum from 1990.*
- b) *General damages for loss of business opportunity.*
- c) *Special damages of Kshs. 50,000 plus interest at 28% from 1st February 1996 to date of judgment.*
- d) *General damages for loss of business due to dishonoured cheques.*
- e) *Damages for loss estate management contract.*
- f) *An order for closure of its account with the Defendant.*
- g) *The Plaintiff's claims are denied by the Defendant through its defence.*
- h) *I shall proceed to deal with each of the above claims seriatim.*

CLAIM FOR REFUND OF KSHS. 100,000

5. The Plaintiff through the testimony in chief of its General Manager, stated it placed Kshs. 100,000 with the Defendant into a fix deposit account. That the Defendant however failed to furnish it with the fixed deposit receipt. Consequently the Plaintiff raised its concern and the Defendant, through its then Manager, wrote a letter dated 23rd June 1992. By that letter Defendant confirmed the cheque was received and banked into the account 23541933. The Plaintiff's General Manager stated that that account was not the Plaintiff's account and that the Defendant failed to respond further on that matter.

6. The General Manager of the Plaintiff, on being cross examined insisted that the proceeds of the cheque of Kshs. 100,000 should have been in placed into a fixed deposit and he reiterated that the Plaintiff did not hold the account No. 239541935. The Plaintiff's General Manager did however accept after his attention was drawn to the Plaintiff's account, and at Defendant's Advocate suggestion, that the Plaintiff did receive those proceed of that cheque. This is what he stated:

“Yes Plaintiff did at some point receive that cheque.”

7. The Defendant through the evidence of its employee stated that the cheque of Kshs. 100,000 was credited into the Plaintiff's current

account. In this regard reference was made of the deposit banking slip and a copy of the Plaintiff's statement, part of the Defendant's exhibits.

DISCUSSION

8. I have considered the Plaintiff's and the Defendant's written submission, on this claim.

9. It does seem that the Plaintiff's Learned Advocate, on consideration of the documents presented by the Defendant, chose not to elaborately submit to this claim.

10. Indeed as the Defendant submitted the Plaintiff failed to prove that the proceeds of that cheque were not credited into its account.

11. The Plaintiff's contention, in this case, is that it instructed the Defendant to deposit that cheque into a fix deposit account. The Plaintiff on this relied on its letter dated 17th August 1990. That letter, which was Plaintiff's exhibit, was addressed to the Defendant. The Plaintiff stated in that letter:

"Dear Sir,

REF: FURTHER FIXED DEPOSIT OF KSHS. 100,000

As agreed during our credit review meeting, enclosed find a cheque No. 137801 drawn on Barclays Bank Account Tuiyot in respect of the above.

The cheque is in respect of share capital for one of our shareholders, hence it is a capital item which should go toward our security account, to provide additional FDR for your retention to guarantee our future borrowing we agreed to 23% interest which stand to be reviewed after one year.

Yours faithfully

G. O. SHIRAKU

GENERAL MANAGER"

12. As stated before the date of the above letter was 17th August 1990. The Defendant produced before this Court a banking slip dated 16th August 1990 which shows that that cheque of Kshs. 100,000 was deposited into the Plaintiffs account number 239541935. The proceeds of that cheque were credited in that very account of the Plaintiff on the same date.

13. Although the Plaintiff hinged its case, in respect to the claim for refund of amount of Kshs. 100,000, on its letter reproduced above it fails to explain how that same cheque was deposited into its account and those proceeds were eventually utilized by it in that account.

14. The Plaintiff's said letter, of 17th August 1990, was not stamped as received, as one would expect of a letter sent to a bank. It therefore raises the question – was that letter at all delivered to the Defendant. Indeed the Defendant's response to that issue (not the letter) was by its letter dated 23rd June 1992 (two years later) whereby the Defendant's Manager referred to a meeting with the Plaintiff's representative. This is what the Defendant stated in that letter:

"Date 23.6.92

Chapex Limited,

P.O. Box 17991,

NAIROBI

Dear Sir,

ATT: MR. G. O. SHIRAKU

CHEQUE NO. 127801 DATED 15.8.90 FOR KSH. 100,000 DRAWN BY TUIYOT AGENCY LIMITED

We refer to your recent call on us wherein we discussed matters related to the above cheque. Upon investigation, we note that the same was deposited to your account 239 541 933 together with another cheque for Kshs. 360.00 on 16.8.90.

As the funds were deposited into the account and utilized by the business, the same were traded with by the company on which a profit was realized and therefore Chapex Limited should pay Tuiyot Agency interest on this amount. In addition, Mr. Ibutiti refutes having had any instructions to place the amount in a fixed deposit.

Please be guided accordingly.

Yours faithfully

J.M. NDENDERO

MANAGER

15. The evidence before me is clear that the Plaintiff did not prove that its instruction for the cheque of Kshs. 100,000 be put in a fixed deposit account was received by Defendant, and I doubt it was. If it had, the Defendant would have referred to that letter of instruction when it responded to the query. In any case there is now proof before Court by way of bank statement that the cheque was deposited in the Plaintiff's account No. 239541935 and not the account stated in the Defendant's letter dated 23rd June 1992.

CLAIM FOR GENERAL DAMAGES FOR LOSS OF BUSINESS OPPORTUNITY AND FOR SPECIAL DAMAGES KSHS. 50,000

16. These two limbs of the Plaintiff's claim relate to a loan programme by the European Investment Bank (EIB) which was entitled – Kenya Global Private Enterprise. The programme was financed by EIB through the government of Kenya on advantageous terms. The funds were to be made available through eight approved financial institutions, one of them being the Defendant.

17. The Plaintiff, through its General Manager, stated that it put to the Defendant proposal for the aforesaid financial facility. That before putting its proposal to the Defendant the Plaintiff submitted that proposal to Deloitte & Touche. That Deloitte approved the Plaintiff's proposal and accordingly the Defendant should not have denied it the funds it sought. That the Plaintiff's proposal was to construct a courier and storage services for tourist. According to the Plaintiff's General Manager, the Defendant approved its proposal but queried whether Kshs. 4.2 million was adequate for the expansion. That by letter the Defendant also required the Plaintiff to value its assets and to obtain architectural designs.

18. It is the Plaintiff's case that it engaged an architect and a quantity surveyor which cost it Kshs. 650,000 which amount the Plaintiff lost when the Defendant failed to approve the proposal. According to the Plaintiff the Defendant was only a facilitator of the programme, because the funds were not theirs.

19. According to the Defendant's witness the Defendant's obligation under the EIB programme was to comprehensively appraise proposals for the loan under the fund. That in its appraisal of the Plaintiff's proposal it raised concerns in regard to the lack of value of the Plaintiff's assets, the lack of estimate cost of the construction the Plaintiff was to undertake, lack of Plaintiffs audited account and lack of feasibility study.

20. According to the Defendant's witness the Plaintiff never did supply additional information as sought.

21. As correctly submitted by the Defendant it was not clear what the Plaintiff's claim under the above head was. There being no contractual relationship between the Plaintiff and Defendant, in as far as the EIB funding was concerned the Plaintiff could not seek damages for breach of contract. And yet that is what the Plaintiff, by Paragraph 11 of its amended Plaintiff pleaded.

22. It is clear from the above discussion that the Plaintiff's claim under the above head fails.

DAMAGES FOR LOSS OF ESTATE MANAGEMENT

23. The Plaintiff's witness stated in its business it provided courier service. It also offered estate management. In that regard the Plaintiff was managing 'The Burn Burn House' of Professor and Mrs. Inyundo. In that regard that the Inyundos complained because their money that the Plaintiff had sent to them through the Defendant's branch at Luanda did not arrive because, the Defendant instead transmitted the money to its Kisumu branch. That as a consequence Onyundos cancelled a 5 year contract they had with the Plaintiff.

24.24. Although the Plaintiff termed the Defendant's letter dated 10th August 1995 as admission of failure to remit the rental funds to Inyundo that is not how I would interpret the content of that letter. That letter, which was written by the Defendant's Kisumu branch reads thus:

"DATE 1008/1995

The General Manager

Chapex Ltd.

P.O. Box 17991,

NAIROBI

Dear Sir,

DELAYED RENTAL REMITTANCE ON NAIROBI PROPERTY CONTRACT NO. 13/93

We have received a copy of your letter reference No.CC/COS/2039 dated 19th July 1995 addressed to prof. Inyundo Weboko contents of which we have noted.

We have taken up the matter for the delayed payment with the parties concerned with a view to establish the exact cause for the delay and possible disciplinary action against the culprits; and will communicate with you in due course.

In the meantime please accept our sincere apologies for the above delay and any inconvenience caused to you and your client.

Yours faithfully

B.M. IBUTIT

MANAGER

c.c. Prof. Inyundo Weboko

P.O. Box 863,

YALA

25. What that letter clearly shows is that neither Inyundo or the Plaintiff provided documentary evidence of transmission of the payment to Inyundo. The Defendant was to establish the cause of delay. But more importantly there is no banking slip or cheque to show the Plaintiff transmitted money to Inyundo which the Defendant failed to deliver to Inyundo. The Plaintiff's claim was not proved on this head on a balance of probability.

DAMAGES FOR DISHONOURED CHEQUE

26. For the Plaintiff to succeed on this claim, it needs to prove on a balance of probability that it had funds in its account when the Defendant dishonoured its cheques.

27. There is on records, in respect to the Plaintiff's claim, a letter written by the Plaintiff to the Defendant, but as noted before the letters exhibited by the Plaintiff in this case do not have the Defendant's stamp to confirm receipt. That as it may be the Plaintiff, by its letter dated 17th August 1996, addressed to the Defendant, the Plaintiff acknowledged that the account where those cheques were dishonoured did not have sufficient funds. That assumption is informed by paragraph (5) of that letter where the Plaintiff stated:

“You returned a number of cheques to various suppliers including one belonging to the undersigned when in fact you could have avoided by first calling the undersigned or pay the same against proceeds from sale of shares, or advise to withdraw from foreign accounts that we operate with your bank.”

28. Further by the Defendant's letter dated 18th November 1996, addressed to the Plaintiff, the Defendant showed the state of the Plaintiff's accounts as follows:

a. Loan account balance	Kshs.	415,191.38 DR
Arrears	Kshs.	224,000
b. Current account balance	Kshs.	1,244,115.40 DR
	Limit Kshs.	700,000

29. From the above it will be noted the Plaintiff was in arrears on its loan account and in respect to the current account it had gone beyond the overdraft limit.

30. In the light of the above, even though the Defendant after a meeting with the Plaintiff, agreed to honour some of the dishonoured cheque, the fact is in as far as the Plaintiff's accounts were concerned the Defendant was not in breach when it dishonoured the Plaintiff's cheques.

ORDER FOR CLOSURE OF ACCOUNT

31. The Plaintiff's prayer under this head will fail because what will guide the closure or otherwise of the Plaintiff's bank accounts is the contractual relationship between the parties. In any case the Plaintiff by its letter, to the Defendant, dated 1st October 1996 surrendered its cheque book which it stated signified closure of its account. It follows the prayer sought hereof is then redundant.

DETERMINATION

32. The Plaintiff has failed to prove all its prayers in the Plaint, as discussed above. It follows therefore that the Plaintiff's case is dismissed and that being so the costs of this suit must follow the event.

33. In conclusion the Plaintiff's suit is dismissed with costs to the Defendant.

DATED, SIGNED and DELIVERED at NAIROBI this 9TH day of MAY, 2019.

MARY KASANGO

JUDGE

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

Sophie.....COURT ASSISTANT

..... **FOR THE PLAINTIFF**

..... **FOR THE DEFENDANT**