

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & TAX DIVISION

CIVIL CASE NO. 142 OF 2009

WESTLINK MBO LIMITED.....PLAINTIFF

VERSUS

EQUITY BANK LIMITED.....1ST DEFENDANT

PETER NJUGUNA.....2ND DEFENDANT

MARTIN NJAU NGOCHI.....3RD DEFENDANT

J U D G M E N T

1. The Plaintiff, **WestLink MBO Limited** is a Limited Liability Company incorporated under the Companies Act. The Plaintiff has commenced this action against **Equity Bank Limited**, as the 1st Defendant, (*hereinafter the Bank*). The Plaintiff has also sued 2nd Defendant **Peter Njuguna** and the 3rd Defendant **Martin Njau Ngochi** who were at all material time employed by the Bank as bank tellers.

2. It is not denied that the Plaintiff Company was a customer of the bank, at Community Corporate Branch in Nairobi, operating a **Current Account No. 01800292062194**. The Plaintiff was in the business of selling Safaricom products.

3. One of the Plaintiff's client who purchased those Safaricom products was Ms Elinah K. Zablon Tai. In conducting the sale of those products the Plaintiff's procedure was that it required its customers to deposit into its aforesaid bank account the amount of money being the total price of those products the customer required.

4. The Plaintiff's claim against the bank and its employees is that in the month of August 2008 banking deposit slips were issued for the credit of the Plaintiff's account from its client Ms. Elinah K. Zablon Tai (Ms Tai) for cash deposit totaling Kshs. 27,335,000, when in fact no such deposit/credit was reflected in the Plaintiff's bank account. The Plaintiff's further claims that the Defendants issued to its client, Ms Tai, with a bank transfer of Kshs. 7.5 million, into the Plaintiff's account which was not in fact transferred into the Plaintiff's account. Further the Plaintiff claims that the 1st Defendant wrongly debited its account with Kshs. 4,485,000.

5. The Plaintiff alleges the 2nd and 3rd Defendants fraudulently failed to credit its bank account with money deposited by Ms Tai, for products she purchased. The Plaintiff alleges that the Bank is vicariously liable for those acts of the 2nd and 3rd Defendant.

6. The 2nd and 3rd Defendants failed to file memorandum of appearance within the requisite period and interlocutory judgment was entered against them.

7. The Bank filed its defence and denied the Plaintiff's claim. The Bank by its defence admits that the 2nd and 3rd Defendants were its employees but denies that, in their actions in relation to the Plaintiff's account, they acted as the Bank's employee. The Bank further by its defence pleaded that the cash deposit slips were not ex facie evidence of deposit of money in the Plaintiff's bank account and that Ms Tai did not deposit the amounts into the Plaintiff's bank, as claimed in the suit. By its defence the Bank pleaded that the bank deposit slips were false/fake because no money was deposited as alleged. Further that the 2nd and 3rd Defendants were not cashiers at the time the money was deposited and nor were they acting in the course of their employment. The Bank also denied that the cash transfer of Kshs. 7.5 from Ms. Tai account was not at all approved. Further that the Bank's debit of the Plaintiff's account of Kshs. 4,485,000 was justifiable and permissible reversal to correct earlier erroneous crediting. The Bank therefore denied fraud attributed to it by the Plaintiff and denied being indebted to the Plaintiff for Kshs. 39,720,000.

ANALYSIS AND DETERMINATION

8. Having considered the parties pleadings, evidence, submissions and issues I am of the view that the three broad issues that will determine the controversy between the parties in this action. Those issues are:

a) *Did the Defendants fraudulently issue the banking slips in question?*

b) *If so, did the Plaintiff rely on them?*

c) *Who bears the costs.*

9. I will consider issue (a) and (b) together.

10. Before embarking on my discussions of the issues identified above I will begin by setting out the background of this matter. The Plaintiff was in the business of supplying Safaricom products to its customers. In order for its customers to purchase those products from the Plaintiff, the Plaintiff required each customer to deposit money into the Plaintiff's bank account No. 0180292062194 at Equity Bank (the Bank). Such customer, on production of the cash deposit slip to the Plaintiff was able to purchase products, from the Plaintiff, worth the value of the cash he/she had deposited. The Plaintiff's case is that it relied on those banking slip as evidence of cash being deposited into its bank account.

11. The Plaintiff's case is that in the month of August 2008 its customer Ms. Elinah K. Zablon Tai (Ms Tai) deposited into the Plaintiff's bank account various cash deposits totaling Kshs. 27,335,000 through the Bank. That on those banking slips being presented to the Plaintiff by Ms. Tai the Plaintiff sold Safaricom products worth the amount deposited. That it was not until the end of August 2008, that the Plaintiff, on receiving its bank statement it realized that those cash deposits were not reflected in the Plaintiff's account.

12. The Plaintiff case is denied by the Bank.

ISSUE (a) DID THE DEFENDANTS FRAUDULENTLY ISSUE THE BAN DEPOSIT SLIP IN QUESTION?

ISSUE (b) IF SO, DID THE PLAINTIFF RELY ON THEM?

13. The Court did not have the evidence of Ms. Tai. The evidence before Court is of the banking slips that Ms. Tai surrendered to the Plaintiff as evidence of her depositing cash in the Plaintiff's account.

14. The Plaintiff, through the evidence of Sala Hussein Ibrahim was that on diverse dates from 9th to 30th August 2008 the 2nd and 3rd Defendants in the course of their duty as employees of the Bank, received cash totaling Kshs. 27,335,000, from the Plaintiff's customer, but that the money was not credited into the Plaintiff's account and that the deposit slips were issued by them with the aim of defrauding the Plaintiff. The witness stated that 2nd and 3rd Defendants fraudulently and illegally generated and issued Ms Tai genuine cash deposit slips but which were merely reprints of previous deposits which resulted in the Plaintiff's bank account not being credited with those funds represented by the re-printed deposit slips. That as a consequence of Ms. Tai being issued with the re-printed banking slips and on presenting those re-printed cash deposit slips Ms. Tai was issued with goods by the Plaintiff on the belief that the presented re-printed deposit slips from the bank were genuine and were actual representation of money deposited into its bank account.

15. The Plaintiff's witness stated that it was not until 1st September 2008, on receipt of the Plaintiff's bank statement, and on realizing the account reflected excessively low balance, the witness went to the bank to see its Manager, at Mama Ngina street branch, which is the branch Ms. Tai deposited cash for the credit of the Plaintiff's account. On reporting the matter to the Manager the Plaintiff's account was placed under investigation. That while those investigations proceeded the Bank Manager debited the Plaintiffs bank account with Kshs. 4,485,000.

16. The Plaintiff's witness stated that he and Ms Tai met with the Bank's investigator where upon Ms. Tai explained how she deposited cash into the Plaintiff's bank account and received from the bank's employee cash deposit slips. Ms. Tai also informed the said investigator that she deposited Kshs. 7.5 million into her account and simultaneously transferred that amount into the Plaintiff's bank account.

17. The Plaintiffs witness had another meeting with the banks head of security, namely Major Mutra Julius Turuchu and during one such meeting the bank's former operations Manager demonstrated to the Plaintiff and the bank's head of security, how easy it was to generate the bank's deposit slip by re-printing a previous genuine deposit slip.

18. The banks witness was Stanley Gatonga. Although this witness stated in his evidence in chief that he was knowledgeable of the facts relating to this case, he negated that when being cross examined he stated:

“I was not involved with this case at the time.”

19. The witness, while being cross examined, accepted that the 2nd and 3rd Defendants were tellers at the bank. This witness also confirmed that after the incidents, the subject of this case, the bank changed its software and that the 2nd and 3rd Defendants were dismissed from their employment. This witness however maintained that the cash deposit slips the Plaintiff relied upon were fake. There was no explanation why he maintained they were fake.

20. The Plaintiff produced before Court cash deposit slips which on close examination one notices that they are one and the same of a previously printed cash deposit slips. For example there is a cash deposit slip for the Plaintiff's account dated 13th August 2008 for Kshs. 4 million. That deposit genuinely represents a deposit made into the Plaintiff bank account on that date.

21. The Plaintiff produced two other cash deposits for Kshs. 4 million bearing the same date, the printed date, but the wet rubber stamp of the teller bears dates of 22nd and 25th August 2008. In other words it is very obvious that the genuine cash deposit dated 13th August 2008 was re-printed twice on 22nd and 25th August 2008 - meaning that the Plaintiff's bank account was, in this case short of two cash deposits of Kshs. 4 million each. That re-printing of cash deposits is repeated ten times and consequently the Plaintiff's bank account was short of Kshs. 27,335,000.

22. The Plaintiff also produced an application made by Ms. Tai for cash transfer, into its bank account, for Kshs. 7.5 million. That cash transfer form is stamped by the Bank tellers and is signed as being approved by the Bank Official. The Plaintiff's bank account for August 2008 does not reflect credit of that amount of Kshs. 7.5 million.

23. The Plaintiff's claim is that the bank through its employees, 2nd and 3rd Defendants committed fraud in re-printing cash deposit. The elements of fraud was stated in the book Kerr on the Law of Fraud & Mistake to be:

“However difficult it may be to define what fraud is in all cases, it is easy to point out some of the elements which must necessarily exist before a party can be said to have been defrauded. Essential that the means used should be successful in deceiving. However false and dishonest the artifices or contrivances may be by which one man may attempt to induce another to contract, they do not constitute a fraud if the other knows the truth and sees through the artifices or devices. ...Next, there can be no fraud without intention to deceive though the motive is immaterial... Lastly there must be damage to the party deceived.... Fraud without damage or damage without fraud gives no cause of action.

24. Those elements discussed by the learned author clearly present themselves in this case. The fraud of re-printing genuine cash deposit slips pretending them to represent current cash deposits successfully deceived the Plaintiff to let it release goods to Ms. Tai, which release is evidenced by Plaintiff's cash sales of the products bought by Ms. Tai. The Plaintiff evidence shows that they were deceived to believe that those re-printed cash deposits were representative of current deposit.

25. The 2nd and 3rd Defendants, the employees of the bank and while in the course of their duties issued those re-prints of previous cash deposits with no other motive but to deceive both Ms. Tai, the one who deposited, and the Plaintiff to believe that they represented current deposits. As consequence of that deception the Plaintiff release goods to Ms. Tai and therefore suffered loss.

26. The Courts have always held that allegations of fraud should be proved on higher standard of proof than the ordinary civil standard of proof. This standard was discussed in the case **KINYANJUI KAMAU –V- GEORGE KAMAU NJOROGE (2015) eKLR** as follows:

“It is trite law that any allegation of fraud must be pleaded and strictly proved. See Ndolo – v- Ndolo (2008) KLR (Golf) 74 wherein the Court stated that:

“... We start by saying it was the respondent who was alleging that the will was a forgery and the burden to prove that allegation lay squarely on him. Since the respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely proof upon a balance of probabilities; but the burden of proof on the respondent was certainly not one beyond a reasonable doubt as in criminal cases...”

.... In Vijay Morjaria – v- Nansing Madhising Darbar & another (2000) eKLR (Civil Appeal No.106 Of 2000) Tunoi J. A... stated:

“It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must of course be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and as distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.” (Emphasis ours).

27. The Plaintiff's in my view met the higher standard of proof for fraud. The Plaintiff produced the genuine and the re-printed cash deposit slips which proved that the 2nd and 3rd Defendants re-printed those cash deposit slip with a view to deceiving Ms. Tai and the Plaintiff and did indeed so deceive them. The Plaintiff's production of its bank statement shows that the re-printed cash deposit slip did not translate into a credit into the Plaintiff's bank account.

28. It is clear that the bank's operation Manager was aware of the weakness in the bank's software, which was capable of re-printing cash deposit slip. Even though that Manager knew of that flaw in the software the software was not changed leaving it open to abuse by the bank's employees to defraud the bank's client/customers, such as the Plaintiff and Ms Tai. It is clear here that the 1st Defendant is vicariously liable for the acts of the 2nd and 3rd Defendant.

29. The Plaintiff proved its case and the burden of proof shifted to the Defendants to prove that the cash deposit slips were fake, as alleged by the Defendants. The 1st Defendant other than making a bare allegation did not prove they were fake. It follows that the cash deposit slips bearing the teller's stamp were issued by the bank's employees in the course of their duty. There was no evidence to the contrary produced by the defence. The defence only witness stated that he had no direct knowledge of the matters related to this case. To the contrary, the Plaintiff's witness had direct knowledge of this matter and testified that he was deceived by the re-printed cash deposit slips.

30. To just give an indication of the fraud of the 2nd and 3rd Defendant, I will reproduce a table prepared by the Plaintiff in its submissions. This table shows the fraud perpetrated by the 2nd and 3rd Defendants.

Particulars of deposits slips

No.	Date	Deposit No.	Security	Amount (Kshs.)	Comments
1.	13/08/2008	34865		4,000,000.00	Genuine

	22/08/2008	34865	4,000,000.00	Reprint
	25/08/2008	34865	4,000,000.00	Reprint
2.	07/08/2008	59923	3,000,000.00	Genuine
	09/08/2008	59923	3,000,000.00	Reprint
	15/08/2008	59923	3,000,000.00	Reprint
3.	11/08/2008	79096	325,000.00	Genuine
	27/08/2008	79096	325,000.00	Reprint
4.	15/7/2008	92277	2,000,000.00	Genuine
	27/08/2008	92277	2,000,000.00	Reprint
5.	14/08/2008	61387	510,000.00	Genuine
	14/08/2008	61387	510,000.00	Reprint
6.	30/06/2008	79652	5,000,000.00	Genuine
	30/08/2008	79652	5,000,000.00	Reprint
7.	22/08/2008	31324	3,000,000.00	Genuine
	09/08/2008	31324	3,000,000.00	Reprint
8.	09/08/2008	91657	1,000,000.00	Genuine
	15/08/2008	91657	1,000,000.00	Reprint
	30/08/2008	91657	1,000,000.00	Reprint
9.	06/08/2008	Deposit slip	500,000.00	Genuine
	06/08/2008	Deposit slip	500,000.00	Reprint

31. The finding above on those deposit slip is also the same finding on the cash transfer form of Kshs. 7.5 million. That form was intended to and did indeed deceive both the Plaintiff and Ms. Tai to believe that that amount of 7.5 million was credited into the Plaintiff's bank account. As consequence of the deception, the Plaintiff suffered loss.

32. The bank failed to explain why it deducted, from the Plaintiffs' bank account Kshs. 4,485,000. That deduction, reflected in the Plaintiff's bank account on 8th September 2008 as 'reversal' was not proved by the Defendant to have had a corresponding correction of earlier credit in error. Indeed looking at Plaintiff's bank statement only four credits of 28th August 2008 are dissimilar to the reversed amounts. These are credits of Kshs. 685,000, Kshs. 500,000, Kshs. 600,000 and Kshs. 300,000. On the whole there is no satisfactory explanation why the Defendant reversed the amount in Plaintiff's bank account of Kshs. 4,485,000 on 8th September 2008.

33. Finally I had the benefit of observing the witnesses as they testified before me. The Plaintiff's witness was in my view truthful and clear in his testimony. On the other hand the Defendant's witness was not a witness of the facts relating to this matter. Indeed I got the impression that the said witness testified more out of duty, as an official of the bank, rather than testifying of the truth or facts he had intimate knowledge of. To him giving evidence in this case seemed more of a chore than anything else.

34. The Plaintiff has proved its case that the Defendant fraudulently issued banking slip and wrongly debited its bank account. It has also proved that it relied on representations of the Defendant. Accordingly the Plaintiff shall have judgment as prayed.

35. The Plaintiff having wholly prevailed in its claim it is entitled to the costs of this suit and to interest at 20%. Interest is awarded at 20% because the fraud related to money that was deposited in favour of the Plaintiff as the purchase price for goods the Plaintiff sold to its customer. Had the Plaintiff rightly been credited with that money it would have probably ploughed the money into its business to generate more money. As it stands now since August 2008 the Plaintiff has been denied its money. It is only fair and just it be paid interest at 20% as reparation for the wrong done to it.

36. The Plaintiff is also entitled to general damage which I assess at Kshs. 2 million.

37. **In the end there shall be judgment for the Plaintiff against the 1st Defendant as follows:**

- a) Kshs. 39,720,000 with interest at 20% from date of filing suit till payment in full.**
- b) General damages Kshs. 2 million.**
- c) Costs of this suit.**

DATED, SIGNED and DELIVERED at NAIROBI this 13TH day of JUNE, 2019.

MARY KASANGO

JUDGE

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

Sophie..... **COURT ASSISTANT**

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

..... **FOR THE 1ST DEFENDANT**

..... **FOR THE 2ND DEFENDANT**

..... **FOR THE 3RD DEFENDANT**