



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

CIVIL SUIT NO. 350 OF 2010

GEOFFREY GATHOGO MWANGI.....PLAINTIFF

VERSUS

EQUITY BANK LIMITED.....DEFENDANT

JUDGMENT

1. **Geoffrey Gathogo Mwangi** (Geoffrey) sued his banker **Equity Bank Limited** (the Bank) seeking declaration that account No. [...] (subject account) solely belonged to him; seeking an injunction to restrain the Bank from interfering with the subject account; and seeking damages for breach of contract and confidentiality.

2. There are facts that are not denied. They are that Geoffrey began to operate the subject account on 19th October 2009. It was his personal account in his name. He provided the Bank with his postal address as Box 60-00200 Nairobi. He received his Bank statement for the period 19th to 31st October through his said postal address. He went to the Bank and requested for his statement for his account for the period of November and December 2009.

3. Geoffrey alleges in his evidence that he went to collect his bank statement from the Bank, for November and December 2009, because he did not receive them through the post. On being given those statements, which were printed at the Bank for him, Geoffrey noted that the title of the subject account bore his name and the name of George Mureithi (George). He admitted in evidence that George was his brother. He also noted that the postal address of the subject account had been altered from the one he gave the Bank, when opening the subject account. The postal address of the subject account had been altered to read P.O. Box 44256-00200 Nairobi. He immediately notified the branch manager of the bank who, according to Geoffrey, promised to check. Geoffrey said that he did not receive further information from the said branch manager.

4. Geoffrey in his evidence he reiterated his evidence and stated that on 20th January 2010 he received a call from George who requested him to collect his bank statement. When he went to collect he said he was amazed to note that the statements given to him of the subject account bore the wrong postal address and was entitled as joint account between him and George. Geoffrey said that he had never operated the subject account as a joint account with George.

5. Geoffrey stated that the Bank in changing his postal address and the title of the subject account breached his right to confidentiality and exposed his private financial affairs to a third party. This is because his statements had details of his financial standing, details of his trading partners and cash flow. That, that information was critical to him and his business and therefore exposing it to third party, without his consent, the Bank erred.

6. Prudence Kibuiya the Bank's credit officer testified on behalf of the bank. She confirmed that Geoffrey attended the Bank on or about 8th January 2010 Geoffrey requested and was given his bank statement. On interrogating the bank statement Geoffrey noted that the postal address was wrong and its title was also wrong. This witness stated that what caused the alterations to Geoffrey's account was the Bank's system which linked Geoffrey's personal number, given by the bank with another bank account which Geoffrey held jointly with George. That although the system altered the address the content of the account remained the same. This witness stated that once Geoffrey complained she personally changed the information on the account while Geoffrey was at the Bank. That the statements of January 2010 onwards bore the correct information.

ANALYSIS AND DETERMINATION

7. There are only three issue that arise for determination, that is:

- i. Did the Bank divulge Geofreys Bank information to a third party.

ii. If so did Geoffrey suffer loss or prejudice.

iii. Who bears the costs.

ISSUE (i)

8. Geoffrey stated in evidence that he visited the Bank and obtained printed bank statements for the subject account. He did not state the date he went to the bank. The bank’s witness stated that she was the one who printed the statement for Geoffrey on 8th January 2010.

9. Geoffrey contends that on 20th January George requested him to collect his bank statement. It is that evidence that Geoffrey relies upon as the disclosure of his personal bank information to a third party.

10. As correctly stated by the learned advocate for the Bank there was no direct evidence adduced by Geoffrey of disclosure of his bank information. It was not enough, I am afraid to say, for Geoffrey to make mere allegation of that disclosure. He needed to do more. Perhaps he could have produced in evidence the envelope which George received with the bank statements of the subject account. Better still, he could have called George as his witness.

11. On the whole there is simply no evidence that there was disclosure of Geoffrey’s bank account to a third party. Geoffrey bore the evidential burden of proof which he did not shift. He asserted there was disclosure and he needed to prove it. This burden was discussed in the case **ROBERT OUMA NJOGA –V- BENJAMIN OSANO ONDORO [2016]eKLR** as follows:

“The well-known aphorism, “he who asserts must prove” was augmented by the Court of Appeal in Jennifer Nyambura Kamau v Humphrey Mbaka Nandi NYR CA Civil Appeal No. 342 of 2010[2013]eKLR as follows:

“We have considered the rival submissions on this point and state that section 107 and 109 of the Evidence Act places the evidential burden upon the appellant to prove that the signature on these forms belong to the Respondent. Section 107 of the Evidence Act provides that “whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.” Section 109 stipulates that the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence. If an expert witness was necessary, the evidential burden of proof was on the appellant to call the expert witness. The appellant did not discharge the burden and as Section 108 of the Evidence Act provides, the burden lies on that person who would fail if no evidence at all were given on either side.”

12. Having failed to adduce evidence on disclosure **issue (i)** is found in the negative. The details of Geofreys bank account were not disclosed to a third party.

ISSUE (ii)

13. Having found in the negative an issue (i) this issue fails. Since there was no evidence on disclosure Geoffrey did not suffer prejudice or loss.

ISSUE (iii)

14. The claim by Geoffrey having wholly failed I find there is no basis for not permitting the costs to follow the event. The costs shall be awarded to the Bank.

15. The other prayer in the plaint for injunction and declaration are not tenable in view of the discussion above.

CONCLUSION

In the end the plaintiff’s case is dismissed with costs being awarded to the defendant.

DATED, SIGNED and DELIVERED at NAIROBI this 4th day OCTOBER, 2019.

MARY KASANGO

JUDGE

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

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

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

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