



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL APPEAL NO. 468 OF 2016**

**GUARANTY TRUST BANK (KENYA) LIMITED (formerly FINA BANK LIMITED).....APPELLANT**

**-VERSUS-**

**GEORGE N. NYANDORO.....1<sup>ST</sup>**  
**RESPONDENT**

**EDWIN ORARE.....2<sup>ND</sup>**  
**RESPONDENT**

**CRESTWING C. A. LIMITED.....3<sup>RD</sup>**  
**RESPONDENT**

***(Being an appeal from the judgement of Hon. Mr. L. Kassan Principal Magistrate***

***in Nairobi Civil Suit no. 6958 of 2012 delivered on 14<sup>th</sup> June 2016)***

**JUDGEMENT**

1) On 14<sup>th</sup> June 2016, Hon. L. Kassan, learned Senior Principal Magistrate delivered a judgment in the sum of ksh.3,046,000/= plus interest and costs in favour of George Nyandoro and Edwin Orare, the 1<sup>st</sup> and 2<sup>nd</sup> respondents herein respectively and against Crestwing C. A. Ltd and Guarantee Trust Bank Ltd (formerly Fina Bank Ltd), the 3<sup>rd</sup> respondent and appellant herein respectively, before the chief Magistrate's Court, Milimani Commercial Court.

2) The appellant being dissatisfied preferred this appeal and put forward the following grounds of appeal;

***i. The learned trial magistrate erred in law and fact in making a finding that the appellant was liable for a contract dated 21<sup>st</sup> September 2012 between the 1<sup>st</sup> and 2<sup>nd</sup> respondent together with 3<sup>rd</sup> respondent.***

***ii. The learned trial magistrate erred in law and fact in failing to consider the overwhelming evidence in court that there was no privity of contract between the appellant and the 1<sup>st</sup> and 2<sup>nd</sup> respondent.***

- iii. The learned trial magistrate erred in law and fact in failing to find that the 1<sup>st</sup> and 2<sup>nd</sup> respondent were not account holders of bank account number 1210200137 held by the appellant.*
- iv. The learned trial magistrate erred in law and fact in finding that the appellant unlawfully restricted the bank account number 1210100137 belonging to the 3<sup>rd</sup> respondent.*
- v. The learned trial magistrate erred in law and fact in failing to find that by the time the 1<sup>st</sup> and 2<sup>nd</sup> respondent instituted the suit the 2<sup>nd</sup> respondent was not a signatory to the 3<sup>rd</sup> respondent's account.*
- vi. The learned trial magistrate erred in law and fact in finding that the appellant was in breach of contract thus illegally dishonouring the plaintiff's cheque number 000567.*
- vii. The learned trial magistrate erred in law and fact in finding liability as against the appellant in absence of participation of the 3<sup>rd</sup> respondent in the proceedings.*
- viii. The learned trial magistrate erred in law in failing to recognize the corporate capacity of the 3<sup>rd</sup> respondent in the proceedings.*
- ix. The learned trial magistrate erred in law and fact in finding that the appellant had illegally and unlawfully restricted the 3<sup>rd</sup> respondent's account.*
- x. The learned trial magistrate erred in law and fact in failing to appreciate the communication and board resolution from the 3<sup>rd</sup> respondent dated 22/11/2012.*
- xi. The learned trial magistrate erred in law and fact in dismissing the appellant defence that the 1<sup>st</sup> and 2<sup>nd</sup> respondents were not directors or signatory of the 3<sup>rd</sup> respondent before instituting the suit.*
- xii. The learned trial magistrate erred in law and fact in finding that there was collusion between the appellant and 3<sup>rd</sup> respondent to restrict the account number 12101000137 from the 1<sup>st</sup> and 2<sup>nd</sup> respondent.*
- xiii. The learned trial magistrate erred in law and fact in finding that the appellant is liable to pay the plaintiffs the special damages of kshs.3,046,000.00*

3) When this appeal came up for hearing, learned counsels appearing in this matter recorded a consent order to have the appeal disposed of by written submissions. I have re-evaluated the case that was before the trial court and considered the rival submissions together with the authorities cited and supplied.

4) It is important at this stage to set out the brief background of this dispute. On 21<sup>st</sup> September 2012, George N. Nyandoro, the 1<sup>st</sup> respondent herein got into a joint venture agreement with Crestwing C. A. Ltd, the 3<sup>rd</sup> respondent herein whereof the 1<sup>st</sup> respondent would finance the 3<sup>rd</sup> respondent's business ventures and that all returns and or proceeds would be channeled through the 3<sup>rd</sup> respondent at its Industrial Area Branch.

5) It was also expressly stated that the 1<sup>st</sup> respondent being the principal financier, would have the first priority to recoup his investments and that the account as held by Guaranty Trust Bank (K) Ltd (formerly Fina Bank Ltd), the appellant herein would be run by joint signatories, one appointed by the 1<sup>st</sup> respondent and the other by the 3<sup>rd</sup> respondent. The 3<sup>rd</sup> respondent committed itself to provide the appellant with minutes of the resolution to alter the list of signatories to the account identified in the joint venture agreement to include the 1<sup>st</sup> respondent's nominee.

6) The 3<sup>rd</sup> respondent too agreed to issue a letter instructing the appellant of the proposed changes to be effected with the appellant with a view of accommodating the parties to the agreement.

7) On 26.9.2012, the 3<sup>rd</sup> respondent passed a resolution executed by all the directors of the company to the effect that one Edwin Orare, the 2<sup>nd</sup> respondent herein, was now a signatory to the aforementioned account. The aforesaid resolution was served upon the appellant which meant that the signatories of the account were Jeremiah Timaiyo Mutonde and Edwin Orare.

8) The 1<sup>st</sup> respondent thereafter furnished the 3<sup>rd</sup> respondent with monies to finance the business venture. On 15.11.2012, money was wired into the account by a mutual customer and the same was confirmed to Edwin Orare by an officer of Guaranty Trust Bank (K) Ltd (formerly Fina Bank Ltd), the appellant. It is said that on 17.11.2015 two cheques no. 00657 for ksh.1,570,000/= and no. 000659 for ksh.100,000/= were drawn and duly signed by both signatories which money was transferred to the 1<sup>st</sup> respondent as his returns from the venture.

9) When the aforesaid cheques were presented on the due dates to the appellant for payment, it is said the appellant refused to honour both cheques without attaching any reason the dishonor. The 1<sup>st</sup> respondent later on learnt that the 3<sup>rd</sup> respondent on 22.11.2015 had passed a resolution to revoke the appointment of Edwin Orare (2<sup>nd</sup> respondent) as a signatory to the account. It also became apparent that the money that the 1<sup>st</sup> respondent was entitled to receive had been withdrawn without the 2<sup>nd</sup> respondent's signature.

10) On the basis of the above chronology of events, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents sued the appellant claiming both general and special damages. The learned Senior Principal Magistrate heard the case and came to the following conclusions: **First**, that the agreement between 1<sup>st</sup> respondent and the 3<sup>rd</sup> respondent was alive. **Secondly**, that the resolution passed by the directors of the 3<sup>rd</sup> respondent to remove the 2<sup>nd</sup> respondent as a signatory of the bank account went against the rule of natural justice because they did not involve the 2<sup>nd</sup> respondent. **Thirdly**, that the bank (appellant) was negligent in changing the names of the signatories without looking at the resolution. **Fourth**, that the bank was duty bound to protect parties money whether they are in the own name or in the name of a company which does not belong to them.

11) Though the appellant put forward a total of thirteen (13) grounds of appeal, those grounds may be summarized to four broad grounds:

*i. Whether there exist a bank-customer relationship between the appellant and 1<sup>st</sup> and 2<sup>nd</sup> respondent.*

*ii. Whether the appellant owed a fiduciary duty to the 1<sup>st</sup> and 2<sup>nd</sup> respondent.*

*iii. Whether there was a privity of contract between the appellant and 1<sup>st</sup> and 2<sup>nd</sup> respondents.*

*iv. Whether the action had been overtaken by events since at time of its institution the 2<sup>nd</sup> respondent was no longer a signatory to the account.*

12) On the first issue as to whether there was a bank-customer relationship between the 1<sup>st</sup> and 2<sup>nd</sup> respondents and the appellant. It is the submission of the appellant that the agreement dated 21.9.2012 entered between the 1<sup>st</sup> respondent and the 3<sup>rd</sup> respondent who is an account holder with the appellant, did not elevate the position of the 1<sup>st</sup> and 2<sup>nd</sup> respondents as account holders.

13) It is also argued that the agreement did not affect the original bank-customer relationship between the appellant and the 3<sup>rd</sup> respondent. The appellant further argued that it was the 3<sup>rd</sup> respondent as its

customer to communicate to the appellant and issue any instructions on matters pertaining the account and not any other person including the signatories.

14) It is the submission of the 1<sup>st</sup> and 2<sup>nd</sup> respondents on the other hand that the appellant was bound to act within the mandate given to it by the 3<sup>rd</sup> respondent. It was pointed out that the mandate introduced by the agreement entered between the 3<sup>rd</sup> respondent and the appellant recognized the 3<sup>rd</sup> respondent's bank account as the account to be used solely for the projects stated in the agreement.

15) According to the 1<sup>st</sup> and 2<sup>nd</sup> respondent, the agreement meant that the 3<sup>rd</sup> respondent ceased to be the sole holder of the said bank account. Having considered the rival arguments, I have come to the conclusion that the bank-customer relationship which exists in this case is that between the appellant and the 3<sup>rd</sup> respondent. With respect, I agree with the submissions of the appellant that the joint venture agreement did not at all make the 1<sup>st</sup> and the 2<sup>nd</sup> respondents as account holders. They were merely made bank signatories but not account holders. They are not customers (account holders) of the appellant. The truth of the matter is that no changes in the account can be effected without a resolution being passed by the 3<sup>rd</sup> respondent, the account holder.

16) The other issue which is closely related to the first issue is whether or not there is a privity of contract between the 1<sup>st</sup> and 2<sup>nd</sup> respondent and the appellant. It is the submission of the appellant that there was no privity of contract between it and the 1<sup>st</sup> and 2<sup>nd</sup> respondents. It was pointed out that the appellant was not party to the joint venture agreement, therefore it did not have any rights flowing from the agreement nor did any obligations arise. The 1<sup>st</sup> and 2<sup>nd</sup> respondents appear to have concentrated their arguments on the issue of trust and fiduciary duty which will be discussed next. There is no attempt on the part of 1<sup>st</sup> and 2<sup>nd</sup> respondents to discuss the issue touching on privity of contract.

17) In my view, it is plain that the appellant was not privy to the contract entered between the 3<sup>rd</sup> respondent and the 1<sup>st</sup> and 2<sup>nd</sup> respondents. It is apparent that the appellant was actually made aware of the aforesaid agreement in its capacity as the banker of the 3<sup>rd</sup> respondent. The appellant did not have any rights under the agreement.

18) The third issue which commends itself for determination is whether there was a duty of care owed to the 1<sup>st</sup> and 2<sup>nd</sup> respondents by the appellants. The appellant is of the submission that the appellant's duty to the respondents is on the basis of the customer's instructions that is to say that the bank had to ensure that the transaction on the 3<sup>rd</sup> respondent's bank accounts were properly authorized by recognized signatories and to direct any inquiries or correspondences to the 3<sup>rd</sup> respondent. It is argued that the appellant's duty being that of a banker.

19) The appellant argued that it explained that the dishonour complained of was based on the appellant's duty of care to the true owner of the cheque. The appellant bank further argued that the transaction in question was carried out in good faith and in the ordinary course of business. It is said the appellant undertook to delay the payment of the two cheques to enable it as the paying bank to ascertain the instructions and real intentions from its customer, the 3<sup>rd</sup> respondent. The appellant bank stated that it received the 3<sup>rd</sup> respondent's Board resolution removing the 2<sup>nd</sup> respondent as a signatory of the account.

20) It is the submission of the 1<sup>st</sup> and 2<sup>nd</sup> respondents that the appellant, being at all times aware of the contract and holding a position of trust as regards enforcement of the contract to the parties therein as regards payment, was mandated at all times to at least honour the existence of the contract and appreciate that a contract cannot unilaterally be revoked, altered or changed to the detriment of other parties.

21) It is the respondents' argument that the appellant bank being the custodian of the monies which were instrumental in giving effect to the contract held a constructive trust towards them. It was also pointed out that the appellant knowingly allowed itself to be used to cause a breach of contract that it knew would deprive the 1<sup>st</sup> respondent his right to access his monies thus being unfair to the 1<sup>st</sup> respondent.

22) Having considered the rival submissions, I am not convinced that the appellant in its actions assisted the 3<sup>rd</sup> respondent to commit a breach of trust. It is apparent from the evidence tendered that the appellant bank acted as per the instructions of its customer, the 3<sup>rd</sup> respondent.

23) The appellant initially effected the instructions of its customer to allow the 2<sup>nd</sup> respondent to be a signatory to the 3<sup>rd</sup> respondent's account. In the second occasion the appellant bank also effected the resolutions passed by the 3<sup>rd</sup> respondent's Board of directors to remove the 2<sup>nd</sup> respondent as a signatory to the account. There was no evidence that indicated that the appellant bank's representative participated in the 3<sup>rd</sup> respondent's board meeting which passed the aforesaid resolutions. There is no doubt that the bank owed a duty of care to its bank holders and to some extent the account signatories. However, in this case there is no iota of evidence that the appellant bank breached the duty of care.

24) The final issue is whether the suit had been overtaken by events since it was filed after the 2<sup>nd</sup> respondent had been removed as a signatory of the account. It is the submission of the appellant that the proper party to bring this suit is the 3<sup>rd</sup> respondent and not the 1<sup>st</sup> and 2<sup>nd</sup> respondents.

25) It is argued that the alleged wrong was committed against a company therefore the 1<sup>st</sup> and 2<sup>nd</sup> respondents had no *locus standi*. It is also stated that the suit was instituted by persons who are neither shareholders nor directors of the 3<sup>rd</sup> respondent. The 1<sup>st</sup> and 2<sup>nd</sup> respondents are of the submission that they properly instituted the suit. A cursory look at the pleadings will reveal that the 1<sup>st</sup> and 2<sup>nd</sup> respondents had locus to institute the suit. The joint venture agreement executed between 1<sup>st</sup> and 3<sup>rd</sup> respondents is the main basis of this suit.

26) In the end, the appeal is found to be meritorious. The appeal is allowed. Consequently, the judgment against the appellant is set aside and is substituted with an order dismissing the suit as against the 2<sup>nd</sup> defendant. Costs of the appeal and the suit are awarded to the appellant. Since the 3<sup>rd</sup> respondent did not challenge the decision of the trial court, the judgment against the 1<sup>st</sup> defendant now 3<sup>rd</sup> respondent stands undisturbed.

Dated, Signed and Delivered at Nairobi this 13<sup>th</sup> day of November, 2019.

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**J. K. SERGON**

**JUDGE**

In the presence of:

.....for the Appellant

.....for the Respondent