



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

MILIMANI COMMERCIAL AND TAX DIVISION

CIVIL SUIT NO. 219 OF 2014

INTERACTIVE ADVERTISING LIMITED1ST PLAINTIFF

GEORGE RAGUI KARANJA2ND PLAINTIFF

VERSUS

EQUITY BANK LIMITEDDEFENDANT

JUDGMENT

1. The plaintiff commenced the suit herein vide a plaint dated 19th May 2014 and filed in court on 26th May 2014 seeking for Judgment against the defendant for:-

(a) A declaration that the conducts of the defendant aforementioned contravened the defendant's duty of care and fiduciary duty to the plaintiff and were actuated by malice and bad faith, negligent, fraudulent and illegal;

(b) A permanent injunction to restraint he defendant by itself, its servants or agents or otherwise howsoever from keeping/maintaining the fraudulent account herein;

(c) Kshs. 19,197,200;

(d) General damages for loss of income and business;

(e) Costs;

(f) Interest on (c), (d) and (e) above at commercial rates from 19th November 2008, until payment in full.

2. The Plaintiff is an advertising business incorporated on 23rd January 2007 by the 2nd Plaintiff together with one Edith Njeri Kimani as directors. That the directors own 50% shares each.

3. That at all material times, the 2nd Plaintiff was the director in charge of operations while the co-director was in charge of finance. The company maintained bank account No. 152/440 at Barclays Bank (K) Limited, Haile Selassie Avenue, where all the company income was channeled. The two directors were joint account signatories.

4. In the year 2010, a dispute arose between the directors of the management of the business which led to several legal proceedings vide HCCC No. 272 of 2010. That in the course of the proceedings, it came to light that, the 2nd Plaintiff's company director was receiving company payments through an unlawful account she opened with her daughter at the defendant's bank.

5. That a private investigator discovered the account was opened at Four Ways Towers, Corporate Section as account No. 0010293196441. On 17th January 2014, the 2nd Plaintiff deposited Kshs. 100 into the said account and confirmed that it existed as he was issued with a deposit slip showing the account was opened and operated by the co-director and the daughter.

6. The 2nd plaintiff reported the matter to Nairobi County Criminal Investigations department headquarters and the complaint booked as Inquiry No. 4 of 2013. The police obtained a court order to collect the account opening documents from the defendant, the supporting

invoices, purchase orders and receipts showing that the said Edith and her daughter Diana were the account signatories and directors of the 1st Plaintiff.

7. That on the 19th November 2008, the defendant collected a sum of Kshs. 11,970,000 to the account and a sum of Kshs. 19,197,200 on the 24th March 2011, belonging to the company. That as a reason thereof, the plaintiff has suffered loss of Kshs. 19,197,200 and further losses in business and income.

8. However, the defendant filed a statement of defence dated 23rd June 2014, and stated that, it is a stranger to the shareholding and directorship of the company. That the suit herein is incompetent and fatally defective as there is no resolution of the Board of the 1st plaintiff to institute proceedings and incur liability in its name. Further, the 2nd plaintiff cannot sue for alleged losses suffered by the company unless leave of the court has been sought.

9. The defendant however admitted that it opened the subject bank account on 19th November 2008, but denied the allegations of conspiracy and collusion with the account holders to defraud the plaintiffs. That the 1st plaintiff applied to open the account and furnished the defendant with several documents inter alia;

(i) Certified copies of the identity cards of Edith Njeri Kimani and Diana Kanyi Wambugu;

(ii) Certified copy of the certificate of incorporation of Interactive Advertising Limited;

(iii) Personal Identification Number (PIN) certificates for Interactive Advertising Limited, Edith Njeri Kimani and Diana Kanyi Wambugu;

(iv) Board Resolution of Interactive Advertising Limited dated 3rd November 2008, to open an account with the defendant;

(v) Certified copy of the Memorandum and Articles of Association of Interactive Advertising Limited.

10. The Memorandum and Articles of Association supplied named Edith Njeri Kimani and Diana Kanyi Wambugu as the only initial subscribers/directors of the company. After the account was opened, several payments were made through it including a payment of Kshs. 11,970,000 made on 19th November 2008. On 20th January 2014, the defendant received a letter from the firm of M/S Atonga Miyare & Associates alleging the account was opened fraudulently. Upon inquiry of the same from the 1st plaintiff, the 1st plaintiff informed the defendant that they were in the process of settling the dispute amicably.

11. On 17th February 2014, Edith and the 2nd Plaintiff executed a settlement agreement (herein the agreement) which amicably settled the complaints and suits filed by the 2nd plaintiff against Edith Njeri Kimani. On 17th February 2014, the same law firm wrote to the defendant to the effect that, the 2nd plaintiff withdrew the complaint lodged against the defendant pursuant to the agreement. As a consequence, the defendant marked the complaint as settled and communicated to the bank's Supervision Department of the Central Bank of Kenya Limited on 26th May 2014.

12. That pursuant to Clause 3 (a) of the agreement, the defendant on 17th February 2014, transferred the sum of Kshs. 5,000,000 to the 2nd plaintiff in the name of Interactive Approach Limited. The defendant avers that therefore the 2nd plaintiff is stopped from filing the suit herein following the unequivocal representation it made with serving the complaint against it. Additionally, the 2nd plaintiff has failed to disclose material facts regarding the agreement as well as the amount already received from the defendant. Similarly, the 2nd plaintiff has mischievously failed to join the co-director to the suit as required in law in such action.

13. The defendant averred that, it acted with due care and attention regarding the banking operations requirement in the Banking sector and in good faith toward the 1st plaintiff and denied the allegations of negligence in the plaint. That the defendant's involvement in the current suit only stems from the Bank-customer relationship with the 1st plaintiff and any allegations of interest whatsoever is denied.

14. The case proceeded to a full hearing whereupon, the 2nd plaintiff George Ragui Karanja testified on behalf of the plaintiff. He adopted and relied on the statements he filed in court dated 19th May 2014 and 7th September 2018 alongside the bundle of documents.

15. He literally reiterated the averments in the suit. The defendant's case was supported by the evidence of Ambrose Makanga Ngari, the general manager of the defendant's bank. He too relied on the statement he filed on 25th June 2014, and the documents filed therewith.

16. The parties filed their final submissions which I have considered alongside the evidence adduced. In consideration of the same, I find that, the following issues have arisen for consideration;

(a) Whether the defendant was negligent in opening the bank account for the company and/or;

(b) Whether the defendant acted fraudulently and/or in collusion with the account holders in opening the account;

(c) Whether the plaintiffs claim against the defendant was settled;

(d) Who should pay the costs of the suit.

17. I have considered the first issue and I find that, the bank is under a duty to act with due care and skill while opening and conducting an account for its customer. The plaintiffs have faulted the bank for having acted negligently by;

- (a) *Failing to conduct and/or carry out due diligence before opening the account;*
- (b) *Allowing an imposter to pose as a director cum secretary of the company in the opening of the fraudulent account;*
- (c) *Opening the account herein without mandatory information;*
- (d) *Opening the account herein without a valid resolution of directors;*
- (e) *Failure to observe that the purported resolution permitting the opening of the account herein lacked the requisite seal;*
- (f) *Using the 2nd plaintiff's co-director's personal account, mobile phone number, email address and other personal contact details, instead of the 1st plaintiff's official/registered postal and email addresses and telephone number for statements of the account and communications thereon;*
- (g) *Failure to notify the 2nd plaintiff or the police of the apparent fraud;*
- (h) *Failure to furnish the plaintiffs with bank statements or other relevant information on the account herein;*
- (i) *Failure to exercise due care of the plaintiffs when opening the account*

18. In a nutshell, the plaintiff submitted that the defendant failed to observe and/or adhere to KYC and CBK Prudential Guidelines while opening the account.

19. However, the defendant submitted that, the plaintiffs can only succeed if they prove the requisite ingredients of negligence which are as follows;

- (a) *There must be a duty of care between the parties;*
- (b) *There must be breach of the duty; and*

20. As a consequence of that breach, loss has arose as held in the celebrated case of; *Donoghue vs Stevenson (1932) UKHL 100*. That the defendant was under clause 5.6.5.1 of the CBK Prudential guidelines enjoined to obtain the following minimum requirements in opening account for corporates;

- (a) *a certified copy of the certificate of incorporation;*
- (b) *the memorandum of and Articles of Association;*
- (c) *a certified copy of the Board Resolution or other similar documentation evidencing legal status.*

21. Further, a Bank cannot be held liable merely because it did not subject the account opening to microscopic examination as held in the case of; *Taxation Comrs vs English, Scottish and Australian bank (1920) AC 683*. Further reference was made to the case of; *A Jewellers Ltd vs Royal Bank of Canada (2001) Can L11 2040 (On CA) Moldarar JA* cited with approval in *Barclays Bank of Kenya Limited vs Jane Nyambura Gakuru & 3 Others (2016) eKLR*.

22. The defendant further submitted that, the alleged loss of Kshs. 19,197,200 has not been proved, as the plaintiffs have not adduced audited report or business records of the company to demonstrate how the funds deposited in the account were diverted from the company business.

23. In my considered opinion, a bank will be held to have acted negligently if it opens an account without proper inquiry it will be held to have acted negligently and liable for conversion, if the account is used to receive funds to which the account holder is not entitled (See the case of; *Lausden & Co. vs London Trustee Savings Bank 1971*). However, a bank that receives a cheque for a customer in good faith and without negligent is not liable to the true owner if the bank's customer had no title. Generally in the absence of complicity in a fraud, a bank is presumed to act in good faith.

24. The 2nd issue concerns the alleged fraud on the part of the bank. The plaintiff submitted that, the defendant certified documents presented for account opening knowing that they were forged and not true copies of the original and certified the same without authority to do so. That it lacked purported capacity to certify the tendered account opening documents. That it acted fraudulently by concealing the true/full identity of its staff responsible for certification of the forged and/or fraudulent documents used in opening the fraudulent account herein in order to perpetuate the fraud. That the it deliberately and fraudulently ignored and/or omitted the subscription page of the 1st plaintiff's Memorandum of Association to facilitate opening of the subject account and to propagate the fraud.

25. However, the defendant submitted that, order 2 Rule 10(1)(a) of the Civil Procedure Rules 2010, is emphatic that every pleading shall contain the necessary particulars of any claim or other matter pleaded including particulars of misrepresentation, fraud, breach of trust,

willful default or undue influence on which the party pleading relies on. Further, Bullen and Leake and Jacob's Precedents of pleadings, 12th Edition at page 111 notes that;

“In some instances, because of the seriousness, gravity or importance of the allegation relied on, there is an express requirement that the necessary particulars relied on to support such allegation must be contained in the pleading. Thus, the necessary particulars must be contained in the pleading of any misrepresentation, fraud, breach of trust, willful deceit or undue influence on which the party relies must be contained in the pleading where he alleges any condition of the mind of any person, whether any disorder or disability of mind or any malice, fraudulent intention or other condition of mind except knowledge but particulars of the facts relied on to support an allegation of knowledge may be ordered.”

26. At page 452 the writer states that;

“where fraud is intended to be charged, there must be a clear and distinct allegation of fraud upon the pleadings and though it is not necessary that the word fraud should be used, the facts must be so stated as to show distinctly that fraud is charged. The statement of claim must contain precise and full allegations of facts and circumstances leading to the reasonable inference that the fraud was the cause of the loss complained of. It is not allowable to leave fraud to be inferred from the facts pleaded and accordingly, fraudulent conduct must be distinctly alleged and as distinctly proved. General allegations, however strong may be the words in which they are stated, are insufficient to amount to an averment of fraud of which court ought to take notice”.

27. Similarly, the court of appeal in R.G. Patel vs Lalji Makanji (1957) EA 314 held as follows in regard to standard of proof of fraud:-

“allegations of fraud must be strictly proved, although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required.”

28. It was argued that, the plaintiffs have not proved the allegations of fraud and additionally the plaintiffs withdrawal of the criminal complaint whilst the suit herein was pending.

29. I have considered the arguments of the parties on the issues of “alleged fraud” and I find that, the most critical evidence in proof thereof was the evidence from the criminal investigations agencies engaged to investigate the matter upon a report made by the 2nd plaintiff. It is in evidence that, the 2nd plaintiff withdrew the complaint vide a letter dated 6th March 2015, which states inter alia that;

“Complaint in Nairobi Area/Provincial Police Headquarters CID inquiry File No. 34/2013: George Ragui Karanja vs Edith Njeri Kimani – In the matter of Interactive Advertising Limited which involved a fraudulent account No. 0010293196441, Equity Bank in the name of Interactive Advertising Limited allegedly opened by the said Edith Njeri Kimani to defraud our client of his investments and financial interests in Interactive Advertising Limited. Our firm instructions is to bring to your attention the settlement of the aforesaid and to communicate as we hereby do, our client's request to have the complaint herein withdrawn and the matte closed. (emphasis ours) (see page 105 of George Ragui's sworn statement).”

30. In that case, there is no conclusive evidence of the alleged forgery of the account opening documents. Section 167 of the Evidence act (Cap 80) Laws of Kenya clearly states that, he who alleges proves. For the defendant to be held to have acted fraudulently, it must be proved that it had knowledge (either directly or circumstantially) that the documents it was acting on were fraudulent. In that regard, fraud is defined under the Black Law dictionary as;

“a knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his or her detriment. A misrepresentation made recklessly without belief in its truth to induce another person to act. A tort arising from a knowing misrepresentation, concealment or material fact or reckless misrepresentation made to induce another to act to his or her detriment.”

31. I find that there is no evidence the defendant acted fraudulently and/or in collusion with the account holders.

32. The final issue regards the settlement agreement. The plaintiff submitted that the defendant did not give any consideration for the agreement nor stood to suffer a detriment there from. That the defendant has no right or obligation in settlement and cannot purport to derive any benefits there from. Further, the plaintiff never entered into any settlement agreement with the defendant in relation to the cause herein, or at all. The settlement dated 17th February 2014 in the matter of Trolley Concepts (K) Limited does not concern the suit/claim herein whatsoever; and neither the 1st plaintiff nor the 2nd plaintiff withdrew any criminal complaint against the defendant as claimed.

33. However, the defendant submitted that, it is beyond peradventure that as per George Ragui Karanja's letter of 6th February 2014, the criminal complaint dated 4th January 2013 made at the CID Nairobi County Headquarters related to the impugned account opened at the defendant in the name of Interactive Advertising Limited.

34. Further, the 2nd plaintiff's alleged investments and financial interest in Interactive Advertising Limited were fully settled by the agreement with Edith Njeri Kimani as admitted by the 2nd plaintiff during cross examination that he has fully received the entire settlement sum as per the agreement. Any further payment would result into unjust enrichment.

35. In considering the subject issue, I find that there is no dispute that the subject settlement agreement was executed as stated herein. I have considered the same and I find that by a letter dated 7th February 2014, the firm of Atonga Miyare and Associates wrote to the defendant and informed it inter alia that;

“The aforesaid parties have been engaged in negotiations with a view of amicably settling all matters referred to under Clause 1 of the Settlement Agreement. The said negotiations have concluded and an agreement will be executed by the parties bringing to an end all the cases and complaints that have been referred to in the agreement involving Edith Njeri Kimani, George Ragui Karanja and Equity Bank Limited.

We hereby confirm that the complaints lodged by George Ragui Karanja against Equity Bank Limited mentioned hereinabove with also stand withdrawn in pursuance of the agreement of the parties, a copy of which we have endorsed for your perusal and records.”

36. It is clear that, the complaint lodged against the defendant stood withdrawn. If that is so, what then are the legal consequences of the withdrawal of the complaint. In my considered opinion, it was to release the defendant from any criminal culpability and by extension any allegation of negligence. The complaint lodged was in connection with the opening/conduct of the subject bank account. How could the plaintiff withdraw the criminal complaint and sustain a claim in tort which is founded on the alleged criminal acts?.

37. Even then, the intention of the plaintiff regarding the matter is clear from settlement agreements that, the 2nd plaintiff was withdrawing all the proceedings relating to disputes between the parties. What then would be the basis of withdrawing all the other proceedings save for the suit herein? Furthermore, it suffices to note that, on the strength of the letter by the plaintiffs lawyers dated 17th February 2014, the defendant informed the CBK that the complaint against it in relation to the subject account had been withdrawn.

38. I find that, by a letter dated 17th February 2014, account holders defrauded the 1st plaintiff, the plaintiff did not find it appropriate to sue these account holders and not only elected to sue the defendant alone, but subsequently, settled all the claims with the suspect account holders. In that case, I find that, the plaintiffs are stopped from any claims against the defendant. If the court were to allow the claim, it would prejudice the defendant in that, the defendant's whose rights against the third parties may have been extinguished by the settlement agreement. Even if the defendant were to compensate the plaintiffs, it amounts to double payment, the plaintiff having been already paid though the plaintiff led the defendant to believe that the issues raised concerning the opening and operation of the subject account were settled. The defendants have referred the court to the Halsbury's Laws of England, 4th Edition, Reissue at paragraph 951, where estoppel is dealt with and states;

“there is said to be an estoppel where a party is not allowed to say that a certain statement of fact is untrue, whether in reality it is true or not. Estoppel may therefore be defined as a disability whereby a party is precluded from alleging or proving in legal proceedings that a fact is otherwise than it has been made to appear by the matter giving rise to that disability.”

39. In conclusion, I find that the defendant may have been negligent in opening and operating the bank account and the plaintiffs may have been justified in lodging a complaint against the defendant. However, the plaintiffs compromised their rights against the defendant by withdrawing the complaint against the account holding whom the plaintiffs allege colluded with the defendant to defraud the 1st plaintiff of its funds. Further, it is curious that, despite the fact that the plaintiffs allege the settlement, it would amount to unjust enrichment.

40. Although the plaintiffs argued that the defendant did not give consideration for the agreement, in the letter dated 17th February 2014, the plaintiffs informed the defendant the claims against it was settled. It cannot therefore be argued that the defendant will not suffer any detriment.

41. All in all, I find that, the plaintiffs have not proved their case on the balance of probability and I dismiss it with costs to the defendant.

42. Those are the orders of the court.

Dated and signed this 29th day of November 2019.

G.L. NZIOKA

JUDGE

Delivered and signed in an open court this 11th day of December 2019.

W. OKWANY

JUDGE

In the presence of:

Miss Leila Ahmed for the Defendant

Miss Oriwo for Miyare for the Plaintiff

Dennis -----Court Assistant