



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL LAW COURTS

CIVIL SUIT NO. 343 OF 2011

EUNICE WAIRIMU MUTURI.....1ST PLAINTIFF

WASHINGTON MUCHIRI MUTURI.....2ND PLAINTIFF

VERSUS

JAMES MAINA THUKU.....1ST DEFENDANT

BARCLAYS BANK OF KENYA LIMITED.....2ND DEFENDANT

JUDGMENT

1. This Judgment relates to the subject suit herein, filed vide a Plaint dated 1st August 2011, amended on 13th October 2011, further amended on 12th June 2012 and filed in Court on 26th June 2012, by the Plaintiffs as the Legal Representatives of the Estate of the late Gerald Muturi Maina (herein “the deceased”) against the Defendants.

2. The Plaintiffs case is that on or about 1st December 2010, the late Gerald Muturi Maina, opened a joint escrow account number [particulars withheld] jointly with the 1st Defendant at the 2nd Defendant’s [particulars withheld] Branch. The account was opened with an opening deposit of Kshs 10,000.00. That subsequently, on or about 7th December 2010, the deceased, transferred from his personal account at Standard Chartered Bank, [particulars withheld] Branch to the said joint account the sum of Kenya Shillings Ten Million (Kshs 10,000,000).

3. It is alleged that the deceased also transferred funds to the account of 1st Defendant held at the 2nd Defendant’s [particulars withheld] Branch as follows that on or about 1st December 2010, Kenya shillings Three Million (Kshs 3,000,000) and on 7th and 9th December 2010, Kenya shillings Six Million (Kshs 6,000,000).

4. The sums transferred to the 1st Defendant’s account are alleged to have been transferred as being monies paid to the 1st Defendant, as an agent of the deceased, in an intended sale of all that parcel of land known as L. R. No. 209/138/44 owned by PundaMilia Farmers’ Co-operative Society. However, the said contemplated sale did not take place as the deceased died on 10th January 2011, before entering into a Sale Agreement with the Vendor of the said property and as aforesaid, the transaction failed and/or collapsed.

5. The Plaintiffs testified that the sum of Kenya shillings Ten Million (Kshs 10,000,000) referred to above, was to be held in the account until the successful transfer and/or registration of Land Reference Number 209/138/44 in favour of the deceased. However, after the demise of the deceased, the family members discovered documents in his office which revealed that, on diverse dates between 26th January 2011 and 7th February 2011, the 1st Defendant, with intent to defraud the estate of the deceased and with connivance and/or aid of the 2nd Defendant withdrew a sum of Kshs 9,912,447.50, from the said joint escrow account leaving only Kshs 95,766.15.

6. That as a result of the said illegal and unlawful actions of the Defendants, committed jointly and severally, the estate of the deceased has suffered loss of Kshs 9,912,447.50, illegal charges of Kshs 1,200.00 and further denied earnings from interest accruing from the initial said deposit of Kshs 10,000,000.

7. The Plaintiffs therefore seek for the following orders against the Defendants jointly and severally;

a) A declaration that the entire sum of Kshs 10,010,000, together with accrued interest deposited in account No. [particulars withheld] held at the 2nd Defendant’s Branch belongs to the Estate of Gerald Muturi Maina;

b) An order directing the Defendants jointly and severally to return and/or credit the account No. [particulars withheld] held at the 2nd Defendant's branch with Kshs 9,913,647.50, together with accrued interest;

b(A) order directing the 1st Defendant to refund Kshs 9,000,000 to the Estate of Gerald Muturi Maina;

c) General damages for breach of contract; and

d) Costs and interest.

8. The 1st Defendant entered appearance and filed his defence on 26th September 2011, and amended on 18th April 2012. He alleged that the joint account referred to herein was opened in joint names of the deceased and himself. That it was not an escrow account but a business account for the two partners to operate a beer distribution business. That the Kshs 10,000,000, deposited into the account was his contribution towards the business and which money had previously been paid to the deceased as per their Agreement dated 12th August 2010. Further, that the Kshs 3,000,000 claimed by the Plaintiffs is part of his Kshs 10,000,000 contribution he had given to the deceased and later deposited in the joint business account they had opened at 2nd Defendant's bank.

9. The 1st Defendant denied knowledge of the sale of land and averred that, it is not a normal business transaction to pay an Agent Kshs 10,000,000 as all alleged. That the amount should be with the Vendor's lawyer or the purchaser's lawyer as stockholder's deposit. He further argued that, on or before the 15th December 2010, he agreed with the deceased, to postpone their beer distribution business as the contemplated distributorship that was to be awarded by East Africa Breweries Limited had been postponed indefinitely. That it was further agreed that he could collect his refund from their account at Barclays Bank and therefore he had no business or obligation contacting the deceased's family, as they were strangers to their Agreement and he didn't need their consent to get his money from his account.

10. He averred that the mandate of the account allowed him to access his money as and when he needed it. Thus he denies that he was fraudulently aided by the 2nd Defendant's in withdrawing his money and states further that there was no intent to defraud the estate of the deceased. That the orders sought for by the Plaintiffs are baseless as they have not shown any cause of action against him and neither have they suffered any loss concerning the monies claimed.

11. The 2nd Defendant entered appearance and on 7th September 2011, filed a statement, amended on 5th July 2012. It is averred that, it did not have purview to any arrangements as concerns the account outside the set standards and ordinary terms of the management of joint accounts by the account holders, and denied any impropriety and/or illegal charges on its part with respect to the handling of the account herein and the allegations or breach as stated in the Plaintiff.

12. The 2nd Defendant further averred that the account holders were duly supplied with the statements of account receipt of which was duly admitted and acknowledged. That in the event the 2nd Defendant did not at any time receive any complaint from the account holders at all regarding supply of the statements of account. Therefore it does not owe the Plaintiffs any money.

13. The Plaintiffs filed a Reply in response to the statement of defence filed in particular by the 1st Defendant. In the Reply filed on 7th October 2011, the Plaintiffs denied the allegations by the 1st Defendant that the deceased person signed a Memorandum of Agreement and acknowledged several payments from him.

14. At the hearing of the case, the 2nd Plaintiff testified on behalf of the Plaintiffs, who further called Mr. Emmanuel K. Kenga, the Forensic Document Examiner as a witness. The 1st Defendant testified on his own behalf and did not call any witness while the 2nd Defendant called Mr. Charles Maina, an Investigating Officer in its employment to testify on its part.

15. In the course of the matter for determination, the Plaintiffs filed a statement of issues dated 7th March 2012; which includes the issues of: the nature of account opened by the deceased and the 1st Defendant, the mandate given, whether Kshs 10,000,000 was deposited therein and the purpose thereof and whether any withdrawal was done. The kind of business relationship between the deceased and the 1st Defendant and whether the 1st Defendant is guilty of fraud and the 2nd Defendant was negligent. Thereafter the parties and in particular the Plaintiffs and the 2nd Defendant filed their submissions.

16. At the conclusion of the entire case and in considering the evidence adduced herein, I find that, the following issues require determination;

a) Did the deceased and the 1st Defendant open an account with the 2nd Defendant;

b) What was the operating mandate of that account in relation to any debits and credits;

c) Did the deceased transfer any money from his own personal account into the joint account, if so how much;?

d) Whether, any sums of money was withdrawn from the joint account in breach of mandate;

e) Whether, then, the Plaintiffs are entitled to the orders prayed for.

17. As regards the 1st issue, I find that, there is no dispute that the 2nd Defendant opened a joint account for the deceased and the 1st

Defendant herein. From the evidence adduced in Court and supported by the copy of Personal Account Opening *aide memoire* dated 30th November 2010, it is clear that, the account number [*particulars withheld*], was opened on 30th November 2010.

18. The 2nd Defendant produced the Account Operating Forms and a perusal thereof indicates that, the mandate required BOTH account holders to sign, before the 2nd Defendant could debit the account with any money. Similarly the 2nd Defendant was provided with specimen signature of each account holders alongside, the passport photographs. It therefore follows that for any debits and credits to be effected on the joint account, both signatories had to give instructions for the same. That answers issues numbers (a) and (b) above that the 2nd Defendant opened an account for the deceased and the 1st Defendant and the mandate for debits required both account holders to sign.

19. The 3rd issue is whether any credits were made into the subject account. In relation to this issue, the 2nd Defendant produced a statement of the account dating from 1st January to 30th June 2011, showing that there was a credit balance of Kshs 10,009,400, (described as the opening balance) as at 1st January 2011. By 30th June 2011, the balance on the account had declined to Kshs 95,766.15. The total debits on the account as per the statement was a sum of Kshs 9,913,649.90. The withdrawals were made between 26th January 2011 to 7th February 2011. The 2nd Defendant in its statement of defence and its oral evidence in Court testified that, all these payments were made by and in favour of the 1st Defendant.

20. Indeed, the 2nd Defendant further submitted as follows that;

“ it is not in dispute that the 1st Defendant on the following dates; 26th January 2011, 2nd February 2011 and 7th February 2011 presented to the Bank duly signed RTGS forms for the transfer of the funds from his joint account with the deceased to another account at Equity Bank in the name of Lenga Distributors Ltd.”

21. The 1st Defendant did not rebut and/or deny the said withdrawals, save to argue that the Kshs 10,800,000, was his own money which he had given the deceased as part of his share in the business of beer distributing and therefore what the deceased transferred to the joint account was not the deceased's money. In answer to issue (c) above it is therefore not disputed that Kshs 10,000,000 was transferred into the joint account by the deceased from his bank account at the Standard Chartered Bank. The issue of whether the said money belonged to the deceased and/or the 1st Defendant is a different issue altogether which I will address later in this matter.

22. Be that as it were, it is not in dispute that the said funds were subsequently withdrawn as stated above. The question that arises is whether all these withdrawals were made or done in accordance with the mandate given to the 2nd Defendant and which required that both account holders sign against withdrawal instructions. Before I address this issue it is noteworthy as aforesaid, that the subject withdrawals were made with effect from 26th January 2011, after the death of the deceased on 10th January 2011.

23. The general principles of law are that, the relationship between the Bank and its customer is contractual. The main basis of this relationship is one of debtor and creditor. As held in the case of; *Foley vs Hill (1848)*, where the customer's account is in credit, then the bank is in effect the customer's debtor, that is to say that the bank owes the money to the customer. Where it is in debit, then the customer is the banker's debtor. In this contractual relationship, the bank owes the customer several duties which includes but not limited to: a duty to comply with the customer's mandate (*Joachson vs Swiss Bank Corporation (1921)*). It is important to realize that this duty not only refers to the original mandate completed when the customer opened the account but also various other documents which are interpreted as mandates, including standing orders, direct debits and cheques. Therefore, the Bank owes its customer an obligation to obey the customer's instructions based on the mandate given.

24. It is also noteworthy, that the legal effect of the death of a customer is to terminate any mandate given to the bank. Therefore, when the deceased demised, the Bank mandate herein was terminated. Similarly, where the mandate requires both account holders' sign against withdrawal instructions and/or cheques, then the bank can only pay against both signatures. Indeed the Debtor-creditor relationship between the bank and its customer necessitates that any debit made on a forged signature must be reversed and the funds be repaid to the customer. This is based on the fact that a person is only liable on a document, if it has been signed by him or her or the duly authorized agent. Thus the bank has no authority to pay against a forged endorsement; and since the bank has a specimen signature and should therefore, recognize the true and/or genuine signature, it will not be a defence for the bank to argue that, the signature was so skillfully done and difficult to detect.

25. Similarly, under Section 24 of the Bills of Exchange Act (cap) 27, Laws of Kenya, a forged signature on a cheque which also applies to RTGS instructions, has the consequences, that the bank has paid the money without authority and in contravention of the mandate. This is informed by the fact that, the forgery has no effect. It is as if the cheques or the RTGS transfer form was paid with no signature at all or that there was a blank space where the signature should be.

26. As held in the case of; *Tai Hing Cotton Mills Ltd vs Liu Chong Hing Bank (1986) PC*, a forged drawer's signature is inoperative and a forged signature on the cheque is invalid and no one can become a holder of it. In that case a fraudulent employee forged the signature of his employer's Managing Director and thereby obtained payment of HK£ 5.5 million representing 300 forged cheques over six years. It was clear that the company had an inadequate accounting system which had facilitated the fraud. No one in the Company, other than the fraudulent employee himself, had reconciled the bank statements. It was argued that the customer owed a duty to the bank to take care of its cheque books and to inspect its bank statements, but these points were rejected. The cheques were forged and it was held that the bank had no authority to pay.

27. The question that arises is whether the signatures and/or instructions on the RTGS transfer forms herein were made and/or signed by both account holders. The 1st Defendant who benefited from the funds transferred on the basis of the said RTGS, testified that, the deceased signed the RTGS forms for transfer of the funds from the joint account to the account of Lenga Distributors Ltd, held at Equity Bank. Therefore, in a nutshell, the 1st Defendant is thus arguing that, the signature of the deceased on these forms is genuine. The 2nd Defendant on its part testified that, it received duly signed RTGS transfer form from the 1st Defendant with respect to the bank account in question and that

both signatures on the RTGS forms tallied with the specimen signatures held at the Bank.

28. However, according to the evidence given by Mr. Kenya, the Forensic Document Examiner, the signature of the deceased on those RTGS transfer forms was a forgery. Mr. Kenga's evidence was adduced in the Criminal Case against the 1st Defendant. His report was thereof accepted as an Expert's Report. No any other evidence has been adduced to rebut it. Thus, the document examiner having found that the deceased signature on the RTGS transfer forms was forged, it therefore follows that all payments made by the 2nd Defendant based on these RTGS transfers forms were made without authority and mandate and must be reversed. The said amount must be re-credited back to the joint account.

29. In fact the 2nd Defendant herein, seems to have been aware of this position. This is because when a report was made to the Police over the alleged theft and forgery of the subject money, and the 1st Defendant subsequently charged in the Chief Magistrate's Court in Criminal Case No. 1547 of 2012, with offences, inter alia of;

a) stealing under Section 275 of the penal code;

b) forgery in three counts under Section 349 of the penal Code

30. The 2nd Defendant's employees testified in the Criminal case in support of the Prosecution case. These were Miriam Murugi Kivingo, a cashier who testified as PW2 and told the Court that, when the 1st Defendant presented the RTGS transfer forms alone, the bank inquired from him where the deceased was, and the 1st Defendant allegedly informed the cashier that;

"the deceased had gone outside the bank to make a call."

31. The other employees of the 2nd Defendant who also testified are: PW4- Robert Macharia Njoroge, a Teller Supervisor at Embakasi branch, PW5 -Nancy Wangui Mwena, a Branch Operations Officer at the Embakasi branch, and PW6 –Charles Kangwaro Maina, an Internal Investigator at the 2nd Defendant's Bank. In the same vein Chief Inspector Daniel, a Forensic Document Examiner, testified that, he carried out a forensic examination of the questioned signature of the deceased and the deceased known signature and formed the opinion that, they were indeed made by different authors.

32. I have already arrived at the conclusion that indeed funds were transferred from the deceased's account to the joint account held between him and the 1st Defendant herein and that it was subsequently withdrawn by the 1st Defendant. This answers issues number (c) and (d) above. I have also held that the withdrawal instructions bore a forged signature of the deceased, and therefore, the 2nd Defendant ought to reverse the debits made on the joint account and re-credit the account with the sum debited.

33. The next issue then is whether the Plaintiffs are entitled to the orders sought for herein. The first prayer is for a declaration that the entire sum of Kshs 10,010,000 together with accrued interest deposited in the joint account herein belongs to the estate of the deceased. The 2nd prayer is seeking for an order directing the Defendants jointly and severally to return and/or credit the joint account with Kshs 9,913,647.50 from the account together with accrued interest.

34. When it comes to a claim by the customer for payment made against a forged endorsement often, compensating the customer will simply be a matter of refunding the account with the amount debited, together with a sum to cover any lost interest or charges incurred as a result of the forgery. It therefore follows that the money that was withdrawn from the joint account based on the forged signature of the deceased on the RTGS transfer forms being a sum of Kshs 9,913,647.50, should be re-credited to that account. It is the 2nd Defendant, that paid without authority and therefore it is the 2nd Defendant that is liable to re-credit that account. I therefore allow orders sought for in paragraph 14 (b) to the extent that they relate to the 2nd Defendant alone.

35. If I may revert back to prayers sought for under paragraph 14(a), I order that once the funds are re-credited, to a joint account, the funds belong both account holders. To determine whether the funds on the subject account belong to the estate of the deceased and/or both account holders, one has to take regard to the various reasons advanced herein by the parties as to why the funds were being transferred. According to the Plaintiffs, the funds were in respect of purchase of property LR No. 209/138/44, which was paid to the 1st Defendant as the agent of the deceased for onward forward to Pundamillia Cooperative who were the sellers of the property. The 1st Defendant on the other side, alleges that, the funds were in respect to a business partnership between him and the deceased for beer distribution. That he gave the funds to the deceased to enable him get a Bank guarantee for Kshs 10,000,000 so that they could get motor vehicles for beer distribution. The 1st Defendant supported his evidence by producing a Memorandum of Agreement allegedly executed between him and the deceased.

36. A perusal of the proceedings in the criminal Court reveals that, Joseph Wanyoike Ngaruiya, who testified as PW7, informed the Court that he is the chairman of Punda Millia Cooperative Society, and that the Society was selling a house in Nairobi. That on 27th July 2010, they received a letter from the deceased who offered to purchase the house at Kshs. 39,000,000. The Society accepted the offer. The matter was referred to their Advocate, thereafter they received information that the purchaser had died. The house was sold to someone else. In my considered opinion, this supports the Plaintiffs case that the deceased intended to buy a house from the society.

37. On the other hand, I note that, the Memorandum of Agreement and several documents which were allegedly signed by the deceased refunding the money to the 1st Defendant were, subjected to forensic examination by Mr. Emmanuel K. Kenga, the Document Examiner and the deceased signature was found to have been forged. That completely renders the 1st Defendant's defence as false and untenable. Therefore it is clear that the 1st Defendant has not supported his alleged claim over the funds in the joint account. I therefore find that the Plaintiffs have adduced adequate evidence to warrant the grant of prayers in paragraph 14(a) of the Plaint. If the funds had been in the account all through and had not been withdrawn, they should have attracted interest and therefore the same sum should be paid together with

interest.

38. The question is, how will the Bank recover the money once it re-credits the joint account? A bank that makes a payment under a mistake of fact which includes paying against a forged cheque, has a right to recover the money from the person benefiting from the payment. This was the holding in the cases of; *Barclays Bank Limited vs W.J. Simms, Son & Cooke (Southern) Ltd and Sowman (1979)*, which related to a stopped cheque, and the bank was able to claim the monies paid from the beneficiary and in a forgery case of; *National Westminster Bank Ltd vs Barclays Bank International Ltd and Ismail (1975)*, where the bank was again able to reclaim the monies paid out. In the instant case, the bank can recover the amounts paid to the 1st Defendant once it re-credits the joint account.

39. I shall now deal with the prayer under paragraph b(A) for an order directing the 1st Defendant to pay refund of Kshs 9,000,000 to the estate of the deceased. I note from the 1st Defendant's amended statement of defence that, indeed under paragraph 5A(2) he stated that he received Kshs 3,000,000 from the deceased, but alleged that it was part of the Kshs. 10,000,000 he had contributed to the beer distribution business. Having held that the beer business was founded on forged documents, this defence by the 1st Defendant cannot withstand the heat of the Plaintiffs case. From the further supplementary list of documents filed by the Plaintiffs and supported by a further statement made by Washington Muchiri Muturi dated 25th June 2012, it is alleged that the sums of Kshs 9,000,000 were transferred to the 1st Defendant on the following dates; 1st, 7th and 9th December 2010. However, I note that the evidence adduced, and supported by the deposit slip produced, which supports the payment of 1st and 9th December 2010 of 3,000,000 each. The other payment is not supported. It also confirms that the funds came from the deceased and in that regard, I allow the subject prayer for the refund of the same, save for a refund of only Kenya shillings six Million(6,000,000) proved.

40. Finally I shall now deal with the issue of a breach of contract. I have considered the evidence herein and the arguments by the parties in regard to this issue, and I find that there is no evidence that the 2nd Defendant and/or his agent colluded or connived actively and intentionally with the 1st Defendant to defraud the estate of the deceased. I find that this is a case of more negligence on the part of the 2nd Defendant than of a criminal nature. There was no plea of negligent on the part of the 2nd Defendant. The relationship as already indicated herein between the 2nd Defendant and the deceased as contractual, thus civil in nature.

41. Therefore unless evidence is adduced to prove that indeed the 2nd Defendant was aware that the signature on the RTGS transfer forms was forged and proceeded to make the payments, it would be hard pressed to find that the 2nd Defendant is liable. The chronology of events in this matter is that, the joint account was opened on 30th November 2010. The deceased died on 10th January 2011. The letter to the 2nd Defendant notifying it of the death of the deceased was written on 7th February 2011 and received on the same date. The withdrawals on the joint account were made between 26th January and 7th February 2011. It is therefore not quite clear, whether the withdrawals made on 7th February 2011, were made before or after the bank received the letter. Even then, the 2nd Defendant can only be found guilty of negligent and that is not pleaded.

42. In conclusion I find that once the Plaintiffs are refunded funds that were erroneously debited on the joint account, the Plaintiff's claim will be adequately addressed. I also find that there is no adequate evidence in support of the prayer for general damages and I disallow the same. I have allowed interest on the sum refundable and direct as follows, the funds to be credited on the joint account will attract interest at 5% (being generally the interest on an account in Fixed Deposit on call) and with effect from date of withdrawals until the filing of the case. Thereafter, interest will be charged at court rates from date filing suit until payment in full. The costs of the suit to be borne by both Defendants.

43. Those then are the orders of the Court.

Dated, delivered and signed in an open Court this 12th day of September 2018.

G.L. NZIOKA

JUDGE

In the presence of:

Mr. Mucheri for Mr. Mbaji for the 2nd Defendant

No appearance for other parties.

DennisCourt Assistant