



## **REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MILIMANI (NAIROBI)**

**COMMERCIAL AND ADMIRALTY DIVISION**

**CIVIL CASE NO.6 OF 2010**

**BARCLAYS BANK OF KENYA LIMITED.....PLAINTIFF**

**VERSUS**

**JOSEPH WAWERU NJAGA.....1<sup>ST</sup> DEFENDANT**

**FRANCIS KAMAU NJAGA.....2<sup>ND</sup> DEFENDANT**

**CAX INVESTMENT LIMITED.....3<sup>RD</sup> DEFENDANT**

### **J U D G M E N T**

The Plaintiff filed this suit against the Defendants seeking the following:-

- 1. Mandatory injunction to freeze the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants accounts in Queens Way Branch of the Plaintiff and family Bank Four Way Branch.*
- 2. In the alternative mandatory injunction do issue directing that the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants Accounts No. xxx-xxx-xxxxxxxxxxxxx Equity Bank Thika Branch and Account No. xx-xxx-xxxxxx-xxx-xxxxx Family Bank Four Way Branch be respectively debited with Kshs. 4,200,000 and Kshs. 2,300,000 respectively in favour of the Plaintiff.*
- 3. A declaration that the Plaintiff has lawful lien over credit balances in the 2<sup>nd</sup> Defendants Account Number xxxxxxxxQueens Way Branch of the Plaintiff.*
- 4. In the alternative judgment be entered for the Plaintiff for Kshs. 10,381,752 together with interest.*

The Plaintiff availed one witness Kennedy Ochieng Ohungo who is Senior Forensic Expert for the Plaintiff. He adopted his witness statement dated 8<sup>th</sup> March 2017 as evidence and also produced the bundle of documents filed.

He testified that on 9<sup>th</sup> September 2015 Barclays Advisory and Registrar Services (BARS) which deal with shares on behalf of the company received instructions from EABL to make payments relating to EABL shareholders. He said the report had 465 EABL shareholders who maintained accounts in Barclay's branches across the country. He said the total amount that was to be credited to customers' accounts were Kshs. 22,920,747.90.

Pw1 testified that the 2<sup>nd</sup> Defendant was not a shareholder but a customer of the Plaintiff bank. He said that payment of Kshs. 10,389,972 was named to the 2<sup>nd</sup> Defendant's Account No. xxxxxxxxxxxx despite the fact that he was not a shareholder of EABL. He testified that the 2<sup>nd</sup> Defendant had a brother in BARS the 3<sup>rd</sup> Defendant Who was in charge of reconciliation before payment is done by another team.

In cross-examination, Pw1 said that BARS was an arm within Barclays Bank whose role was to deal with share from different companies. He said EABL is a client of Barclays Bank and that it authorizes the bank to debit their account and credit accounts of shareholders across all branches. He said 3<sup>rd</sup> Defendant was working for BARS and that he is brother of 2<sup>nd</sup> Defendant.

Pw1 said that he is not aware if the 2<sup>nd</sup> Defendant was engaged to maintain computers.

In reexamination, Pw1 confirmed that the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants are brothers. He said that he is not aware if the 2<sup>nd</sup> Defendant was doing

business with BARS and that he is seeing service level agreement for the first time in court. He said the purported agreement is signed by the 3<sup>rd</sup> Defendant on behalf of Barclays Bank. He said that the 3<sup>rd</sup> Defendant was working with BARS not procurement department. He added that the service level agreement has no seal from Barclays Bank, which is a requirement if it is emanating from the bank.

Pw1 said BARS was sold to Standard chartered bank.

The 1<sup>st</sup> Defendant adopted his witness statement dated 22<sup>nd</sup> August 2017 and list of documents filed. He testified that he two accounts frozen by the Plaintiff had his money, which he believes belong to him. He said the bank is using the money in his fixed deposit account to give him credit card.

2<sup>nd</sup> Defendant admitted that Kshs. 10,389,972 was deposited in his account on 21<sup>st</sup> October 2009. He said he was doing services for BARS and that the amount was payment for the services. He said from the 2003 to 2005 he offered maintenance services for BARS in the name Smack Systems but he never provided Certificate of Registration. He said he was sole proprietor of the business.

He said that Samuel Mungai was his engineer and that he is the one who signed the contract. He said he has not provided invoice and that he filed the agreement in the year 2017. He confirmed that the person who signed the agreement on behalf of BARS is his brother.

He confirmed that he paid 1.7 Million to his brother on 31<sup>st</sup> December 2009 and 2.5 million on 4<sup>th</sup> January 2010. He said that his brother was his business partner and that 2.5 m was for computers supplied. On further cross-examination he said that in RTGS it's indicated 2.5 M was for a plot in Thika.

He confirmed that he was not a shareholder of EABL. He said he still gets credit against the money in the account and since 2005 he has been using the money as collateral, he said he is not privy to Barclay's internal operations. He maintains that the money in the account is his.

The 3<sup>rd</sup> Defendant adopted his witness statement dated 6<sup>th</sup> June 2017 and list of documents filed.

In cross-examination, the 3<sup>rd</sup> Defendant confirmed that he worked with BARS as in charge of accounts and reconciliation. He confirmed that he was in charge of paying dividends to shareholder. He said BARS was a Limited Liability Company but failed to produce registration document. He said he was in charge of service agreements that would bind BARS. He confirmed signing Service Level Agreement between him and 2<sup>nd</sup> Defendant on 2<sup>nd</sup> February 2005. He said he issued with invoice against payment. He however confirmed that payment of 21<sup>st</sup> October 2005 is indicate as commission dividend.

He said he would even pay salary from dividend account and do reconciliation and that he could use his discretion to pay service providers. He said they had service agreement with 2<sup>nd</sup> Defendant and that he was in charge of maintenance of computers. He confirmed receiving a total of 4.2 Million from the 2<sup>nd</sup> Defendant. He said for some of the amount, he had supplied computers with the 2<sup>nd</sup> Defendant and part of it was for parcel of land. He said 2.5 Million was for land. He said the transactions were not completed because the accounts were frozen; he confirmed indicating 2 acre plot in Thika and 1 acre in Ruiru. He denied that they were splitting the money obtained from Barclays bank.

In cross-examination, the 3<sup>rd</sup> Defendant said he was signatory of the account where money was paid and that he was authorized to sign agreements.

In re-examination, he said he was authorized to sign agreements on behalf of BARS. He confirmed that he was charged in a criminal court and was sacked as a result of this matter.

## **SUBMISSIONS BY PARTIES**

### **PLAINTIFF**

Plaintiff's Counsel highlighted 2 issues, Plaintiff's locus and admissibility of proceedings of criminal court and investigation report.

He submitted that it was Plaintiff's evidence that BARS was a unit in Barclays bank. He submitted that the Defendant testified it was a separate entity but failed to provide evidence of separation. He said no Certificate of Incorporation or CR12 from Registrar of Companies was produced to prove that BARS is a separate entity.

On admissibility of investigation report he submitted that Section 53 of Evidence Act allows production of a document where the maker cannot be found without undue delay or cost and that it was made in the ordinary course of business. He said none of the Defendants objected production for the document.

On criminal proceedings, he submitted that Section 34 of evidence allow production of proceedings. He further said Defendants produced proceedings of criminal case in this case and that they should not be allowed to approbate and reprobate. He submitted that an acquittal in criminal proceedings is not automatic that civil proceedings cannot be sustained as civil proceedings are decided on a balance of probabilities.

Counsel for 2<sup>nd</sup> Defendant submitted that whether BARS was separate entity was conversed in criminal case No.2546 of 2005

On admissibility of evidence, he submitted that expert opinion must be corroborated by material particulars. He said Defendant has demonstrate that money that came into has account was for valuable consideration and should not be denied from using it.

In rejoinder Counsel from Plaintiff submitted that the Magistrate did not say the money did not belong to the Plaintiff.

He added that the Defendants failed to provide invoices to Court.

### **ANALYSIS AND DETERMINATION**

I have considered evidence adduced. I have also considered submissions by Advocates herein and perused documents filed.

I wish to consider two issues.

1. Whether BARS was a separate entity from Barclays Bank the Plaintiff herein.
2. Whether the 2<sup>nd</sup> Defendant was rightly paid Kshs. 10,389,972 or the same was fraudulent enrichment.

On the first issue, the Defendants indicated that BARS was a separate entity from Barclays Bank while the Plaintiff's evidence is that it was an arm within Barclays, which has now been sold to Standard Chartered Bank.

Defendants however failed to produce Certificate of Incorporation or any other document to confirm the allegation.

From the foregoing, I find that on a balance of probabilities the Plaintiff proved BARS operated within Barclays Bank and therefore has locus standi to file this suit.

In so far as the second issue is concerned, the 2<sup>nd</sup> Defendant has not disputed receiving Kshs. 10,389,972 in his account, he however said that he was rightfully paid as he had contract to service computers for BARS.

There is also no dispute that money deposited in 2<sup>nd</sup> Defendants account was meant to pay EABL shareholders and that the 2<sup>nd</sup> Defendant was not one of the shareholders of EABL.

Further, there is no doubt that the money was paid out by 3<sup>rd</sup> Defendant; it is also not disputed that the 2<sup>nd</sup> Defendant is a brother to 3<sup>rd</sup> Defendant's be other. 3<sup>rd</sup> Defendant says he paid 2<sup>nd</sup> Defendant the amount for services provided. He admitted being part the 4.2 million by 2<sup>nd</sup> Defendant. Explanation for the payment was supply of computers; he however failed to produce any invoice issued before payment. It is evident that this is not a genuine agreement. Moreover, that the 2<sup>nd</sup> Defendant has not demonstrated that he was entitled to the funds.

Further the 2<sup>nd</sup> and 3<sup>rd</sup> Defendant confirm that that the agreement does not also have Plaintiffs seal neither is it signed by authorized persons. 3<sup>rd</sup> Defendant never gave satisfactory explanation as to why the funds paid to 2<sup>nd</sup> Defendant was paid from EABL account if indeed it was for services rendered. 3<sup>rd</sup> Defendant further indicated that he intended to use the money to purchase land but contracted himself by saying he wanted to purchase 2 acres in Thika and at another talked of buying 1 acre in Ruiru.

The contradiction clearly demonstrates that the claim of purchase of land was an attempt to launder the fraudulently obtained money.

The agreement produced does not have Plaintiff's seal and is signed by 3<sup>rd</sup> Defendant who is 2<sup>nd</sup> Defendant's brother. There is no prove that the 2<sup>nd</sup> Defendant was awarded contract and rendered services to be entitled to payment from Plaintiff. Therefore, there was no contract giving 2<sup>nd</sup> Defendant work.

From the foregoing, I find that the Plaintiff has proved its case on a balance of probabilities.

### **FINAL ORDERS**

1. Judgment is hereby entered for Plaintiff against the Defendants jointly and severally for Kshs. 10,381,752.
2. Mandatory injunction do issue directing the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants Accounts No. xxx-xxx-xxxxxxxxxxxxx Equity Bank Thika Branch and Account No. xx-xxx-xxxxxx-xxx-xxxxx Family Bank Four Way Branch be debited to satisfy the Plaintiff's claim.
3. Interest on order 1 above at Court's rate from the time of filing this suit until payment in full.

**Judgment Delivered, Dated and Signed at Nairobi this 13<sup>th</sup> day of December, 2018**

.....

**RACHEL NGETICH**

**JUDGE**

**IN THE PRESENCE OF**

Naomi: **COURT ASSISTANT**

Omino: **COUNSEL FOR PLAINTIFF**

No appearance for: **1<sup>ST</sup> DEFENDANT**

Muturi: **COUNSEL FOR 2<sup>ND</sup> DEFENDANT**