



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MILIMANI (NAIROBI)

COMMERCIAL AND ADMIRALTY DIVISION

CIVIL CASE NO.169 OF 2016

EQUATORIAL COMMERCIAL BANK LIMITED.....PLAINTIFF

VERSUS

PARAMOUNT UNIVERSAL BANK.....1ST DEFENDANT

JAMES MWANGI KANYI T/A MIRAGE

SUPPLIERS AND CONTRACTORS.....2ND DEFENDANT

J U D G M E N T

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

1. Kshs.. 9,450,000 together with interest from 2nd September 2015.
2. Mandatory injunction to compel the 1st and 2nd Defendants to release the said amount to be paid to Account Number [...] held at Paramount Bank Limited, the 1st Defendant branch in the name of Mirage Supply & Contractors to Plaintiff.
3. Damages.
4. Costs and interest from date of judgment until payment in full.

Parties herein produced documents by consent. Each availed one witness.

PLAINTIFF'S EVIDENCE

The Plaintiff availed one witness who is the head of Audit in the bank. He adopted his witness statement as evidence and urged the Court to look at his Affidavit sworn on 11th May 2016 in which he has referred to documents filed.

He testified that the 2nd Defendant herein were being paid Kshs. 9,450,210 by Holy Ghost Construction project on 1st September 2015. He said that the money was to be paid to Paramount Universal Bank. That the amount was paid on 1st September 2015 at 2.13 as per swift confirmation document on page 2 of the Plaintiffs bundle of documents.

On realization that the money was sent in error, it was recalled as shown on page 3 of the Plaintiffs documents. The Plaintiff recalled the money the next day 2nd September 2015 from their counterpart bank the 1st Defendant herein. Reason for recall was that the Plaintiff suspected fraudulent activity.

Pw1 said that the information for recall of the money was relayed to the bank at 10.54 a.m. He further testified that the 1st Defendant was expected to return the money on receiving recall message. He said they forwarded recall and subsequently indemnity. He said the indemnity was intended to protect 1st Defendant in the event that the 2nd Defendant make a claim against the 1st Defendant. He showed email communications between the two banks.

Pw1 testified that the 1st Defendant communicated to them indicating that there is a Garnishee order in Milimani CMCC No.5857 of 2015 in which the 1st Defendant indicated that the money is subject to criminal investigations. He showed Court order preserving the money and

staying Garnishee proceedings. He also showed Court a letter from the 1st Defendant's Chief Executive asking for indemnity. He said they never said that the money would be paid to another party and that they expected the money to be paid to the 1st Defendant. He showed Court account of 2nd Defendant kept by the 1st Defendant which confirms that Kshs. 9,450,210 was credited to the account and that it was the same money they were recalling. He said no entries were done in the account between 2nd September 2015 to 30th September 2015. He said that on 1st September 2015 Kshs. 776,033.61 was paid on instructions of client.

Pw1 testified that once a bank gets information that the money is fraudulent it is supposed to be frozen and anyone keying in internally will be to see it. He says there is payment of 126,500 which was reversed immediately, Kshs. 1.8 million was paid on 9th May 2016, legal fee of 232,000 was paid the same day and 500,00 paid to Joruth Enterprises who is the Plaintiff in CMCC No 5857 of 2015. He said that Kshs. 7,792,268.74 which was in the account on 9th May 2016. He said 24 transactions were done in one day. He said that none of the transactions paid money back to spire bank neither did the 1st Defendant inform the Plaintiff that it was going to pay third parties.

In cross-examination, Pw1 said that the 1st Defendants undertaking to refund the money was subject to indemnity. He confirmed that the account was frozen through Misc. Application NO.169 of 2015. He further stated that the 1st Defendant had intimated that in the event that the freezing order is lifted, they would require indemnity.

Pw1 said that investigation in the bank revealed that the money was a fraud. He said payment of the money was an internal mistake. He said that instruction to pay did not emanate from their customer Holy Ghost Construction and that it was a cyber related crime.

He confirmed that freezing order was issued on 7th September 2015 and Garnishee order later issued in Milimani CMCC No. 5857 of 2015. He also confirmed the freezing order was lifted on 1st February 2016 and Garnishee orders lapsed on 6th May 2016. Pw1 said that despite no limiting factors, the 1st Defendant declined to return the money. He said that the 1st Defendant was required to give Plaintiff a format which they were to adopt as to come up with deed of indemnity.

He confirmed that on 1st September 2015 there was an inward RTGS of Kshs. 9,450,210 and that on the same day there was a set off Kshs. 776,033.61. He said that if there is a non performing loan the bank will do a set off immediately. He confirmed that recall instruction was done on 2nd September 2015. He confirmed that before the recall there was nothing to prevent the bank from dealing with the bank.

Pw1 said that according to Central Bank Guidelines, for any deposit over one million the bank is required to ask the customer to provide information about the payment.

In re-examination Pw1 said that the order lifting freeze of the account was served 1st Defendant bank on 19th March 2016 and payments were done on 9th May 2016 2 months after the order. He said it has nothing to do with the order. He said the order does not refer to proceedings by banking fraud. He said there is no letter indicating that the 1st Defendant was no longer interested in indemnity.

Further Pw1 said the Court ruling indicated that the money be preserved and amount to go to the party that was entitled. He said that before the account was credited with Kshs. 9,450,210.61, it was overdrawn by Kshs. 881,632.65 and that the bank should have asked where the money credited came from. He said there are no documents to support the payments.

DEFENDANT'S CASE

The Defendant availed one witness Timothy Kimani a Legal Officer for the 1st Defendant. He adopted his witness statement as evidence. He confirmed that on 1st September 2015 the 2nd Defendant who was 1st Defendants customer received RTGS transfer of Kshs. 9,450,210 from the Plaintiff bank. He stated that the originator of the transfer was Holy Ghost Construction Project. He confirmed that on the same day there was a set off of Kshs. 776,033.61 in the 2nd Defendants account.

He further confirmed that on 2nd September 2015 the 1st Defendant received swift communication from the Plaintiff bank recalling the amount transferred on 1st September 2015. He said reason was suspected criminal activities.

In cross examination, Dw1 testified that on 21st January 2015 a cheque of Kshs. 126,500 issued by the 2nd Defendant was returned unpaid due to insufficient funds in the account. He said on 23 February 2015 and 21st April 2015, the 2nd Defendant also issued cheques for the same amount but were returned unpaid. He said from 21st January 2015 to 31st August 2015 there were no funds in the account.

He said the bank did not receive any information that the 2nd Defendant was expecting funds to be paid to the account on 1st September 2015. He confirmed that the deposit would have raised some concern to the bank. He confirmed that the amount was received at 2.13pm and that the bank did not have a meeting with the customer on that day.

He confirmed that there was recall of the money transferred and that it is a common practice in the banking industry. He further informed Court that the other bank does not need to explain reason for suspecting fraud.

He confirmed that the 1st Defendant sought indemnity from the Plaintiff and that they do not require a Court order to act on it. He said 1st Defendant never sent format of indemnity. He said the 1st Defendant sent a letter to Plaintiff on being served with an order discharging the freezing order but failed to show out the latter. He confirmed that activities in the account resumed on 5th September 2015. He said the freezing order was discharged in March 2016. He said ruling in respect of Garnishee proceedings was delivered on 8th April 2016. He confirmed that in the Garnishee proceedings the Garnishee indicated that the money belonged to a third party. He confirmed that there is no

order determining Garnishee proceedings but what is seen is discontinuance, which was filed by Plaintiff and not with consent of all parties. He confirmed that the notice was served on the Plaintiff on 9th May 2016 at 3.22 p.m. He confirmed that the 1st Defendant never wrote to the Plaintiff asking for indemnity format.

He said they were served with notice of discontinuance on 7th May 2016 by the firm of Kiplangat & Associates. He said the lawyer had a meeting with the 1st Defendant bank the same day and James Kanyi on behalf of 2nd Defendant went to the bank the same day wanting to access the money. He said the bank had separate meetings with the lawyer and the customer James kanyi; but never had a meeting with the 1st Plaintiff bank.

He said they asked the customer supporting documents for the deposit but he never produced the documents in Court.

In reexamination Dw1 confirmed that by letter dated 23rd November 2015 the 1st Defendant confirmed that it would comply with Plaintiff instruction recalling the funds once Court order was lifted and format of indemnity agreed. He said it was difficult to agree on format as they were dealing with investigations by criminal investigation Department (CID).he showed Court criminal proceedings with a prayer to restrict withdrawal from account until conclusion of investigations. He said the order was served on the 1st Defendant on 15th September 2015 following the order, the account was frozen. He said on 25th November they were served with an order to pay Plaintiff in CMCC No 5857/2015 to satisfy the decree but they could pay because there was a freezing order. He said there were 2 conflicting orders. He said the civil case was discontinued. He said he is not aware of any consent by parties to discontinue.

SUBMISSIONS BY PLAINTIFF

Counsel for the Plaintiff submitted that the account which money was transferred to from Plaintiffs account is different from the account referred to in the Garnishee proceedings. He said Garnishee Account is [...] whereas the account, which received money from Plaintiff bank, is no. [...].

Counsel further submitted that there were correspondences between the two banks and the 1st Defendant bank never indicated that it had any difficulties in refunding the money once the deed terms are agreed and that the terms were to be dictated by the 1st Defendant bank but the format was never forwarded by the 1st Defendant bank before money was released.

Counsel further submitted that there was no determination of Garnishee proceedings but what happened was that notice to discontinue was filed but never endorsed, adopted nor served. He referred to the case of Tatu City where the Court held that a notice of withdrawal, which has not been endorsed by Court, has no effect.

He further submitted that payment of Kshs. 7 million, which another bank has laid a claim on a Saturday, is curious and points at fraud.

On KEPS rules and guidelines Counsel submitted that the 1st time never informed Plaintiff that it would not pay the money due to KEPS rules and guidelines. He argued that the 1st Defendant never talked of any illegality that would be occasioned by reversal of the money.

He said receiving huge amount in an account, which has been receiving small amount, does not appear normal.

He further submitted that notice to discontinue was served on a Friday and money was paid out on Monday the next working day.

SUBMISSIONS BY 1ST DEFENDANT

Counsel for the 1st Defendant submitted that the account captured in Garnishee proceedings is not different. He the other details in the account is branch code Counsel submitted that as a result of an order in Miscellaneous criminal Application no. 1693 of 2015 the second Defendant accessed funds in the account.

Counsel submitted that the 1st Defendant was compliant with Court orders and that indemnity deed could not be formulated due to the freezing order which was issued 5 days after Plaintiff issued a recall of funds. He submitted that the order freezing the account remained up to 1st February 2016. he said what was pending was Garnishee proceedings. He added that discontinuance of Garnishee proceedings meant that the orders issued in respect of the proceedings lapsed.

He further submitted that as per PEPS rules, once payment has been settled through two accounts, the signing participants have no ability to recall the payment. He argued that it was not possible to comply with the request to recall owing to RTGS rules no.5.5 and 6 governing the transaction.

Counsel for Defendant submitted that the Plaintiff has not demonstrated how the alleged mistake of fact, which led to the transaction, which is the subject, matter of this suit, occurred. He argued that under Section 17 of the evidence Act, what has been alleged must be proved. He submitted that the Pw1 deliberately failed to disclose how the fraud occurred

He further submitted that the 1st Defendant never owed the Plaintiff duty of care. He said KEPS cover RTGS transactions with clear procedure of dispute resolution; that under rule 5.5 and once transaction is complete, it is final and irrevocable. He submitted that there is no evidence that the transaction was not authorized by the Plaintiffs customer. He prayed for the suit to be dismissed.

RE-JOINDER BY PLAINTIFF

In a rejoinder, Plaintiff's Counsel submitted that by the time, the 1st Defendant received recall instructions money had not been paid out & 1st Defendant promised to return the money once freezing order was lifted. He said all they needed to do was to send draft indemnity and guarantee to Plaintiff for execution. He questioned the speed at which money was paid out; in that, the order was served on Friday afternoon and the whole amount paid out the next Monday through 24 transactions. He concluded that there was mischief, fraud, and urged Court to look at justice in this matter. He prayed for damages if Court find the 1st Defendant owed Plaintiff a duty.

ANALYSIS AND DETERMINATION

I have considered evidence. I have also considered submissions by both Counsels and perused documents produced in Court. It is not disputed that 1st Defendant transferred Kshs. 9,450,210 from its customer Holy Cross construction to 2nd Defendants Account in 1st Defendant bank.

It is not also disputed that the next day 2nd September 2015, the Plaintiff recalled the money on account of fraud.

It's also not disputed that the 2nd Defendants account was frozen on 7th September 2015 following freezing order in MISC CR, Case No 1693of 2015. Kshs. 776,...61 was set off by the 1st Defendant the same day of transfer of funds.

At the time of set off the recall swift message had not reached the 1st Defendant neither was there any Court order freezing the funds.

It is not disputed that for any money that comes into an account the practice is for the bank to set off any monies owing to the bank.

What I wish to consider is whether it was proper for the 1st Defendant to pay out monies that were paid out after the recall by the Plaintiff.

There is no dispute that the 1st Defendant was duly notified that the money transaction was a result of suspected fraud activities.

There was assurance by the 2nd Defendant to the Plaintiff that once the freezing order was lifted indemnity deed would be executed which would pave way for release of the funds.

From evidence adduced, upon receiving order for discontinuance of Garnishee proceeding, the 1st Defendant failed to notify Plaintiff of the new developments. With report of suspected fraud in respect of the money, it was incumbent on the 1st Defendant to notify the Plaintiff of the position of the case that held it from complying with recall of the funds. Instead of notifying the Plaintiff of the new developments, the bank chose to meet with the 2nd Defendants and his Advocate and paid the whole amount in 24 transactions in one day. The move by the 1st Defendant is suspect. It is clear that the transactions were done in a speedy manner to defeat the Plaintiffs claim.

The 1st Defendant relies on rule 5.5 and 6 of PEPS in making payments it alleges that once money is transferred it is final and irrevocable. I do not agree with that position. Once a bank is notified of an irregularity, then it has a duty to hold release of the money. The Plaintiff was willing to execute deed of indemnity in the event that the 1st Defendants customer made a claim against the 1st Defendant.

The 1st Defendant failed to explain why it was reluctant to execute the guarantee with the Plaintiff. No explanation was given for the speedy payment of money out of the account despite the history which was well known by the 1st Defendant.

From the foregoing I find that the the 1st defended wrongly paid out money which had been recalled due to suspected fraud.

FINAL ORDERS

1. I hereby enter judgment for the Plaintiff against the Defendants jointly and severally for **Kshs. 8,673,966.39** (Kshs. 9,450,000 less Kshs. 776,033.61)
2. Interest on amount in order 1 above to be paid by Defendants at Courts rate from 2nd September 2015.
3. Costs to the Plaintiff.

Judgment Delivered, Dated and Signed at Nairobi this 13th day of December, 2018

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RACHEL NGETICH

JUDGE

IN THE PRESENCE OF

Naomi: **COURT ASSISTANT**

Omino H/B for Luseno: **COUNSEL FOR PLAINTIFF**

Wachira: **COUNSEL FOR 1ST DEFENDANT**

No appearance for: **COUNSEL FOR 2ND DEFENDANT**