



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**COMMERCIAL AND TAX DIVISION**

**CIVIL SUIT NO. 373 OF 2011**

**ANTHONY KIMANI NGIGE.....PLAINTIFF**

**VERSUS**

**CO-OPERATIVE BANK OF KENYA LIMITED.....DEFENDANT**

**JUDGEMENT**

1. The plaintiff, **ANTHONY KIMANI CHEGE**, was a customer of the defendant **CO-OPERATIVE BANK of KENYA LIMITED**.
2. It is common ground that the plaintiff operated an Account Number **01109127579300** at the bank's Nairobi Business Centre Branch, Ngong Road.
3. The bank issued to the plaintiff a debit card **No.4407830011038792**, and the plaintiff was registered to the bank's Internet and M-Banking service.
4. Through the use of the service provided by the defendant, the plaintiff was able to operate his account through his mobile phone.
5. It is the plaintiff's case that as at 7<sup>th</sup> May 2011, his account had a Credit Balance of Kshs. 4,829,965/15.
6. Notwithstanding that credit balance, the bank had frozen the plaintiff's account, alleging that the said account was overdrawn.
7. However, because the account in issue was a Savings Account, the plaintiff insists that the account could not have been overdrawn.
8. In any event, the plaintiff makes it clear that he neither applied for, nor obtained any overdraft, term loan or other credit facility from the bank.
9. It is the plaintiff's case that the freezing of his account was unlawful, unjustifiable and an infringement of the fiduciary relationship between the 2 parties.
10. Apart from freezing the plaintiff's account, the defendant thereafter appropriated the credit balance to itself. That act was considered by the plaintiff to constitute the conversion of his funds, which the bank was supposed hold, as a bailee, to the order of the plaintiff.

11. In the result, the plaintiff asked the court to declare that the act of freezing his account was null and void.
12. The plaintiff wishes to have the defendant compelled to forthwith un-freeze his account, and to release to the plaintiff the sum of Kshs. 4,829,969/5, which was the credit in his account when it was frozen.
13. Furthermore, the plaintiff wishes to get an order to restrain the defendant from interfering with the operations of his account.
14. Finally, the plaintiff sought costs of the suit and interest on the sums found to be due to him.
15. In its Defence, the bank pointed out that as at 28<sup>th</sup> February 2011, the plaintiff's account had a credit of Kshs. 19,745/-. Thereafter, the deposits into the account increased dramatically, without any correlation to its previous conduct or to the plaintiff's disclosure of his income.
16. According to the bank, it did become suspicious in or about May 2011, when it noted certain un-reconciled debits in its Card Suspense Account. This led to investigations, which revealed a malfunction in the bank's computer system.
17. It is the bank's case that the malfunction had been exploited by certain customers, to effect online transactions at a cost which was not debitted to their respective accounts.
18. The bank stated that its investigations established that between October, 2010 and 6<sup>th</sup> May 2011, some seven (7) customers had run up debits totalling Kshs. 115,869,566/-, which had not been debitted into their respective.
19. It is the bank's case that the plaintiff was one of the 7 customers; and that the debits attributable to him totalled Kshs. 19,065,090/-.
20. All those debits were described as being in relation to internet transactions, connected to gambling.
21. The bank explained that the transactions were being carried out when the bank's main operating software for banking transactions was offline, having been shut down at the end of the day.
22. Following the investigations conducted by the bank, it concluded that the funds which were in the plaintiff's account were, in fact, money belonging to the bank. Therefore, the bank does not deem its actions as constituting the conversion of funds belonging to the plaintiff.
23. If anything, the bank believes that if the money was to be given to the plaintiff, that would result in him becoming unjustly enriched.
24. The bank had debitted the plaintiff's account with all the debits attributable to it, resulting in a debit of Kshs. 14,235,121/35.
25. As a result, the bank lodged a Counter-claim against the plaintiff, seeking to recover the sum of Kshs.14, 235,121/35, together with interest at 20% per annum from 10<sup>th</sup> May 2011.
26. The bank also claimed the costs of the suit and of the Counter-claim.
27. During the trial, 4 witnesses testified. Out of the 4, only one gave evidence on behalf of the plaintiff
28. The following are the Issues which the parties placed before the court, for determination;

**“1. Whether the Plaintiff's Account No. 01109127579300 had a credit balance of Kshs.**

**4,829,969.15 as at 7<sup>th</sup> May 2011 that was frozen by the Defendant.**

**2. Whether the plaintiff had applied for a term loan, overdraft or other credit facility from the Defendant so as to make his account slip into a debit status.**

**3. Whether a Savings Account is capable of being overdrawn.**

**4. Whether the Defendant furnished the Plaintiff with a Statement of Accounts.**

**5. Whether the Defendant's actions of freezing the Plaintiff's Account was lawful and/or justified.**

**6. Whether the Defendant's actions of freezing the Plaintiff's Account was an infringement of the fiduciary obligations owed to him and whether the Defendant's actions amounts to conversion of the Plaintiff's funds.**

**7. In what ways have the Defendants actions of freezing the Plaintiff's Account affected the Plaintiff.**

**8. Who between the Plaintiff and the Defendant is entitled to the funds held in the Plaintiff's Account?**

**9. Whether the Plaintiff is indebted to the Defendant in the sum of Kshs. 14,235,121.35.**

**10. Who should bear the costs of the suit and the Counter-claim??**

**29.** In his evidence, the plaintiff said that amongst the transactions he carried out using his account was online betting; and that he did so by instructing the Defendant to debit his account and to then remit funds to betting sites.

**30.** The plaintiff testified that he did either win or suffer losses at the betting sites.

**31.** When he made wins, the money would be credited to his account.

**32.** Another aspect of the plaintiff's testimony was that the bank could only accept his instructions to make debits if his account had sufficient funds.

**33.** In the event that the said account had insufficient funds, the plaintiff expected the bank to reject his instructions.

**34.** As at 7<sup>th</sup> May 2011, the plaintiff inquired from the bank and he was told that he had a credit balance of Kshs. 4,829,059/15 in his account. That information concerning the credit balance was relayed to the plaintiff at 13.14 hours, on 7<sup>th</sup> May 2011.

**35.** When he later made inquiries, the bank informed him that his account was overdrawn, to the tune of Kshs. 14,000,000/-.

**36.** On 9<sup>th</sup> May 2011 the bank informed the plaintiff that his account had a debit balance of Kshs. 14,235,121/-. However, the bank refused to provide him with a copy of his Bank Statement.

**37.** In a nutshell, the plaintiff insists that the bank had taken his money, without any colour of right.

**38.** He denied the contention that he had only used his debit card after working hours. He said that he used his debit card at any hour of the day.

39. During cross-examination, the plaintiff said that he used his phone to place bets. He did not use any other gadget.
40. Even when he wanted to ascertain his balances, the plaintiff obtained the same through his phone.
41. As regards the Statement of Account, the plaintiff confirmed that he never asked the bank for the same prior to 7<sup>th</sup> May 2011. And when he eventually got the bank statement on 9<sup>th</sup> May 2011, the plaintiff disputed it strongly.
42. When he was asked about how many times he betted, using his debit card, the plaintiff said that he did so “*numerous times?*”, but he was unable to provide a more precise answer.
43. After the plaintiff testified, he closed his case.
44. **DW1, JOHN MURREY** testified that when a customer of a bank conducts a transaction using a debit card, his bank is required to make payment to the Merchant from whom the customer had purchased goods or services.
45. The customer authorizes the transaction using his PIN. His banker, like the defendant in this case, would confirm that all the requirements had been met, before the bank grants approval.
46. In this case, the plaintiff was transacting gambling business. The Visa Merchant Code for Merchants of gambling business was given as Code 7995.
47. Once the bank had verified that everything was in order, it gave approval authorization, and the approval message is sent to the Merchant.
48. When the bank was issuing the approval authorization, it was simultaneously expected to debit the customer’s account. After debiting the customer’s account, the bank would place the funds in a suspense account, waiting for the Merchant to claim the same, through its own bankers.
49. In this case, the transactions were designated in Euros or United States Dollars. Therefore, the defendant worked with its Correspondent Bank, the **DEUTSCHE BANK, NEW YORK**.
50. Visa debited the defendant’s account at the Corresponding Bank, and passed on the money to the Merchant.
51. But because there would usually be a number of transactions, involving a number of customers, Visa would net-off the various credits and debits, involving various Issuing Banks and Acquiring Banks. Thereafter, Visa would send a consolidated settlement report to all parties involved, to enable them conduct reconciliations.
52. In this case, the plaintiff’s account at the bank should have been debited with the amounts which the defendant paid out to the various gambling sites where the plaintiff had made transactions.
53. However, the bank’s system is said to have had a fault, which prevented the debiting of the plaintiff’s account.
54. Whilst the system was not picking up the debits, the credits were being received through a different route.
55. Eventually, when the bank detected the error in its system, it posted the debits manually. And **DW1** provided the court with a detailed summary of all the debits and credits, which reflected total credits of Kshs. 5,800,529/15, and that debits of Kshs. 20,036,120/50.
56. By reconciling those 2 figures, the witness drew the conclusion that the plaintiff owed to the bank the

sum of Kshs. 14,235,121/35. It is that amount which the bank was claiming against the plaintiff, in its Counter-claim.

57. During cross-examination, **DW1** said that there was no bar to the plaintiff using his debit card for gambling.

58. But he expressed the view that the plaintiff only transacted the gambling business at night. However, when confronted with some particulars contained in the bank's own documents, the witness confirmed that there were instances when the plaintiff transacted business during the day-time.

59. In relation to the overdraft which the plaintiff allegedly accrued, John Murrey said that it was possible for a customer to run up an overdraft on his account or through his card, even without a formal overdraft facility.

60. Finally, this witness told the court that he was not aware why there was an internal delay at the bank, resulting in the late posting to the account, of transactions undertaken by the plaintiff.

61. **DW2, DAVID KIBET ROTICH**, told the court that the bank operated 2 banking systems which were linked through interface; being the Centralized Financial Banking System called "*Bank Master?*", and the Card Management and Switching system called "*Trans Master?*". The said interface enabled the Bank Master to automatically register transactions which had been captured on the Trans Master system when the former was down.

62. He added that the transactions which were previously undertaken during offline would be updated automatically reflected to Bank Master.

63. **DW2** concluded by saying that;

**"Whereas a bank-issued visa debit card is used, be it online, at a Merchant Point or at an ATM, details of the said transaction are captured by the Trans Master System. Such details are transaction date, time, card used, merchant and transaction type (e.g balance enquiry, cash withdrawal, mini-statement request, quasi cash or online purchase). The card system is able to capture all these details whether the transaction was successful or not?."**

64. In the light of that testimony, the Court is unable to fathom why the bank would need to have any manual entries, to capture transactions which were carried out when the card system had been closed at the end of the day.

65. **DW3, EDWIN KARURI**, testified that he was the Investigations Manager at the Co-operative Bank.

66. He said that the plaintiff was allowed to, *inter alia*, make payment for goods and services which he purchased over the internet.

67. He testified that on 7<sup>th</sup> May 2011, the bank's Security Department was informed by the bank's **ICT** Department, that the bank's Credit Card Debit Suspense Account had unreconciled debits, which appeared suspicious. Upon receiving that information, he commenced investigations.

68. The said investigations revealed that between October 2010 and 6<sup>th</sup> May 2011, debits totaling Kshs.115, 869,566/-, which had been transacted by 7 customers on their credit cards, had not been debited to their respective accounts.

69. The investigations further revealed that the debits were in respect of internet transactions relating to gambling.

70. According to Edwin Karuri, the transactions in issue were carried out when the bank's main

operating software for banking transactions was offline, having been shut down at the end of the day.

71. He explained that the interface between Trans Master and Bank Master had malfunctioned, so that debits arising from transactions emanating from gambling sites were not being recognized by the Bank Master.

72. Therefore, the investigation team utilized Authorization History of various cards to trace the transactions.

73. One aspect of investigations showed that all the 7 customers had opened their accounts at the bank's Ngong Road Branch, and they were introduced by one of the bank's employees. That revelation led to the suspicion by Karuri, that the bank employees were aware of the malfunction in the bank's system, and had encouraged customers to take advantage of the system.

74. Although Karuri had testified that the transactions in issue were all carried out after 6.00 p.m, **John Murrey (DW1)** had conceded, during cross-examination that the bank's own documents indicated that some transactions were carried out during the regular working hours.

75. Therefore, based on the available evidence, the court finds that the bank's narrative was not backed by the documents made available by the bank itself. In other words, it was inaccurate to assert that the plaintiff conducted his gambling transactions after working hours.

76. The insinuation by the bank must have been that the plaintiff was transacting business when it would be difficult for the bank to track down the said activities.

77. But as gambling on the internet was not prohibited, there was no reason why the plaintiff would have needed to keep his activities a secret.

78. I also find absolutely no evidence that either the plaintiff knew that the banking system had malfunctioned, or that he worked in cahoots with any employee of the bank, with a view to take advantage of the bank's system.

79. In any event, the bank also made it clear that it was not making any allegations of fraud against the plaintiff. To my mind, that means that the bank did not, *inter alia*, assert that the plaintiff was guilty of conspiracy, (*jointly with some employees of the bank*), to defeat the systems of the bank.

80. It is common ground that the plaintiff operated a Savings Account, and that he never applied to the bank for any overdraft facility.

81. Pursuant to Condition 11 (a) of the Terms and Conditions governing the operations of the account, the customer would need to apply separately for an overdraft facility, for it to become an entitlement, after the bank had given its approval for such facility.

82. When the bank had given its approval, the customer became entitled to overdraw his account, to the extent of the approval.

83. But as was stated in Halsbury's Laws of England, 4<sup>th</sup> Edition Volume 3, at page 156;

**“Drawing a cheque or accepting a bill payable at the banker's, where there are not funds sufficient to meet it, amounts to a request for an overdraft?.**

84. The bank provided several authorities which re-affirmed the position that when a customer issued a cheque, and if such a cheque was honoured notwithstanding the fact that the customer's account had insufficient funds, that constituted an overdraft.

85. The plaintiff accepts that legal position. However, he emphasizes that it was only applicable to

current accounts.

86. On the other hand, the bank says that;

**“...contractually, it matters not that the request by the customer is by means of a debit card as that is the instrument by which the bank allowed the customer to access his account?.**

87. The defendant did not provide any authority to back its assertion in that respect.

88. But I cannot overlook the facts in this case. First, the account was a Savings Account. Ordinarily, such an account is intended for use by a customer to “save” his income. Therefore, it would be expected that there should have been more inflows than the outflows.

89. But in this case, the plaintiff said that he specifically intended to use the account for purposes of gambling. He also explained that the process of gambling entailed the placing of bets, which should have been debited to his account.

90. That implies that for every credit to the plaintiff’s account, there should have been at least one debit.

91. The credits would be in relation to the wins which the plaintiff enjoyed.

92. But as the plaintiff conceded, there were times when he did not win. In such instances, there should have been debits, without any corresponding credits.

93. A perusal of the plaintiff’s bank account did not reflect the debits, which should have been the bets he placed when he was gambling.

94. I therefore find that the manual entries reflected in the account, as at 9<sup>th</sup> May 2011 were a realistic and probable reflection of the debits which ought to have been captured automatically, but which had not been so captured.

95. When the bank provided the details of the money debited on each occasion, they had discharged the evidentiary burden of showing the basis upon which the bank effected each such debit. At that point, it became incumbent upon the plaintiff to disprove such details by demonstrating what he considered to be a reflection of the only bets he had made.

96. The plaintiff did not disprove the accuracy of the debits effected by the bank. He could have done so by providing details of the bets which he had placed. His failure to provide those details, coupled with the failure to challenge each of the particular debits captured by the bank, leads the court to conclude that in all probability, the debits made by the bank were indicative of the correct factual position.

97. But the bank cannot escape censure. I so find because **DW3** testified that in January 2011, the issue of the debits not being reflected in the customer’s account, had already been detected by the bank.

98. Notwithstanding, the fact that the attention of that fact was drawn to the **ICT** personnel, the bank did not address it.

99. Considering that the plaintiff had opened his account in January 2011, the bank could have stopped the bleeding of the account if it had taken appropriate action in a timely manner. By failing to act appropriately and in a timely fashion, the bank negligently contributed to the continued debiting of an account which did not have requisite funds to meet such debits.

100. The bank’s claim arose from the fact that it had failed to do the right thing, on time. I find that the bank was right to debit the plaintiff’s account with the debits, once those were identified in May 2011.

101. Therefore, although the account had reflected a credit balance of Kshs. 4,829,969/15, the plaintiff is

not entitled to that sum because the sum total of debits attributable to him was Kshs.20, 036,120/50.

**102.** The bank was entitled to offset the debit balance against the credit; and that left a sum of Kshs. 14,235,121/35 payable to the bank, by the plaintiff.

**103.** But as the bank was contributorily negligent, to such a degree that it allowed the transactions to continue for a whole 4 months, I find that the losses should lie where they have fallen.

**104.** In the result, the plaintiff's claim is dismissed in its entirety. And in respect to the Counter-claim, the defendant is found to be entitled to no compensation for any part of the sum of Kshs. 14,235,121/35, because it was contributorily negligent to that extent.

**105.** Each party will bear his own costs of the suit.

**DATED, SIGNED and DELIVERED at NAIROBI this 20<sup>th</sup> day of February 2017.**

**FRED A. OCHIENG**

**JUDGE**

***Judgement read in open court in the presence of***

Kamau for the Plaintiff

Ouma for Mayende for the Defendant

Collins Odhiambo – Court clerk.