



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL APPEAL NUMBER 92 OF 2013

BARCLAYS BANK OF KENYA LIMITED.....APPELLANT

VERSUS

1. JANE NYAMBURA GAKURU..... 1ST RESPONDENT

2. WILSON NGOTHO GAKURU.....2ND RESPONDENT

(Both suing as personal representatives of Estate of the Late William Gakuru Gakio)

3. SERAH WAIRIMU GAKURU.....3RD RESPONDENT

(Appeal from the Judgment of the Chief Magistrate's Court at Naivasha, Hon. E. Boke (Ms.) Resident Magistrate delivered on the 23rd day of March 2012 in SPMCC No. 18 of 2011)

JUDGMENT

1. Barclays Bank of Kenya Limited appealed from the Judgment of the trial court delivered on the 23rd March 2012. The court held and found that the said bank was liable in negligence by allowing the third Respondent to transact and withdraw monies in the deceased's account when no Letters of Administration or a Confirmed Grant of Letters of Administration were availed to it, yet court proceeded to order that the appellant do pay the sum of Kshs.813,498/40 to the deceased's estate with interest.

2. The grounds upon which the appeal is based revolve on whether or not the trial Magistrate erred in law and fact in reaching the above conclusion in its judgment when the appellant relied **on a valid court order** directing it to allow the third Respondent:

“-- to access, manage deal, or to otherwise transact as the appointed Trustee of William Gakuru Gakio in Account No. [particulars withheld] held by Barclays Bank of Kenya Naivasha Branch.”

3. A brief background leading to the trial court's case and judgment is that the deceased, one William Gakuru Gakio was an account holder with the Barclays Bank in Account Number **[particulars withheld]** at its Naivasha Branch. When he died, the widow approached FIDA – Federation of Women Lawyers-to assist her and who by its letter dated 18th February 2008 requested the Bank to freeze the account while she pursued grant of Letters of Administration. That was done.

That on the 22nd July 2008, the 3rd Respondent, One Serah Wairimu Gakuru visited the Bank and

produced a court order issued by the **Senior Principal Magistrate Court at Limuru vide Misc. Civil Case No. 5 of 2008 – In the matter of the Estate of William Gakuru Gakio** and in the **matter of an application by Serah Wairimu Gakuru** – issued on the 22nd July 2008, in the following manner:

1. ---

2. That Serah Wairimu Gakuru is hereby authorised to access,manage, deal or otherwise transact as the appointed trustee of William Gakuru Gakio in Account Number [particulars withheld] held by Barclays Bank of Kenya – Naivasha.

3. That costs of this application be in the cause.

Orders accordingly.

Given under my hand and seal of this court this 21st July 2008.

Issued at Limuru this 22nd July 2008.

4. On receipt of the above order, the Bank, as its custom sought to authenticate and verify from the issuing court whether the court order was genuine and upon due diligence, the order was found to have been a valid and genuine court order. It then proceeded to allow the third Respondent to transact in the account. The total sums in the account were withdrawn by the third Respondent on the 23rd July 2008 and 25th July 2008.

Much later on 13th September 2010 the first and third Respondents through their Advocates forwarded a Certificate of Confirmation of Grant from the High Court at Nakuru instructing the Bank to draw a cheque for the amount in the account in favour of the administrators, the first and second Respondents.

5. It is the revelation that the money had been withdrawn by the 3rd Respondent that prompted the filing of the trial court suit against both the bank and the third Respondent, seeking orders that the two defendants jointly and severally do pay to the respondents the sum of Kshs.813,498/40 plus interest and costs.

6. In its defence, the Bank stated that it acted upon lawful and valid court orders and in compliance thereof allowed withdrawal of the monies in the deceased account and denied any fraudulent or irregular dealings in the account.

From the Record of appeal it does not appear like the third Respondent defended the suit. However, during the hearing of the suit before the trial Magistrate, the respondents discontinued the suit against the third Respondent/second Defendant in the primary suit leaving the Bank to fight it alone.

7. This court being the first appellate court is obligated to re-evaluate the evidence adduced in the trial court and come up with its own independent findings and conclusions.

See **Selle -vs- Associated Motor Boat & Others (1968) EA 123** among many other decisions.

8. **The Respondents case** was urged by **PW1 Wilson Ngomo Gakuru** one of the two administrators of the deceased's Estate. It was his evidence that the account was frozen following the letter from FIDA in July 2008 but in September 2010 when the confirmed Grant of Letters of Administration were presented to the Bank, it was found that the money had been withdrawn by the said Serah Wairimu Gakuru without notice to them. He testified that he did not know Serah Wairimu Gakuru. He however conceded that the Bank acted upon a valid court order and that the

money was withdrawn by Serah Wairimu Gakuru, not the bank, but blamed the bank for allowing the withdrawal by Serah Wairimu Gakuru.

9. **The Appellant's case** was presented was by its Operations officer at its Naivasha Branch, one Silas Saya. It was his testimony that he acted upon the Limuru Principal Magistrate's court order that upon due diligence was done was certified as a valid court order.

He testified that the order was duly authenticated and certificate issued by the Limuru Principle Magistrate's Court that it was a genuine and valid court order and as such, he could not disobey the court order that would have led to contempt of a court order. He produced a letter sent to the Limuru Principal Magistrates Court requesting for authentication of the court orders. He urged that the suit against it being irregular ought to have been dismissed. Asked why he did not call FIDA to inform them of the court order, it was his response that the freezing of the account was by letter and that a court order takes precedence over any letters by third parties.

10. The trial Magistrate upon interrogating the evidence made findings that the bank being aware that the account had been frozen ought to have informed FIDA of the court order and that is failure was negligent and in breach of its duty to its customer. The trial court on those reasons found the appellant Bank negligent and liable for the loss of the money and ordered it to pay back the same to the respondents with interest.

11. I have considered the evidence as adduced by all the parties. There is no dispute over the following facts:

That the account had been frozen following a letter by FIDA dated 18th June 2008 representing one Jane Gakuru, alleged to be the widow of the deceased account holder.

That the Limuru Principal Magistrate's court issued the order authorising one Serah Wairimu Gakuru to have full access and authority to transact the said account. That the said court order was duly certified to have been a genuine and valid court order upon due diligence by the appellant upon which the Bank acted in compliance with the said court order.

12. **The issues** then that arise for this court's determination are three fold:

1. whether the appellant abdicated its duty of care to its customer when it authorised withdrawal for the money from the subject account without being provided with Confirmed Letter of Administration for the Estate of the deceased.

2. Whether the appellant was under an obligation to comply with a genuine and valid court order, certified to be so.

3. Whether the trial Magistrate erred in law and fact by holding the appellant liable in negligence in the face of the Limuru Principal Magistrates Court order viz-a viz a letter written by FIDA on the freeze of the account.

13. It is trite that the relationship between a bank and its customer is one of trust. At all times a bank is under a duty to make reasonable inquiries regarding a possible breach of trust in the operation of an account and especially by third parties who are not signatories to the said account. These enquiries depend on the circumstances of each case.

It is stated in the **Canadian Court of Appeal** case cited in the case **A&A Jewellers Ltd -vs- Royal Bank of Canada (2001) Can L11 2040 (On CA) Moldarer JA** Stated:

“--- The bank is however not required to engage in an impractically extensive inquiry, nor is it to be held to a standard of perfection. All that is required is that it act reasonably in the circumstances.”(emphasis mine)

Sopika J. in Gold -vs- Rosenberg(1997) 3 S.C.R. 802 observed:

“that word reasonable at a minimum must include steps and measures that are part of the bank's obligation under the terms of the agreement governing the account and the banks policy. In other words, in assessing whether the inquiries made by a bank in a particular case are reasonable, it is proper to measure them against the terms and conditions of the agreement with the customer, as well as the Bank's policy. —”

14. The above observations were quoted with approval by **Hon. J.B. Havelock J** in the case in **Kenya Grange Vehicle Industries Ltd -vs- Southern Credit Banking Corporation (2014) e KLR**. What follows is therefore that where a Bank is under a duty to make inquiries of its customer regarding possible breach of trust, it will be found to be in contravention of constructive knowledge of the the breach of trust if it fails to make the appropriate inquiries.

15. In the present appeal, the bank upon being presented with the court order by the third Defendant/respondent, it conducted an inquiry by sending the order for authentication by the court that issued the same. The order was certified by the issuing court to be valid and genuine, and a copy of the certified Order was thus issued to the Bank.

Was that enough and reasonable inquiry?

The bank was required to act reasonably, and at the minimum, to take steps and measures that are part of the banks policy. The appellant's DW1, the operations officer testified that he took steps to get the court order authenticated and certified as valid, that it was part of the Banks policy to confirm whether the court order authorised a third party to transact in the customers account and whether it was valid and genuine.

It was its submission that upon authentication it was bound and expected to comply with the court order. It is further submitted that the bank had a legitimate and equitable consideration and expectation in complying with the court order.

16. Citing the Case **Teachers Service Commission -vs- Kenya National Union of Teachers and 2 Others (2013) e KLR** on disobedience of a court order, it was stated:

“A party who walks through the justice door with a court order in his hands must be assured that the order will be obeyed by those it is directed ---- a court order is not a mere suggestion or an opinion or a point of view. It is a directive that is issued after much thought and with circumspection. It must therefore be complied with and it is in the interest of every person that it remains the case. To see it in any other way is to open the door to chaos and anarchy --- If one is dissatisfied with an order of the court, the avenues for challenging it are also set out in the law. Defiance is not an option.”

17. Further, in the **Wildlife Lodges Ltd -vs- County Council of Narok & Another (2005) 2 EA 344,**

Learned Justice Ojwang JA added that:

“A party who knows of an order, whether null or valid, regular or irregular, cannot be permitted to disobey it ----.”

Given the circumstances of the appellant, did it then have an option not to comply with the Limuru Principal Magistrate's Court Order? The answer in my considered view is in the negative. Having confirmed the validity of the court order, the appellant did what it had to do in line with the law, to comply and authorised the third defendant/respondent to transact the account. See also **Rahash Popatlal Shah & Another -vs- National Industrial Credit Bank Ltd (2005) e KLR** where Hon. Justice L. Njagi observed:

“But when you come to an order which is suggested may have been made without jurisdiction, if upon looking at the order one can see that it is the ground of appeal. It seems to me that such a case has always been treated as one in which the court will entertain the objection to the order, though the person making the objection is in contempt---”

18. The above is a powerful observation. Evidence adduced by PW1 did not suggest that the Limuru Principal Magistrate's Court Order was either made by the court without jurisdiction or was it illegal or fraudulently obtained. All what he stated was that he did not know the said Serah Wairimu Gakuru, nor did he suggest that he was not aware of the application at Limuru Principal Magistrate's Court. The court was not expected to go on a fishing expedition as to the legality or otherwise of the said court order at that point in time. It was upon the respondents to bring all material facts to the court for consideration.

The respondents' submission is that the Bank having frozen the account by a letter from FIDA it ought to have informed it of the court order, and that the omission to do so constituted negligence and collusion with a stranger, the said Serah Wairimu Gakuru.

19. I have considered the evidence before the trial court. No where was it shown to the Bank by the respondents the names or particulars of the persons that had applied for Letters of Administration. No notice of the Petition for grant was filed with the bank that would have informed it of the possible administrators of the deceased's Estate. The letter by FIDA requesting for freezing of the Account did not give names of any petitioners. In my view, any person who had an interest in the deceased's estate could have applied for grant including the widow or by any other persons, that may have included the Third Respondent. Without any notice, it would have been asking the bank to engage in an impractically extensive inquiry that would have been outside its policy and mandate. **Kenya Grange Vehicle Industries Case – (Supra).**

20. I further find that no reason was given to the court when the first and second respondents discontinued the trial case against the Third Defendant/Respondent. Being the party that withdrew the money from the deceased's account, it would have been prudent that she was called upon to explain herself, the capacity under which she obtained the said court orders and her interest in the deceased's estate and relationship with the Respondents. This vital evidence was lost by the discontinuation of the suit against her by the Respondents. The Limuru Principal Magistrate's Court order may have been unpalatable to the Respondents but they had an option to challenge the same in court. No word was said as to whether or not the said Limuru Principal Magistrate's Court orders were challenged or not or whether indeed they were obtained by a “stranger,” as stated by the second Respondent.

21. The court is not permitted to wonder in the wilderness in search of answers that of necessity ought to be furnished by the litigants. It is trite law that he who alleges a fact must prove the same – **Section 107 & 108 of the Evidence Act.** The Respondents did not in my considered opinion prove the allegations of negligence and abdication of the appellant's duty of care towards the deceased's account to the required legal standard on a balance of probability.

22. Upon the above analysis and findings, this court finds that the Appellant did take reasonable steps as was expected of it, and upon its policy, to authenticate and confirm validity of the court order authorising the transaction of the deceased's account by the named Serah Wairimu Gakuru. It is a further finding that in the circumstances of the case, the appellant was under a legal obligation and duty to comply with the Limuru Principal Magistrate's Court Order.

23. Consequently, the court comes to the conclusion that the trial Magistrate erred both in law and fact by holding the appellant bank negligent and directing it to pay to the first and second respondents the sum of Kshs.813,490/40 with interest. Further, the court finds that it was improper for the first and second Respondents to have discontinued the trial case against the third respondent, Serah Wairimu Gakuru who held the key and vital information and explanations on

what interest and in what capacity she obtained the apparent offensive Limuru Court Order pursuant to which she withdrew the deceased's monies held in the appellant bank. However, hope is not all lost for the Respondents as they may still pursue the said Serah Wairimu Gakuru for payment of the money she withdrew from the deceased's account, without their authority.

24. For those reasons, the appeal is found to be merited and it is allowed.

The judgment and decree of the trial court case **Naivasha RMCC No. 18 of 2010** is hereby set aside, and the entire suit is dismissed as against the appellant.

Circumstances of the appeal and the primary suit persuade me to order that each party bears its own costs of both the primary suit and this appeal.

It is so ordered.

Dated, signed and delivered in open court this 2nd day of June 2016.

JANET MULWA

JUDGE