



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

CIVIL SUIT NO. 322 OF 2014

DUROGOODS LIMITED.....PLAINTIFF

VERSUS

CHASE BANK (KENYA) LIMITED.....DEFENDANT

RULING

1. This is an application by the plaintiff, for the striking out of the Defence. The application is premised on Order 2 Rule 15; Order 36 Rule 1; Order 13 Rule 2 and Order 51 Rule 1 of the Civil Procedure Rules.
2. The applicant also sought reliance upon Sections 1 A, 1 B and 3 A of the Civil Procedure Act.
3. It is the plaintiff's request that consequent upon the striking out of the Defence, this court should enter Judgment in favour of the plaintiff for Kshs. 7,493,113/-, together with costs and interest.
4. It is common ground that the plaintiff, **DUROGOODS LIMITED** was a customer of **CHASE BANK (KENYA) LIMITED**. The plaintiff operated a US \$ Account and also a Kenya Shilling Account at the bank's branch at Hurlingham, Nairobi.
5. On 3rd March 2013 Durogoods issued instructions to Chase Bank to debit its Dollar Account with the sum of **GBP** £ 51,000.00, which sum the bank was to then transfer to **MOTOR HEADHUNTERS LIMITED** in the United Kingdom.
6. The bank duly debited the plaintiff's account, and thereafter transmitted the funds to Motor Headhunters Limited.
7. According to the plaintiff, the bank had been instructed, on 7th March 2013, not to release the funds. Notwithstanding those instructions, the bank is said to have released the funds on 8th March 2013.
8. In the light of the express instructions from Durogoods, the plaintiff contends that the defendant had acted in the absence of the requisite confirmation from the plaintiff.
9. Furthermore, the plaintiff, Durogoods, attributed the defendant's action to negligence on the part of the bank.
10. Not only was the defendant said to have acted negligently and without requisite confirmation, but the bank is even said to have readily admitted its liability for the wrongdoing.
11. On account of those facts, the plaintiff held the view that the bank was truly indebted to it. Therefore, the Defence put forward by the bank was described as being devoid of merit. The said Defence was said to comprise of mere denials.
12. According to the plaintiff, the interests of justice and the overriding objectives of the Civil Procedure Act demand that the Defence be struck out.
13. On its part, the Defendant stated that the plaintiff had expressly instructed the bank to make payment to the **MOTOR HEADHUNTERS LIMITED**. Therefore, the Defendant described its

- actions as being deligent.
14. In effect, the Defendant is understood to be denying the assertions of negligence.
 15. It was the defendant's case that after the bank had carried out the instructions of the plaintiff, and when the funds had already been paid out, the plaintiff told the bank to put on hold the earlier instructions for payment.
 16. Indeed, the plaintiff is said to have acknowledged receipt of information concerning the transfer of funds, and to have ratified the actions of the bank.
 17. Notwithstanding the fact that the bank had written to the **MOTOR HEADHUNTERS LIMITED**, asking them to refund the money, which had, reportedly, been paid out in error, the bank denies having admitted liability.
 18. As far as the bank was concerned, the communication to **MOTOR HEADHUNTERS LIMITED** was nothing more than an act of good faith, geared towards helping its customer recover its money.
 19. In an endeavour to explain its actions, the bank exhibited other communication that was exchanged between the parties herein. As far as the defendant was concerned, the said correspondence demonstrates the true intentions of the parties. In particular, the correspondence was said to show that the plaintiff had given express written instructions to the bank to transfer the funds.
 20. Therefore, the bank submitted that the plaintiff ought not to be permitted to isolate one email from the others, for use in proving the bank's alleged liability.
 21. I will now give consideration to the legal authorities cited.
 22. In the case of **ONJALLAH VS KENYA COMERICAL BANK [2004] 2 E.A. 253**, the bank had debited the bank account of its customer after the bank had been told by **MUMIAS OUTGROWERS COMPANY LIMITED**, that the said company had had its funds fraudulently credited to the bank's customer.
 23. However, **MUMIAS OUTGROWERS LIMITED** did not give evidence at the trial, to prove that the money had been credited to the account of Onjallah, fraudulently.
 24. Therefore, the Court of Appeal held that the bank was obliged to pay Onjallah the money, because the bank was in breach of its contractual obligation to its customer, to only pay out money from the customer's account on the instructions of the customer.
 25. Therefore, if the defendant in this case had paid out money to a third party without the requisite instructions or authority from the plaintiff, the defendant would be liable to repay the money to the plaintiff.
 26. But the defendant insists that it was given express instructions to make payment.
 27. This case is thus distinguishable from that of **ONJALLAH VS KENYA COMMERCIAL BANK LIMITED [2004] 2 E A 253**, in which the bank had not even communicated with its customer before paying out the money to **MUMIAS OUTGROWERS COMPANY LIMITED**.
 28. In the case of **747 FREIGHTER CONVERSION LIC VS ONE JET ONE AIRWAYS KENYA LIMITED & 3 OTHERS (MILIMANI) HCCC NO. 445/2012**, Havelock J. concluded that the 1st Defendant had made a plain and obvious admission that the plaintiff had given it a loan. Therefore, the court was convinced that the defence lodged by the defendants was simply a smokescreen intended to try and avoid liability.
 29. Accordingly, the Judge struck out the defence, and granted judgment in favour of the plaintiff.
 30. It is clear that Havelock J. rejected the plaintiff's contention that the defence was scandalous. The learned Judge actually held that Defences based on an alleged mistake as to the identity of one of the parties to the contract, was a defence which was available at law, because if it were proved, such a defence would vitiate a contract.
 31. Thereafter, the court proceeded to strike out the Defence because there had been plain and obvious admissions by the 1st Defendant.
 32. In the case before me, the defendant sent an email to **JON BEARD** of Begbies Traynor (Central) LLP. It is not clear to me whether or not the defendant was already aware, as at 26th March 2013, that Jon Beard was one of the two administrators of Motor Headhangers Limited.
 33. Nonetheless, the defendant wrote as follows.

“Dear Mr. Beard,

The above subject refers. We have had to recall the funds (GBP 51,000.00) sent in favour of Motor Headhunter which our client Durogoods Ltd had left instructions for transfer for 2 vehicles he was looking to purchase.

As per our procedures, we called Mr. Karanja to confirm this transfer on Thursday the 7th of March and he advised us NOT to release the funds until otherwise advised.

Subsequently one of our associated unfortunately released the funds on 8th of March before getting final approval at which time Mr. Karanja was travelling to the US.

Due to this we have initiated a recall of the funds on his behalf given it was an error on our part. Once your bank receives the recall notice we would very much appreciate your co-operation in expediting the return”.

- 34.The letter was signed by Ms. Wachuka Kariuki, and it was copied to Mungai Karanja of Durogoods Limited.
- 35.It is clear that the defendant told Mr. Beard that the transfer of funds to Motor Headhunters Limited was an error on the part of the defendant.
- 36.It was said to be an error because the payment was made subsequent to the receipt of instructions telling the defendant not to release the funds.
- 37.In my considered view, if there was an issue between the defendant and Mr. Beard, the only plausible conclusion was that the defendant had unequivocally admitted having made an error when it paid the funds.
- 38.However, the defendant has expressly stated in its defence that the plaintiff’s instructions to the defendant were received after the defendant had already transferred the money.
- 39.In the defence, it is stated that the payment was made on 13th March 2013. Before taking the action of effecting the transfer of funds, the defendant asserts that the plaintiff had expressly instructed the defendant to transfer the funds speedily.
- 40.And after the plaintiff was informed about the transfer, he told the defendant that it would be fine.
- 41.Obviously, the message from the defendant is that the plaintiff was well aware about the unique circumstances under which the defendant wrote to Mr. Beard.
- 42.The defendant’s position was that if the letter to Mr. Beard is placed within its proper perspective, it would be clear that the only intent and purpose of writing to Mr. Beard was to try and help the plaintiff.
- 43.In the light of the emails exhibited by the defendant I hold the view that the explanation tendered by the defendant appears to be plausible.
- 44.I further hold that if the defendant proved the contents of the communication giving rise to its defence, that may well provide an answer to the plaintiff’s claim.
- 45.Therefore, there is a possible answer to the plaintiff’s claim. The admission, which is contained in the one email, is no longer so plain and obvious when it is placed within the context of all the other pieces of communication which the parties exchanged. If anything, I find that, on a *prima facie* basis, the plaintiff has not offered any explanation for the emails which appear to suggest that the plaintiff had expressly urged the defendant to act expeditiously and to transfer the funds in issue.
- 46.In the result, there is no merit in the plaintiff’s application dated 16th September 2014. It is therefore dismissed, with costs to the defendant.

DATED, SIGNED and DELIVERED at NAIROBI this 10th day of February 2015.

FRED A. OCHIENG

JUDGE

Ruling read in open court in the presence of

Miss Mugo for the Plaintiff.

Muriuki for the Defendant.

Collins Odhiambo – Court clerk