



Shah Munge & Partners Limited v National Social Security Fund Board of Trustees & 2 others (Civil Appeal 309 of 2018) [2023] KECA 1199 (KLR) (6 October 2023) (Judgment)

Neutral citation: [2023] KECA 1199 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL 309 OF 2018
HM OKWENGU, K M'NOTI & F SICHALE, JJA
OCTOBER 6, 2023**

BETWEEN

SHAH MUNGE & PARTNERS LIMITED APPELLANT

AND

**NATIONAL SOCIAL SECURITY FUND BOARD OF TRUSTEES 1ST
RESPONDENT**

CENTRAL BANK OF KENYA 2ND RESPONDENT

EURO BANK OF KENYA 3RD RESPONDENT

(An Appeal from the judgment of the High Court of Kenya at Nairobi (Azangalala, J.) dated 23rd October, 2009 In Milimani Civil Suit No. 1175 of 2002)

JUDGMENT

1. The suit, the subject of this appeal was commenced by the filing of a plaint which was subsequently amended vide an amended plaint dated December 10, 2002 by National Social Security Fund Board of Trustees (the Board of Trustees), (the 1st respondent herein and the then plaintiff). Central Bank of Kenya (CBK) (the 2nd respondent herein), Shah Munge & Partners Ltd (the appellant herein) and Ben Mtuweta were named as the 1st, 2nd and 3rd defendants respectively.
2. In its amended plaint, the Board of Trustees averred that it purchased a Treasury Bill No. 1471 with a maturity value of Kshs 256,000,000.00 as at 26th August, 2002 from CBK and that on 26th June, 2002, CBK, without any instructions from the Board of Trustees purported to rediscount the said Treasury Bill and paid the proceeds thereof to an account at National Bank of Kenya, the rediscounted value of Kshs 251,508,581.70 contrary to the instructions that payment was to be made to Kenya Commercial Bank; that the purported mandate to rediscount the bill was from National Social Security Fund (the Fund) which had no authority to give such instructions. The Board of Trustees demanded from CBK



the value of the Bill upon its maturity as at 26th August, 2002, a sum of Kshs 256,000,000.00 plus further interest thereon at 10% from 26th August, 2002 until payment in full; that the interest as at 26th September, 2002 was Kshs 2,153,333 thus bringing the total sum demanded to Kshs 258,133,333.00.

3. In respect of Ben Mtuweta, the then Managing Trustee of the Fund, the Board of Trustees contended that he purported to be its agent and proceeded to engage the appellant as a Stock Broker; that Ben Mtuweta without the Board of Trustees' authority caused the said sum of Kshs 251,505,500.00 to be paid to the appellant's account held at the 3rd respondent's Bank which Bank was known by the appellant to be in financial difficulties; that the said sum was credited to the appellant's office Account No. 200000155 on 1st July, 2002 and on the same date (1st July, 2002), Kshs 49,209,434.91 was used to offset the appellant's overdrawn account; that on 5th July, 2002 and 8th July, 2002, the appellant paid by cheque the sums of Kshs 50,000,000.00 and Kshs 14,000,000.00 respectively from the said office account. The Board of Trustees averred that as at 16th July, 2002, the appellant had utilized Kshs 125,079,699.96 out of a sum of Kshs. 251,505,500.00; that notwithstanding the reduced balance thereof, the appellant caused Euro Bank Ltd to issue a back-dated deposit receipt purporting to be holding the money in a fixed deposit account which clearly was not the factual position as the receipt was not backed by sufficient funds. The Board of Trustees sought judgment against the appellant, CBK and Euro Bank jointly and severally for:

“Kshs 258,133,333.00cts.

- a. Interest on (a) at 10% from 26th September, 2002 to 6th November, 2002 and thereafter at Court rates.
 - b. General Damages
 - c. Costs
 - d. Interest on (c) and (d) at Court rates”.
4. In its amended statement of defence dated 21st May, 2003, CBK, maintained that the Treasury Bill No.1471 was held in the name of the Fund and the Board of Trustees was hence non- suited and that in any event, the sum of Kshs 251,508,581.70 was deposited in the Board of Trustees' designated account.
 5. The appellant filed its amended defence and a counter-claim dated 13th December, 2002. Its position was that it received formal and written instructions from Ben Mtuweta and his Deputy Managing Trustee, one Mr.Chemng'orem to rediscount Treasury Bill number 1471 to be “converted to Treasury Bond”; that it received Cheque No. 001473 drawn on National Bank of Kenya dated 28th June, 2002 for Kshs 251,505,500.00 from the Board of Trustees and that it also received instructions to place the funds in Euro Bank Ltd. It denied utilizing the funds to clear an overdrawn account and/or issuance of cheques as alleged by the Board of Trustees. The appellant maintained that the Board of Trustees was issued with the deposit receipt by Euro Bank Limited for the full amount and hence culpability for the loss of the money, if at all, should be attributed to Euro Bank Ltd. In its counter-claim, the appellant sought various reliefs including a refund of a fine of Kshs 1.5 million imposed on it by the Capital Markets Authority “...as a result of the negligence” in handling of the funds, the subject of the suit.
 6. In Ben Mtuweta's defence dated December 17, 2002, he maintained that his actions were lawful and backed with the necessary authority.
 7. The dispute was heard by Azangalala, J (as he then was) who in the impugned judgment found against the appellant.
 8. The appellant was dissatisfied with the said outcome, hence this appeal.



9. In a Memorandum of Appeal dated 24th August, 2018, the appellant raised the following grounds of appeal:
- i. The Learned Judge erred in finding that the Appellant was liable to the 1st Respondent for breach of contract.
 - ii. The Learned Judge erred in failing to find that Managing Trustee of the 1st Respondent, Mr. Ben Mtweta, (now deceased) had the ostensible authority, power and mandate to issue the instructions that he did to the Appellant to place Kshs. 251,505,500/- in a fixed deposit account with the 3d Respondent.
 - iii. The Learned Judge erred in law and in fact in failing to consider the Judgement entered against the 1st Respondent's Managing Trustee, Ben Mtuweta (deceased) on his own admission that he instructed the Appellant, in his position as the Managing Trustee of the 1 Respondent, to deposit Kshs 251.505.500/- with the 3^o Respondent.
 - iv. The Learned Judge erred in law and in fact in finding that the Fixed Deposit Receipt for Kshs 251,505,500/- issued in the name of the 1st Respondent by the 3rd Respondent had no value.
 - v. The Learned Judge erred in law and in fact in finding the Appellant had converted the 1st Respondent's Kshs 251,505,500/- or part of it to its own use.
 - vi. The Learned Judge erred in law and in fact in failing to find that the 3rd Respondent had admitted liability to the 1st Respondent for the value of the fixed deposit receipt of Kshs 251, 505, 050/- issued in the name of the 1st Respondent.
 - vii. The Learned Judge erred in law and in fact in failing to consider the internal report of the 1st Respondent dated 19th August 2002, in which the 1st Respondent admits to issuing instructions to the Appellant to deposit Kshs. 251, 505, 050/- in a fixed deposit account with the 3rd Respondent.
 - viii. The Learned Judge erred in fact and in law in failing to find that the 1st Respondent in a letter dated 28th August 2002 demanded for repayment of Kshs 251, 505, 500/- from the 3rd Respondent.
 - ix. The Learned Judge erred in law and in fact in failing to consider the letter dated 19th September 2002 from the 1st Respondent to the Capital Markets Authority stating inter alia that:

“Our Board of Trustees has discussed this matter in detail and is concerned about Euro Bank's capacity to repay the fund's money despite its verbal undertakings to do so.”
 - x. The Learned Judge erred in law and in fact in failing to consider the statements of the officers of the 3rd Respondents recorded with the Police, and particularly that of Charles Kimumbu Ruto, who confirmed that the 3rd Respondent received Kshs. 251, 505, 050/- from the 1st Respondent through a cheque dated 1st July 2002.
 - xi. The Learned Judge erred in dismissing the Appellant's Third Party Notice against the 3rd Respondent. Further, the Learned Judge erred in failing to find that the Appellant had proved its case on a balance of probabilities against the 3rd Respondent who did not offer any witnesses or produce evidence controverting the Appellant's Third Party Notice, witness testimony and documentary evidence.



xii. The Learned Judge erred in law and in fact in dismissing the Counterclaim of the Appellant against the 1st Respondent.”

10. In its submissions dated 10th April, 2019, the appellant condensed the 12 grounds of appeal into three thematic areas. The first issue was whether the appellant offered brokerage advice to the Board of Trustees, whether it made false representation as regards the release of Kshs 251,505,500.00 for purposes of purchasing a bond in the secondary market; whether it provided investment advice to the appellant and whether there was a breach of contract on its part. The appellant contended that it never offered any stock-brokerage services to the Board of Trustees; that it was not a party to the request to move the money from CBK to National Bank of Kenya as this was done by the Board of Trustees’ Managing Trustee, Mr. Mutweta; that Mr. Chemngórem, the Fund’s Deputy Managing Trustee confirmed as much in his testimony when he stated

“I am a (sic) retired. Previously I was Deputy Managing Trustees personnel and administration (sic) of the plaintiff. I worked for plaintiff from March 1994 to March 2003. The managing trustees were: -

1. Muinah;
2. Masika;
3. Konzolo; and
4. Mutweta.

Mutweta was appointed in May 2002. He left in August 2002. He served for about 3 months. As Deputy manager trustee I did not attend board meetings. I recall the deposit of the 256,000,000/=, I also recall discounting of treasury bill no. 1471 which was rediscounted to purchase treasury bonds. This was when I was called by Mutweta. I went to the office of managing trustee and found Mr. Ruto former investment manager. The managing trustee had a letter written to Governor CBK instructing discounting of treasury bills. I see letter dated 25/6/2002 in plaintiff’s bundle. I signed the letter. I was shown this letter. I was told that Advisory and investment committee had discussed the matter and that the fund was going to purchase treasury bond from secondary market as that it was going to earn the fund a higher return. I was told to sign because the other deputy managing trustee, finance and investment was not around. The other deputy manager trustee was Rachel Lumbasio (PW1). I wish to produce this letter as a P.exhibit 7. I see documents in plaintiff’s bundle. It is a letter dated 25/6/2002. I signed it. It was addressed to CBK. It was authority to discount treasury bond. Proceeds were to be transferred to account at NBK. I produce letter as plaintiff exhibit 8. PW1 at the time it was told that, She was out of the office. From my own knowledge, she was not in the office. I see document 12(b) in the plaintiff’s bundle. It is sale confirmation of treasury bills bundle. I signed it. I produce it plaintiff exhibit 12(b). It was also signed by manager trustee Mutweta. The document was brought to me. I don’t know by whom this is the 1st document of the typed that I signed. I see document 19(c). it is a cheque for Kshs. 251.506,500/= (sic) to Shah Munge & Partners Ltd. It is dated 25/6/2002. I signed it and produce same as plaintiff exhibit 19(g). It was also signed by Mr. Mutweta. I signed as a signatory (A). I am one of the signatories. I was not involved in any manner in the transaction apart from merely signing.”



11. The appellant further contended that the Board of Trustees' letter of 25th June, 2002 authorized the rediscounting of the money. The letter stated:

“Nahashon Nyagah

Governor

Central Bank of Kenya PO Box 60000

Nairobi

Dear Sir

RE: Treasury Bill Issue No 1471 for Kshs.256 Million

We refer to the above quoted investment on Treasury Bills.

We hereby give authority for the whole amount of Kshs.256 (Two Hundred and Fifty-Six) Million Only to be rediscounted and converted to Treasury Bonds to mature on 28th August, 2002 with an interest rate of not less than 10% p.a. We have instructed M/S Shah Munge & Partners Ltd, Stock Brokers, to handle the transaction on our behalf.

Our CDS account with Central Bank is 051000 2356. Yours faithfully

B'N Mtuweta SK Chemn'gorem Managing Trustee

Deputy Managing Trustee (P&A)

CC:

M/S Shah Munge and Partners Ltd Nation Centre

Nairobi (Attention: Mr Arthur Namu).”

12. It was the appellant's position that on 1st July, 2002, the Fund's Managing Trustee, (Mr. Mtuweta) instructed the appellant to deposit the money with Euro Bank Ltd and that it was on the basis of those instructions that the money was deposited in Euro Bank Ltd. It denied being in breach of any contract.
13. The second thematic area was “whether the appellant issued instructions that the sum be used to pay liabilities, whether the appellant acted negligently or fraudulently in depositing the sum ... and whether the 1st respondent suffered loss”. The appellant submitted that the Managing Trustee's letter of 1st July, 2002 directed that the money be deposited in Euro Bank Ltd pending the identification of a bond; that it is Euro Bank Ltd who failed to release the money plus interest when the deposit matured on 28th August, 2008; that although the appellant's firm's account had been credited with the cash in the ordinary course of business albeit in error, this error was subsequently rectified and that in an undated letter to the 2nd respondent, Euro Bank Ltd admitted owing the sum of Kshs 251,505,500.00 to the Board of Trustees but it was unable to pay owing to “insufficient cash flow” on its part, hence the loss of that sum cannot be attributed to the appellant.
14. Finally, in the 3rd thematic area, the appellant argued that the learned judge erred in dismissing the appellant's counter-claim against the Board of Trustees. It was contended that the complaint made against it at the Capital Markets Authority was unlawful and that this unlawful complaint subsequently led to loss and closure of the appellant's business.
15. In opposition to the appeal, the Board of Trustees filed its written submissions dated 25th June, 2020. The Board of Trustees submitted that vide a crossed Cheque No. 001473 for Kshs 251,505,500.00 being drawn in favour of the appellant for the latter to buy bonds from the secondary market as



advised by the appellant, a contractual relationship between the appellant and the Board of Trustees was created; that Euro Bank Ltd on receipt of the cheque, deposited the funds in the appellant's office account which at the time was overdrawn by a sum of Kshs 49,209,434.91; that after off-setting the overdraft, the account was left with Kshs 202,296,065.95 which was variously withdrawn by the appellant and as at 31st July, 2002, the account had a balance of Kshs 61,741,273.21; that although on 3rd July, 2002, the appellant purported to write to Euro Bank Ltd allegedly pointing out that the money in its account belonged to the Board of Trustees and Euro Bank Ltd purported to issue a receipt for this deposit, the money was not 'transferred' to the Board of Trustees' account as the latter had no account in Euro Bank Ltd. Further, that the appellant continued to withdraw funds from this account even after notifying Euro Bank Ltd that the money was not its money but that it belonged to the 1st respondent.

16. On the dismissal of the appellant's counter-claim, it was submitted that although the appellant challenged the Capital Market's Authority Tribunal's findings against it at the High Court, his appeal was substantially dismissed and hence he cannot purport to revive an issue that had been determined against it. We were urged to dismiss the appeal with costs.
17. On 26th July, 2022, the appeal came up before us for hearing.
Mr. Ndolo, held brief for Miss Kethi Kilonzo for the appellant whilst Miss Olando held brief for Mr. Orenge for the Board of Trustees. There was no representation on the part of CBK and Euro Bank Ltd in spite of service of hearing notices on 4th July, 2022 at 1.44 PM upon the Attorney General for CBK and Mr. Kimani Michuki for Euro Bank Ltd.
18. Mr. Ndolo relied on the appellant's written submissions as aforesaid. On her part, Miss Olando relied on the Board of Trustees' written submissions and reiterated that contrary to the appellant's assertion, there was indeed a contract between the appellant and the Board of Trustees; that the appellant gave professional advice based on its letter of 27th June, 2002 as to where the funds would be invested.
19. The letter stated as follows:

"June, 27, 2002

The Managing Trustee National Social Security Fund

Box 30599

Nairobi

Fax

Dear Sir

REF: Purchase of Treasury Bonds For Kshs. 251,505,500

Dear Sir,

Further to our letter dated 26 June 2002, we wish to reiterate our earlier position that there is a one-year bond (FXT/1/2001/1) available in the secondary market with a coupon rate of 14.5% pa on sale carrying a yield of about 10% p.a.

Considering the prevailing Treasury bill rates and the duration between now and the maturity date of the Treasury bond in question, we highly recommend that you consider investing in the same.



However, we have noted that you desire an absolute return of Kshs 258 million by the end of August. Please put us in funds to complete the investment. Our fee is 0.040% of the investment which works out to Kshs 103,200 only.

Yours truly,

For: Shah, Munge & Partners Limited

Arthur Namu

Chief Executive”

20. That on 28th June, 2002, a cheque for Kshs 251,505,500.00 was forwarded to the appellant who then deposited the said amount with Euro Bank Ltd in the appellant’s office account who converted the money for its use. The letter forwarding the cheque to the appellant is dated 28th June, 2002. It read:

“28th June, 2002

M/S Shah Munge & Partners 12th Floor Nation Centre Kimathi Street

Nairobi

Dear Sir,

Our Cheque No.001473 for Kshs.251,505,00.

We forward herewith, our cheque No.001473 for Kshs.251,505,500.00(Read Kenya Shillings Two Hundred and Fifty-One Millions, Five Hundreds and Five Thousands Five Hundreds only), being the cost for purchase of Treasury Bond(FXT/1/2001/1) through the secondary market.

Please finalize the investment and forward confirmation records for the transaction for our records.

Yours faithfully,

B. N. Mtuweta

Managing Trustee”

21. That the Board of Trustees did not have an account with Euro Bank Ltd and further that one of the directors of the appellant was a member of the Board of Euro Bank Ltd, thus raising an issue of conflict of interest.
22. In a brief response, Mr. Ndolo pointed out that the issue of conflict of interest being alluded to by the Board of Trustees was not one of the issues raised at the High Court and that the instructions to deposit the money with the Euro Bank Ltd came from Mr. Mtuweta, the then Board of Trustees’ Managing Trustee.
23. We have considered the record, the rival submissions made before us, the appellant’s and the Board of Trustees’ submissions, the authorities cited and the law.
24. This being a first appeal our mandate is as set out in *Selle vs. Associated Motor Boat Co. of Kenya & others* [1968] EA 123 wherein it was stated:

“**An appeal to this court from a trial by the High Court is by way of a re-trial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions



though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect.

In particular, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif –vs- Ali Mohamed Sholan (1955)22 EACA 270”.

25. In our view, the appeal before us is a fairly straight forward matter. The payment of Kshs 251,505,500.00 by the Board of Trustees to CBK for the purchase of Treasury Bill No. 1471 is not disputed. However, on 25th June, 2002, the Fund's Managing Trustee and the Deputy Managing Trustee authored the following letter addressed to the then Governor, CBK

“Nahashon Nyagah:

“SF/(S)/A/16/14 VOL.1(3) June 25, 2002

Nahashon Nyagah Governor Central Bank of Kenya

PO Box 60000 Nairobi

Dear Sir

RE: Treasury Bill Issue No 1471 for Kshs.256 Million

we refer to the above quoted investment on Treasury Bills.

We hereby give authority for the whole amount of Kshs.256 (Two Hundred and Fifty-Six) Million Only to be rediscounted and converted to Treasury Bonds to mature on 28th August, 2002 with an interest rate of not less than 10% p.a. We have instructed M/S Shah Munge & Partners Ltd, Stock Brokers, to handle the transaction on our behalf. Our CDS account with Central Bank is 051 000 2356.

Yours faithfully

BN Mtuweta SK Chemn'gorem Managing Trustee Deputy ManagING TRUSTEE(P & A)

CC

M/S Shah Munge and Partners Ltd Nation Centre

Nairobi (Attention: Mr Arthur Namu)”

26. The appellant who was copied in the letter of 25th June, 2002 responded vide its letter of 26th June, 2002 as follows:

““The Managing Trustee

National Social Security Fund Social Security House PO Box 30599 Nairobi

Dear Sir.

Kindly put us in funds to facilitate purchase of the Treasury Bond from the secondary market as soon as the Central Bank has rediscounted your above referenced Treasury Bill. The particular Treasury Bond meeting your criteria can only be sourced from the secondary market. In this connection, please instruct your Bankers to pay the money directly to our



Bankers Stanbic Kenya Limited for credit of Shah, Munge & Partners account in their books. This will be a more secure and quicker method of getting the funds than a cheque.

We also look forward to receiving the relevant Treasury Bond purchase Transfer form (green in colour) duly completed in due course.

We take this opportunity to thank you for the privilege to serve your good institution.

Yours truly,

For: Shah, Munge & Partners Limited

Arthur Namu

Chief Executive

CC Mr. Nahashon Nyagah Governor,

Central Bank of Kenya

Box 60000

NAIROBI.”

27. This letter of 26th June, 2002 was followed by another letter of the same date (26th June, 2002) by the appellant confirming that there is a one-year bond (FXTI/2001/1) in the market with a coupon of 14.5% maturing on 26th August, 2002. The letter stated:

“The Managing Trustee 26/06/2002

National Social Security Fund Social Security House

Box 30509

Nairobi

Dear Sir

Re: Treasury Bill Issue No. 1471 For Kshs, 256 million

Your letter ref. SF/(S) A/16/14 Vol 1(3) dated 25 June 2002 refers. Based on our discussions and as confirmed in our earlier letter, we understood your instructions clearly as requiring us to source from the secondary market a Treasury Bond giving you a yield of not less than 10%. Your above referenced letter erroneously refers to 20% p.a. contrary to our verbal discussion. We wish to confirm that there is one-year bond (FXT1/2001/1) in the market with a coupon of 14.5% pa. maturing on 26 August 2002. We are looking for a seller who is willing to dispose of a bond that will give you a yield to maturity of not less than 10% pa. Naturally our negotiating position is to get a much higher yield.

We shall keep you posted of progress. Thank you for the opportunity to serve you.

Yours truly,

For: Shah, Munge & Partners Limited

Arthur Namu Chief Executive

CC. Nahashon Nyaga Governor Bank,

Central Bank of Kenya”



28. The advice on availability of the bond in the secondary market was reiterated in the appellant's letter of 27th June, 2002. It read:

“The Managing Trustee June 27, 2002 National Social Security Fund

PO Box 30599

Nairobi

Dear Sir,

REF: Purchase of Treasury Bonds for Kshs. 251.505-500

Further to our letter dated 26 June 2002, we wish to reiterate our earlier position there is a one-year bond (FXT/1/2001/1) available in the secondary market with a coupon rate of 14.5% pa on sale carrying a yield of about 10% p.a.

Considering the prevailing Treasury bill rates and the duration between now a maturity date of the Treasury bond in question, we highly recommend that you investing in the same.

However, we have noted that you desire an absolute return of Kshs, 258 million by the end of August. Please put us in funds to complete the investment. Our fee is 0.04% of the investment which works out to Kshs. 103,200 only.

Yours truly,

For: Shah, Munge & Partners Limited

Arthur Namu

Chief Executive”

29. In a letter of 28th June, 2002 (the following day) addressed to the appellant, the Managing Trustee of the Fund responded as follows:

“28th June, 2002

Ms Shah, Munge & Partners Ltd 12th Floor Nation Centre Kimathi Street

Box 14686

Nairobi.

Our Cheque No. 001473 for Kshs. 251,505,500.00

We forward herewith, our cheque No. 001473 for Kshs 251,505500.00 (Read Kenya Shillings Two hundred and fifty one millions, five hundreds and five thousands five hundreds only) being the cost for purchase of Treasury bond (FXT/1/2001/1) through the secondary market.

Please finalize the investment and forward confirmation records for the transaction for our records.

Yours faithfully,

B.N. Mtuweta

Managing Trustee”



30. In our view, and given the above exchange of correspondence, a contract was established between the appellant and the Board of Trustees. The letter of 27th June, 2002 addressed to the appellant was asking that the funds to purchase the bond be placed in their hands. This money was forwarded to the appellant on 28th June, 2002. The advice of the purchase of the bond from the secondary market in place of the investment in Treasury Bill had been made by the appellant. It is therefore fallacious for the appellant to contend that there was no contract between itself and the Fund. On receipt of instructions from the Fund vide letter of 25th June, 2002 signed by Mr. Mtuweta and Mr. Chemngorem, the Managing and Deputy Managing Directors respectively of the Fund, CBK transferred the sum of Kshs 251,508,581.70 to National Bank of Kenya (NBK). According to David Njenga Njoroge, an employee of NBK (he testified as PW3), on 27th June, 2002, NBK received the payment of Kshs 251,508,581.70 from the CBK being proceeds of discounting of Treasury Bills. This money was in the account for barely a day as on 28th June, 2002, the Fund asked that the money be transferred to its other account held by NBK. These instructions were acted upon. However, on 1st July, 2002 a Cheque No. 001473 for Kshs 51,505,500 from Euro Bank Ltd was received. The payee on the cheque was the appellant. The cheque was honoured on the same day.
31. Again, there is no contestation that at the time the funds hit the appellant's office account at Euro Bank Ltd, the same was overdrawn by Kshs.49,209,434.91, the then outstanding overdraft in the appellant's office account at Euro Bank Ltd. Part of the sum of Kshs 251,505,500.00 was immediately used to offset the appellant's indebtedness to Euro Bank Ltd. Thereafter, there were massive withdrawals from the appellant's office account at Euro Bank Ltd.
32. The said withdrawals are not denied by the appellant. It is common ground that the Managing Trustees of the Fund (Mr. Mtuweta) together with his Deputy Managing Trustee (Mr. Chemngorem) signed off the Fund's money without authority from the Board of Trustees. It is apparent that a scheme was hatched by the Fund Managing Trustees together with the appellant in collusion with directors of Euro Bank Ltd to misappropriate the money belonging to the Fund. This explains the letter of 25th June, 2002 signed by Mr. Mtuweta and Mr. Chemngorem asking CBK to release the money invested in Treasury Bill No.1417 the then fixed deposit for purposes of investing in a bond. The money was quickly paid to NBK and shortly thereafter paid to the appellant's account held at Euro Bank Ltd. It bears repetition to state that the Board of Trustees did not have an account at Euro Bank Ltd. The attempt by Euro Bank Ltd to hoodwink the Board of Trustees that it had placed the money in a fixed deposit account and attempting to issue a receipt to this effect were all actions made to cover up the fraud. The letter of 28th June, 2002 addressed to the fund stated:

“The Managing Trustee

National Social Security Fund NSSF Building

Nairobi

Dear Sir

Thank you for your letter dated 28th June 2002 together with the enclosed cheque No. 001473 for Kshs. 251,505,500.00.

We are pleased to attach for your records our receipt No. 46474 for the same amount. The Contract documents will follow as soon as we have found the bond and effected the transaction as per your instructions.

Thank you for the opportunity to be of service.

Yours sincerely



Arthur R. Namu Chief Executive Enc.”

33. The contents of the letter of 28th June, 2002 are in sharp contrast with the appellant’s letter of 9th August 2002 intimating that they had placed the funds in a deposit account. The letter read:

““The Managing Trustee

National Social Security Fund Social Security House

Box 30509

NAIROBI

Dear Sir,

Re: Conversion of Treasury Bills into Treasury Bonds Your letter dated 25 June Refers:

We acknowledge receipt of your letter dated 6 August 2002 on the above matter, the contents of which we have noted.

As you are aware, on 2 July, we informed you that it had proved difficult to find a holder of the bond willing to sell the bond at a price giving you the desired yield. In accordance with your instructions dated 1st July, we placed the funds on deposit to mature on the same date the bond would have matured in order to obtain your desired absolute return of Kshs, 258 million.

We shall therefore encash the deposit and pay you the funds plus accrued interest at the rate of 17.52% vide a bankers cheque on 28th August 2002. By a copy of this letter, we are requesting the Bank to effect the transaction on 28th August 2002.

Thank you for the opportunity to be of service.

Your faithfully,

For: Shah, Munge & Partners

Limited Arthur Namu

Chief Executive”

34. In our view, the two positions (i.e Euro Bank Ltd having placed the money in a fixed deposit account on 25th June, 2002 and issuing a receipt in the name of the Board of Trustees) and the other position that the appellant had itself placed the funds in a fixed deposit as stated in their letter of 9th August, 2002 cannot both be true. Besides, after the money was deposited in the appellant’s office account, it was defrayed immediately to settle an overdrawn account of the appellant. Thereafter, there were massive withdrawals from this account. This is how the learned judge summed up the evidence on the fate of moneys deposited in the appellant’s office account at Euro Bank Ltd.

“**At a casual glance, the 2 defendant’s claim against the 3rd Party would appear sound.

Evidence adduced however, gives a completely different picture. The said sum of Kshs. 251,505,500/= was paid to the 2nd defendant by a crossed cheque drawn on National Bank of Kenya. Being a crossed cheque, it could only be banked and cleared through the 2nd defendant’s account. The cheque was indeed deposited in the 2nd defendant’s office account with the 3rd Party which in turn issued a fixed deposit receipt on 1st July 2002 in the 2 defendant’s name. The plaintiff was not involved at this stage of the transaction. Indeed, it could not be involved because it had issued the said cheque, not to the 3rd Party, but to the



2 defendant. Following consultations, the 3rd Party cancelled the fixed deposit receipt in the name of the 2nd defendant and issued another one in the plaintiff's name on 3 July 2002 but back dated it to 1st July 2002. The plaintiff had not deposited any funds with the 3rd Party upon which a fixed deposit receipt would be issued. There is therefore no way any funds would be paid on the fixed deposit receipt issued in the name of the plaintiff. In any event the 2nd defendant had not endorsed the said cheque to the plaintiff. The plaintiff did not have any account with the 3rd Party. The 2nd defendant's office account into which the deposit had been made, was overdrawn by a sum of Kshs. 49,209,434.91/=. The deposit of the said cheque paid off the 2nd defendant's overdraft leaving the account with a credit balance of 202,296,065.95. The 2nd defendant issued a cheque on 2nd July 2002 for Kshs. 10,000,000/= and another one of Kshs. 1,388,900/= on 3rd July 2002. So, by the time the 3rd Party purported to issue the fixed deposit receipt in the name of the 2nd defendant, the 2nd defendant did not have the funds in its account to back the deposit. By the time the 3rd Party purported to cancel the first fixed deposit receipt and issue another one in the plaintiff's name, the said account had been depleted further by debits amounting to Kshs. 11,388,900.00. So, even the 2nd fixed deposit receipt was not supported by the requisite deposit.

The evidence adduced at the trial showed that the 2nd defendant was not restricted or in any way prevented from utilizing the said funds. The fixed deposit receipt issued in the name of the plaintiff had therefore no value since the plaintiff had not applied for the same nor deposited any funds with the 3rd Party. Any admissions or undertakings given to the plaintiff regarding the said deposit by the 3rd Party cannot found a cause of action in the absence of a bank/customer relationship which did not exist between the 3rd Party and the plaintiff.

In the end, I did not find as proved the 2nd defendant's claim against the 3rd Party. The 3rd Party could not honour fixed deposit receipts against which there were no funds and cannot therefore be called upon to indemnify the 2nd defendant or contribute to the settlement of the plaintiff's claim against the 2nd defendant. The 2nd defendant's claim against the 3rd Party is therefore dismissed."

35. It is noteworthy that Euro Bank issued a Fixed Deposit receipt on 1st July, 2002 in the name of the appellant. On 3rd July, 2002, this Fixed Deposit Receipt was quickly cancelled and issued in the name of the respondent under the pretext that it had been issued in the appellant's name in error. Never mind the fact that the 1st respondent did not have an account in Euro Bank Ltd and neither had the appellant signed off the funds in his account in favour of the respondent. Again, even at the time of the issuance of the said Fixed Deposit Receipt for Kshs 251,505,500.00, the money in the appellant's office account had greatly dwindled.
36. As for the counter-claim, we find no merit in the appellant's complaint entitling it to compensation. The Board of Trustees' money was deposited in the appellant's account at Euro Bank when the Board of Trustees had no account in Euro Bank. This was a scheme of stealing the money and the Capital Market Authority's action of suspending the appellant's operations for 30 days on account of professional misconduct cannot be faulted.
37. It is our considered view that the appeal herein is unmeritorious. It is hereby dismissed with costs to the 1st respondent.

DATED AND DELIVERED AT NAIROBI THIS 6TH DAY OF OCTOBER, 2023.

HANNAH OKWENGU



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JUDGE OF APPEAL
K. M'INOTI

.....
JUDGE OF APPEAL
F. SICHALE

.....
JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR

