IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: VISRAM, MWILU & AZANGALALA, JJ.A.)

CIVIL APPEAL NO. 194 OF 2014

BETWEEN

AFRICAN CORPORATION BANK LIMITED……...…APPELLANT

VERSUS

DR. ZULFIQUAR ALI JAFFERY…….....…RESPONDENT

(Being an appeal from the judgment and decree of the High Court of Kenya at Nairobi (Musinga, J) dated and delivered on 4th October, 2012

in

High Court Civil Suit No. 158 of 2005)

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JUDGMENT OF THE COURT

[1] In a further amended plaint dated 28th February, 2012 filed in the High Court at Nairobi Milimani Commercial Courts, **Zulfiquar Ali Jaffery**, the respondent herein, pleaded that he was at all material times a customer of **African Banking Corporation Limited**, the appellant herein, at its Koinange Street and Westlands Branches at which he had Fixed Deposit Accounts namely:

(a) Koinange Street A/c No. *particulars withheld* ;

(b) Koinange Street A/c No. *particulars withheld*;

(c) Koinange Street A/c No. *particulars withheld*;

(d) Westlands Branch A/c No. *particulars withheld;*

[2] He further pleaded that on diverse dates between 15th January, 1998 and 18th April, 2000 he would deposit various amounts of monies into those accounts and at no time during the said period, did he withdraw large sums of money from the accounts nor did he otherwise issue instructions to the appellant, its servants, employees or agents to withdraw any money therefrom save once when he authorized the transfer of Kshs.9,747,505/15 from the Koinange Branch to the Westlands Branch on the advice of the appellant's former Manager, **Abbas Zafar** (*Abbas*). He also pleaded that his intention was to earn interest

and not to withdraw his savings haphazardly or at all.

[3] The respondent further pleaded that by its letter of 12th January, 2000 the appellant, through the same Abbas, acknowledged that the respondent had a credit balance of Kshs. 9,747,505.15 in his account. He further averred that on or about 10th December, 2003 he requested for account statements and upon perusal of the same discovered that unauthorized withdrawals had been made from his said accounts. He further pleaded that it was the duty of the appellant to exercise reasonable care to protect his deposits which duty the appellant failed to exercise and was therefore grossly negligent. The respondent listed particulars of breach of contract and negligence and continued that subsequent to the filing of the suit the appellant furnished him with complete statements of account which, on analysis, reflected that Kshs.22,014,459.55 was withdrawn without his authority. He averred further that he had reported the theft of his money to the police who only obtained a warrant to investigate the appellants' books of account without more. In those premises, the respondent claimed from the appellant, among other reliefs, the said sum of Kshs.22,014,459.55 with interest at court rates from 30th May, 2005 until payment in full. He also prayed for any further relief as the court would deem fit to grant and costs.

[4] In answer to those averments, the appellant relied upon its amended defence dated 24th June, 2010. It admitted its relationship with the respondent and the existence of the accounts pleaded. It however, denied that the respondent's accounts had the credit balance pleaded or that the respondent authorized a transfer of Kshs.9,747,505.15 from the Koinange Street Branch to its Westlands Branch. The appellant further averred that the respondent would from time to time make large withdrawals from his fixed deposit account No. 1309 in its Koinange Street Branch. It further denied informing the respondent that he had a credit balance of Kshs.9,747,505.15 and that if any letter was addressed to him in that regard, the same was forged and/or fraudulently acquired, through collusion between the respondent and the said Abbas. It enumerated particulars of the fraud. It also denied default in furnishing the respondent with account statements as statements in fixed deposit accounts were not necessary. The appellant however averred that what it furnished the respondent with, were summaries of accounts for his various deposits and withdrawals. It denied that there were any unauthorized withdrawals from the respondent's accounts and found it strange that the respondent with earlier knowledge of the alleged unauthorized withdrawals did not report the same to it or the police for investigation.

The appellant also pleaded that it was the responsibility of the respondent as depositor to provide details of receipts and or documents evidencing deposits which he did not produce despite requests for him to do so. It further averred that all withdrawals made from the respondent's accounts were duly authorized by him. It denied breach of contract or duty and the particulars listed in the plaint. The appellant denied the computation made by the respondent and averred that the same did not take into account the summaries of accounts furnished to the respondent. It also denied that the respondent had suffered any loss and damage. In those premises the appellant denied the respondent's entire claim.

[5] After hearing the evidence and submissions, the learned Judge of the High Court (**Musinga, J** as he then was), concluded as follows:

> ***"56……,The defendant's assertion that the plaintiff made withdrawals from his fixed deposit accounts is in conflict with the finding that there was fraud involving the plaintiff's account, and the bank did conduct investigations and established that.***
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> ***57. For the defendant not to have records or evidence of how payments were made if at all, a part from assertions that it had the Fixed Deposit receipts as evidence of payment is puzzling. It is evident that there were serious weaknesses in the defendant's internal systems which were unable to prevent irregularities and thus failed to guarantee safe keeping of its monies. The fact that a senior officer could sign authorization question (sic) only goes to show the defendant's system's weakness which I believe enabled Mr. Abbas or other employees of the defendant to misappropriate money in his fixed deposit accounts.***
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> ***58. Apart from the assertion that it possesses the fixed deposit receipts, the defendant has not been able to show how payments to the plaintiff was effected.***

59. In view of the foregoing I find that the defendant is liable to the plaintiff and accordingly enter judgment in favour of the plaintiff as prayed in the further amended plaint."

[6] Against this decision, the appellant has preferred this appeal premised upon some twelve (12) grounds namely, that the learned Judge granted contradictory orders; that the learned Judge erred in finding that the appellant had breached its obligations to the respondent; that he failed to take into consideration the obligations of the respondent and the consequences of breach of such obligations; that he misapprehended the operation of a fixed deposit account; that the learned Judge erred in relying on the contradictory evidence of the respondent and that of a non-expert witness; that the learned Judge misunderstood, misapprehended and/or failed to consider, appreciate and/or take into account the appellant's defence and submissions that the respondent was part of a fraudulent scheme to defraud the appellant; that the learned Judge erred in failing to consider the evidence on withdrawals made from the respondent's accounts and that the findings of the learned Judge were not supported by the evidence.

[7] Counsel for the parties agreed to dispose of the appeal by way of written submissions which were duly filed.

[8] This is a first appeal. That being the case we are entitled to re-evaluate and re-analyze the evidence tendered before the trial court and come to our own independent conclusion bearing in mind that the trial Judge had the advantage of seeing and assessing the demeanor of the witnesses, an advantage we do not unfortunately enjoy, and should therefore give allowance for the same (see **Selle & Another vs Associated Motor Boats Co. Ltd [1968] EA 123**). As we carry out our duty as a second appellate court, we are also alive to the principle that a Court of Appeal will not normally interfere with a finding of fact of the trial court unless it is based on a misapprehension of the evidence or the judge is shown to have acted on wrong principles in reaching the findings. (See **Jabane vs Olenja [1986] KLR 661**).

[9] Having considered the submissions, the record, the grounds of appeal and the applicable law, we think that this appeal turns on whether the respondent had any credit balances in his fixed deposit accounts with the appellant and if so, whether the sums therein were withdrawn negligently and who between the appellant and the respondent was liable for the negligence.

[10] On that central theme, the respondent, a doctor in general practice who is also a physician, testified that he was a customer of the appellant and maintained fixed deposit accounts at its Koinange Street and Westlands Branches. He denied making any withdrawals from those accounts, as he explained he was saving for retirement. He reiterated his averment in the further amended plaint that he received a letter dated 12th January, 2000 authored by Abbas, the appellant's chief manager at the time,by which letter he was informed that his accounts had a credit balance of Kshs.9,747,505.15.

[11] He subsequently scrutinized his statements which reflected unauthorized withdrawals from his accounts which were not explained by the appellant and which had no supporting documents. He obtained a professional audit of the accounts which confirmed the unauthorized withdrawals and as Abbas became uncooperative, he reported to the Banking Fraud Unit (BFU) who commenced investigations.

[12] He further testified that the said Abbas left the appellant and joined another financial institution where he continued with is fraudulent activities resulting in his being charged with stealing by servant. He absconded and Interpol was looking for him.

[13] On cross-examination, he denied making any withdrawals and discredited two signatures at the back of some fixed deposit slips but admitted making a deposit of Kshs.3,274,000/= on an account held in the joint names of himself and his deceased wife.

[14] The respondent called **Mukash Shah** (PW2) (***Shah***), an accountant by profession who testified, among other things, that his analysis of the respondent's accounts reflected unauthorized withdrawals of Kshs.22,014,459.55. Shah failed to trace documentary support for the withdrawals. He however, saw five receipts which had signatures. He detected deposits and withdrawals without accompanying instructions. He also detected renewals which were not endorsed. In his opinion, most transactions in the accounts

were not supported by relevant authorization and that most documents were signed by Abbas.

[15] The appellant's case at the trial was presented through two witnesses,**Caroline Opiyo** (DW1) (***Caroline***) and **Stanley Karim Kibanya** (DW2) (***Kibanya***). Caroline was then the appellant's Head of Retail Banking. She admitted that the respondent was indeed the appellant's customer and initially maintained accounts in their two branches. She took the court through the process of opening and operating a fixed deposit account. She testified that the appellant did not keep any fixed deposit receipts and that the appellant would act on both verbal and written instructions. She acknowledged Abbas' letter to the respondent regarding the credit balance of Kshs.9,747,505.15. She also had no doubt that no evidence of forgery or collusion involving the respondent and Abbas had been adduced. She also admitted that the respondent had complained about the unauthorized withdrawals to the police and that normally, payments from a customers' account would be acknowledged by a customer's signature.

[16] With respect to the respondent's accounts however, she was aware of instances when the respondent would send a messenger after having talked to Abbas and payments would then be made in cash. These payments were made notwithstanding the appellant's standard procedure of requiring authorization by two officials. She identified two improper withdrawals. She admitted that internal investigators revealed fraudulent activity with the respondent's accounts. She further acknowledged that Abbas had subsequently been charged in a criminal case where he had defrauded Fidelity Bank. Although she testified that she frequently saw Abbas authorize cash payments in the presence of the respondent, there was no evidence that the respondent collected the alleged cash.

[17] Kibanya was the appellant's expert witness. He was an accountant by profession and was conversant with bank operations. He did a forensic audit of the respondent's accounts with the appellant and found certain abnormalities. He did not find it normal that the respondent reduced his claim from Kshs.60,139,099.75 to Kshs.22,014,459.55. Notwithstanding that abnormality, he testified that the respondent had been paid Kshs.19,876,490.50. Like Caroline, he testified about normal operations of a fixed deposit account. It was his testimony that the possession of the original fixed deposit receipts by the appellant was evidence of payment of the sums therein to the respondent. In his view, there was no requirement that a fixed deposit receipt be signed. Commenting on Abbas' letter acknowledging the sum of Kshs.9,747,505.15 to the respondent's credit, Kibanya testified that the same did not show how the said sum had been arrived at.

[18] On cross-examination, Kibanya admitted that he did not trace any written authorization or request for payment by the respondent but maintained that the respondent would go to the bank and cash some of the fixed deposit receipts. In his view, the evidence that the respondent was paid was in the original receipts which he surrendered to the appellant.

[19] Before considering the central issue in this appeal, we propose to first consider the appellant's complaint that the judgment itself is contradictory. That complaint was made because the learned Judge of the High Court entered judgment in favour of the respondent as prayed in the further amended plaint. The reliefs sought in the further amended plaint were as follows:

> ***"(a) A declaration that the defendant was negligent in maintaining the plaintiff's account in accordance with normal banking practices and failed in having internal checks and balances to safe guard the sanctity of the plaintiff's account and is now liable to make good all sums it received from the plaintiff together with the accrued interest thereon.***
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> ***An order for accounts, inquiries and directions of all money belonging to the plaintiff which was received by the defendant on diverse dates in respect of all accounts maintained at both the Koinange and Westlands branches.***
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> ***(b) An order that the defendant do pay to the plaintiff such sums as may be found due upon taking the said accounts together with interest thereon at the bank's applicable rates at the time the deposits were made and would have matured.***

(c) Payment of the sums in respect of the plaintiff's Account Number 0936 and 1309 of Kshs.22,014,459.55 made up as following

(i) Kshs. 5,198,158.00 with interest at court rates from 3rd September 2004 until payment in full

(ii) Kshs. 16,681,421.00 with interest at court rates from 18th August 2000 until payment in full.

(iii) Kshs.134,880.55 with interest at court rates from 30th May, 2005 until payment in full.

(d) Any further relief as the court deems fit in the interest of justice.

(e) Costs of the suit on an Advocate-Client basis and interest thereon at court rates."

[20] A judgment in terms of the prayers in the further amended plaint would mean thatall the above reliefs were granted by the learned Judge. Yet part of prayer (a) and(b) depended on the result of taking accounts. The record does not show that at any stage of the proceedings of the High Court, an order for

"*accounts, inquiries and directions on all money received by the respondent*"was ever made. The reliefs sought in the said prayers, if granted, would suggest that some other or further proceedings would have to be held before ordering the appellant to pay the sums found due.

[21] Our perusal of the proceedings however, leaves no doubt as to what the learned judge determined with respect to the dispute between the respondent and the appellant. To begin with, the record shows that the parties framed separate issues for determination which issues the learned judge set out in his judgment. It is significant that the issues identified by the respondent did not include the specific issue of accounts. Indeed the only suggestion that the accounts were raised as an issue is found in issue number 5 which was framed as follows:

"5. Is the plaintiff entitled to judgment as prayed in the further Amended Plaint."

[22] The appellant on its part also did not frame the taking of accounts as an issue for the determination of the court. The only issue which would remotely refer to accounts as an issue was issue number 4 which read:

"4. Whether the plaintiff has satisfied the required burden of proof to have judgment given in his favour."

[23] In our view therefore, the issue of taking of "*accounts, inquiries and directions of money belonging to the plaintiff*", although prayed for in the plaint, was abandoned and no determination by the court on the same was required.

[24] The learned Judge considered the evidence adduced by both sides and accepted the version given by the respondent. The respondent, in his testimony, did not seek the taking of accounts, but sought specified sums. He stated that he deposited, with the appellant, in fixed deposit accounts,specific sums which attracted interest. The appellant's witnesses did not also have any issue with regard to the taking of accounts. It was clear from the evidence given on its behalf that all monies deposited by the respondent were withdrawn or otherwise paid to him which contention is not in consonance with the taking of accounts.

[25] In those premises, our conclusion on the complaint raised by the appellant that the judgment of the court below was contradictory, although legitimate, is nevertheless only technical as mere clarification removes any perceived or apparent contradictions.

[26] The rest of the complaints raised by the appellant in its memorandum of appeal may be considered

together under the question whether the learned Judge erred in finding that the appellant breached its obligations to the respondent as its customer. The appellant denied that it was in breach of its duty of care to the respondent. Its principal argument, in our view, was that the accounts involved being fixed deposit accounts, its possession of the original fixed deposit receipts clearly demonstrated that the sums in those receipts had been paid to the respondent which payment thereby discharged the appellant from any liability in respect of the fixed deposit accounts.

[27] The appellant's further and secondary contention was that it was the duty of the respondent to take care of the original fixed deposit receipts and if he released them without payment, then he had himself to blame. The appellant invoked two English decisions to buttress that proposition.

[28] The first case relied upon is that of **Greenwood –v- Martin's Bank Limited[1932] AII E.R. 51**. There, a husband and wife had a joint account with the respondent who undertook to honour cheques signed by both of them. Later the joint account was closed and the husband opened another account in his sole name. It transpired however, that before the joint account was closed, and even when the husband opened his own account with the wife having no authority to draw cheques upon it, the wife repeatedly forged her husband's signature to cheques and withdrew money therefrom which money she applied to her own uses. The husband became aware of the forgeries after opening his sole account. The wife had however persuaded him not to report the forgeries. He kept silent for some time but after about eight months he reported the forgeries to the bank. The wife then unfortunately committed suicide. The husband sought to recover the sums paid out of his sole account using the forged cheques.

[29] The court held that the husband had owed a duty to the bank to disclose the forgeries immediately he became aware of them and his failure to make the disclosure at the earliest opportunity deprived the bank of the opportunity of bringing an action against the husband and the wife for the tort committed by the wife which action could not be brought against the wife as the same had abated.

[30] Those facts speak for themselves. They are clearly distinguishable from the facts herein. The appellant herein did not demonstrate that the respondent and Abbas had colluded in defrauding the bank. It was indeed the respondent who on discovering the irregular operations of his accounts, reported Abbas to BFU. The appellant never made any complaint against the respondent and has not done so to date.

[31] The second decision invoked by the appellant was that of **London Joint Stock Bank Ltd. –v- Macmillan [1918] A.C. 777.** There, the court held that it is a necessary condition of the relation of banker and customer that the customer should take reasonable care to see that in the operation of his account, the bank is not injured. A clerk of a partnership had altered the words and figures on a cheque on which were left spaces which the clerk filled with the additional figures and words thereby altering the amount payable on the cheque. Obviously those facts are clearly distinguishable from the facts herein. The appellant herein did not demonstrate any negligence on the part of the respondent as clearly acknowledged by Caroline, the appellant's Head of Retail Banking.

[32] On determining who was negligent, the testimony of Caroline is significant. As already stated, she was, at the time of testifying, the Head of Retail Banking at the appellant bank. She admitted that the letter dated 12th January, 2000 written to the respondent informing him of his credit balance of Kshs.9,747,505.15, as at the date of the letter, was authored by Abbas. Caroline described Abbas as the then appellant's Chief Manager with whom she had worked for seven (7) years. In that capacity, Abbas was probably the face of the appellant. He did not write the said letter in his personal capacity. The letter was from the appellant. Caroline may not have been able to verify whether the respondent actually had a credit balance of Kshs.9,747,505.15 but if she could not verify that position in her capacity as the Head of Retail Banking, then who would? The appellant had custody of the respondent's bank records and the figure of Kshs.9,747,505.15 could not have been plucked from the air. It is significant, that according to Caroline, the said letter of 12th January, 2000 was not a forgery. She also acknowledged that the appellant had no evidence of collusion between Abbas and the respondent. If that admitted sum was indeed available as unambiguously stated by Abbas in the said letter, it must have been withdrawn from the respondent's accounts without his authority. It is indeed subsequent to the same letter that the respondent complained to BFU about unauthorized withdrawals from his accounts. The appellant never made any

complaint against the respondent to the police or any other relevant authority.

[33] Caroline also made some strange statements with respect to the way the appellant operated. She testified that money from fixed deposit receipts would be acknowledged by a manager on behalf of a payee. With specific reference to the running of the respondent's accounts, She stated that he would sometimes send a messenger to collect cash from the appellant after talking to Abbas and that all payments to the respondent were made in cash. Yet Caroline produced no single acknowledgement signed by the respondent, not even a voucher, not a cheque, not anything.

[34] If the appellant, through its manager, could acknowledge receipts of payments on behalf of customers,if it could pay messengers on instructions given over the phone by customers without the messengers signing anywhere or without the appellant keeping a record of the transactions, we do not find it difficult to determine who was to blame as between the appellant and the respondent.

[35] Caroline further admitted that the appellant carried out internal investigations which revealed fraudulent activity with the respondent's accounts. Having admitted that the appellant failed to demonstrate collusion between Abbas and the respondent, then the fraudulent activity must have been perpetrated by the appellant's employees including Abbas. Yet the appellant made no complaint to any relevant authority. Caroline in fact testified that occasionally during the subsistence of the accounts, she would see the respondent and Abbas together in the latter's office where Abbas would authorize cash payments. Yet she produced no acknowledgements for any cash signed by the respondent.

[36] It would therefore not surprise anyone that when Abbas moved to Fidelity Bank, he got into trouble with the law and was charged with several counts of stealing by servant contrary to **section 281** of the **Penal Code**.

[37] If what Caroline admitted was not a demonstration of negligence on the part of the appellant, then we confess we do not know the term.

[38] In view of the manner in which the appellant operated the respondent's fixed deposit accounts, it was rather simplistic for the appellant to hinge its case on the fact that because it had possession of the fixed deposit receipts issued to the respondent, it demonstrated that the sums in the fixed deposit receipts were paid to the respondent. That, with respect, was not an answer to the respondent's case which was ambly buttressed by Caroline. We cannot therefore fault the learned Judge on his finding that the appellant was in clear breach of its duty of care to the respondent.

[39] In **Fazila Sharriff Tejpar –v- Fidelity Commercial Bank Ltd. [2008] eKLR,** the plaintiff sued the defendant bank on account of theft by it***s*** employee of his funds held by the defendant. We found that the bank was negligent by failing to have in place appropriate checks and balances and supervisory mechanisms. We stated:

> ***"The respondent cannot be blamed for negligence if the bank retained as its employee a person who had questionable integrity and who was less than honest. It was not anticipated that the respondent would be dealing with a potential fraudster. We therefore find that there was no contributory negligence on the part of the respondent."***

[40] We adopt those sentiments. The respondent herein did not anticipate that he would be dealing with employees of the appellant who had questionable integrity. We add that the respondent, in opening his fixed deposit accounts with the appellant, anticipated a system which was not open to abuse by its employees.

[41] In **Onjellah –v- Kenya Commercial Bank Ltd. [2004]1 KLR 702**, the High Court found that the appellant's employer had erroneously paid some money into the appellant's savings account and when the error was discovered, the employer requested the bank to return the money and the bank did so. On appeal, we,*inter alia*, held:

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3. The respondent/Bank had not proved that the remission of the money into the appellant's account was mistaken and that the appellant was not entitled to the amount so deposited in the account. The Bank was therefore in breach of its contractual obligation to its customer to pay out any deposits in the customer's account to the customer or to his order."

[42] In the said case, we cited with approval **Halsbury's Laws of England, 4th Ed. Vol. 3 paragraph 40** where the learned editors state:

"The receipt of money by a banker from or on account of his customer constituted him the debtor of the customer. The banker is normally liable to repay only the person from whom he received the money ------

------ the receipt of money on deposit account constitutes the banker a debtor to the depositor but not a trustee for him. The debt is payable either on demand or on conditions agreed with the depositor."

[43] We agree with that position of the bank/customer relationship. In our case the appellant, on receipt of the deposits made in the fixed deposit accounts, became a debtor of the respondent and could only pay out those sums on the respondent's demand or to his order. Having found that the appellant did not pay the said sums on the respondent's demand, our conclusion is that it is clearly liable to the respondent.

[44] We think we have said enough to show that this appeal cannot succeed save for the clarification aforesaid. We order that judgment be and is hereby entered for the respondent against the appellant as follows:

(a) a declaration is issued that the appellant was negligent in maintaining the respondent's accounts in accordance with normal banking practices and failed in having internal checks and balances to safeguard the sanctity of the respondent's accounts and is liable to make good all sums it received from the respondent together with accrued interest thereon.

(b) The appellant do pay the respondent sums in respect of the respondent's account numbers 0936 and 1309 of Kshs.22,014,459.55 made up as follows:-

(i) Kshs.5,198,158.00 with interest thereon at court rates from 3rd September, 2004 until payment in full;

(ii) Kshs.16,681,421.00 with interest thereon at court rates from 15th April, 2000 until payment in full.

(iii) Kshs.134,880.55 with interest thereon at court rates from 30th May, 2005 until payment in full.

[45] The appellant shall pay the respondent's costs of this appeal and the costs of the suit in the High Court.

DELIVERED at NAIROBI this 7th day of October, 2016.

ALNASHIR VISRAM

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JUDGE OF APPEAL

P. M. MWILU

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JUDGE OF APPEAL

F. AZANGALALA

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR