



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: OMOLO, GITHINJI, JJ.A & RINGERA, AG. JA)

CIVIL APPEAL NO. 259 OF 2001

BETWEEN

LAZARUS MASAYI ONJALLAH.....APPELLANT

AND

KENYA COMMERCIAL BANK LTD.....RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Kakamega (Birech, C.A) dated 12 th July, 2001

in

H.C.C.C. NO. 48.1997)

JUDGMENT OF THE COURT

In an amended plaint filed in the Superior Court on 3rd November, 1997, Lazarus Masayi Onjallah, the appellant herein, pleaded that he was at all material times a customer of the Kenya Commercial Bank, the respondent herein, at its Mumias Branch and that he maintained two interest earning accounts, namely, No 128-028-828 in his own name and No 128-038- 219 in the name his minor son, Antony Mukandia Masayi. He further pleaded that as at 24th June, 1994, his account number 128-028-828 had a credit balance of Kshs 398,000/= while his minor son's account had a credit balance of Ksh 52,000/= which sums added to a total of Ksh 450,000/ =. He further pleaded that on 27th June, 1994 when he went to withdraw his money from the aforesaid accounts he was dismayed to find that he could not withdraw the said amount or any part thereof as the accounts had been frozen by the branch manager. The appellant further pleaded that on 4th January, 1995 he was able to withdraw a sum of Kshs 47,000/ = being interest earned over a period of 6 months. He averred that the freezing of his accounts was unlawful and without justification and in total contravention of banking provisions and that the act of freezing was an adverse infringement of the privileged relationship between himself and the respondent bank. He averred further that according to the information available to him, he was not allowed to withdraw money from his accounts because the respondent had transferred the entire amount and interest thereon from his accounts to its own account and unlawfully appropriated the same. In those premises, he claimed from the respondent the sum of Kshs 450,000/= together with all accrued interest at current bank rates and general damages for breach of contract from 24th June, 1994 till payment in full or, in the alternative, a

reactivation of the said accounts unconditionally after disclosure to him of a duly computed standing balance. He complained that despite demand and notice of intention to sue given, the respondent had officially refused to comply and offer amends.

In answer to those averments in the amended plaint, the respondent filed an amended defence on 2nd December, 1997. The respondent admitted its relationship with the appellant and the existence of the accounts pleaded. It denied that the appellant's accounts had the credit balances pleaded as at 24th June, 1994 and averred that the amounts pleaded in the plaint were erroneous payments credited into the appellant's accounts and that the same were refunded to the appellant's employers, Mumias Outgrowers Co Ltd in June 1994. The respondent further averred that the appellant's employer demanded its money after tracing from their records that the said money had been sent to the Bank fraudulently. Indeed, so the respondent further pleaded, upon the discovery of the fraud, the appellant's employer decided to have him arrested and charged with a criminal case of fraud at Kakamega. The respondent also denied that the appellant was allowed to withdraw the sum of Kshs 47,000/= as interest as claimed, or that the appellant was unable to withdraw the principal sum of Ksh 450,000/=, or that the appellant's accounts were unlawfully frozen. The respondent averred that it did not hold any money for the appellant as the same had been paid to his employer and he was aware of the fact.

After hearing the evidence and submissions, Commissioner of Assize *P K Birech* made the following findings of fact and law. The appellant was a customer of the respondent Bank at Mumias Branch. He maintained three savings accounts and one current account. The savings accounts were numbers 128-028-828 in his own name, No 128-035-211 in his minor child's name, and No 128-025-311 in his wife's name. Between August, 1993 and April 1994 some money was remitted into those accounts by Mumias Outgrowers Company (*Mocco*). The money remitted into the accounts came from the 15% retention dues which had been unprocedurally prepared and remitted into those accounts. The remittances were therefore erroneous. When the error was detected and the respondent was asked by *Mocco* to return the money, the respondent acceded to that request and returned what was available which was the sum of Kshs 402,151.85. On that premise, the respondent could not be held to have unlawfully frozen the appellant's accounts as an error or fraud had been discovered and the remitter of the funds asked for the said funds to be refunded which the respondent did without delay. If the appellant had a right to the sum of Kshs 450,000/= his remedy was against the body who laid a claim on that amount and to whom it was remitted. As regards alleged disclosure of the details of the appellant's account with the respondent, it was found that it was not the respondent who made the disclosures and that even if there had been such disclosure the appellant did not suffer any damage "given the way the whole episode was." The appellant's evidence that he was a successful businessman who used to make regular deposits into those accounts was not truthful. In the result, the appellant had not proved his case on a balance of probability and his suit was dismissed.

Having heard the arguments canvassed by both parties in this appeal we think that the issue of law which arises is whether a bank could lawfully debit its customer's savings account without reference to that customer and pay out all or any of the money credited into that account to a third party who claimed the same on the basis that the remittance into the customer's account was erroneous for having been made by mistake or as a result of a fraud on the third party by the customer. Unfortunately, neither party furnished the Court with any authority on the point. The appellant was on his part, content to argue that the debit of his account by the Bank without reference to him was in breach of the contractual relationship between banker and customer and the respondent was equally contented to impress on the Court that this was not an ordinary case of banker and customer but one where the customer had fraudulently induced the deposit made into his account with the respondent. Our own researches do not also disclose any direct authority on the point. We have therefore to approach the matter from general principles of banking law as they apply to deposit accounts, as the accounts in question here were all savings accounts.

In *Halsbury's Laws of England*, 4th Ed Vol 3, paragraph 40, the learned editors posit the law as follows:-

"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 repayable either on demand or on conditions agreed with the depositor.”

The above proposition would appear to support the appellant’s contention that the bank could not pay out or debit his account with any money save to himself or to his order on conditions agreed with him. However the respondent Bank’s position is that it debited the appellant’s accounts and paid out therefrom the sum of Kshs 402,151.85 on the request of *Mocco* who claimed to have remitted funds into those accounts by mistake. The *prima facie*, issue therefore is whether money allegedly paid into a customer’s bank accounts by mistake could be refunded to the payer.

The law appears to be settled that money paid under a mistake of fact is repayable. In *Kerrison v Glyn, Mills, Currie & Co* [1912] LJ KB 465, the House of Lords held that the position of a banker does not differ from that of any other recipient of money acting as an agent and, accordingly, money paid to a banker under a mistake of fact can be successfully re-demanded from the banker by the person who so paid it. In the words of Lord Mersy, at Page 472:-

“No doubt when a banker receives money, either from his customer or from a third person on account of his customer, he becomes his customer’s debtor for the amount so received. But this does not entitle the Banker to retain money which in common honesty ought not to be kept. If indeed, the banker has paid over the money to his customer, or has altered his position in relation to his customer to his detriment, on the faith of the payment, the banker may refuse to repay the amount and may leave the person who has paid him to enforce his remedy against the customer.”

To similar effect is an earlier decision of the House of Lords in *Kleinworth, Sons, and Co vs Dunlop Rubber Company* 97 LT (1907-08) 263. Summarizing the authorities, Lord Atkinson posited the position as follows:-

“Whatever may in fact be the true position of the defendant [the banker] in an action brought to recover money paid to him under a mistake of fact, he will be liable to refund it if it be established that he dealt as a principal with the person who paid it to him. Whether he would be liable if he dealt as agent with such person will depend upon this, whether before the mistake was discovered, he had paid over the money which he received to the principal, or settled such an account with the principal as amounts to payment, or did something which so prejudiced his position that it would be inequitable to require him to refund.”

On the basis of the above authorities it may be concluded that money paid by a third person to the bank either directly, or on account of a bank’s customer, is refundable if it is established that it was paid under a mistake of fact and the mistake has been brought to its attention before the Bank has either paid it out to the customer, or settled its account(s) with the customer in a manner which would amount to payment, or otherwise done something which has so prejudiced its position that it would be inequitable to require a refund.

How do those principles apply to the matter at hand? The respondent Bank acted on two letters from *Mocco* dated 19th and 20th days of May, 1994. Both letters claimed that money had been remitted to certain accounts (which included the appellant’s account) by mistake and asked for a return thereof. There was no explanation of the nature of the mistake and it was accordingly not possible to tell whether the mistake was one of fact or law. And at the trial the respondent Bank did not call any witness from *Mocco* to establish the basis of the latter’s claim to the money in the appellant’s accounts’. The only witness called by the respondent was its station head at the Mumias Branch who testified that the Bank received the two letters and acted thereon and ventured the opinion that as the Bank had received the money from *Mocco* and it had returned the same, it was not in breach of contract with the appellant. And the learned Commissioner of Assize on his part did not, and he indeed could not on the above evidence, make a finding of fact that the money paid to the Bank on account of its customer was paid under a mistake of fact. He was content to hold that the moneys deposited in the appellant’s accounts was unprocedurally prepared and remitted thereto and was therefore erroneous. He further held that if the amounts in those accounts were legitimate, the appellant was obliged to prove so and he had not discharged that duty.

In our view, in the absence of any proof that *Mocco* had paid the money to the respondent Bank under a

mistake of fact, the other findings and conjectures by the Superior Court as to how the money ended in the appellant's accounts were irrelevant and the ultimate finding that the respondent Bank was obliged to and acted properly in refunding whatever was in the appellant's accounts to the third party was erroneous in law. In the circumstances of this case, the Bank was in breach of its contractual obligation to its customer to pay out any deposit(s) in the customer's account to the customer or to his order. And the amount paid out to a third party in breach of that contract was the sum of Kshs 402,151.85. The position would have been different had the respondent Bank proved, probably by calling *Mocco* as a witness, that the remission of the money into the appellant's account was mistaken and the appellant was in fact not entitled to the amount so deposited in his account. Take for example a person who robs one bank and deposits the proceeds of the robbery in his account with another bank. That robber would clearly not be entitled to the proceeds of the robbery deposited in his account and the receiving bank would be, in law, justice and fairness entitled to pay out the money to the robbed bank, secure in the knowledge that it would be able to prove, if asked, that the money so paid out from the customer's account had been the proceeds of a robbery committed against the bank to which the money had been paid back. In this case the respondent Bank merely contented itself by saying that it had been asked to refund the money by *Mocco* who had paid it into the appellant's account. That was insufficient to relieve the respondent Bank of its obligations to the appellant.

As regards the appellant's claim for damages for breach of the duty by the respondent Bank not to disclose his account or the state thereof to third parties, we are satisfied, as the Superior Court was, that the claim was not established.

In the result, we would allow the appeal with costs, set aside the judgment and decree of the Superior Court and substitute therefor judgment for the appellant in the sum of Kshs 402,151.85 together with interest thereon at court rates from the date of filing suit until payment in full and the costs of the suit.

Dated and delivered at Kisumu this 9th day of July, 2004.

R.S.C. OMOLO

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JUDGE OF APPEAL

E.M. GITHINJI

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JUDGE OF APPEAL

A.G. RINGERA

.....

AG. JUDGE OF APPEAL

I certify that this is a true copy

of the original

DEPUTY REGISTRAR