



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 859 OF 2013

(Before Hon. Justice Mathews N. Nduma)

**SPIRE BANK LIMITED (formerly known EQUATORIAL
COMMERCIAL BANK LIMITED)CLAIMANT**

VERSUS

PETER HUGH HARRIS RESPONDENT

J U D G M E N T

1. The suit was sought by way of a Memorandum of Claim filed on 7th June, 2013 and later amended on 13th September, 2016 and filed on 14th September, 2016.
2. The Claimant seeks the following reliefs:-
 - a. A sum of USD 700,000 (at the then exchange rate of Kshs.88/-) together with interest thereon at the rate of 5.528% per annum being the then prevailing commercial rate at 20% levied on the over drawn portion from 29th May, 2012 until payment in full.
3. Interim orders were sought by the Claimant and were granted in a ruling dated 25th July, 2013 attaching 50% of the various properties owned by the Respondent pending the hearing and determination of the suit.
4. Further, the Claimant gave an undertaking in damages in the event the suit was finally determined to be ill founded and without merit.

Facts of the suit as pleaded

5. The Respondent was employed by the Claimant Bank as the Managing Director on 16th July, 2008.
6. The Respondent's delegated authority in respect of advances and/or lending for short term unsecured lending up to a maximum of Kshs.5,000,000 or the equivalent foreign currency.
7. The Respondent resigned from the employment of the Claimant in August, 2012.
8. That the Respondent in breach of his obligations to the Claimant under the contract and contrary to what is reasonably expected of a reasonable Managing Director of a banking institution and in excess of his delegated authority caused a total of USD 700,000 to be siphoned out of the Claimant bank through an unsecured lending to a Third party who was known to him.
9. The Respondent in making the said irregular lending did not seek and obtain the Mandatory Board of Directors approval of the one part nor did he ensure that it was supported by completely executed and sanctioned loan processing instruments that obtain within the Claimant Bank.
10. The particulars of breach by the Respondent were outlined to comprise:-
 - i. Acting in excess of delegated authority.
 - ii. Failure to ensure the lending was supported by complete and fully executed documentation.

- iii. Causing and/or defrauding the Claimant through a deliberate and reckless act of dishonesty.
- iv. Failure to disclose to the Claimant his close relationship to the Third Party who was being used as a conduct of the fraud; and
- v. Sanctioning the disbursement of a sum of USD 700,000 without seeking and obtaining the required sanction and or approval.

11. The Claimant prays the reliefs be granted with interest and costs.

Amended Defence

12. The Claimant Peter Hugh Harris, filed an Amended Memorandum of Defence on 7th October, 2016.

13. The Respondent admits that at all material times he was the Managing Director of the Respondent bank having been employed for a period of 2 years from 15th September, 2008. The contract was reviewed for a further three year period effective 15th September, 2010.

14. The Respondent admits that he resigned from the employment of the Bank on 12th November, 2012 upon giving the requisite statutory and contractual notice and served out his notice period. The Claimant Bank accepted his resignation.

15. In response to the allegations of breach of contractual obligations and/or irregular lending and/or fraud, the Respondent states that he performed his duties as Managing Director with utmost good faith, in strict accordance with his terms and conditions of employment and also in accordance with the rules and guidelines governing the running of a banking business. The Claimant was put to strict proof on the allegations made against the Respondent.

16. In short, the Respondent denied all the particulars of Claim and the reliefs sought by the Claimant in the Amended Memorandum of Claim and prays the suit be dismissed with costs.

17. The Respondent admits that during the tenure of his employment with the claimant certain credit facilities were given by the Claimant Bank to some of its customers and business relations. Those credit facilities subsequently became non performing.

18. The Respondent denies that liability of non-performing loans should be shifted to him. The Respondent denies that any of the facilities including that for US \$ 200,000 and US \$ 500,000 aggregating to US \$ 700,000 was irregularly or fraudulently granted to the bank customers. That the allegations made by the Claimant are patently false, unfounded and are denied and the Claimant is put to strict proof thereof.

19. In particular, Respondent denies having siphoned monies irregularly to Mr. Kevin Michael Connolly, pay stream limited and Abzu Capital Limited.

20. The Respondent pleaded further that;

a. Mr. Connolly was an individual well known to the Claimant Bank and was infact in a formal business relationship with the Bank. Mr. Connolly and the Bank entered into a business venture aimed at developing and distributing visa and master card credit cards. In addition Mr. Connolly was in talks with the Board of Directors of the Claimant Bank on the issue of securing potential investors for the Bank. That prior to the filing of the suit, the Claimant bank had resolved that Mr. Michael Connolly was indebted to the bank to the tune of several hundred thousand US Dollars. The said Kevin Michael Connolly had acknowledged to the Claimant that he owed to it the above mentioned debt and he undertook to pay on a defined date.

21. That the Claimant bank has wrongfully chosen not to pressure the debtor but chose to claim the amount from the Respondent.

22. The Respondent relies on various documentation to support his defence.

23. The Respondent further states that he filed a suit at the High Court being HCCC No.238 of 2013 upon the Bank refusing him and his wife to access monies from his accounts held in the Claimant Bank. That the hearing and determination of the suit at the High Court was stayed by Hon. Lady Justice Kamau on 18th June, 2013 pending the hearing and determination of the suit.

24. That this suit be dismissed with costs.

Oral Testimony

25. The Claimant bank called three witnesses namely, CW 1 Mr. Samuel Ndegwa Kimondo; CW 2 Dan Ameyo and CW 3 Martin Ernest in support of its case. The Respondent on the other hand called two witnesses, namely the Respondent himself RW 1, Peter Harris and Grayham Gilmour RW 2.

26. Oral evidence in chief was led at great length and diligently by Mr. Luseno for the Claimant bank in respect of CW 1, CW 2 and CW 3. Mr. Wachira closely and with great detail, cross examined the three witnesses. The reverse happened with respect of RW 1 and RW 2. At this stage, I pose to recognize the candor and professionalism demonstrated by the two counsel in this matter that has however taken too long to conclude due to various factors including that some of the witnesses were based in the United Kingdom and therefore took long to obtain.

Determination of the Suit

27. The issues that fall for determination in this matter are as follows:-

- a. Did the Respondent in breach of his contractual obligations led USD 700,000 in excess of his delegated authority?
- b. Did the Respondent in breach of his contractual obligations cause and/or defrauded the Claimant of the said USD 700,000 through a deliberate and reckless act of dishonesty.
- c. Did the Respondent fail to ensure that the lending of the said USD 700,000 was not supported by complete and fully executed documentation and thereby dishonestly allowed persons known to him to siphon money irregularly from this Bank.
- d. What reliefs if any is the Claimant entitled to.

Issues a, b and c are closely intertwined and shall be determined together.

Facts not in Dispute

28. Upon a careful consideration of the pleadings, oral and documentary evidence by both parties, the following facts are common cause and are not in dispute:-

29. A sum of USD 200,000 was paid out to a 3rd party on 29th May, 2012 by the Claimant Bank. A sum of USD 500,000 was paid to a 3rd party on 17th October, 2012.

30. The two facilities were advanced by the Claimant Bank separately and the total sum of USD 700,000 was never recovered by the Bank.

31. It is not in dispute that at the material time when the separate sums were paid to the 3rd parties by the Bank, the Respondent was the Managing Director of the Claimant Bank and was therefore overall in charge of the bank operations under the oversight of the Board of Directors whose chairman was CW 2, Dan Ameyo.

Facts in Dispute that have been proved

32. Whereas, the Claimant Bank states that a sum of USD 200,000 was paid out to Abzu capital on 29th May, 2012 with the approval of the Respondent, it is the respondent's sworn testimony that US \$ 200,000 was on 29th May, 2012 paid to pay stream limited, a local company on application by its Director, RW 2, Graham Gilmour. According to the evidence before court, the loan application was to purchase point of sales machines. RW 2 was Chief Executive of an entity called The Business Phone ("TBP") which in turn was the parent company of pay stream limited.

33. CW 1, Samuel Ndegwa confirmed to court that RW 2, was the Group Managing Director of Pay Stream Limited.

34. CW 1 while acknowledging that RW 2 was his boss went ahead to contradict the testimony by RW 2 that pay stream limited applied for the loan of US \$ 200,000. However, documentation at page 69 of the Respondent's bundle of documents being an email from one Elizabeth Machua, a relationship manager to CW 1 dated 26th June, 2012 expressly states that the loan was to Pay Stream Limited.

35. Furthermore, CW 2 Mr. Dan Ameyo, chairman of the Claimant Bank acknowledges in an undated letter at page 150 of the Respondent's bundle that monies were paid to Pay Stream Limited.

36. It is noteworthy that Elizabeth Machua was not called by the Claimant bank to put this matter to rest. CW 1 and RW 2 worked for Pay Stream Limited RW 2 being the boss of CW 1. The dispute between the two as to who was the recipient of the loan is purely an internal matter.

37. The funds having been advanced to Pay Stream Limited were then upon instructions by RW 2 transferred to Abzu Capital Limited. This was an internal matter between Pay Stream Limited and Abzu Capital Limited. The two companies as explained by RW 2 had entered into an "accommodation agreement" in furtherance of a joint venture project that they were undertaking with the claimant Bank.

38. It is for the Claimant to prove on a balance of probabilities that the Respondent breached any of his contractual obligations in approving this loan and sanctioning the transfer by Pay Stream Limited to Abzu Capital Limited. It is not in dispute that Kevin Connolly, was well known to the bank and therefore to the Respondent. It is also not in dispute that Kevin Connolly was a Director of Abzu Capital Limited. The allegation by the Claimant that Mr. Kevin Connolly was not known to the bank but was an associate and friend of the Respondent were ably rebutted by the Respondent and RW 2 in their testimony at pages 32 – 35. Clearly relationship between the Claimant Bank and Kevin Connolly existed as far back as 2011 and Kevin Connolly was through Abzu. Capital limited, sourcing investors to put money into the Claimant Bank. (See page 97 -112) Respondent's bundle.

39. The Claimant's Board itself had, in board meetings approved of projects being undertaken or being facilitated through Kevin Connolly (pg.28 and 45). The Claimant Bank through the Chairman Dan Ameyo CW 2 and a Director, Martin Ernest CW 3, confirmed to interact with Kevin Connolly after the Respondent left the Bank. They continued to discuss issues dealing with sourcing investors for the Bank. (See emails at page 86, 88 and letter at page 97 – Respondent bundle).

40. This issue of past knowledge and relationship between Kevin Connolly and the bank having been disposed off, of more importance is whether the Respondent ensured that Bank Policy and Bank procedures were followed in advancing USD 200,000 and 500,000 respectively to the third parties and if indeed, the Respondent exceeded his credit limit in approving either of the two disbursements. Furthermore of critical importance is the implications on the part of the respondent if he is found to have negligently or willfully failed to comply with any of his contractual obligations and the bank policy in disbursing the said loan to the third parties.

41. RW 1, testified in detail on the process of approval and disbursement of the US \$ 200,000. He stated that the various departments of the bank were involved in the said process. That these departments acted independently of each other and reported to various officers of the Bank and not necessarily all of them reporting to the Managing Director. The credit policy guided the process. RW 1 could therefore not solely approve and disburse the loan of US \$ 200,000 as CW 2 stated clearly. Management Committee had the mandate to approve a loan of US \$ 200,000 in the instance where it was fully secured. The policy provided –

“The Management Credit Committee will approve credit proposals per borrower upto Kshs.30 m if fully secured.”

Using the exchange rate at the time of Kshs 88 pleaded in the Memorandum of Claim, US \$ 200,000 amounted to Kshs.17,600,000. This loan was fully secured by a corporate guarantee from the Business phone company and a personal loan from Graham Gilmour RW 2 (RW 2 page 271 – 273). The Respondent oversaw the process of documentation was in place. The evidence before court clearly depict the effort respondent made to ensure that the loan was fully secured before it was disbursed even though this was the responsibility of individual departments of the Bank. It is also clear from the testimony of CW 1 and CW 2 that something went wrong in the documentation process hence the loan of US \$ 200,000 was not properly secured and upon default of payment by pay stream limited, the Bank was unable to recover the money. Members of the Credit Committee comprised The Managing Director (RW 1), General Manager and Head of Operations and Head of Corporate. The Approvals of the loan were done in a “Round Robin” manner ie. Not all members of the committee needed to sit together to give the approvals. The documentation was simply circulated to each of them. RW 1’s clear evidence is that the disbursement of US \$ 200,000 was actually given by the Management Committee as stipulated, within Claimant bank’s credit policy. No member of the Management Credit Committee was called by the Claimant to refute the testimony by RW 1 on this matter.

42. In **central microfilm operators (1990) Limited v Teachers Service Commission [2015] eKLR**, justice Odunga had this to say on the issue of failure to call critical witnesses –

“It is well known rule of evidence founded on section 119 of the Evidence Act that the failure by a party to call as a witness any person whom he might reasonably be expected to give evidence favourable to him may prompt a court to infer that the person’s evidence would not have helped the party’s case and would have been prejudicial to its case and that the witnesses may have technically avoided to testify to escape being embarrassed on cross-examination.”

See Green Palms Investment Limited v Kenya pipeline Company Limited Mombasa HCC No. 90 of 2003, Bukonya & Others v Uganda [1972] E A 549; R vs Ubale-[1938] 5 EACA 58.

43. It is opportune to note that the Respondent made great effort to have the Claimant produce all the relevant approval documentation, which was out of reach of the Respondent by fact of his having left the bank with regard to the disbursement of USD 200,000 and 500,000 in vain. The court also notes the conduct by the respondent that upon resigning from the bank, he continued to bank with the Claimant bank and was not in a hurry to close his accounts.

44. The totality of this evidence leads the court to make an inference that the Respondent had nothing to hide and had the Claimant produced the documentation sought, and called members of the Credit Management Committee to testify, this evidence would have favoured the Respondent’s case and would have been unfavourable to the Claimant.

45. The burden of proof regarding whether or not the Credit Policy was followed in approving the disbursement of US \$ 200,000 squarely lies with the Claimant Bank in terms of section 107 and 108 of the evidence Act, Cap 80 Laws of Kenya. Section 107 reads:-

“(1) Whoever desires any court to give judgment as to any Legal right or liability dependent on the existence of facts which he asserts must prove that those facts exists.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person”

46. In addition to the burden of proof, the Act, provides for incidence of burden under section 108 as follows:-

“The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.”

47. As to whether the correct procedure and policy was followed in the disbursement of USD 200,000 the court finds that the Claimant has failed to prove on a balance of probabilities that the Respondent had the sole responsibility to approve the loan and that the Respondent failed in his contractual responsibility to ensure that the Bank policy with regard to the approval and disbursement of the USD 200,000 was followed. On the contrary, the Respondent has ably rebutted the allegations by the Claimant Bank that he negligently and/or fraudulently caused wrongful and unprocedural disbursement of USD 200,000 to one Kevin Connolly. As a matter of fact, the money was loaned to Pay Stream Limited, a local company and disbursed to Abzu Capital Limited with the express approval of RW 2, Graham Gilmour, a Director of Pay Stream Limited. That the loan was approved by the Credit Management Committee in which the Respondent was a member and the Committee and the Respondent did not exceed its credit limit.

48. However, it is the court’s considered finding that the Credit Management committee collectively, failed to ensure that the sum of US \$

200,000 loaned to Pay Stream Limited and disbursed to Abzu Capital Limited was loaned and disbursed against cash collateral since the amount exceeded Kshs.15,000,000 that could be approved by the Managing Director and the Credit Management Committee when fully secured and without a cash collateral. The Claimant has successfully demonstrated contrary to the testimony by RW 2, Mr. Gilmour that the US \$ 200,000 was not backed by cash collateral.

49. The Credit Management Committee in which the Respondent was a member was negligent in the failure to ensure, bank policy was strictly followed. There is no evidence by RW 1 that the matter was escalated to the Board of Directors to obtain a waiver on the requirement of a cash collateral. This is the finding by the court. The implication of this finding on the reliefs sought by the Claimant bank will be discussed later in this judgment.

The Facility for USD 500,000

50. The matter of US \$ 500,000 is a different kettle of fish. RW 1 confirmed that the disbursement to Kevin Connolly was not a loan but was infact made to Kevin Connolly with the understanding that cash guarantee (cover) was contemplaneously being remitted by Kevin Connolly. Kevin Connolly was a foreigner and was a debtor of the Bank at the material time.

51. At page 128 of the Claimant's bundle, Kevin Connolly in an email wrote to one Loise as follows:-

“Hi Loise,

I am going to send you some payment for 5 swift payments off my account. Please prepare them as they are urgent and I will speak to Peter before I ask you to release them.”

The email was copied to the RW 1.

52. At pages 131, RW 1 authorized the payment in the following terms;

“You have received a series of 5 emails from Kevin Connolly to pay a total of USD 500,000 to various beneficiaries. This is to confirm that you may do so and cover is being remitted to his account today.”

RW 1 admitted in court having approved the payment. On the issue of cover, RW 1 stated in court –

“I said to her it was okay to pay as cover was coming in. Kevin was the back up. He promised to pay as soon as remittance were made.”

53. From the foregoing it is clear that RW 1 gave instructions to a bank staff to make payments of US \$ 500,000 relying only on the word of Kevin Connolly that he would remit the cash guarantee to his account. These indeed were very strange instructions coming from a Managing Director who had delegated authority from the Board to approve disbursement of monies against cash collateral of up to Kshs.20,000,000. The Managing Director also had delegated authority to approve unsecured short term lending up to Kshs.5,000,000. US \$ 500,000 at the time when 1 US \$ exchanged at 88 Kshs. Amounted to Kshs.44,000,000 (Fourty Four Million).

54. Under the Credit Policy at page 17-

“Any drawing against uncleared effects should be considered as overdraft and application should be submitted for approval to the relevant approval authority.”

55. Clearly, in the absence of a contemptaneous cash guarantee the request for US \$ 500,000 was an overdraft facility. The approving authority for such a facility was the full Board of Directors.

56. The Claimant has proved on a balance of probabilities that no authority of the full Board of Directors was obtained by RW 1 before authorizing release of the amount to a foreigner, Kevin Connolly. RW 1 presented in court at page 131 an email purporting to be a resolution by the Claimant's Board of Directors. This was clearly not such resolution. In any event the alleged approval is supposed to have happened after RW 1 had tendered his resignation as the Managing Director. RW 1 had resigned citing one of the reasons for the resignation to be failure by the Bank to accept Connolly and Abzu capital as an Equity Performer. The question that arises is how, one could grant an overdraft facility to a potential equity performer.

57. The Claimant relies on Section 59A of the Banking Act, Cap 488 Laws of Kenya to submit that the conduct by RW 1 amounted to fraud. The section defining fraud provides:-

“Include intentional deception, false and material representation, concealment or non-disclosure of a material fact or misleading conduct, device or contrivance that results in loss and injury to the institution with an intended gain to the officer of the institution or customer of the institution.”

58. The Claimant further submits that reckless conduct is defined in the Act to include:-

a. Offering facilities contrary to any guidelines or regulations issued by central bank.

b. Failing to observe the institution's policies as approved by the Board of Directors.

59. The Claimant wrote a show cause letter to the Respondent after he had resigned from employment. It was after the show cause letter that the Respondent panicked and commenced steps towards hiding his attachable assets. The Claimant submitted.

60. The Claimant submits that as a result of the fraudulent and reckless conduct by the Respondent, Claimant lost its shareholders monies in the sum of US \$ 700,000 and prays that the court finds the Respondent personally liable for the loss and pay accordingly.

61. The court is satisfied that the Respondent acted beyond his mandate in authorizing disbursement of US \$ 500,000 before cash supposed to provide cover were received in the customer's account. Given the amount of money involved, this action was grossly negligent in the court's considered view. The authorization was based on a false promise by Gilmore that cover would be released immediately. The respondent ought to have waited. He was overly enthusiastic to say the least. The officers who dispensed the monies without confirming that the cash guarantee was in place were equally negligent. This is the finding of the court on this matter.

Liability - Issue (iv)

62. The issue that the court must now determine is whether the Claimant is entitled to the reliefs sought. In particular the court must determine if the Respondent is liable to refund the sum of USD 700,000 disbursed to 3rd parties unprocedurally. The 3rd parties defaulted in their obligation to repay the facilities provided hence the claim.

63. It is the Claimant's case that the Respondent being the managing director approved the irregular and fraudulent transactions and should be held personally liable for the loss to the bank.

64. Claimant further submitted that, it is settled law that a party purporting to exercise power that is not donated to him is liable for loss incurred by that conduct.

65. Claimant further submitted that under the company law, the general rule is that –

“Where necessary approval is not sought and obtained, every director who is a party to the transaction and every director who authorized is liable to indemnify the company for the loss and damage incurred resulting from the breach.”

66. That RW 1 was the Managing Director and has not demonstrated that other directors were involved in two disputed transactions. That the Respondent is solely responsible for the loss. The court is invited to rely on the cases of –

a. Duckwari Plc vs Offerventure Limited (No.1) 1999 ch. 253;

b. British Racing Drivers Club Limited vs Hextail Erskille & Company (1996)3 All ER 667;

c. Item Soft Ware (UK) vs Fassihi (2004) EWCA; and Simon Mortware QC, Company directors, Duties, liabilities and Remedies second edition, Oxford University Press, to find the Respondent liable for the loss to the Claimant bank and judgment be entered against him accordingly. That the Respondent falls under the category captured under the doctrine of fraud on a power. That he committed a fraud on the powers donated under the contract of Employment he entered into with the Claimant and he should be held liable accordingly.

67. Regarding the authorities relied upon by the Claimant, in re **Duckwari Plc vs Offerventure Limited (No. 1) 1999 ch 253**, this case related to interpretation of sections 320, 322(3)(b) and 727 of the companies Act 1985. It was not shown that the transactions in issue and the applicable provisions were in any way similar to the facts in issue and the law applicable in this matter. The issue was whether parties entering into arrangement under section 320 were obliged to provide indemnity to the company **“for any loss or damage resulting from the arrangement or transaction.”** The court of appeal answered this question in the affirmative. This does not answer the issue before us.

68. The case of **British Racing Drivers' Club Limited & Another vs Hextall Erskine & Company** dealt with the issue of solicitor's negligence claims and is not relevant to the issue in question here.

69. The decision of the Supreme Court of Judicature in the case of **Item soft ware (UK) Limited v Kouroush Fassihi & 3 others** dealt with the issue whether the Judge was correct in law to hold that Mr. Fassihi was in breach of his duties as a Director/or an employee of the Respondent in failing to disclose his own misconduct at the time it occurred. The Judge had held that the employer was entitled to recover from him damages for breach of that duty suffered as a result of the termination of an agreement with isograph, otherwise than in relation to sales in the United States. Assessment of damages was stayed pending the appeal. The Supreme Court upheld the decision by the Judge that the Director/employee was obliged to disclose the misconduct that resulted in termination of sales agreement when it was discovered by the other party. The court made distinction between the position of a director from that of an employee to be that a director is subject to fiduciary duties and obligations whereas it is not necessarily the case with an employee.

70. The Respondent in this case is alleged to have failed to disclose his close relationship to Kevin Connolly before approving credit to him to the loss and detriment of the company. There is no evidence before court that the Respondent benefited in any manner from the impugned transactions other than mere suspicion from his alleged conduct in quickly approving these transactions without ensuring that the securities were perfected, leading to the loss by the bank.

71. This is a case of outright breach of a contract of employment. The consequences of such breach must be contained in the employment

contract itself and/or the policy document applied by the Respondent in implementing his contractual obligations and/or in the Employment Act, 2007 which regulates employment relationships in Kenya. In the case of US \$ 200,000, the breach was contributory as a member of the credit management committee whereas in the case of US \$ 500,000, the breach was predominatory if not solely by the Respondent himself. There is no specific statutory provision which was cited by the Claimants imposing duty to pay damages for loss incurred by the Bank due to negligence or gross negligence by the managing director. The present case in the court's view falls in the category of collective negligence with respect to disbursement of US \$ 200,000 and gross negligence in respect of US \$ 500,000. The Claimant bank did not prove any intentional fraudulent conduct on the part of the Respondent. If there was any, Criminal charges would have been commenced against the Respondent.

72. The conduct by the Respondent may equally be described to be an exercise of a power for an extraneous purpose. In this case, the persons granted the credit purported to be potential financiers or investors of the bank. This is the concept of fraud on a power as explained by Lord Parker in **vatchery v Paul [1915] AC 372, 378**. It does not necessarily denote a conduct amounting to fraud in the common law meaning of the word. It simply means that the power to lend was exercised by the Respondent with an intention beyond the scope or not justified by the bank policy document and the contract of employment. That the Respondent actually introduced the credit policy of the bank and went out of his way to look for investors to improve the bank's capital. That his resignation resulted from lack of support by the Board in his pursuit for investors. That his faith in the bank was evidenced by his continued retention of his and his wife's joint account at the Claimant Bank even after leaving the bank. That whereas the default by the 3rd parties was regrettable, it could not be attributed to any deliberate Criminal conduct on his part.

73. It is also common cause that a prudent banking institution is obliged to take out insurance cover in respect of foreseeable losses that may occur in the cause of normal banking operations resulting from negligent, reckless or fraudulent conduct by employees of the bank.

74. It is the Respondent's case that during his tenure the performance and profits of the Claimant bank improved by a big margin. That it was in conceivable that the Respondent would have deliberately conducted himself to the Loss and detriment of the Bank beyond the scope, or not justified by the bank policy document and the contract of employment.

75. The Respondent prays that the reliefs sought by the Claimant against him be dismissed with costs. That in any event the Respondent's wife has a beneficial interest in the joint accounts and other assets of the Respondent and as such the assets could not be wholly appropriated for action solely attributable to the Respondent to the loss and detriment of his wife.

76. That the Respondent has since applied and has become a resident of Kenya. That the allegations made against him are inconsistent with the moves by the Respondent to remain in the Country and continue to serve in the banking industry in Kenya. That he only transferred his house to his wife for personal medical reasons but not to conceal his properties with a view to evade liability for his alleged misconduct.

77. The contract of employment between the Respondent and the Claimant Bank which was renewed for a period of 3 years effective 15th September, 2010 provided for consequences for serious or persistent misconduct; breach of any of the provisions of the contract or of any of the regulations of the Bank; continuous or persistent neglect of duty to be termination of the contract of employment with or without notice.

78. The contract does not provide that the Respondent would be liable to payment of damages or compensation to the bank in event of any breach of the contractual terms.

79. The contract of employment does not specifically refer to a specific policy document by the bank that would attract payment of damages or compensation by the Respondent to the bank in the event of breach of contract.

80. The Respondent voluntarily resigned from the employment of the bank before any of the allegations made against the Respondent by the Bank were made to him. The issue of termination of the Respondent's contract did not therefore arise.

81. Employee/Employer relationships are governed primarily by the written contract. Any other policy documents intended to govern that relationship must be specifically referred to in the contract of employment or in an addendum if they were developed and adopted after conclusion of the contract of employment. Furthermore, the Employment Act, and other statutes governing specific industry provide the standard to be applied in respect of employees in that specific industry. In this case, the Banking Act, Cap 488 Laws of Kenya is applicable to the employment relationship between the Managing Director of a bank and the Bank.

82. We have not been referred to any provision in this Act, that provides for payment of damages and/or compensation by an employee in respect of losses that occur in the cause of employment. We were invited to look at section 9A thereof which merely define fraudulent and reckless conduct but no evidence was presented regarding specific obligation by the Respondent to pay damages or compensation in respect of bad debts that may be attributable to negligent, or grossly negligent conduct by an employee. The contract of employment between the parties only provides for the ultimate consequence of termination of employment with or without notice. No more.

83. As said earlier, case law referred to from different jurisdictions primarily dealt with local statutes and circumstances. The general common law principles of liability by a principal and agent are not applicable where a written contract governing the relationship between the parties is available and does not provide for the reliefs sought.

84. If the case by the Claimant Bank was and is proved that the Respondent received all or part of the US \$ 700,000 or directly benefited from the same as a result of conduct directly attributed to him by fact of his position with the Claimant bank, that would be a different matter. It is not the case before us unfortunately.

85. Accordingly, the court finds no basis of granting the reliefs sought by the Claimant bank against the Respondent.

86. The suit by the Claimant against the Respondent is dismissed and the following orders made in favour of the Respondent as against the

Claimant –

a. The orders by the court granted in favour of the Claimant against the Respondent in the ruling of the court delivered on 15th July, 2013 are discharged unconditionally. For the avoidance of doubt, the injunction prohibiting the Respondent from operating; disposing and/or accessing 50% proceeds in Bank Account Numbers 0100843101, 0400843103, 0200843103 and 0400843103 held with Equatorial Commercial Bank Limited; 50% of Government Bonds presently in the sum of Kshs.4,500,000; and Motor Vehicle KAU 040 Q station wagon is discharged.

b. The Respondent having contributed to the losses incurred by the bank in the manner described in this judgment is not entitled to the costs of the suit. Each party to bear their own costs of the suit.

c. The amounts held by the Claimant bank in the aforesaid accounts jointly held by the Respondent and his wife be availed to the Respondent with interest at the prevailing Commercial interest rate from 25th July, 2013 to the date of Judgment until the date the amounts are fully made available to the Respondent by the Claimant Bank.

Judgment Dated, Signed and Delivered in Kisumu this 14th day of February, 2019

Mathews N. Nduma

Judge

Appearances

Mr. Luseno for Claimant

Mr. Muchiri for Respondent

Crispo – Court Clerk