

**IN THE HIGH COURT OF TANZANIA**  
**(DAR ES SALAAM DISTRICT REGISTRY)**  
**AT DAR ES SALAAM**  
**CIVIL CASE NO 43 OF 2008**

**SAVINGS AND FINANCE COMMERCIAL BANK  
LIMITED.....PLAINTIFF**

**VERSUS**

**RHINO HOMES LIMITED.....1<sup>ST</sup> DEFENDANT**

**JAMES PETER RUGEMBE.....2<sup>ND</sup> DEFENDANT**

***17/11&18/12/2015***

**JUDGMENT**

**MWANDAMBO, J:**

In this suit the Plaintiff, a bank duly licenced to carry on banking business in the country has instituted a suit for recovery of Tshs 560,020,320/06 from the Defendants said to have been paid by mistake on diverse dates between 14<sup>th</sup> June and 8 July, 2005. To put the record in its proper perspective, the suit was filed in the name of Savings and Finance Bank Limited but it subsequently changed its name to NIC Bank Tanzania Limited vide certificate of change of name No. 25848 issued by the Registrar of Companies on 5 October 2010 and filed in court on 6 August 2012.

The facts relevant to this judgement are fairly straight forward. The 2<sup>nd</sup> Defendant was at all material times a Managing Director of the 1<sup>st</sup> Defendant and in that capacity he (the 2<sup>nd</sup> Defendant) was a signatory to two bank accounts opened on behalf of the 1<sup>st</sup> Defendant with the Plaintiff

at its branch in Dar es Salaam. It is alleged that on three different occasions, the 2<sup>nd</sup> Defendant presented three cheques drawn in the 2<sup>nd</sup> Defendant's favour by two different drawers. The first cheque is said to have been drawn by A&K Holdings from Standard Chartered Bank, shoppers Plaza Branch in Dar es Salaam for an amount of Tshs. 289,000,000/=. The other two cheques are shown to have been drawn by Apex Promotion from CRDB Bank, Kijitonyama Branch, for Tshs 172,458,000/= and Tshs 98,562,320 respectively. It is to be noted that the said cheques are said to have been presented through cheque deposit slips annexed to the plaint. According to the evidence of PW1 supported by a bank statement of the 1<sup>st</sup> Defendant (exh. P1) the Plaintiff credited the proceeds of the three cheques to the 1<sup>st</sup> Defendant's account and in the process, the 1<sup>st</sup> Defendant was allowed to withdraw money from that account through the 2<sup>nd</sup> Defendant. The withdrawals were by way cash and bankers cheques and by 8<sup>th</sup> July 2005, the Defendants appear to have exhausted the proceeds of the three cheques presented for payment by the 2<sup>nd</sup> Defendant.

Although the pleadings as well as the evidence tendered do not show if the said cheques went through the normal clearing process, it occurred later that the true owners had reported to their respective bankers that the cheques went missing and thus the said banks stopped payment. As a result, the drawers' accounts were not debited with the amount shown in the cheques and thus the Plaintiff did not obtain credit of the cheques which she could credit to the 1<sup>st</sup> Defendant's account. Since the 1<sup>st</sup> Defendant had already parted with the proceeds of the cheques, the

Plaintiff could not reverse the entries in the account and hence the suit for recovery of the said amount together with interest and costs.

The Defendants did not file their written statements of defence within the prescribed time following service and their attempts to file them out of time were put to rest by my brother (Amour, J) in his ruling delivered on 15 December 2014. That ruling resulted in the Plaintiff being allowed to prove its case ex parte. Perhaps it is not completely out of the way to mention in passing that hearing started with Hassan Rashid Singano (PW1) before Amour, J who for compelling reasons could not finish the trial and hence the reassignment to me.

During hearing, the Plaintiff produced three witnesses namely; Hamis Rashid Singano (PW1), Donata Severin (PW2) and Godfrey Nimrod Sigalla (PW3). PW1 testified as an Assistant Credit Manager of the Plaintiff and produced a bank statement (exh. P1) whereas PW2 and PW3 testified on behalf of CRDB Bank and Standard Chartered Bank respectively. Each of the two witnesses tendered in evidence letters said to have been written to the Plaintiff on 25 and 29 July 2005 respectively informing the latter of their decision to stop payment of the cheques following report by their true owners that they went missing. The court admitted the two letters as exhibits P2 and P3 respectively.

In his closing submissions, Mr. Pascal Kamala, learned Advocate for the Plaintiff invited the court to enter judgment as prayed because the Plaintiffs had proved case on the required standard. The learned Advocate submitted that the 1<sup>st</sup> Defendant through the 2<sup>nd</sup> Defendant obtained credit which did not belong to it and withdrew money from the account out of

credit which was fraudulent following report by the true owners of the cheques that the same had been stolen.

Upon examination of the evidence tendered, there is no dispute that the Plaintiff accepted the cheques in question presented by the 2<sup>nd</sup> Defendant on behalf of the 1<sup>st</sup> Defendant for collection and once cleared, the proceeds of the cheques would be credited to the 1<sup>st</sup> Defendant's account for utilization. However, as indicated earlier, there is no evidence to prove that the Plaintiff caused the said cheques to be cleared in the normal clearance process before crediting the 1<sup>st</sup> Defendant's Account with the proceeds thereof. Needless to say, was the Plaintiff precluded from demanding recovery of the money from its customer upon discovery that the 1<sup>st</sup> Defendant had no title to the credits by way of proceeds from the fateful cheques? I will answer that question shortly.

The question I have posed was considered and dealt with by the Court of Appeal in ***Silayo V. CRDB (1996) Ltd*** [2002] I E A 288 and accepted as sound principles of law developed by English courts beginning with the absolutist approach in ***Kelly V. Solami*** [1841] 9M and W54 and subsequent developments in ***Akeyjna V. Fairbairn Lawson Etc Limited*** [1943] 32 and ***Westdeutsche Landesbank Gizorentrale V. Islington London Borough Council*** [1966] 2 All. ER 961 on the right to recover money paid under mistake. Discussing the point further, the Court of Appeal stated:

*"...In practice it is perfectly in order to credit a customer's account with amounts in un cleared cheques, just as it happened in the instant case.*

*Should the cheque be subsequently dishonored, the banker is entitled to reverse the entry and ask the customer to obtain a replacement cheque; in other words, the amount entered in the customer's account does not irreversibly accrue until the completion of the clearing process: **Ellinger and Lomnicka Modern Banking Law 1994 at 335**. It is therefore recognized that mere crediting of a customer's account does not give value to the cheque, nor does it, without more, indicate that he is permitted to draw against the uncleared component of the balance: *AL Underwood Limited V Barclays Bank (1924) 1KB 775*. But should the banker represent to the customer, either expressly or by conduct that he might treat the money as his own, or negligently fails to discharge his duty to the customer, as to lead the customer to change his position and act to his detriment, the banker will not be permitted to recover money paid under a mistake...." (at page 293)*

It is glaringly clear in this case that the Plaintiff credited the 1<sup>st</sup> Defendant's Account with the amounts on uncleared cheques and permitted her to withdraw but that in itself did not preclude the Plaintiff from seeking recovery of the amounts withdrawn following discovery that the cheques in question could not be paid after the true owners had reported their losses. Of course the Plaintiff is not entirely free from blame

in the whole process but as discussed by the courts in *Kelly V. Solari (supra)* and *Akeyjna V.Fairbairn Lawson Etc Limited* (supra) negligence or recklessness on the part of the bank does not entitle the Defendant to unjust enrichment. Gladly, there is no defence in this case to the effect that the 1<sup>st</sup> Defendant was entitled to the proceeds of the cheques notwithstanding the defect in title thereto.

In the circumstances, I am satisfied that the Plaintiff was entitled to recover the money paid to the 1<sup>st</sup> Defendant by way of a suit as it has done following failure to reverse the entries into the customer's account.

Accordingly, judgment must be and is hereby entered for the Plaintiff against the 1<sup>st</sup> Defendant as prayed in the plaint. As for the 2<sup>nd</sup> Defendant, it is clear that he was the Managing Director cum signatory of the account but that in itself did not make him personally liable in a contract between the Plaintiff and the 1<sup>st</sup> Defendant. In the absence of any evidence to link the 2<sup>nd</sup> Defendant with that contract I would be hesitant to find him liable.

In the upshot, there will be judgment against the 1<sup>st</sup> Defendant for the amounts indicated in the plaint with costs.

**L.J.S MWANDAMBO**

**JUDGE**

**16/12/2015**

Delivered in court in the presence of Ms Esther Njau Advocate  
holding for Mr P. Kamala the Plaintiff this 18<sup>th</sup> day of December 2015.

**L.J.S MWANDAMBO**

**JUDGE**