

IN THE HIGH COURT OF TANZANIA

COMMERCIAL DIVISION

AT DAR ES SALAAM

COMMERCIAL CASE No. 123 OF 2017

MAXIMA CLEARING AND FOWARDING LIMITED.....PAINTIFF

Versus

NATIONAL MICROFINANCE BANK PLC.....DEFENDANT

JUDGMENT

MRUMA, J

The plaintiff a limited Liability company has sued the defendant bank for recovery of a sum of **T.shs.3,619,859,579.12** and **USD 1,091,717.62** being special damages for loss suffered by her due to the Defendant's negligence and failure to use reasonable skills, care and diligence in opening and operating two bank accounts in the name of the Plaintiff's company without her authority. The plaintiff is also claiming for general damages, interests and costs of the suit.

The Plaintiff in its Complaint states that it was incorporated on 21st October 2011 and its directors were Antony Lucian Uiso and Joel Lucian Uiso. Later on two more directors Amitel Lucian Uiso and Honesta Lucian Uiso joined the company. The share holders of the company were Antony

Lucian Uiso and Joel Lucian Uiso who held 200 shares each. The Secretary of the Company was Joel Lucian Uiso.

In an undisclosed date, the Plaintiff's company learnt that unknown persons have opened Tanzania Shillings' Account No. **20110020250** and **USD Account NO. 20110020251** in the Defendants' bank in the name of their company without the consent and knowledge of their Board of Directors'. On 10th February, 2017 they wrote a letter to the Defendants to request documents that were used to open the said bank account so that they could take action to remedy the situation. The letter was accompanied with a search report from BRELA which showed the share holders, Secretary and Directors of the Plaintiff's company. The Defendant responded to that letter on 22nd February, 2017 stating that she couldn't supply the requested information because that although the accounts were in the name of the Plaintiff's company, the Board of Directors was not entitled to share information about the account because according to the banking practices only the signatories were privileged to get information relating to the accounts.

It is the Plaintiff's case that on 20th June, 2017 the amount of money that was meant to be paid to her by its customers was paid into the said two accounts. The amount alleged to be paid to the said accounts were T.shs. 3,619,859.12 and USD 1,091,717.62 respectively which the Plaintiff is now claiming. The Plaintiff avers that there was fraud and the success of the fraudulent transactions was caused by the Defendant's negligence in opening those accounts in the name of the Plaintiff without complying with the good banking practice. According to the Plaintiff's plaint it had never opened an account nor had it ever

authorized or mandated any person to open and operate such an account in Defendant's bank.

The defendant in its written statement of defence denied all the allegations contained in the plaint. It has instead contended that so far as the Plaintiff had averred that it does not own or operate the bank accounts subject of this suit, the Defendant doesn't have any duty and obligations to disclose to the Plaintiff any banking or financial information relating to those accounts. Further that the Defendant's staff always exercise due diligence and care while serving her clients and as such no regulations, ethics or duty was breached. The Defendant further negated the allegations of negligence, fraud and banking malpractice.

At the final pre-trial conference five issues were framed for trial at the namely:-

1. Whether Bank account **No.20110020250** and **No.2011002251** were opened with authority and knowledge of the Plaintiff withdrawn by the plaintiff or under her mandate;
2. If the answer to the first issue is in the affirmative, whether the Defendant's refusal to supply information in relation to the said accounts was proper;
3. Whether the Defendant acted with negligence in the operation of the said Accounts;
4. What damages/loss did the Plaintiff suffer as a result (If any) of the Defendant's acts/omissions in relation to the Accounts;
5. To what reliefs are the Parties entitled?

Initially the Plaintiff was represented by Mr. Frodius Mutungi assisted by Asia Toputoola while the defendant was represented by Ms. Josephine Safiel and the matter was presided over by his Lordship Mr. Justice Mwandambo (as he then was) The plaintiff produced one witness Mr. Joel Lucian Uiso (PW1) who testified before Mwandambo J, and the defendant produced one witness, namely; Ms. Lilian Rugeiyamu Komuhangirwa (DW1), Senior officer of the Defendant's bank holding the position of Company Secretary of the Bank, who testified before myself.

In his testimony Mr. Joel Lucian Uiso (PW1) one of the Plaintiff's Directors testified that the Plaintiff's company was not a customer of the Defendant's but in the course of its dealing it discovered that on 2nd March, 2016 two bank accounts were opened and are being operated in the company name. He mentioned the bank accounts as Account **No. 20110020250 for USD Dollars and Account No. 20110020251** which was for local currency.

Immediately after realizing that, they wrote a letter to the Defendant's bank informing her about the existence of the said accounts and requested to be availed with documents which were used to facilitate their opening. To substantiate this, the witness tendered in evidence a letter (Exhibit P1) with Reference No. MAX/NMB/10022017 dated 10th February, 2017 and addressed to the Branch Manager of the Defendant Bank. In that letter the Plaintiff's company requested for copies of all documents which were used to open the two Account numbers at NMB Bank House Branch. The plaintiff claimed that the two bank Accounts

were opened without the knowledge of share holders and/or directors of their company.

The witness also tendered in evidence the Defendant's reply letter (Exhibit P2) dated 22nd February, 2017 and signed by Lilian R. Komwihangiro, the Defendant's bank Company's Secretary (DW1) in which they informed the Plaintiff that the requested information was confidential and privilege to account signatories only. That was followed by a demand notice (Exhibit P3) written by the Plaintiff lawyers and addressed to the Defendant's bank head office threatening legal action if the information demanded would not be supplied. The Defendant remained adamant and hence this suit.

On cross-examination PW1 stated that in their business practice, their customers make payments upon receiving invoices from them. When he was asked whether the Plaintiff raised any invoice against any of their customer, PW1 told the court that in their company invoices are prepared by accountant and he mentioned the officer concerned as one Michael Malisa who is no longer with their company. He insisted that their main complaint in this matter is that the Defendant's bank opened an account in their names without their consent and authorization.

For the defendant, DW1 testified that she personally dealt with the issue relating to this matter. She said that the Defendant replied to the Plaintiff's request for supply of documents used in opening the impugned accounts and informed them that law prohibits banks from giving any banking information to persons who are not account signatories. She said further that they could not divulge any information

to the Plaintiff because the Plaintiff had stated clearly that they do not own or operate the two bank accounts.

She however, conceded during cross-examination that for a company to open and operate a bank account, there must a company resolution to authorize its officers to open and operate an account.

Upon completion of hearing evidence, both counsels agreed to file closing submissions and they did so. With the above summary of evidence, I now turn to consider the written submissions filed by counsel. On issue number one, counsel for the plaintiff submitted that the plaintiff's ordeal is that unknown persons opened two bank accounts **No.2011020250** and **No.20110020251** with knowledge and assistance of the Defendant but without consent and authorization of the Plaintiff. It is the submission of the learned counsel that the said accounts were used by unknown persons who are signatories thereto to collect monies which were meant for the Plaintiff from the Plaintiff's clients. It is further submitted that the Plaintiff's clients' with whom it had done business paid the monies in the impugned accounts and unknown persons deviated the monies to the accounts without the Plaintiff's authority and knowledge. The learned counsel concluded that the fact that DW1 told the court that the opening of the impugned accounts followed all procedures including production of Memorandum of Association, Board Resolution, photographs and physical presence to sign the bank mandate, but the bank failed to bring any of them to testify signifies the Plaintiff's allegation that the Accounts were opened and operated without her authority.

In response to counsel for the plaintiff's submissions on issue number one, counsel for the Defendant agreed with the counsel for the Plaintiff that on the evidence adduced the Plaintiff was not aware on the opening and operations of the accounts. The learned counsel submitted that the evidence of DW1 and contents of Exhibit P2 all points out to the fact that the Plaintiff were not aware of the opening and operation of the two accounts.

I have carefully gone through the pleadings of the parties and counsels' submission on this issue. I have also reviewed the evidence adduced by both parties in this case and my finding is that it cannot be true that the Plaintiff were not aware of the opening and operation of the two accounts. According to paragraph 3 of the witness statement of Joel Lucian Uiso (PW1), which is his evidence in chief, the Plaintiff discovered that there were two bank accounts which had been opened and were being operated in their company's name. This was immediately after the said accounts were opened in March 2016 as, according to him they wrote to the Defendant to request for copies used to open the accounts immediately.

Another inference that the Plaintiffs were aware of the two accounts is the fact that while they alleges that they didn't had any access to the said accounts whatsoever, yet they are claiming that T.shs 3, 619,859,579.12 and USD 1,091,717.62 was deposited by their customers in the said accounts. The purported customers and the nature of the business which the Plaintiffs did with those customers were not disclosed to the court. In other words, the source of these huge deposits made into the two accounts had not been disclosed, though known to

the Plaintiffs to be payments from their customers for the business done. The inference that the Plaintiff had knowledge of the impugned accounts is also confirmed by the testimony of DWI Lilian Komwihangiro who when asked by the court to clarify on the results of the investigations conducted by their Forensic Department she told the court that their investigations revealed that there were two companies incorporated at BRELA in the same name of MAXIMA as the name of the Plaintiff. She said that they refused to divulge the information requested because the authors of Exhibit P1 did expressly state that they were not signatories of the two accounts.

It has been submitted by the counsel for the Defendant and correctly so, that on the evidence of PW1 there were three inferences to the effect that the Plaintiff knew about the opening and operation of the impugned accounts. He mentioned those inferences as the averment in the witness statement that the Plaintiff learnt about the opening of the two accounts, the allegations under paragraph 11 of the Plaintiff's Plea which states clearly that the Plaintiff is aware that the Defendant's bank has continued to operate the said accounts and paragraph 8 of the witness statement where PW1 stated on oath that on 20th June, 2017 T.shs 3,619,857,579.21 and USD 1,091,717.62 were withdrawn from the said accounts without mandate.

I do agree with the Defendant's counsel. The only conclusion that can be drawn from the plaintiff's pleadings and evidence that she learnt about the opening of the two accounts by unknown persons, her knowledge that some money had been deposited in the two accounts and her knowledge that on 20th June, 2017 over T.shs 3.6 billion and

over T.shs 1 Million were withdrawn by unknown persons, is that the accounts were operated with her knowledge. Accordingly I answer the first issue in the affirmative.

The second issue is, if the first issue is answered in the affirmative whether, the Defendant's refusal to supply the information about the account was proper. Submitting in respect of this issue, counsel for the Plaintiff submitted that since the second issue is dependent entirely on the outcome of the first issue and much as the first issue is answered in the negative, then it goes without saying that the Defendant's refusal to supply information in relation to the impugned accounts is also answered in the negative. With due respect to the learned counsel, I beg to differ.

The bank-customer relationship is regulated by the law. Section 48 (1) of the Banking and Financial Institutions Act, 2006 provides that:

"Every Bank or Financial Institution shall observe as otherwise required by law, the practice and usage customary among bankers, and in particular shall not divulge any information relating to its customers or their affairs except in circumstances in which, in accordance with the law or practices and usages customary among bankers, it is necessary or appropriate for the bank or financial institutions to divulge such information"

In the famous English case of **Tournier Versus National Provincial and Union Bank of England [1924], 1 KB 461** cited by the counsel for the Defendant it was held that:-

"One of the implied terms of the contract is that the bank enter into a qualified obligation with their customer to abstain from disclosing information as to his affairs without his consent"

In the present case the Plaintiff denied to have any bank/customer relationship with the Defendant. In their letter to the Defendant they clearly stated that they didn't have any bank account in Defendant's bank. They also maintained that two bank accounts were opened and were being operated by persons unknown to the Plaintiff's company. Accordingly in terms of Section 48(1) of the Banking and Financial Institutions Act and the authority in the case of **Tournier** quoted above, it was correct and proper for the Defendant to refuse to divulge information about the accounts which the Plaintiff had disowned. This answers the second issue in the affirmative.

On issue number three, having answered the second issue in the affirmative it goes without saying that the issue of being negligent on the part of the bank cannot arise. The third issue is therefore answered in the negative. Similarly the fourth issue which is about damages suffered by the Plaintiff. Having found as a matter of fact that the accounts did not belong to the Plaintiff, it goes without saying that the Plaintiff didn't suffer any damages for anything done in the those accounts.

Before I conclude this judgment I think it is appropriate to say a word in passing in respect of the opening and operations of these two accounts which seems to me to be fishy. Firstly, according to DW1 there are two companies duly incorporated under the same name of MAXIMA Clearing

& Forwarding Limited. This is not possible under the Companies Act. Secondly looking at the evidence adduced, the Defendant didn't come up with details which could assist the court to investigate about the alleged two companies with the same name of Maxima Clearing and Forwarding Company Limited and the impugned accounts. Thirdly, it is inconceivable that the Plaintiff's would be paid over T.shs 3,619,859,579.12 and USD 1,091,717.62 by customers and business which they do not know or at least they are not ready to disclose. Fourthly, fraud being a crime, it is also inconceivable that both parties would risk losing such huge amount of money without reporting the matter to the police for investigations and necessary police action.

Consequently, and as I have already ruled, the Plaintiff's case fails. I find no basis for awarding damages and I decline to award any. I believe there was no negligence which would entitle the Plaintiff to recover damages. Apparently both parties for reasons not disclosed didn't assist the court to uncover the kernel of the matter.

In summary therefore, the Plaintiff's case is dismissed with costs.




A.R. Mruma,

Judge.

Dated at Dar Es Salaam this 4th day of April, 2019.