**Barclays Bank of Kenya v Jandy**

**Division:** Milimani Commercial Courts of Kenya at Nairobi

**Date of ruling:** 9 July 2004

**Case Number:** 361/02

**Before:** Nyamu J

**Sourced by:** EW Kinyenje

**Summarised by:** C Kanjama

*[1] Bank – Duty of care – Customer’s duty of care – Warranty of authority – Customer utilising large*

*unexpected credit placed in his account – Whether customer’s failure to make a query was a breach of*

*contractual duty and warranty of authority – Whether bank’s statement of account amounts to positive*

*representation by bank – Circumstances in which customer entitled to rely on bank’s representation.*

*[2] Bank – Negligence – Bank negligently debiting one customer’s account and crediting second*

*customer – Second customer privy to unusual transaction originating with third party forgery – Whether*

*bank had failed in duty of care to second customer – Whether bank estopped from recovery due to*

*change of position by second customer after receipt of funds in his account.*

*[3] Civil procedure – Interest – Order for refund of money under equity – Bank seeking interest on*

*wrongly credited funds – Whether commercial interest payable.*

*[4] Equity – Mistake of fact – Estoppel – Transfer of money under mistake of fact – Transferee utilising*

*money while aware that it did not belong to him – Whether he had changed his position in law – Whether*

*order for restitution and tracing would be made.*

*[5] Restitution – Unjust enrichment – Mistake of fact by bank – Funds debited from first customer’s*

*account after forged mandate – Second customer facilitating withdrawal of funds credited to his account*

*– Whether amounts to unjust enrichment – Whether restitution would be ordered if money had been*

*spent.*

**JUDGMENT**

**Nyamu J:** At the outset, the counsels for the parties agreed to have the matter finally determined on the

basis of:

(a) Agreed facts (which I shall set out in full shortly).

(b) Statement of agreed issues, filed on 23 May 2003 and dated the same date.

(c) Plaintiff’s list of documents filed on 20 May 2003.

(d) Filed written submissions filed as follows:

(i) Plaintiff’s submissions filed on 21 November 2003 with authorities.

( ii) Defendant’s submissions with authorities filed on 21 January 2004.

(iii) Reply to Defendant’s submission with authorities filed on 29 April 2004.

(e) The order by consent to proceed as above was recorded on 21 May 2003 at the Milimani Court during my tour there in the Commercial Division of the High Court.

The Plaintiff bank seeks the following:

(i) A refund of KShs 1 348 410 which was withdrawn from the Defendant’s account after the funds were credited to the Defendant’s account on the basis of a forged letter.

( ii) A mareva injunction to restrain the Defendant from dealing with his assets which include but are not linked to various accounts held with the Plaintiff’s Westland’s Branch and in any other financial institution.

(iii) An order that the Defendant does give full discovery of the sum of KShs 1 348 410 and any information necessary to trace the history of the said sum.

(iv) Interest on (i) above at 26% per annum from 24 December 1997.

(v) Costs.

The agreed facts not in dispute are as follows:

(a) The Defendant was the Plaintiff’s customer and held various accounts at the Plaintiff’s Westland’s

Branch. The account’s documents including statements appear at pages 3–6 of the Plaintiff’s bundle of documents.

(b) The letter dated 23 December 1997 issued by Peponi House Preparatory School (hereinafter referred to as “Peponi”) was a forgery. The said letter directed the Plaintiff to transfer the sum of KShs 1 348 410 (hereinafter referred to as “the amount”) to the Defendant’s account number 1283834. The Defendant withdrew KShs I million on 31 December 1997 by issuing an open cheque to one Lawrence Karanja and the same was paid to Kenneth Kamau in the presence of the Defendant – see page 2 of the Plaintiff’s bundle of documents.

(c) In addition the Defendant issued written instructions to the Plaintiff to transfer the sum of KShs 200 000 to the Defendant’s optimum account number 6090074 (see pages 7 and 8 of the Plaintiff’s bundle of documents).

(d) At the time the Defendant received the said amount he was not expecting the said sum neither did he know the source of the funds. The Defendant did not inform the Plaintiff that he was expecting the money.

(e) The Defendant’s combined accounts held KShs 514 975–10 (see pages 3, 4, 5 and 6 of the bundle).

(f ) The Defendant was originally convicted in criminal suit number 136/98 but his conviction was set aside in criminal appeal number 619 of 2000 (see page 14 onwards of the bundle).

(g) As a result of the fact that the said letter of instructions was fraudulent the Plaintiff suffered a loss because it had to refund Peponi the said amount (see pages 9, 11, 12 and 13 of the bundle).

The issues to be determined are:

1. In the matters complained of in the plaint did the Defendant act in good faith?

2. Was the Defendant in breach of his contractual duty to the Plaintiff?

3. Was the Defendant in breach of his warranty of authority with regard to the banker/customer relationship obtaining between him and the Plaintiff?

4. Was the sum of KShs 1 348 410 credited to the Defendant’s account by mistake?

5. Is the Plaintiff entitled to restitution?

6. Did the Plaintiff make any representation to the Defendant as to make him believe that the money so credited belonged to him?

7. If yes, did the Defendant change his position as a result of the representation?

8. Was the Plaintiff negligent in crediting the Defendant’s account with the said money?

9. Is the Plaintiff entitled to the relief sought in the plaint?

*Issue 1:*

From the agreed facts I find that the Defendant did not act in good faith for the same reasons as are so ably set out in the trial Magistrate’s judgment at 3–4. The amount of money over 1,3 million was a big enough sum of money to put a reasonable person on guard. Firstly he knew the mastermind was a mere clerk in a law firm. Before withdrawals were effected he should have sought an explanation as to how a mere clerk had come by such a large sum of money. He claims to have known about the money after the deposit or credit had been made in his favour. However the speed at which the withdrawal was made and a credit to his optimum account was requested and effected is indicative of the Defendant having been a party to the transaction. The fact that the withdrawal of 1 million was made in the Defendant’s presence in the company of the two masterminds namely Mr Lawrence Ndungu Karanja the payee and Mr

Kenneth Kamau who collected the cash gives room to considerable doubt as to the Defendant’s innocence.

It is clear from the evidence adduced in the criminal court that Peponi would have lost much more from another transaction involving the same note paper of Peponi. The excuse given by Mr Kamau that he did not have an identity card and this was why he used his (the Defendant’s) account should not have been accepted by a person of the Defendant’s age, standing and intelligence. Why was it necessary to transfer Shs 200 000 on the same day to his optimum account? What was the consideration for this?

*Issue 2:*

The Defendant was in breach of his contractual duty as a customer to the Plaintiff bank. He never made any inquiries or informed the bank of the receipt of the money after being informed by Kenneth Kamau that the money was lying in his account. Firstly in order to give the bank the opportunity to inquire into the origin of the money since he was not expecting it and secondly to inform the bank that his account had been used by a friend of his without his permission and that he was not sure where the credit had originated from. This would have put the bank on guard and it is possible that if the credit had not been withdrawn upon receipt the forgery could have been detected in good time. If he had acted properly he would have alerted the bank concerning the big credit and this would have led the bank to freeze any withdrawals pending inquiries. Instead he facilitated the withdrawals and the deposit into his account – this is what facilitated the fraud and induced the success of the forgery.

I find and hold that a customer in the circumstances of this case has a duty to the bank as defined hereinafter and as per the authority cited by Miss *Kinyenje* the learned counsel for the Plaintiff – *Encyclopaedia of Banking Law* (Issue 63) September 2003 Banking Law Issue section 58: “The customer undertakes to exercise reasonable care in executing his written orders so as not to mislead the Bank by ambiguities or to facilitate fraud or forgery”. Concerning the customer’s duty of disclosure the

*Encyclopedia* states: “The customer owes his bank a duty to inform it of any forged payment orders as soon as he becomes aware of it”.

Failure to suspect that there was something amiss in a clerk using his account to cash over 1 million and not to have disclosed this to the bank is in the view of this Court a breach of a customer’s duty of care as correctly set out above.

I do not think it matters whether or not he was aware of the forged letter – the use of his account to facilitate such a big cash withdrawal was sufficient knowledge for a person acting in good faith to alert the bank. It defies logic for him to hide behind his contention that the bank was negligent in paying on the authority of the forged letter. The transaction of the forged letter including the crediting of the large amount into the Defendant’s account did not cease to be fraudulent because the Defendant did not know or had no knowledge of the fraud. After all he was not expecting the money. This is even the more reason why he should have been on his guard and exercised reasonable care to prevent farther loss. Unless

Kenneth Kamau and the Defendant had some understanding how could he Karnau have had advance knowledge of the Defendant’s account number 1283834 and also be sure that he, Kamau, would be allowed to withdraw the money and that the Defendant would freely account for the money after being informed that there was such a large sum in his account? Why did he extract such a big commission for his “role” which he vehemently disputes? Mr Karnau’s expectation that he would be allowed to withdraw the money after the fraud and the deposit had been made defies logic unless the Defendant had some involvement.

I accept the learned counsel for the Plaintiff s submission that it would have been prudent, reasonable and logical for the Defendant to report to the bank that another person had used his account.

The fact that the criminal court following an unexplained concession by a State Counsel acquitted the

Defendant is neither here nor there. This is a civil court and I will act in accordance with the standard of proof in civil cases – on a balance of probabilities. The Defendant and the bank had a contractual relationship and it is for this Court to consider if any duty was breached and it is quite clear from the above analysis of the facts that the Defendant was in breach of his contractual duty to the Plaintiff in failing to make any inquiries and in conducting himself as if the funds belonged to him.

The alleged negligence by the bank happened at the other end and the contractual duty was owed and should have been exercised at the other end of the transaction. Even if he the Defendant were to prove that the Bank was initially negligent in accepting the forged letter in the opinion of this Court the

Plaintiff bank’s negligence would not absolve the Defendant from his duty of care as outlined above.

The alleged acts of negligence as per the Defendant’s counsel are:

(i) The Bank failing to notice the differences in the signature.

( ii) It failed to notice that the letterhead purporting to give instructions was no longer in use.

(iii) Even the quality of paper used was different.

(iv) The emblems were different.

(v) In not confirming with “Peponi” that the letter had originated from them and that they could act on

it in transferring the funds to the Barclays Bank Westlands to the Defendant’s account.

Granted that the Bank could have been negligent as against its customer “Peponi”, I find that the Bank’s

negligence is in law too remote to affect the Bank’s customer/banker relationship with the Defendant.

*Issue 3:*

Again I must find and hold that the Defendant was in breach of his warranty of authority.

He knew that the funds were not his yet he facilitated, encouraged and in actual fact assisted in having the funds withdrawn from his account and at the same time extracting a fat commission and was physically present at the time of the cash withdrawal and he also gave instructions for the transfer of Shs 200 000 into the optimum account in the Westlands Branch. By these acts and his conduct he warranted to the bank the authority that the funds were his and he could be allowed to withdraw in the normal course of banking business.

The withdrawal and the use of the funds has in turn resulted in the loss to the bank which had to honour its obligations in law by refunding to Peponi the funds because they did not belong to the Defendant and the bank had acted on a forged letter.

The Defendant was clearly in breach of his warranty of authority.

*Issue 4:*

The withdrawal and the use of the funds has further resulted in the loss to the bank which had to honour its position in law by refunding to Peponi the funds because they did not belong to the Defendant and the bank had acted on a forged letter.

The Defendant was clearly in breach of his warranty of authority. From the analysis of facts as above the money was credited to the Defendant’s account by mistake.

Granted that the bank could have done better in detecting the irregularity in the forged letter and in phoning Peponi the funds were nevertheless credited into the Defendant’s account by mistake.

According to the criminal proceedings record a second transaction was stopped by exercising more care. There was evidence in the criminal record that Peponi did use similar letters to request large transfers in the course of their business with the bank and therefore the bank could to a certain extent be expected to assume that the forged letter was just like any other and therefore genuine. Any negligence on the part of the bank need not prevent recovery for the reasons I shall outline later in this judgment.

*Issue 5:*

Yes in the circumstances money paid under a mistake of fact entitles the Plaintiff to restitution.

*Issue 6:*

There is nothing to suggest that the Plaintiff did make any representation to the Defendant that the money was his. It is in evidence that before the withdrawal he had been alerted by Kamau concerning the credit and he even checked his account balance before the withdrawal. Confirmation of account balance per se cannot in the view of this Court amount to a representation that the funds are yours where the balance is unusual, out of the ordinary or it is windfall not expected.

If you find more funds than you would ordinarily expect you should be on your guard that the funds are not yours and you have a duty to inquire from the bank. The Defendant did not inquire from the bank on whether or not the funds were his. Instead, he embarked on hasty and reckless withdrawal in the company of the masterminds of the fraud.

*Issue 7:*

The Defendant was not led to believe that the funds were his to warrant or justify the withdrawal. The fact that he facilitated the withdrawal did not amount to a change of his position and should there be any the change in his position, the same was voluntary and reckless. He was the author of his own wrong.

Indeed in the criminal proceedings the Defendant admitted that there was no consideration for the funds deposited in his account. He could not therefore have changed his position to his detriment. Indeed there can never be a better application of the doctrine of “ex turpi causa non oritur action” ie one cannot seek to benefit from an illegal or unlawful transaction.

*Issue 8:*

From the analysis of the acts of omission and commission outlined above and although this does not call for a finding by this Court the Plaintiff was negligent as against Peponi in that it ought to have detected the differences noted above in the note paper and its quality and the different emblems. Above all it was in breach of the normal acceptable procedure of confirming by phone with the customer anything over and above KShs 1 million. But negligence apart, the bank has already paid for this in that it has refunded the customer the moneys paid pursuant to the forged letter. However my finding (obiter) on negligence by the Plaintiff bank is only as against its first customer Peponi and not as against the Defendant.

*Issue 9:*

Notwithstanding the Plaintiff’s apparent negligence to Peponi the Plaintiff is as against the Defendant entitled to the reliefs claimed for the reasons which will shortly appear. In a nutshell the Plaintiff is successful on all the framed issues.

The heart of the matter is the Defendant’s contention that due to the bank’s negligence in acting on the forged letter and paying into his account moneys which have since been withdrawn the bank is not entitled to recover firstly because of its negligence and secondly because by virtue of payment it is deemed to have made a representation to the Defendant that the money was his and he has acted on the representation to his detriment, by the withdrawal of the money and it having been cashed by a third party at the bank counter.

It is therefore important for this Court to examine the effect of negligence in law and whether any representation was made to the Defendant as a customer and if he had in fact acted on the representation to his detriment and whether in the circumstances it could be conscionable or equitable for the Plaintiff bank to recover in the light of the above.

It is also important to consider whether the money was paid into the Defendant’s account under a mistake of fact. What then is the law concerning mistake of fact? *Halsbury’s Laws of England* (4 ed) at

54 paragraph 70 defines mistakes of fact as follows:

“Money paid by mistake is recoverable only if the mistake is one of fact and not of law. A payment is made under a mistake of fact if it is so made honestly notwithstanding that the payer had means of which he did not avail himself, of knowing the true facts”.

The other important point to examine is whether after the payment into the Defendant’s account the bank would be entitled to recover and trace the moneys paid. On this point I have found the following statement on the law of unjust enrichment in Goff and Jones *The Law of Restitution* (5 ed) at 11 and 12 extremely enlightening:

“Most mature systems of law have found it necessary to provide, outside the fields of contract and civil wrongs, for the restoration of benefits on grounds of unjust enrichment. There are many circumstances in which a Defendant may find himself in possession of a benefit which in justice he should restore to the

Plaintiff. Obvious examples are where the Plaintiff has himself conferred the benefit on the Defendant through mistake or compulsion. To allow the Defendant to retain such a benefit would result in his being unjustly enriched at the Plaintiff’s expense and this, subject to certain defined limits the law will not allow”.

The Court has also found great comfort concerning the effect of negligence on the chances of recovery in

*Paget’s Law of Banking* (8 ed) at 383–386 and in particular the following passage:

“It is a common phrase that a banker is bound to know his customer’s signature but it is a misleading and an inaccurate statement. There can be no such legal obligation. The real position is that if the Banker pays and debits his customers account in reliance on a signature being his customer, which is not so, he cannot charge his customer with that payment. Even if it were a duty to know the customers signature it could only be a duty to the customer; it could not possibly extend to third persons such as the payee of a cheque. So with the suggested negligence; there is no duty to the payee or holder to take care, and without such a duty there can in law be no negligence”.

The learned counsel for the Defendant Mr *Onindo* has cited a number of relevant and useful authorities in support of his contention on the effect of negligence, representation and that the Defendant did act on the Plaintiff’s representation to his detriment.

In the Indian case of *Canara Bank v Canara Sales Corporation and others* [1988] LRC (Comm) where a branch of the appellant bank had opened a current account in favour of the First Respondent company where the chief accounts officer had charge of and custody of the cheque books issued by the appellant, a number of cashed cheques were discovered in March 1961 by the accounts officer’s assistant to have been paid on the company general manager’s forged signature.

The company’s claim against the appellant bank was upheld both by the Indian High Court and the

Supreme Court of India.

However the relevance of this case to the situation before this Court is remote in that this was a strictly banker/customer relationship where the bank was required to recoup from the company in respect of the forged cheques. In the situation before me the principle in the case could apply to the Plaintiff and the Peponi relationship and in keeping with the principle in the Indian case the Plaintiff bank has paid its customer Peponi on the forged letter.

This case does not therefore advance the Defendant’s case even an inch and is clearly distinguishable.

Concerning the argument based on the case of *Price v Neal* [1962] 3 Burr 1354 on possible representation implied by virtue of payment and which could disentitle the bank from recovering from the Defendant, in the circumstances of the case the Court finds that the bank did not make any representation to the Defendant concerning payment. All it did was to mistakenly pay the money into his account and he the Defendant had the money withdrawn in his presence and also converted the balance to his use and that of the masterminds and by directing that KShs 200 000 be transferred from the account in question to his own optimum account. If no representation was made to him by the bank the mere fact that the money was paid into his account did not entitle him to assume that the money was his by right.

The documents produced by way of statements concerning the operation of his account reveal that the average credits in his account were always between KShs 200 000 and KShs 300 000. The big credit of about KShs 1,4 million into his account should have put him on guard to make inquiries. Reliance on

*Price v Neal* is therefore irrelevant to the situation before me.

Reliance has also been placed on the Tanzanian case of *National Bank of Commerce v Yakut* [1989]

TLR 11. Here again the brief facts were that at the instigation of a bank manager of National Bank of

Commerce, a country cheque was drawn in favour of the Defendant, deposited and its effects withdrawn before clearance. The bank wanted the customer to agree that the amount withdrawn be treated as an overdraft. On the customer’s refusal to so agree the bank sued him to recover the amount of the “lost” cheque.

It was held:

(i) A collecting bank owes a duty of care to its customers in that it should conduct its activities with care and circumspection

( ii) From the facts of the case the bank was either grossly negligent or acted deliberately to incur such loss – the action failed.

This does not apply to our situation because here a bank official and its customer were in league to defraud the bank. There was negligence by the bank to its customer and it could not therefore recover. No such duty is owed to the Defendant. He deliberately caused the money to be withdrawn in his presence.

He was the author of his own wrong. He was in the company of the perpetrators of the fraud and in fact facilitated the fraud by his “presence at the counter”.

In the Tanzanian case of *Silayo v CRDB* (1996) Ltd [2002] 1 EA 288, a customer was given a cheque by a third party and deposited it into his account with CRDB Bank. The third party went to Silayo’s business and placed an order for building materials worth TShs 13 276 000 but Silayo told the third party that the materials would be issued out when the cheque had been cleared. The bank credited Silayo’s account on the same day and six days later Silayo started drawing against the cheque and continued to do so until one cheque was returned or dishonoured. Upon inquiry with CRDB he was told that his cheque had been lost *en route* to the third party’s bank. He was asked to request a replacement from the third party to whom Silayo had in the meantime released the building materials. It came to pass that the third party had never existed and the bank debited Silayo’s account with the entire amount and sued Silayo.

Held:

1. As a general rule, a collecting bank is bound to use reasonable skill, care and diligence in presenting and securing payments of cheques entrusted to it for collection and placing the proceeds to the customer’s account and in taking such other steps as may be proper to secure the customer’s interests.

2. Should the banker represent to the customer, either expressly or by conduct that he might treat the money as his own, or negligently fail to discharge his duty to the customer so as to change his position and act to his detriment, the banker will not be permitted to recover money paid under a mistake.

This is the principle in the cases of *Al Underwood Ltd v Barclays* Bank [1924] 1 KB 775; *Re Jones Ltd v*

*Waring and Gillow Ltd* [1926] AC 670; and *Dukhiya v Standard Bank of South Africa Ltd* [1959] EA 958

Again, the situation I am dealing with is clearly distinguishable from the *Silayo* case in that the Plaintiff in this case did not make any representations to the Defendant concerning the existence of the credit in his account. Checking the balance and mere advice of the balance in an account does not constitute a representation in the circumstances of the case in hand firstly because there is evidence that the

Defendant had been informed in advance by Kenneth Kamau of the expected balance (after the fraud) and secondly because the Defendant was purposely in attendance in order to have the amounts withdrawn as described above and thirdly in the normal course of business his balance never exceeded KshS 300

000. The Plaintiff never made any representation that the entire balance in his account was his. He knew in advance that it was not his!

This Court does however hold the view that in the normal course of banking business bankers do make representations to their customers when they give advice on the account balances. Barring any special circumstance the customers are entitled to rely on the representations made as per the written advices on account balances.

In the case of *Dukhiya v Standard Bank of South Africa Ltd* [1959] EA 958 a bank clerk who had previously borrowed money from the Appellant offered to deposit money with the appellant repayable on demand. The Appellant having agreed to the proposal the bank clerk fraudulently debited the ledger account of the bank’s customers and by forging cheques had the bank account of the Appellant credited with the sums aggregating Shs 32 800. The bank clerk informed the Appellant that he had credited the money to the Appellant’s bank account and the Appellant after checking his balance at the bank paid the clerk when demand was made.

The matter was reported to the police and the clerk was prosecuted and convicted for his frauds after which the bank sued the appellant for Shs 32 800 alleging that he had received the money fraudulently or alternatively under a mistake of fact induced by the clerk’s fraud. It was held *inter alia*:

“(iii) the appellant was not the agent of the bank clerk in receiving the money and the respondent dealt with and regarded the appellant as a principal and customer.

(iv) the appellant clearly altered his position to his own detriment before the respondent claimed repayment of the money and did so in reliance upon the respondents representations as to the appellant’s bank balance”.

The bank could not recover in the face of the representation.

I am conscious that this is a decision of the respected Eastern Court of Appeal but again I must point out that as found above the Plaintiff bank contrary to the position in *Dukhiya* never made any representations to the Defendant touching on the KShs 1,4 million (app) credit and in addition there was no involvement of the bank’s clerk and for this reason although the facts are strangely almost similar the decision cannot in this case assist the Defendant’s case in the absence of representations. Representation in the current case came from the fraudsters and not the bank. In addition the Defendant cannot prove that he acted to his detriment because after the knowledge that the money would be in his account he went to the bank and literally supervised the withdrawals. On the contrary it is the Defendant who with his distinguished presence at the paying counter made representations or gave a warranty of authority to the Plaintiff bank that the money was indeed his.

As held in the case of *Yeung and another v Hong Kong and Shanghai Banking Corporation* [1980] 2

All ER 599 which was relied on by the learned counsel for the Plaintiff bank, Miss *Kinyenje*, whether a warranty was to be implied where none was expressed was a question of fact dependent on circumstances. In the present case I hold that there was clear warranty due to the conduct of the Defendant and his presence at the counter. By his presence he gave a warranty to the bank that the funds were his and he had the right to have the funds withdrawn or transferred on his orders.

On the basis of the same facts I hold that the Defendant did not in law change his position since he was the author of the change and the events at the paying counter and he had not given any consideration in the transaction leading to the loss.

On whether there was representation by the Plaintiff bank to the Defendant which he relied on I hold that the Defendant has not proved any specific representation which the Plaintiff bank made to him which led him to believe that the money paid by mistake belonged to him. The mere fact that the bank paid the money to his account is not sufficient.

There must be a separate independent and distinct act that shows the bank made a positive representation to the Defendant. See *Paget’s Law of Banking* (8 ed) at 368.

I accept as good law the following legal principle in the case of *Barclays Bank Ltd v WJS Simmson and Cooke (Southern) Ltd and another* [1977] 1 QB 677:

“That money paid under a mistake of fact was *prima facie* recoverable provided the payer did not intend the payee to have the money in any event, the money was not paid for good consideration and the payee had not in good faith changed his position and that that principle applied to a bank that erroneously acted without a mandate from its customer in circumstances where the payee was not deemed to have changed his position”.

In the case before me there is a clear lack of good faith on the part of the Defendant in changing his position. There was no good consideration between the parties and there was certainly no intention by the

Plaintiff to pay the Defendant in any event.

In the case of *Re Jones Ltd v Waring and Gillow Ltd* (*supra*) the following principles concerning money paid under a mistake of fact were established:

(1) If a person pays money to another under a mistake of fact which causes him to make payment, he

is *prima facie* entitled to recover it as money paid under a mistake of fact.

(2) His claim may however fail if:

( a) the payer intends that the payee shall have the money at all events, whether the fact be true

or false or is deemed in law so to intend; or

( b) the payment is made for good consideration, in particular if the money is paid to discharge

and does discharge a debt owed to the payee; or

( c) the payee has changed his position in good faith or is deemed in law to have done so.

On the basis of the facts as agreed in the case I find that the Defendant cannot place himself in any of the enumerated exceptions in order to prevent recovery because the Plaintiff is squarely and clearly covered by the principle on recovery.

Finally concerning the issue of representation and whether it prevents recovery I accept as good law the following principles established in the case of *National Westminister Bank Ltd v Barclays Bank International Ltd* [1975] QB 654:

1. The paying bank owes no duty of care to the payee in deciding whether to honour a customer’s

cheque at any rate when it appears to be regular on its face. This prevents an estoppel by negligence.

2. I think that the law should be slow to impose upon an innocent party who has not acted negligently an estoppel merely by reason of having dealt with a forged document on the assumption that it was genuine.

3. It appears from the case that one can never finally dispense with the idea that by paying money on a forged signature the payer is making any representation that it was genuine such as to entitle the defendant to rely on an estoppel.

On the change of position to his detriment:

4. The mere spending of money does not amount to a sufficient change of position and detriment.

5. In *Larner v LCC* [1949] 2 KB 683 Lord Justice Denning had this to say:

“Speaking generally, the fact that the recipient has spent the money beyond recall is no defence unless there is some fault, as for instance breach of duty on the part of the paymaster and none on the part of the recipient”.

6. In *Re Jones Ltd v Waring* cited above Lord Sumner had this to say:

“But if the recipient was himself at fault and the paymaster was not – as for instance, if the mistake was due to an innocent misrepresentation or a breach of duty by the recipient – he clearly cannot escape liability by saying that he has spent the money”.

Applying the above principles which I consider sound law, to this case the Plaintiff bank was not negligent as against the Defendant, it was only negligent against Peponi who have been paid already. As against the Defendant the bank was not at fault at all. At the other end of the scale the Defendant was at fault for facilitating the fraud, his presence when payment was being made, his failure to disclose to the bank that he knew the funds were not his. For these reasons the Defendant cannot escape liability.

By God’s grace, I note that I will not be blazing the trail in that Madan JA (as he then was) and Wambuzi JA (as he then was) in the case of *Chase International Investment Corporation and another v Keshra and others* [1978] KLR 143 held that it would be unjust to allow Chase to retain the benefit of the two lodges built by a third party who had built two lodges at his expense and on representation by the bank’s vice president. They went on to say that in the circumstances of the case a claim could properly be founded on restitution.

In the case of *Ndei v Mathira Cooperative Society*, Cockar J (as he then was) held that a voluntary overpayment does not create a cause of action for unjust enrichment where there is no pleading of the reason why it would be unjust for the recipient to retain the benefit of a voluntary overpayment. This authority is only good for the fact that Cockar J did consider the application of the principle of unjust enrichment in the peculiar circumstances he was dealing with. I am not sure I agree with him concerning the consequences of a mistake of law.

Finally on the local scene in the case of *Standard Chartered Bank Ltd v Akello* [1979] KLR 89 the panel of Madan, Wambuzi and Law JJA, where a cheque was paid into an account by mistake and funds withdrawn, applied the principle in the *National Westminister Bank Ltd v Barclays Bank International*

*Ltd* [1974] 3 All ER 834, 836 and held that the money having been paid under a mistake was recoverable.

An examination of the authorities above however does indicate that on the issue of an actual restitution order and the granting of a decree in equity to trace I will be on virgin land in this part of the world.

On whether the Defendant bank is entitled to trace the sum of KShs 1 348 410 I hold that they would be entitled to do so as good law both in terms of equity and the doctrine against unjust enrichment – see

*Paget’s Law of Banking* (8 ed) at 422. “A mistaken payment may in equity be traced and recovered if the circumstances warrant it”.

I further fully endorse the principle of law set out therein that the Defendant by transferring to his optimum account KShs 200 000 which money was paid under a mistake of fact he held the same as trustee and the Plaintiff bank is entitled to the equitable remedy of tracing. As Goulding J put it in *Chase*

*Manhattan Bank v Israel British Bank (London) Ltd* [1981] Ch 105; [1979] 3 All ER 1028: “It is common ground that if (as I have decided) there is a right in English law to trace money paid by mistake, it rests on a persistent equitable proprietary interest”.

On this principle I find and hold that the Plaintiff bank is entitled to a decree in equity for the sum of

KShs 1 348 410, for the purpose of tracing the money actually paid or transferred and or the property representing it. It is apparently difficult to trace the KShs 1 million paid to a third party but this tracing decree in equity can be immediately used to recover the KShs 200 000 transferred to the optimum account.

I further find and hold that, even on the principle against unjust enrichment as defined above the

Plaintiff bank is so entitled to trace the funds in this case.

In *Roper v Taylor’s Central Garages (Exeter) Ltd* [1951] 2 TLR DC, I accept Lord Denning’s observation that if a party “shuts” his eyes to an obvious source of knowledge he is to have actual knowledge in the law.

This Defendant literally shut his eyes and went on to facilitate the fraud:

(a) by refraining from enquiring about the origin of the funds;

(b) failing to enquire why his account was being used to receive such a huge sum of money; and

(c) the fact that he knowingly and willingly paid over the money to Kenneth Kamau at the counter.

In the normal course of events of life money unlike manna does not fall from above or grow on trees, instead like running water it has defined channels which it follows in coming to all of us. If the unusual happens to us we have a duty to inquire about the source of the money. Even manna had a heavenly source to quote the Bible. As students of science we were taught that water takes its own level – it always takes the shape of the container it is in. Money appears to have the same characteristics. It takes the shape of the transaction generating it. It always comes to us in the shape of the transactions. When the extraordinary happens and it purports to come in another form and defies the shape and overflows, it is sending a signal that it is probably not ours. I think the duty to account is both legal and moral. Money flows in through the channels of for example, dividends declared, stock and shares, salaries, pension, business deals and transactions. However it should not be difficult for all of us to know when the unexpected or the extraordinary windfall comes in – it is here that we owe a duty to make inquiries and to disclose to the bank.

Yes, it is our law, that when one cannot explain one’s wealth, at that point in time, one is likely to hear the twin bells of unjust enrichment and restitution in one’s ears swinging to the not-so-friendly rhythm – It is payback time – It is payback time.

I hold that there was such a duty owed to the Plaintiff bank by its Defendant customer.

I hold that he the Defendant was also under a contractual duty to the bank to disclose that the funds were not his and to give the bank the opportunity to check the source. I hold that the Defendant did not act in good faith in the circumstances.

I further hold that he was also in breach of warranty of authority to the bank in that due to his conduct he warranted to the bank that the funds were his.

Although interest at the rate of 26% per annum on the refund has been claimed I refuse to award it for the following reasons:

(1) There is no written agreement to charge interest between the parties and under common law it cannot be awarded without a written agreement.

(2) There is no proof of usage or custom to charge interest in similar circumstances under the banking law. The transaction cannot be said to be a mercantile transaction.

(3) There was no agreement on this as per the agreed facts outlined above

(4) It would be unfair, unconscionable, and inequitable for the Plaintiff bank to benefit from its own mistake or omission.

(5) The equitable remedies of restitution and tracing ought to be reasonably confined to what has been unjustly acquired and the tracing ought to attach to the funds paid or acquired and to the property, or the proprietary interest acquired with the funds unjustly acquired.

For the above reasons I disallow the claim on interest except that on the item of refund I award interest at court rates from the date of this judgment.

And, I finally hold that the Plaintiff is entitled to relief as follows:

(a) I enter judgment for the Plaintiff as against the Defendant in the sum of KShs 1 348 410 being the refund.

(b) I grant a permanent mareva injunction in terms of prayer (b) of the plaint.

(c) I disallow the interest as claimed but award interest on the refund figure above at court rates from the date of this judgment.

(d) As regards the reliefs sought in prayer (c) I decline to give any interim relief this being a final judgment and instead grant a decree in equity enabling the Plaintiff bank to trace and recover the amount of KShs 1 348 410 from the Defendant and to immediately trace and appropriate KShs 200 000 in the optimum account.

(e) Costs of the suit are awarded to the Plaintiff.

I wish to take this opportunity to commend both counsel for their industry and in particular for demonstrating considerable skills in case management and for clarity of presentation.

For the Plaintiff:

*EW Kinyenje* instructed by *Kaplan and Stratton Adv*

For the Defendant:

*MD Onindo* instructed by *Owino Kojwando & Co*