**Onjallah v Kenya Commercial Bank Ltd**

[2004] 2 EA 253 (CAK)

**Division:** Court of Appeal of Kenya at Kisumu

**Date of Judgment:** 9 July 2004

**Case Number:** 259/01

**Before:** Omolo, Githinji JJA and Ringera AJA

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**Summarised by:** A Mwanzia

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*[1] Banking – Banker/customer relationship – Debit of customer’s account in favour of third party –*

*Whether bank may debit customer’s account in favour of a third party for money remitted or fraud*

*belonging to the third party.*

**Editor’s Summary**

The appellant was a customer of the respondent bank where he maintained two accounts. Sometime in

1994, the appellants accounts were debited by the respondent for the sum of KShs 402 151-85 on advise

from Mumias Outgrowers Company Limited who wrote to the bank claiming the sum as erroneously and

fraudulently remitted to the appellant’s accounts from the company.

The appellant sued the respondent in the High Court seeking to recover the amounts debited together

with damages for breach of duty by the respondent bank not to disclose his account or the State thereof to

third parties. The respondent’s defence was that the amounts were remitted to the appellant’s employers

Mumias Ougrowers Company Limited after the company discovered that the said money had been sent to

the bank fraudulently.

Respondent called its branch manager who testified that the bank had received two letters from

Mumias Outgrowers company advising them of the fraud and seeking remittance of the amount. The

High Court Judge dismissed the appellant’s case finding that the money deposited in the appellant’s

accounts were unprocedurally prepared and therefore erroneous. He also held that if the amounts in those

accounts were legitimate, the appellant was obliged to prove so and he had not discharged that duty.

The appellant appealed to the Court of Appeal. The issue on appeal was whether a bank could

lawfully debit its customer’s account without reference to that customer and pay out all or any of the

money credited into that account to a third party who claimed the same on the basis that the remittance

into the customer’s account was erroneous for having been made by mistake or as a result of a fraud on

the third party by the customer.

**Held** – Money paid by a third person to the bank either directly, or on account of a bank’s customer, is

refundable if it is established that it was paid under a mistake of fact and the mistake has been brought to

its attention before the bank has either paid it out to the customer, or settled its accounts with the

customer in a manner which would amount to payment, or otherwise done something which has so

prejudiced its position that it would be inequitable to require a refund. *Kerrison v Glyn, Mills, Currie &*

*Co* [1912] LJ KB 465; *Kleinwort, Sons & Co v Dunlop Rubber Co* (1907-08) 97 LJ 263 adopted.

Since the respondent bank did not call an independent witness from Mumias Outgrowers company to

show that the company had paid the money to the bank under a mistake of fact, the bank was in breach of

its contractual obligation to its customer to pay out any deposit(s) in the customer’s account to the

customer or to his order. The appellant had, however, not established his claim for damages for breach of

duty by the respondent bank not to disclose his account or state thereof to third parties.

Appeal allowed, with costs.

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**Cases referred to in judgment**

(“**A**” means adopted; “**AL**” means allowed; “**AP**” means applied; “**APP**” means approved; “**C**” means

considered; “**D**” means distinguished; “**DA**” means disapproved; “**DT**” means doubted; “**E**” means

explained; “**F**” means followed; “**O**” means overruled)

***United Kingdom***

*Kerrison v Glyn, Mills, Currie & Co* [1912] LJ KB 465 – **A**

*Kleinwort Sons & Co v Dunlop Rubber Co* (1907-08) 97 LT 263 – **A**

**Judgment**

**OMOLO, GITHINJI JJA AND RINGERA AJA:** In an amended plaint filed in the superior Court on

3 November 1997, Lazarus Masayi Onjallah the appellant herein, pleaded that he was at all material

times a customer of the Kenya Commercial Bank, the respondent herein, at its Mumias Branch and that

he maintained two interest earning accounts, namely, number 128-028-828 in his own name and number

128-038-219 in the name of his minor son, Antony Mukandia Masayi. He further pleaded that as at 24

June 1994 his account number 128-028-828 had a credit balance of KShs 398 000 while his minor son’s

account had a credit balance of KShs 52 000 which sums added to a total of KShs 450 000. He further

pleaded that on 27 June 1994 when he went to withdraw his money from the aforesaid accounts he was

dismayed to find that he could not withdraw the said amount or any part thereof as the accounts had been

frozen by the branch manager. The appellant further pleaded that on 4 January 1995 he was able to

withdraw a sum of KShs 47 000 being interest earned over a period of six months. He averred that the

freezing of his accounts were unlawful and without justification and in total contravention of banking

provisions and that the act of freezing was an adverse infringement of the privileged relationship between

himself and the respondent bank. He averred further that according to the information available to him,

he was not allowed to withdraw money from his accounts because the respondent had transferred the

entire amount and interest thereon from his accounts to its own account and unlawfully appropriated the

same. In those premises, he claimed from the respondent the sum of KShs 450 000 together with all

accrued interest at current bank rates and general damages for breach of contract from 24 June 1994 until

payment in full or, in the alternative, a reactivation of the said accounts unconditionally after disclosure

to him of a duly computed standing balance. He complained that despite demand and notice of intention

to sue given, the respondent had officially refused to comply and offer amends.

In answer to those averments in the amended plaint, the respondent filed an amended defence on 2

December 1997. The respondent admitted its relationship with the appellant and the existence of the

accounts pleaded. It denied that the appellant’s accounts had the credit balances pleaded as at 24 June

1994 and averred that the amounts pleaded in the plaint were erroneous payments credited into the

appellant’s accounts and that the same were refunded to the appellant’s employers, Mumias Outgrowers

Co Ltd in June 1994. The respondent further averred that the appellant demanded its money after tracing

from their records that the said money had been sent to the bank fraudulently. Indeed, so the respondent

further pleaded, upon the discovery of the fraud, the appellant’s

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employer decided to have him arrested and charged with a criminal case of fraud at Kakamega. The

respondent also denied that the appellant was allowed to withdraw the sum of KShs 47 000 as interest as

claimed, or that the appellant was unable to withdraw the principal sum of KShs 45 000, or that the

appellant’s accounts were unlawfully frozen. The respondent averred that it did not hold any money for

the appellant as the same had been paid to his employer and he was aware of the fact.

After hearing the evidence and submissions, commissioner of Assize PK Birech made the following

findings of fact and law. The appellant was a customer of the respondent bank at Mumias Branch. He

maintained three savings accounts and one current account. The savings accounts were numbers

128-028-828 in his own name, number 128-035-211 in his minor child’s name, and number 128-025-311

in his wife’s name. Between August 1993 and April 1994 some money was remitted into those accounts

by Mumias Outgrowers company (Mocco). The money remitted into the accounts came from the 15%

retention dues which had been unprocedurally prepared and remitted into those accounts. The

remittances was therefore erroneous. When the error was detected and the respondent was asked by

Mocco to return the money, the respondent acceded to that request and returned what was available

which was the sum of KShs 402 151-85. On that premises, the respondent could not be held to have

unlawfully frozen the appellant’s accounts as an error or fraud had been discovered and the remitter of

the funds asked for the said funds to be refunded which the respondent did without delay. If the appellant

had a right to the sum of KShs 450 000 his remedy was against the body who laid a claim of that amount

and to whom it was remitted. As regards alleged disclosure of the details of the appellant’s account with

the respondent, it was found that it was not the respondent who made the disclosures and that even if

there had been such disclosure the appellant did not suffer any damage “given the way the whole episode

was”. The appellant’s evidence that he was a successful businessman who used to make regular deposits

into those accounts were not truthful. In the result, the appellant had not proved his case on a balance of

probabilies and his suit was dismissed.

Having heard the arguments canvassed by both parties in this appeal we think that the issue of law

which arises is whether a bank could lawfully debit its customer’s savings account without reference to

that customer and pay out all or any of the money credited into that account to a third party who claimed

the same on the basis that the remittance into the customer’s account was erroneous for having been

made by mistake or as a result of a fraud on the third party by the customer. Unfortunately, neither party

furnished the Court with any authority on the point. The appellant was on his part, content to argue that

the debit of his account by the bank without reference to him was in breach of the contractual

relationship between banker and customer and the respondent was equally contented to impress on the

Court that this was not an ordinary case of banker and customer but one where the customer had

fraudulently induced the deposit made into his account with the respondent. Our own research does not

disclose any direct authority on the point. We have therefore to approach the matter from general

principles of banking law as they apply to deposit accounts, as the accounts in question here were all

savings accounts.

In *Halsbury’s Laws of England* (4 ed) Volume 3, paragraph 40, the learned editors posit the law as

follows:

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“The receipt of money by a banker from or on account of his customer constituted him the debtor of the

customer. The banker is normally liable to repay only the person from whom he received the money. The

receipt of money on deposit account constitutes the bankers a debtor to the depositor but not a trustee for him.

The debt is repayable either on demand or on conditions agreed with the depositor”.

The above proposition would appear to support the appellant’s contention that the bank could not pay out

or debit his account with any money save to himself or to his order on conditions agreed with him.

However the respondent bank’s position is that it debited the appellant’s accounts and paid out therefrom

the sum of KShs 402 151-85 on the request of Mocco who claimed to have remitted funds into those

accounts by mistake. The *prima facie* issue therefore is whether money allegedly paid into a customer’s

bank accounts by mistake could be refunded to the payer.

The law appears to be settled that money paid under a mistake of fact is repayable. In *Kerrison v*

*Glyn, Mills, Currie & Co* [1912] LJ KB 465, the House of Lords held that the position of a banker does

not differ from that of any other recipient of money acting as an agent and, accordingly, money paid to a

banker under a mistake of fact can be successfully re-demanded from the banker by the person who so

paid it. In the words of Lord Mersy at 472:

“No doubt when a banker receives money either from his customer or from a third person on account of his

customer, he becomes his customer’s debtor for the amount so received. But this does not entitle the banker to

retain money which in common honesty ought not to be kept. If indeed, the banker has paid over the money to

his customer, or has altered his position in relation to his customer to his detriment, on the faith of the

payment, the banker may refuse to repay the amount any may leave the person who has paid him to enforce

his remedy against the customer”.

To similar effect is an earlier decision of the House of Lords in *Kleinwort Sons & Co v Dunlop Rubber*

*Co* (1907-08) 97 LT 263. Summarising the authorities, Lord Atkinson posited the position as follows:

“Whatever may in fact be the true position of the defendant (the banker) in an action brought to recover

money paid to him under a mistaken of fact, he will be liable to refund it if it be established that he dealt as a

principal with the person who paid it to him. Whether he would be liable if he dealt as agent with such person

will depend upon this, whether before the mistake was discovered, he had paid over the money which he

received to the principal, or settled such an account with the principal as amounts to payment, or did

something which so prejudiced his position that it would be inequitable to require him to refund”.

On the basis of the above authorities it may be concluded that money paid by a third person to the bank

either directly, or on account or a bank’s customer, is refundable if it is established that it was paid under

a mistake of fact and the mistake has been brought to its attention before the bank has either paid it out to

the customer, or settled its account(s) with the customer in a manner which would amount to payment, or

otherwise done something which has so prejudiced its position that it would be inequitable to require a

refund.

How do those principles apply to the matter at hand? The respondent bank acted on two letters from

Mocco dated 19 and 20 May 1994. Both letters claimed that money had been remitted to certain accounts

(which included the appellant’s account) by mistake and asked for a return thereof. There was no

explanation of the nature of the mistake and it was accordingly not possible to tell whether the mistake

was one of fact or law. And at the trial the respondent bank did not call any witness from Mocco to

establish the basis of the latter’s

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claim to the money in the appellant’s accounts’. The only witness called by the respondent was its station

head at the Mumias Branch who testified that the bank received the two letters and acted thereon and

ventured the opinion that as the bank had received the money from Mocco and it had returned the same,

it was not in breach of contract with the appellant. And the learned commissioner of Assize on his part

did not, and he indeed could not on the above evidence, make a finding of fact that the money paid to the

bank account of its customer was paid under a mistake of fact. He was content to hold that the moneys

deposited in the appellant’s accounts were unprocedurally prepared and remitted thereto and was

therefore erroneous. He further held that if the amounts in those accounts were legitimate, the appellant

was obliged to prove so and he had not discharged that duty.

In our view, in the absence of any proof that Mocco and paid the money to the respondent bank under

a mistake of fact, the other findings and conjectures by the superior court as to how the money ended in

the appellant’s accounts were irrelevant and the ultimate finding that the respondent bank was obliged to

and acted properly in refunding whatever was in the appellant’s accounts to the third party was erroneous

in law. In the circumstances of this case, the bank was in breach of its contractual obligation to its

customer to pay out any deposit(s) in the customer’s account to the customer or to his order. And the

amount paid out to a third party in breach of that contract was the sum of KShs 402 151-85. The position

would have been different had the respondent bank proved, probably by calling Mocco as a witness, that

the remission of the money into the appellant’s account was mistaken and the appellant was in fact not

entitled to the amount so deposited in his account. Take for example a person who robs one bank and

deposits the proceeds of the robbery in his account with another bank. That robber would clearly not be

entitled to the proceeds of the robbery deposited in his account and the receiving bank would be, in law,

justice and fairness entitled to pay out the money to the robbed bank, secure in the knowledge that it

would be able to prove, if asked, that the money so paid out from the customer’s account had been the

proceeds of a robbery committed against the bank to which the money had been paid back. In this case

the respondent bank merely contained itself by saying that it had been asked to refund the money by

Mocco who had paid it into the appellant’s account. That was insufficient to relieve the respondent bank

of its obligations to the appellant.

As regards the appellant’s claim for damages for breach of the duty by the respondent bank not to

disclose his account or the State thereof to third parties, we are satisfied, as the superior court was, that

the claim was not established.

In the result, we would allow the appeal with costs, set aside the judgment and decree of the superior

court and substitute therefore judgment for the appellant in the sum of KShs 402 151-85 together with

interest thereon at court rates from the date of filing suit until payment in full and the costs of the suit.

For the appellant:

*Information not available*

For the respondent:

*Information not*