

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA  
(DAR ES SALAAM DISTRICT REGISTRY)**

**AT DAR ES SALAAM**

**CIVIL CASE NO. 33 OF 2017**

**NATIONAL MICROFINACE BANK PLC.....PLAINTIFF**

**VERSUS**

**AFRI TEA COFEE BLENDERS (1963) LIMITED.....1<sup>ST</sup> DEFENDANT**

**FURAHA TRADING COMPANY LIMITED.....2<sup>ND</sup> DEFENDANT**

**KITO GENERAL TREADING COMPANY LIMITED.....3<sup>RD</sup> DEFENDANT**

**JUDGEMENT**

**Date of last Order:** *18/11/2020*

**Date of Judgment:** *01/12/2020*

**MLYAMBINA, J.**

There are two legal issues to be determined in the instant main suit: **One**, whether the Plaintiff's act of freezing the Bank account was legally justifiable. **Two**, to what relief (s) are the parties entitled to. In determining the foregoing issues, I will restate briefly the facts of this case and the claims in both main suit and counter claim.

It was alleged by the Plaintiff that sometimes in November, 2010 the 1<sup>st</sup> Defendant through an extra ordinary resolution resolved to open a Bank Account with the Plaintiff's Bank. Any of the two

Directors, namely; Yusuf Nawab Mulla and Abdulhakim Mulla were given signatory mandate with the financial controller, one Dindukurthy Ravi Kumar.

The alleged resolution was disputed by the Plaintiff in the Counter claim. The later alleged that the only valid resolution of the 1<sup>st</sup> Defendant authorizing the opening of Bank accounts is the one dated 4<sup>th</sup> September,2008, signed by all Directors of the 1<sup>st</sup> Defendant's board.

The Plaintiff contended that as per the Memorandum and Articles of Association, the 1<sup>st</sup> Defendant company has two corporate shareholders, namely, second and third Defendants holding 51% and 49% shares respectively. It was pleaded by the Plaintiff that having complied with all account opening requirement; the Plaintiff authorized the opening of the Account Number 2236600378. The parties smoothly and through the duly submitted mandate operated this account since then.

The Plaintiff pleaded further that on 21<sup>st</sup> February, 2015 the Plaintiff received a change of mandate notice from the first Defendant. The change of mandate was duly signed by Mr. Tony Fernandes and Mr. Ali Saeed Juma Albwardy as Director and Chairman respectively. The changes introduced were that there

would be panel A and panel B save for payments by account payee cheque for water, electricity, telephone and internet bill which would be signed by two signatories from any panel. All other transactions were to be signed jointly by one member from each panel. This fact was admitted by the 2<sup>nd</sup> Defendant in its Written Statement of Defendant.

According to the Plaintiff, the 2<sup>nd</sup> Defendant disputed the new mandate structure. It stated that panel A represents the second and not the third Defendant and panel B represents the third and not the second Defendant.

It was further pleaded by the Plaintiff that the changes of mandate notice as can be observed were dated 9<sup>th</sup> February, 2015 and received upon the Plaintiff on 21<sup>st</sup> February, 2015. On 16<sup>th</sup> April, 2015 about two months later, the Plaintiff received an extract resolution indicating that on 9<sup>th</sup> February 2015 the Defendant company held a special meeting chaired by one Yusuf Mulla. The agenda in that meeting was addition of signatories. Mr. Abbhijit Sen Gupla and Shain Poyyara Radhakrishnan were added as signatories.

The 2<sup>nd</sup> Defendant in its Written Statement of Defence did not recognize it as a valid resolution of the 1<sup>st</sup> Defendants Board of

Directors. The 2<sup>nd</sup> Defendant stated that the purported Board Resolution are not of the Chairman and Company Secretary of the 1<sup>st</sup> Defendant.

The Plaintiff alleged that, She operated the account in line with the new mandate changes. In October, 2016 the Plaintiff permitted several withdrawals and debited the Defendant account to the tune of TZs 352, 724, 143.80. But on 31<sup>st</sup> October, 2016 the Plaintiff received a letter from the 3<sup>rd</sup> Defendant complaining that the withdrawals were made contrary to the mandate submitted to the Plaintiff on 21<sup>st</sup> February, 2015. The Plaintiff having been made aware of the dispute between the Directors/shareholders on mandates and in order to protect the interest of its customers froze the 1<sup>st</sup> Defendant's account number 2236600378 with about TZs 367,384, 817.18 in it temporarily pending resolution of the dispute.

The 2<sup>nd</sup> Defendant in its Written Statement of Defence noted the Plaintiff's failures in ascertaining the veracity of the purported resolution and the Plaintiff failure to seek clarification of the purported change of mandate from the 1<sup>st</sup> Defendant's Board of Directors. It further replied that the Plaintiff failed in its obligation to exercise due care and diligence by permitting the unauthorized withdrawal of the amount to the tune of TZs 352, 724, 143, 80.

The Plaintiff went on to allege that the 2<sup>nd</sup> Defendant wrote a letter through its lawyers dated 10<sup>th</sup> February 2017 claiming that the withdrawals were made with proper mandate as such the freezing of the account is illegal and demanded opening of the account.

In response, the 2<sup>nd</sup> Defendant denied to have written the purported letter of 10<sup>th</sup> February, 2017. To the best knowledge of the 2<sup>nd</sup> Defendant, the alleged letter was written by the 3<sup>rd</sup> Defendants Advocate. ***Wherefore***, the Plaintiff prayed for Judgement and Decree against the Defendant as follows:

- a) Declaration that the Plaintiff's act of temporarily freezing the 1<sup>st</sup> Defendant's Account Number 2236600378 is a breach of contract and or a failure of duty of care on the part of the Plaintiff's Bank;
- b) Costs of this suit; and
- c) Any other relief as this Honourable Court deems appropriate in the circumstances.

The 1<sup>st</sup> and 3<sup>rd</sup> Defendants in their separate Written Statement of Defence denied the Plaintiff's claims. The 1<sup>st</sup> Defendant stated that the Plaintiff's act to freeze the 1<sup>st</sup> Defendant's account

without been duly instructed by the 1<sup>st</sup> Defendant amounts to a total interference with the 1<sup>st</sup> Defendant's liberty to utilize their funds is absolute breach of duty of care on the part of the Plaintiff.

The 1<sup>st</sup> Defendant stated that the absence of Mr. Abbhijit Sen Gupta and Shain Poyyara Radhakrishnan, the added signatories via the 1<sup>st</sup> Defendant resolution dated 9<sup>th</sup> February, and the silence of the resolution on the alleged change of mandate signifies the illegitimacy of the alleged notice purported to have been served to the Plaintiff by the 1<sup>st</sup> Defendant. It was however admitted by the 1<sup>st</sup> Defendant that it authorized the withdrawal of TZs 352, 724, 143.80 and that the Plaintiff's act to freeze the 1<sup>st</sup> Defendant's account on his own accord devoid of any prior notice to such effect been served to the 1<sup>st</sup> Defendant amounts to a breach of duty at a massive detriment on the part of the 1<sup>st</sup> Defendant.

The 2<sup>nd</sup> Defendant on its part stated *inter alia* that the change of mandate notice dated 9<sup>th</sup> February, 2015 is not a mandate which the Plaintiff negligently and without any colour of right acted on it, but merely a letter, allegedly issued by the 1<sup>st</sup> Defendant. The 3<sup>rd</sup> Defendant further averred that, as a shareholder in the 1<sup>st</sup> Defendant, none of its Directors who represent it in the Board of

the 1<sup>st</sup> Defendant were signatories to the said letter, and the said letter is not tantamount to a resolution of the 1<sup>st</sup> Defendant's Articles of Association and it does not meet the requirements of article 2 of the 1<sup>st</sup> Defendant's Articles of Association.

The 2<sup>nd</sup> Defendant, apart from disputing the claims, raised a counter claim. It stated that the Plaintiff acted in breach of the account operating mandate and has permitted authorized withdrawals from the 1<sup>st</sup> Defendant's Bank accounts resulting in loss to the second Defendant as shareholder of the 1<sup>st</sup> Defendant.

**Wherefore**, the 2<sup>nd</sup> Defendant prayed for the following orders and relief (s):

1. That, the Plaintiffs in breach of its Bank/ customer obligation and duty of care for permitting the unlawful withdrawal of money from the 1<sup>st</sup> Defendant's Bank account to the detriment of the 2<sup>nd</sup> Defendant;
2. Judgement in favour of the 2<sup>nd</sup> Defendant on its counter claim for the amounts unlawfully withdrawn from the 1<sup>st</sup> Defendant's account;
3. The Plaintiff be ordered to pay costs of this suit;
4. Such further orders and relief (s) this Honourable Court deems just, convenient and equitable.

There was no defence filed to the Counter claim. That being the end of pleadings, I will now turn to determine the two main issues.

To start with the issue; whether the Plaintiff's act of freezing the Bank account was legally justifiable. At the outset, I must observe that it is the duty of the Bank while opening account to seek for the true identity of the signatories of the account. Basically, in these suits, there is no dispute on opening of Account No. 2236600 378 by the 1<sup>st</sup> Defendant to the Plaintiff Bank. It is also not disputed that the only valid resolution of the 1<sup>st</sup> Defendant authorizing the opening of Bank account is the one dated 4<sup>th</sup> September, 2008 which was signed by all Directors of the 1<sup>st</sup> Defendants' Board.

The tug of dispute is on the change of mandate from the 1<sup>st</sup> Defendant's Board of Directors. PW1 Mr. Dioniz John working with the Plaintiff as a Branch Manager at Temeke, testified *inter alia* that when opening the account, the 1<sup>st</sup> Defendant had two shareholders; Furaha Trading who owned 51% and Kito Trading who owned 49%. PW1 was of testimony that the Directors of Kito Trading Ltd are Abdulhakimu Mulla and Yusuf Mulla. While Furaha Trading Ltd had three Directors, namely: 1. Antony Fernandez. 2. Hashur Masrani and 3. Ally Saeed Albwardy.



It was further testified by PW1 that on 16<sup>th</sup> April, 2015 the Plaintiff received Board resolution which required change of signatories adding two signatories. The minutes of the special meeting of Board of Directors of the 1<sup>st</sup> Defendant was admitted as exhibit P3.

Another testimony from PW1 was that, on 31<sup>st</sup> October, 2016 the Plaintiff received a letter from the 2<sup>nd</sup> Defendant complaining on four transactions.

1. Payment to Bluekey Software Solution TZs 104 431, 639.20 made on 5<sup>th</sup> October, 2016.
2. Payment to Lushoto Tea Co. Ltd of TZs 60,058,389.60 made on 5<sup>th</sup> Octobers, 2016.
3. Payment to Bluekey Software Solutions Ltd TZs 38 234,115.00 made on 27<sup>th</sup> October, 2016.
4. Payment to Lushoto Tea Co. Ltd TZs 150,000,000 made on 27<sup>th</sup> October, 2016.

The letter indicating the fore complaint was admitted as exhibit P4. It was PW1 testimony that, after the complaint, the Bank communicated with Kito General Trading Ltd. They verified that the transactions were correct. With that dispute, the Bank frozen the account to protect the interests of the 1<sup>st</sup> Defendant.

PW1 gave two circumstances under which the Bank can freeze the account. **One**, if the shareholders are in dispute till when they resolve it. **Two**, by an order of the Court or TRA.

It was, however, admitted by PW1 that the Plaintiff never received Board resolution from the 1<sup>st</sup> Defendant requiring to freeze the account. The other testimony by PW1 was that AFRITEA changed signatories without involving Furaha General Trading.

On the other hand, DW1 one Generald Josiah Amin the Finance Manager of the 1<sup>st</sup> Defendant testified that there has been no Board of Directors resolution to freeze the account but it was frozen due to instruction from the 2<sup>nd</sup> Defendant.

DW2 Antony Leo Fernandez, one of the 1<sup>st</sup> and 2<sup>nd</sup> Companies Directors testified *inter alia* that, when opening the 1<sup>st</sup> Defendant's account there were two signatories from the 2<sup>nd</sup> Defendant (DW2 and Ally Abward) and in February, 2015 there was first change which required one signatory from Kito General Trading Ltd and one signatory from Furaha Trading Ltd but in September, 2015 the 2<sup>nd</sup> Defendant realized that there were payments made without mandate. That is why the 2<sup>nd</sup> Defendant complained to the Bank through its lawyer.

From the above evidences and exhibits, I find six points as an important factor in answering the first issue. **First**, the 12nd Defendant is the majority shareholder occupying/owning 51% of the 1<sup>st</sup> Defendant's Company and the 3<sup>rd</sup> Defendant owns 49% of the 1<sup>st</sup> Defendant's Company. **Second**, the Plaintiff could only operate the 1<sup>st</sup> Defendant's account by relying on the authorized Board Resolution of the 1<sup>st</sup> Defendant. **Third**, the disputed change of mandate was not of the 1<sup>st</sup> Defendant but engineered by the 3<sup>rd</sup> Defendant only for interest best known to it. **Fourth**, the 3<sup>rd</sup> Defendant in its Written Statement of Defence has admitted authorizing payments to the three companies but there is nothing to prove authorization from the Board Resolution representing interests of both Furaha Trading Co. Ltd and Kito General Trading Co. Ltd. **Five**, it appears correct that the Plaintiff partly was negligent in identifying the false change of mandate presented to it without taking care of the 2<sup>nd</sup> Defendant's interests. However, such negligence was maliciously attributable to the 3<sup>rd</sup> Defendant who with ill intent failed to involve the 2<sup>nd</sup> Defendant in such change. **Sixth**, the onus of establishment circumstances showing absence of negligence is on the Bank. In this case, it is clear that there was a dispute between the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants which lead to illegal authorization of the

withdrawal of the sum of TZs 52, 724, 143. 80. As such, the Plaintiff was justified to freeze the account till when the dispute was/is resolved.

It is the findings of this Court that where a Bank is under duty to make inquiries to her customer regarding a possible breach of trust, the Bank should be allowed to freeze the account within reasonable time to avoid further losses to her client.

Indeed, in the circumstances of this case where there are two shareholders companies, it was almost impossible if not a hundred percent impossible to receive a Board Resolution from the account owner company. The reason being that, the minority shareholder had already exerted its interests alone.

The Court is of further findings that there is no good reason in record as to why Mr. Yusuf Mulla was not called by the 3<sup>rd</sup> Defendant to testify in Court. In fact, the 3<sup>rd</sup> Defendant opted not to bring any witness. Mr. Yusuf Mulla is the Director and shareholder of the 3<sup>rd</sup> Defendant. He disputed existence of dispute between the 2<sup>nd</sup> and 3<sup>rd</sup> Defendant's in Written Statement of Defence of the 1<sup>st</sup> and 3<sup>rd</sup> Defendants both signed by him. As pointed by the Plaintiff in her final written submission, Mr. Yusuf Mulla was a material witness. Failure to call him, the Court is

In this case, there was already a complaint from the 1<sup>st</sup> Defendant's majority shareholder (the 2<sup>nd</sup> Defendant) about withdrawal of the money without authorized mandate. The Bank could therefore not brook its eyes and proceed to allow further withdrawal without inquiring on the same. Hence the temporal freezing of the account was justified.

As regards the relief (s), I find no good reason as to why the 2<sup>nd</sup> Defendant did not file a Counter claim as against the 3<sup>rd</sup> Defendant who has largely occasioned all the possible losses.

In the end, I therefore dismiss both Main suit and Counter claim, but I order the 3<sup>rd</sup> Defendant to pay costs of the suit to both Plaintiff, 1<sup>st</sup> Defendant and 2<sup>nd</sup> Defendant.



**Y. J. MLYAMBINA**

**JUDGE**

**01/12/2020**

Judgment pronounced and dated 1<sup>st</sup> December, 2020 in the presence of Counsel John James for the Plaintiff Sauli Santu for the 1<sup>st</sup> Defendant, Heri Munisi holding brief of Stanislaus Ishengoma for the 2<sup>nd</sup> Defendant and Heri Munisi for the 3<sup>rd</sup> Defendant.



**Y. J. MLYAMBINA**  
**JUDGE**  
**01/12/2020**

A handwritten signature in blue ink, which appears to be "Y. J. Mlyambina", is written over the typed name and date. The signature is fluid and cursive.