



Bethany Village Africa v Bank of Africa Kenya Limited (Civil Appeal E648 of 2021) [2023] KEHC 21550 (KLR) (Civ) (18 August 2023) (Judgment)

Neutral citation: [2023] KEHC 21550 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL E648 OF 2021

AN ONGERI, J

AUGUST 18, 2023

BETWEEN

BETHANY VILLAGE AFRICA APPELLANT

AND

BANK OF AFRICA KENYA LIMITED RESPONDENT

(Being an appeal from the judgment and decree of HON. E. WANJALA (SRM) in Milimani CMCC no. 3682 of 2017 delivered on 6/2/2019)

JUDGMENT

1. The appellant filed Milimani CMCC no 3682 of 2017 against the respondent seeking USD 6,000.00 which was withdrawn from the appellant's account held by the respondent.
2. The respondent denied the appellant's claim.
3. The cause of action arose on 30/1/2014 when the appellant's cheque no 000xxxx for USD 6,000 bearing a forged signature was cashed at the respondent bank where the appellant had a dollar account and also Kenya shillings account.
4. The trial court found that the respondent did not act in breach of their duty of care. The cheque was presented by one Richard Onyango Simba, the bank compared the signature with specimen and cashed it.
5. The Trial Court found that the cheque was paid according to the Plaintiff's mandate and had thus not breached the contract with the Plaintiff and/or duty of care owed to the Plaintiff and thus the Defendant was exempt from liability. The suit was dismissed with costs to the Defendant.
6. The applicant was aggrieved by the judgment and has appealed on the following grounds.



- a. That the Learned Magistrate erred in law and fact in finding that the Appellant failed to establish its case on a balance of probabilities as against the Respondent and subsequently dismissing the Appellant's case with costs to the Respondent;
 - b. The Learned Magistrate misdirected herself in law and in fact by finding and holding that the Respondent acted within the Appellant's mandate in cashing the suit cheque and that the Respondent paid the cheque in ordinary course of business between themselves and the Appellant.
 - c. The Learned Magistrate erred in law and in fact that payment was done by the Respondent in good faith and did not breach any contract or duty of care owed to the Appellant.
 - d. The Learned Magistrate erred in law and fact in finding that Clause 24 of the general terms and conditions was applicable to Richard Onyango Simba.
7. The parties filed written submissions which I have duly considered. The Appellant submitted that the issues for determination are as follows;
- a. Whether the Respondent paid against the cheque without reasonable care and skill; and
 - b. Whether the Respondent's General Terms and conditions protected it from liability of paying against a forged cheque.
8. The Appellant submitted that the Respondent had a duty to call the rest of the signatories in the event that a cheque was presented by only one signatory, and failure to do so was an act of negligence but concedes that the cheque was paid in the ordinary course of business. The Respondent cannot thus seek protection under Clause 24 of its General Terms and Conditions because it was obligated to exercise reasonable care and diligence.
9. The respondent submitted that it was under duty to abide by its customer's instructions to pay against drawn cheques if the account of the Appellant was in sufficient funds. There was no requirement for the Respondent to call the Appellant before cashing cheques so long as it bore the signature of any two listed signatories.
10. Further, the respondent submitted that it acted within its mandate with due care and skill and that the Respondent's regulations which were well known to the Appellants protect it from liability where a cheque is forged by an employee of the Appellant.
11. This being a first appeal the duty of the first appellate court is to re-evaluate the evidence adduced before the Trial court and to arrive at its own conclusion whether or not to support the findings of the Trial court while bearing in mind that the Trial court had an opportunity to see the witnesses.
12. The issues for determination in this appeal are as follows;
- i. Whether the appellant proved its case to the required standard.
 - ii. Whether the respondent was in breach of their fiduciary duty of care.
 - iii. Who pays the costs of this appeal?
13. On the issue as to whether the appellant proved its case, I find that the appellant is bound by the terms of the contract between the parties.
14. The respondent acted according to instructions and the Trial court was right in finding that the cheque was paid in the ordinary course of business and further that clause 24 of the general terms and



conditions of the bank exempted the respondent from liability if the forgery was committed by an employee, an agent or a servant of the appellant.

15. It is not the duty of the court to rewrite contracts between parties.
16. In the case of *Pius Kimaiyo Langat versus Co-operative Bank of Kenya Ltd* [2017] eKLR, the court stated as follows;

“We are alive to the hallowed legal maxim that it is not the business of Courts to rewrite contracts between parties. They are bound by the terms of their contracts, unless coercion, Fraud or undue influence are pleaded and proved.”
17. In the current case I find that the respondent acted with due diligence before making the payment there was no requirement for the Respondent to call the Appellant before cashing cheques so long as it bore the signature of any two listed signatories and there were sufficient funds in the account.
18. On the issue as to whether the bank was in breach of their fiduciary duty the answer is in the negative.
19. There is evidence that Richard Onyango Simba was a signatory of the appellant’s bank account and he acted as an agent and/or servant of the Appellant.
20. I dismiss the appeal with costs to the respondent.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 18TH DAY OF AUGUST, 2023.

.....
A. N. ONGERI

JUDGE

In the presence of:

.....for the Appellant

.....for the Respondent

