



Barclays Bank of Kenya Limited v Amitty Equipment Limited & another (Civil Appeal E511 of 2021) [2023] KEHC 21879 (KLR) (Civ) (16 August 2023) (Judgment)

Neutral citation: [2023] KEHC 21879 (KLR)

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

CIVIL

CIVIL APPEAL E511 OF 2021

AN ONGERI, J

AUGUST 16, 2023

BETWEEN

BARCLAYS BANK OF KENYA LIMITED APPELLANT

AND

AMITTY EQUIPMENT LIMITED 1ST RESPONDENT

KENINDIA ASSURANCE COMPANY LIMITED 2ND RESPONDENT

*(Being an appeal from the judgment and decree of Hon. B. J. Ofisi(RM)
in Milimani CMCC No. 1125 of 2017 delivered on 11/6/2021)*

JUDGMENT

1. The 1st respondent in this appeal Amity Equipment Limited was the plaintiff in Milimani CMCC 1125 of 2017 in respect of a refund of kshs.462,422 which was withdrawn vide banker's cheque no. 31225 in favor of the 2nd respondent Kenindia Assurance Company. The cheque was cashed at Diamond Trust Bank, Kericho branch by Mega Sacco Society Limited.
2. Kenindia Assurance Company Limited was the 3rd party in Milimani CMCC 1125 of 2017.
3. The appellant who was the defendant in the primary suit denied the 1st respondent claim and stated that the 1st respondent ought to have pursued the 2nd respondent, Kenindia Assurance Limited.
4. The trial court found that the appellant was in breach of duty of care by issuing a cheque of kshs.462,422 To Kenindia Assurance Limited for renewal of a policy which was still in force.
5. The trial court absolved the 3rd party from the claim for reasons that the cheque was represented by Mega Sacco to Diamond Trust Bank.



6. The trial court entered judgment in favour of the 1st respondent in the sum of ksh.462,422/= with interest from the date of the suit and costs.
7. The appellant has appealed against the judgment and decree on the following grounds
 - a. The learned magistrate erred in fact and in law in finding that the appellant had breached its fiduciary duty to the 1st respondent.
 - b. The learned magistrate erred in fact and in law in finding that the appellant required to obtain the 1st respondent's consent before renewal of policy.
 - c. The learned magistrate misdirected herself in assuring and holding that existence of the policy set to commence on 30th March 2012 and to expire on 31st march 2013 was evidence of payment of premium.
 - d. The learned magistrate erred in fact and in law by absolving the 2nd respondent from the claim.
 - e. The learned magistrate erred in fact and in law by failing to appreciate the evidence by the appellant that Mr Wilson Thairu was an employee of the 2nd respondent and was acting on instructions of the 2nd respondent
 - f. The learned magistrate erred in fact and in law by failing to find that the cheque no. 312251 was drawn in favour of and delivered into the 2nd respondent's possession.
 - g. The learned magistrate erred in fact and law by failing to find that the appellant was entitled to indemnity by the 2nd respondent.
 - h. The learned magistrate erred in fact and in law by completely disregarding the appellant's submissions.
8. The parties filed written submissions in the appeal as follows;
(Note: There was no submissions by the appellant on file and CTS)
9. The 1st respondent submitted that as an account holder the appellant owed the 1st respondent a duty of care to act in its best interest which was breached when the appellant without approval or consent debited the 1st respondents account with the sum of Kshs. 462,422 via banker's cheque purporting to pay for the renewal of policy that was ongoing at the time.
10. It was later revealed that the cheque was not paid to the alleged intended insurance company, the 2nd respondent but, to a third party not in any way connected to the 1st or 2nd respondents. In the absence of the 1st respondent's consent the debit was not only unauthorized but fraudulent in nature contrary to an implied banker/customer relationship.
11. The 1st respondent further indicated that the banker's cheque payment was not in discharge of the 1st respondent's debt since as at the date of the purported renewal, the said policy was ongoing having been renewed by the 1st respondent set to expire 31st march 2013 as such no debt was owing to the 1st respondent that necessitated such debit.
12. On the burden of proof, the 1st respondent submitted that it discharged its duty. The appellant further provided the contract on Multi Option Facility Commercial Terms did not in any way grant the appellant the right to access the 1st respondent's account and debit funds without approval/ authorization.



13. The 2nd respondent submitted that no evidence was adduced to show that Wilson Thairu who allegedly collected the banker's cheque on behalf of the 2nd respondent was indeed an employee of the 2nd respondent. There also was no attempts at enjoining the said Wilson Thairu to the trial proceedings so that the learned trial magistrate could have the opportunity to determine the relationship between the 2nd respondent and the said Wilson Thairu.
14. The 2nd respondent submitted that the unilateral decision by the appellant to handover the banker's cheque to Wilson Thairu was not a wrongful act on the part of the 2nd respondent in light of DW1's confirmation that it was the appellant's finance director who confirmed that Wilson Thairu was an employee of the 2nd respondent and not the 2nd respondent.
15. The 2nd respondent submitted that the proceeds of the banker's cheque was never credited to the account of the 2nd respondent and therefore contribution by the 2nd respondent was never explained; and that further not privy of contract between the appellant and the 2nd respondent and it played no role in the bank debiting the 1st respondent's account.
16. This being a first appeal, the duty of this court is to re-evaluate the evidence adduced before the trial court and to arrive at its own conclusion whether to support the findings of the Trial court while bearing in mind that the Trial court had the opportunity to see the witnesses.
17. In *Selle –Vs- Associated Motor Boat Co.* [1968] EA 123 it was held that: -

“An appeal from the High Court is by way of re-trial and the Court of Appeal is not bound to follow the trial judge's finding of fact if it appears either that he failed to take account of particular circumstances or probabilities, or if the impression of the demeanour of a witness is inconsistent with the evidence generally.

An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect.

In particular, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally.”

18. The issues for determination in this appeal are as follows;
 - i. Whether the trial court erred in finding that the appellant was in breach of its fiduciary duty to the 1st respondent.
 - ii. Whether the trial court erred in absolving the 2nd respondent.
 - iii. Whether the appellant was entitled to indemnity from the 2nd respondent.
19. On the issue as to whether the trial court erred in finding that the appellant was in breach of its fiduciary duty to the 1st respondent there was evidence that the banker's cheque no. 31225 was drawn against the 1st respondent's account without their consent or authority.



20. Black’s Law Dictionary, 10th Ed. 2009 at pg 745 defines a fiduciary relationship as;

“A relationship in which one person is under a duty to act for the benefit of another on matters within the scope of the relationship. ...Fiduciary relationships usually arise in one of four situations; 1) when one person places trust in the faithful integrity of another, 2) when one person assumes control and responsibility over another, 3) when one person has a duty to act for or give advice to another on matters falling within the scope of the relationship, or 4) when there is specific relationship that has traditionally been recognized as involving fiduciary duties, as with a lawyer and client, ...”

21. The trial court was right in holding the appellant liable for breach of its fiduciary duty to the 1st respondent.

22. In *Co-operative Bank of Kenya Ltd v Biwott (Civil Appeal 18 of 2019) [2022] KEHC 9946 (eKLR)*, the Court said as follows;

“The bank-customer relationship is contractual in nature and imposes a duty on the bank to exercise reasonable care and skill in its dealings with the customer ... A bank has a duty under its contract with its customer to exercise “reasonable care and skill” in carrying out its part with regard to operations within its contract with its customer. The standard of that reasonable care and skill is an objective standard applicable to bankers. Whether or not it has been attained in any particular case has to be decided in the light of all the relevant facts, which can vary almost infinitely.”

23. On the issue as to whether the trial court erred in absolving the 2nd respondent, I find that the trial court found that the amount was presented by Mega Saccos to Diamod Trust Bank.

24. The trial court also found that the alleged agent and/or employee WILSON THAIRU acted in his own capacity since there was no evidence that he was the 2nd respondent’s employee or that he had instructions to act for the 2nd respondent.

25. I find that the trial court was right in absolving the 2nd respondent since they were not paid. It was Mega Sacco that was paid.

26. On the issue as to whether the appellant was entitled to indemnity from the 2nd respondent, I find that the 2nd respondent did not receive the money.

27. The appeal herein is dismissed with costs to the 1st respondent.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 16TH DAY OF AUGUST, 2023.

.....

A. N. ONGERI

JUDGE

In the presence of:

..... for the Appellant

..... for the 1st Respondent

..... for the 2nd Respondent

