



**Ohaga v Kenya Commercial Bank (Civil Appeal 31 of 2019)
[2022] KEHC 11482 (KLR) (20 May 2022) (Judgment)**

Neutral citation: [2022] KEHC 11482 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CIVIL APPEAL 31 OF 2019
RN NYAKUNDI, J
MAY 20, 2022**

BETWEEN

NICHOLAS MUGA OHAGA APPELLANT

AND

KENYA COMMERCIAL BANK RESPONDENT

(Appeal arising from the judgement in Eldoret CMCC 771 of 2010.)

JUDGMENT

Coram: Hon. Mr. Justice R. Nyakundi

Mukabane & Kagunza Adv for the appellant

Manani, Lilan, Mwetich & Co. Adv for the respondent

1. The appellant was the plaintiff in Eldoret CMCC 771 of 2010 where he instituted a suit vide a plaint dated September 21, 2020 seeking a declaration that the defendant is not entitled to demand any money from the plaintiff on the loan account, general damages and special damages of Kshs 4,340/-. The cause of action arose from a loan account the plaintiff operated with the defendant at its branch in Siaya town. The defendant claimed outstanding loan account arrears of Kshs 26,266.70/- on the account in July 2008. He claimed he had deposited a cheque of Kshs 17,976/- to settle the outstanding balance of Kshs 17,972/- on the loan on November 13, 2007.
2. The trial court, after hearing the matter, and considering all the pleadings and submissions and found that there was no breach of contract on the part of the defendant. The appellant being dissatisfied with the decision of the court instituted the present appeal vide a memorandum of appeal dated March 14, 2019. The appeal was based on the grounds that;



1. That the trial magistrate erred in law and in fact by failing to appreciate the fact that the appellant had proved his case on a balance of probabilities as required by law and that the appellant had adduced evidence to prove his case as pleaded in the plaint.
2. That the trial magistrate erred in law and in fact by failing to take into account and to consider the appellant's evidence in arriving at its decision.
3. That the trial magistrate erred in law and in fact by failing to consider the submissions made on behalf of the appellant in arriving at his decision.
4. That the trial magistrate erred in law and in fact by applying the wrong principles of law in arriving at his judgment.
5. That the trial magistrate erred in law and in fact by considering issues that were neither raised nor submitted upon by the respondent.
6. That the trial magistrate erred in law and in fact by failing to find the evidence of the respondent as incredible, contradictory and inconsistent.
7. That the trial magistrate erred in law and in fact by dismissing the appellant's case on the sole ground that there was no breach of contract on the part of the respondent and ignoring issues of negligence on the part of the respondent raised by the appellant.
8. That the trial magistrate erred in law and in fact by showing open biasness against the appellant.

Appellant's Case

3. It is the appellant's case that he took a loan of Kshs 80,000/- from the respondents and the same was deducted from his salary on a monthly basis. On November 12, 2007 he deposited a cheque for Kshs 17,976/- to clear the loan balance. He received a letter on July 23, 2008 demanding payment for more money on the loan. The said letter stated that the default for the arrears was occasioned by the bank which misplaced the bankers' cheque issued to clear the loan. He produced the letter confirming the loss of the cheque, the letter from the bank demanding replacement of the lost bankers' cheque and a letter from cooperative bank to Magereza Sacco instructing the respondent to sign an indemnity form regarding the loss of the cheque. He however lost the indemnity form which was to be signed by the respondents.
4. The appellant submitted that the respondent owed him a duty of care in keeping safe custody of the bankers' cheque. That the respondent breached the duty grounded on the following: The respondent failed to keep custody of the bankers' cheque and upon loss he was notified after expiry of 6 months. The respondent in their various correspondences acknowledged that they lost the bankers' cheque. The respondent breached this duty by failing to fill the indemnity form, misplacing the indemnity form and failing to update the appellants' loan account upon receiving the bankers' cheque. Had there been no breach of duty the appellant would not be in arrears or suffered damages.
5. It is the appellant's case that the court considered extraneous issues that had not been pleaded. By asking him whether he had approached Magereza Sacco to have it fill the indemnity form. The appellant maintained that the finding was erroneous as the cheque that was lost from cooperative bank was handed over to the respondent and such a loss is an admitted fact. Further, that the trial court failed to make distinctions between a bankers' cheque and a personal cheque. It was the duty of the respondent to follow the correct bank procedures under section 46 of the *Bills of Exchange Act* to have it replaced instead of shifting the blame to the appellant.



Respondent's Case

6. It is the respondent's case that the appellant had an outstanding loan and his attempt to settle the same through bankers' cheque was unsuccessful. Both the cheque and the indemnity form were lost and the loan remained outstanding. The court held that the funds in respect to the bankers' cheque were not realised and the funds did not leave the Magereza Sacco account. The appellant did not tender evidence that he settled the loan amount.
7. It is undisputed that the contract obliged the appellant to clear the loan and therefore that obligation never shifts to any other third party. It was the contention by the respondent that it had no access to the Magereza Sacco account to settle the appellant's loan amount and the funds did not leave the account thus the appellant breached the contract. The respondent cited the case of *Nakana Trading Co Ltd v Coffee Marketing Board* (1990-1994) EA 448 in support of its submissions on breach of contract. It also cited the case of *Danson Muriuki Kihara v Johnson Kabungo* [2017] eKLR and *Samuel K Macharia v Kenya Commercial Bank Limited & Kenya Commercial Finance Company Limited* with regards to breach of contracts. Further, that finding that the respondent breached the contract will amount to unjust enrichment.
8. The respondent submitted that the courts' findings were correct as the evidence demonstrated that the bankers' cheque never went through the clearing house to debit the account of the appellant. The appellant ought to have taken indemnity form to cooperative bank which was willing to credit the Sacco. The court's decision to waive interest on loan between the periods of November 2007 to July 2008 and also order the parties to regularise the position of November 13, 2007 in relation to the loan was an equitable remedy to address the loss of the bankers' cheque and indemnity forms by the respondent. The appellant did not adduce any evidence to show entitlement to special and general damages. It asks that the appeal be dismissed.

Resolution

9. Upon perusal of the submissions and the record of appeal I have identified the following issues for determination;
 1. Whether the trial court erred in finding that there was no breach of contract by the respondent.
 2. Whether the appellant cleared the loan.

Whether The Trial Court Erred In Finding That There Was No Breach Of Contract By The Respondent

10. The duty of the 1st appellate court is well stated in *Sokoro Saw Mills Limited v Grace Nduta Ndungu*, Nakuru High Court Civil Appeal Number 99 of 2003 (Kimaru, J on 24 March 2006);

“In the first appeal the Court is mandated to reconsider and re-evaluate the evidence adduced by the witnesses before the trial magistrate's court so as to arrive at an independent decision whether or not to uphold the decision of the trial magistrate. See *Jabane v Olenja* (1986) KLR 661.”



11. The basic principle of interference of the court below findings and judgments is premised in the decision of the court of appeal in Mwangi v Wambugu [1984] KLR 453, in which that court pronounced itself as follows:-

“A court of Appeal will not normally interfere with a finding of fact by the trial court unless such finding is based on no evidence or on a misapprehension of the evidence or the Judge is shown demonstrably to have acted on wrong principle in reaching the finding and an appellate court is not bound to accept the trial judge’s finding of fact if it appears either that he has clearly failed on some material point to take into account of particular circumstances or probabilities material to an estimate of the evidence, or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.”

13. The bone of contention is in relation to the law of damages arising out of the circumstances on the loan repayment and loss of the banker’s cheque. For purpose of this appeal I reiterate the following principles. In Robinson v Harman (1848) 1 Exch 850, Parke B said:

“The rule of the common law is, that where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation, with respect to damages, as if the contract had been performed.”

That statement has been endorsed on many occasions at the highest level, most recently in Bunge SA v Nidera NV (formerly Nidera Handelscompagnie BV) [2015] UKSC 43; [2015] Bus LR 987, para 14, where it was described as the

“fundamental principle of the common law of damages”.

It has also been described as the “ruling principle” (Wertheim v Chicoutimi Pulp Co [1911] AC 301, 307), the “fundamental basis” for assessing damages (British Westinghouse Electric and Manufacturing Co Ltd v Underground Electric Railways Co of London Ltd (No 2) [1912] AC 673, 689), and the “lodestar” (Golden Strait Corp v Nippon Yusen Kubishika Kaisha (The Golden Victory) [2007] UKHL 12; [2007] 2 AC 353, para 36).

14. That is not to say that damages in contract will always be different from damages in tort. For example, the damages awarded in cases of medical negligence do not normally depend on whether the claimant was a private patient: the substance of the obligation breached, and the recoverable harm caused, are normally the same whether the cause of action is framed in contract or in tort. Equally, the user principle derived from the property cases discussed earlier is of potential relevance whether the wrongful use of property arises in a contractual or tortious context.
15. The compensatory nature of damages for breach of contract, and the nature of the loss for which they are designed to compensate, were explained by Lord Diplock in Photo Production Ltd v Securicor Transport Ltd [1980] AC 827, 848- 849. As his Lordship stated, a contract is the source of primary legal obligations upon each party to it to procure that whatever he has promised will be done. Leaving aside the comparatively rare cases in which the court is able to enforce a primary obligation by decreeing specific performance of it, breaches of primary obligations give rise to “substituted or secondary obligations” on the part of the party in default. Those secondary obligations of the contract breaker arise by implication of law:

“The contract, however, is just as much the source of secondary obligations as it is of primary obligations ... Every failure to perform a primary obligation is a breach of contract. The secondary obligation on the part of the contract breaker to which it gives rise by implication



of the common law is to pay monetary compensation to the other party for the loss sustained by him in consequence of the breach ..." (p 849)

I note that the trial court, in considering the conduct that the appellant claims to have been breach of duty of care, remedied any damages the appellant would have suffered as a result of the loss of the cheque and the late notification by waiving the interest on the loan amount for the period the appellant was not notified.

Black's Law Dictionary, 9th Edition, page 213 defines a breach of Contract as;

"a violation of a contractual obligation by failing to perform one's own promised, by repudiating, or by interfering with another party's performance. A breach may be one by non-performance or by repudiation or both. Every breach gives rise to a claim for damages and may give rise to other remedies. Even if the injured party sustains no pecuniary loss or unable to show such loss with sufficient certainty he has at least a claim for nominal damages".

16. The respondent admitted the loss of the bankers' cheque and made an effort to reach out to the drawer of the cheque who wrote to the Sacco and urged it to fill an indemnity form. The loss of the cheque being the alleged breach, I find that the same was remedied by notifying the appellant. Further, the appellant did not suffer any damages from the failure to bank the cheques as the trial court ordered that the interest be waived. This put the appellant in a position where he was before the alleged breach. The damages he claims i.e. inability to access a loan facility and having his credit rating watered down are consequences of failing to pay the loan and not the misplacement of the cheque. The relevant events as summarised in this appeal prima facie do not constitute negligence. For purposes of the appeal the respondent produced evidence qualifying the alleged loss which to me was not a breach of the covenants in the contract.
17. I find that there was no breach of contract and the trial court was correct in its findings.

Whether The Appellant Cleared The Loan

18. It is evident that the appellant did not clear the loan as he did not provide any proof of the same. Further, it is clear that the money was not credited from the Sacco account and therefore the loan was not paid. If anything, it is evident that the appellant was in breach of the loan agreement. One observation can however be made so far as this contract between the lender and the borrower the information so far availed to the court clearly demonstrate the loan amount is still outstanding. I do not think the loss of the banker's cheque should exonerate the appellant from keeping his part of the bargain. The compensatory nature of damages for breach of contract while the contest is to enforce the primary obligation in the contract is not sustainable. The consequential loss of the banker's cheque is not capable of constituting liability on the part of the respondent's conduct. I find that the loan was not paid.
19. It is therefore the finding of this court that the appeal fails in its entirety and is dismissed. It would have been prudent of the appellant to settle the loan as per the decision of the lower court as he had been relieved of the interest that was due. However, given that equity aids the vigilant and not the indolent, he must now settle the loan arrears and the interest incurred in accordance with the findings of the trial court. For those reasons the appeal is dismissed with costs to the respondent.

DATED, SIGNED AND DELIVERED VIA EMAIL AT ELDORET ' THIS 20TH DAY OF MAY, 2022.

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R NYAKUNDI
JUDGE

