Ace Technologies Limited v Family Bank Limited (Civil Appeal E006 of 2022)
[2022] KEHC 13224 (KLR) (Commercial and Tax) (28 September 2022) (Judgment)

Neutral citation: [2022] KEHC 13224 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

CIVIL APPEAL E006 OF 2022

DAS MAJANJA, J

SEPTEMBER 28, 2022

BETWEEN

ACE TECHNOLOGIES LIMITED ..... APPELLANT

AND

FAMILY BANK LIMITED ..... RESPONDENT

(Being an appeal from the Judgment and Decree of Hon. D. W. Mburu, SPM dated 4th December 2020 at the Magistrates Court at Nairobi, Milimani in Civil Case No. 4134 of 2018)

JUDGMENT

1. Before the court for determination is an appeal filed by the Appellant that is grounded in its Memorandum of Appeal dated February 3, 2022 where it seeks to set aside the judgment and decree issued by the Subordinate Court dated December 4, 2020 dismissing its suit.

2. The facts giving rise to the suit and this appeal are fairly straightforward and can be gleaned from the record. At the material time, the parties were in a banker-customer relationship where the Appellant operated a bank account number xxxxx with the Respondent's Sonalux branch in Nairobi. By a Plaint dated April 30, 2018, the Appellant filed suit claiming that the Respondent ('the Bank'), in granting it a Post Import Finance facility to settle a documentary Letter of Credit denominated in Euros, applied an exchange rate of Kshs 118 to 1 Euro not agreed upon by the parties and unlawfully debited Kshs 281,970.00 from its account.

3. The Appellant further claimed that the Bank, without any notice, forwarded its name to the Credit Reference Bureau ('the CRB') for listing for failing to pay the debited sum and that this action constituted an abuse of the Bank's privilege under the Credit Reference laws. The Appellant thus contended that it had suffered financial loss and grave reputational damage, that it had been subjected

to embarrassment and odium and as a result it could not access to credit facilities as it had been portrayed as a loan defaulter.

4. For the aforesaid reasons, the Appellant prayed for judgment for Kshs 281,970.00 together with interest until payment in full, a declaration that the causation of the Appellant's listing with the CRB by the Bank was unlawful, a mandatory injunction directed at the Bank compelling it to cause the removal of the Appellant's name from the listing at the CRB, general damages and costs of the suit together with interest.

5. In its defence, the Bank denied that it was indebted to the Appellant or that it had agreed with the Appellant on an exchange rate for the facility it had extended to the Appellant. The Bank stated that the exchange rate was agreed at Kshs 116.00 to 1 Euro for a period of two days only and upon the Appellant sufficiently funding its account with the amount covered by the facility within the stipulated period to enable the Bank honour the said Letter of Credit. The Bank stated that by the time the Appellant fully funded its account, the exchange rate had changed to Kshs 118 to 1 Euro and that the debit was lawful and reflective of the prevailing exchange rate.

6. The Bank thus stated that since the Appellant did not remit of payment of all the proceeds under the facility, the Appellant was in breach of the terms therein and as a result, was indebted to the Bank in the sum of Kshs 252,697.00 thereby causing the Bank to lawfully list it as a defaulter with the CRB.

7. The matter was set down for hearing with the parties each calling witnesses. After considering evidence and submissions, the trial magistrate delivered his judgment on December 4, 2020. The court stated that the main issue for determination was whether the exchange rate of Kshs 116 for 1 Euro agreed upon by the parties on June 20, 2017 for the facility was a fixed rate or whether the same was a spot rate applicable for two days.

8. The trial magistrate held that there was no indication whatsoever from the evidence that the exchange rate was to remain fixed. The trial magistrate accepted the Bank's evidence that the facility granted to the Appellant was to be handled with speed as it is standard practice in the banking industry for the exchange rate to be held for a very short period and that the reason why the exchange rate was not stated in the letter of offer was that it varied and that the rates are set by the Central Bank of Kenya and keeps fluctuating. The court further relied on the principle of 'trade usage' as applied by the court in *Francis Joseph Kamau Ichatha v Housing Finance Company of Kenya Limited [2014] eKLR* to state that it had taken judicial notice that exchange rates between different currencies are not static and keep fluctuating and that such exchange rates are set by the Central Bank of Kenya and therefore, the Bank could not solely determine the exchange rate applicable on July 1, 2017 when the Appellant funded its account and that it was not in dispute that the Appellant funded its account about 10 days later and that this sufficiently explained the change in the exchange rate.

9. In sum, the trial court did not find any wrong doing on the part of the Bank. It held that the Appellant had failed to prove its case against the Bank and thus dismissed the suit with costs. It is this decision that has precipitated this appeal which has been canvassed by way of written submissions. The arguments made by the parties are along the lines I have outlined above hence he do not propose to rehash the same arguments.

Analysis and Determination

10. Since this is the first appeal, it is not disputed that this courtis under an obligation to abide by the provisions of section 78 of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya) to evaluate and examine the lower court record and the evidence presented before it in order to arrive at its own

conclusion. The applicable principle of law was highlighted in *Selle v Associated Motor Boat Co Ltd [1968] EA 123* where the court stated that:

> [An appellate court] is not bound necessarily to accept the findings of fact by the court below. An appeal to this 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.

11. With the above in hindsight, the issue this court is required to resolve is whether the trial court arrived at the correct conclusions in law and fact in its determination whether the exchange rate agreed upon by the parties was fixed for two days only. In its evidence, the Appellant maintained that it negotiated a rate of Kshs 116 to 1 Euro with the Bank but that the Bank applied the rate of Kshs 118 without its approval. It further stated that the Bank was at fault since it did not fund its account on time.

12. In his testimony, the Appellant's witness stated that on 20th June the Bank wrote to it an email giving a rate of Kshs 116 and that the rate of Kshs 118 was not agreed upon and he was never informed of the change. He further stated that there was no disagreement on whether the rate was 'fixed' or 'spot' and insisted that the negotiated rate for the facility was Kshs 116 and no other details were communicated to the Appellant.

13. On its part, the Bank gave evidence that the exchange rate was initially Kshs 116, valid for two days and that if the money was not activated within 2 days, the rate was subject to change and that when the Appellant credited its account, the rate was Kshs 118. When cross-examined, the Bank's witness stated that the agreement for the rate of Kshs 116 was recorded on June 20, 2017 and that the letter dated June 30, 2017 got to the Appellant 10 days after June 20, 2017. He further insisted that the rate of Kshs 116 was applicable for two days only and that the letter of offer had no principle on application of the exchange rate and that the exchange rate was not stated in the agreement. According to the Bank, the Appellant was always aware of the requirement of the rate only being valid for two days.

14. I have gone through the record and in an email from the Bank dated June 13, 2017, the Bank communicated to the Appellant as follows:

    Hi Steve,

    We have received the attached LC documents to be released against payment.

    Kindly make arrangements

    The Euro rate is 116.55

15. On June 19, 2017, the Bank further wrote to the Appellant:

    Steve,

    Please find attached, kindly follow-up with beneficiary to provide the itemized packing list.

    Meanwhile, kindly negotiate for a rate

16. On June 20, 2017, the Appellant wrote to the Bank as follows:

    Afternoon Rebecca,

    We spoke earlier.

    Rate at 116 from Stephen.

Also you will need to write to us a release on the B/L the consignee is Family Bank.

We are sending for docs.

17. On July 3, 2017, the Bank wrote to the Appellant as follows:

Dear Steve,

Attached hereto is your bank statement. Please deposit the difference of at least Kshs 160,000.00 so that the guarantee is settled this morning.

18. On the following day, July 4, 2017, the Appellant wrote to the Bank reprising the aforementioned correspondence and bringing issue with a new rate that had been applied by the Bank. The Appellant was emphatic that it was not privy to and ought to have been drawn into a conversation about a new rate because the matter was totally out of its control and that if there was a new rate applicable, it ought to have been between the Bank themselves to decide how to settle it. The Appellant thus declined to absorb the new exchange rate which the Appellant attributed to the internal breakdown of communication between the Bank branch and its Treasury.

19. From the above correspondence, I hold that there was no conversation about the rate of Kshs 116 being applicable for two days or that the same was conditional upon the Appellant crediting its account. I agree with the Appellant that it was called by the Bank to negotiate a rate, which it did at Kshs 116 and which the Bank confirmed. The Bank never informed the Appellant that the rate of Kshs 116 was only applicable for two days or that it would change if the Appellant did not credit its account. The Bank's email of July 3, 2017 only sought the credit so as to enable the 'guarantee to be settled'. It did not notify the Appellant of a change of the exchange rate in case of default or failure to credit the account.

20. I therefore fault the trial court's holding that there was no indication from the documents tabled by the Appellant that the exchange rate was to remain fixed. This was a clear misapprehension of the evidence as the Appellant produced correspondence that was sufficient to demonstrate that the exchange rate agreed upon was fixed. On the contrary there was no indication that the same was to change after two days from the date of agreement. I further disagree with the lower court's finding that the Bank informed the Appellant that the said transaction was to be done with speed so as to maintain the exchange rate as there is nothing on record to such a communication.

21. In reaching its conclusions, the trial court relied on judicial notice and trade usage which the Bank called in aid in its submissions before the trial court. Section 59 of the *Evidence Act* (Chapter 80 of the Laws of Kenya) provides that no fact of which the court shall take judicial notice need be proved while section 60 sets out matters which the courts shall take judicial notice including matters of general or local notoriety. I do not think matters of banking and trade fall within the rubric of matter of general or local notoriety particularly where the relationship between the parties was contractual in nature and is governed by specific documents.

22. Further and as regards custom and trade usage, the law as I understand, is that it must not be assumed, it must not only be pleaded but also proved. This is what Newbold, P stated in *Harilal & Co and Another v Standard Bank Ltd [1967] EA 512, 518* that, 'Where a claim is based upon a trade usage then the pleadings should quite clearly aver not only that fact but the precise nature of the trade usage on which the claim is founded'. On the same note, Duffus JA, observed that, 'On the question of usage, as my Lord the President points out, this has not been pleaded, though I should think it possible that a usage if properly pleaded and proved, could be established to show that there would be a variation of interest paid by or to a bank in accordance with the change of a recognized and established bank rate'. I have read and re-read the statement of defence and I find and hold that the Bank did not plead trade usage as part of its defence.

23. While the trial court relied on trade usage to hold that exchange rates between different currencies are not static, the court in Francis Joseph Kamau Ichatha v Housing Finance Company of Kenya Limited (Supra) also held that banks should stipulate all the conditions for the grant of facilities and that they should not hide some conditions from the customer only to later resort to them under the guise of trade custom and usage. It is for this reason that where a party relies on trade custom and usage, it must be pleaded so that the court can ascertain whether the trade custom and usage alleged exists. Further, the Bank had an obligation to inform the Appellant that the exchange rate agreed upon was not fixed and was to lapse after two days, if at all. This is consistent with Article 46(1)(b) and (c) of the *Constitution* which provides for the rights to the information necessary for consumers of goods and services to gain full benefit from goods and services and to the protection of their health, safety, and economic interests. I therefore find and hold that the trial court misapprehended the import of trade custom and usage in resolving the suit.

24. At the end of the day, the Appellant set out to prove that the parties had an agreement on an exchange rate. It discharged its burden of proof on the basis of the documentary evidence. I agree with the Appellant that the Bank did not have any justification to apply the new exchange rate on the facility as this was a unilateral variation to the parties' agreement and was detrimental to the Appellant.

25. I therefore find that the Appellant's appeal has merit as it proved that the Bank was not entitled to debit its account with Kshs 281,970.00. The natural consequence of this act is that it was not entitled to list the Appellant as a defaulter with the CRB. The Appellant is therefore entitled to general damages. In its submissions before the trial court, the Appellant cited *Namalwa Christine Masinde v National Bank of Kenya Ltd KKG HCCC No 2 of 2015 [2016] eKLR* where the court awarded the plaintiff therein Kshs 200,000.00 as general damages for financial embarrassment and unlawful listing with the CRB as a loan defaulter. I find this decision to be relevant and similar to this case and therefore award the Appellant Kshs 200,000.00 as general damages.

Disposition

26. For the reasons I have outlined above, I allow the appeal on the following terms:

    a. The judgment of the Subordinate Court dated December 4, 2020 be and is hereby set aside and substituted therefor with the judgment on the following terms.

    b. Judgment is entered for the Appellant against the Respondent for Kshs 281,970.00 with interest thereon at court rates from the date of filing suit until payment in full.

    c. The Appellant is awarded Kshs 200,000.00 as general damages with interest thereon at court rates from December 4, 2020 until payment in full.

    d. The Respondent is directed to cause the removal of the Appellant's name from the listing at the Credit Reference Bureau

    e. The Respondent shall pay the costs of the suit in the Subordinate Court and costs of this appeal which are assessed to Kshs 50,000.00.

DATED AND DELIVERED AT NAIROBI THIS 28TH DAY OF SEPTEMBER 2022.

D. S. MAJANJA

JUDGE

Court Assistant: Mr M. Onyango.

Mr Marete instructed by Kithinji Marete and Company Advocates for the Appellant

Ms Kivindyo instructed by P. W. Wena and Company Advocates for the Respondent