



Sylvester Sule Nyagweth t/a Yasul Automobile and Spares v Kimeli & another (Civil Appeal 590 of 2015) [2022] KEHC 14130 (KLR) (Civ) (21 October 2022) (Judgment)

Neutral citation: [2022] KEHC 14130 (KLR)

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

CIVIL

CIVIL APPEAL 590 OF 2015

JK SERGON, J

OCTOBER 21, 2022

BETWEEN

**SYLVESTER SULE NYAGWETH T/A YASUL AUTOMOBILE AND
SPARES APPELLANT**

AND

RICHARD KIMELI 1ST RESPONDENT

BARCLAYS BANK OF KENYA LIMITED 2ND RESPONDENT

*(Being an appeal from judgment and decree of the Honourable
Mrs. Wachira, Senior Principal Magistrate made on 6th Day of
November, 2015 in the Chief Magistrate Civil Case No.10877 of 2005)*

JUDGMENT

1. The appellant herein instituted a suit before the Chief Magistrate's Court by way of the plaint dated October 3, 2005 and sought for reliefs against the respondents in the sum of Kshs 300,000/=, damages for loss of business reputation, loss of profit and business potential plus costs of the suit and interest thereon for alleged fraud and misrepresentation.
2. The appellant pleaded in his plaint that on or about May 8, 2003 the plaintiff was approached by the 1st respondent in the company of an old friend and was informed that the 1st respondent had used the appellant's bank account to receive some money through a wired transfer from a relative in the United States of America and indicated that the wire transfer was worth Kshs 349,750/=.
3. The appellant further pleaded that he together with the 2nd respondent confirmed of the credit entry and in view of the 2nd respondent's confirmation the appellant proceeded to withdraw a sum of Kshs 300,000/= for the benefit of the 1st respondent however surprisingly thereafter, the 2nd respondent



reversed the credit entry of Kshs 349,750/= aforesaid and purported that the appellant had overdrawn his account with the amount of Kshs 115,385/65 which it created an overdraft account for and demand repayment.

4. The appellant pleaded that he was relying on the 2nd respondent for the liquidity of his business and the 2nd respondent's action not only blackmailed the appellant, but also completely paralyzed the appellant's business with the consequence that he has suffered enormous financial loss.
5. The appellant avers that the sum of Kshs 349750/= was credited to his account with the active knowledge of the 2nd respondent and/or its employees in collusion with the 1st respondent.
6. The appellant further avers that he has lost the sum of Kshs 300,000/= as result of the respondents joint and or several misrepresentation and fraud as well as suffering loss and business reputation.
7. The appellants filed their statement of defence denying the entire claim. The matter proceeded for hearing and judgment was eventually delivered in favour of the appellant in the sum of Kshs 250,000/= plus costs of the suit and interests.
8. The appellants being aggrieved preferred this appeal and put forward the following grounds:
 - a. The learned Magistrate erred by failing to consider and apply the duties of a bank to its customer and thereby reached a wrong conclusion by dismissing the appellant's case as against the 2nd respondent.
 - b. The learned Magistrate erred in law by failing to find that the 2nd respondent had breached its duties as a banker, which breach caused the appellant to suffer financial loss.
 - c. The learned Magistrate erred in law by holding that the 2nd respondent did not misrepresent itself as to the availability of funds in the appellant's account whereas the 2nd respondent is duty bound to inform its client of the true and actual position of accounts.
 - d. The learned Magistrate erred by failing to find that the 2nd respondent is estopped from recovering monies paid under a mistake where it makes erroneous representation to the customer as to his bank balance and the customer relies on this representation to his detriment.
 - e. The learned magistrate who wrote and delivered the judgment did not conduct the hearing but the Hon Nchoe, who left the station thereafter, did. The learned Magistrate erred by not recalling the parties to give fresh evidence which should have allowed her to have a proper grasp of the matter and come to a different conclusion.
9. This court gave directions to have the appeal disposed of by written submissions. I have re-evaluated the arguments presented before the court. I have also considered the rival written submissions. The five grounds of appeal put forward by the appellant revolve around the following issue:
 - a. Whether the learned Magistrate erred in failing to consider the 2nd respondent's duty of care and due diligence in securing payment of the cheque.
 - b. Whether the learned magistrate erred in holding that the 2nd respondent did not misrepresent to the appellant on the availability of funds in his account.
10. On the first issue, it's the appellant's submission that the learned magistrate failed to arrive at a determination that the 2nd respondent failed in its duty to protect him from fraud as it was unable to state the circumstances under which the cheque was brought in for collection, the identity of the person who submitted it and that when the cheque was presented they ought to have done preliminary inquiries and that the same was not done.



11. The appellant relied on the case of *Silayo v Centenary Rural Development Bank Limited* 2002 1 EA 228 the Court stated that ordinarily it is not mandatory to inquire into every cheque presented but it is an assumption of risk not to inquire.
12. The appellant further submitted that the 2nd respondent witness stated that he was not sure as to who presented the cheque and this uncertainty proves that reasonable care was not exercised to ensure that the plaintiff is safeguarded against fraud.
13. On the other hand, the 2nd respondent contends that from the record of the trial court it is evident that it was the 1st respondent who informed the appellant that his account had been credited with funds from abroad, that there was no evidence that the 2nd respondent was informed of the arrangement that the 1st respondent was to use the appellant's account to receive funds from abroad, the 2nd respondent was not part of the agreement between the appellant and the 1st respondent drafted once the funds were deposited in the appellant's account, the cheque was stopped by the drawer and there was no evidence that the 1st respondent acted jointly with the 2nd respondent to defraud the appellant.
14. The respondent relied on the case of [*Samuel Mwamba Ambundo & 7 Others v Spell Investment Co Ltd & 5 Others*](#) (2019)eKLR the court held as follows:

“...However, there are circumstances when the bank can be held liable for breach of duty of care towards a non-account holder .This occurs generally, when a bank opens an account without care and skill and/or pays a cheque to a person who is not entitled thereto... Therefore, the greatest risk of the bank and in particular the collecting bank is that of conversion “Conversion was defined in the case of *Hirt v Bott* (1874) as unauthorized act which deprives another of his property permanently or for an indefinite time. The most common example is conversion is a collection of a cheque for a person who has no title to it or a cheque that has a forged or unauthorized essential endorsement. The collecting bank facilitating the conversion, even though innocent will be interpreted as a party to the conversion and liable to the true owner.”
15. In this case in my view the 2nd respondent was not party to the arrangement between the appellant and the 1st respondent since it was part of the agreement, which the 1st respondent drafted and that there was no evidence that the 1st respondent acted jointly with the 3rd respondent to defraud the appellant and that is why the trial court exercised its discretion correctly when it arrived to the conclusion that the appellant did not prove fraud at all.
16. In the case of [*Bodenham v Hoskins*](#) (1943) ALL ER where it was held that, the bank should not concern itself with the purpose of opening of the account or what the money paid therein are for and /or the purpose for which the money was paid.
17. On the second issue, the trial court argued that the 2nd respondent had a responsibility to inform its client of the true as the actual position of accounts and to make representations to the customer regarding the balance in his account. The bank was estopped from disputing that the representations were made and reclaiming the money paid in error, the appellant argued.
18. On the other hand, the 2nd respondent submitted that it is true that the money had been credited to the appellant's account, and this was confirmed by the appellant, so the 1st respondent did not misrepresent anything. However, after learning that the cheque was a fake, the 1st respondent decided to reverse the transaction, which led to the appellant's account going overdrawn.



19. I am in agreement with the 2nd respondent that indeed it was part of the agreement between the appellant and 1st respondent and that it only reversed the credit entry when it was alerted that the cheque was a forgery and it had an obligation to reverse since the transaction was a forgery.
20. After careful review of all the evidence presented to this court as well as the authorities, I find that indeed the 1st respondent truly misrepresented and frequently obtained Kshs 250,000/= from the appellant.
21. Accordingly, the appeal is dismissed with costs.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 21ST DAY OF OCTOBER, 2022.

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J. K. SERGON

JUDGE

In the presence of:

.....for the Appellant

..... for the 1st Respondent

..... for the 2nd Respondent

