



**Oluoch v Stanbic Bank Ltd (Civil Appeal 336 of 2019)
[2022] KEHC 17194 (KLR) (Civ) (24 November 2022) (Judgment)**

Neutral citation: [2022] KEHC 17194 (KLR)

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

CIVIL

CIVIL APPEAL 336 OF 2019

DO CHEPKWONY, J

NOVEMBER 24, 2022

BETWEEN

VINCENT OTIENO OLUOCH APPELLANT

AND

STANBIC BANK LTD RESPONDENT

*(Being an appeal from the Judgment of the PM, the Honourable Mr.
D. A. Ocharo delivered on 28th May, 2019 in CMCC N0.988 of 2017)*

JUDGMENT

1. *Vide* a Memorandum of Appeal dated 19th June, 2019, the Appellant instituted an Appeal against the Judgment and decree of Hon. (Mr.) D.A Ocharo (P.M), in Nairobi MCCC N0.988 of 2017 delivered on 28th May, 2019 on the grounds that the leaned trial magistrate erred in law and in fact in;
 - a. framing the wrong issues for determination;
 - b. failing to consider the issues drawn by the Plaintiff in the primary suit;
 - c. admitting in evidence the evidence of DW1 in the primary suit;
 - d. failing to consider at all the Plaintiff's evidence in the primary suit;
 - e. holding that the Plaintiff's card was a debit card;
 - f. holding that the Plaintiff decided to pay for the Uber services through electronic money transfer when there was no evidence to support such finding;
 - g. holding that the Defendant Bank honored the debit request by Uber, ignoring evidence to the contrary;



- h. his evaluation of evidence thereby arriving at an erroneous decision;
 - i. failing to consider at all the Plaintiff's submissions on record.
- The Appellant prays for orders that;
- a. the Appeal herein be allowed with costs to the Appellant.
 - b. the Judgment and decree of the subordinate court be set aside and the same be substituted with the decision of this Honourable Court.
2. The gist of this matter is that the Plaintiff sued the Defendant vide a Plaint dated 17th February, 2017 for a declaration that an alleged debit of USD 14.90 to his account on 23rd July, 2016 was without his authority and of effect, USD 14.90, interest at commercial rate from the date of debit to date of payment, damages and costs. The Respondent opposed the claim vide its defence dated 17th March, 2017.
 3. The matter proceeded to full trial wherein the Appellant testified on his behalf while the Respondent called one witness. After hearing both parties, the trial Magistrate delivered the Judgment on 28th May, 2019 dismissing the Appellant's suit with costs to the Respondent. The Appellant was dissatisfied hence this Appeal.
 4. The Appellant filed a Record of Appeal on 21st November, 2021. On 17th February, 2022, this court admitted the appeal for hearing and directed the parties to canvass the same by way of written submissions which they duly filed.

Determination

5. To determine this appeal, and being a first appeal, this court is duty bound to re-evaluate the facts afresh and come to its own independent findings and conclusions. In the case of *Selle –vs- Associated Motor Boat Co. & Others* [1968] E.A. 123, it was stated as follows:

“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 (*Abdul Hameed Saif v Ali Mohamed Sholan* (1955), 22 E.A.C.A. 270)”.
6. I have read through the proceedings and Judgment of the trial court, submission by all parties in considering the grounds of appeal. The issues for determination are;
 - a. Whether the card issued by the Respondent to the Appellant is a credit or debit or neither.
 - b. Whether the evidence of DW1 should not have been admitted by the trial court.
 - c. Whether the Respondent can be blamed for the ensuing transaction.
 - d. Whether the trial court failed to consider the issues drawn by the Plaintiff and relied on wrong issues in its determination of the matter before it.



- e. Whether the trial court failed to take the Plaintiff's submissions into consideration in its determination.
7. As to whether the card issued by the Respondent to the Appellant is a credit or debit card or neither, the Appellant testified as PW1 and stated that he opened a transaction account with the Respondent being Account No. xxxx in 2014 and which was not a credit/debit account but a USD account maintained using USD. Further, that he was issued with a card No. xxxx which was neither a debit nor credit but was only for purposes of checking balances at an ATM as advised by the bank. DW1 testified on re-examination that the card issued to the Plaintiff had a card number on it but no account number meaning that it was a debit card. The Plaintiff confirms that the bank issued a hard card No.xxxx.
8. From the evidence of the Plaintiff, it is clear that the description given by DW1 of the card issued to the Plaintiff is not controverted. [Merriam Webster Dictionary](#) defines a "debit card" as;
- "A card like a credit card by which money may be withdrawn or the cost of purchases paid directly from the holder's bank account without the payment of interest." (definition accessed at <https://www.merriam-webster.com/dictionary/debit%20card>)
9. The Appellant claims that he was issued with a card for checking balances only and that the account was a USD maintained by USD. As defined above, a debit card and an account are two different things. A debit card aids transactions directly or by ATM irregardless of whether it is in USD or whatever currency. I am therefore satisfied that the card issued to the Appellant by the Respondent was a debit card as rightly held by the trial court.
10. In regard to whether the evidence of DW1 should not have been admitted by the trial court, the record shows that the Witness Statement of DW1 was filed on 30th October, 2018. The matter was certified ready for hearing on 20th November, 2017 and the Defendant was granted leave to comply with Order 11 of the Civil Procedure Ruled within 14 days from the date thereof. Upon close of the Plaintiff's case on 13th September, 2018, the Defendant's counsel sought for an adjournment of the defence hearing as he intended to call one brief witness. The Plaintiff protested the adjournment on the ground that the Defence had indicated that they were not calling any witness and in that case there was no witness statement filed on record at the time. The Defendant undertook to bring a witness. It is therefore clear that the DW1'S Witness Statement was filed way later after pleadings had closed and without leave as there is none on record.
11. The Court of Appeal in the case of Trust Bank Limited –vs- Amalo Company Limited, Civil Appeal No. 215 of 2000 [2002] 2 KLR 627 [2003] 1 EA 350, cited its decision in the case of Central Bank of Kenya –vs- Uhuru Highway Development Ltd. & Others, Civil Appeal No.75 of 1998 and observed that;
- "The principle which guides the Court in the administration of justice when adjudicating on any dispute is that where possible disputes should be heard on their own merit and errors should not necessarily deter a litigant from the pursuits of his right...The court is obliged to look at the documents on record even though filed out of time unless for a reason other than mere lateness, it considers it undesirable to do so."
12. Similarly, in the case of Wambua –vs- Kimondiu & 3 Others (Miscellaneous Civil Application 087 of 2022) [2022] KEHC 10426 (KLR)



(3 August 2022), the court observed that;

“The law is therefore clear that the Court ought not to ignore documents on record even if irregularly filed unless the filing thereof has prejudiced the other party in material respect particularly where the other party may be compensated in costs. It has been said that seldom, if ever, do you come across an instance where a party has made a mistake in his pleadings which has put the other side to such disadvantage or that it cannot be cured by the application of that healing medicine.”

13. Guided by the above decisions, I am persuaded that the admission of the Defendant’s evidence was not prejudicial to the Plaintiff’s case. In any case, the Plaintiff participated in the admission of the evidence and even cross-examined the witness without raising an issue. In view of this, it is in the interest of justice to find that the trial court was right in admitting the Defendant’s evidence despite it having been filed after close of pleadings and without undue regard to technicalities.
14. On whether the Respondent can be blamed for the ensuing transaction, PW1 testified that in 2016, he signed up as a customer with Uber Technologies, an online transportation network operating taxi services. He went on to state that to sign up with Uber Technologies Services, the Company requires all its customers to provide their electronic card details, which the Appellant did. According to the Appellant, he provided the card number for his account at the Respondent’s branch viza card No.xxxx in the knowledge that it was neither a credit nor debit card. That upon signing up with Uber Technologies on 22nd July, 2016, the Appellant dialed a cab and paid for it in cash and at no point did he swipe his card at any point of sale to authorize the debit of his account.
15. Further, PW1 stated that on 23rd July, 2016 the Respondent wrongfully and without the Appellant’s authority or consent, debited the Appellant’s account with the sum of USD 14.90 on account of a point of sale transaction. And on the same day, the Appellant received an SMS alert from the bank advising him of a debit entry in his account. That as per the requirement of a customer by the Respondent, the Appellant immediately called the bank to instruct it to stop the payment, and that the bank assured him that it would not debit his account. And despite the assurance, the bank wrongfully and contrary to instructions proceeded to debit the Appellant’s account.
16. On the other hand, the Defendant argued that on 2rd July, 2016, a debit transaction was initiated from Uber Technologies for USD 14.90 against the Appellant’s account for transport services rendered to him by Uber Technologies. It is also admitted that the Appellant contacted the Respondent but the transaction had already completed and there was nothing the Respondent could do.
17. The Appellant admits that he signed up for Uber Technologies Services and gave out his details including the card number. He also admits using Uber Taxi on the day a debit request was raised and for the same amount as per the debit request. He claims that he had paid for the services in cash.
18. I have perused the documents on the record and note that at page 12 thereof, there is an email which was sent to the Appellant by Uber on 2nd August, 2016 and the response therein states in part;

“I reviewed your trip with John and it shows that it was requested on a cashless payment”

19. The Respondent had no control of choice of payment or was it privy to the contract between the Appellant and Uber Technologies. The Respondent acted on the authority of Uber Technologies Services and the Appellant admits using an Uber Taxi on the same day. In my humble view, I find that the dispute as to whether the Appellant had paid in cash or not, ought to have been sorted out between the Appellant and Uber Technologies Services and not the Respondent herein. In the circumstances, I



agree with the finding by the trial court that the Respondent cannot be blamed for honoring the debit request by Uber Technologies Services.

20. On the question of whether the trial court relied on wrong issues in its determination, it is trite law that a court is not bound by issues set out by the parties. A court is at liberty to develop its own issues based on the pleadings and evidence adduced before it irregardless of whether or not parties had filed their issues. In any case, I have read through its Judgment and find that the trial court captured the Plaintiff's claim in the suit.
21. On the issue of failing to consider the Plaintiff's written submissions, it is trite that submissions are not evidence or issues to be addressed by court. They only market or buttress a party's case. As such, it is not a requirement that the court must consider all that is set out in submissions filed by parties, as long as it captures all the evidence and pleadings that are adduced before it. In this instant case, it is worth-noting that the trial court captured the evidence and pleadings that was advanced before it.
22. Having analyzed and re-evaluated the proceedings and Judgment of the trial court, it is this court's finding that the Appellant's Appeal is without merit. The same is therefore dismissed with costs to the Respondent.

It is hereby ordered

JUDGMENT DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 24TH DAY OF NOVEMBER 2022.

D. O. CHEPKWONY

JUDGE

In the presence of:

Mr. Kimani counsel for Respondent

No appearance for and by Appellant

Court Assistant - Simon

