



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**COMMERCIAL AND ADMIRALTY DIVISION**

**CIVIL APPEAL NO. E033 OF 2019**

**MALINDI MANAGEMENT STRATEGIC LTD.....APPELLANT**

**VERSUS**

**BARCLAYS BANK OF KENYA LTD.....RESPONDENT**

*(Being an Appeal from the Judgment of Hon. L. L. Gicheha (Mrs.), CM at*

*Milimani Commercial Courts, Nairobi delivered on 3/12/2019 in CMCC No.*

*10941 of 2018- between Barclays Bank of Kenya Ltd vs. Malindi Management Strategic Ltd)*

**J U D G M E N T**

1. The appellant held an Italian Lire (ITL) account at the respondent's Malindi branch. On 6/11/1998, the appellant deposited into that account cheque no. 0053744259 for ITL 50,000,000 drawn on Banca Popolare Di Lodi S.C.A.R.L of Italy.
2. The respondent cleared the cheque to the payee bank for collection by submitting the cheque to a courier (DHL) for delivery and presentation. Prior to the clearance, the respondent allowed the appellant to draw the full equivalent of ITL 50,000,000 being Kshs. 1,777,350/- as at 6/11/1998.
3. However, the cheque was lost in transit to Italy. It was never presented to the payee bank and the respondent did not receive its proceeds. The respondent thus claimed for Kshs. 1,777,350/= or Kshs. 2,108,827.50 being the aggregate sum due as at 30/8/1999. The respondent claimed that it was a holder for value in due course. It wrote to the appellant and requested for a replacement cheque and that the appellant request the drawer to stop payment but the appellant declined.
4. The appellant denied owing the respondent the amount claimed and contended that the loss of the cheque was due to the respondent's negligence. It counterclaimed against the respondent claiming breach of duty of care in the collection procedures that had led to loss of several cheques. It also sought damages against the respondent.
5. After trial, the trial court entered judgment on 3/12/2019 in favour of the respondent for Kshs.2,108,827/50 and dismissed the appellant's counterclaim with costs.
6. Aggrieved by the said decision, the appellant lodged this appeal setting out 5 grounds of appeal which can be summarized into three, *to wit, that the trial court erred in failing to appreciate and apply the applicable statute, the Bills of Exchange Act, Cap 27 Laws of Kenya, that the trial court misconstrued the parties' pleadings and evidence on record and finally, that the trial court failed to consider the appellant's submissions.*
7. This being a first appeal, it is the duty of the Court to review the evidence adduced before the trial court and come to its own independent findings and conclusions. See **Selle & Another vs. Associated Motor Boat Co. Ltd & Others [1968] EA 123.**
8. At the trial, **Castrol Mutai** (Pw1), a legal officer at the bank, testified for the respondent. He confirmed the facts of the respondent's case as presented above. He reiterated that the appellant was informed of the loss of the cheque and requested to ask the drawer of the cheque to stop payment and issue a replacement cheque but the appellant failed to heed the request.
9. **Robert Cellini** (Dw1), a director of the appellant testified on its behalf. He stated that it was the respondent's responsibility to take care of the bills of exchange deposited with it. That the subject cheque got lost due to the respondent's negligence. He confirmed the respondent's practice of paying the appellant against uncleared effects. He also admitted that he was requested to obtain a replacement cheque but did not.

10. The first ground of appeal was that the trial court did not apply the relevant statute law being the **Bills of Exchange Act, Cap 27 (“the Act”)** and in particular **sections 45, 46, 69 and 70**. It is not in dispute that a cheque is a bill of exchange pursuant to **section 73 of the Act**. **Section 45 of the Act** provides for presentation of cheque failure to which the drawer and endorser of the bill would be discharged.

11. On the other hand, **section 46** provides for exception in cases of delay or non-presentment for payment. The section provides that: -

**“(1) Delay in making presentment for payment is excused when the delay is caused by circumstances beyond the control of the holder, and not imputable to his default, misconduct or negligence; but when the cause of delay ceases to operate, presentment must be made with reasonable diligence.**

**(2) Presentment for payment is dispensed with—**

**(a) where, after the exercise of reasonable diligence, presentment, as required by this Act, cannot be effected; but the fact that the holder has reason to believe that the bill will, on presentment, be dishonoured, does not dispense with the necessity for presentment”**

12. In the present case, the respondent was unable to present the cheque because it got lost while in transit to Italy. The respondent had handed over the same to a professional courier services provider, DHL, for transmission to Italy. Noting that the respondent is a banker and is not in the business of overseas transmission, it was not possible for the respondent to be involved in the technicalities of the transmission. DHL was an independent contractor over whose conduct the respondent could not be held liable.

13. In this regard, the delay or failure to present the cheque was caused by circumstances beyond the control of the respondent. The respondent’s submission that the respondent’s excuse of a lost cheque is not covered under **section 46 of the Act** has no basis. The respondent handed over the cheque to DHL for transmission to Italy in the normal course of business. In this regard, the circumstances are covered under **section 46 (2) (a) of the Act**.

14. In the circumstances, I find that presentment for payment was dispensed with and the appellant was not discharged from its obligation to make good to the respondent the value thereof.

15. **Section 69 of the Act** provides for holder’s right to duplicate of lost bill and states: -

**“1) Where a bill has been lost before it is overdue, the person who was the holder of it may apply to the drawer to give him another bill of the same tenor, giving security to the drawer, if required, to indemnify him against all persons whatever in case the bill alleged to have been lost shall be found again.**

**2) If the drawer on request as aforesaid refuses to give a duplicate bill he may be compelled to do so”.**

16. The respondent informed the appellant that the bill was lost and requested that drawer be advised to stop payment and issue a replacement. This fact was not denied. There was no evidence that the appellant made the request, and if only was made, what the outcome was. The conclusion would be that the appellant failed to make this request pursuant to section 69 of the Act.

17. As regards **section 70 of the Act**, the same provides for action on lost bill. It is not clear how this provision would have aided the appellant’s case. The trial court’s decision was based in law and cannot be faulted for not referring to the aforesaid sections. Accordingly, this ground fails.

18. The second ground was that the trial court misconstrued the parties’ pleadings and evidence. It was submitted for the appellant that the trial court failed to consider that, the respondent had admitted custody and loss of the cheque and that it was a holder for value of the cheque hence this was not a fact in issue.

19. I have carefully considered the judgment of the trial court. It is clear that it made a finding that the issues set out above were undisputed. That the issues before it was; whether the respondent had a claim against the appellant for the value of the cheque and whether the respondent was negligent in handling the cheque. These were the issues which the trial court properly identified and determined.

20. The trial court found as a fact that the appellant was paid the full value of the cheque yet it failed to pursue the drawer for replacement. Further, the trial court found that the appellant had failed to prove any negligence on the part of the respondent or DHL. In any event, DHL had not been joined as a party in the proceedings. The appellant having alleged negligence, it was incumbent upon it to prove the same. This it failed. That ground also fails.

21. The last ground was that the trial court failed to consider the appellant’s submissions on record. This complaint does not lie. At page 8 lines 19 and 20 of the record shows that the trial court did consider the appellant’s submissions. This ground also fails.

22. Accordingly, I find the appeal to be without merit and dismiss the same with costs.

It is so decreed,

**DATED AND DELIVERED AT NAIROBI THIS 30<sup>TH</sup> DAY OF JUNE, 2021.**

**A. MABEYA, FCI Arb**

**JUDGE**