



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**CIVIL APPEAL NO. 167 OF 2019**

KOIGI WAMWERE.....1<sup>ST</sup> APPELLANT

NDUTA KOIGI.....2<sup>ND</sup> APPELLANT

SAUTI YA WANANCHI RADIO & TV LTD.....3<sup>RD</sup> APPELLANT

**VERSUS**

COOPERATIVE BANK OF KENYA LIMITED.....RESPONDENT

*(BEING AN APPEAL FROM THE JUDGEMENT OF HON. E. KELLY (SRM)*

*DATED 6<sup>TH</sup> SEPTEMBER 2019 IN NAKURU CMCC NO. 592 OF 2015).*

**JUDGEMENT**

1. The appellants filed their suit against the respondent at the lower claiming compensation for breach of contract and the sum of Kshs. 279,297 together with costs and interest.
2. The genesis of the problem was clear and straight forward. The 3<sup>rd</sup> appellant through the first and second appellants its directors wanted to purchase an equipment namely a **flowmeter** for and on behalf of Nyakonga Enterprises Limited from Flowmatics Limited (hereinafter referred to as the supplier). They then went to the respondent, their bankers, where they filled the Electronic Funds Transfer forms (hereinafter referred to as EFT), for the sum of Kshs. 600,000 in favour of the said Flowmatics limited.
3. The said sum was to be paid to the said supplier immediately as time was of essence for there was no other available equipment with similar prices in the market. The respondent failed to pay the supplier as per the directions of the appellants and consequently the supplier sold it to another customer.
4. The appellants were therefore left with no other option but to seek another machine elsewhere where they purchased it for Kshs. 879,297 which was over and above the sum of Kshs. 600,000 earlier agreed with Flowmatics limited. The appellants therefore were forced to pay an extra kshs. 279,297 which was over and above the Kshs.600,000.
5. The appellants laid blamed on the door of the respondent for the reason that it failed to honour the EFT and have the money transferred to the supplier immediately and as a result it was forced to buy another machine which was much bigger and expensive in the circumstances.
6. The 1<sup>st</sup> appellant testified that they chose to use EFT as it was faster and the amount was to be paid to the supplier by 13<sup>th</sup> February 2014. He went on to state that they filled the form by 12<sup>th</sup> February 2014 and handed over to the respondent.
7. When cross examined he said that the machine was being purchased for Nyakonga Enterprises through the 3<sup>rd</sup> appellant although he did not produce any agreement between them. The loan of Kshs. 600,000 was to be refunded at a later by Nyakonga. It must be noted that the 1<sup>st</sup> appellant was the director of the said Nyakonga Enterprises.
8. He said that he filled the EFT form with an assurance that the money was to be transferred within one day and that there was no other supplier stocking the same kind of machine. He went on to state that he was aware of the banks disclaimer conditions stipulated at the bottom of the EFT form.

9. The second appellant also the director of the 3<sup>rd</sup> appellant confirmed that she filled the bank transfer forms on 12<sup>th</sup> February 2014 although they were erroneously stamped 11<sup>th</sup> February 2014 and left them at the bank to effect transfer.
10. She went on to state that the money was transferred from their personal account yet it was meant to have been transferred from the 3<sup>rd</sup> appellant. It was nevertheless reversed on 13<sup>th</sup> February 2014.
11. On cross examination she said that the form she filled does not give the period the money was to be transferred. She did not also notify the bank the urgency with which the money was to be transferred. However, when she filled the RTGS form on 17<sup>th</sup> February 2014 the money was wired immediately.
12. She said that there was no evidence that she tried looking for another machine elsewhere when they could not get a similar one from Flowmatics. She said that she did thereafter appreciate that RTGS was faster than EFT.
13. The respondent's single witness **Nancy Mburu**, the branch manager confirmed that the appellants filled the EFT forms on 12<sup>th</sup> February 2014 which is usually effected after two days. She said that there was no indication that the money was to reach the recipient the same date.
14. She said that the RTGS mode of transferring money was the quicker option which is normally within three hours. She said further that the bank was not to blame as it had acted under instructions of the appellants to transfer the money via EFT mode.
15. During cross examination she said that the 1<sup>st</sup> and second plaintiffs account were wrongly debited and they reversed the error when they realised. This was however done within the ordinary time when EFT was to be effected. She said that the indemnity clause in the forms indemnifies even when errors occur.
16. In the end the court found that there was no merit in the matter and proceeded to dismiss it with costs to the respondent hence this appeal.
17. The appellants have raised several grounds of appeal to impugn the trial court's decision which fundamentally include the claim that the court did not weigh the evidence as adduced by the appellants which had proved the case on a balance of probabilities; that it was wrong for the court to find that the 1<sup>st</sup> appellant had no capacity or authority to bring the suit on behalf of the 3<sup>rd</sup> appellant; the court failed to appreciate the law on misjoinder and non-joinder of parties; failing to appreciate the negligent act by the respondent ;and that the court basically relied on technicalities in dismissing the appellants suit.
18. The parties when the matter came up for directions were ordered to file written submissions which they have complied. The court has perused the same extensively and wishes not to reproduce the same entirely.
19. The appellants while relying on the case of **MICROSOFT CORPORATION V. MITSUMI COMPUTER GARAGE & ANOTHER (2001) eKLR** faulted the trial court for relying on mere technicalities on the issue surrounding the verifying affidavit by the 1<sup>st</sup> appellant on behalf of the 3<sup>rd</sup> appellant. He went on to state that the issue of the verifying affidavit was never raised during trial.
20. On the issue of misjoinder of parties, they submitted that the court dwelt so much on Nyakonga Enterprises Ltd which in essence was never a party in the whole matter and the court failed to appreciate the provisions of Order 1 rule 9 of the Civil procedure rules.
21. Finally, the appellants submitted that the court failed to appreciate the breach of contract by the respondent when it failed to transfer the entire sum of Kshs. 600,000 to Flowmatics Ltd within the stipulated time rendering the appellants to suffer loss and damage and forced to incur an extra Kshs. 279,297. That the respondent was bound to instantly transfer the cash as time was of essence.
22. The appellants in the premises implored this court to analyse the issues afresh and find that the trial courts findings were erroneous and hence ought to be reversed.
23. The respondent on the other hand has supported the findings of the trial court. It submitted *inter alia* that there was an established contract between the respondent and the appellants by virtue of the accounts they operated with them.
24. The respondent agreed with the findings by the trial court that it had no privity of contract with Nyakonga Enterprises limited nor Flowmatics ltd. It was therefore not possible for the bank to undertake any bidding for the two. This was strictly between the appellants and them.
25. For the above reasons therefore there was no negligence or breach of contract or duty against it. That it executed the instructions given to it namely transfer of funds vide EFT mode as directed by the appellants which was within the stipulated timeframe of three days.
26. The respondent submitted that there was no indication by the appellants that time was of essence and by choosing the EFT mode the appellants had themselves to blame.
27. It further submitted that the appellants had themselves to blame for they did not inquire from the other sources whether the machine they intended to procure was found elsewhere other than Flowmatics Company. In short they failed to mitigate their losses.
28. Essentially the appellants as indicated above endorsed the trial courts findings on all issues including non-joinder or misjoinder of parties and the issue that the verifying affidavit by the 1<sup>st</sup> appellant in respect to the 3<sup>rd</sup> appellant was wrong. They urge the court to dismiss this

appeal.

### **ANALYSIS AND DETERMINATION.**

29. The duty of the court regarding a first appeal was well explained in the now famous case of **SELLE V. ASSOCIATED MOTOR BOAT CO. LTD (1968) E A 123** where Sir Clement de Lestang stated that;

30. The court having perused the proceedings and the submissions and the exhibits on record as well as the attached legal authorities finds that the issue which is germane in this appeal is how the funds were transferred. I state so because that was the crux of the matter. The appellants wanted the same to arrive at the supplier so that they could be supplied with the equipment they desired and it appears that the supplier was impatient as there were other people waiting for it.

31. There is no doubt that there was a contract between the appellants and the respondent arising out of the accounts the appellants operated with the latter.

32. This was emphasised in the old case of **JOACHIMSON V. SWISS BANK CORPORATION (1921) VOL.3 A B 110** where Lord Atkin stated as follows;

***“The question turns upon the terms of the contract made between the Banker and the Customer in ordinary course of business when a current account is opened by the bank. It is said on the one hand that it is a simple contract of loan; it is admitted that there is added, or super added, an obligation of the Bank to honour the customer’s drafts to any amount not exceeding the credit balance at any material time; but it is contended that this added obligation does not affect the main contract. The Bank has borrowed the money and is under the ordinary obligation of a borrower to repay. The lender could sue for his debt whenever he pleases.”***

33. It appears that the 2<sup>nd</sup> appellant when she filled the forms for the electronic transfer of the money from the account desired that they shall be quickly dispersed to Flowmatics Ltd so that it could get the machine which was the only one pending. It is admitted either directly or impliedly that she did not notify the respondent of the urgency.

34. The appellant readily and procedurally accepted the EFT form and for some strange reasons debited the 1<sup>st</sup> and 2<sup>nd</sup> appellants joint account of a sum of Kshs. 600,000 without their instructions. When it realised the error it unilaterally reversed the entries. It was the respondent’s case that the error was corrected within the three days’ window the EFT transfer was to be effected.

35. As indicated above the appellants did not admittedly notify the respondent of the urgency of the transaction. It is clear that the quickest way was to have transferred the money through RTGS mode. The appellants on the contrary chose the EFT mode. Who was to blame for this? I think the appellants. They had the choice of the two and perhaps had they inquired from the respondent they would have been directed given the urgency to wire the money to their supplier.

36. This position is informed by the fact that even the transfer of the sum Kshs. 897,297 on 17<sup>th</sup> February 2014 was via RTGS which was faster and done on the same day. The appellants consequently failed to appreciate the two modes which were readily available to them.

37. As a matter of fact, the 2<sup>nd</sup> appellant appreciated this when she stated in cross examination that ***“I now know that EFT does not transfer money immediately RTGS does.”***

38. Where then does liability against the respondent lie.? In my humble view non. Had the appellants filed the correct form namely RTGS perhaps it would have had a claim against the respondent. At the same time had they given instructions to the respondent and in this case written to the effect that there was need to transfer the money within that specific time, then at least the respondent would have been blameworthy.

39. As clearly found by the trial court the respondent had no privity of contract between the appellants and other 3<sup>rd</sup> parties. Its contractual obligations ended with the appellants. Whether they were to procure whatever machine they required was solely the appellant’s responsibility and not the respondent.

40. This court agrees with the respondent’s submission that the appellants failed to mitigate their losses. They did not demonstrate that other than Flowmatics Ltd there were no other supplies of the machine they intended to procure. The issue of mitigating once loss was clearly spelt out by the Court of Appeal in the case of **AFRICAN HIGHLAND PRODUCE LTD V. JOHN KISORIO (2001) ELKR CIVIL APPEAL no. 264 Of 199** where the court rendered itself as follows;

***“It is the duty of the plaintiff to take all reasonable steps to mitigate the loss he has sustained consequently upon the wrongful act in respect of which he sues, and he cannot claim as damages any sum which is due to his own neglect. The duty arises immediately a plaintiff realises that an interest of his has been injured on breach of contract or tort, and he is then bound to act, as best he may, not only in his own interests but also in those of the Defendant...The question of what is reasonable for a plaintiff to do in mitigation of his damages is not a question of law, but one of fact in the circumstances of each particular case....”***

41. Having stated so, I do not see any need to go through the other grounds of the appeal which are periphery for now. The issue surrounding non joinder or misjoinder of parties in my view and the question of whether the verifying affidavit is a mundane issue. What is essential is what this court has stated above namely that the appellants filled the form which did not ensure that the funds were transferred

within the period it desired.

42. The court of course finds that the respondent is indemnified by the contents in writings on the transfer documents produced but I do not find the need of indemnification relevant for now considering that there was no blameworthiness on its part.

43. This court consequently does not find any merits in the appeal. The trial courts findings and analysis in my humble view was consistent with the facts and evidence before it. It clearly carried out a proper analysis and arrived at the right decision.

44. **The appeal is otherwise disallowed with costs to the respondent.**

**DATE SIGNED AND DELIVERED VIA VIDEO LINK AT NAKURU THIS 24TH DAY OF JUNE 2021.**

**H K CHEMITEI**

**JUDGE**