



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CIVIL APPEAL NUMBER 152 OF 2018

(An appeal from the Ruling and Order of Honourable G. Kiage (Mr.), Resident Magistrate delivered and dated the 20th day of July 2019)

BARCLAYS BANK OF KENYA LIMITED.....APPELLANT

-VERSUS-

DIANA SAMBO MWASELA.....RESPONDENT

JUDGEMENT

Background

The Plaintiff's (hereinafter the Respondent) claim is that money went missing from her account held by the Defendant Bank (hereinafter the Appellant) without her knowledge or authorization. The Honourable Magistrate Court decided the claim in favor of the Respondent and ordered that she be refunded her money back by the Appellant. In addition to that, an award of Kshs. 10, 000/= in form of damages was made in favor of the Respondent for the Appellant's negligence in handling the Respondent's account.

The Appellant, Barclays Bank of Kenya Limited brought the instant appeal before this court against the ruling and order of Hon. G Kiage, RM, delivered on 20th day of July 2018 in the Resident Magistrate Court Civil Suit No.998 (A) of 2014.

The Appeal is premised upon the following grounds:

- (a) That the Learned Magistrate erred in fact and in law in adjudicating on facts beyond those pleaded in the plaint dated 23rd May 2014.*
- (b) The learned Magistrate erred in fact and in law in failing to appreciate the averments made in the amended statement of defence dated 13th November 2017 regarding the unauthorised withdrawals on the plaintiff's account.*
- (c) That the Respondent's claim is time bared.*
- (d) That the Court shifted the burden of proof on the veracity of the plaintiff's claim to the Defendant/Appellant contrary to the express provisions of the Evidence Act.*
- (e) That the learned Magistrate erred in law and in fact in dismissing the preliminary objection raised by the Defendant/Appellant.*

The Appeal is further canvassed by way of arguments contained in the written submissions from both the Appellant and the Respondent.

The Appellant's Submission.

The appellants raised five grounds of Appeal which they argued separately under distinct heads in their submissions. The Appellants submits that the learned Magistrate misrepresented himself and law by adjudicating beyond the facts pleaded in the Plaint dated 23rd May the parties themselves have raised by the pleadings. It asserted that the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties and to do so would be to enter upon the realm of speculation.

Moreover, according to the Appellants, in such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice. In view of the foregoing it is the Appellants' utmost belief that the learned magistrate, no matter how well-intentioned, went well beyond the issues raised by the Plaintiff and overstepped his mandate thereby essentially assisting the Plaintiff in an impermissible manner

by adjudicating on issues not pleaded and pray that this court hold the same.

It is the Appellants' submission that the trial Magistrate erred in law and fact by failing to appreciate the averments made by the defendant in its Amended statement of Defense which clearly alluded to the Appellant herein having conducted investigations into the Plaintiff's unauthorized withdrawals. In further proving its allegations, the Appellants further demonstrated to the honourable court in its submissions how the alleged unauthorized withdrawal were transacted on the plaintiff's bank accounts at various alleged dates in the month of February 2008. The appellants aver that the relationship between the Appellant and Respondent herein is a contractual banker- customer that imposes certain obligations on both parties.

Further that the Plaintiff herein approached the court via a plaint dated 23rd May 2014 accusing the Defendant of breaching its obligation to her by handling her account in a careless manner such that the suit amount deposited in the account was withdrawn without her knowledge or authorization. In defending itself, the Appellants are adamant that they were able to demonstrate to the trial court how upon receiving complaint by the Plaintiff it was able to establish that the various withdrawals on the plaintiff's account were done on different dates at the Defendant's ATM machines in Mombasa in the month of February 2008. Further that by establishing when the monies were withdrawn the Appellant was able to establish the timeline of when the alleged breach occurred and was able to demonstrate the Plaintiff's negligence in protecting her interests. The Appellants stated that it is trite law that magistrates have a duty to consider every fact that is on record and failure to do so would be a great abdication of their duty.

It is also the appellant's position that the respondent's cause of action is statute-barred by dint of Sec 4(1) of the Limitation of Actions Act and plea of limitation finds its basis on pleadings filed by the parties herein. The Appellant's averment is that the Plaintiff filed its plaint on the 23rd of May 2014, and its cause of action accrued in the month of February 2008 following the alleged unauthorized withdrawals on separate occasions on said month of February 2008. Further that the relationship between the plaintiff and the Defendant herein was of contractual in nature following the application and execution of Account Application forms by the plaintiff herein for purposes of opening an account number 081418**** with the Appellant herein. According to the Appellant, the relationship created a banker-customer relationship that required each party to fulfil certain obligations.

The appellant further averred that the Plaintiff approached this court on the 23rd of February 2014 accusing the Defendant of carelessly managing the Plaintiffs account thus allowing for unauthorized withdrawals to occur an allegation that the Defendant vehemently denied. It is therefore argued by the appellant that the Limitations of Actions Act is quite clear on when actions founded in contracts may be brought before the court and the same is provided for under Sec 4(1) where it clearly stipulates that actions founded in contract may not be brought at end of six years from the date on which the cause of action accrued which is clearly the instance herein.

In support of their argument, the appellant aligned themselves with the observations made by Potter, J. In the Court of Appeal decision of **Gathoni -vs.- Kenya Co-operative Creameries Limited Civil Application No. 122 of 1981 as cited in E. Torgbor -vs.- Ladislaus Odongo Ojuk [2015] eKLR** where he remarked as follows:

"The law on limitation is intended to protect defendants against unreasonable delay in bringing of suits against them. The statute expects the intending plaintiff to exercise reasonable diligence and to take reasonable steps in his own interest"

The appellant therefore pray for a declaration that the plaintiff's cause of action accrued in the month of February 2008 when the alleged unauthorized withdrawals were made and not after the audits were concluded since the relationship between the parties is governed by the law of contract and a cause of action in this case arises when the breach in contract happens and in this case the alleged breach happened in February 2008 making this whole suit a non- starter in law.

The Appellant is also of the position that the learned trial magistrate misrepresented himself in law and fact when shifted the burden of proof to the Defendant herein contrary to the provisions of the Evidence Act that the Defendant conducted an enquiry -first to establish the claim and confirm if indeed the money had gone missing as claimed and that once the Defendant had done so it would help establish the veracity of the plaintiff's claim and that the plaintiff can then commence action.

According to the Appellant by giving this holding the learned trial magistrate was imposing an unnecessary burden on the Defendant/ Appellant as the same was tantamount of asking the Defendant to decide whether the Plaintiff should bring a claim before the court or not. In any way, it is the Appellant's belief that the Defendant's findings would have not had any impact to the matter at hand as the claimant's claim involves monies allegedly withdrawn from the account without authorization.

To buttress the foregoing contention, the Appellant cited the Evidence Act Cap 80 is very categorical under its Sec 107 wherein it provided that:

"(1) whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the Burden of proof lies on that person.

The Act goes further to state in its subsequent sections that:

Sec 108:

The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

Sec 109:

The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

The Appellant's view of the above provisions is that the law imposes a great responsibility on any individual that approaches the court with a dispute. In this instance the Plaintiff approached the court with allegations of mismanaging her accounts in a careless manner such that there were unauthorized withdrawals. Further that, Plaintiff herein being aggrieved had the responsibility of proving her allegations against the defendant which leads to the conclusion that the learned magistrate misrepresented himself by holding that the Defendant had to establish the veracity of the plaintiff's claim so that the Plaintiff can properly amend his claim. The Appellant concluded that by doing so the Magistrate's actions were tantamount to asking the Defendant to help prosecute the Plaintiff's claim. It is common knowledge that any person that brings a claim to a court of law ought to have personal knowledge of the facts of the claim.

The Appellant therefore prays for a declaration that the Learned trial Magistrate erred in law and in fact in holding that the Defendant had to establish the veracity of the Plaintiff's claim so that the Plaintiff can properly thereby shifting the burden of proof on the veracity of the plaintiff's claim to the Defendant/appellant contrary to the express provisions of the Evidence Act, Cap 80 of the Laws of Kenya.

Lastly, the Appellants humbly submitted that the learned trial Magistrate erred in law and in fact in dismissing the Preliminary objection raised by the Defendant/appellant herein when the plaintiff's suit is statute-barred by dint of Section 4(1)(a) of the Limitation of Actions Act, Cap 22 of the Laws of Kenya as clearly demonstrated above. It is the appellant's belief that the trial court did not appreciate the evidence and facts put before it thereby misrepresenting itself when it held that the cause of action could only begin after the completion of an audit by the Defendant/ Appellant and not on the month of February when the alleged breach to the banker-customer relationship occurred.

It is the Appellant's contention that the Preliminary Objection was of vital importance as it raised the issue of whether the court has the requisite jurisdiction to determine the matter at hand after all jurisdiction is of utmost importance as enunciated in the case of **Lillian 'S' (1989) KLR 1** in which this Court succinctly set out the principles and context for determination of jurisdiction. **Nyarangi, JA** stated, inter alia:

"Jurisdiction is everything. Without it, a court has no power to make one more step. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."

In conclusion, the appellant prays that this honorable court consider all the issues submitted to herein and allow the Appeal herein with costs to the appellant. It also prays that the Ruling and Order of R.M.C.C No. 998(A) of 2014 delivered on 20th July 2018 be set aside and substituted with an order upholding the Preliminary objection dated 21/11/2017 and striking out the Plaintiff's case with costs.

The Respondent's Submissions.

In her submissions, the respondent stated that she had never withdrawn the money by using her bank card or at the counter and that the withdrawal was done by the appellant, its agents or employees. It is the respondent's submission that the trial court's finding was not made in error and that the court while making its ruling considered all the relevant factors and the law and took into the account the correct principles hence arrived at a fair ruling in dismissing the appellant's preliminary objection dated 21 November 2017.

In response to Ground 1,2,3,4 and 5 of the Appellant's Appeal, from the respondent's point of view pertaining to the appeal herein, the trial magistrate was right and used the correct principles in disregarding the appellant's Preliminary Objection. It is the Respondent's submission that this instant appeal is aiming at defeating the course of justice. The Respondent referred this Court to the pleadings under Page 5 and 6 of the Record of Appeal and averred that it is instructive to note that there existed a relationship between the respondent at the appellant's bank Digo Road Branch-Mombasa. However what is in contention is whether the suit filed by the respondent herein was barred and as a result ought to have been dismissed by the trial court by dint of Section 4 of the Limitation of Actions Act.

The Respondent also referred to Page 14 of the Record of Appeal is a demand letter dated 2nd February 2014 where the respondent informed the appellant of the alleged fraud. It is the Respondent's submission that the time of discovery of the fraud should be computed from the date when the respondent discovered the fraud hence the instant notification upon the appellant.

Further to that, the Respondent invited the court to consider the letter dated 12th February 2014 drawn by the appellant addressed to the respondent herein whose content was a notification that the appellant had received the demand letter dated 2nd February 2014 and that the respondent was held any precipitous action until an internal investigation was conducted. In terms of Page 31 of the Record of Appeal is letter dated 14th November 2014 drawn by the appellant and addressed to the respondent informing her of the investigation report as previously promised by the appellant. The Respondent contends that the suit was filed on 23rd May 2014 after an internal investigation was conducted as had been previously promised by the appellant. It is humbly submitted that this honourable court does find that the suit was not time barred and was instituted within the legal time frame as envisaged under section 4(1) of the Limitation of Actions Act.

Further reference is made to Page 84 of the Record of Appeal where a ruling by the trial magistrate is attached. In the said ruling, it was held that the cause of action could only come after conclusion of the audit. The Respondent concurs with the holding of the trial magistrate and invites this honourable court to look at Page 16 of the Record of Appeal in particular paragraph 6 where the appellant herein averred that prior to the institution of the suit the respondent herein was to conduct an audit. It is submitted therefore that the trial magistrate adjudicated on facts that were pleaded in particular under the defence dated 24th September 2015.

The Respondent further submitted that the learned trial magistrate did not indirect himself in law and fact by holding that the appellant herein had to first conduct an enquiry first so as to establish the veracity of the claim. The respondent's claim was based on illegal withdrawals made without the respondent's knowledge. The appellant under Page 16 of the Record of Appeal requested the respondent to hold any legal action pending an audit being conducted. From the foregoing, it is the Respondent's submission that the trial magistrate did not shift the burden of prove to the defendant as claimed by the appellant. Further that it was the duty of the appellant to conduct the audit as had been promised earlier.

Findings, Analysis and Determination.

The facts of this case show that there existed a contractual banker-customer relationship between the Appellant and the Respondent. It follows that such a relationship imposes certain obligations upon the parties. It is the Respondent who approached the court on the basis of an allegation that the Appellant breached its duty owed to her by handling her account in a careless manner. According to the Respondent the alleged breach of duty of care resulted into loss of the suit amount through unauthorised withdrawals which happened without her knowledge. The Respondent believes the withdrawals were done by the Defendant and or its agent or employees, a fact vehemently denied by the Defendant (Appellant).

The first question to ponder is whether the Respondent's claim was time bared. It is the Appellant's contention that the Respondent's case is time bared by dint of Section 4(1) of the Limitation of Actions Act. The Respondent filed her plaint on the 23rd of May 2017 while the alleged breach is said to have been discovered sometime in February 2008. In the Appellant's view, the Respondent's cause of action accrued in the month of February 2008, since that is when the alleged unauthorised withdrawals were discovered. According to the Appellant, the Respondent's claim was instituted outside the six year limitation envisaged in terms of Section 4(1)(a) of the said Act, and for this reason it out to be struck out with costs.

There is uncontroverted evidence to the effect that the Appellant requested the Respondent to hold any legal action pending an audit being conducted by the Appellant. By that fact alone the Appellant may be estopped from claiming that the Respondent's claim is time bared. In any event, it was incumbent upon the Appellant to conduct an internal investigation to establish the veracity of the Respondent's claim.

In respect of the foregoing, the Respondent's cause of action could only have arisen at the time the audit in question had been completed. The effect of the audit in question was to discover whether indeed there was some fraud which resulted in the loss of the Respondent's money or it was just technicality within the institution.

The preceding account is congruous with the Appellant's statement of defence dated 28 September 2015, in terms of paragraph 6 that it was upon conducting internal investigations into the plaintiff's withdrawal complaint, and the Appellant claimed to have established various withdrawals transacted on the account in question at the Defendant's ATM Machines in Mombasa in February in February 2008.

Therefore, it is logically competent to find that Respondent could only sue after the investigation had been completed and the Appellant had denied responsibility as regards alleged unauthorised withdrawals. This because the alleged breach of duty of care would have been a technical error within the bank. A clarification in that regard needed to be done before instituting court proceedings. I therefore find that the Appellant's claim was not time bared.

Having made a finding that the Respondent's claim was not time bared, the question to ponder is as regards the liability towards the alleged unauthorised withdrawals. There are some facts which are not in dispute herein which are as follows: that there existed a bank-customer relationship between the parties herein and that money was indeed withdrawn from the Respondent's account on several occasions.

An internal investigation was conducted in the plaintiff's withdrawal complaint and the Appellant established that various withdrawals were transacted on the account in question at the Appellant's ATM Machines in Mombasa in the month of February 2008. The Appellant argues that if at all there was an unauthorised withdrawal of the sum of Kshs. 102, 145/= as alleged, then such withdrawal was enabled by the Personal Identification Number (PIN) of the Respondent. Further that the contents of such PIN were only privy to the Plaintiff. The Respondent on the other hand is adamant that the Appellant was negligent in the manner in which it handled her account which led to loss of the suit amount in question.

The law treats the relationship between a banker and its customer as a contractual one. The reciprocal rights and duties included in the contract are to a great extent based upon custom and usage. It is now accepted that the basic, albeit not the sole, relationship between the banker and customer in respect of a current account is one of debtor and creditor.

In light of the foregoing, it may therefore be said that a bank has a contractual duty to its customer to exercise reasonable care and skill. In **Karak Brothers Company Ltd v Burden (1972) All ER 1210** the Court had this to say about a bank's contractual duty to its customer:-

"... a bank has a duty under its contract with its customer to exercise "reasonable care and skill" in carrying out its part with regard to operations within its contract with its customer. The standard of that reasonable care and skill is an objective standard applicable to bankers. Whether or not it has been attained in any particular case has to be decided in the light of all the relevant facts, which can vary almost infinitely."

A bank's duty to its customers includes projecting the customer from exposure to fraud by agents such as directors, business partners and others. In the instant matter, the Respondent is the customer who holds the account in question in her own name. Undoubtedly it was the responsibility of the Bank to protect the Respondent's account from third parties and also from its own directors or agents if it became evident that the said directors were acting in a questionable manner.

The Appellant seems to suggest that the Respondent is liable for the lost suit amount since the withdrawals were enabled by the Personal Identification Number that was only privy to the Plaintiff. I have a difficulty with the Appellant. This is because the Appellant only alleged that the Respondent caused the money to be withdrawn since her pin was used in the process of withdrawing such monies. There are other persons other than the Respondent which may have access to the Appellant's details and this includes the bank employees, directors among others. Secondly, the bank ought to have other mechanisms to trace the exact person who withdraw the said monies without the Appellant's authorization such as CCTV. If such mechanisms are not in existence then many customers are at risk of losing their money through unauthorised transactions.

In light of the foregoing, if the bank allowed dubious, unauthorised transactions to slip through, then it takes the risk of being held

accountable to the customer and in the process losing money. The Appellant failed to discharge its duty of care to the Respondent in the manner it maintained the Respondent's account, it can't run away from this responsibility. When a customer opens an account with the bank, there is a reasonable expectation on the part of the customer that the bank will apply its skill, expertise and all manner of safeguards to ensure that the customer's money is safe from unwarranted and unauthorised withdrawals.

In **Fidelity Commercial Bank Limited v Italian Market Kenya Limited (2017) eKLR**, it was observed that the customer is not obligated to be checking its accounts every other day to confirm that the account is safe. As long as a customer keeps his/her/it's end of the bargain by ensuring that he refrains from doing acts that may facilitate fraud or forgery, like not drawing cheques as per the generally accepted instructions given by the bank acting in good faith; and alerting the bank of any inconsistencies in the bank accounts as soon as possible, then the bank is expected to keep the customer's account safe.

This did not happen in this case as the bank failed to protect the Respondent from unwarranted and unauthorized withdrawals. The Appellant has not successfully shown to this court that the Respondent was in breach of its duties owed to it. At least no such tangible evidence has been placed before this court to prove that fact.

In the premises, this court rejects the Appellant's grounds of appeal in their entirety and makes a finding that the learned trial magistrate was well within the law and his factual analysis cannot be said to be wanting. The appeal lacks merit and is hereby dismissed with costs.

It is so ordered

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 9TH DAY OF MARCH 2020.

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R. NYAKUNDI

JUDGE

In the presence of:

1. Mr. Anangwe for the appellant
2. Ms. Naliaka for the respondent