REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT CHUKA

HCCA NO.7 OF 2019

CO-OPERATIVE BANK OF KENYA LTD.....APPELLANT

VERSUS

ISAAC M'RINJEU MBAKA.....RESPONDENT

(Being an appeal from the Judgment/decree of the Honourable J.M. Njoroge, Chief Magistrate Chuka in Chuka CMCC No.103 of 2011 dated and delivered on 30th January 2019).

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J U D G E M E N T

1. This appeal stems from the Judgment of Chief Magistrate's Court delivered on 30th January 2019 in **Chuka Chief Magistrate's Court Civil Case No.103 of 2011.**

2. In that suit, the Appellant had been sued by the Respondent for breach of contractual and fiduciary duty. The Respondent in this appeal had pleaded he operated an account with the Appellant that he knew he had some funds in his account having previously made some deposit. According to him, when he visited the Appellant bank at Chuka Branch on 15th October 2011 with an intention to withdraw Kshs.120,000/- to purchase farm inputs and to pay his labourers, working at his farm, he was shocked to be told that his account only reflected credit balance of Kshs.6000/-.

3. The Respondent claimed that the money missing in his account (Kshs.250,000/-) was later on 24th October 2011 credited in his account by the Appellant. It was the Respondent's case that the Appellant irregularly held his Kshs.250,000/- in a suspense when it knew or ought to have known that he owed them no money and blamed the Appellant for negligence and breaching its fiduciary duty to him as its customer. He claimed to have suffered embarrassment, ill health loss and damage and claimed general damages as a result.

4. The Appellant on the other hand pleaded that while it had bank-customer relationship with the Respondent, it acted prudently in its dealing with him. Its position was that the Respondent, on 18th January 2011 applied for a loan facility from a revolving fund extended by the Government of Kenya through a facility known as Stabex which was meant to resuscitate coffee farming which attracted interest of 50% and was administered through the Appellant's bank. It pleaded that the respondent being a large scale coffee farmer was advanced Kshs.750,000/- on 28th February, 2011 which was to be repaid within one year inclusive of interest and that towards that end a letter of offer which set out modes of repayment was signed by both the Respondent, and the Appellant representative.

5. It was the Appellant's case that it had received money from coffee proceeds totaling Kshs.400,000/- and that it was on that basis that it proceeded to recover Kshs.180, 450/- on 12/10/2011 and 69,520/- on 14/10/2011 and that is why the Respondent found the balance of Kshs.6000/- in his account when he went to attempt to withdraw Kshs.120,000/-. The Appellant averred that due to position the Respondent found himself, he requested the Appellant to reverse the deductions promising to repay at later date which was done. The Appellant claimed that the reversal was done and the respondent later repaid all the outstanding amount due to stabex facility between December 2011 and February 2012. It maintained that the recovery which had been done by the Appellant causing discomfort to the Respondent had been done in good faith and that when the reversal was done it was done on humanitarian grounds. -It further claimed that the letter of offer signed by the Respondent had provision for standing order which the bank applied when the amount became due.

6. The trial court evaluated the evidence tendered and found that in ordinary circumstances once a loan is due and a standing order is effected, it cannot be reversed on humanitarian grounds. The Trial court also found that the Appellant had failed to tender any document to demonstrate that the reversal was done on humanitarian grounds and not because of negligence that may have caused the dismissal of an appellant's employee named Cecilia. The trial court further found that the Respondent had proved that the Appellant intruded into his account in breach of contractual terms and deducted some funds when the one year repayment period had not lapsed. The respondent was

then awarded general damages of the Kshs.4 million for Appellant's negligence which saw him suffer embarrassment, ridicule, and harm to his reputation and standing.

7. The Appellant felt aggrieved by the said decision and preferred this appeal raising the following grounds namely:-

a. That the trial magistrate erred in law and in fact by failing to find that the letter of offer dated 9/2/2011, the letter of set off and the tripartite marketing agreement dated 21/2/2011 provided two avenues of payment of the loan namely within 12 months from the date of disbursement or upon receipt of coffee proceeds of the year 2009/2010. Therefore, the recovery of Kshs 250,000/= from the respondent's account on 12/10/2011 and Ksh 69,520/= on 14/10/2011 was in order as agreed as the same was coffee proceeds.

b. That the magistrate erred in finding that the reversal of the recovery of Kshs 250,000/= on 26/10/2011 should have been evidenced in writing yet the request for the reversal was also not in writing but was guided by bank-customer relationship.

c. That the magistrate erred in making a finding that one Cecilia was fired because of the loan recoveries when there was no evidentiary basis to show that.

d. That the magistrate erred in awarding damages of Kshs. 4,000,000/= when there was no proof that the bank breached its customer relationship, that there was no proof that the respondent had collapsed in the bank and there was no proof that the respondent's hypertension was caused by the banking relationship herein.

e. The award of Kshs 4,000,000/= was an excessive and erroneous estimate of the loss suffered by the respondent.

f. The magistrate erred in law and in fact by giving a wide birth to the evidence tendered by the appellant's witness.

g. The judgment is against the weight of evidence, unfair and speculative.

8. In its written submissions dated 6th July 2020 though Kiautha Arithi and Co. Advocate, the Appellant submits that it advanced a facility (Stabex Loan) of Kshs.750,000/- to the Respondent on the agreed understanding that the Stabex Loan was to be repaid over a period of 12 months through coffee proceeds of 2009/2010. It points out that the parties herein signed a Tripartite agreement between the Appellant, the Respondent and Kehya Co-operative Coffee Exporters Ltd.

9. The appellant further submits that apart from the Tripartite agreement, the Respondent also signed a letter of set off in favour of the bank dated 21st February 2011. The Appellant contends that under the Tripartite agreement, KEHYA Co-operative Coffee Exporters Ltd was required to channel all coffee proceeds of the Respondent to the Appellant's bank to service the loan.

10. According to the Appellant, the agreement between it and the Respondent was that the respondent was to repay the loan in twelve months or upon receipt of coffee proceeds whichever came earlier and that the arrangements was contained in the Tripartite agreement. It contends that when the coffee proceeds were deposited it went ahead to recover Kshs.180,480/- on 12th October 2011 and Kshs.69,520/- on 14th October 2011, from the Respondent account pursuant to the said agreement.

11. The Appellant submits that a court cannot rewrite a contract entered into by parties. It claims that it had no duty to inform the Respondent because he had already authorized it. It submits that the Respondent should not be exonerated and allowed to be discharged from his contractual obligations. It relies on the case of ***Andrew Kiriti Gathii -vs- Equity Bank Ltd [2017] eKLR*** where the court made the following observations;

" Evidently, the duty to exercise reasonable care and skill arises concurrently and co-extensively in both contract and tort. All must depend on the circumstances of each case where the bank is accused by its customer, but I must add that the bank ought not to be held too easily to have acted negligently given that the relationship is guided by contract. To hold it liable there is need to show a breach of a contractual duty of care. Caution must be taken in view of the practical differences between contract and tort claims which include but not limited to different limitation periods, different rules as to remoteness of damage and a different approach as to contributory negligence……"

12. The Appellant contends that it should not have been held liable by the trial court because its relationship with the Respondent was guided by a contract. In its view the respondent did not prove that it acted contrary to the terms of the contract. It further submits its fiduciary duty of care cannot override the contractual obligation between the parties.

13. It submits that the reversal of Kshs.250,000/- effected by the bank on 26th October 2011 was guided by bank-customer relationship between the two parties herein that there was no need for the same to be in writing because the instructions for the reversal was also not in writing.

14. The Appellant has also faulted the trial court for award of Kshs.4 million as damages contending that the award was too high and there was no proof that the appellant had breached bank-customer relationship with the Respondent. The Appellant contends that the Respondent health afflictions could have been caused by its actions.

15. The Respondent has opposed this appeal through his written submissions done through Ms Lucy Kaaria, Matumbi and Co Advocates. He contends that the action by the bank to deduct monies in his account was a clear breach of duty of care. According to the Respondent, the loan was to be repaid over a period of twelve months from the date of disbursement or upon receipt of coffee proceeds of 2009/2010 and that

in default the whole facility would become repayable immediately on demand in writing made by the Appellant.

16. The Respondent contends as per the Tripartite Marketing Agency Agreement signed on 21st February 2011 between the Parties herein and the marketing Agency, the Agency was mandated to pay proceeds to the financier (Appellant) who would in turn provide accounts in writing and give any notices under the agreement. The Respondent submits that no demand or payment request was ever written to the Respondent and according to him, there was no clause in the agreement that expressly allowed the Appellant to withdraw monies from the Respondent's account. He argues that he was not in default when the Appellant deducted monies in his account.

17. The Respondent submits that the Appellant had a contractual duty of care and to exercise reasonable care and skill in its operations in bank- customer relationship. It relies on the decision in ***Karak Brothers Co. Ltd -vs- Burden (1972) ALL ER page 1210***. It faults the bank for lacking skills and diligence in its action arguing that it reversed the transaction on its own without a letter of authorization. The Respondent submits that the reversal was an admission of wrong on the part of the Appellant adding that one of the Appellant's employee was dismissed over the issue.

18. The Respondent further submits that the Appellant's actions caused great harm as there was no money in his account when he needed it most for his business operations. He opines that there was a case proved against the Appellant for breach of contractual, fiduciary and duty of care.

19. On damages, the Respondent submits that damages given by the trial court were deserved considering the embarrassment suffered. He submits that he further endured ridicule because he could not meet his financial obligations adding that his health deteriorated as a result.

20. The Respondent contends he deserved an award of general damages as that was a remedy available to him because of breach of contract by the Appellant. He relies on the decisions in ***Nicholas Ombija -vs- Kenya Commercial Bank Ltd [2009] eKLR*** and ***Otieno – Omunga and Ouma Advocates -vs- CFC Stanbic Bank Ltd [2015] eKLR.*** In Ombija's case, the Plaintiff was awarded Kshs.2,500,000/- and in the latter case, the Plaintiff was awarded Kshs.6,000,000/- both for breach of contract that cause them dishonor and defamation of character. The Appellant submits that the duty of care includes duty to keep correct accounts and to avail money whenever required by the customer and that the Appellant's action exhibited negligence contrary to regular banking practices.

Analysis and Determination:

21. This court has considered both the Appellant's case and the response made by the Respondent. The Respondent as highlighted above sued the Appellant for breach of fiduciary duty when the bank deducted money from the Respondent's account and the Respondent's case was that the deductions were done illegally and irregularly without notice to him thereby causing him embarrassment, suffering, loss and ill health. He claimed general and aggravated damages for same. The Appellant justified its actions stating that the same were within the terms of the loan agreement between it and the Respondent and denied any wrong doing on their part notwithstanding the reversals it later made after deducting a total of Kshs.250,000/- .

22. The trial court's decision to decide a favour of the Respondent and award him general damages of Kshs.4 million was mainly based on the reversals made by the Appellant's bank after the Respondent made a complaint. The trial court reasoned that in ordinary circumstances once a loan becomes due payable and a standing order is effected, it cannot be reversed even on humanitarian grounds as the Appellant had indicated. The trial court further found that the Appellant's wrongful action saw one employee named Cecilia being dismissed and that the Appellant's intrusion of Respondent's account aggravated his poor health.

23. This appeal now faults the trial court for failing to see that there were 2 avenues of loan recovery, for awarding excessive damages and for speculating on issue that led to sacking of bank's employee named Cecilia and speculating on the Respondent's ill health.

24. The duty of this court as an appellate court is to relook at the facts or evidence adduced at the trial and re-evaluate the same with a view to reaching at own conclusions noting that that unlike the trial court, this court does not have the advantage of having seen the witness testify in court and so the advantage of observing the witnesses' demeanor is lacking

25. The issues that have cropped up in this appeal are as follows namely:

i. Whether the Appellant's actions to deduct a total of Kshs.250,000/- from the Respondent's account were legal and proper.

ii. Whether the Appellant should have given notice before effecting the deductions and whether the reversal amounted to admission to wrong doing.

iii. Whether the Respondent's case proved that the loss and damages suffered was caused by the Appellant.

(i) Whether the deductions by the bank were legal and proper:

25. This issue was central to the dispute between the Appellant and the Respondent in the lower court. They were three crucial documents tendered during trial that were the basis of the decision by the trial court. The documents are namely;

(a) Letter of offer 9th February 2011 and the acceptance dated 28th February 2011.

(b) An undated letter of set-off

(c) A Tripartite agreement dated 21st February 2011.

26. It is not disputed that there existed a banker customer relationship between the parties herein that the Respondent received a loan of Kshs.750,000/- after signing a letter of acceptance on 28/2/2011. The loan facility also known as Stabez Loan had a clear clause stating as follows:-

> **"The Stabex Loan is to be repaid over a period of 12 months from the date of disbursement or upon receipt of coffee Proceeds of 2009/2010"**

The repayment clause in the said letter of offer further gave the following clarification.

> **"Note: Repayment instalments will be debited to the arrears on due dates and will remain in the areas account until paid by you. Consequently, the amount outstanding under the loan agreement at any given time will be total of balance in the loan account and the balance in the Arrears Account"**

27. The Appellant herein has faulted the trial court for misapprehending the recovery clause arguing that there were options for the bank to make recovered namely:-

i. Over a period of one year from the date of disbursement (read 28/2/2011) and

ii. Upon receipt of coffee proceeds of 2009/2010.

28. On the other hand the Respondent insists that the latter option (i) above was what was agreed between the parties and that when the Appellant effected the deductions on 12th October 2011 and 14th October 2011 respectively totaling 250,000/-, the amounts had not become due and payable and to him the due date was sometime in February 2012.

29. The main contest before the trial court therefore boiled down to the interpretation of the recovery clause in the loan agreement (letter of offer) between the Appellant and the Respondent. In interpretation of agreements courts have been driven by the looking at the intention of the parties in a given contract and the courts would therefore adopt an objective theory. What is the wording of the agreement and what is the ordinary meaning of the express terms used? In the case of ***Fedility Commercial Bank Ltd –vs- Kenya Grange Vehicle Industries Ltd [2017] eKLR*** the Court of Appeal when called upon to interpret a clause in the agreement between the parties made the following observations;

> **"Courts adopt the objective theory of contract interpretation and profess to have the overriding aim of giving effect to the expressed intention of the parties when construing a contract. This is what sometimes is called the principle of four corners of an instrument, which insuits that a document's meaning should be denied from the document itself, without reference to anything outside of the document (extrinsic evidence) such as the circumstances surrounding its writing or the history of the party or parties to it……..."**

30. In my considered view the repayment clause in the signed agreement between the Appellant and the Respondent is clear and lends evidence to the Appellant's position that the parties herein expressly agreed on two avenues of loan recovery which were one year repayment period or upon receipt of coffee proceeds of 2009/2010. There was no ambiguity in the clause I have already highlighted above.

In the case of ***Winfred Karanja –vs- Regnoil Kenya Ltd [2018] eKLR,*** Makau J. made the following observations.

> "**The court does not make a contract for the parties. The court will not even improve the contract which the parties have made for themselves. If the express terms are perfectly clear and far from ambiquity, there is no choice to be made between meanings. The clear terms must be applied even if the court thinks some other terms could have been more suitable."**

31.31. I have perused through the evidence tendered by the Appellant's witness (DW1) and according to him, coffee proceeds from cooperative agencies were received between 23rd August 2011 and 12th October 2011. The deductions of monies in the Respondent's account were effected on 12th October 2011 (Kshs.180,450/-) and on 14th October 2011 Kshs.69,520/-. In total the total recovery in the Respondent's accounts was Kshs.250,000/- When the Respondent visited his bank in Chuka Town on 15th October 2011 with an intention to withdraw Kshs.150,000/-, he found out that his account balance read kshs.6,000/- and hence his grievance against the Appellant. According to him, he never expected the Appellant to deduct the amount before the end of one year period. This begs the question, was the bank right to deduct the amount in the Respondent's account before the end of one year a look at the repayment clause in the agreement shows that the bank was perfectly right effect the deductions because the repayment period of the loan was over a period of 12 months from the date of disbursement," **or** ***"upon receipt of coffee proceeds of 2009/2010."*** The use of the conjunctive word "**OR"** clearly gave an alternative option to the bank. The logical and ordinary meaning of the conjunction used in the repayment clause meant that the bank was at liberty to apply any of the two repayment modes. So when it opted to deduct the amount of Kshs.250,000/- upon receipt of coffee proceed, it was legal and proper for it to deduct. The answer of the first issue of determination in this appeal has to be in the affirmative.

(ii) **Whether the Appellant should have given notice before effecting deductions.**

32. The Appellant has faulted the trial court's finding that it ***"meddled with the Plaintiff's account"*** without giving notice that it was doing so. It is true that good banking practices should entail keeping its customers well informed of activities in their accounts at all times. I have

looked at the letter of set off signed by the Respondent and it states ***inter alia.***

> **"I hereby agree that in addition to any other security which from time to time you may have, you are entitled to hold as security all monies in my/our fixed, short call, savings and current account now and in future at any of your branches……and I/we hereby irrevocably authorize you to set off at any time all monies held by you against the amount of my/our indebtedness arising from the facilities….and at any time to combine my/our accounts and to do all the foregoing without giving notice to me/us, or receiving notice from me/us".**

33. The Respondent appears to have expressly waived his right to be notified because he gave the Appellant the right to set off any amount in his account against the loan ***"without notice to me."***

34. In the case of ***Barclays Bank of Kenya Ltd –vs- Kepha Nyambera & 191 others [2013] eKLER,*** the court held *inter alia*

> **"…… Thus in the circumstances where a bank has a loan account and also a current account in credit with the same customer and holds security for the ultimate balance, the banker is at liberty to combine and consolidate the accounts and set off the accounts. In the instant case, it is very clear that the 2nd Respondent had given the right to the Appellant to consolidate and set off any sum standing to the credit of any one or more of those account in or towards the satisfaction of any liabilities due to it."**

35. The letter of set of duly signed by the Respondent as I have observed above allowed the Appellant to deduct monies in the Respondent's saving account to set off the amounts in the loan account. The bank's action of effecting the deduction without any notice was at best uncourteous but it was not illegal. The same action was backed by the Respondent's letter of set off. One of cause can raise a legitimate question as to why or what informed the Appellant's decision to reverse the deduction if it was done procedurally or legally. The Respondent for good measure has strongly delved on this to oppose this appeal but I am not persuaded that the bank did anything wrong in deducting the amount in the Respondent at the time it did. It was simply exercising its right or its option to set off the amount ***"upon receipt of coffee proceeds of 2009/2010"*** There was an allegations that one of the Appellant's employee lost her job because of the reversal made but the evidence tendered in my view was insufficient to make such conclusion and doing so in my view as speculative and it was a misdirection for the trial court to make such a conclusion without sufficient evidence. Further the issue of dismissal of the said employee if at all was simply an obiter. This court finds that the Appellant did not have a legal obligation to give notice to the Respondent in the face of Respondent's letter of offer. The bank was not wrong not to issue notice before effecting the deductions notwithstanding the unexplained reasons why it reversed the deductions later. This court would not want to speculate that perhaps that is why the bank employee named Cecilia was sacked by the Appellant for the aforestated reasons.

(iii) Whether there was prove of loss and damages by the Respondent.

36. The provisions of Section 107 of the Evidence Act (Cap 80 Laws of Kenya) places the evidential burden on whoever alleges. The Respondent alleged that he was unable to purchase farm inputs and pay his labourers as a result of the Appellant's actions. He also claimed that he suffered physically and mentally and went to great lengths to prove that he had health afflictions. The trial court in my view properly found that the Respondent's hypertensive conditions (he was overweight) was not cause by the Appellant. I am however not persuaded by the further finding that the bank aggravated the Respondent's health conditions because there was no basis for that finding because the Respondent testified that he had never been diagonised with hypertension. The bank certainly could not have aggravated a non-existent condition.

On the alleged loss of business the Plaintiff stated that he was unable to buy farm inputs, pay labourers, tend to his farm and even maintain financial family obligations due to the removal of monies from his account. I note that the money was returned to the plaintiff's account within 10 days or so after its deduction. I am of the view that the plaintiff despite showing that he owns various tracts of land, some under coffee and tea plantation and some under maize and beans plantation, he did not show how his coffee revenue was affected in the two weeks that he did not have access to the money. The record of deliveries that was tabled at the lower court shows that prior to the deduction, the plaintiff in August 2011 had delivered 156kgs of coffee to Weru Tea Factory, in September 2011 he delivered 424 Kgs, in October 2011 he delivered 980kgs, in November 2011 he delivered 1285 Kgs and in December 2011 he delivered 1501kgs. There was no evidence that the business losses or his delivery rate to Weru Tea Factory was affected because the deliveries were consistently rising during the period before and after the bank deductions.

37. On the alleged inability to meet his financial obligations or meet his family needs, this court finds that even if the Respondent had proved those allegations (which he did not) I still find that there was no nexus made between those afflictions and the bank's actions. Furthermore the bank had done no wrong to be blamed in any event.

38. The Respondent has cited the decisions in the case of Ombija (supra) and Otieno Omuga (supra) that I find that the decisions are not relevant in this appeal. In the case of Ombija, the bank declined to accept transactions involving how Nicholas Ombija citing insufficient funds but when an inquiry was made it was discovered that Ombija's account had sufficient funds and the bank had exposed the Plaintiff to an embarrassing situations due to lack of diligence on its part. In the **Otieno-Omuga** case, the bank dishonoured a cheque when the customer's account had sufficient funds and though it later repaid, it never offered an apology, In the present instance, the Appellant was not at fault and so unlike the two decisions cited by the Respondent, it could not be faulted and ordered to pay damages. The Appellant did not breach its contractual or fiduciary duty to the Respondent and the trial court was in error when it held otherwise. In the end this appeal for the above reasons succeeds. The same is allowed with costs to be agreed or taxed. The Judgment of the lower court delivered on 30th January 2019 is hereby set aside and in its place the Respondent's suit is dismissed but I make no order as to costs in the lower court so each party to meet own costs.

Dated and signed by;

HON. JUSTICE R. K. LIMO.

SIGNED DATED 14TH SEPTEMBER 2020.

Dated, signed and delivered in the open court on 28TH day of SEPTEMBER 2020

By:

HON. LADY JUSTICE L.W. GITARI