



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL APPEAL NO. 163 OF 2019

REUBEN KIOKO MUTYAENE.....APPELLANT

-VERSUS-

KCB BANK LIMITED.....RESPONDENT

(An appeal from the judgment and/or decree of honourable J.B. Kalo Chief Magistrate

in Nakuru CMCC No. 107 of 2018 (formerly Nakuru Civil Suit No. 34 of 2017)

delivered on 3rd September 2019)

JUDGMENT

1. The Appellant sued the Respondent through plaint dated 3rd August 2017 and amended on 25th May 2018 following failure to pay a cheque for kshs 80,350.000 sometimes in March 2015 issued in favour **M/s Gordon Ogola, Kipkoech & Co. Advocates** despite the fact that there were sufficient funds in the account to pay for the cheque. The Appellant sought the following: -

- i. *A declaration that the defendant's action amounted to negligence, ignorance, breach of statutory duty of care and breach of contract;*
- ii. *A declaration that the defendant's action was in violation of the plaintiff's constitutional rights and fundamental freedom as enumerated in the plaint;*
- iii. *A declaration that the defendant's failure to act/respond on the Plaintiff's letters and emails was in violation of **Fair Administrative Action Act and Consumer Protection Act.***
- iv. *A declaration that the defendant's actions and inactions were in full contravention of the **Banking Act, Bills of exchange Act, Central Bank of Kenya Act, the Cheques Act, the Central Bank Prudential Guidelines and Defamation Act;***
- v. *An order directing the Defendants to permanently expunge from his statement the "unpaid cheque" and "unpaid cheque charges" entries;*
- vi. *An order directing the defendant to pay damages in lieu of apology for the numerous inconveniences caused to the plaintiff;*
- vii. *Special damages of Kshs. 60,000/= as pleaded in the plaint;*
- viii. *General and aggravated damages;*
- ix. *Any other relief the court may deem fit;*
- x. *Costs of the suit.*

2. The Respondent denied the Appellant's claim and pleaded that at the time the Appellant drew the cheque, his account had an overdraft of Kshs. 863,738/= and with the negative balance, the Appellant ought to have informed the Respondent about the cheque issued so that they

could honour the cheque the negative balance notwithstanding. The Respondent prayed the Plaintiff's suit be dismissed.

3. By judgment delivered on 3rd September 2019, the trial magistrate found that the Court did not have jurisdiction to grant constitutional declarations sought. He noted that the appellant was seeking to have the respondent found to have acted negligently by refusing to pay the said cheque. He found that the appellant failed to demonstrate how the defendant's alleged negligence manifested itself and that he suffered loss as a result of the defendant's negligence. He observed that the Appellant relied on overdraft from the respondent to run his business and it appeared the cheques took time to be cleared and it took his personal intervention to be cleared. He held that, that alone does not amount to negligence; further that the Plaintiff has not stated terms of the overdraft for the Court to establish whether the Respondent was in breach.

4. On special damages the trial magistrate found that the amount expended on preparing pleadings would have been recovered from costs.

5. The Appellant being aggrieved by the trial Court's judgment, filed a Memorandum of Appeal dated 1st October 2019 seeking the Court to allow the appeal by reversing and setting aside of the judgment and decree of the trial Court on the following grounds: -

i. That the learned magistrate erred in law and fact by failing to find the Respondent at fault for its inactions in failing to honour cheques on demand when the appellant's bank current account was sufficiently funded and the outstanding balance within the authorized overdraft

ii. That the learned magistrate erred in law and in fact by finding the appellant had not shown that he suffered loss and damages as a result of the Respondent's negligence in dishonouring two cheques drawn on the Appellant's bank account held at the Respondent's Moi Avenue branch;

iii. That the learned magistrate erred in law and fact by failing to consider and take into account all evidence, testimony, pleadings and submissions adduced by the appellant to proof the Respondent's injustices resulting from its actions, inactions and omissions which amounted to negligence, breach of statutory duty of care; injurious and malicious falsehoods; and breach of contract as pleaded in the amended plaint dated 25th May 2018;

iv. That the learned magistrate misapprehended and misanalysed the facts of the case by wrongly stating that cheque issued in March 2016 was only cleared after he intervened personally; that the appellant failed to state the terms of the overdraft facility; that he had issued "another cheque" for kshs. 900,000/= on 5/01/2018 which was cleared on 01/02/2018; and that he had pled for Kshs. 30,000/= in special damages;

v. That the learned magistrate failed to adjudicate, determine and resolve the impasse resulting from the Respondent's failure to respond to the Appellant's request seeking transfer of his bank account to the Defendant's Masii Branch in contravention to Fair Administrative Action Act, the Consumer Protection Act, the banking act and the Central Bank of Kenya Prudential Guidelines.

vi. That for the reason that the Constitutional declarations sought by the Appellant are not within jurisdiction of the honourable Magistrate's court, the Appellant's grievances of violation of constitutional rights and fundamental freedoms will be conclusively adjudicated and determined on merit in the High court and avoid filing a separate suit to litigate on the constitutional issues raised. (the matter was initially filed in the High court on 3rd August 2017 before being transferred to the chief Magistrate's court on 23rd May 2018 at the court's own motion);

vii. That in awarding costs of the suit to the Respondent/Defendant, the honourable magistrate erred in law and fact by failing to consider and acknowledge the fact that the suit arose out of admitted facts of actions, inactions, omissions and commissions of the Respondent to illegally dishonour cheques and levy "unpaid cheque charges" when the Appellant's current account was well funded.

viii. That the learned magistrate erred in law and fact by failing to find that the Respondent was in breach of the law in failing to respond to the Appellant's numerous correspondences and only swung into action after 13 months when he threatened to seek legal redress.

ix. That the learned magistrate erred in law and fact by failing to find that the Respondent did not present evidential documents or witnesses to rebut the Plaintiff's/Applicant's assertions and testimony;

x. That the learned magistrate erred in law and fact by failing to find that the appearance of the words "unpaid cheque charges" in his bank statements is prejudicial to the Appellant and that his standing, image and reputation was tainted as evidenced by denial of credit facilities and services at various financial institutions and at a construction company

xi. That the learned magistrate erred in law and misdirected himself by analysing and taking into considerations issues which should not have been taken into account and failing to take into considerations relevant matters of the case raised in the Appellant's pleadings, testimony, submissions and binding authorities hence arriving at an erroneous outcome.

6. On 21st May 2020 directions were given that the appeal was to be canvassed by way of written submissions. Both parties filed their submissions through email.

APPELLANT'S SUBMISSIONS

7. The Appellant submitted that the learned magistrate erred in analysing and determining that the only issue for determination was

negligence; that he failed to address the issue of breach of contract, lack of statutory duty of care and holistically and independently on all the issues pleaded. The appellant pleaded for general damages for violation and infringement of a myriad of constitutional rights & fundamental freedoms and aggravated damages.

8. Further that the trial magistrate failed to take into account that the Respondent did not give any good reason as to why he dishonoured his cheques yet his account had sufficient funds; that he erred when he held that the appellant did not prove the losses and damages he suffered out of the Respondent's negligence. He submitted that his pleadings and submissions were not taken into account in the lower court judgement and determination.

RESPONDENTS' SUBMISSIONS

9. The respondent's advocate submitted that the appellant did not prove his case on a balance of probability and the learned magistrate did not error in law or facts in dismissing his appeal. The appellant pleaded that the Respondent was negligent in handling his account in regard to the cheques he issued but failed to prove the negligent aspect by the Respondent.

10. The Respondent's Advocate further submitted that the Appellant did not suffer any loss or damages as there was no negligent act on the part of the Respondent; that they only delayed in clearing the Appellant's cheque as they were taking reasonable care as legally required when handling accounts.

11. Respondent submitted that both cheques were eventually cleared and an apology offered to the appellant. On constitution violation he failed to meet the test concerning the alleged violations of his constitutional rights as Court decisions cannot be based upon the unsupported hypothesis, he ought to have presented clear evidence of this violation and the prejudice he suffered. That he further did not object to the transfer of the case to the lower Court in the lower Court thus cannot sneak in that issue in the appellant stage.

12. On special damages, counsel for the respondent submitted that the same must be pleaded and specifically proved and the Appellant failed to meet the requirements of special damages as established by the law.

ANALYSIS AND DETERMINATION

13. The duty of the first appellate court was stated in the case of **Selle & Another vs Associated Motor Boat Co. Ltd & Another [1968] EA 123** where the court held as follows: -

“My duty is to evaluate and reexamine the evidence adduced in the trial court in order to reach a finding, taking into account the fact that this court had no opportunity of hearing or seeing the parties as they testified and therefore, make an allowance in that respect...”

14. In view of the above, I have perused and considered evidence adduced in the trial court; I have also considered submissions filed herein.

15. Record shows that there was a bank-customer relationship between the respondent and the appellant. The Appellant testified that he was a businessman operating in Machakos and Nakuru and he relied on loans and overdrafts from financial institutions to run his business. He testified that sometimes in March 2016, he issued a cheque in favour of the firm of **Gordon Ogola, Kipkoech & Co. advocates** for a sum of Kshs. 80,350/= with the belief that his account had sufficient funds to cover the payment. On receiving his bank statement on 7th April 2016, he realised the cheque was marked as unpaid and a sum of Kshs. 3,300/= debited into his account as unpaid cheque charges.

16. He wrote to the defendant asking for a reversal and an explanation of the charges and for over a year he did not receive any response from the defendant only to be told it was a technical error in his account without any further explanation.

17. He testified that on 5th January 2018, the appellant further issued a cheque no. 000655 for Kshs. 900,000/= payable to **Kioko Kithuka**. At this time his credit balance was Kshs. 935,654.80 and the cheque was dishonoured with the remarks “crossing Stamp Cancelled” it was however cleared at the Respondent's Masii branch after he intervened.

18. The appellant testified that as a result of the defendant's negligence and malicious act, he has suffered injuries on his reputation and image and has been shunned down by banks and business partners. An example being HFC Ltd which declined to offer him a mortgage and his application to Kyamu Construction & Engineering Ltd was rejected due to the words “unpaid cheque” and “unpaid cheque charges” appearing on his statement.

19. The Appellant stated that he has suffered loss and damages in the hands of the Respondents and lives with uncertainty in his business due to the hostile treatment by his banker by failing to honour his cheques. He also pleaded for special damages of Kshs. 60,000/= charged in drafting the pleadings by a paralegal assistant.

20. What I consider in issue is **whether the trial court erred in dismissing the appellant's suit with costs.**

21. The appellant argues that the respondent dishonoured his cheque on the ground that he did not have sufficient funds in his account stating that he only had an overdraft in his account and in order for the said cheque to be honoured he should have communicated to the bank for it to honour the cheque. The bank dishonoured the said cheque and charged him charges for the unpaid cheques. Thereafter through the intervention by the appellant the said cheque was cleared and the bank apologized for the error. The argument by the bank was there lack enough funds in the appellant's account for them to honour the cheque as it was operating with an overdraft while the appellant argues the amount in his account was sufficient as he had an overdraft of over 1 Million and his account had not reached its limit.

22. I note that the offer letter is dated 30th September 2015 for overdraft of kshs 1,000,000; its purpose being to provide working capital and was to be available up to 10th June 2016 when it could be reviewed. From the statement the cheque of kshs 80,350 was indicated as unpaid on 4th April 2016 and a charge of kshs 3,300 the same day.

23. The statement show that the account was overdrawn by kshs 863,738 but as per the letter of offer of overdraft facility up to kshs 1,000,000 had not lapsed.

24. **T. G Reeday, Law Relating to Banking, 2nd Edition** on the obligations of the Bank in honouring cheques, the author writes thus:

“The opening of a current account implies a contract that the bank will pay at the branch concerned cheques drawn by the customer in correct form and with funds available, whether consisting of a credit balance or an authorized overdraft limit. If a bank dishonours a cheque wrongfully i.e. where funds are available and no legal impediment to payment exists, then this is a breach of contract for which the customer can sue for damages and the measure of the damages is not the amount of the cheque but such sum as is reasonable compensation for the injury to his credit..... However, in the case of a tradesman, and by analogy is that of a professional man or a commercial agent, reasonable compensation can be recovered without proof of special damages.”

25. Record shows that the appellant produced the letter of offer dated 30th September 2015 which was to run from 30th September 2015 and was available up to 10th June 2016 and the limit of the overdraft was kshs1,000,000 for purposes of working capital. The payment of the cheque of kshs 80,350 would not have caused the overdraft to exceed the allowed kshs 1,000,000.

26. I however note from the statement and evidence adduced by appellant in cross examination that the error was corrected the same day and kshs 80,350 paid. The statement shows entry of the cheque on 4th April 2016, indicated as unpaid the same day and the charges of kshs 3,300 was entered. On the same day 4th April 2016 there is entry showing the cheque was paid out. Any reasonable person reading the statement can tell that the entry was an error and the responded promptly rectified the same.

27. Record also shows in cross examination of the appellant, that he never showed Court any document to demonstrate that he was denied loan from Housing Finance because of the bank statement. In response to cross examination, he said he did not have loan application. There is no doubt that the bank was expected to exercise due care while clearing the cheque. Appellant further said the charges of kshs 3,300 was also paid.

28. In respect to special damages of kshs 60,000 the appellant stated in the lower court that they were made up of costs for preparing pleadings. On this the trial magistrate rightfully found that it should come under costs of the suit.

29. From the foregoing I find that the appellant failed to prove his case on a balance of probabilities. The trial magistrate rightfully dismissed his case

30. **FINAL ORDER**

1. This appeal is hereby dismissed

2. Costs to the respondent.

Judgment dated, signed and delivered via zoom at Nakuru

This 24th day of September, 2020

RACHEL NGETICH

JUDGE

In the presence of:

Jeniffer - Court Assistant

Appellant in person

Ms. Nasimiyu Advocate for Respondent