



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 276 OF 2016

FINA BANK LIMITED.....APPELLANT

VERSUS

EVANGELINE WANJIRA NJOKARESPONDENT

(Being an appeal from the Judgment of Hon. M. Chesang (Ms) Resident Magistrate in CMCC No. 157 of 2012 delivered on 29th April, 2016)

JUDGMENT

The respondent herein had a bank account with the appellant. At some point the respondent wanted to withdraw some money but was refused to do so by the appellant's agents and or managers, notwithstanding, that there were adequate funds in the account to meet the demand.

The reasons advanced by the appellant were that the account did not have sufficient money and that there were instructions not to operate that account. It was the respondent's case in the lower court that the appellant's action was illegal, unlawful and contrary to public policy which caused the respondent hardship, embarrassment and ridicule, as a result of which she suffered loss and damage for which she held the appellant liable.

The claim was therefore that the conduct of the appellant be declared illegal and unlawful, and that the respondent be allowed to operate her account and withdraw the money. She also claimed general damages for the injury suffered.

The amended plaint dated 19th March, 2013 captured the respondent's cause of action in addition to the complaint that, while the suit was pending the appellant unlawfully debited a sum of Kshs. 843,588.54 from her account and therefore the appellant should be ordered to credit the said sum into the account.

The appellant denied the respondent's claim and further pleaded that the respondent was a shareholder of a company known as Zingo Investments Limited which obtained a loan from the appellant, upon which the respondent also gave a personal guarantee. The conditions of the said loan were breached by the directors which led to the compromise of the account held in the name of the respondent.

After a full trial, the lower court gave judgment in favour of the respondent and made an award of Kshs. 250,000/= general damages plus costs and interest. The appellant was aggrieved by the said judgment and filed this appeal setting out several grounds contained in the Memorandum of Appeal dated 18th and filed on 23rd May, 2016.

The lower court was faulted for finding that the appellant unlawfully restricted the respondent's account, without considering overwhelming evidence why this was done. The court was also faulted for failing to find that the respondent was a co-director of Zingo Investment Limited and that she had executed a guarantee and indemnity of the said company to the tune of Kshs. 46,537,000/=. There were some allegations in the said Memorandum of Appeal relating to the failure of the trial court from finding or considering some fraudulent transaction had taken place in the account of Zingo Investment Limited.

The findings that the appellant was negligent in restricting the respondent's account were also questioned by the appellant. The defence of justification in debiting the respondent's account was also made an issue of appeal.

As required of me, I have made an evaluation of the evidence adduced before the trial court. In finding in favour of the respondent, the lower court had the following to say,

“It is not disputed that the plaintiff executed a deed of indemnity with respect to Zingo Investments Limited for which she is a director. This was for debt of Kshs. owed by Zingo Investment's Limited.

DW1 admitted under oath that the liabilities of Zingo Investments Limited had been taken over by Kenya Commercial Bank

who had issued a discharge of charge thereby absolving the plaintiff and releasing the plaintiff's personal guarantee. Therefore I find that the plaintiff has succeeded in her claim and orders are issued as prayed at prayer (a) and (b) of the plaint. As to general damages, I will award the plaintiff Kshs. 250,000/=. The award shall attract interest at court rates. The plaintiff is also awarded costs of the suit."

Both parties have made submissions in the argument of this appeal. There is no dispute that the respondent had an account with the appellant. There is also no dispute that that account had a credit balance of Kshs. 843,588.54 which however was disputed by the defence witness who gave evidence on behalf of the appellant. According to him, the credit balance was Kshs. 97,934.54 which was available to the respondent.

There was evidence that the liability of Zingo Investment Limited had been taken over by KCB. By so doing, the liability of that Company to the appellant had been discharged. However, it was the defence case that the guarantee had not been discharged.

There is no evidence whatsoever that the respondent was given notice by the appellant of any limited access to her account, for reasons of personal guarantee to secure the indebtedness of Zingo Investments Limited to the appellant.

When she sought to confirm her balance in the account before moving to withdrawal Kshs. 400,000/= the funds in her account were sufficient to meet that withdrawal. There was no restriction that had been communicated to her. She had a legitimate expectation that the funds were available.

The fiduciary relationship between the appellant and the respondent required that the respondent be informed of any limitation attached to her account. The failure by the appellant to do so was in breach of that relationship. It is not surprising therefore that, as a result of the appellant's failure to meet the respondent's expectation, she complained of embarrassment and personal injury.

The judgment of the lower court was brief and wanting to some extent, in material particulars as required by order 21 Rule 4 of the Civil Procedure Rules, on the contents of a judgment. However, the contents capture the dispute, the main point for determination and the determination.

In my judgment, the respondent established that the appellant was negligent in not communicating with her about any restriction to her account, and also in denying her the funds sought, yet the liability of the company she guaranteed had been taken over by Kenya Commercial Bank, and for failure to give her any notice whatsoever of any adverse entries in her account.

The defence witness who gave evidence on the part of the appellant did not dislodge the respondent's claim. The lower court was therefore correct in finding the appellant liable. The award made in terms of general damages was modest in the circumstances of this case, and I find no reason to disturb the same. This appeal is therefore dismissed with costs to the respondent.

Dated, signed and delivered at Nairobi this 26th Day of July, 2019.

A. MBOGHOLI MSAGHA

JUDGE