



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL & TAX DIVISION
CIVIL CASE. 37 OF 2016

ANDREW KIRITI GATHII.....PLAINTIFF

VERSUS

EQUITY BANK LIMITED..... DEFENDANT

JUDGMENT

Introduction

1. The Plaintiff seeks both special and general damages against the Defendant.
2. The basis upon which relief is sought is that upon approval of a credit agreement between the Plaintiff and the Defendant, the Defendant was obliged to send a letter of undertaking and commitment to a third party confirming the Plaintiff's readiness and ability to engage and complete a sale transaction involving Plot No. 756 on LR No. 13131. The Defendant was also obliged to pay Kshs. 360,000/= to the third party vendor but did not.
3. The Defendant's failure to pay the Kshs 360,000/= commitment to the third party vendor, contends the Plaintiff, resulted in the third party cancelling the sale transaction and the Plaintiff ultimately losing the opportunity to own the subject Plot No. 756 on LR. No. 13131.
4. The Plaintiff contends that granting judgment in his favour will fully reconstitute him as if the sale transaction had been completed.
5. The Defendant contests the claim and blames the Plaintiff for the misfortune that befell him.

Background facts

6. The relevant facts are to a large extent common cause.
7. The Defendant is a banking institution duly licensed to carry out the business of banking in Kenya. At all material times the Plaintiff was the Defendant's customer under the Plaintiff's trade name Bonjour Nairobi.
8. In August 2010, the Plaintiff sought to and agreed to purchase from Thika Greens Limited a parcel of land known as Plot No. 756 ("the subject property") which was to be excised from Land Reference No. 13131. The agreed purchase price was Kshs. 1,200,000/=. The Plaintiff was to pay a deposit of Kshs. 360,000/= and completion was stated as 90 days from execution of the sale agreement. A letter of offer to

like effect was duly issued to and executed by the Plaintiff on or about 30 August 2010.

9. Subsequently, the Plaintiff approached the Defendant for a credit facility in the sum of Kshs. 840,000/= to help finance the purchase. As at the time the Plaintiff signed the letter of offer the Plaintiff's current account with the Defendant was in credit in the sum of Kshs. 400,000/=.

10. The Defendant agreed to advance the Plaintiff the balance of the purchase price and duly instructed its counsel on 31 March 2011 to prepare a first legal charge over the subject property as security for the advance. The Defendant also instructed its counsel to issue a suitable professional undertaking to the third party vendor for payment of the balance of the purchase price of Kshs. 840,000/= upon successful transfer of the subject property in favour of the Plaintiff.

11. The charge document was indeed prepared and executed in 2012. A sublease over the subject property was also executed. Then in April 2014, the third party vendor informed the Plaintiff that the subject property was no longer available for purchase by the Plaintiff. The ostensible reason was that the third party vendor never received the 30% deposit of Kshs. 360,000/=. This prompted the Plaintiff to demand answers from the Defendant.

The Plaintiff's case

12. The Plaintiff's case is that the Defendant owed the Plaintiff a duty to make payment of the deposit in time on behalf of the Plaintiff. The Plaintiff contends that the Defendant negligently failed to honour this duty leading to the Plaintiff's loss and damage.

13. The Plaintiff relies upon the fact that the Plaintiff had credited with the Defendant the amount payable to the third party vendor as deposit. The Plaintiff contends that the Defendant was very aware of the need to make payment but negligently or deliberately failed to do so, whilst at the same time issuing instructions for the credit facility documentation to be finalized.

Defendant's case

14. The Defendant denies being negligent in any manner whatsoever. The Defendant contends that the onus of paying the deposit amount of Kshs. 360,000/= to the third party vendor was always upon the Plaintiff. Additionally, the Defendant contends that it was only obligated to advance the secured amount but that in the absence of a Sale Agreement being executed by the Plaintiff and the third party vendor the credit facility transaction also collapsed.

The Evidence

15. Both parties called one witness each.

The Plaintiff testifies

16. The Plaintiff testified on his own behalf. His testimony was largely centered on the transaction between the third party vendor and himself as well as the credit facility transaction. Nothing was said of the banker customer-relationship with the Defendant.

17. The Plaintiff testified that the credit facility of Kshs. 840,000/= was approved by the Defendant subject to the Plaintiff depositing the amount of Kshs. 360,000/= with the Defendant. This amount constituted the deposit payable to the third party vendor. The Plaintiff asserted that he did deposit the said amount. Making reference to the credit facility letter of offer and to his bank statements, the Plaintiff testified that he duly deposited the amount of Kshs. 500,000/= in cash even as he applied for the credit facility. He further testified that he complied with all conditions in the credit facility letter of offer dated 2 September 2010 and it was for the Defendant to perform its part which it only partly did.

18. According to the Plaintiff, the Defendant's failure to pay the amount of Kshs. 360,000/= led to the

third party vendor reneging on the sale transaction in the year 2014, nearly three years after the initial engagement. The Plaintiff, in cross-examination, contended further that the Defendant always had his instructions to pay the amount of Kshs. 360,000/= to the third party vendor as that was what the credit facility letter of offer dictated. In cross examination as well, the Plaintiff confirmed having signed the sale agreement but not having been provided with a copy.

The Defendant's version

19. The Defendant's sole witness was Peter K. Mucheru.

20. DW1 testified that the records revealed that the Plaintiff's account was in credit and that the Kshs. 360,000/= could have been paid to the third party vendor but was not paid as the Plaintiff never gave instructions to the Defendant to make payment. According to DW1, the Plaintiff failed to meet the conditions of the credit facility as had been set out in the credit facility letter of offer.

21. In cross-examination, DW1 testified that all the transactions were to be effected through the Defendant but insisted that the Defendant could only pay the third party vendor upon receipt of instructions from the Plaintiff. DW1 stated that the Plaintiff never gave the instructions to pay and neither did the Plaintiff supply the Defendant with a copy of the Sale Agreement.

Issue(s)

22. Having considered the pleadings and the parties' respective testimony, in my view, the core question for determination is whether the Defendant failed or neglected to discharge its obligations to the Plaintiff to the detriment and loss of the Plaintiff.

Discussion and Determination

23. There is no dispute that there existed a customer-banker relationship between the Plaintiff and the Defendant. The Plaintiff however accuses the Defendant of not honouring its obligations. The Defendant is accused of inaction.

24. I must state that law books and law reports are rife with discourse and reports of cases where the bank has acted without the customer's instructions or acted negligently but not where it has failed to act. I find it apposite consequently to reflect briefly on the nature of the relationship between a bank and its customer.

The banker and his customer

25. The basic narrative is that through the opening of an account (when a bank agrees to open an account for its customer) the essential relationship between a bank and its customer is contractual. Obligations consequently flow from both sides with the fundamental aspect being that the banker has to honour his customer's instructions continuously including the instruction to terminate the relationship. The elemental mid nineteenth century case of **Foley v Hill [1848] 2 H.L Cas 28** set this basic principle as to the nature of the relationship and it has been followed over the years without exception: see **Hebby Ondieki v Barclays Bank Ltd [2008] eKLR**.

26. The relationship is seen through the prism of a debtor and creditor: see **Ajay Shah v Deposit Protection Fund Board as liquidator of Trust Bank Ltd (in liquidation) [2016] eKLR**. The understanding is that an account held by the customer with the bank is a statement of the extent of indebtedness as between the banker and its customer. If the account be in credit the customer is owed, if in debit the bank is owed. It follows that where the bank owes the customer (account in credit), the bank may not make unauthorized payments. The money held belongs to the customer. The bank must act only on the customer's instructions. It must not by omission or action, be negligent. It has a primary duty to honour the customer's instructions and make payment in accordance with the mandate issued by the customer: see **Foley v Hill (Supra)**.

27. The customer on the other hand has the obligation to issue clear and unambiguous instructions and ensure that its orders and directives are not susceptible to falsification.

28. In my view, in the current commercial and business set-up, the instructions may take a number of forms. It could be a demand by the customer to be paid. It could be a cheque. An order to pay direct debit. A standing standard order. An Electronic funds transfer (EFT). An ATM instruction. And, even internet instruction. Name it. The fundamental principle will however always remain the same: the payee is clearly identifiable and the banker must be indebted to the customer.

29. Where it is a third party payee the details of payment must be clear. Clarity, in my view, assists in establishing the necessary intention of the customer to be honoured by the banker. The intention to pay is deemed to be clear when the banker knows who to pay, in which event the customer relinquishes his right to the money payable and identifiable payee acquires access to and control over the sum to be paid. The bank thus may not be able to effect payment unless there is *animus solvendi* with clarity which itself confirms the authority to pay.

30. Where consequently the instructions to pay are unclear and ambiguous the bank may not be faulted where it fails to pay in honor of the instructions. Though, the bank ought to act reasonably and prudence in such an instance. It would dictate that the bank approaches the customer and seeks a clarification: see also **Patel v Standard Chartered Bank plc [2001] Lloyd's Rep 229**. It is prudent to seek clarifications as failure to honour payment orders by a customer may result in liability where it is shown that the bank was indebted to the customer: see **Kpohraror v Woolwich Building Society [1996] 4 All ER 119**.

31. It is also relatively clear that in modern banking the bank does much more. It receives money on behalf of the customer. It advises the customer. There is thus a fiduciary posture. The bank owes the customer a duty of care both in contract and in tort, even in its ordinary daily business. Thus in **Selangor United Rubber Estates Ltd v Cradock (No. 3) [1968] 1 WLR 1555**, Lord Ungood-Thomas stated as follows, as regards a banks duty of care:

“To my mind... 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 relevant facts which can vary almost infinitely”.

32. 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 also be taken in view of the practical differences between contract and tort claims which include but are not limited to different limitation periods, different rules as to remoteness of damage and a different approach as to contributory negligence.

33. I now return to the instant case.

34. In his testimony before this court, the Plaintiff's principal argument was that he had made an effectual payment by depositing funds into an account in his name. Accordingly, the Plaintiff contended that the Defendant was indebted to it but failed to honour instructions to pay, yet the Defendant had represented to the Plaintiff that it would make payment to third party vendor. During the trial, the Plaintiff located payment made by him in a statement of account held under the name “Bonjour Nairobi”. It is not disputed, that this was the Plaintiff's trade name.

35. It is also not disputed that the Defendant did not make any payments to the third party vendor. The Defendant however disputes that it made a representation that it would make payment or that the Plaintiff instructed it to pay the third party vendor.

36. There is no controversy that the Plaintiff had agreed to purchase the subject property from the third party vendor. There is also no controversy that the Plaintiff was to make payment of Kshs. 360,000/= to the third party vendor. Additionally, it is not contested that this payment was never made and that the sale transaction was rescinded by the third party vendor for this reason. Perhaps, I need also add that it is common cause that the Defendant offered to finance the balance of the purchase price and indeed instructed its lawyers to perfect the security for the same which instructions were adhered to until the third party vendor rescinded the sale transaction.

37. The parties however part ways when the Plaintiff blames the Defendant for failing to pay the Kshs. 360,000/= to the third party vendor. The Plaintiff relies explicitly on Clause 6 of the Facility Letter dated 2 September 2010 and accepted by the Plaintiff on 9 September 2010.

38. Clause 6 of the Facility Letter, in so far as is relevant, read as follows;

“The client’s contribution of Kshs. 360,000/= to be confirmed and the property vendor to be paid directly by the bank”.

39. In his testimony, the Plaintiff asserted that this clause constituted his instructions to the Defendant to pay the third party vendor. The Plaintiff’s counsel’s submissions also advanced the view that this was an express confirmation by the Defendant to pay the Kshs. 360,000/= to the third party vendor.

40. The Plaintiff’s logic is however flawed, in my view.

41. The statement of account reveals that the Plaintiff had to his credit Kshs. 399,948/= on 2 September 2010 as the facility letter was prepared. By 16 September 2010, the credit balance was Kshs. 209,896/=. This was far below the amount of Kshs. 360,000/= the Defendant was to pay, if the Plaintiff’s argument is to be accepted. The Plaintiff in the meantime continued to make drawings on his account and it was not until 29 October 2010 that a credit deposit was made to get the account to Kshs. 361,662/=. only for the Plaintiff to resume the withdrawals.

42. My review and analysis of the statement of account, admitted by both parties, does not allow me to conclude that at the material time the Defendant as a banker was indebted to the Plaintiff as to make a payment of Kshs. 360,000/= to the third party vendor. Indeed, payment ought to have been made within the first seven days following the execution of the letter of offer by the third party vendor and within this period the Facility Letter prepared by the Defendant had not yet been executed.

43. Notionally, I suppose, it is conceivable that the parties may be in agreement on payment to the third party vendor but it could not have been effectual in the absence of adequate funds giving the third party vendor a right over the sums in credit in the Plaintiff’s account with the Defendant. I would imagine stronger evidence should have been tendered by the Plaintiff to show that it was entitled to more credit from the Defendant over and above the secured kshs. 840,000/=.

44. I have already pointed out the need for clear and unambiguous instructions for payment by any customer to its banker. In this case, this was clearly lacking.

45. During cross-examination, the Plaintiff insisted that his instructions could be found in Clause 6 of the Facility Letter dated 2 September 2010. I have pointed out that, in my view, as at 9 September 2010 as the Plaintiff accepted the Facility Letter, there was not adequate funds in his account to enable the Defendant honour any payment instructions as contended.

46. Additionally, my clear reading of clause 6 of the Facility Letter does not point to instructions to pay the Kshs. 360,000/=. The clause demanded that the Plaintiff’s contribution of Kshs. 360,000/= be confirmed. It did not direct the Defendant to make any payment. The only payment the Defendant was scheduled to make was for the secured amount of Kshs. 840,000/= for which an undertaking was also given by the Defendant’s advocates.

47. It is easy to understand this line of thought when one considers that the Kshs. 360,000/= ought to have been paid by bankers cheque much earlier and the obligation to pay was always upon the Plaintiff. It is also further easier to understand the line of thought that the Defendant was not obligated to pay the Kshs. 360,000/= when one considers the fact that the Plaintiff continuously withdrew monies from the same account it expected the Defendant to honour instructions.

48. I am not convinced that the Plaintiff gave any instructions to the Defendant to make any payments on his behalf to the third party vendor. The intervening obstructions through withdrawals by the Plaintiff would support the notion that no such instructions existed. Further, there was no clear and identifiable payee coupled with any account details upon which the Defendant could have been expected to act.

49. I am unable to find for the Plaintiff. He has not proven his claim to the expected standard.

Conclusion and disposal

50. I conclude by stating that in my view where one seeks to hold a bank responsible for breach of a duty, as in this case, the wrongfulness of any alleged misrepresentation or inaction or action must be positively established on the scale of a balance of probabilities. The Plaintiff has not done so in the instant case. The Plaintiff has not established that the Defendant represented that it would pay the Kshs. 360,000/= on behalf of the Plaintiff. The Plaintiff has also not shown that he gave the Defendant any instructions to pay Kshs. 360,000/= on his behalf to the third party vendor.

51. I have to dismiss the Plaintiff's suit. It is so dismissed with costs to the Defendant.

Dated, signed and delivered at Nairobi this 28th day of September, 2017.

J.L.ONGUTO

JUDGE