



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CIVIL APPEAL NUMBER 328 OF 2012**

**CONSOLIDATED BANK OF KENYA LTD. .... APPELLANT**

**VERSUS**

**MAISHA FLOUR MILLS LTD. .... RESPONDENT**

*(Being an appeal from the Judgment and decree from Original Milimani CMCC No. 6613 of 2006 delivered on 30<sup>th</sup> May, 2012 by D. Ole Keiuwa – Principal Magistrate)*

**J U D G M E N T**

The Appellant Consolidated Bank of Kenya Limited were the Defendant in the CMCC Case No. 6613 of 2006 where the Respondent Maisha Flour Mills Ltd sued them by Plaint dated 29<sup>th</sup> May, 2006. The Respondent/Plaintiffs claim was that: -

- 1. At all material times, the Plaintiff maintained an account at the Defendant's Nyeri Branch.***
- 2. On the 7<sup>th</sup> day of February, 2005, The Plaintiff deposited a cheque on its account namely: Cheque No. 103528 drawn by one Gatumi Gathoni in the sum of Ksh.783,500/- the Plaintiff's customer and the defendant accordingly acknowledged receipt of the same.***
- 3. In breach of its duty to its customer and by a letter dated 5<sup>th</sup> day of March, 2005, the Defendant informed the Plaintiff that it had misplaced the said cheque without having credited the Plaintiff's Account.***
- 4. That the Plaintiff is unable to secure the replacement of the said cheque from its customer and holds the Defendant liable for the payment of the sum of Ksh.783,500/- together with interest.***

The Respondent, therefore, prayed for judgment for: -

- a. Ksh. 783,500/-.**
- b. Reversal of levies or penalties on the account in the sum of Ksh.50,147.60/-.**
- c. Interest on the above at Court Rates.**
- d. Costs of the suit.**

The Appellant/Defendant in its statement of defence denied the claim stating: -

***a. The Defendant denies each and singular the contents of paragraph 8 of the Plaintiff and avers that the Plaintiff secured a replacement of cheque No. 103528 with cheque No. 103739 dated the 6<sup>th</sup> day of March, 2005 and deposited the said cheque on the 7<sup>th</sup> day of March, 2005.***

***b. Further, the Plaintiff's cheque No. 103739 for the sum of Ksh.783,500/- was credited to the account of the Plaintiff and hence the Defendant is not liable to the Plaintiff in the sum of Ksh.783,500/- as alleged or at all.***

***c. The Defendant further pleads that having dealt with cheque No.103739 of Ksh.783,500/- which was a replacement of cheque No. 103528, the Plaintiff is not justified in law or otherwise to seek payment of Ksh.783,500/- from the Defendant and as such the Plaintiff's claim is for unjust enrichment.***

After trial the learned trial magistrate entered judgment for the Plaintiff/Respondent as prayed.

Dissatisfied with the judgment and decree the Appellant preferred this appeal. Its main grounds of appeal are: -

***1. The learned magistrate erred in law and in fact by failing to appreciate and/or misconstruing the Appellant's arguments, evidence and the law applicable to professional negligence.***

***2. The learned magistrate erred in law in entering judgment against the Appellant without evidence to proof that any amount was due and owing as a result of the lost cheque.***

***3. The learned magistrate erred in law and in fact by failing to appreciate the import of the replaced cheque.***

By consent of the parties directors were taken that this appeal proceed by way of written submissions. Both parties filed written submissions.

Briefly the evidence before the trial court was that PW 1 Abel Waseka who worked as an accountant for Respondent testified that the Appellants are bankers of the Respondents which is a company based in Nyeri. On 7<sup>th</sup> February, 2005 the Respondent deposited a cheque No. 103529 drawn by one Gatumi in favour of the Respondent for a sum of Ksh.783,500/-. This

cheque having been received by the Respondents was however misplaced in their offices. They notified the Appellant by latter dated 5<sup>th</sup> March, 2005 and requested the Respondent to request the drawer Gatumi Gachoni for a replacement. They informed the customer who, however, declined to issue a replacement. Respondent blamed the Appellant for negligence and then sued for the value of the cheque which was lost within their premises. The Appellants called Edward Thuli the Branch Manager of the Appellant Bank in Nyeri. He testified that is true cheque No. 103528 drawn by Gatumi Gachoni deposited on 2<sup>nd</sup> March, 2006 for Ksh.783,500/- was misplaced. He wrote to and visited them in Muranga over the issue. He gave evidence that the missing cheque was replaced by cheque No. 103739 dated 6<sup>th</sup> March, 2005 for Ksh.783,500/-. He however, stated that another cheque No. 104488 for Ksh.783,500/- was issued by the same Gatumi to the Respondent but its payment was stopped by the drawer because he alleged that the Appellant did not supply him with the goods. Consequently the witness stated that they do not owe the Respondent any money. DW 2 Joseph Ndungi Mureya an accountant with Magu Nandu Wholesalers testified that the cheque they had issued got lost and they replaced it with cheque No. 103739 dated 6<sup>th</sup> March, 2005. He confirmed that they stopped another cheque because the goods were not supplied.

This is a first appeal. The role of the first appellate court was stated by the Court of Appeal in **Selle Vs Associated Motor Boat Co. (1988) EA 123** as follows: -

***"An Appeal court cannot properly substitute its own factual finding for that of a trial court unless there is no evidence to support the finding or unless the judge can be said to be plainly***

**wrong. An Appellant court has jurisdiction to review the evidence in order to determine whether the conclusion reached upon that evidence should stand.”**

Mr. Otenyo for the Appellant in his submissions submits that the only issue for determination in the trial court was whether the missing cheque No. 103528 was ever replaced by Mr. Gatumi who had drawn it. He submits that from the evidence the same was replaced with cheque No. 103739. The same having been replaced then the Appellant had no debt due to the Respondent and the entry of the judgment for the same by the trial magistrate was in error.

Mr. Onduso learned counsel for the Respondent submitted that the evidence in the trial court was clear that the misplaced cheque was never replaced, and that it was wrong for the Appellant to deal directly with the customer in the replacement of the cheque without informing the Respondent.

It is common ground that cheque No. 103529 dated 7<sup>th</sup> February, 2005 issued by one Gathumi in favour of the Respondent for the sum of Ksh.783,500/- was received by the Appellant but was misplaced in their premises and the funds were not credited to the Respondents account. The only issue for determination in this appeal as was in the lower court is whether the same was ever replaced by Gathumi and the sum credited to the Respondents account.

DW1 Edward Thuli the Manager of the Appellant, Nyeri Branch testified: -

***“I wrote to the Galana to issue replacement of the cheque. 15.5.2005 I wrote to Gatonye to replace also in July 2005 I visited Gatonye in Muranga. I was given evidence of replacement of the cheque. 103739 No. dated 6<sup>th</sup> March, 2004 cheque for Kshs.783,500/-, we had unpaid a cheque for Kshs.783,500/- cheque No. 104488 for reasons of being unstopped by the drawer. They said they were not supplied with commodities. The account overdrawn Account Ksh.50,147/60. March, 2005 to June 2005. The reverse was not deserve as they got a replacement. Cheque was paid to replace the lost cheque. We do not owe the Plaintiff money. The issue of interest does not arise. The person who has given replacement left the Plaintiff. They are still doing serves together. We had issues of unpaid cheque. A replacement is only done once. The bank does not owe the Plaintiff the Principal sum and interest. On being cross-examined by Otenyo he explained that they were not paying interest because a replacement was issued. Dispute arose when a cheque of similar account was stopped and there were two cheques for similar amount.”***

DW 2 Joseph Ndunga Muraya an accountant with Magu Nandu Wholesalers who issued the cheques testified that there was a cheque that got lost. On 5<sup>th</sup> March, 2005 was a letter by Defendant addressed to Plaintiff and the replacement with cheque No. 103739 dated 6<sup>th</sup> March, 2005. The replacement for the lost cheque was done on 6<sup>th</sup> March, 2005. The Plaintiff has never come to us to complain of the cheque. They had no issue in respect to this payment. They stopped a cheque for failure to supply the goods.

The learned trial magistrate in his judgment as this issue stated that:-

***“Edward Thuli a Manager with the Defendant case. He told court that two cheques mentioned by Plaintiff’s witness got misplaced on the course of clearance and the cheques were replaced following their communication directly to customers of the Plaintiff.***

***I have carefully considered the evidence on record. It appears after losing the cheques, the bank opted to deal with the Plaintiff’s client direction. In the process the Plaintiff was adept in the dark as to the dishonoured cheque of the similar amount to the one which got misplaced. In my humble the Defendant acted unprofessionally by losing the cheque and dealing with Plaintiff’s client behind the back of the Plaintiff.”***

From the evidence of the defence witnesses in the lower court, the lost cheque was replaced by the customer and funds credited into the Respondents account. The cheque which was not credited is the one

for a similar amount which was stopped by the customer. The evidence of the defence witness in my view explains that the lost cheque was replaced and funds credited to the Respondent account and therefore the Appellant did not owe the Respondent any sum. The request for replacement of lost cheque to the customer is in my view a normal prudent business action and the Appellant cannot be said to have gone behind the Respondent's back.

Upon evaluating the appeal and submission, I am satisfied that the judgment for Respondent against the Appellant for the sum of Ksh.783,500/- was not supported by evidence. I hereby allow the appeal and set aside the judgment and decree dated 30<sup>th</sup> May, 2012. The Appellant will have the cost of this appeal.

**Dated, signed and delivered at Nairobi this 18<sup>th</sup> day of September, 2017.**

.....

**S N RIECHI**

**JUDGE**