REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

HIGH COURT CIVIL APPEAL NO. 231 OF 2015

ECOBANK KENYA LIMITED.....APPELLANT

VERSUS

INSTARECT LIMITED.....RESPONDENT

(Being an Appeal from the Judgment and orders of Honourable

Leah W Kabaria (Mrs.) Resident Magistrate on the 20th

of March, 2015 in Nairobi CMCC No. 2741 of 2012.)

JUDGMENT

1. The Respondent, Instarect Limited, filed suit in the Lower Court against the Appellant, Ecobank (K) Ltd for the sum of Ksh.773,000/=, damages for breach of contract, costs and interest. The Plaintiff's claim involves the payment of cheque No. 501263 for the said sum of Ksh. 773,000/= on 26th August, 2009 allegedly drawn fraudulently on the Plaintiff's account with the Defendant. The Plaintiff blamed the loss of the money on the Defendant's negligence and/or breach of contract and/or breach of duty of care.

2. The claim was denied vide the statement of defence dated 1st August, 2012. It was denied that the cheque in question was fraudulently drawn on the Plaintiff's account. The Defendant denied any negligence or breach of contract or breach of duty of care to the Plaintiff. It was averred that the cheque was paid in good faith in the ordinary course of business.

3. The Respondent filed a reply to the defence and reiterated the contents of the plaint.

4. During the hearing of the case before the Lower Court, PW1 Gordon Peter Hays testified on behalf of the Plaintiff. He adopted his witness statement as his evidence. PW1's evidence was that he was the Managing Director of the Plaintiff company. That the Defendant opened a current account with the bank in May, 2007 with the signatories to the account as follows.

1. Gordon Charles Hays – Director

2. Gordon Peter Hays - Managing Director

3. Lawrence K Maina – Financial controller

5. That on 27th October, 2009, theft occurred in the said account through the payment of cheque No. 501263 in the sum of Ksh.773,000/=. That investigations carried out revealed that their Financial Controller, Lawrence Maina was the one behind the theft of the said money. PW1 stated that one of the signatures on the cheque in question was purported to be his, yet he did not sign the said cheque.

6. Morris Muteti Muia (DW1) a deputy manager in charge of operations testified on behalf of the Bank. He adopted his witness statement as his evidence. He testified that when the cheque which bore the signatures of the two signatories, Gordon Peter Hays and Lawrence K. Maina was presented for payment, he telephoned the Plaintiff's offices and spoke to Lawrence Maina who confirmed that the cheque was genuine and therefore the bank proceeded to pay. It was further stated that the cheque was paid in good faith in the ordinary course of business.

7. The trial court entered judgment for the Plaintiff for the sum of Ksh.773,000/=, costs and interest. The Defendant was dissatisfied with the said judgment and appealed to this court on the following grounds:

(1) The learned Magistrate erred in law by failing to consider the provisions of the Evidence Act, Cap 80 of the Laws of Kenya concerning opinions on handwriting prior to making conclusions thereon.

(2) The learned Magistrate fundamentally misdirected herself in law and in fact in comparing handwriting without the assistance of an expert and making her own conclusions on the basis of such comparisons.

(3) The Learned Magistrate erred in constituting herself as an Expert Witness and thus denying the Appellant to test her opinion which then informed the decision appealed from.

(4) The learned Magistrate erred in law and in fact in concluding that the Respondent had proved its case concerning the genuineness of disputed signatures in spite of the Respondent deliberately failing to call an expert on the subject as confirmed by its witness's testimony.

(5) The learned Magistrate erred in law and in fact in find that a cheque was fraudulently drawn and did not bear genuine signatures on the basis of criminal proceedings whose existence was not proved.

(6) The learned Magistrate erred in not considering the evidence of Morris Muteti Muia who testified on oath as to the processes and steps taken to confirm the issuance of the cheque AND INSTEAD ruled that the Appellant "did not offer any evidence contrary."

(7) The learned Magistrate failed to consider the duty of the bank when dealing with Instruments and more particularly whether the mere denial by an account holder imputes negligence on the part of the Bank.

(8) The Learned Magistrate misdirected herself on the nature of statutory protection donated to a bank under section 60(1) of the Bill of Exchange Act Chapter 27 Laws of Kenya.

(9) Having found that criminal proceedings were pending against an alleged forger without evidence on the same, the Learned Magistrate further erred in law and in fact in finding that a cheque was fraudulently drawn and did not bear genuine signatures on the basis of those proceedings which had not been demonstrated to have led to the conviction of the alleged forger.

(10) Such other grounds and reasons to be adduced at the hearing hereof.

8. During the hearing of the appeal the learned counsels for the parties opted file written submissions. I have considered the said submissions alongside the authorities relied on.

9. This being a first appeal, this court is duty bound to re-evaluate the facts afresh and come to its own independent findings and conclusions. See for example the case of **Selle v Associated motor Boat Co. & others [1968] E.A. 123** where it was stated as follows:-

> **"An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif v Ali Mohamed Sholan (1955), 22 E.A.C.A. 270)".**

10. It is not in dispute that the Respondent held a bank account with the Appellant bank and that the signatories at the material time were Gordon Peter Hays and Lawrence Maina. It is also not in dispute that the mandate given to the bank reflected the said signatures. It is common ground that the said sum of Ksh.733,000/= was debited in the Respondent's account following the issuance of a bankers cheque in favour of Fina Bank.

11. The bone of contention is whether the signature of Gordon Peter Hays was as per the mandate and whether the bank was in breach of the duty of care to the Respondent when they debited the Respondent's account

12. Section 60 of the Bills of Exchange Act Cap 27 laws of Kenya which is central to the arguments by the parties herein states as follows:

> **"(1) When a bill payable to order on demand is drawn on a banker, and the banker on whom it is drawn pays the bill in good faith and in the ordinary course of business, it is not incumbent on the banker to show that the endorsement of the payee or any subsequent endorsement was made by or under the authority of the person whose endorsement it purports to be, and the banker is deemed to have paid the bill in due course, although such endorsement has been forged or made without authority; and in this subsection "bill payable to order on demand" includes a prescribed instrument within the meaning of the Cheques Act (Cap. 35), which is payable to order."**

13. According to Halsbury's Laws of England, 3rd Edition Volume 2 Pg. 198:

> **"A banker who in good faith and in the ordinary course of business pays a cheque payable to order drawn on him, to which the person in possession has no title, by reasons of endorsement being forged, protected from liability and can debit his customer with the amount to be paid. A thing is done in good faith if it is done honestly, whether it is done negligently or not."**

14. In the case at hand the Plaintiff (PW1) pointed out the difference between the questioned signature in the cheque and the specimen signatures given to the bank and pointed out that they bore no resemblance. PW1 specifically pointed out the different characteristics in the strokes and loops in the aforestated signatures. I have looked at the said signatures and I have observed that there are apparent discrepancies. One does not need to be a handwriting expert to see the differences in the said signatures. The uncontroverted evidence of PW1 is that their then Financial Controller, Lawrence Maina jumped bail and is on the run to avoid criminal liability following the theft of the funds in question. This points fingers at the said Lawrence Maina as the culprit, the absence of a handwriting expert notwithstanding.

15. The evidence of the bank (DW1) is that the signatures on the cheque in question were verified and a telephone call to Lawrence Maina confirmed the payment. However, during cross examination, DW1 conceded that there was nothing marked on the cheque to confirm how the teller verified the signatures. The lack of evidence to confirm the verification of the signatures shows lack of diligence on the banks

part. This translates into lack of good faith and honesty in paying out the question cheque.

16. The law on the banks duty of care to it's customers was espoused by the Court of Appeal in **Simba Commodities Ltd v Citibank [2013] eKLR** while referring to the case of **Karak Brothers Company Ltd v Burden [1972] AIIER** as follows:

> **"....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 the relevant facts, which can vary almost infinitely. The relevant considerations include the prima facie assumption that men are honest, the practice of bankers, the very limited time in which banks have to decide what course to take with regard to a cheque presented for payment without risking liability for delay, and the extent to which an operation is unusual or out of the ordinary course of business. An operation which is reasonably consonant with the normal conduct of business (such as payment by a stockbroker into his account of proceeds of sale of his client's shares) of necessity does not suggest that it is out of the ordinary course of business. If "reasonable care and skill" is brought to the consideration of such an operation, it clearly does not call for any intervention by the bank. What intervention is appropriate in the exercise of reasonable care and skill again depends on circumstances.'**
>
> **"As between the company and the bank, the mandate, in my view, operates with in the normal contractual relationships of customer and banker and does not exclude them. These relationships include the normal obligation of using reasonable skill and care; and that duty, on the part of the bank, of using reasonable skill and care, is a duty owed to the other party to the contract, the customer, who in this case is the plaintiff company, and not to the authorized signatories. Moreover, it extends over the whole range of banking business within that contract. So the duty of skill and care applies to interpreting, ascertaining, and acting in accordance with the instructions of a customer; and that must mean his really intended instructions as contrasted with the instructions to act on signatures misused to defeat the customer's real intentions. Of course, *omnia praesumuntur rite esseacta*, and a bank should normally act in accordance with the mandate – but not if reasonable skill and care indicate a different course."**

17. A bank teller is expected to possess knowledge through experience to ascertain a customers instructions. As stated by the Court of Appeal in **Amosan Builders Developers Ltd v. Betty Ngendo Gachie & 2 others [2009] eKLR**:

> **"All persons, I think who practice a business or professions which requires them to possess a certain knowledge of the matter in hand are experts so far as experience is required."**

18. In the case at hand there were two signatures. One of the signatures appeared on the face of it to be different from the mandate held by the bank. The bank teller failed to see that the signatures were different and ended up confirming the cheque with the other signatory which turned out to be of no help. The difference in the signatures in question ought to have aroused the banks doubts and further inquiries carried out, otherwise the customers mandate would serve no useful purpose. It is observed that although the bank through the evidence of PW1 stated that the signatures to the cheque were those of the signatories, there was no proof as required under Section 70 of the Evidence Act.

19. The Appellants side argued that the Respondent was a limited liability company and therefore the "indoor management rule" as set out to the Turquand Rule applied. The said rule is set out in the case of **Industrial & Commercial Development Corporation (ICDC) v Patheon Limited [2015] eKLR** where the Court of Appeal held as follows:

> **"As regards, the issue of the consent of the appellant's board we rely on the rule in Turquand's case as was propounded in Royal British Bank v Turquand (1856) 119 E.R 886**

and hold that whether or not the consent was given is an internal management issue and cannot afford a defence to the appellant. The respondent was entitled to assume that the appellant had complied with its internal rules and regulations before entering into consent, taking accounts and making the offer it did in its letter dated 4th September, 1997. We find that the respondent had no actual knowledge of these internal rules or of any suspicious circumstances putting him on inquiry."

20. In the instant case, the bank failed to act in accordance of the customers instructions. It matters not whether the cheque was not reported as stolen or that the payment was carried out through another bank. My view is that in the circumstances of this case the aforestated rule does not protect the bank. I would say the same in respect of the statutory provisions which protect the banks.

21. In the upshot, I find no merits in the appeal and dismiss the same with costs.

Dated, signed and delivered at Nairobi this 22nd day of Nov., 2017

B. THURANIRA JADEN

JUDGE