REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 101 OF 2015

KENYA COMMERCIAL BANK LTD ………..………APPEALLANT

VERSUS

BRYCESON N. KUBOKA t/a

AIRPORT AFRICANA RESTAURANT ....RESPONDENT

J U D G M E N T

1. This appeal arises from the judgment and decision of the trial court which allowed the Respondent's/plaintiffs suit which had essentially challenged the Appellants right to freeze the Respondent's account operated at the Appellants' branch at Moi International Airport Mombasa.

2. The suit before the trial court was initiated by the plaint dated 5/8/2014. In that plaint the Respondent had specifically pleaded that the Appellant without proof of any wrongdoing had frozen the Respondents account and thereby occasioned to the Respondent loss and damage for which the Respondent sought an order for an account of all transactions and payments through the account as well as loss of income and costs.

3. To the plaint, the Appellant filed a defence dated 3/10/2014 in which the defendant denied the agreement between the parties and denied having availed to the Respondent the PDQ Machine as pleaded at paragraph 4 & 5 of the plaintiff. The defendant equally asserted that with its automated countrywide branch networks, it was not able to scrutinize and confirm that all payment that passed through the account were from the plaintiffs customers. It was then additionally asserted that there was a merchant Agreement on visa cards by which the Appellant reserved the rights to debit the Respondent accounts with any amount credited to the Respondents accounts in case of discovery of the transaction being invalid, illegal of the transaction being payable under a separate arrangement with the bank. On the basis of the agreement, it was therefore pleaded that a routine review had revealed that there had been several fraudulent visa card and master card transactions as a consequence of which the bank was **charged back** Kshs.3,428,830 and the Appellant therefore withheld the sum of Kshs.1,577,088 in the Respondent's account and that the bank would crave the leave to counter-claim from the Respondent the difference. No counter-claim was however filed until the matter was heard and determined.

4. After hearing one witness from each side and in a reserved judgment, the magistrate determined the suit in the following words:-

> **"….there was no proof of any fraud or fraudulent transactions. There was nothing to show the defendant bank was charged back or made to pay for the transaction that were**

fraudulent if any.

…..I find that there is no justification to continue to freezing the plaintiffs account and the freezing is therefore ordered to be lifted forthwith..."

5. It is that decision the Appellant now challenges in this appeal by the Memorandum of Appeal dated 13th july 2015 and crafted as follows:-

1. The learned Resident Magistrate erred in law and fact in holding Appellant as being culpable for the purported loss of the Respondent when no evidence had been tendered to that effect.

2. The learned Magistrate erred wholly in disregarding the Appellant's Counsel's Submissions and the authorities submitted and proceeded to rely on his own views not backed by law.

3. The learned Magistrate erred in law and fact by completely ignoring the practice and customary operations between the Appellant and Respondent in operation system of PDQ Machines.

4. The learned Magistrate erred in failing to analyse and synthesis evidence before him and arrived at a completely erroneous and ambiguous finding.

6. This being a first appeal I am bound in law to re-asses, re-examine and re-evaluate the entire evidence and come to my own conclusion without necessarily concurring or disagreeing with the trial but while well aware that I lack the benefit enjoyed by the trial of having heard and observed the witnesses as they testified. An appellate court will only interfere with a trial courts findings of facts if such finding is not supported by the evidence led and where that the trial court misdirected itself in some matter and as a consequence arrived at a wholly wrong and erroneous decision or short of that, that the trial judge was clearly wrong in exercise of his discretion and that as a result there has been injustice. *See KEN ODONDI & 2 OTHERS -vs- OKOTH OMBURA & CO. ADVOCATES [2013] eKLR.*

7. Having read the record of appeal, although the trail court did not isolate issues for determination expressly, the one and only dispute that the court was called upon to determine by the pleadings and evidence was whether in operating the PDQ Machine, there had been committed fraud which led to the Appellant being charged back and therefore entitling the appellant to invoke clause 19, 23.1 of the "MERCHANT AGREEMENT FOR ACCEPTANCE OF CARDS".

8. The plaintiff came to court on the basis that the bank had withheld its money without cause. To that accusation the defendant asserted that it had the right under the agreement to debit the plaintiff's account on discovery of the fact that some receipts or vouchers were invalid, or if the cardholder makes claim against the bank. The statement of defendant in particular quoted verbatim the clauses it relied upon at paragraphs 7 & 8 of the statement of defence.

9. My appreciation of the dispute is therefore the determination of whether or not there was fraud which made the vouchers upon which the Respondent's account was credit or if there had been a complaint by a card holder. That was the crux of the dispute upon which evidence was bound to be led. That issue was brought to the pleadings by the Appellant as a defendant then.

10. It was therefore the Appellant who desired the court to find that there was fraud and therefore it was entitled to debit the Respondent's account. It was person to lose if that fact was not proved or if no evidence at all was led in that regard. In law of evidence parlance, the defendant asserted and the onus fell upon it to avail the proof.

11. The appellant in this matter faults the trial court for failure to analyse and synthesis the evidence before it and thereby arriving at an erroneous and ambiguous finding. These accusation begs for this

court to determine whether or not the trial court erred in its analysis of the evidence adduced are touching on that question of fraud.

12. At page 103 of the Record of Appeal DW 2, Gilbert Juma in his evidence said and I quote from line 36:-

> **“There is no document of claim from the specific banks.**
>
> **The banks claimed for visa and master card. Upon disclaimer Kenya Commercial Bank then was advised that charge back process through visa and master card. It is explained in our agreement but we have no reports to show we incurred that charge. There is no known list of cards to accept or decline”.**

And on cross examination at Page 105, he said:-

> **“There are written features that cannot be detected by the eyes. Due diligence, is on the merchant.**
>
> **I can’t tell what he did not do.**
>
> **…..We don’t have prove of charge-back on our bank. There are not transaction reports to show the payback”.**

13. This was all the evidence the Appellant availed before the court to prove that there had been fraud committed by use of PDQ Machine. I find that it did not amount to a Scintilla of evidence towards proof. The Appellant totally failed to justify their resort to the provisions of the agreement between the parties. To say that they were entitled to debit the Respondents account with the sum of Kshs.1557,088 or just withhold it without proof of wrong doing would be to say the very least. unjust. It would be to open a flood gate that once a customer deposits money in his account, the bank can at whim debit the same account, withdraw from it or just withheld the sum therein by caprice.

14. My understanding of the bank-customer relationship is that so long as there is credit balance on the account the customer has the right to access and withdraw it at will unless where there is a contract to the contrary. As it were the bank merely keeps the money safe on behalf of the customer. It has no right or indeed any claim over the property in the money. The money simply doesn’t belong to it to deal with it as it pleases. That to me is all the trial court found in the judgment challenged before me. I find no fault with the trial court with the analysis of evidence and the decision reached and to that extent I find that the appeal is unmerited.

15. There is however the other finding by the trial court on loss of income which the court found to have been suffered by virtue of freezing of the court. In that regard the court said:-

On the prayer of loss of income, the Bank having been found to have unjustly frozen the account of the Plaintiff and withheld money therein, the Plaintiff was a businessman and the accounts and PDQ were channels of running his businesses, he must, as a matter of course, lost in his earnings. I therefore find that the Plaintiff is rightfully entitled to be compensated for lost earnings. It's understandable that there is no exact figure claimed under this prayer since the loss is still ongoing as the accounts remain frozen, till the account is defrozen. I grant prayer for lost income from the date of freezing the account i.e. 1/6/2013 till the account is defrozen and notice served on the Plaintiff by the Bank. Then the Plaintiff is directed to assess and file accounts of the loss in court within 7 days of having been served with the defreezing notice by the Bank. The court will consider the quantum of loss based on the accounts filed as directed.

16. With due respect to the trial court, having found that the losses were ongoing and no specific sum had been proved, the losses, were at large and were therefore in the nature of general damages, that fell upon the court to assess.

However, the plaintiff's prayer was for loss of income. That must be taken to be what it is, special damages that ought to have been specifically pleaded and strictly proved. There was never specific pleading of the sum lost nor was any evidence led on any such sum. To the extent that the trial court gave additional period of seven days for the plaintiff to assess and file account, the court was going out of its way to allow the Respondent lead additional evidence after the case had been concluded with no guideline on how that evidence would be tested by the defendant. On that finding the trial court erred and I find so even though this was never one of the grounds of appeal by the appellant.

17. The upshot is that the appeal fails and it is dismissed with costs.

Dated and Delivered at Mombasa this **14th** day of **October 2016**.

HON P.J.O. OTIENO

JUDGE