REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CIVIL APPEAL NO. 10 OF 2013

PETER KARUIRU GACHIRA T/A KARUNJE ENTERPRISES LTD……APPELLANT

VERSUS

CONSOLIDATED BANK…….....……...……RESPONDENT

(Being an appeal against the judgment and decree in Nyeri Chief Magistrates' Court Civil Case No. 321 of 2011 (Hon. E.K. Makori) delivered on 8th February, 2013)

JUDGMENT

1. **Background:**

The appellant sued the respondent in the magistrates' court for a sum of Kshs. 95,000/=, general damages, costs of the suit and interest thereof. In the plaint filed in court on 3rd October, 2011, the appellant contended that the respondent's employee cleared a forged cheque of Kshs 95,000/= drawn on the appellant's account in favour of one **Patrick Muriuki Mwaniki**. It was the appellant's case that had the respondent or its agent taken time to study the cheque, they would have noticed that it had not been drawn by their customer but had instead had been uttered. The cause of action was therefore basically based on negligence.

The respondent denied the claim and in its statement of defence dated 30th January, 2011 it contended that it honoured and paid the payee because the cheque was regular in every of its vital respects. It averred that if any loss occurred, it was out of the appellant's negligence particulars of which included carelessness in management of his cheque book and failure to notify the respondent in time that a cheque leaf thereof had been stolen. It sought to have the suit dismissed with costs.

The court found for the respondent and dismissed the suit with costs. In his judgment, the learned magistrate held that the cheque looked regular on its face and the respondent's act to honour and pay the cheque upon presentation for payment was not unusual; in fact, if there was any negligence, so the learned magistrate held, it was the appellant who was negligent in being careless with his cheque book.

The appellant has appealed against this decision and according to the amended memorandum of appeal filed in court on 25th March, 2013, the learned magistrate has been faulted in his judgment on the following grounds:-

1. He erred in law and in fact by failing to consider all the facts in his judgment;

2. He erred in law and in fact when he failed to consider a particular exhibit produced by the appellant in support of his case;

3. He erred in law and in fact by failing to address the question of negligence;

4. He erred in law and in fact by relying heavily on the disappearance of the cheque leaf and ignoring the negligence on the part of the respondent's agent;

5. He erred in law and in fact by filling the gaps in the respondent's case;

6. He erred in law and in fact in dismissing the appellant's case when the respondent had admitted negligence.

The appellant asked this court to allow the appeal, set aside the judgment of the lower court and substitute it with an order allowing the suit against the respondent. He also sought for the costs of the appeal.

2. **The Evidence:**

The appellant testified that he held a bank account with the respondent bank; on 3rd November, 2010, he found out that Kshs. 5,000/= was missing from this particular account. The appellant reported the theft to the police who, upon investigations, established that the sum of Kshs. 95,000/= had been stolen from the appellant's account by one **Patrick Muriuki Mwaniki**. Mwaniki was later apprehended and arraigned in court where he pleaded guilty to the charges related to theft of the cheque leaf with which he withdrew the money from the appellant's bank account. He was accordingly convicted and sentenced to two years imprisonment.

The cheque leaf was admitted in evidence; it is apparent on its face that it is purportedly to have been drawn and signed on 21st October, 2010 by the appellant instructing the respondent bank to pay the said **Patrick Muriuki Mwaniki** the sum of Kshs. 95,000/=. A closer scrutiny of the cheque shows that letters "c" and "k" on the name "Patrick" were emphasised or as the appellant argued, overwritten. The bank stamp on the cheque shows that it was presented for payment on 22nd October, 2010.

The appellant testified that the respondent's agent did acknowledge that she erred in clearing and paying the cheque. According to him the agent admitted in her statement to the police that she didn't note the overwriting and neither did she know the payee and thus she cleared the cheque as "she usually does to others".

When the appellant wrote to the bank's branch manager on the issue the latter responded and promised to investigate and indeed he later confirmed that the matter had been referred to the bank fraud unit; in his letter to the appellant, however, he denied liability. It was the appellant's evidence that the respondent bank was negligent and ought to be held responsible for the loss of the money.

Upon cross-examination the appellant testified that his cheque book was kept in a drawer but that he inadvertently left it open; his clerk, who he identified as Charles Kinyua took advantage of the appellant's laxity in this regard and stole the cheque leaf. The appellant admitted that he was negligent not to lock his drawer and that he was to blame for exposing his cheque book to the theft.

The operations manager of the respondent bank testified on behalf of the bank; he testified that he knew the appellant. Ordinarily, according to his evidence, whenever a cheque is presented for payment in his bank the cashier or teller would check whether it is duly signed and whether there are sufficient funds in the account. The specimen signature would be compared with that on the cheque and payments would only be made if the two are consistent.

As far as the cheque in issue is concerned, the bank's representative testified that it was duly signed and there was no reason to doubt the signature. He admitted that there was a slight overwriting of letters "c" and "k" on the payee's first name, "Patrick" but that save for the overwriting, there were no major alterations that could raise any suspicions. The witness told the court that whenever a cheque is properly drawn it is the bank's obligation to honour it and pay to avoid any embarrassment to their customers.

On the custody of cheque books, the manager testified that it is the obligation of their customers to ensure that they are properly kept and secure. In this particular case, it was the appellant's duty to maintain the proper and safe custody of his cheque book. As far as the bank is concerned, so the manager testified, they never received any report of the appellant's loss of his cheque book or a leaf thereof and that is why the bank made the payment immediately the cheque was presented for this purpose. The witness also testified that the person who stole the appellant's cheque was his own employee whom he confirmed was convicted on his own plea of guilty when he appeared in court to answer to the charges related to this loss.

According to the respondent's witness, the signature on the cheque appeared genuine. In his opinion, much as the obligation was with the bank to ascertain that the cheque was regular before making the payment, the appellant was negligent in two respects; he was careless in keeping his cheque book secure and secondly, he did not report its loss or the loss of leaf thereof in time or at all.

3. <u>Analyses and Conclusions:</u>

From the evidence given at the trial it would appear to me that the cheque was regular in all its material respects except for the emphasis or the overwriting of letters "c" and "k" on the name "Patrick"; it is this aspect of the cheque that appears to have preoccupied the minds of parties in their evidence and nothing more. Although, the appellant has picked up the issue of the validity of the signature in his submissions, it never arose at the trial as far as I can gather from the record; in these circumstances, I would agree with the respondent's counsel that it is a bit late in the day and legally inappropriate to raise this issue at this particular juncture.

(a) Alterations:

I have had the opportunity to look at the cheque and my appreciation of the overwriting complained of is that unless one takes a closer scrutiny, the overwriting of the two letters is not apparent on the face of it. What is apparent, and the evidence does not suggest the contrary, is that the overwriting is not an alteration; by this I mean that it is apparent that the drawer always intended to write the name "Patrick" in those letters and there is no evidence that there was an attempt to change what could have been perhaps a different name from that of "Patrick".

My appreciation of the evidence at the trial leads me to think that the major consideration that the respondent bank ought to have been concerned with the moment the cheque was presented for payment was whether the overwriting of the last two letters in the payee's first name was material or so material that it was obliged not to honour the cheque. I found the law on this point in **Halsbury's Laws of England, Volume 49 (2008) 5th Edition at paragraph 1559** which states:-

> ***Where an instrument, or if a bill the acceptance thereon, is materially altered without the assent of all the parties liable on it, the instrument is avoided as regards all the parties except any one who has himself made, authorised, or assented to the alteration, and those who have become parties to the instrument subsequent to the material alteration. But where the alteration, although material, is not apparent, a holder in due course, in whose hands the instrument is, may avail himself of the instrument as if it had not been altered, and may enforce payment of it according to its original tenor.***
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> ***The materiality of an alteration has been said to be a question of law. It does not matter whether the parties ever benefited or not by the alteration. The onus is on a person claiming on a bill manifestly altered to show that the alterations do not alter the liability of parties, either by English law, or, if the bill is governed by foreign law, by that law.***

My understanding of this statement is that a bill that has been materially altered will not be accepted or honoured; however, where such alteration is not apparent the bank may make the payment and indeed the holder can enforce the payment. As noted from that excerpt, materiality of the alteration is a question of law and therefore **paragraph 1560** of the same **Halsbury's Laws of England** goes further to specify

what material alterations are made up of. It states:-

> ***The following alterations are specifically declared to be material: any alteration of: (1) the date; (2) the sum payable; (3) the time of payment; (4) the place of payment, or the addition of a place of payment where none is mentioned by the acceptor, without the acceptor's assent.***
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> ***Other alterations which have held to be material are the addition or alteration of a rate of interest, the insertion of a particular rate of exchange, the alteration of the description of the payee, the alteration of the place of drawing of a complete bill, which changes the bill from an inland to a foreign bill, the addition of the name of a new maker to a joint and several note, or the elimination of the name of an existing maker, and the conversion of a joint note into a joint and several note.***
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> ***A crossing of a cheque as authorised by the Bills of Exchange Act 1882 becomes a material part of the cheque, so that an obliteration of the crossing or an addition thereto, when not so authorised, is a material alteration of the cheque, and is not lawful.***
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> ***In general terms, a materially altered cheque is a worthless piece of paper and, since it accordingly has no value, no action may be brought in conversion with respect to the face value of the instrument.***

It is clear that an overwriting of some letters in a name is not an alteration and even if it was it is not among the category of alterations that, in law, are considered material.

A drawer of a cheque undertakes that the cheque will be paid upon presentation. The banker on the other hand is under obligation to pay when a cheque duly drawn is presented for payment and he will not be held liable where he pays the cheque in the ordinary course of business in good faith. At **paragraph 1552** of the **Halsbury's Laws of England** (supra), this obligation on the part of the banker is stated in the following terms:-

> ***A banker is in a somewhat exceptional position, for where a bill is drawn on him payable to order on demand, and he pays the bill in good faith and in the ordinary course of business, it is not incumbent on him to show that any indorsement on the instrument was made by or under the authority of the person whose indorsement it purports to be; and he is deemed to have paid the bill in due course although the indorsement has been forged or made without authority.***
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> ***… a banker paying a cheque in good faith and in the ordinary course of business which is not indorsed or is irregularly indorsed does not in so doing incur any liability by reason only of the absence of, or irregularity in, indorsement and he is deemed to have paid in due course. But if he pays a cheque on which his customer's signature as drawer is forged, he cannot charge him with the money paid.***

Having analysed the evidence at the trial, and considering the law that I have alluded to, I cannot find anything to suggest that the cheque in issue here was not paid in good faith and in the ordinary course of business by the respondent bank.

(b) Negligence:

The issue of negligence was raised by both parties at the trial and in pursuing this point the appellant relied on the proceedings in the criminal case against **Patrick Muriuki Mwaniki**; in those proceedings, the said Mwaniki is recorded to have entered a plea of guilty to all the charges against him. A copy of the charge sheet which would ordinarily indicate these charges was not included amongst the appellant's list of documents and therefore it is not clear from the record which particular offences the accused pleaded to and was convicted of. Regardless of the charges against the accused person, the appellant seems to argue that the accused person's plea of guilty is evidence conclusive enough to have persuaded the learned magistrate that the cheque was forged and the bank was negligent in honouring it. In his opinion

the learned magistrate erred in law not to have been so persuaded.

I regret that I cannot accept the appellant's argument principally because, as I have found before, those aspects of the cheque that are alleged to be forged were not apparent at the time the cheque was presented for payment and in any event, they weren't material in the language of banking law; as noted also, it is only when the accused person was charged and pleaded guilty to the offences against him that it emerged that the cheque had in fact been forged. I reckon that if the bank had this information beforehand, it obviously would not have honoured the cheque. To say that the bank was negligent in failing to note a forgery which was not obvious and only admitted in a criminal trial initiated long after the payment was done is to stretch the concept of duty of care, a mile too far.

I would agree with the learned magistrate that the appellant largely contributed to or was solely responsible for the misfortunes that befell him. I say so because, in the first place, the appellant never made any report of the loss of his cheque to the bank; if the cheque in issue was stolen on about the time it was presented for payment which was the 22nd October, 2010, no explanation was given for the appellant's inaction until the 3rd November, 2010 when he noticed that some money was missing from his bank account. In fact, if his narrative is anything to go by, it is only after the Criminal Investigations Department stepped in that he discovered that **Patrick Muriuki Mwaniki**, who is said to be one of his employees, had withdrawn his money using the stolen cheque. Having admitted that he had at times been careless in keeping his cheque book, his concern that it was intact whenever he had opportunity to access it, is the least that was expected of him. If the cheque book was secure, his own employee or employees would not have accessed it and even after he left it exposed it was incumbent upon him to ascertain its status so that if it was tampered with, as it turned out to be the case, he would report this to his bankers at the earliest opportunity possible.

I see no need to say more on this but to conclude that I am inclined to agree with the decision of the learned magistrate and I find no merit in this appeal; I will uphold the magistrate's decision and dismiss this appeal with costs to the respondent. Orders accordingly.

Signed, dated and delivered in open court this 31st day of July, 2015

Ngaah Jairus

JUDGE