REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA

AT KITALE

CIVIL APPEAL NO. 14 OF 2012

STANDARD CHARTERED BANK (K) LIMITED.....APPELLANT.

VERSUS

DANIEL MOSES MAGETO OKEBIRO.....RESPONDENT.

J U D G M E N T

This appeal arises from the decision and judgment of the Senior Principal Magistrate in Kitale CMCC No. 405 of 2010 in which the respondent, **Daniel Moses Mageto Okebiro,** had sued the appellant, **Standard Chartered Bank (K) Ltd.**, for general damages and an order for the re-opening of the respondent's super save a/c No. [particulars withheld].

After trial, the learned trial magistrate entered judgment in favour of the respondent and awarded him general damages in the sum of Ksh. 200,000/= for breach of duty of care on the part of the appellant.

Being aggrieved with the said decision, the appellant filed the present appeal on the basis of the grounds contained in the memorandum of appeal dated 10th April, 2012.

At the hearing of the appeal, the appellant was represented by the Learned Counsel, **Mr. Mokua**, while the respondent was represented by the Learned Counsel, **Mr. Onyancha.**

Both counsels presented written submissions in support of their respective cases.

Having considered the grounds of appeal in the light of the rival submissions, the duty of this court was to re-visit the evidence and draw its own conclusions bearing in mind that the trial court had the benefit of seeing and hearing the witnesses. In that regard, this court considered the evidence by the plaintiff/respondent, **Daniel Moses Mageto Okebiro (PW1),** and all the exhibits produced by him as well as the evidence by the defendant/appellant's Eldoret branch operation manager, **Emily Naliaka (DW1)**, and all exhibits produced by her.

Basically, the issue for determination centred on the closure by the appellant of the super save account No. [particulars withheld] held by the respondent at the appellant's Eldoret branch and whether the closure was regular and if not, whether the respondent was entitled to general damages from the appellant.

The pleadings and the evidence raised no dispute with regard to the existence of the material account at the material time. The two cards issued at the time the account was opened i.e. (P. Ex. 2 and P. Ex. 3) are dated 1st October, 1996 and 7th October, 1996 respectively.

The account number at the time was [particulars withheld] which was changed to the current material number with effect from April, 1997 (see, P. Ex. 14).

the account balance request (P. Ex. 5) indicated that the balance stood at Ksh. 1,365,000/= as at 27th November, 1996. However, there was no evidence from the respondent as to when and how the amount was deposited into the account.

The appellant contended that the account was closed on the 5th June, 1997 after the balance fell below Ksh. 200,000/=. This fact was vehemently denied by the respondent who contended that even if the account was closed as alleged, the appellant did not invoke clause 7 of the terms and conditions set out in a brochure entitled super save account (P. Ex. 1). The respondent, it would appear, operated under the impression that the brochure (P. Ex. 1) was the contracted document which governed his relationship with the appellant vis-a-vis the material account.

The learned trial magistrate also proceeded under the same impression and treated the brochure as the formal contract setting out the terms and conditions governing the relationship between the respondent and the appellant.

In so doing, the learned trial magistrate found that the material account was irregularly closed by the appellant thereby entitling the respondent to general damages in the sum of Ksh. 200,000/= for breach of duty of care owed to him by the appellant.

This court would take the position that a brochure is an advertisement tool, an invitation to treat aimed at inducing the purchase of produce being marketed. It would not amount to a formal contractual document setting out the terms and conditions of a relationship between parties.

The brochure (P. Ex. 7) ought not therefore have been treated as setting out the actual terms and conditions governing the material account.

At most, the respondent in order to prove his case against the appellant in a satisfactory manner ought to have laid down the actual contractual document governing his relationship with the appellant and signed by him and the appellant. His failure to produce such document meant that he was unable to disprove the contention by the appellant that the material account was closed after it was overdrawn and reduced to a balance of Ksh. 18,642/30 cts as at the 5th June, 1997 as demonstrated by the bank statement (P. Exh. 8 (b)).

Even if it were taken that the terms and conditions governing the relationship between the respondent and appellant were spelt out in the brochure (PW1) which then acted as a formal contract, the appellant was given the discretion to close an account whose balance fell below Ksh. 200,000/= subject to giving necessary notice to the account holder. It was however not specified that the notice had to be in writing. Nonetheless, the appellant's witness (DW1) confirmed that necessary notice was issued to the respondent but it could not be traced for production in court due to lapse of time.

The statement (P. Exh. 8 (b)) confirmed that the balance had gone down to Ksh. 18,642/30 as at the time of the closure of the account. This fact was confirmed by the appellant and was not disproved by the respondent by production of necessary documentary evidence stating that as at that time the balance was well above Ksh. 200,000/=. The account balance request (P. Ex. 5) was not sufficient for that purpose and more so, considering that it was disputed by the appellant.

It is the view of this court that considering the foregoing factors and the totality of the evidence laid before the trial court, the respondent did not discharge his burden of proof by showing that the closure of the material account by the appellant was contrary to the applicable terms and conditions and hence irregular. He was therefore not entitled to any of the prayers sought in the plaint and in particular general damages for breach of duty of care on the part of the appellant or even for breach of contract.

Besides, the cause of action arose on 5th June, 1997 when the account was closed, the suit before the

lower court was instituted on 21st July, 2010, well past the limitation period for suits based on contract which is six (6) years from the date of the cause of action in terms of section 4 of the Limitation of Action Act. (Cap 22 LOK).

In sum, this appeal is merited and is hereby allowed to the extent that the judgment and decree of the trial court be and is hereby set aside and substituted with an order dismissing the respondent's suit with costs.

[Delivered and signed this 22nd day of May, 2014.]

J.R. KARANJA.

JUDGE.