REPUBLIC OF KENYA

IN THE HIGH COURT AT HOMA BAY

CIVIL APPEAL NO. 11 OF 2013

BETWEEN

ALFRED SAGWA MDEIZI T/A

PAVE AUCTIONEERS ….……..…….…….. APPELLANT

AND

NATIONAL BANK OF KENYA LTD .....…….. 1st RESPONDENT

GEORGE MUNYUA KIGATHI T/A

KIKI REGISTRARS …...…… 2ND RESPONDENT

(Being an appeal from the Judgment and Decree of Hon. Z. J. Nyakundi in Principal Magistrates Court in Rongo, Civil Case No. 245 of 2011 dated 245 of 2011)

JUDGMENT

1. The appellant appeals against a judgment and decree of the subordinate court in Rongo where his suit against the 1st respondent ("the Bank") was dismissed and judgment entered for the sum of Kshs 330,000/- with interest and costs against the 2nd respondent ("Kiki Registrars"). The 2nd respondent did not enter appearance in the court below and did it participate in this appeal.

2. The uncontested facts before the court were that the appellant operated an account at the Bank's Awendo branch. On or about 31st July 2010, Kiki Registrars drew a cheque of Kshs 330,000/- in favour of the appellant. On 2nd November 2010, the appellant banked the cheque in his account at the Kisii Bank branch. The cheque was subsequently dishonoured.

3. The gravamen of the appellant's case against the Bank is that it failed to inform him that the cheque had been dishonoured contrary to the express and standard terms of agreement between him and the Bank. He averred that he visited the Bank several times with a view to receiving the status of the cheque and that the Bank failed to update him of the status or give him the cheque.

4. In his plaint dated 22nd November 2011, the appellant particularised the allegations of fraud against the Bank as follows;

i. Failing to notify the plaintiff on the status of the cheque within the prescribed period.
ii. Withholding the plaintiff's cheque for an inordinately long period of time hence aiding the 1st

defendant to escape liability.

iii. Failing to respond to correspondence or complaints by the plaintiff as a customer.

iv. Unduly colluding with the 1st defendant to deny the plaintiff his entitlement by sitting on the bad cheque.

v. Failing to perform its duties to the plaintiff as customer in a diligent manner befitting its position as a financial institution.

vi. Acting in disregard or the express provisions of the ***Banking Act*** and regulations made thereunder.

5. As a result of the respondents conduct the appellant prayed for judgment against them jointly and severally for the sum of Kshs 330,000/- together with interest from 31st July 2011 to the date of payment and general damages for breach of contract.

6. The Bank filed a statement of defence dated 8th February 2012 where it denied liability. It admitted that the appellant was its customer. It averred that it was to credit the value of the cheque into the appellants account upon the same being cleared but it was returned unpaid. The Bank stated that the appellant did not visit any of its branches to collect the cheque and that he could have easily ascertained the status of the cheque by visiting any branch and making an inquiry. The Bank denied knowledge of persistent complaints by the appellant.

7. After hearing the appellant and a witness from the Bank, the learned magistrate dismissed the claim. The appellant now appeals on the following grounds;

i. *That the learned trial magistrate erred in procedure and in law in reaching a decision against the weight of the evidence adduced.*

ii. *That the learned trial magistrate erred both in law and in fact in relying on extraneous facts unsupported by any tangible evidence.*

iii. *That the learned trial magistrate erred in law and in fact by applying wrong principles in law and thereby reaching a decision that is manifestly erroneous.*

iv. *That the learned trial magistrate erred in law and in fact by making a finding against a party not party to proceedings.*

v. *That the learned trial magistrate erred both in law and in fact in making a decision based on unfounded assumptions and not on evidence.*

vi. *That the learned trial magistrate erred both in law and in fact in pronouncing a judgement which was invalidated by effoction (sic) of time.*

vii. *That the learned trial magistrate erred both in law and in fact in failing to appreciate and apply the provision of Order 21 Rule 1 of the Civil Procedure Rules.*

viii. *That the learned trial magistrate erred both in law and in fact in upholding the defence of the defendant despite the existence of glaring contradictions and inconsistencies in the defence evidence.*

ix. *The learned trial magistrate erred in law and in fact by failing to find that the appellant had failed to prove his case on a balance of probability.*

8. As the first appellate court, this court is called upon to analyse and re-assess the evidence on record and reach its own conclusions bearing in mind that it neither saw nor heard the witnesses testify (see ***Selle v Associated Motor Boat Co.*** **[1968] EA 123**). In ***Jabane v Olenja*** **[1986] KLR 661, 664**, Hancox JA., described the duty of the first appellate court as follows, ***"I accept this proposition, so far as it goes, and this court does have power to examine and re-evaluate the evidence and findings of fact of the trial court in order to determine whether the conclusion reached on the evidence should stand – see (Peters vs. Sunday Post [1958] E.A. 424). More recently, this court has held that it will not likely differ from the findings of fact of a trial judge who had the benefit of seeing and hearing all the witnesses, and will only interfere with them if they are based on no evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching the findings he did – see in particular Ephantus Mwangi v Duncan Mwangi Wambugu (1982-88) 1 KAR, 278 and Mwana Sokoni v Kenya Bus Service (1982-88)1 KAR 870."***

9. Mr Onyango, counsel for the appellant, urged the court to re-evaluate entire evidence and find that the evidence did not support the decision reached by the trial magistrate. He contended that there was breach of trust by the Bank and that the breach occasioned damage to the appellant. Counsel submitted that the bank had a duty to inform the appellant that his cheque had been dishonoured and that the appellant had no obligation to prompt the bank to get the information.

10. In opposing the appeal, Mr Ongoso, counsel for the Bank, submitted that the appellant had cause of no action. He argued that the appellant had not proved that there was collusion between the Bank and Kiki Registrars and that the appellant had not proved any injury suffered as he already had judgment against the 2nd respondent. He further submitted that the Bank had no obligation to inform the appellant that the cheque had been dishonoured as it was merely a collecting agent and therefore not liable for cheque.
11. All the grounds of appeal except grounds 6 and 7 deal with the learned magistrate's appreciation of the evidence. From the pleadings, the issue before the trial court was whether the Bank acted fraudulently by failing to notify the appellant of the status of the cheque, withholding the cheque for a long period, failing to respond to correspondence or inquiries by the customer and colluding with Kiki Registrars.

12. The appellant testified that on 2nd November 2010, he deposited a cheque dated 31st July 2010 issued in his favour by Kiki Registrars at the Bank's Kisii Branch. He expected the cheque to clear within one and half weeks. He said that did not receive any communication from the Bank that the cheque had been dishonoured and he only came to learn of it after he received his account statement. He stated that he made verbal inquiries but never got any response. He also testified that that he wrote several letters to the Bank which remained unanswered. That the bank finally responded to his letter dated 24th August 2011. The Bank manager called him on 7th October 2011 and advised him to collect the cheque.

13. The Awendo Branch Manager (DW 1) denied that the appellant made any inquiries or wrote letters. He stated that he only received the letter dated 24th August 2011. Thereafter he called for the cheque from the Kisii Branch and when it was delivered, he called the appellant on 7th October 2011 to collect it. The appellant did send his agent to collect the cheque on that date.

14. I have perused the letters dated 12th November 2010 and 15th January 2011 which were produced in evidence by the appellant to support the contention that inquiries were made. Like the learned magistrate, I find that there is no evidence that the letters were sent or received in the ordinary course of business. A similar letter dated 24th August 2011, which was delivered, was acknowledged by the Bank's date stamp. It is this letter that DW 1 stated that he acted upon when he called the appellant to collect the cheque.

15. Does the Bank have a duty to inform the customer that the cheque had been dishonoured? In his plaint, the appellant pleaded that the Bank failed to inform him contrary to the express and standard term contract between him and the bank. The appellant did not prove that there was such an agreement or prove the terms he proposed rely on. When DW 1 attempted to produce the general terms and conditions governing the relationship between the Bank and its customers, the appellant's advocate objected to the same and the learned magistrate allowed the objection. The plaintiff therefore failed to prove the terms on the relationship between himself and the appellant in order to support his case hence a duty could not be implied on that basis. Furthermore, the appellant did not prove the existence of a custom or usage from which the court could rely on to imply such a duty.

16. Although the parties did not refer to it, **section 74B** of the ***Bills of Exchange Act (Chapter 27 of the Laws of Kenya)***, which is relevant to this case, provides as follows;

74B (1) Where a cheque presented for payment in accordance with subsection (1) of section 74A is dishonoured by non-payment, the presenting banker may either—

(a) On its own motion or at the request of the holder, return the cheque to the holder; or

(b) Issue to the holder an image return document.

17. The language of **section 74B** of the ***Act*** is not mandatory. It does not place a direct responsibility on the Bank to inform its customer's cheque has been dishonoured. The customer has the right to make an inquiry from the bank and request for the dishonoured cheque. In this case when the appellant made the request by the letter dated 24th August 2011 and the Bank complied with the request by providing the cheque which was collected by the appellant's agent.

18. The appellant accused the Bank of collusion and fraud with the 1st respondent. While fraud is easily to allege, the plaintiff shoulders a high standard of proof. I would no better that quote the Court of Appeal in ***Central Bank of Kenya Ltd v Trust Bank Ltd & 4 Others*** **CA NAI Civil Appeal No. 215 of 1996 (UR)** where, in considering the standard of proof required where fraud is alleged, it had this to say, *"The Appellant has made vague and very general allegations of fraud against the Respondent. Fraud and conspiracy to defraud are very serious allegations. The onus of prima facie proof was much heavier on the Appellant in this case than in an ordinary Civil Case."* I have scrutinised the testimony of the appellant and there is nothing to suggest that the Bank acted in any other way other than as an ordinary banker. Kiki Registrars was not its customer and it acted merely as a collecting agent for the appellant. The claim for fraud and collusion was rightly dismissed by the learned magistrate.

19. Having considered the analysed and re-evaluated the evidence, I have come to the same conclusion as the learned magistrate that the appellant failed to prove its case on a balance of probabilities.
20. In his grounds of appeal, the appellant contended that the learned magistrate failed to comply with the provisions of ***Order 21 rule 1*** of the ***Civil Procedure Rules*** which provides as follows;

21(1) In suits where a hearing is necessary, the court, after the case has been heard, shall pronounce judgment in open court, either at once or within sixty days from the conclusion of the trial notice of which shall be given to the parties or their advocates.

Provided that where judgment is not given within sixty days the judge shall record reasons thereof copy of which shall be forwarded to the Chief Justice and shall immediately fix a date for judgment.

21. According to the proceedings, the hearing of the matter was concluded on 18th December 2012 and the judgment delivered on 4th April 2013. This means the judgment was delivered beyond the 60 days provided for by the rule. Does this render the judgment invalid?

22. ***Order 21 rule 1*** of the ***Civil Procedure Rules*** does not invalidate a judgment delivered beyond the 60 day period. It is intended to ensure that judicial officers deliver decisions without undue delay. The reporting to the Chief Justice is intended to enhance accountability. Ultimately the judgment in this matter was delivered and no prejudice was occasioned to the appellant.

23. The judgment and decree of the subordinate court are affirmed. The appeal is dismissed with costs to the 1st respondent.

DATED and **DELIVERED** at **HOMA BAY this 30th day of October 2014.**

D.S. MAJANJA

JUDGE

Mr Onyango instructed by Sam Onyango & Company Advocates for the appellant.

Mr Ongoso instructed by Moronge & Company Advocates for the 1st respondent.