



REPUBLIC OF KENYA

High Court at Nakuru

Civil Case 471 of 1994

NATIONAL BANK OF KENYA LIMITED.....PLAINTIFF

VERSUS

OBADIAH MAIRA MUNEMA.....DEFENDANT

JUDGMENT

1. THE PLEADINGS

A. THE PLAINT

In a Complaint dated 23rd June 1994 and filed on 12th July 1994, the National Bank of Kenya Ltd (*the Bank*) sued Obadia Maira Munema (*the Defendant*) and sought judgment against the Defendant for -

- (a) the sum of Ksh 1,032,057.60,
- (b) Bank charges and interest on the principal sum at the bank rate of 40% per annum and/or current bank rate of interest calculated on daily balances at monthly rates from 30th May 1994, until payment in full,
- (c) costs of and incidental to the suit and interest at court rates of 14% pursuant to Section 27(2) of the Civil Procedure Act, plus Value Added Tax @18%,
- (d) any other or further relief the court may deem fit to grant.

The Plaintiff averred in the Complaint that the sum of Ksh 1,032,051.60 due and owing by the Defendant to the Bank as at 30th May 1994, was the balance of money or and/or overdraft allowed and money paid to the use of the Defendant by the Plaintiff as Bankers for the Defendant at the Defendant's request at Nakuru and interest thereon at the agreed rate of 40% per annum and/or current bank rate of interest calculated on daily balances at monthly rests upon money due from the Defendant to the Plaintiff and for Bank charges upon such moneys.

2. THE DEFENCE

In his Defence dated 6th September 1994 and filed on 7th September 1994 the Defendant, while admitting that he received a demand notice for payment of the suit sum not only denied owing the plaintiff the said sum of Ksh 1,032,051.66 and put the plaintiff to strict proof thereof, but also contended that -

- (a) the Plaintiff has loaded onerous and unlawful interest and other illegal charges loan/overdraft and has neglected/omitted and/or refused to render any or any proper account to the Defendant in respect thereof and has persisted in such refusal and misrepresentation of the accounts, and that the Plaintiff had not shown any record of payments made to the Plaintiff by the Defendant;
- (b) the Plaintiff charges illegal, unreasonable and non-commercial rate of interest and is not in accordance with any agreement between the Plaintiff and the Defendants and that,
- (c) if the Plaintiff allowed the accounts to be overdrawn, that was illegal as there was no agreement between the Plaintiff and the Defendant for such accommodation and the Defendant is not liable for any such moneys further put the plaintiff to strict proof thereof.

For those reasons, the Defendant prayed for the Plaintiff's suit to be dismissed with costs to him.

3. THE EVIDENCE

After many years of the file lying in the Registry shelves, this suit was heard on 11th December 2011 (*when the Plaintiff's evidence was taken, and the Plaintiff's case was closed*) and 19.03.2012 when the Defendant's evidence was taken and the Defendant also closed his case. Thereafter counsel for the respective parties filed their submissions. The Defendant's counsel's submissions dated 10th April 2012 were filed on 11th April 2012, and those of the plaintiff's counsel dated 17th April 2012 were filed on 3rd May 2012. The submissions were highlighted before me on 20th July, 2012.

A. The Plaintiff's Evidence

As stated, the Plaintiff called one witness, PW1 – who was the Plaintiff's Nakuru Branch Manager. He testified that he was well conversant with the facts of the case as he was the custodian of the plaintiff's records in the Branch. PW1 testified *inter alia* that the Defendant opened a Current Account Number 301040338 with the Plaintiff on 30-11-1991, and produced the opening forms duly filled by the Defendant himself including the Specimen Signature Card (Pex.I), the Defendant's copy of National Identity Card (*Pexh. 2*), and the Personal Private Account Form (*PExt.3*).

PW1 also testified that after completing those Account Opening Forms, the Defendant was subsequently issued with a cheque book, of which, he was, from the account opening instructions the sole signatory to the account. This witness also testified that in the course of operating the account, the Defendant issued a number of cheques in instances where he did not, as account holder, have adequate funds, and overdraw his account. PW1 tendered Bank Statements and copies of cheques showing how the Defendant overdraw his current account with the plaintiff Bank.

B. THE DEFENDANT'S EVIDENCE

(1) The Defendant too, was the sole witness to his case. The Defendant admitted to having opened and operated an account with the Plaintiff Bank at the material time. He also admitted being issued with a cheque book of which he said he was the sole signatory and custodian. He however contended that though he applied for a loan, his application was not granted.

(2) When cross-examined whether the signatures appearing on the front of the cheques, that overdraw his account were his, the Defendant stated that they (*signatures*) were like his. The Defendant had particular issues with the following cheques -

(a) Cheque Number 732075 of 2.03.1992 upon which Thurgen Secondary School was improperly and illegally paid Sh 20,000/= because PW1 testified that the account had no funds in it at the time.

(b) Cheque No. 732086 of 12-12-1992 which the Defendant claimed had several unknown signatures at the back whose authors were unknown to the Plaintiff and the Defendant, the Defendant contended that the Plaintiff could have cleared and paid this cheque of Shs 150,000/= in doubtful and unclear

circumstances, and in particular when the Defendant's account had allegedly no money;

(c) Cheque No. 732085 dated 17.12.1992 for Ksh 300,000/= paid for a Banker's cheque. The Defendant contended that there was no evidence to support or prove the issuance of a Banker's cheque, and that the Plaintiff improperly paid to persons unknown by the Defendant.

The Defendant consequently contended that in the absence of any formal memorandum in writing, the Plaintiff has no basis in which to institute a suit against the Defendant for claiming the sum of Ksh 1,032,051/60 or any other sum. The Defendant's counsel relied upon the provisions of Section 3(1) and 3(B) of the Law of Contract Act (*Cap. 23, Laws of Kenya*). The Defendant's counsel also contended that the Plaintiff had failed to discharge the evidentiary burden placed upon it by SS 107(1), 109 and 112 of the Evidence Act as stated.

4. ANALYSIS OF THE EVIDENCE AND THE LOAN

I will commence with an analysis of the Law of Contract, as stated in the Law of Contract Act, SS. 3(1) and 3(3) thereof -

(1) No suit shall be brought whereby to charge the defendant upon any special promise to answer for the debt, default or miscarriages of another person unless the agreement upon which such suit is brought or some memorandum or note thereof, is in writing and signed by the party to be charged therewith or some other person thereunto by him lawfully authorized;

(2) No suit shall be brought whereby to charge any person upon or by reason of any representation or assurance made or given concerning or relating to the... conduct, credit, trade or dealing of any other person, to the intent or purpose that such other person may obtain credit, money or goods, unless such representation or assurance is made in writing, signed by the party to be charged therewith;

(3) relates to contracts relating to land;

(4) relates to contracts made in the course of an action;

(5) The terms of a contract may be incorporated in documents either by being set out in it or by reference to some other document.

Counsel for the Defendant submitted that Sections 3(1) and 3(3) of the Law of Contract requires that a loan or an overdraft of Ksh 1,032,051.60 must be in writing, signed by both parties and that the signature of the contractual parties (*in this case, the plaintiff and the Defendant*) must be attested. Counsel submitted that in this light the miscellaneous bank statements bear no legal weight and cannot be relied on.

On their part counsel for the Plaintiff did not in his submissions specifically answer this question. The Plaintiff's evidence was however clear that the Defendant opened and operated an account with the Plaintiff Bank, that he did apply for a loan but the loan application was not granted. As correctly pointed out by the Plaintiff's Counsel, and indeed as the pleadings reveal, the Plaintiff's claim is based, not upon a formal loan advanced to the Defendant but on the Defendant's overdrawing his account. The question is whether the act of overdrawing an account by an account holder in a bank constitutes a contract in writing to meet the requirements of either Section 3(1) in respect of a primary obligor, or 3(2) in (*in respect of a guarantor*).

The simple answer to this question would simply to say it does not. This answer would however not meet the requirements of either the banking law as it has evolved from pre-Industrial Europe to the present electronic age.

In pre-Industrial Europe and America where the current global concepts first evolved, it is correct that to answer a claim for a debt, whether as a primary obligor, or a guarantor, the creditor had to show

some evidence in writing. Such evidence did not have to be in a formal form of agreement as we know them today. They were sufficient if they were merely a note or memorandum acknowledging the debt or indebtedness. That is why Section 3(1) of the Law of Contract refers to **“some memorandum or note in writing.”**

A debt may not also be contained in one such memorandum or note, hence Section 3(5) of the Law of Contract Act says that -

“the terms of a contract may be incorporated in a document either by being set out in it or by reference some other document.”

The issue in this case therefore is, what is the effect in contract law in relation to the law of banking and custom of bankers where an account holder, a customer, issues a cheque to the bank requesting the Bank to pay the sum on the face of the cheque either to himself or to a third party?

Usually there is no difficulty if there are adequate funds, the cheque will be honoured. Depending on the operations of the account, the cheque may still be honoured and the Bank expects and usually advises the account holder to regularize the account by depositing adequate funds to meet both banking charges, and requests for withdrawals, and for payment by cheque to third parties, or the Bank itself in the case of requests for Bankers cheques.

The Defendant has advanced two arguments against liability for those payments made by the Plaintiff Bank, against his cheques well knowing that there were no inadequate funds in the account. **Firstly** the Defendant accused the Plaintiff Bank of negligence in making such payments. **Secondly** the Defendant has contended that those payments were made fraudulently by the Bank.

The first question does not with respect to both the Defendant and his counsel does not arise. The duty of the Bank upon presentment of a cheque duly issued and signed by the drawer is to pay the sum on the face thereof. *“A cheque”* is by definition under S.73 Bills of Exchange Act (*Cap. 27, Laws of Kenya*), a bill of exchange drawn on a banker payable on demand. Provided that the customer such as the plaintiff has not countermanded the payment of the cheque, or there is no notice of the death of the customer, and the Banker has paid the cheques in good faith and honestly cannot be said negligently done.

Similarly fraud cannot be a defence in the circumstance of this case. There were no pleadings, or evidence to that effect. The applicable procedure at the time suit was filed was Order VI, rule 8(1) of the Civil Procedure Rules which provided -

“8(1) Subject to subrule(2), every pleading shall contain the necessary particulars of any claim, defence or other matter pleaded, including without prejudice to the generality of the foregoing -

(a) particulars of any misrepresentation, fraud, breach of trust, wilful default or undue influence on which the party pleading relies ...

There was no pleading of either misrepresentation, fraud or breach of trust, and allegations of fraud were entirely misplaced.

The final question therefore becomes this, is the Defendant, as a customer of the Plaintiff Bank liable for the cheques paid by the plaintiff where there were inadequate funds in the customer's account?

The answer to this question must be in the affirmative, yes. Again, the reasons are not far to look. As a matter of law a cheque is a draft or bill of exchange signed by the maker or drawer, drawn on a bank, payable on demand and has unlimited negotiability. In ordinary parlance it is an unconditional order in writing, addressed by one person (*called the drawer*) to another (*called “the drawee”*), signed by the person giving it, requiring the person to whom it is addressed (the Bank) to pay on demand, or at a fixed or determinable future, a sum certain in money to or to the order of the person specified or to the bearer.

As a matter of fact the Defendant issued all the cheques he disputes, the Bankers cheque was requested to be payable to himself - **“Please Issue Bank Cheque in my name.”** The Defendant applied for a loan per his letter 16th September 1992 and surrendered his title deed Bwisaba/Bukira/30 which the Bank kept, and PW1 confirmed was still in the Bank's custody. The defendant drew cheques which he expected to be paid on demand and were paid.

In a letter dated 24th February 2003, a member of the Defendant's family sought ways to discuss with the Plaintiff Bank how to settle the outstanding debt and redeem the title.

I do not accept the Defendant's evidence that he did not receive the Bank Statements issued by the Bank because they were sent to a wrong address. Upon opening the account on 30th November 1992, the Defendant gave his postal address as P. O. Box 16, SUNA. Out of the twenty one (21) Bank Statements issued to the Defendant by the Plaintiff Bank, only four (4) of them bear a postal address of P. O. Box 165 SUNA. That could be a mistake or re-organisation of the SUNA Post Office as a result of the growth of population or services. Even if it was an error, it is not an error which goes to the root of the Plaintiff Bank's claim.

Lastly, the Defendant was very concerned about Ksh 10,000/=, Ksh 300,000/=, Ksh 20,000/= and Ksh 150,000/= about whose issue the Defendant disputed. I am not a Document Examiner and claim no qualification in that field, but looking at the Defendant's specimen signature in the Account Opening Card, and the signatures on those cheques, they bear such a remarkable resemblance as to lead one to the conclusion that they are signatures of one and the same person. The bold dark and broad pen (*nib*) signatures of the bank are quite distinct, and I can discern the word *“approved”* against the cheques for Ksh 10,000/=, Ksh 300,000/= and Ksh 150,000/= which were drawn most probably in excess of the funds available on the account. The Defendant led no evidence to show that these signatures were not his. He testified that the signature were like his. He did not say they are not his.

Finally on the question of contract, the Defendant undertook in the Form KCA 13 Personal Private Account, on the Opening of the Account, the Defendant agreed as follows -

“I hereby agree to conform to the rules, terms and conditions governing Current Accounts at National Bank of Kenya Ltd, including the Bank's absolute right to withdraw, cancel or refuse to issue cheque books and/or withdraw cheque book facilities.”

My understanding of these terms is that so long as the Bank had retained confidence in the customer, it could at its discretion grant the Defendant credit by payment of his cheques even though as the evidence showed, he had no or limited funds. In so doing the Plaintiff Bank was not acting negligently. It was secure in the knowledge that it could perfect the security represented by the Defendant's title. The acts of the Bank cannot be regarded as either negligent or fraudulent.

By drawing up, presenting and uttering those cheques and others he issued out of his cheque book, the Defendant was making an unconditional written demand to the Bank to honour his cheques. Having issued those cheques and received cash in return, the Defendant is bound under the terms of opening the account to repay all sums drawn in excess of moneys in his account.

For those reasons, I find that the Plaintiff Bank has on the balance of probability proved its claim against the Defendant and I accordingly enter judgment for sum of Ksh 1,032,051.60. I also award costs to the Plaintiff.

Although the interest rates were high at the time, I find the rate of 40% per annum unconscionable. I award interest at court rates for the entire period, and until payment of the decretal sum.

There shall be orders accordingly.

Dated, signed and delivered at Nakuru this 26th day of October, 2012

M. J. ANYARA EMUKULE

JUDGE