



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

CIVIL APPEAL NO. 60 OF 2007

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SOUTHERN CREDIT BANK
CORPORATION
..... APPELLANT

-VERSUS-

DILRAJ BHUI
..... RESPONDENT

JUDGMENT

This is an appeal from the judgment of Resident Magistrate in Kisumu C.M.C.C. NO. 747 OF 2004 Dilraj Bhui versus Southern Credit Bank Corporation Limited. The defendant in the said case (now the appellant) being dissatisfied with the whole decision preferred this appeal.

Through a plaint filed on the 10th of December, 2004 the plaintiff then (now respondent) describing himself as a customer of the defendant (now appellant) operating account number 0052400401. He claimed that on or about the 1st of September, 2004 he drew a cheque No. 023190 for Kshs 37,000/= which cheque was returned uncleared with remarks "effects not cleared". That he placed the cheque once more but the same was not cleared and his account was debited with charges of Kshs 2,000/=. In the plaint he claimed for Kshs 39,000/= being the effects of the uncleared cheque and costs thereof, costs and interest.

The appellant (defendant) filed a defence and counter-claim denying the plaintiff's claim and claiming that the plaintiffs account as at the 3rd of September, 2007 was overdrawn by Kshs 71,422.10. It further claimed that the cheque was returned lawfully and justifiably as the account was overdrawn and there was no money to pay the said cheque. In its counter-claim the appellant (defendant) stated that on the 24th of August, 2004 at the respondent's request he was paid Kshs 100,000/= against a cheque number 031654 drawn by Anjali enterprises, with the assurance by the respondent that the cheque would clear but later the said cheque was countermanded by the drawer thus leaving the respondent's account withdrawn

which the appellant now claims.

In her judgment the learned trial magistrate found for the respondent for the sum of Kshs 39,000/= together with costs. She dismissed the counter-claim.

The appellant has now appealed on the grounds that:-

1. The learned trial magistrate erred in-law in finding for the plaintiff when the facts were uncontroverted that there was no money in the account to meet the cheque drawn by the plaintiff.
2. The learned trial magistrate erred in dismissing the counter-claim when the evidence was explicit that the plaintiff owed to the defendant money in account of a cheque paid against uncleared effects which effects was later stopped by the drawer.
3. The learned trial magistrate erred in law in holding that the defendant should have done everything possible to ensure that the cheque was not stopped by the drawer and thus put upon the defendant onus that were beyond the known standard.
4. The judgment was against the weight of evidence adduced contrary to Law.

The appeal sought for setting aside of the lower court's judgment and instead judgment on the counter-claim and costs of this appeal and the suit in the lower court.

Mr. P. J. Otieno for the appellant argued that contrary to the provisions in Order 20 rule 20 of the old Civil Procedure and Order 21 of the new rules in the entire trial magistrate's judgment, no issues were framed and no reason for the judgment was given; that evidence contradicts the lower court's judgment; that the evidence on record was explicit and did not support the finding by the magistrate; the counter-claim was not contested and therefore there was no reason to dismiss it; and the court ought not to have imposed an obligation that was not contractual.

On his part Mr. V. Odunga for the respondent opposed the appeal on the grounds that there was only one issue for determination which is whether a bank that has credited an account can unilaterally debit in the absence of a mistake.

In response Mr. P. J. Otieno argued that the issue was whether the cheque was cleared or not, that the cheque was stopped and there were no funds to meet the cheque.

This being the first appellate court, it has the duty to re-consider, examine, analyze and evaluate the evidence on record a fresh so as to arrive at an independent conclusion. See *Sella & Another versus Associated Motor Boat Company Limited and Another* (1968)E. A at 122.

The case for the appellant is that the respondent is its customer with an account at its Kisumu branch. That in he year 2004 the respondent deposited a cheque drawn by Anjali enterprises for Kshs 110,000/= . Before the same was cleared he asked to be paid Kshs 100,000/= which was done on the assumption that

the banked cheque would clear. The cheque was stopped by the drawer which then meant the respondent's account was overdrawn. That the respondent's account was never credited with the proceeds of Anjali cheque.

Further that the respondent later deposited a cheque for Kshs 30,000/= which cleared part of the debit leaving a debit of Kshs 71,722.10. The respondent then drew a cheque for Kshs 30,000/= which the appellant declined to pay. The appellant claims that it is the respondent who owes it money paid against the Anjali enterprises cheque that failed to clear together with charges thereof which he has to date declined to pay.

The respondent on the other hand testified that he banked two cheques but learnt that one was not cleared. He admits that he withdrew Kshs 100,000/=. He stated that before the withdrawal he was told that there was money in his account. He stated that a cheque for Kshs 37,000/= he drew bounced and was returned for lack of funds. His claim is for Ksh 40,000/= inclusive of the Kshs 30,000/= cheque that remains unpaid.

In cross – examination the respondent stated that his bank account shows the cheque for Kshs 100,000/= was dishonoured and there was no balance to withdraw Kshs 37,000/=.

My understanding of the respondent's case is that since the appellant paid him Kshs 100,000/= (even before clearance of a cheque he had banked) that the bank cannot claim against him nor debit his account due to non – payment of the same.

The issues for determination in my view are quite clear:-

1. Whether the effects of the cheque drawn by Anjali enterprises was cleared.
2. Whether the appellant could debit the respondent's account, having paid him Kshs 100,000/= as against the cheque referred to in 1 above.
3. Is the respondent entitled to the sum of Kshs 37,000/= claimed in the plaint.
4. Is the appellant entitled to the sum of Kshs 71,442.10 claimed in the counter-claim.

The appellant's claim that the effects of cheque no. 031654 drawn by Anjali enterprises for Kshs 100,000/= was not cleared as the drawer stopped the same has not been rebutted by the respondent. Indeed the appellants witness stated that the respondent was before the incident a good client and may have been paid Kshs 100,000/= before the effects were cleared. Common practice in banks is that effects of a cheque are paid after a period of 4 working days and upon confirmation that the effects are cleared. In this instance the respondent was paid after a day of banking the cheque and two days later the said cheque was stopped by the drawer. The position clearly was that the respondent's account was never credited with the proceeds of the said cheque. This was communicated to the respondent. The appellant then debited the respondent's account and when the respondent deposited a cheque of Ksh 30,000/= the appellant credited the same towards the deficit in the respondent's account.

Could the appellant debit the respondent's account having paid against the unpaid cheque? I think so. Since both parties agree that Anjali enterprises stopped the cheque, then the respondent owes the bank

money advanced to him erroneously or on a mistaken belief or assumption that the cheque he banked would be cleared. The factual position is that the cheque did not clear.

I am of the view that the respondent is not entitled to the amount claimed in his plaint. The sum of Kshs 30,000/= he credited into his account went to pay part of the amount of Kshs 100,000/= he withdrew and rightly so.

I find that the counter-claim by the appellant is merited, indeed the same was not challenged. The respondent owes the appellant the balance of Kshs 100,000/= he withdrew, which amount is claimed in the counter-claim.

In the circumstances I set aside the lower court's judgment. In its place I enter judgment for the appellant for Kshs 71,422.10 together with costs of this appeal and the lower court's trial.

Dated and delivered in Kisumu on 29.03.2011.

ALI-ARONI
JUDGE

In the presence of:

for Appellant

..... present

Respondent

.....present for