



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

Civil Appeal 48 of 2003

KENYA COMMERCIAL BANK LTD APPELLANT

VERSUS

ABDULLAHI AHMED 1ST RESPONDENT

MUSLIMA MOHAMED 2ND RESPONDENT

JUDGMENT

(An appeal from a judgment of P.M. Ndung’u P.M. Isiolo, dated 28th November, 2003)

In a plaint dated 25th July 2001, the respondents who are man and wife sued the appellant for:-

- i. A declaration that the withdrawals made in respect of the plaintiffs’ account number 140002206 with Wajir branch of the defendant without the plaintiffs’ knowledge were fraudulently, wrongfully and illegally made.**
- ii. An order compelling the defendant to furnish the plaintiffs with all bank statements and copies of withdrawal forms in respect of the said account for the period extending from 1995 to 1998 and an order compelling the defendant to credit the plaintiffs’ account with such sums as may have been illegally withdrawn therefrom during the said period**
- iii.**
- iv.**

The gist of the respondents’ claim against the appellant was that the former opened an account with the latter into which the 1st respondent’s pension’s dues from the Kenya Army was deposited. The account was in the joint names of the respondents with the mandate allowing either to withdraw. To this end each one of them had a plastic account number plate.

In or about 1998 the respondents realized that certain withdrawals had been made without their knowledge or approval. The sums withdrawn in their estimation was in the range between Kshs. 250,000 between 1995 and 1998. The respondents averred that the withdrawals were affected through a fraud or by the negligence of the appellant. For the resultant loss the respondents sought the above reliefs. The appellant on its part denied the respondents’ assertions and maintained that the withdrawals were by the respondents.

They have also denied having been negligent. The dispute was tried by the court below, P.M. Ndungu,

Principal Magistrate who found the appellant negligent in the handling of the respondents' account and gave judgment in favour of the respondents "as prayed for in the plaint."

It was the testimony of the 1st respondent that in 1982 he opened a savings account with the appellant's Wajir Branch in his name and that of his wife, the 2nd respondent. At the time of opening the account the respondents deposited Kshs.300,000/=. In 1993 they deposited Kshs. 500,000/= in form of a cheque, being the 1st respondent's terminal dues from the Kenya Army. In June and August 1998 the 1st respondent withdrew Kshs. 150,000 and kshs.125,000 respectively. Later, the 2nd respondent withdrew Kshs.150,000 (which was reflected in the bank records as Kshs. 160,000/=).

When the 1st respondent attempted to withdraw funds to buy a vehicle in 1998 he realized that the account did not have sufficient funds. On further inquiry, he learnt that there had been unauthorized withdrawals. He addressed the appellant on this matter to which the latter responded that it was not responsible. A report was then made to the police and investigations commenced by PW4, **Abdirahim Mohamed**. The police report was to the effect that a number of thumb prints on the withdrawal vouchers did not match the thumb prints of any of the respondents.

The 2nd respondent, on her part maintained that she only went to the bank twice, namely, on the opening of the account and when she withdrew kshs.150,000/=. The respondents' son, PW3, **Mustafa Abdullahi**, explained that prior to detection of the unauthorized withdrawals, he assisted the respondents with opening of the account and withdrawals. This was because both the respondents were illiterate while Mustafa is a teacher. After the detection of the problem, the respondents signed a mandate authorizing Mustafa to withdraw funds on their behalf. This was in 1998. He, however, did not withdraw any funds prior to 1998.

On behalf of the appellant, Mohamed Derrow Ahmed, in charge of savings at the Wajir Branch, testified that when the complaint was brought to the attention of the appellant, he commenced investigations which revealed that the withdrawals in question were done by the respondents. That in brief constitutes the dispute. As I have already indicated, the lower court found for the respondents, which finding aggrieved the appellant who has preferred this appeal relying on four grounds which can be condensed as follows:-

1. That the learned trial magistrate erred in finding the appellant liable.
2. That the judgment of the learned trial magistrate is erroneous, based on wrong legal principles and incapable of being enforced.

These grounds were canvassed before me on 2nd October 2007. Learned counsel for the appellant submitted that no specific amount was claimed hence the declaration sought is incapable of enforcement. He also took issue with the fact that the plaint was verified only the 1st respondent's affidavit thereby rendering the 2nd respondent's claim unverified. Further the verifying affidavit of the 1st respondent was defective as it did not disclose the source of information. Counsel also argued that the trial magistrate erred in relying on the police report which was based on investigations which were incomplete. Finally, he urged the court to allow the appeal as the respondent's claim was not specifically pleaded being a claim for special damages. In response learned counsel for the respondents confirmed that indeed each respondent swore a verifying affidavit. He concurred with the finding of the learned trial magistrate that the claim had been proved. He maintained that the decree was capable of execution.

I have considered these rival arguments as well as the single authority, **David Mwangi V. Occidental Insurance Co. Ltd** cited by counsel for the appellants in support of his proposition that special damages must be pleaded and proved. It was the respondents' case before the lower court that through fraud or negligence on the part of the appellant, the respondents' funds in their account were withdrawn without their knowledge or authority. They claimed, therefore, that as a result they lost between Kshs. 250,000/= and Kshs. 300,000/=. It is also their contention that they were unable to ascertain the actual loss because the appellant has refused to furnish them with the statement of the status of the account.

Before considering the merit or otherwise of this appeal, I propose to dispose of the issue of verifying affidavit as it is a straight forward matter. Only the 1st respondent's verifying affidavit is indeed in the record of appeal. However, a perusal of the original record show clearly that the 2nd respondent also swore a verifying affidavit. That disposes of that ground.

The main ground in this appeal is liability of the appellant to the respondents for the latter's loss. Although the 1st respondent served in the army for 34 years and retired as a Warrant Officer I and while he testified that he can read and write a little bit, he opted to thumb print each time he withdrew cash. There was evidence also that the 2nd respondent was illiterate.

While the 2nd respondent maintained that the total deposit made was Kshs. 850,000/= including his terminal dues, I am unable to understand this in view of his evidence that apart from his pension (terminal dues) of Kshs. 500,000/= and an earlier deposit of Kshs. 300,000/= there were monthly deposit of Kshs. 5,600/= being his monthly retirement benefits from 1993 to 1998 which would translate to approximately Kshs. 336,000/= on the monthly payment alone. If the only authorized withdrawals amounted to Kshs. 425,000/= then the account ought to have had Kshs. 911,000/=. The 1st respondent contention is that a total of Kshs. 450,000/= was illegally withdrawn from their account. That is the figure he gave in his testimony. But in the plaint he avers that between Kshs. 250,000/= and Kshs. 300,000/= was withdrawn without their knowledge or permission.

The respondents' claim is in the form of special damages. Funds were appropriated from their accounts without their permission. In order to remedy their loss the same must be certain. A decree drawn following the judgment of the court below is in the following words:-

“.....and an order compelling the defendant to credit the plaintiffs' account with such sums as may have been illegally withdrawn therefrom during the said period..”

The question is, how much was illegally withdrawn? The respondents, I find, have failed to prove their loss and the learned trial magistrate erred in finding that there was loss. Indeed the decree, reproduced above is incapable of execution. It is unbelievable that a person who has served in the armed forces for three decades would be so careless as to deposit such large sums of money in a bank without demanding a copy of the deposit slip. As a matter of fact he had no document to show that he made deposits or withdrew funds from the account.

His testimony as to how much he deposited is full of contradictions. According to his son, Mustafa, Kshs. 300,000/= was unlawfully withdrawn. Whereas fundamental questions were raised in the police investigations those investigations were not complete at the time the case was heard. The police had not recorded statements from key bank officials and all the statements had not been furnished by the bank. Regarding statements of account, there is evidence by Mustafa that the same had been passed over to their advocate.

The investigating officer similarly confirmed that most of the statements were made available to him. None of these statements were produced at the trial. It was therefore not clear which statements the respondents required. The trial learned magistrate therefore erred in ordering the appellant to furnish the respondents with withdrawal forms, which were already in the possession of the investigating officer and statements which were not specified. Besides, it was the bank's position that it was ready and willing to furnish these documents on request.

Further, the respondents' recourse with regard to these documents are in the provisions of Order 10 regarding discovery of documents. For the reasons stated this appeal is allowed. The judgment and decree issued by the court below are set aside and the respondents' suit dismissed. I award costs in both the appeal and the trial.

Orders accordingly.

Dated and delivered at Meru this 6th day of February 2008.

W. OUKO

JUDGE