



REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI
CIVIL CASE NO. 399 OF 1995
MARINA MACHINERIES (K) LIMITED PLAINTIFF
VERSUS
BANK OF BARODA (K) LIMITED..... DEFENDANT

JUDGMENT

1. Background and Pleadings

The original Complaint in this suit, dated 30th January, 1995 was filed on 8th February, 1995. It was later replaced by the Amended Complaint of 14th February, 2002. The original Statement of Defence was dated 10th April, 1995 and filed on the same date. It was replaced by the Amended Statement of Defence dated 26th February, 2002.

Plaintiff's reply to Amended Statement of Defence was dated and filed on 6th March, 2002.

The Amended Complaint carried the following main averments:

- (a) that, at all material times to the suit, the Plaintiff was a client of the Defendant and in that capacity maintained a current account, No.73950309 at the Defendant's Nairobi main branch;
- (b) that, on 26th March 1986 the Plaintiff by its cheque issued instructions to the Defendant to pay to the Income Tax Department a provisional tax amounting to Kshs.450,000/= from monies held by the Defendant in the Plaintiff's current account;
- (c) that, on or about 10th April, 1986 the Defendant duly debited the Plaintiff's said current account with Kshs.450,000/=; and so the Plaintiff concluded that its instructions had been carried out;
- (d) that, the Defendant was in breach of trust by failing, neglecting and/or declining to effect the Plaintiff's aforesaid instructions by paying the said sum of Kshs.450,000/= not to the Income Tax Department, but to persons unknown to the Plaintiff;
- (e) that, the Plaintiff came to know of the breach of trust only on or about 19th April, 1993 when its auditors and Income Tax consultants, M/S Patel & Co., wrote to advise that the Income Tax Department had written to the auditors informing them that the provisional tax in the sum of Kshs.450,000/= had never been remitted to the Department by the Defendant;
- (f) that, due to the failure by the Defendant to remit the provisional tax money, the Plaintiffs

Income Tax Department account had fallen into arrears standing at Kshs.1,308,979 by 28th March, 1996;

(g) that, on or about 28th March, 1996 the Defendant without authority paid out of the Plaintiff's current account the sum of Kshs.1,308,979 and debited that account; and as this was not known to the Plaintiff, the Plaintiff issued a cheque for Kshs.3,000,000/= which the Defendant failed to honour purportedly on the ground that the Plaintiff's account had insufficient funds;

(h) that, the Plaintiff committed breaches of trust as follows -

i) by failing to carry out the Plaintiff's clear and precise instructions;

ii) by receiving money, debiting the Plaintiff's account and failing to remit the same for intended purposes;

iii) by failure and/or refusal to account on whom the money had been paid to;

iv) by paying out of the Plaintiff's current account the sum of Kshs.1,308,979 to unknown persons without instructions or authorization;

(i) that, as a consequence the Plaintiff has suffered and continues to suffer massive damage and loss flowing from the injury done to its credibility and credit-rating amongst financial institutions for which it claims damages;

(j) that, the Plaintiff has also suffered special damages as follows:

· loss of Kshs.450,000/=

· loss of Kshs.1,308,979/=

total = Kshs.1,758,979/= plus interest at mean commercial bank rates from 26th March, 1986 and 28th March, 1986 respectively till payment in full.

To the Plaintiff's pleadings, the Defendant's Amended Statement of Defence responded as follows:

(a) that, the Defendant did debit the Plaintiff's account with the sum of Kshs.450,000/= on 10th April, 1986, issued a certificate to this effect and remitted the same to the Income Tax Department.

(b) that, the Department paid out to the Income Tax Department the sum of Kshs.1,308,979 in compliance with Section 96 of the Income Tax Act under which it was appointed;

(c) that, the Defendant notified the Plaintiff of its appointment as an agent, and further advised the Plaintiff on 28th March, 1986 that it would remit the sum of Kshs.1,308,979 to the Income Tax Department in compliance with the demand notice;

(d) that, the Defendant denies that the Plaintiff has suffered loss or damage as alleged; and if the Plaintiff has suffered any loss, it has not been occasioned by the Defendant;

(e) that, the suit herein is statute-barred;

(f) that, the suit is misconceived and bad in law.

The Plaintiff pleaded in its Reply to Amended Statement of Defence as follows:

(a) that, the Income Tax Department did inform the Plaintiff's auditors that the Kshs.450,000

amount payable as provisional tax had never been remitted to the Department by the Defendant Bank;

(b) that, if any payment above the sum of Kshs.450,000/= was due to the Income Tax Department from the Plaintiff, it was only due because of the Defendant's non-remittance of the sum of Kshs.450,000/=, and contrary to the Plaintiff's express instructions, in fundamental breach of trust.

After the last pleadings, counsel for the Plaintiff, on 21st August, 2002 filed a statement of agreed issues dated 19th August, 2002 which however was not signed by counsel for the Defendant. As there is no competing similar list on file, I will consider that the issues as filed are indeed the issues in respect of which legal resolution is required. The said issues are as follows:

- (a) Did the Defendant debit the Plaintiff's account No.7390509 with the sum of Kshs.450,000/= as instructed by the Plaintiff?
- (b) If the answer to (a) above is in the affirmative, did the Defendant remit the said sum of money to the Income Tax Department?
- (c) Did the Income Tax Department inform the Plaintiff's auditors that the said money had never been remitted by the Defendant?
- (d) Did the Defendant's failure to remit the money as above stated occasion the Plaintiff's income tax account to fall into arrears?
- (e) Did the Defendant herein, without instruction nor authorization, pay out of the Plaintiff's current A/C No.73950309, to the Income Tax Department, Kshs.1,308,979/00 and debit the said account with the amount?
- (g) Is there breach of trust on the part of the Defendant?
- (h) Has the Plaintiff suffered any loss or damage?
- (i) Who should pay the costs of this suit?

On the basis of the pleadings, the hearing of the case took place in full before the Honourable Mr. Justice Hayanga, and the proceedings were later prepared.

2. Evidence in Support of the Plaintiff's Case

On 7th April, 2003 Mr. Amollo appeared for the Plaintiff, and Mr. Lugadi (holding brief for Mr. Simiyu) for the Defendant. PW1, Muhir Chalishazar, was sworn and gave his testimony. He is an accountant in the employ of M/S B.C. Patel & Co. Certified Public Accountants. In 1993 he had been an accountant with M/s. M.J. Patel & Co. Certified Public Accountants. On 19th April, 1993 M.J. Patel & Co. sent to the Plaintiff a letter which had been received from the Income Tax Department. This letter was dated 2nd April, 1993 and stated as follows:

"I am sorry to inform you that your client's records in our collection office do not reflect the receipt of such an amount as provisional tax. Under such circumstances please be advised to avail to me a photocopy of the cheque (both sides) through which the payment was made. Short of you producing the receipt issued for the payment this would help me establish whether such payment was actually made and received by the Department."

There is a bank statement which shows that the sum of Kshs.450,000/= was withdrawn from the Plaintiff's account with the Defendant; but the Defendant showed no evidence of payment to the Income Tax Department.

On cross-examination by Mr. Simiyu for the Defendant, PW1 said he is a Chartered Accountant and is the holder of a Bachelor of Commerce degree. He has been a Chartered Accountant since 1982, joined M.J. Patel & Co. in 1990, and left that firm in 1994. The witness testified that, as at 1987, the Plaintiff had no unpaid tax; and in 1998 there was an overpayment of Kshs.62/=. The payment authorized by the Plaintiff, of Kshs.450,000/= was never acknowledged by the Income Tax Department.

On re-examination PW1 stated that the direct responsibility for paying Kshs.450,000/= to the Income Tax Department fell on the Defendant, who should have effected payment before 31st March, 1986. The said sum of Kshs.450,000/= was tax payable for 1985, and therefore even if the 1986 returns showed a nil figure, this would be of no consequence.

PW2, J.R. Patel, was examined on 15th May, 2003. The witness testified that he was a director of the Plaintiff company. He had, on 26th March, 1986, requested the Defendant to pay kshs.450,000/= to the Income Tax Department. The Plaintiff's account was then debited with the said sum of Kshs.450,000/=. The Defendant did write a cheque in favour of the Income Tax Department, the same being paid into the Department's bank account at the Kenya Commercial Bank, Moi Avenue, Nairobi; but the Department later indicated in a letter that the payment had not been received.

On cross-examination the witness testified that the account shown in the Amended Plaintiff, paragraph 3A as No.73950309 was wrong and should instead read 7395309; and he said he had paid into this account the sum of Kshs.450,000/= for the Defendant to pay over to the Income Tax Department. The witness identified a counterfoil from the Defendant which showed a payment from the Plaintiff's account, in respect of the 1985 provisional tax. The counterfoil, however did not show the Income Tax Department as the beneficiary of the payment. The Income Tax Department later indicated that it never received the cheque.

On re-examination, the witness said that the Plaintiff, by a letter dated 27th October, 1992 had asked the Defendant whether the sum of Kshs.450,000/= had indeed been paid to the Income Tax Department. The Defendant responded, acknowledging that payment had indeed been effected; but there was no independent confirmation that payment had been effected. A letter from the Defendant dated 28th March, 1996 and another from the Income Tax Department, of the same date, showed that the Plaintiff had tax arrears in the sum of kshs.1,308,979/=.

This was the close of the Plaintiff's case, and examination of the Defendant's witnesses began before the Honourable Mr. Justice Hayanga on 9th June, 2003.

3. Evidence in Support of the Defendant's Case

DW1 was Kennedy Machoka, who was sworn and said he was an Assistant Manager in the Current Accountant Department at the Bank of Baroda (the Defendant) main office in Nairobi. He testified that the Defendant made a payment of Kshs.450,000/= to the Income Tax Department, presumably on behalf of the Plaintiff. The witness then said: ***"But then the Plaintiff made our cheque payable to another person in the amount of 3,000,000 but the cheque was [dishonoured?] because there were no sufficient funds."***

On cross-examination the witness testified as follows: He was a B.Sc. Economics graduate from Egerton University at Njoro (1992). He had been employed in 1993 and was unaware of things in relation to the suit that took place in 1986. He was unable to confirm whether the said sum of Kshs.450,000/= was paid to the Income Tax Department, but that it was paid out of the Plaintiff's account. He said there was an Income Tax Department receipt showing that the sum of Kshs.450,000/= had been paid. However, the receipt-copy referred to by the witness, dated 29th March, 1996 shows the payment of Kshs.497,020. There is still another such receipt-copy from the Income Tax Department, dated 29th March 1996 which shows payment, also by Marina Machineries (K) Ltd, of Kshs.811,959/=. The witness testified that the sum of Kshs.450,000/- was not paid to the Income Tax Department during the year 1986.

On re-examination, DW1 said the sum Kshs.450,000/= had been paid to Kenya Commercial Bank, whereas Kshs.1.3 million had been paid directly to the Income Tax Department. The witness did not know how the said sum of Kshs.1.3 million was made up.

4. Submissions for the Plaintiff

Counsel for the Plaintiff remarked the fact, emerging from the evidence, that the Plaintiff did request confirmation from the Plaintiff that the cheque for Kshs.450,000/= had been cleared in favour of the Income Tax Department. However the Defendant admitted that they failed to respond. On 25th August, 1992 the Plaintiff requested a copy of the cheque again. The Defendant admitted not responding at all. On 27th October, 1992 the Plaintiff again requested confirmation from the Bank that the Income Tax had been paid. There was no response. The witness for the Defendant admitted that such a cheque would have been retained on file for a period of 7 years; and so the failure to provide a copy of the cheque amounted to a serious irregularity.

Counsel asserted that the Plaintiff's request for a photocopy of the cheque was not honoured by the Defendants, and so it cannot be concluded that the said cheque was paid to the Income Tax Department. Counsel submitted that the said cheque had been cleared in favour of a 3rd party, contrary to the Plaintiff's instructions. Counsel submitted that such action by the Defendant was fraudulent and unlawful.

Counsel submitted that the failure by the Defendant to transmit the payment to Income Tax led to a penalty against the Plaintiff in the sum of Kshs.333,720/= and so this together with the unremitted principal amount, led to an actual loss by the Plaintiff amounting to Kshs.783,720/=, and the sum now due to Income Tax owing to accumulation is Kshs.1,308,979/= as at 28th March, 1996. When this sum was now properly demanded by the Income Tax Department from the Defendant, to be paid within 12 months, the Defendant failed to notify the Plaintiff. Counsel prayed for an amount of Kshs.758,976 with damage to be paid to the Plaintiff by the Defendant.

5. Submissions for the Defendant

Mr. Simiyu for the Defendant submitted that the Defendant had paid the sum of Kshs.450,000 on 19th April, 1986 into the Kenya Commercial Bank account of the Income Tax Department, and that if this payment was not reflected in the books of the Income Tax Department, then the Defendant could not be blamed.

6. Final Decision

This case was mentioned before me on 17th June, 2004 for the purpose of ascertaining that the proceedings which had been recorded before Mr. Justice Hayanga had been typed, so that I could proceed on that basis to prepare a Judgment. Counsel appeared before me and in their view, there would be no need for trial *de novo*.

Although the record that came before me and which I have herein reviewed is, in my opinion, and with great respect, somewhat skimpy and discontinuous, it is clear from the evidence that the Plaintiff was unable to secure from the Defendant a frank account of how the Plaintiff's instructions regarding tax remissions to the Income Tax Department had been carried out; and in the meantime the Income Tax Department made demands for payment of taxes which should already have been remitted to that Department by the Defendant. The Defendant was not even able to produce copies of cheques which it had used to make the tax payments in accordance with the clear instructions of the Plaintiff.

In the circumstances, I hold that the Plaintiff has proved its case on a balance of probabilities. Accordingly I now give this Judgment as prayed by the Plaintiff, as follows:

1. The Defendant shall pay to the Plaintiff the sums respectively of Kshs.450,000/= and 1,308,979 totalling to Kshs.1,758,979.

2. The Defendant shall pay interest to the Plaintiff on the sums indicated in 1 above at mean Commercial Bank rates, respectively, from 26th March, 1986 and 28th March, 1996 till payment in full.

DATED and DELIVERED this 8th day of October, 2004.

J.B. OJWANG

Ag. JUDGE

Coram:

Ojwang, Ag. J

Court Clerk: Mwangi

For the Plaintiff: Mr. Amollo, instructed by M/s. Rachier & Co. Advocates

For the Defendant: Mr. Simiyu, instructed by M/s. Musyoka & Wambua, Advocates