



REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI
CIVIL CASE NO 985 OF 2001

DENNIS MUKHOLO OCHWADA PLAINTIFF

VERSUS

KENYA COMMERCIAL BANK LTD.....DEFENDANT

JUDGMENT

This claim arises out of the alleged wrongful dishonour of the plaintiffs cheques by the defendant.

The facts of this case are not in dispute. The plaintiff in his evidence told the Court that sometimes in the month of December, 1995 he decided to go into maize business. He made arrangements with his brother to loan him some money. On 14th December, 1995 his brother rang him to go and collect the money which he did. He operates two bank accounts. One at the Kenya Commercial Bank and the other at Standard Chartered Bank.

Both banks are at Kenyatta Avenue opposite each other but across the street. The account with the Kenya Commercial Bank was No 256745898 and the one with Standard Chartered was No 00100114273005. The plaintiff deposited the cash with the Kenya Commercial Bank account on 14th December, 1995 and on the same day he drew two cheques in favour of himself of Shs 400,000/= each with the Standard Chartered Bank and sought special clearance because he wanted the money to go and purchase maize at Eldoret, Kitale and Lugari. The cheques were No 929733 and 921732 for Shs 400,000/= each. After depositing the money he proceeded to Eldoret to look for the maize. He found the maize about 1420 bags at Eldoret. But when he went to the Standard Chartered Bank Eldoret Branch to look for money to pay for the maize he found there was no money. The

Manager telephoned their Nairobi Branch but was informed that the amount of the two cheques had not been entered into his account. He had no funds in his account. He travelled back to Nairobi on 18th December 1995 to find out what had gone wrong. He was informed that the said cheques were returned with a remark "Payment requires drawers confirmation." This fact is not disputed either. He went on to state that when those cheques were returned he had sufficient funds and on 27th December, 1995 he wrote a cheque and withdrew cash Shs 800,000/=.

He proceeded to Eldoret to start to buy the maize but when he reached there he could not find the maize. He could not continue to buy maize because the prices had gone up in Eldoret but gone down in Mombasa where he wanted to sell it. He had intended to minimize his costs by hiring vehicles which had transported relief food to Sudan and while on their way back to Mombasa he could have hired them cheaply. He further told the Court that he had lost immediate opportunity for profits.

He said he could sell the 1420 bags he had found at a profit of Shs 360/= per bag and he would have earned Shs 511,200/= profit. On cross examination he admitted that he had not done maize trade before and that this was his first attempt which did not succeed. PW3 Simiyu in his evidence told the Court that he is the one who assisted the plaintiff to get the maize that he intended to buy. He had contacted farmers who kept 1420 bags for the plaintiff but when the plaintiff missed the money to purchase, those farmers sold the maize to other traders.

The defendant called two witnesses. DW 1 Jane Nyasio who told the Court that the plaintiff used to operate an account with her bank Kenya Commercial Bank and his averages in his account was between Shs 50,000/= and Shs 100,000/= and at times the account used to run at a debt. On 14th December 1995 there was a cash deposit of Shs 1,000,000/= in his account. On the same day the customer drew 2 cheques for Shs 400,000/= each and drawn by Ochwado the plaintiff himself. The two cheques were banked at Standard Chartered Bank which was just a few metres away from the Kenya Commercial Bank and the customer sought special clearance. They were presented over the counter. On being presented to her bank, they were returned with a remark "Payment requires drawer's confirmation." She further told the Court that this is a normal banking practice whenever any large cheque is issued by a customer the bank requires confirmation with the customer before payment is made.

So that the bank is sure that it is paying the right person and not a wrong person. To determine whether the amount of the cheque is large the bank checks from the conduct of the customers account if he has been issuing such large cheques before. She further told the Court that this transaction was peculiar because the customer deposited Shs 1,000,000/= and on the same day he draws 2 cheques of Shs 400,000/= each and the payee was the same customer the drawer.

The bank was not sure whether the drawer Dennis Mukholo Ochwada in Kenya Commercial Bank was the same Dennis Mukholo Ochwada in Standard Chartered Bank. The Bank tried to contact the plaintiff through the available contact in the bank record but to no avail presumably because he was out of Nairobi. But when he was at last traced, on 27th December, 1995 he was paid Shs 800,000/= the amount of the two cheques. The bank did not act unreasonably.

DW2 Mary Chesire in her evidence also confirmed that remarks "Payment requires confirmation of the customer" are normal remarks in banking practices and this is meant to protect the customer's account as well as the bank.

Counsel for the plaintiff quoting from *Paget's Law of Banking 10th Edition 1989* at page 199 submitted that "The paying banker's obligation is to honor its customer's payment instructions, including payment orders constituted by drawing of cheques in legal form, provided that he has sufficient available funds to do so. The obligation is owed to the customer, not the payee. It is the plaintiff's case that the defendant acted unreasonably imprudently and contrary to the norms of the banking industry.

The subject cheques were drawn and signed by the defendant's customer with clear instructions that the proceeds of the cheques be paid into the account of the self same customer at a different bank. The dishonour of the two cheques was unjustifiable wrongful and not based on any custom or usage in the banking industry and counsel urged the Court to find that the defendant is liable to the plaintiff for wrongful dishonour of the cheques.

On special damages counsel submitted that the evidence of PW1 and PW2 conclusively show that the plaintiff was a trader. He wanted to encash the cheques so that he could take advantage of what he described as a window of business opportunity to cash in the prevailing profitable trade in maize.

When the cheques were dishonoured the plaintiff was precluded from benefiting from the lucrative window of opportunity and urged the Court to accept the plaintiff's loss of Shs 511,200/= by reason of the defendant's wrongs. He also urged the Court to award general damages for breach of contract and libel in the sum of Shs 1,000,000/=plus costs and interest.

While counsel for the defendant submitted that the defence adduced evidence of what a prudent banker

would do in the circumstances. The cheques in question were returned with the remark "Payment requires drawer's confirmation". Looking at the statements of the plaintiff's account with the defendant, the average balance was between Shs 50,000/= and Shs 100,000/=. This was admitted by the plaintiff himself. The plaintiff then suddenly made a deposit of Shs 1,000,000/=. On the same day the two cheques for Shs 400,000/= each are drawn on the account and payable to the customer himself. Clearly this was unusual and put the Bank on inquiry. The Bank, after being put on inquiry, sought confirmation from the drawer but this was not forthcoming. Confirmation was necessary to protect both the customer and the bank from fraud. The possibility that the defendant's customer was being impersonated by a fraudster was very real. The Dennis Mukhulo Ochwada at the Standard Chartered Bank may not necessarily have been the same Dennis Mukhulo Ochwada at the defendant's bank. The defendant bank would have been negligent indeed had it not sought confirmation.

The customer has no right to put upon a banker, and the banker is not bound to accept any risk or inability not contemplated in or essentially arising out of the ordinary routine of business. In banking practice contingencies arise where, in the interests of the banker and the customer alike the only reasonable course is to "postpone" payment in appropriate and innocuous terms. In the instant case what the defendant bank did was merely to postpone payment in view of the unusual circumstances and the customer was paid a few days later after confirmation.

The plaintiff also sought damages for libel. On the facts of the instant case can it be said that the customer's commercial credit was seriously injured by the expression. "Payment requires drawer's confirmation"? Were the effect of these words to lower the reputation of the customer in the minds of right thinking people? Certainly not. Taking into account that the customer's average balance in his account was between Shs 50,000/= and Shs 100,000/= and all of a sudden a sum of Shs 1,000,000/= is deposited and on the same day he draws two cheques of Shs 400,000/= each and the drawer is the payee and under special clearance this was unusual and rightly put the bank on inquiry and this action by the bank cannot be said to be unreasonable and unjustifiable.

On special damages counsel submitted that they must be specifically pleaded and strictly proved. The plaintiff failed to plead the prices of the maize in Mombasa and without this it is impossible to determine whether the plaintiff would have made any profit at all. Special damages have also not been proved in the absence of documentary evidence on the costs of buying the maize, labour costs and costs of transportation. The plaintiff could easily have called a farmer and labourer from Eldoret and a transporter to testify on these costs. Further the plaintiff admitted that he was trading in maize for the first time and he cannot therefore be taken as an expert on the knowledge in the field.

On general damages as I have stated earlier the postponement of payment was justifiable and hence there was no breach of contract. And as I have also said earlier the drawer was also the payee and the remark "Payment requires confirmation" are not libelous and in my opinion the effect of those words were not to lower the customer's reputation in the minds of the right thinking people.

For the reasons stated above the plaintiff's claim fails and the suit is dismissed with costs.

Dated and delivered at Nairobi this 30th day of June, 2003

J.L. OSIEMO

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JUDGE