

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO 1559 OF 1999

KENYA COMMERCIAL BANK LTD.....PLAINTIFF

VERSUS

DAVID MWANGI KINYUA & ANOTHER.....DEFENDANT

JUDGMENT

This suit arises out of cheque number 012138 for sh 2,858,500/- drawn on Block Hotels Ltd account Number 22936570. Briefly, the facts may be stated. On 11.8.97 the first defendant presented the said cheque for Sh. 2,858,500/= payable to himself and delivered the same to the second defendant at Muthaiga Branch where the first defendant holds an account with the second defendant. The said cheque was presented to the plaintiff at Moi Avenue Branch where Block Hotels Limited has an account. After verifying the specimen signatures with their client Blocks Hotel Limited, the plaintiff cleared the cheque for payment and the first defendant was paid. After about 3 days when the plaintiff telephoned Blocks Hotels Limited, it was informed that the said cheque was not issued by Block Hotels Limited to the first defendant Kiamunyi Tyre Dealers and Accessories.

The plaintiff filed this suit against the defendants on the ground that the said cheque was presented to the plaintiff by the second defendant for payment whereupon the plaintiff paid the sum of sh 2,858,500/- under a mistake of fact namely;-

- (i) That the cheque (No 012138) presented to the plaintiff by the 2nd defendant for payment of the aforesaid sum was genuine.
- (ii) That the cheque No 012138 for Sh 2,858,500/- presented to the plaintiff by the second defendant for payment of the aforesaid sum was lawfully drawn by the plaintiff's client Block Hotels Limited in favour of the first defendant's client Kiamunyi Tyres Dealer and Accessories.
- (iii) That the cheque No 012138 for sh 2,858,500/- presented to the plaintiff by the second defendant for payment of the aforesaid sum, was genuine payment order by the plaintiff's clients Block Hotels Ltd
- (iv) That the cheque (No 012138) presented to the plaintiff by the second defendant for payment of the aforesaid sum, was drawn and signed by the lawful signatories to the plaintiff's clients account.
- (v) That the defendants were lawfully entitled to payment of the aforesaid sum vide the said cheque No 012138 was sh 2,858,500/-.
- (vi) That the cheque (No 012138) presented to the plaintiff by the second defendant, for payment of the aforesaid sum was genuine.

The proceeds of the cheque No 012138 was paid over to the second defendant who collected the proceeds of the said cheque and placed the same to the credit of the first defendant's account with the second defendant's Bank in Nairobi.

Consequently, the plaintiff came to learn that the said cheque No 012138 was not valid order for payment drawn by the plaintiff's client Block Hotels Limited in favour of the first defendant's Kiamunyi Tyres Dealers and Accessories. The same was fake and a forgery. In the premises the defendants have wrongfully converted the aforesaid sum of money to their own use and wrongfully deprived the plaintiff thereof whereby the plaintiff has suffered damage in the amount aforesaid.

The plaintiff called two witnesses P.W 1 Margaret Mbutia who told the court that cheque No 012138

was presented by the second defendant to the plaintiff payable to Kiamunyi Tyre Dealers and Accessories. The plaintiff paid out Sh 2,858,500/- but debited their clients account Block Hotels Ltd. She further told the court that the said cheque though paid was fraudulent as the same was not issued to the first defendant by the Block Hotels Limited. But on cross examination she admitted that the said cheque was proper in that when the signatures on it were verified with the specimen signatures of their client Block Hotels Limited they were in agreement and that she saw nothing wrong with the cheque. The second witness called by the plaintiff was Susan Kamau who dealt with the said cheque when it was presented to the plaintiff. She also told the court that when the said cheque was verified, it was found to be proper as the signatures on it and the specimen signatures of Block Hotels Limited as contained in their records were the same and she cleared the cheque for payment. But after about 3 days when she telephoned their client Block Hotels Limited to inquire about the same cheque, she was informed by one Mureithi an employee of Block Hotels Limited that the said cheque was not issued by them. She immediately telephoned the second defendant to stop the payment but she discovered that the first defendant had hurriedly been paid by the second defendant. But on cross-examination she admitted that there was nothing wrong with paying the customer promptly.

The first defendant called one witness David Mwangi Kinyua the proprietor of Kiamunyi Tyre Dealers and Accessories who told the court that he had business dealings with Block Hotels Limited for the supply of tyres. Previously whenever he supplied them with tyres payment was in cash. But this time when they requested to be supplied with tyres worth Shs 2,858,500/- he demanded payment by cheque because the amount was huge. Two employees from Block Hotels Limited came to discuss the deal with him and gave him the cheque for Sh 2,858,500/- But he informed them that he could not release the goods until the said cheque was cleared. He presented the said cheque to his bank the second defendant where he operates an account. The second defendant also presented the said cheque to the plaintiff where Block Hotels Limited operates an account. The same was verified and cleared. He then released the goods. Block Hotels Limited came with a big truck and loaded the tyres and took them away. He further stated that he had no reason to doubt them because the same people who brought him the cheque were the same people who came to collect the goods.

Counsel for the plaintiff's contention is that the defendant had wrongfully converted the claimed sum of money to their own use. But it is confirmed by the plaintiff's own witnesses that the said cheque was in order and the payee was Kiamunyi Tyre Dealers and Accessories.

Counsel for the first defendant submitted that it is not in dispute that the Block Hotel Limited had held an account with the plaintiff. That the cheque for sh 2,858,500/- was drawn in favour of the first defendant and debited to the account of Block Hotels Limited and it follows therefore that it was Block Hotels Limited who can be said to have lost the alleged money and thereby suffered damage and therefore the plaintiff claim does not disclose any reasonable cause action. Secondly, even assuming that the said cheque was forged which has not been proved since no witness was called from Block Hotels Limited to say that they had lost any money to a fraudster, it was the plaintiff who held the specimen signatures of the Block Hotels Limited and therefore it was the plaintiff who had a duty to confirm with their client whether the said cheque was genuine or not.

Counsel for the 2nd defendant also submitted that since the plaintiff admits that the cheque complained of was drawn on Block Hotels Limited and that company's account was debited, it follows therefore that the Plaintiff has no cause of action since the proper plaintiff should have been Block Hotels Limited and that the plaintiff had not suffered any damage. He further submitted that even assuming that the said cheque was forged the second defendant as the collecting bank cannot be held liable under section 3(2) of the Cheques Act Cap 35 which provides that where a banker in good faith and without negligence and in the ordinary course of business receives payment for a customer of a prescribed instruction to which the customer has no title or had a defective title the banker does not incur any liability to the true owner of the instrument by only of it having received payment of it. In the present case the collection of the cheque was in good faith and in the ordinary course of business to the account of the first defendant and no negligence is alleged or proved. Counsel further submitted that the allegation in paragraph 10 of the plaint that the second defendant had received the said sum and converted the same to its own use was negated by the plaintiff's own evidence which shows that the said sum was paid to the first defendant.

The claim of the plaintiff is based on the fact that the said cheque No 012138 was forged and was used to draw money from account No 22936570 which account belongs to Block Hotels Limited. It is admitted that when the said cheque was presented to the plaintiff who compared the signatures appearing on the cheque and the specimen signatures of Block Hotels Ltd were found to be proper. The first defendant in his evidence told the court that he had supplied goods worth Sh 2,858,500/- and was paid by the said cheque which cheque was valid for the same. The said cheque was verified by the plaintiff and was cleared for payment. Without evidence from Block Hotel Limited denying that the 1st defendant had ever supplied them with the said goods and that they never issued him with the said cheque, the claim that the said cheque was forged cannot stand and must fail.

The second issue is whether the plaintiff has suffered any damage and therefore has any cause of action. The plaintiff admits as pleaded in the defence that the said cheque was drawn on Block Hotels Limited and that the company's account was debited. It follows therefore that the plaintiff did not suffer any loss and therefore has no cause of action against the defendants since the proper plaintiff should have been Block Hotels Limited and who have not complained that they have lost any money.

All in all, the plaintiff has failed to prove its case on a balance of probabilities as required under the law. The suit is therefore dismissed with costs to the defendants.

Dated and delivered at Nairobi this 12th day of February, 2002

J.L OSIEMO

JUDGE