



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL COURTS
CIVIL CASE NO. 435 OF 1996

BARCLAYS BANK PLC PLAINTIFF

VERSUS

ARTS “680” LIMITED DEFENDANT

JUDGMENT

The plaintiff has lodged this suit to recover the sum of US Dollars 21,000 from the defendant, which said sum the plaintiff says is due to it from the defendant in connection with the use by the defendant of an Electronic Point of Sale Terminal at its premises at 680 Hotel Nairobi. The circumstances under which the claim arose are as described below.

By an agreement in writing dated 15.1.1976 made between the plaintiff and the defendant, the plaintiff at the request of the defendant agreed to install in the defendant’s premises at 680 Hotel Nairobi, an Electronic Point of Sale Terminal for the purpose of improving efficiency in handling financial service card transactions operated by the plaintiff. An Electronic Point of Sale Terminal facilitates the transaction of card business electronically.

The parties entered into a further agreement dated 5.11.1993 (hereinafter called the merchant agreement) pursuant to which the defendant agreed to honour the cards presented to it by cardholders. By virtue of the merchant agreement the defendant would supply goods, services or other facilities to cardholders in accordance with the procedure guide provided by the plaintiff and would not on any one day without the express authorisation of the plaintiff make sales to any cardholder or issue a sales voucher to the total value of more than US Dollars 100.

It was also agreed between the parties that if a sales voucher was issued or presented in breach of the merchant agreement or if a cardholder made a claim against the plaintiff relating to a transaction in respect of which a sales voucher had been issued by the defendant through the terminal, then the plaintiff may, without specifying any reason therefor, withhold payment on presentation of the sales voucher, or if the defendant had been paid for the sales voucher, the defendant would immediately repay the amount of the sales voucher.

The basis of the plaintiff’s claim is that on 20.9.1994, the defendant breached the merchant agreement by making a sale and issuing a sales voucher for the sum of US Dollars 21,000 well above the floor limit, without prior authorisation. It is also averred on behalf of the plaintiff that with fraudulent intent, the defendant keyed a false authorisation code to facilitate payment of the US Dollars 21,000. Particular of the fraud are given in paragraph 8 of the plaint.

In its defence denying the claim, the defendant avers that it complied with all the relevant provisions

and procedures laid down in the agreement and in the premises it is not liable to the plaintiff for the sum claimed or any other sum.

The evidence for the plaintiff was tendered by one John Njatha Jeremia (PW1) a security manager with the plaintiff attached at the Card Centre Nairobi. He described his duties at the Card Centre as safeguarding and fighting losses for the plaintiff and explained how the Credit Card System functions electronically. He testified that before transacting any business with a cardholder in excess of US \$.100, the defendant was required to obtain prior authorisation from the Barclays Card Centre.

The authorisation would involve the following steps. Firstly, the plaintiff would be provided with a telephone number to use when seeking authorisation. When it required an authorisation, the defendant would use the telephone numbers provided and get through to the Card Centre which works round the clock every day of the year other than on Christmas days. When the request for authorisation is received and acknowledged, the defendant or its representative is asked to give its card number as well as card numbers expiry date and the amount intended to be charged that particular card number. The defendant is also asked to state his merchant establishment number or the name. That information is meanwhile being keyed into the computer by the officer attending the merchant. Within 3 seconds, an authorisation code will be flashed on the screen. This is repeated over the telephone by the authorisation official. If it is a decline, the same will be flashed on the screen and repeated to the merchant. At the end of the day all such authorisations or declines will be produced from the computer as a terminal authorisation log report.

With regard to the transaction giving rise to this suit, PW1 testified that he received reports from the section at the Centre which handles 'charge backs' that they were experiencing problems in connection with receiving point of return terminal copies from the defendant. A charge back is a debit raised through the Visanet (an international computerised payment system for card issuers and acquirers of Visa International Cards) whereby a debit in the sum of US \$.21,000 was raised against the plaintiff in connection with a transaction which took place at the defendant's terminal. The transaction purportedly took place at 14.09 hrs at Hotel 680 Building Nairobi.

According to PW1's further evidence, investigations into the matter revealed that there was no entry of such a transaction in the plaintiff's authorisation log report; there was indeed not a single entry for the whole day i.e. 20.9.1994 from the terminal at the defendant's premises. The investigations also revealed that there was an erroneous date programme of one month behind which meant that the transaction giving rise to the charge back actually took place on 20.10.1994 and not on the date shown on the receipt (Exh. 4), but a check at the authorisation log report 20.10.94 also failed to show the authorisation code quoted on the receipt. According to PW1 that meant that the transaction was not authorised. Consequently, PW1 demanded a refund of the sum of US \$.21,000 from the defendant in terms of the merchant agreement but the defendant failed to effect any payment.

Bhaveshu Shah (DW1) a director of the defendant company whose functions are to look after the affairs of the company testified for the defendant. Although he conceded that he was not present when the transaction giving rise to this suit was recorded in the terminal which he said was done by a sales girl who has since left the defendant's employment, he claimed that the transaction was proper. According to him, the transaction involved the purchase of wood carvings by a customer whom he did not know but whom he claimed saw when he came back the following day to collect the carvings after they had been packed. He further said that the sale had been conducted on 20.10.1994 although the receipt showed the date as 20.9.1994 which he said was wrong without explaining how the error occurred. He also stated that a cash sale was issued in connection with transaction. No document was tendered by DW1 to substantiate those claims. DW1's stand is that the transaction was authorised and proper. Its validity was confirmed by the payment received from the plaintiff of a cheque for the amount involved within 2 weeks.

Given the pleadings filed herein and the evidence tendered by the parties, it is my view that only two issues call for determination in this matter. The first one is whether or not the purported transaction that allegedly took place on 20.10.1994 was authorised, while the second one is whether or not on a correct reading and interpretation of the merchant agreement, particularly clause 5.1 thereof, the defendant is obliged to refund the plaintiff the sum of US Dollars 21,000 which was 'charged back' to the plaintiff in

respect of the transaction. In determining the second issue, I accept the unchallenged evidence of PW1 that the plaintiff's account was debited with US \$.21,000 under Visanet System in respect of the transaction.

Regarding the transactions authorisation or lack of it, the plaintiff has tendered what I consider to be credible evidence to show that the transactions was in breach of clause 1:1 of the merchant agreement in that it was not authorised. In that respect I accept PW1's evidence that there is no entry in the plaintiff's authorisation log book relating to the transaction either on 20.9.1994 which is the date shown on the receipt issued for the transaction and which both parties admit was wrong or on 20.10.1994 which is the actual date of the transaction. The alleged sales lady who purportedly made the sale to the unknown customer at the defendant's shop was not called and clearly most of the evidence by DW1 regarding the transaction was hearsay. I say so because having admitted that he was away from the shop when the sale allegedly took place, he was obviously not in a position to tell the court whether or not the transaction which, it is common ground, required prior authorisation from the plaintiff, received such authorisation. In that connection it must be observed that the fact that payment was made by the plaintiff against the questioned transaction is no evidence that it was proper. Given the circumstances of the matter, the plaintiff could only tell that the transaction was proper if subsequently there was no evidence of an irregularity. The fact that there was a charge back implies that there was a compliant about the transaction. That coupled with the fact that there is no evidence of any authorisation and that the date shown in the receipt purportedly issued by the defendant is wrong and the sales lady who allegedly recorded the transaction was not called by the defendant to explain the transaction strongly suggests that the alleged sale was fictitious. In my view therefore, the plaintiff having satisfactorily shown that the transactions did not appear on the document in which it ought to have been recorded, the burden shifts to the defendant to prove that the transaction was authorised (see Section 112 of the Evidence Act). And in my view the defendant has miserably failed to do so.

As regards the second issue, Clause 5 of the merchant agreement provides:-

"5. Charges -back Rights

5.1 If a Sales Voucher is issued or presented in breach of this Agreement or a Cardholder makes a claim aga inst the bank relating to a transaction in respect of which a Sales Voucher has been issued (a) the Bank may without specifying reason, withhold payment on presentation of the Sales Voucher; or (b) if the Merchant has been paid for the Sales Voucher, the Merchant shall immediately repay the amount of the Sales Voucher."

The evidence available shows that the plaintiff was made to pay the sum of US \$.21,000 in respect of a transaction which was processed at the defendant's terminal. There is also more than ample evidence to establish that the transaction was not properly processed and may in all likelihood have been fictitious. It did not appear on the computerised documents in which it ought to have appeared, for example the terminal log report for 20.9.1994 and 20.10.1994 (Exh. 5). That evidence is sufficient to entitle the plaintiff to invoke the provisions of clause 5.1 of the merchant agreement and to demand the refund of the sum paid to the defendant.

For all the above reasons, I am satisfied that the plaintiff has established on a balance of probability its case against the defendant for the recovery of the sum of US \$.21,000. Accordingly, there will be judgment for the plaintiff against the defendant for the said sum together with interest thereon at the ruling bank overdraft rates from time to time until payment in full. The defendant will also bear the plaintiff's costs of this suit together with interest thereon at court rates.

Dated at Nairobi this 16th February, day of February, 2001.

T. MBALUTO

JUDGE

