



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

HIGH COURT CIVIL CASE NO. 903 OF 1997

KENYA COMMERCIAL BANK LIMITED.....PLAINTIFF

-VERSUS

SIMON MUKUNJU MWANGI

T/A INTER AFRICA ANTIQUES.....DEFENDANT

JUDGEMENT

In this suit, the Plaintiff Bank, (the Bank) claims Shs.981,999/50 from its customer, the Defendant in rather unusual circumstances.

The Defendant is the proprietor of a business, Inter Africa Antiques.

The form signed by the Defendant on 24th June 1994 contained the phrase “ I am solely responsible to the Bank for liabilities of the firm with the Bank and the Bank may recover its claim from my Estate”.

The form in addition requests monthly statement.

On or about 5th October 1994, the Defendant delivered to the Branch for collection a foreign cheque for US\$10,111.56. The cheque was dated 22nd August 1994 by Idex Investor Services Inc. in favour of Mathew Giddings & Susan Giddings payable at National Bank of Florida in Tampa Florida. It was not crossed. It was apparently endorsed by Mr. & Mrs. Giddings although the signatures are illegible and then had written underneath those signatures ‘pay Inter Africa Antiques’ with an account number but no further signature. The cheque was sent by the bank to its correspondent bank for clearance.

It was cleared and proceeds of Shs.458,764/20 were credited to the Defendant’s account on 3rd November 1994.

Within 6 days of that credit, the Defendant withdrew virtually the whole amount. Thereafter, he used the account with the Bank for a month or two for some bankings but mostly withdrawals.

At the end of January 1995, the bank was informed by the correspondent bank that the endorsement was a forgery and it therefore debited the bank’s account with it.

It is crucial in understanding this case to note that all the Bank knows is that its account with the corresponding bank was debited. It is true that the explanation given was that the endorsement was a forgery but the Bank does not make that averment. All it says is that its account was debited and in terms of the clause referred to at the beginning of this judgment, the Bank then debited the defendant on 27th February 1995. From the time of that debit onwards the defendant did not pay in any more funds to the

Bank. The amount claimed is made up of two or three further debits and interest and bank charges.

The Bank did obtain from its correspondent bank that bank's evidence of forgery. Mr. Otachi for the defendant has urged very strongly on me that there is a triable issue of whether or not there was a forgery or not. With respect, that is not so on an examination of the pleadings. The Bank has been debited by its correspondent and it merely passed that debit on to the defendant, its customer.

The Bank relies on the protection accorded to it by Section 3 of the Cheques Act (Cap.35) but in my view that section is more appropriate in a claim by Mr. & Mrs. Giddings than is one by the Defendant.

There are suspicions raised in the affidavit about the Defendant's actions:

- 1) The defendant's affidavit refers to one person only when the cheque is made payable to two and is ostensibly endorsed by two people.
- 2) No reference is made nor evidence tendered as to the goods or services for which the cheque was allegedly endorsed.
- 3) When a bank requires a person to identify himself, the normal practice is for the bank to note down the particulars thereof.
- 4) The removal of the entire proceeds of the cheque within 6 days of the credit as already referred to.

It is just possible that both the Bank and the Defendant are innocent parties in all of this but the sad fact is that, the Defendant undertook to be responsible to the Bank and that includes responsibility for any debit arising out of the collection process.

In the course of the collection process, the Bank was debited by its correspondent therefore it debited its customer. The reason given by this correspondent was forgery but that is not alleged by the Bank.

I accordingly enter Judgment as prayed, but as interest rates have fallen since 1st March 1997 of which I take judicial notice, I direct interest shall be calculated as follows:

From 1st March, 1997 at 46.5% p.a.

From 1st January 1998 at 35% p.a.

From 1st January 1999 at 28% p.a.

From 1st January 2000 at 25% p.a. until payment in full.

Delivered and dated this 23 day of June, 2000.

P.J.S. HEWETT

JUDGE