



Co-operative Bank of Kenya Ltd v Jiweze Improved Productivity Limited (Civil Appeal 189 of 2019) [2023] KEHC 2186 (KLR) (1 March 2023) (Judgment)

Neutral citation: [2023] KEHC 2186 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CIVIL APPEAL 189 OF 2019
JM CHIGITI, J
MARCH 1, 2023**

BETWEEN

CO-OPERATIVE BANK OF KENYA LTD APPELLANT

AND

JIWEZE IMPROVED PRODUCTIVITY LIMITED RESPONDENT

JUDGMENT

Brief background

1. In the trial court, the respondent sued the appellant for Kshs 820,600/= with interest and general damages and costs of the suit for breach of client instructions.
2. The appellant denied the claim stating it acted in accordance with the instructions issued by the client. The suit was heard and judgment was delivered on November 13, 2019 against the appellant for the sum of Kshs 820,600/=plus interest from the date of filing the plaint.
3. Being aggrieved by the judgment of the trial court the appellant lodged an appeal to this court on the following grounds:
 - a. That the learned magistrate erred in law and in a fact by failing to appreciate how the cheque clearing process works leading to the erroneous finding that the speed at which the impugned cheque number 254 dated March 21, 2017 was cleared negated the appellant's plea of good faith on its actions or involvement in the clearance process.
 - b. That the learned magistrate erred and in law and in fact making a finding that the speed at which the impugned cheque number 254 dated March 21, 2017 was cleared was ground to impeach the appellant's plea of good faith on its actions or involvement in the clearance process.



- c. That the learned magistrate erred in law and in fact in finding the appellant negligent for failure to make an inquiry from the respondent when there was uncontroverted evidence before the subordinate court that the appellant made a call to the respondent to confirm the payment of the impugned cheque and the respondent gave the go-ahead on the payment.
 - d. That the learned magistrate erred and misdirected herself in law and in fact in failing to appreciate the different responsibilities of the paying and collecting bank in the context of the cheque clearance process.
 - e. That the learned trial magistrate erred in law and in fact in ignoring or failing to appreciate that the evidence presented in court by the appellant on its investigation and analysis of the impugned cheque was not challenged by the respondent's witnesses.
 - f. That the learned magistrate erred in law and in fact in finding against the appellant by failing to consider there was no rebuttal to the position that the appellant promptly initiated recovery efforts by raising a claim with the paying bank, family bank, in accordance with the Kenya Banker's Association Clearing Rules.
 - g. That the learned magistrate erred in law and in fact in failing to appreciate the appellant's recovery efforts, which efforts were curtailed by the respondent who failed to provide the original cheque leaf of the impugned cheque which was necessary to initiate the recovery process.
4. It proposed to ask the court for the following orders:
 - A. The appeal be allowed with costs.
 - B. Set aside the trial court judgment and substitute it with the court's judgment.
 - C. Any other reliefs the court may deem fit.
 5. The parties agreed to canvass the appeal through written submissions.

Analysis and Determination:

6. In its submissions, appellants counsel argues that PW2 and PW3 whose signatures appeared on the specimen signature admitted that the signatures resemble their actual signatures though they stated they had not signed the disputed cheque. According to the appellant, the respondent has failed to provide to the appellant the original cheque leaf number 254 from its cheques book to enable the appellant to make a claim to the collecting bank (family Bank).
7. Counsel submits that the evidence adduced by the appellant after investigations were not rebutted by the respondent. Further, counsel submits the trial court erred in finding the respondent had proved that the appellant was negligent in clearing the cheque dated March 21, 2017.
8. Counsel submits the appellant acted upon the instructions of its client and thus was not negligent. It cited the case of; *Barclays Bank of Kenya ltd versus John peter Nyagetari Simba (liquidator of Lakestar insurance Co staff Retirement Benefits Scheme (in Liquidation))*2015 which held:-

“The Mandate embodies an agreement which authorizes the bank to pay if given instructions in accordance with its terms. Typically a mandate will list the individuals who have authority to sign cheques or other payment orders and will specify which individuals (if more than one) must sign the order” a bank which acts in accordance with the mandate is duly



authorized...in the civil case of a current, the basic obligation on the banker is to pay his customer's cheques in accordance with his mandate.”

9. Counsel submits that there was no express communication by the respondent to show PW2 could only sign cheques of certain amounts. The appellant submits the cheque was cleared on March 22, 2017, after a confirmation call was made through cell phone no. 0711xxxx provided by the respondent at the account opening.
10. Counsel submits that the claim ought to be made to the Family bank which was the collecting bank, unlike the appellant which was the paying bank. Counsel urged the court to allow the appeal and set aside the orders of the trial court.
11. On its part in its submissions, the respondents counsel submits that the finding of negligence against the appellant by the trial court was grounded on merit. That during the hearing PW2 and PW3 denied signing the impugned cheque and the alleged payee Membley enterprises is neither an individual nor a company but a creature without identity.
12. The printing date of the impugned cheque was before the respondent opened an account with the appellant. Further, counsel pointed out that there were discrepancies in the name and address of the respondent in the forged cheque from the genuine sample. The amount involved was the highest withdrawal since the opening of the account.
13. Counsel submitted that the actions of the appellant of following up with family bank was based on a public relation exercise. Counsel points out that the appellant owed a duty of care to the respondent which it failed to diligently exercise.
14. Counsel urged the court to uphold the trial court finding and dismiss the appeal with costs.
15. The duty of this court as the first appellate court is to reconsider the evidence of the trial court, re-evaluate it and make its own conclusions as was cited in the Court of Appeal in the case of *Selle & Another vs Associated Motor Boat Co. Ltd & Another* (1968) EA 123 held that: “A Court on appeal will not normally interfere with the finding of fact by a trial court unless it is based on no evidence, or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching his conclusion.
16. PW1 testified he was a director of the respondent, adopted his witness statement as examination in chief and was cross-examined. During cross-examination he stated he was one of the Directors who opened the bank account with the appellant. The office telephone number given was 0711980XXX. The instructions on the account opening were that any two directors could sign.
17. He stated on March 27, 2017, money was withdrawn from the account, and he was informed through his internet banking, he then raised the issue with the bank manager who promised to refund the money.
18. PW1 informed the court he was asked to provide a copy of the original cheque book, claim form and original cheque leaf. According to pw1, the cheque leaf was a forgery. PW1 said the bank was aware of the cheque book issued to the respondent.
19. In cross-examination, PW1 said the respondent opened the account with the appellant in 2016, while the cheque used to draw the money was printed in 2015, while the original issued to the respondent was printed on January 19, 2013. PW1 stated there was a discrepancy in the name of the respondent in the Impugned cheque which read as Jiweze Improved Productivity Limited, while the respondent's name is Jiweze Improved Productivity.



20. PW2 denied signing the cheque date March 21, 2017, he said the signature resembles his but it is not his. PW2 told the court he started working with the respondent in 2013, he confirmed he was a signatory of the respondent. According to him, the office number was 071xxxx.
21. PW3 testified he was a signatory of the respondent but denied signing the impugned cheque. He said the signature resembles his but that was not his signature. PW3 told the court he received alerts from the bank for amounts more than Kshs 200, 000/=.
22. DW1 the Branch Manager of Co-operative Ukulima, adopted her witness statement and the list of documents. DW1 informed the court the respondent was their customer, and that due process was followed.
23. During cross-examination, DW1 informed the court that the respondent opened an account with the appellant on December 1, 2016, and the account was operational for 3 months before the incident happened.
24. DW1 confirmed the impugned cheque used was printed before the account was opened, DW1 also pointed out the notable difference between the 2 cheques i.e. the existence of a postal code in one cheque and not on the other, the mention of Kiambu Kenya in one cheque and the omission in the other, the word Limited in the impugned cheque. According to DW1, she did not know the payee. DW1 informed the trial court she was paying the collecting bank but according to her Membly enterprises did not have an account with them.
25. In the re-examination, DW1 informed the court the cheque was deposited in Limuru Family bank and scanned to their office for clearance.
26. DW2 testified that she works with appellant as the technical verification officer. Her duty is to call clients to verify the authenticity of the cheque. According to DW2 in this case she used phone no. 071xxxx which was in the system to confirm the authenticity of the cheque DW2 informed the court she spoke with Reuben Mwaniki.
27. She informed the court her duty is also to confirm the cheque physically and in case the details don't match the cheque is not processed. In her testimony, she stated the authorization to pay was given by Reuben Mwaniki.
28. DW3 the fraud analyst adopted his witness statement.
29. I have perused the record of appeal, the trial court proceedings, and the submissions by the parties the issues for determination are:
 - a. Whether the appellant was in breach of a fiduciary duty to the respondent?
 - b. Whether the trial court judgment ought to be disturbed.

Whether the appellant was in breach of the fiduciary duty to the respondent

30. According to *Black's Law Dictionary*, 11th edition, a fiduciary duty is “a duty of utmost good faith, trust, confidence, and candor owed by a fiduciary (such as an agent or a trustee) to the beneficiary (such as the agent's principal or the beneficiaries of the trust;... a duty to act with the highest degree of honesty and loyalty toward another person and in the best interest of the other person-....Also termed as duty of loyalty, duty of fidelity; duty of faithful service; duty to avoid conflict of interest.”



31. The appellant being the custodian of the monies of the respondent is entrusted with the fiduciary duty over the customers' money and should treat all transaction touching on the bank account with utmost caution.
32. The appellant submitted the money was paid to the collecting bank after due diligence was done on the cheque and an authorization alert was obtained from Rueben Mwaniki. DW2 stated that in instances where the physical appearance of the cheque differs from the cheque presented for payment the same is not paid.
33. I have compared the notable differences in the impugned cheque and the initial cheque issued to the respondent, being the initial cheques does not indicate the postal code while the impugned cheque has a postal code, the impugned cheque indicated Jiweze Improved Productivity Ltd, while the initial cheque reads Jiweze Improved Productivity Ltd., the date on the impugned cheque is April 12, 2015 while the date on the initial cheque is October 19, 2017.
34. The appellant in the instance case has indicated physical notable differences, with many glaring notable differences the cheque ought to remain unpaid. The payment of the cheque was carelessly effected notwithstanding the notable differences, therefore, it shows a breach of duty by the appellant. The appellant conducted poor or no due diligence before clearing the cheque.
35. The appellant submits the authorization message was confirmed by Reuben Mwaniki through cell phone no. 071xxxx.
36. The number used by the appellant to get a confirmation authorization is the number in the system. The respondent has denounced the said number and insisted their number is phone no 071xxxx which is different from phone no. 071xxxx.
37. I have looked at the account opening form dated December 1, 2016, signed by the two (2) directors of Jiweze Improved Productivity Limited, Reuben Waweru Mwaniki and Faith Nyambura, the address of the company provided is 1996 -00900 Kiambu, the telephone address provided is 071xxxx.
38. In the case of *Kenya Grange Vehicle Industries Ltd vs Southern Credit Banking Corporation Limited* (2014) eKLR the court ruled that:

“In cases such as this, where the Bank is under a duty to make inquiries of its customer regarding a possible breach of trust, the Bank will be found to be in constructive knowledge of the breach of trust if it ‘fails to make the appropriate inquiries’”
39. Further *Equity Bank of Kenya & Another v Robert Chesang* [2016] eKLR where it was held: “A bank has a duty under its contract with its customer to exercise reasonable care and skill in carrying out its part with regard to operations with its contracts with its customers. The duty to exercise reasonable care and skill extends over the whole range of banking business within the contract with the customer. Thus the duty applies to interpreting, ascertaining and acting in accordance with the instructions of the customer.....The bank/customer relationship is based on utmost good faith. The bank is also under a contractual duty to diligently handle the accounts of a customer, to ensure that funds-deposited on the account are available when required by the customer. Any deviation from that understanding without justifiable reasons which should be communicated to the customer well in advance or immediately, the bank is in breach of a contract with the customer and is liable in damages.”
40. The trial court found that the appellant breached their fiduciary duty. The court did not act in error and neither did it misappropriate the law. The bank was entitled to exercise due care before paying the cheque.



Disposition:

41. I do not find a basis for interfering with the trial magistrate’s judgment. In the upshot, I uphold the trial court judgment.

Orders:

- a. The appeal is hereby dismissed.
- b. The respondent will have the costs of the appeal and the trial court.

DATED AND DELIVERED AT KIAMBU THIS 1ST DAY OF MARCH, 2023.

.....

J. CHIGITI (SC)

JUDGE

