



REPUBLIC OF KENYA



**Economy Farm Products v Equity Bank Limited (Civil Appeal E079 of 2022)
[2023] KEHC 19167 (KLR) (Commercial and Tax) (19 June 2023) (Judgment)**

Neutral citation: [2023] KEHC 19167 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL APPEAL E079 OF 2022
JWW MONG'ARE, J
JUNE 19, 2023**

BETWEEN

ECONOMY FARM PRODUCTS APPELLANT

AND

EQUITY BANK LIMITED RESPONDENT

(Appeal from the Judgement of the Principal Magistrate, Hon. Kagoni E.M delivered on 13/06/2022 at Nairobi, Milimani Commercial Court in CMCCOMMSU No. 474 of 2019)

JUDGMENT

1. By a Memorandum of Appeal dated and filed before this court on 24th day of June 2022, the Appellant has challenged the decision of the Principal Magistrate, Hon Kagoni EM delivered on June 13, 2022 at Nairobi, Milimani Commercial Court in CMCCOMMSU No 474 of 2019. The Appellant has filed the following grounds of appeal;
 - i. The learned Magistrate erred in law and in fact in finding that the Appellant gave authority to the Respondent, a bank, to debit the Appellant's account twice on the same cheque
 - ii. The learned Magistrate erred in law and in fact in finding the Appellant through Mary Nyambura Christine, gave instructions to the bank on telephone to pay one Joseph Ndegwa Njuguna who was not the payee of the cheque. This finding is contrary to the express testimony recorded by the Magistrate.
 - iii. The learned Magistrate erred in law and in fact in finding that the bank was right in retrieving a used cheque, 14 months after it had been utilised to pay the payee, Joseph Ndegwa Mwangi and utilizing it to pay Joseph Ndegwa Njuguna.
 - iv. The Learned Magistrate completely misapprehended the law in dismissing the Appellants case.



2. The Appellant seeks the following prayers in the appeal;
 - a. The Appeal be allowed and the Judgment delivered by the Honourable magistrate on 13/6/2022 be set aside and be substituted in favour of the Appellant for a sum of Kshs 547,369/-, interest at court rate from 14/8/2019 and costs of the subordinate court case.
 - b. The costs of this Appeal be borne by the Respondent.
 - c. Any other or further orders that the court may deem fit and just in the circumstances.
3. The Appeal is opposed and both parties have filed their respective written submissions and made oral highlights of the same before this court. On its part, the Appellant reiterates that the learned magistrate erred in law by finding in favour of the Respondent when there was clear demonstration that the Respondent acted contrary to laid down banking procedures by paying two different payees on the same cheque and also making the second payment against a stale and an archived cheque 14 months later after making the initial payment.
4. The Appellant argues that the trial court failed to consider the principles of banking as enumerated under section 81 of the *Bills of Exchange Act* which provides that a crossed cheque is not transferrable and is only valid between the parties concerned. The Appellant argues that cheque No 006xxx being the cheque in dispute was only valid between themselves and the payee, one Joseph Ndegwa Mwangi and this, the Appellant argues that the Respondent confirmed, was the practice pertaining in the banking sector.
5. The Respondent opposed the Appeal and stated that the authority to make the payment was premised on a callback from the Appellant's director who allowed the Respondents to effect payment on the same cheque twice. The Respondent further contended that the trial court was right in its findings and the appeal should be dismissed for lack of merit.

Analysis and Determination: -

6. In *Abok James Odera T/A A J Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates* [2013] eKLR, the court stated as follows:-

“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and re-analyse the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way.”

7. Upon considering the memorandum of appeal, record of appeal and submissions of the parties, the following issue arise for determination, to wit;- Whether the trial court erred in its determination on that the Appellant authorised the Respondent to pay the cheque to the wrong payee contrary to banking practice and procedure.”.
8. It is not disputed that the bank in the first instance credited the wrong payee, “Joseph Ndegwa Njuguna” instead of “Joseph Ndegwa Mwangi”. The bank statement exhibited by the defendants shows that a debit and credit of the sum of Kshs 547,309/- on 25/6/2018 from the Appellant's account.



9. It is also not in dispute that a similar debit was done on the Appellants account on 14/8/2019. This in my view is the source of the dispute before the trial court and the appeal before this court. Section 81A (1) of the Bills of Exchange Act provide as follows;

“Where a cheque is crossed and bears across its face the words “account payee” or “a/c payee”, with or without the word “only” the cheque is not transferable and is valid only between the parties thereto.”

10. From common banking practice, a cheque is payable between the drawer and the payee and a bank cannot seek authority of the drawer to pay a party other than the payee on the face of the cheque. Indeed, and as testified by the Respondent’s witness at trial, a cheque once honoured is archived and cannot be retrieved after 6 months as the same will be deemed “stale” and not payable. From an analysis of the evidence placed before the trial court and which I have had an opportunity to evaluate, it appears to me the second payment against the same cheque was made in contravention of the law on banking procedure and practice. Upon realising that the Bank had made payment to the wrong account, in my view, the bank ought to have pursued the wrong payee to recover the said funds since the said James Ndegwa Njuguna was also a customer of the bank, instead of visiting the Bank’s error on the Appellant.

11. I have perused the record of appeal and I find no evidence that the Appellant was contacted by the Respondent when it made the second payment on 14/8/2019. The callback that the trial court erroneously relied on to dismiss the Appellant’s case was for the first correct payment to one Joseph Ndegwa Mwangi, which from which as testified by the Appellant’s witness, was done on 19/6/2018. I find therefore that the trial court erred in its finding that the Appellant approved the impugned payment, which in itself was an illegality. In conclusion, I find and hold that the appeal has merit and I shall allow it.

12. The judgment of the trial court in Milimani CMCC No 472 of 2019 delivered on 13/6/2022 is hereby vacated and set aside. In its place, Judgment is hereby entered in favour of the Appellant against the Respondent for the sum of Kshs 547,369/- with interest from 26/8/2019 till payment in full.

13. Costs of this appeal are awarded to the Appellant. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 19TH DAY OF JUNE 2023

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J.W.W. MONG’ARE

JUDGE

In the Presence of:-

1. Mr. Odek for the Appellant.
2. Mr. Gaia for the Respondent.
3. Sylvia- Court Assistant

