REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 748 OF 2016

BRAZAFRIC ENTERPRISES LTD.....APPELLANT

VERSUS

JULIUS LUMUMBA TSIKHUTSU.....1ST RESPONDENT

EQUITY BANK LIMITED.....2ND RESPONDENT

JUDGMENT

A. Introduction

1. This is an appeal from the judgement and decree of the Senior Principal Magistrate Milimani CMCC No. 6461 of 2013, delivered on the 1st December, 2016.

2. The appellant's filed a memorandum of appeal dated 21st January, 2009 based on 8 grounds of appeal which can be summarised as;

> ***a) The learned magistrate erred by dismissing the appellant's entire claim on the basis that it was not proved on a balance of probability.***
>
> ***b) The learned magistrate failed to follow legal proceedings in Criminal Case No. 1654 of 2007 availed to her and authorities cited by the appellant on the responsibility and culpability of the 2nd respondent and thereby arriving at a wrong decision.***

3. The parties agreed to dispose of the matter by way of written submissions.

B. Appellant's Submissions

4. The appellant submitted that he had proved negligence on the part of the 2nd respondent which was never rebuffed as the 2nd respondent chose not to call any evidence and thus its statement of defence remained unsubstantiated. He relied on the case of **Motex Knitwear Limited v Gopitex Mills Limited HCCC No. 834 of 2012.**

5. He further submitted that the 2nd respondent had a duty of care not only to its customers but also to the appellant and that the 2nd respondent's negligence amounted to conversion. He relied on the cases of **Kenya Garage Vehicles Industries Ltd v Southern Credit Banking Corporation Ltd [2014] eKLR, Shalimar Flowers Self-Help Group v Intercom Services Limited & 4 Others [2004] eKLR** and **Standard Chartered Bank Kenya Limited v Intercom Services Limited & 4 Others [2004] eKLR.**

6. He further submitted that Sections 3(2) and 4 of the Cheques Act could not aid the 2nd Respondent without evidence of good faith and lack of negligence.

C. 2nd Respondents' Submissions

7. The respondents submitted that the fact that they did not call a witness during trial did not absolve the appellant of the burden of proof. They relied on the case of **Charterhouse Bank Limited (Under Statutory Management) v Frank N. Kamau [2016] eKLR.**

8. It was further submitted that contrary to allegations by the appellant, they were not guilty of conversion as they had acted in good faith and without negligence and as such was accorded protection under Section 3 (2) of the Cheques Act. The case of **Lipkin v Gorman** was cited in that regard.

D. Analysis of Law

9. I have considered the written submissions of the appellant and those of the respondents. I have also considered the authorities relied on by the respective parties.

10. As a first appellate court, it is my duty to subject the whole of the evidence to a fresh and exhaustive scrutiny and make my own conclusions about it, bearing in mind that I did not have the opportunity of seeing and hearing the witnesses first hand. The duty of the court in a first appeal such as this one was stated in ***Selle & another –vs- Associated Motor Boat Co. Ltd.& others (1968) EA 123*** in the following terms:

> ***"I accept counsel for the respondent's proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally (*Abdul Hammed Saif –vs- Ali Mohamed Sholan **(1955), 22 E.A.C.A. 270)."***

11. I have considered the pleadings, evidence tendered by the parties as well as the written submissions. It is trite law that the relationship between a bank and its customer is one of trust. At all times a bank is under a duty to make reasonable inquiries regarding a possible breach of trust in the operation of an account and especially by third parties who are not signatories to the said account. These enquiries depend on the circumstances of each case.

12. It is stated in the **Canadian Court of Appeal** case cited in the case **A&A Jewellers Ltd -vs- Royal Bank of Canada (2001) Can L11 2040 (On CA) Moldarer** JA Stated:

> ***"--- The bank is however not required to engage in an impractically extensive inquiry, nor is it to be held to a standard of perfection. All that is required is that it act reasonably in the circumstances." (****emphasis mine)*

> **Sopika J. in Gold -vs- Rosenberg [1997] 3 S.C.R. 802 observed**:

> ***"that word reasonable at a minimum must include steps and measures that are part of the bank's obligation under the terms of the agreement governing the account and the banks policy. In other words, in assessing whether the inquiries made by a bank in a particular case are reasonable, it is proper to measure them against the terms and conditions of the agreement with the customer, as well as the Bank's policy. –"***

13. The above observations were quoted with approval by **Hon. J.B. Havelock J** in the case in **Kenya Grange Vehicle Industries Ltd vs Southern Credit Banking Corporation (2014) eKLR.** What follows is therefore that where a Bank is under a duty to make inquiries of its customer regarding possible breach of trust, it will be found to be in contravention of constructive knowledge of the breach of trust if it fails to make the appropriate inquires.

14. In the present appeal, the appellant avers that agents of the 2nd respondent colluded with the 1st respondent and diverted their cheques to a newly opened account. The appellant has not provided evidence of this collusion or even how it was done.

15. I take note that employees of the 2nd respondent were not charged in criminal case no. 1654 of 2007 which was against the 1st respondent and another. In fact, from proceedings in the aforementioned criminal case, it is evident from the testimony of the 2nd respondent's agent that due care was taken in opening the accounts and handling the cheques. The bank was required to act reasonably, and at the minimum, to take steps and measures that are part of the banks policy.

16. The failure by the 2nd and 3rd respondents to call witnesses during the trial in the lower court does not automatically lead to the success of the Appellants case. In the case of **Charterhouse Bank Limited (Under Statutory Management) v Franck N. Kamau [2015] eKLR**, the Court of Appeal while relying on the case of **CMC Aviation Ltd v Crusair Ltd (No 1) [1987] KLR 103** stated as follows:

> **"The suggestion, however, implicit in some of the decisions quoted above, that in all and sundry civil cases the failure by the Defendant to adduce evidence in support of his defence means that the Plaintiff's case is proved on a balance of probabilities cannot possibly be correct. It is also obvious to us that in some of those decisions the question whether the Plaintiff has, in the absence of evidence from the defendant, proved his case on a balance of probabilities, was conflated and confused with the distinct issue of the effect of the Defendant's failure to testify when he had filed a defence and counterclaim. While the defendant's failure to testify has fatal consequences for the counterclaim because the onus is on him to prove it on a balance of probabilities, it does not necessarily have the same consequence for the defence where the onus is on the Plaintiff to prove his claim on a balance of probabilities."**

17. The burden of proof lies with the appellant which he failed to discharge in his evidence.

18. The banker's duty in processing payments for customers and others was extensively discussed by the Court of Appeal in the case of ***Standard Chartered Bank Kenya Ltd versus Intercom Services Ltd and 4 others [*2004] eKLR. As observed by the learned judge of appeal statutory provisions protecting bankers were intended to mitigate against the strict duty imposed under common law ***"to one's neighbour***

who is the owner, or entitled to possession of any goods is to refrain from doing any voluntary act in relation to his goods which is an usurpation of his proprietory or possessory rights in them …." . This protection was purposed to create an environment where the banking industry would develop ***(See Diplock LJ in Marjani & Company Ltd vs. Midland Bank Ltd (1968) 2 ALLER 573)***

19. A collecting banker is protected under **Section 3(2) of the Cheques Act** which states:

> ***"Where a banker, in good faith and without negligence and in the ordinary course of business—***
>
> ***(a) receives payment for a customer of a prescribed instrument to which the customer has no title or has a defective title; or***
>
> ***(b) having credited the customer's account with the amount of a prescribed instrument to which the customer has no title or a defective title, receives payment of the instrument for himself, the banker does not incur any liability to the true owner of the instrument by reason only of his having received payment of it; and a banker is not to be treated for the purposes of this subsection as having been negligent by reason only that he has failed to concern himself with the absence of, or irregularity in, endorsement of a prescribed instrument of which the customer in question appears to be the payee."***

20. English authorities dealing with this protection include the much quoted ***Marfani & Co. Ltd versus Midland Bank Ltd (1968) 2 ALL ER 573; the London Bank of Australia versus Kendall (1920) 28 CLR 410, Karak Rubber Co. Ltd versus Burden (No 2) (1972) 1 ALLER 1210 and Thackwell versus Barclays Bank PLC (1986) I ALLER 676, and the Lipkin Gorman Case (Supra).***

21. The protection accorded by statute to a paying bank is found in section 4 (1) of the Cheques Act cap 35 which states :

> ***"Where a banker, in good faith and in the ordinary course of business, pays a prescribed instrument drawn on him to a banker, he does not in doing so incur any liability by reason only of the absence of, or irregularity in, endorsement of the instrument, and —***
>
> ***(a)in the case of a cheque, he is deemed to have paid it in due course, and***
>
> ***(b) the case of any other prescribed instrument, the payment discharges the instrument"***

22. On the other hand, the protection is reinforced in **Section 60 of the Bills of Exchange Act** Cap 27:

> ***"(1) When a bill payable to order on demand is drawn on a banker, and the banker on whom it is drawn pays the bill in good faith and in the ordinary course of business, it is not incumbent on the banker to show that the endorsement of the payee or any subsequent endorsement was made by or under the authority of the person whose endorsement it purports to be, and the banker is deemed to have paid the bill in due course, although such endorsement has been forged or made without authority; and in this subsection "bill payable to order on demand" includes a prescribed instrument within the meaning of the Cheques Act which is payable to order.***
>
> ***(2) Any draft or order (other than a bill or a cheque) drawn upon a banker for a sum of money payable to order on demand which shall, when presented for payment, purport to be endorsed by the person to whom it shall be drawn payable, shall be a sufficient authority to the banker to pay the amount of the draft or order to the bearer thereof; and it shall not be incumbent upon the banker to prove that the endorsement, or any subsequent endorsement, was made by or under the direction or authority of the person to whom the draft or order was or is made payable either by the drawer or endorser thereof."***

23. The paying banker must pay in good faith and in the ordinary course of business. Hence the burden lies with the plaintiff customer in such case to prove negligence, whereas the collecting banker will aim to show that he acted without negligence. In the case of **Barclays Bank of Kenya Limited v John Peter Yagetari Simba (Liquidator of Lakestar Insurance Co. Staff Retirement Benefits Scheme) in Liquidation [2015] eKLR,** the learned Judge **(Aburili J)** cited a portion of the judgment in ***Simba Commodities Ltd versus Citibank N.A. Civil Case No. 236 of 2003 (2013) eKLR*** wherein the case of ***Karak Brothers Company Ltd versus Burden (1972) ALLER*** was quoted.

24. The cited passage demonstrates the scope of the duty of a paying banker to its customer and is worth reproducing in extensor:

> ***" as to the nature and extent of the contractual duty of care owed by a paying bank to its customer when called on to honour a cheque drawn by the customer; and in particular, in the case of a corporate customer which has given the usual mandate to its bank, to what extent the bank is entitled to place exclusive reliance on the fact that the cheque is signed by the corporation's duly authorized signatories the conclusion reached by Ungoed-Thomas J was as follows:***
>
> ***'… 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 within its contract with its customer. The standard of that reasonable care and skill is an objective standard applicable to bankers. Whether or not it has been attained in any particular case has to be decided in the light of all the relevant facts, which can vary almost infinitely. The relevant considerations include the prima facie assumption that men are honest, the practice of bankers, the very limited time in which banks have to decide what course to take with regard to a cheque presented for payment without risking liability for delay, and the extent to which an operation is unusual or out of the ordinary course of business. An operation which is reasonably consonant with the normal conduct of business (such as payment by a stock broker into his account of proceeds of sale of his client's shares) of necessity does not suggest that it is out of the ordinary course of business. If "reasonable care and skill" is brought to the consideration of such an operation, it clearly does not call for any intervention by the bank. What intervention is appropriate in the exercise of reasonable care and skill again depends on***

circumstances.'

> ***As between the company and the bank, the mandate, in my view, operates within the normal contractual relationships of customer and banker and does not exclude them. These relationships include the normal obligation of using reasonable skill and care; and that duty, on the part of the bank, of using reasonable skill and care, is a duty owed to the other party to the contract, the customer, who in this case is the plaintiff company, and no to the authorized signatories. Moreover, it extends over the whole range of banking business within the contract. So the duty of skill and care applied to interpreting, ascertaining, and acting in accordance with the instructions of a customer; and that must mean his really intended instructions as contrasted with the instructions to act on signatures misused to defeat the customer's real intentions. Of course, omnia praesumuntur rite esseacta, and a bank should normally act in accordance with the mandate – but not if reasonable skill and care indicate a different course."*** (empasis supplied)

25. The basic duty in respect to the cheques paid out by the 2nd Respondent herein was the obligation to pay the cheques *as per the customer's mandate.* However, in so doing it had to act in good faith and in the ordinary cause of business while exercising reasonable care and skill. There was evidence that in opening the account, the agents of the 2nd respondent ensured that they received all the necessary documents normally required in the exercise which is a demonstration of good faith.

26. During the withdrawals, the 2nd respondent's agents said that they requested for the original identity card as is the practice with banks.

27. It is my considered view that the appellant was obligated to discharge the burden of proof that the 2nd respondent did not act in good faith. He failed to do so and the mere fact that the 2nd respondent did not call a witness did not guarantee the appellant's success in the claim.

28. I find that the appellant has not established his grounds of appeal as required.

29. The appeal lacks merit and is hereby dismissed with costs.

30. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 6TH DAY OF FEBRUARY, 2019.

F.N. MUCHEMI

JUDGE