



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL APPEAL NO. 158 OF 2014

JAMES OLLE OLE NGITI.....APPELLANT

VERSUS

NATIONAL BANK OF KENYA LTD.....1ST RESPONDENT

(Being an Appeal from Original Conviction and Sentence in Nakuru chief Magistrates civil case No. 667 of 1995 by Hon. L. Komingoi, SP.M. delivered on 23rd October 2014)

J U D G M E N T

INTRODUCTION

1. The 1st respondent filed a suit claiming kshs.291,045 against the defendant plus bank charges and interest on the principal sum advanced by the 1st respondent. The defendant denied being advanced the said amount and issued third party notice against the 2nd respondent for indemnity. Judgment was entered against the appellant/defendant for kshs.671,889.65. The sum is made up of principal and accrued interest.

2. The appellant being dissatisfied with the judgment rendered filed this appeal on the following grounds:-

- i. The appellant failed to file submissions despite being directed to file granted 14 days to file on 27th November 2018 and a further 7 days on 30th January 2019.
- ii. On 14th February 2019 when the matter came up for hearing, the appellant failed to attend court for highlighting of submissions and judgment date.
- iii. The 1st respondent filed affidavit of service dated 7th November 2018.

RESPONDENTS SUBMISSIONS

3. The respondent filed written submissions dated 29th January 2019 filed on even date.

4. While highlighting the written submissions, Mr. Kiburi submitted that despite the appellant denying having had a relationship with the 1st Respondent, he admitted having opened an account with 1st defendant during cross examination and drawing various cheques which gave rise to the debt herein. He submitted that opening an account, drawing from it creates a relationship, and it is mischievous for the appellant to deny the relationship.

5. Counsel further submitted that the 1st respondent proved its case to the required standard in the trial court contrary to the appellant's assertion. He urged court to find no merit in the appeal and dismiss it with costs.

ANALYSIS AND DETERMINATION

6. This being the first appellant court, I am required to reevaluate evidence adduced in the trial court and arrive at an independent determination. This I do while minded of the fact that I never got the benefit of taking evidence first hand and the need to therefore give due allowance.

7. The 1st respondents witness PW1 testified that the appellant opened account number 301-039-887 at its Nakuru branch on 3rd October 1991. He stated appellant's identity card number and address. He produced appellant's account opening form, copy of identity card, passport photograph, and specimen signature. He added that the appellant was issued with cheque book, which were used to withdraw funds. He said

all the cheques were issued by the appellant and had his specimen signature; that he signed at the back of the cheques acknowledging receipt of money. He produced statements capturing the transactions.

8. The 1st respondents evidence is that it stopped charging interest in 1996 and at the time the amount owing was kshs.669,859.65

9. In cross-examination, the 1st respondent's witness said that the bank never demanded kshs.291,000 from the defendant. When recalled PW1 showed court a letter dated 26th may 1998 by the defendant addressed to his lawyer indicating that the amount outstanding was kshs.266,709.26. He added that statement dated 23rd November 2010 indicate the net amount owing as kshs.671,856.54

10. While being cross examined, PW1 stated that amount owing as at 26th may 1998 as per amended plaint was kshs.266,709.25. He further stated that as at 2009 the amount owing was kshs.671,859. He said he did not produce any document stopping running of interest.

11. In his testimony, the defendant admitted opening a current account with the defendant and being issued with cheque book in 1991. He however denied receiving any loan or overdraft from the 1st respondent. He admitted operating the account said the highest amount he withdraw by cheque across the counter was kshs.4,000

12. Appellant further testified that, for 6 months of the period he worked in Nakuru, he lived with the third party who at the time worked for the 1st defendant and that in 1998 the third party admitted before his Advocate Rodi Orege that he illegally withdrew money from his account in 1993; he showed court an agreement dated 9th November 1998 between him and third party.

13. In cross-examination, the defendant indicated that he never raised any complaint to the bank on illegal encashment of any cheque to the wrong person. On further cross-examination, he said he does not know how much he deposited in the account but he deposited kshs 10,000 on 11th may 1993. In reexamination he denied depositing 5,000 and 10,000 and that he did not know that somebody was depositing money in his account.

14. The defendant availed his Advocate Rodi Orege who testified and confirmed that the third party admitted receiving kshs.30,000 from the defendant. He produced the acknowledgment report in court as exhibit.

15. On perusal of exhibits produced in court as exhibits, I note that the appellant opened account herein on 3rd October 1991. By 11th November 1991, the account was overdrawn to the tune of kshs.27,190.50. The only deposit I see to the account thereafter were 900,550,5000,500 and last of 10,000 on 11th may 1993 which reduced the amount overdrawn to kshs.46,400. What I see next are debit entries which I believe indicated as interest. As at 31st December 1996 the overdrawn amount was kshs.173,755.75.

16. Transactions from 11th November 1991 to 2nd December are not shown but debit as at 3rd December 1991 is shown as 25,474.5. kshs.30,000 was withdrawn from the account on 30th December 1991. Prior to that kshs.4,000,500 and 2000 was debited from the account. Total amount overdrawn became kshs.60,084.000. What follows the kshs.30,000 withdrawal are debit entries for interest.

17. The letter dated 25th April 1995 by banks Advocate indicate that civil claim was filed to recover kshs.84,630.50. This suit was filed in march 1995 for a claim of kshs.84,630.50. Amended plaint was filed on 17th July 1998 for a claim of kshs.291,045.15 plus bank charges and interest from 1st July 1998 until payment in full. Kshs.671,889.65 is indicated as amount owing as at 18th August 2009. Meaning that is when the bank stopped charging interest.

18. Amendment No.9 of 2006 which introduced section 44A in the banking Act introduced in-duplum Rule into Kenyan legislation. The provision came into effect on 1st may 2007. It was introduced to limit the amount which a bank can recover in respect of non-performing loan.

19. The section provide that the maximum amount recoverable is the sum of the principal owing when the loan became non performing and interest in accordance with contract between the debtor and institution but not exceeding the principal owing when the loan became nonperforming (when loan not serviced for 3 months). I however note from statement as 23rd November 2010 that what was brought forward to statement on 10th July 2007 is the amount indicated in the amended plaint. This means no calculation of interest was done thereafter.

20. It is evident therefore that the bank complied with the In- duplum rule. It is unfortunate that the defendant could not benefit from the rule prior to year 2007; as section, 44A could not operate retrospectively.

21. In respect to 3rd party liability, the agreement indicate that he received kshs.30,000 which he received from defendants account in the 1st defendant bank. The defendant never made any efforts to demonstrate that the money was obtained without his authority neither did he take any action against the third after being notified by the 1st respondent.

22. The defendant created contractual relationship with the 1st respondent when he requested and was allowed to open an account with 1st respondent. Bank-customer relationship was created. In respect of withdrawals from the account, the defendant denied being granted overdraft. He alleged that he lived in his (third party's) house who was 1st respondent employee at the material time and

23. The bank statement produce however, show that at the time the appellant withdrew kshs.4000 which he admitted, the account was already overdrawn worth kshs.25,475.500. There is therefore no way he could have uncashed the cheque the 4000 and 2000 cheques without requesting 1st respondent to allow overdraft.

24. In respect of subsequent withdrawal of kshs.2000 and 30,000 he never complained of any theft of his cheque leaves. There is therefore no evidence to confirm that he is not the one who uncashed the cheque. The acknowledgment agreement produced by Rodi Rege Advocate does not state that it the 3rd party who withdrew the kshs.30,000. The third party only says he received the 30000 which he obtained from defendants account. If it was not true as he alleged, he would have lodged a complaint with investigate arm to carry out investigation.

25. If indeed the defendant never benefited from the money withdrawn from the account, he had a right to raise complaint. He failed to do so but he has an option of seeking indemnity for the third party whom he joined to this suit.

26. From the foregoing, I find that the defendant obtained overdraft from the 1st respondent which stood at kshs.60,575.50 as at 30th December 1991.

FINAL ORDERS:-

1. The appeal is dismissed
2. The defendant is at liberty to seek indemnity from the third party
3. Appellant to bear costs of Appeal.

Judgment Dated, signed and delivered at Nakuru this 2nd day of May 2019.

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RACHEL NGETICH

JUDGE

IN THE PRESENCE OF:-

Jared Court Assistant

Kisila Holding Brief for Kiburi Counsel for Respondent

No Appearance for Appellant