



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI LAW COURTS**

**CIVIL APPEAL NO 512 OF 2015**

**ODERA OBAR & COMPANY ADVOCATES.....APPELLANT**

**VERSUS**

**CATHERINE WANGARI MBURU.....RESPONDENT**

**(Being an appeal from the Judgment and/or Orders of Hon Kabaria (Ms), Resident Magistrate (RM) at the Chief Magistrate's Court at Milimani in Civil Case No 4011 of 2012 delivered 6<sup>th</sup> October 2015)**

**JUDGMENT**

**INTRODUCTION**

1. In her decision of 6<sup>th</sup> October 2015, the Learned Trial Magistrate, Hon L.W Kabaria (Ms), Resident Magistrate (RM), dismissed both the Respondent's Counter-claim and the Appellant's suit. She directed that each party was to bear its own costs.
2. Being dissatisfied with the said judgment, on 6<sup>th</sup> October 2015, the Appellant filed its Memorandum of Appeal of even date. It relied on eight (8) grounds of appeal.
3. Its Written Submissions and List of Authorities were dated 31<sup>st</sup> October 2018 filed on the same date. The Respondent did not attend court or file any Written Submission despite having been served with the Hearing Notice as was evidenced in the Affidavit of Service of Festus Nzuki Kalu that was sworn on 19<sup>th</sup> October 2018 and filed on 22<sup>nd</sup> October 2018.
4. Having been satisfied that the Respondent had been duly served with the Hearing Notice of 3<sup>rd</sup> December 2018 and had failed to attend court, this court reserved judgment.

**LEGAL ANALYSIS**

5. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanor of the witnesses and hearing their evidence first hand.
6. This was aptly stated in the cases of **Selle vs Associated Motor Boat Company Ltd[1968] EA 123** and **Peters vs Sunday Post Limited [1985] EA 424** where in the latter case, the court therein rendered itself as follows:-

**“It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion...”**

7. Having looked at the grounds of Appeal that the Appellant herein had relied upon, it was evident that the sole issue that had been placed before this court was whether or not the Learned Trial Magistrate erred when she determined that the Appellant ought to have first taxed its Bill of Costs before filing suit against the Respondent herein. The court addressed all grounds together as they were related.
8. The Appellant's Plaint dated 18<sup>th</sup> July 2012 and filed on 19<sup>th</sup> July 2012 had sought judgment in its favour against the Respondent for:-

**a. Kshs 200,000/=**

**b. Special damages of Kshs 2,000 being the (sic) bank charges.**

**c. Costs of the suit plus interest.**

9. In its Plea, the Appellant had stated that, during the period of 1<sup>st</sup> July 2011 to 3<sup>rd</sup> April 2012, at the Respondent's request and instance, it offered her professional services in a transaction for the purchase and charge to Kenya Commercial Bank (KCB) in respect of an apartment erected on L R No 209/3307/2 (hereinafter referred to as the "subject property") where the value was Kshs 13,500,000/=.

10. On 3<sup>rd</sup> April 2012, the vendor of the subject property terminated the sale whereupon the Respondent issued the Appellant a cheque in the sum of Kshs 200,000/= on account of its fees. However, on presenting the cheque to the bank, the same was dishonoured due to insufficient funds. As a result, it incurred banking charges in the sum of Kshs 2,000/=. It was these amounts that the Plaintiff had claimed in its Plea.

11. In her Statement of Defence dated and filed on 28<sup>th</sup> August 2012, the Respondent denied the Appellant's claims and stated that she had asked it not to bank the said cheque as she had stopped the cheque for the reason that it had refused to continue acting for her in the said transaction. In her Counter-Claim against the Appellant, she had pleaded particulars of negligence on its part. She did not, however, attend trial court during the hearing and the matter proceeded in her absence.

12. The Learned Trial Magistrate found that the issue before her was one of recovery of the Appellant's professional fees for services it had rendered to the Respondent. Although neither party addressed her on the issue, she took the view that the Appellant ought to have complied with Section 48 (1) of the Advocates Act Cap 16 (Laws of Kenya) before filing suit against the Respondent.

13. Section 48 (1) of the Advocates Act stipulates as follows:-

**1. Subject to this Act, no suit shall be brought for the recovery of any costs due to an advocate or his firm until the expiry of one month after a bill for such costs, which may be in summarized form, signed by the advocate or a partner in his firm, has been delivered or sent by registered post to the client, unless there is reasonable cause to be verified by affidavit filed with the plaintiff, for believing that the party chargeable therewith is about to quit Kenya or abscond from the local limits of the Court's jurisdiction, in which event action may be commenced before expiry of the period of one month.**

14. She also relied on Section 49 (a) of the Advocates Act that provides as follows:-

**"Where, in the absence of an agreement for remuneration made by virtue of section 45, a suit has been brought by an advocate for the recovery of any costs and a defence is filed disputing the reasonableness or quantum thereof—**

**a. no judgment shall be entered for the plaintiff, except by consent, until the costs have been taxed and certified by the taxing officer;**

15. As the Appellant had only presented a Notice of Dishonour under the Bill of Exchange Act Cap (Laws of Kenya) and did not demonstrate that it had complied with the provisions of Section 48 (1) of the Advocates Act, as there was no consent to be recorded and as the Respondent had filed a Statement of Defence, the Trial Court found the Appellant's suit to have been premature.

16. Having considered the circumstances of this case, this court agreed with the Appellant that the Learned Trial Magistrate erred because she failed to appreciate that the claim that was before her was for recovery of the sum of Kshs 202,000/= being the sum of the dishonoured cheque it had been issued by the Respondent and the bank charges for the dishonoured cheque.

17. The purpose of the cheque was not disputed as the Respondent did not lead any evidence to demonstrate that she had asked the Appellant not to bank the cheque on the ground that it had refused to act for her.

18. The fact that the Respondent had issued the Appellant with a cheque for legal fees removed her from the operations of the Advocates Act as it was implied that the fees had been agreed upon. Indeed, in her Statement of Defence, the Respondent did not suggest that there was a dispute as to the amount of legal fees the Appellant had charged her. What this court understood was that she stopped the cheque because the Appellant had refused to continue acting for her. She did not allege that the issuance of the cheque was tainted by fraud, undue influence, misrepresentation or coercion.

19. Notably, the law relating to dishonoured cheques is well set out in the Bills of Exchange Act. It is not an issue that should be addressed in the Advocates Act which ideally deals with the process of taxing bills of costs and entry of judgment, whereafter monies owed are paid, once a negotiable instrument is issued, the legislation regulating unpaid negotiable instruments moves to the Bills of Exchange Act Cap 27 (Laws of Kenya).

20. Section 38 of the Bills of Exchange states that:-

**The rights and powers of the holder of a bill are as follows—**

**a. he may sue on the bill in his own name;**

**b. where he is a holder in due course, he holds the bill free from any defect of title of prior parties, as well as from mere personal defences available to prior parties among themselves, and may enforce payment against all parties liable on the bill;**

c. where his title is defective-

i. if he negotiates the bill to a holder in due course, that holder obtains a good and complete title to the bill; and

ii. if he obtains payment of the bill, the person who pays him in due course gets a valid discharge for the bill.

21. Section 47 of the Bills of Exchange stipulates that:-

1. A bill is dishonoured by non-payment—

a. when it is duly presented for payment and payment is refused or cannot be obtained; or

b. when presentment is excused and the bill is overdue and unpaid.

2. Subject to the provisions of this Act, when a bill is dishonoured by non-payment, an immediate right of recourse against the drawer and endorsers accrues to the holder.

22. Further, Section 55 (1) of the Bills of Exchange provides that:-

(1) The drawer of a bill by drawing it—

(a) engages that on due presentment it shall be accepted and paid according to its tenor, and that if it be dishonoured he will compensate the holder or any endorser who is compelled to pay it, so long as the requisite proceedings on dishonour be duly taken;

(b) is precluded from denying to a holder in due course the existence of the payee and his then capacity to endorse.

23. The Respondent was deemed to have become a party thereto for value when she issued the cheque. One of the Appellant's rights and powers of the cheque were to sue on the cheque in its own name as envisaged in Section 30 of the Bills of Exchange.

24. Once the Appellant was issued with the cheque, it was required to either present it for acceptance or negotiate it within a reasonable time. Cheques or negotiable instruments are not to be held as chattels but must be presented for payment or negotiated as aforesaid otherwise the drawer is discharged as stated in Section 40 of the Bills of Exchange.

25. Indeed, Section 40 of the Bills of Exchange states that:-

1. Subject to the provisions of this Act, when a bill payable after sight is negotiated, the holder must either present it for acceptance or negotiate it within a reasonable time.

2. If he does not do so, the drawer and all endorsers prior to that holder are discharged.

3. In determining what is a reasonable time within the meaning of this section, regard shall be had to the nature of the bill, the usage of trade with respect to similar bills, and the facts of the particular case.

26. This court agreed with the holding of Gikonyo J in the case of Equitorial Commercial Bank vs Wilfred Nyasim Osoko [2015] eKLR that a dishonoured cheque was “an admission of a debt in the sense of the law.”

27. The Learned Trial Magistrate ought to have entered judgment in favour of the Appellant upon finding that the said cheque had been issued and not require it to take a longer route in recovering the debt it was owed by the Respondent particularly because she did not shift the burden to the Appellant, the Respondent having failed to attend the hearing in the Trial Court.

28. In addressing the question of burden of proof, in the case of Hassana Issa & Co vs Jeraj Produce Store [1967] EA 55 the Court of Appeal had the following to say:-

“...in this case in as much as the suit was upon a cheque and in as much as the cheque was admittedly given, the onus was then on the defendant to show some good reason why the plaintiff was not entitled to have judgment upon the cheque admittedly given for the figure set out in that cheque. This position stems from Section 30 of the Bill of Exchange Act (Ch 215); which provides that the holder of a bill is prima facie deemed to be a holder in due course; but if an action on the bill is admitted or proved that the issue is affected with duress or illegality, then the burden of proof is shifted unless certain events, which the irrelevant, then the burden of proof is shifted unless certain events, which are irrelevant for this purpose, take place. The position is therefore that where is a suit on a cheque and the cheque was admittedly been given the onus is on the defendant to show circumstances which disentitle the plaintiff to a judgment to which otherwise he would be entitled.”

29. Notably, as this very court held in the case of Lubullelah & Associates vs N.K Brothers Ltd [2005] eKLR and M.G Sharma vs Uhuru Highway Development Ltd [2001] eKLR, an advocate may file suit to recover its costs or tax its costs. This was not the situation in this case.

