REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 242 OF 2017

ESTHER WANJIRU DONDE *T/A* CYBER KIDS .....APPELLANT

VERSUS

KENYA COMMERCIAL BANK LIMITED ..... RESPONDENT

(Being an appeal from the judgment of Hon. M. Murage dated 8th May 2017 delivered in Milimani CMCC No. 5921 of 2012)

JUDGMENT

1. This appeal emanates from the judgment of *Hon. M. Murage* (RM) delivered on 8th May 2017 in Milimani CMCC No. 5921 of 2012. The appellant, *Esther Wanjiru Donde T/A Cyber Kids* was the plaintiff in the suit filed in the lower court while the respondent, *Kenya Commercial Bank Limited*, was the defendant.

2. The suit was instituted by way of a plaint dated 18th December 2011 in which the appellant sought the following reliefs:

i. The sum of KShs.320,851.34;

ii. Bank charges of KSh.2,500 for a dishonoured cheque;

iii. Damages for loss of business reputation;

iv. Interest on (i) (ii) and (iii) above; and

v. Costs of the suit.

3. The appellant averred that at all material times, she was the respondent's customer operating a current account number 110XXXXXXX which was held in its Karen branch. The account was operated in the name of *Cyber Kids*. She claimed that on 30th September 2009 in the ordinary course of business, she deposited a foreign currency cheque number 033054 for USD 25,375 drawn by *Bayside Medical Group Inc*. The cheque was cleared and proceeds therefrom credited to her account on 22nd October 2009.

4. It was the appellant's case that on 2nd November 2009, her account had a credit balance of KShs.320,851.54 but on that date, the respondent unlawfully and without any lawful justification debited it with KShs.1,875,212.50 together with the bank charges of KShs.800. Before the alleged unlawful debit, she had withdrawn and utilized KShs.1,600,000 in purchasing computer hardware for her customers.

5. The appellant further alleged that due to the respondent's unlawful actions, she suffered loss of business and reputation among her customers as she was no longer able to transact business with them.

6. In its statement of defence and counterclaim dated 16th November 2012, the respondent admitted that the appellant was its customer and that a foreign currency cheque had in fact been deposited into her account on 30th September 2009 but denied that the cheque was deposited in the normal course of business. Though admitting that the proceeds of the cheque in local currency in the sum of KShs.1,875,212.50 was credited to her account on 22nd October 2009 out of which the appellant withdrew KShs.1,600,000, the respondent asserted that the crediting of the account and subsequent payment of KShs.1,600,000 to the appellant was based on a mistake of fact as when transmitted to its correspondent bank *Deutsche Bank Trust Company Americas, New York* and the paying bank *Summit Bank*, the cheque was not paid as it was dishonoured on account of forgery; that the appellant was therefore never entitled to the benefit of those funds.

7. It was thus the respondent's claim that it legitimately debited the appellant's account with the proceeds from the foreign cheque and that her account was consequently overdrawn and had an outstanding balance of KShs.2,996,433.16 by the time the bank filed its defence. The

respondent therefore counterclaimed for the said amount together with interest at 24% per annum from 20th October 2012 till payment in full together with costs of the counterclaim.

8. After a full trial, the learned trial magistrate found that the appellant had failed to prove her claim against the respondent. She dismissed the appellants suit and partially allowed the respondent's counterclaim by ordering the appellant to refund to the respondent the sum of KShs.1,875,212.50 which was proceeds of the forged cheque wrongly credited to her account. The amount was to attract interest at the prevailing commercial rates till payment in full. Each party was ordered to bear its own costs.

9. The appellant was dissatisfied with the trial court's decision. She lodged this appeal vide a memorandum of appeal dated 18th May 2017 relying on ten grounds which can be compressed into three main grounds as follows:

> i. That the learned trial magistrate erred in law and in fact in basing her findings only on the evidence adduced by the respondent while disregarding the appellant's evidence and submissions.
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> ii. That the learned trial magistrate erred in law and in fact in overruling the appellant's objection on admission of documents without calling their makers.
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> iii. That the learned trial magistrate erred in law and in fact by overturning a finding of a court of concurrent jurisdiction in criminal case no. 226 of 2010 and finding in favour of the respondent against the appellant.

10. By consent of the parties, the appeal was prosecuted by both written and oral submissions. Both parties filed their respective submissions on 8th March 2019 through their advocates on record namely *A.S. Kuloba & Wangila Advocates* who represented the appellant and *Macharia Mwangi & Njeru Advocates* for the respondent. The submissions were orally highlighted before me on 3rd April 2019. Learned counsel *Mr. Wangila* appeared for the appellant while learned counsel *Mr. Kimani* represented the respondent.

11. This being a first appeal to the High Court, it is an appeal on both facts and the law. I am fully conscious of my duty as the first appellate court which duty was articulately summarized by the Court of Appeal in ***Selle & Another V Associated Motor Boat Company & Others, [1968] EA 123***, in the following terms:

> ***"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…''***

12. On the mandate of an appellate court, the court proceeded to state as follows:

> ***"… In particular, this court is not bound necessarily to follow the trial judge's findings of fact if it appears 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 on the case generally."***

13. The role of an appellate court was also pronounced by the Court of Appeal in ***Abok James Odera T/A A.J. Odera & Associates V John Patrick Machira & Company Advocates, [2013] eKLR*** where the court stated that:

> ***"This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyse 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."***

14. I have carefully considered the grounds of appeal, the evidence on record as well as the rival written and oral submissions made on behalf of the parties and the authorities cited. Having done so, I find that the resolution of this appeal hinges on a determination of two main issues. These are;

> i) whether the learned trial magistrate erred in overruling the objection made by the appellant to the production of documents produced by the respondent without calling their makers; and
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> ii) whether the learned trial magistrate erred in her decision to dismiss the appellant's claim and to partially allow the defendant's counter claim.

15. Turning to the first issue, the court record shows that when the respondent's witness (DW1) was testifying before the trial court, he indicated that he wanted to produce in evidence documents involved in the transaction resulting from the deposit of the alleged forged cheque. The appellant objected to the production of some of the documents since the witness was not their maker and their makers had not been called as witnesses. The respondent while opposing the objection claimed that the documents had been received by the bank and the bank should be allowed to produce them. In a brief ruling, the learned trial magistrate overruled the objection saying that it ought to have been made at the pretrial stage.

16. In her submissions, the appellant contended that the learned trial magistrate's ruling overruling the objection amounted to a violation of the rules governing the admissibility of documentary evidence set out under *Section 35* of the *Evidence Act*. She submitted that the trial magistrate erred in admitting the said documents and in relying on them to arrive at her decision.

17. On its part, the respondent maintained that the trial court was right in overruling the objection on grounds that when it filed its defence and counterclaim, it also filed its bundle of documents which included the documents that were the subject matter of the objection; that it also indicated that it was calling one witness whose witness statement was also filed; that having disclosed its case at the onset, the appellant ought to have indicated during the pretrial stage that it would insist on the respondent producing the makers of the documents as witnesses and should not have waited to raise the objection when the respondent was giving its evidence four years later. In the respondent's view, the objection was not only belated but was also made in extreme bad faith.

18.Having considered the objection and the submissions made by the parties, I find that though there is no law that limits the making of objections to the production of documents to the pretrial stage, the purpose of pretrial is to disclose each party's evidence and to give parties an opportunity to thrash out all preliminary issues including which witnesses ought to be called in the trial in order to assist the court achieve the overriding objective of the *Civil Procedure Act* (hereinafter the Act) as stipulated in *Sections 1A and 1B* of the Act. The overriding objective of the Act is to facilitate the just, expeditious, proportionate and affordable resolution of civil disputes. The parties to civil proceeding and their advocates are statutorily enjoined under *Section 1A (3)* to assist the court in furthering the aforesaid overriding objective and to that extent, I agree with the learned trial magistrate that the appellant ought to have indicated at the pretrial stage that the respondent should avail the makers of those documents as witnesses during the trial instead of doing so at the point at which the documents were being produced because this obviously amounted to an ambush.

19. That said, I must point out that the learned trial magistrate does not appear to have addressed her mind to the law that governs the admissibility of documentary evidence before arriving at her decision. *Section 35* of the *Evidence Act* requires that documents must be produced by their makers except where the maker is dead or cannot be found or is incapable of giving evidence or if his attendance cannot be procured without an amount of delay or expense which in the circumstances of the case appears to the court to be unreasonable.

20. When responding to the objection, the respondent's counsel merely stated as follows:

> ***"The documents were received by the bank on 2nd November 2009. It should be admitted as evidence."***

21. The respondent did not attempt to bring its case within the exceptions provided under *Section 35* of the *Evidence Act* either by claiming that the authors of the documents were dead or could not be found or could not be procured without unnecessary expense. The learned trial magistrate therefore erred in not finding that a good basis had not been laid for the production of the said documents by a witness who was not their maker.

22. In my view, the intention of *Section 35* of the Act was to ensure that only genuine and authenticated documents were tendered in evidence as proof of facts in dispute and that opposing parties are given an opportunity to cross examine the maker of the documents unless it was practically impossible or it was extremely difficult or unduly expensive to procure their attendance in court or where the witnesses attendance cannot be procured without occasioning unnecessary delay.

23. The documents whose production the appellant objected to were a swift notice/advise dated 28th October 2009 from *Deutsche Bank Trust Company Americas*; an affidavit sworn by Affiant on behalf of *Bayside Medical Group Inc.*; copy of cheque no. 0333054 issued by *Bayside Medical Group Inc* endorsed as a forgery and copy of cheque no. 033354 stamped received by the defendant on 26th October 2009.

24. As is evident from the face of the documents, the makers of the documents were persons who resided in America or outside the jurisdiction of the court and even if the respondent did not lay a good foundation to show why they could not be availed as witnesses to produce the documents, it is obvious that their attendance could not have been procured without causing unnecessary delay and expense which would have ran contrary to the aforestated overriding objective.

25. In view of the foregoing, I have come to the conclusion that the admission of the said documents without calling their makers was justified and lawful going by the reasons stated above but not the reason advanced by the learned trial magistrate.

26. In the event that I am wrong in the above finding, the question that must now be answered is this: did the admission of the documents affect the validity of the trial court's decision? The answer to this question can be found in the provisions of *Section 175* of the *Evidence Act* which provides that:

> ***"The improper admission or rejection of evidence shall not of itself be ground for a new trial or for reversal of any decision in a case if it shall appear to the court before which the objection is taken that, independently of the evidence objected to and admitted, there was sufficient evidence to justify the decision, or that if the rejected evidence had been received it ought not to have varied the decision.***

27. In her evidence, the appellant who testified as PW1 claimed that she received the cheque for USD 25,375 drawn by her client *Bayside Medical Group*. She reiterated her pleadings relating to how she banked the cheque and how her bank account was credited with the cheque's proceeds. She admitted having withdrawn KShs.1,600,000 on 24th October 2009 after which the bank's branch manager informed her that the cheque had been confirmed to be a forgery. The bank subsequently debited KShs.1,875,202 from her account when it had a credit balance of KShs.320,000. As a result, a cheque she had issued to one of her business partners was dishonoured on 5th November 2009.

28. In her evidence on cross-examination, PW1 claimed that the cheque was payment for supply of goods to *Bayside Medical Group*. She admitted that she had not produced any evidence to show that she had any business dealings with *Bayside Medical Group*. During re-examination, she denied having forged the cheque herself but in her entire evidence, she did not deny that the cheque was indeed a forgery.

29. The respondent's witness (DW1) testified that after the appellant deposited the cheque, the bank forwarded it to its corresponding bank, *Deutsche Bank Trust Company Americas* for clearance and payment. After 21 days, they received information from the corresponding bank

that the cheque had been cleared. Relying on this information and in good faith, the bank credited the appellant's account with the proceeds of the cheque and notified her accordingly. On 24th October 2009, the bank paid the appellant KShs.1,600,000 but on 2nd November 2009, it received information from its corresponding bank that the cheque had been dishonoured by the paying bank, *Summit Bank* because it was found to be a forgery. As the bank had credited the appellant's account with its own money in the belief that the cheque was genuine and was going to be honoured, it reversed the transaction by debiting the account with the proceeds of the cheque in order to recover its money. The account was consequently overdrawn with a debit balance of KShs.2,996,433.16 which continued to attract interest at the rate of 24% per month.

30. In her judgment, after considering the evidence adduced by both parties, the learned trial magistrate found that the cheque was a forgery; that the appellant's bank account had been credited with proceeds of the cheque by mistake and the appellant could not therefore be allowed to benefit from the bank's mistake.

31. After my own independent analysis of the evidence on record, I find that though the appellant denied having forged the cheque, she did not deny that the cheque was as a matter of fact a forgery. I also find that quite apart from the documents received by the respondent from the paying and corresponding bank, there was evidence from DW1 which proved on a balance of probabilities that the bank did not receive the money proceeds of the cheque from its corresponding bank and that the crediting of the appellant's account with the amount was made in good faith on the mistaken belief that the cheque would be paid upon presentation to *Summit Bank*.

32. It is instructive to note that the appellant did not produce any iota of evidence to prove that she had any business dealings or transactions with the alleged drawer of the cheque to show the context in which the cheque was issued and that the cheque had been banked in the ordinary course of business, facts which would especially be within her knowledge.

33. From the evidence on record, it is clear to me that it was not disputed that the cheque in question was not honoured. What was disputed was the reason why it was dishonoured and that is why the respondent was producing the documents whose production the appellant objected to.

34. In view of the foregoing, I am unable to fault the learned trial magistrate's finding that though the bank ought to have exercised due diligence to confirm that the cheque had been paid before crediting the appellant's account, the truth of the matter is that the cheque was not honoured upon presentation to summit bank. The crediting of the appellant's account with the proceeds of the cheque was therefore a mistake and the appellant was not entitled to the money so credited.

35. The trial court's decision ordering the appellant to refund the respondent the money that was wrongly credited to her account was supported by the evidence on record and I have no reason to interfere with it.

36. The appellant had also sought damages for loss of business reputation. She however did not adduce any evidence to prove the said claim. The trial court's finding to this effect was therefore correct.

37. In view of the foregoing, I have come to the same conclusion as the learned trial magistrate, albeit for different reasons, that the appellant failed to prove her claim against the respondent on a balance of probabilities. Her claim was therefore lawfully dismissed.

38. In allowing the counter claim, the learned trial magistrate ordered a refund of KShs.1,875,212.50 to the respondent instead of the claimed amount of KShs.2,996,433.16 which was correct in my view since the respondent did not adduce evidence to show how the proceeds of the cheque mushroomed to the amount claimed. The learned trial magistrate ordered that the amount be paid with interest at the prevailing commercial rates but did not specify the rate of interest she had in mind. The magistrate ought to have specified the rate of interest that was to accrue on the awarded amount for purposes of clarity and certainty in the computation of that interest.

39. Before I pen off, I would like to comment on the complaint raised by the appellant that the trial magistrate erred by overturning the finding made by a court of concurrent jurisdiction in criminal case no. 226 of 2010. I have perused the judgment in that case. It is not in doubt that the charges that faced the appellant in the criminal case revolved around the cheque that she had deposited in the account held with the respondent and the allegation that the cheque was a product of forgery. The appellant was acquitted of all the charges in that case. However, the fact that she was acquitted in that case did not necessarily mean that she would automatically succeed in her civil claim because as correctly pointed out by the learned trial magistrate, the standard of proof in the two cases was totally different. The burden of proof in the criminal case was beyond any reasonable doubt while in the civil claim, it was on a balance of probabilities. The two cases were different and distinct from each other and a decision in one of them could not have had the effect of overturning or overruling a decision in the other. Nothing therefore turned on that ground of appeal.

40. For all the reasons stated above, I uphold the learned trial magistrate's decision save for the award of interest which I substitute with an order that the amount allowed in the counter claim shall attract interest at court rates from the date of judgment of the trial court until payment in full.

41. In the end, it is my finding that this appeal save for the award of interest on the counterclaim lacks merit and it is dismissed with costs to the respondent.

It is so ordered.

DATED, SIGNED and DELIVERED at NAIROBI this 17th day of October, 2019.

C. W. GITHUA

JUDGE

In the presence of:

Mr. Gulam Ali holding brief for Mr. Wangila for the appellant

Mr. Mwaura holding brief for Mr. Kimani for the respondent

Mr. Salach: Court Assistant