



**REPUBLIC OF KENYA**

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

**CIVIL DIVISION**

**HIGH COURT CIVIL APPEAL NO. 486 OF 2015**

**MUGOYA VEGETABLE SHOP LIMITED.....APPELLANT**

**VERSUS**

**BARCLAYS BANK OF KENYA LIMITED.....RESPONDENT**

**(Being an appeal from the Judgment delivered on 23<sup>rd</sup> February 2015**

**by Hon. M Chesang (Senior Resident Magistrate) Chief Magistrate's Court**

**at Milimani Commercial Courts in CMCC No. 1848 of 2012)**

**JUDGMENT**

1. The Appellant who was the Plaintiff in the lower court instituted a case against the Respondent/Defendant claiming the sum of Ksh.451,870/=.
2. The Appellant's claim was that it used to operate Account No. 070xxxxxx with the Respondent Bank's Bunyala Branch which account the Appellant closed on 23<sup>rd</sup> March, 2011. That the Appellant thereafter never opened any other account with the Respondent. That on unknown dates in the year 2011 the Respondent negligently and fraudulently caused the opening of Account No. [xxxx] in the Appellant's name, Mugoya Vegetable Shop Ltd, without the Appellant's Directors/ Shareholders participation. That cheques drawn by the Appellant's customers were fraudulently deposited in the said account and the monies withdrawn.
3. The Respondent denied the Appellant's claim as per the statement of defence filed dated 15<sup>th</sup> June, 2012. The Respondent denied any irregularities, mismanagement or negligence involving the Appellant's Accounts.
4. After the conclusion of the trial the trial magistrate dismissed the Appellant's case with costs. That is what triggered the filing of the appeal herein on the following grounds:
  1. **The learned magistrate erred in law and in fact by dismissing the appellant's suit contrary to the weight of the evidence.**
  2. **That the trial magistrate erred in law and in fact by addressing her mind on issues not before court and which the defence did not tender evidence.**
  3. **The trial magistrate misdirected herself in law and in fact by failing to analyze the Appellant's evidence in support of the claim hence find that same had been proved.**
5. The appeal was canvassed by way of written submissions which I have considered.
6. This being a first appeal, this court is duty bound to re-evaluate the facts afresh and come to its own independent findings and conclusions. See for example the case of **Selle v Associated motor Boat Co. & others [1968] E.A. 123** where it was stated as follows:-

**“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 demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif v Ali Mohamed sholan (1955), 22 E.A.C.A. 270)”.**

7. The Appellant through its Chief Executive Officer, PW1 Abdul Rasul Hassan Sidi testified and adopted his statement as his evidence herein. His evidence was that the Appellant supplied fresh produce to its institutional customers who made payments by cheques. That the said cheque payments were not reflected in the Appellant's bank statement at Equity Bank Ltd Mombasa branch. That on following up with the customers the Appellant established that the cheques in question had been deposited with the Respondent bank Account No. [xxxx] and the proceeds withdrawn. The Appellant gave the details of the cheques as follows:

**1. Cheque No.339782 Ksh.184,728.00**

**2. Cheque No.000582 Ksh.87,247.00**

**3. Cheque No.009564 Ksh.89,394.10**

**4. Cheque No.079515 Ksh.59,397.80**

**5. Cheque No.002675 Ksh.31,103.40**

8. The Appellant's evidence was that it had closed its account with the Respondent and was not the holder of Account No. [xxxx] where the cheques in question had been fraudulently banked by its employee known as Augustine Kiplangat Kipkurui. That the matter was reported to the police but he was not aware if the said employee was charged.

9. During cross-examination, the Appellant stated that he did not produce a copy of the bank statement from Equity Bank and stated that the Appellant's company through its employee's or himself used to collect the cheques from their customers and then bank the same.

10. The Respondent's side did not call any witness following a failed application for adjournment.

11. The Appellant's evidence was that it was not a holder of any account at the Respondent Bank at the material time. It was therefore not expected to hold any documents in its name. The Appellant's claim that Account No.[xxxx] is where the cheques in question were banked is not supported by any sufficient evidence. Given that the Appellant's evidence was that it was not the holder of the said fraudulent account, it could not have had any access to documents for the same. However, it could have called evidence from its customers who had issued the cheques to testify in respect of which account the proceeds of the said cheques ended. No evidence of the investigations carried out by the police was adduced. The investigations carried out could have shed more light in the matter.

12. The Appellant stated that the Respondent opened a fraudulent account in its name. Although the statements of defence admitted the description of the parties, it is noted that any negligence or fraud on the Respondent's side was denied. There was no evidence called from the Registrar of companies to shed light on the issue of the said existence of two limited liability companies in the same name.

13. The Respondent did not testify. The documents filed by the Respondent are therefore not evidence. The Appellant's documents that were produced as exhibits are the demand letter and correspondence between the parties. The only letter dated 3<sup>rd</sup> November, 2011 written by the Respondent to the Appellant that was produced stated that internal investigations were going to be conducted. There was no other correspondence from the Respondent exhibited. There was no admission of any liability in the said letter.

14. With the foregoing, this court's conclusion is that the Appellant failed to prove its case on a balance of probabilities. The appeal has no merits and is dismissed with costs.

**Dated, signed and delivered at Nairobi this 8<sup>th</sup> day of Oct., 2019.**

**B. THURANIRA JADEN**

**JUDGE**