



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT KISUMU

(CORAM: CHERERE-J)

CIVIL APPEAL NO.57 OF 2018

BETWEEN

PAUL OMONDI OGUTU T/A BUDDIES PAINTS &

SUPPLIES.....APPELLANT

AND

ECO BANK LIMITED.....RESPONDENT

(Being an Appeal from the Judgment and Decree in Kisumu CMCC No. 421 of 2014 by Hon. M. Agutu (SRM) on 31st May, 2018)

JUDGMENT

1. **ECO BANK LIMITED** (hereinafter referred to as Respondent) sued **PAUL OMONDI OGUTU t/a Buddies Paints & Supplies** (hereinafter referred to as Appellant) in the lower court claiming Kshs. 1,345,060.96 with interest from 21st August, 2012 till payment in full and costs of the suit.

2. The Defendant/Appellant denied the claim and pleaded that the Respondent disbursed Kshs. 592,684.35 which was less than the agreed sum and prayed for dismissal of the suit with costs.

Plaintiff's case

3. **PW1 THADEUSOKWARO MBOGA** the Respondent's manager at its Kisumu branch stated that by a letter of offer dated 16.01.12, the Appellant was advanced a sum of Kshs. 1,000,000/- at his request which was to be repaid in 6 equal instalments of Kshs. 180,600/- together with interest at 28% per annum and a default interest of 24% over and above the interest rate which he failed to repay necessitating the filing of a suit. In support thereof, the witness produced as exhibits the letter of offer and statement of account for the period up to 24.03.17 which shows that the outstanding sum stood at Kshs. 1,992,812.06.

4. In cross-examination by Mr. Odeny for the defendant, the witness conceded that 12 cheques issued by the defendant were debited on defendant's account in 2011 which was more than 6 months from the date of their issue.

Defendant's case

5. **PAUL OMONDI OGUTU**, the Defendant conceded that he applied for a loan of Kshs. 1,000,000/- out which the Plaintiff paid 12 stale cheques leaving him with a balance of Kshs. 407,315.65 making it impossible for him to service the loan. In cross-examination, the Defendant conceded that he had issued the cheques for payment by the bank.

6. In a judgment delivered on **31st May, 2018**, the trial court found that Appellant indebted to the Respondent and entered judgment for the sum of Kshs. 1,345,060.65 with interest from 21st May, 2012 till payment in full.

The Appeal

7. The Appellant being dissatisfied with the lower court's decision on 29th June, 2018 filed the Memorandum of Appeal of same date which

sets out 5 grounds which I have summarized into 3 grounds as follows: -

- 1. The trial magistrate grossly misdirected herself in allowing the Respondent's suit**
- 2. The trial magistrate erred failed to appreciate that the Respondent was in breach of the terms of the loan**
- 3. The trial magistrate erred in law and in fact in failing to appreciate that the Respondent had honoured 12 stale cheques**
- 4. The trial magistrate erred in law and in fact to uphold service yet there was a dispute on the same**

8. As a first appellate court the duty of course is to approach the whole of the evidence on record from a fresh perspective and with an open mind. As was espoused in the Court of Appeal case of **Selle & Another v Associated Motor Boat Co. Ltd & Another (1968) EA 123**, my duty is to evaluate and re-examine the evidence adduced in the trial court in order to reach a finding, taking into account the fact that this court had no opportunity of hearing or seeing the parties as they testified and therefore, make an allowance in that respect.

SUBMISSIONS BY THE PARTIES

9. When the appeal came before me for mention for directions on 09.05.19, I directed that the appeal be argued by way of written submissions which both parties dutifully filed.

Appellant's submissions

10. Appellant submitted that while he applied for a loan of Kshs. 1,000,000/-; the Respondent disbursed Kshs. 407,315.35 and retained Kshs. 592,684.35 that had been debited on Appellant's account in respect of 12 cheques for the said sum.

11. Appellant faulted the trial court for failing to appreciate that the cheques were debited on 31st October, 2011 which was 14 months from the date of issuance and were therefore stale.

Analysis and Determination

12. I have considered the appeal in the light of the evidence on record and the cited authorities.

13. The trial court found as a fact that the Respondent advanced by a sum of Kshs. 1,000,000/- to the Appellant at his request. The letter of offer demonstrates that the sum was to be repaid in 6 equal instalments of Kshs. 180,600/- together with interest at 28% per annum and a default interest of 24% over and above the interest rate.

14. There's evidence that the Respondent applied Kshs. 592,684.35 to clear 12 cheques issued by the Appellant and only disbursed Kshs. 407,315.35.

15. Section 73 of the Bills of Exchange Act Chapter 27 Laws of Kenya (*the Act*) define a cheques to mean:

- 1. A cheque is a bill of exchange drawn on a banker payable on demand.**

16. Under the provisions of Section 10 of *the Act*

- 1. A bill is payable on demand—**

- a. which is expressed to be payable on demand, or at sight, or on presentation; or in which no time for payment is expressed**

17. Section 45 of *the Act* on the Rules as to presentment for payment provides that

- 1. Subject to the provisions of this Act, a bill must be duly presented for payment; and if it be not so presented, the drawer and endorsers shall be discharged.**

- 2. A bill is duly presented for payment which is presented in accordance with the following rules—**

- a. where the bill is not payable on demand, presentment must be made on the day it falls due;**

- b. where the bill is payable on demand, then, subject to the provisions of this Act, presentment must be made within a reasonable time after its issue in order to render the drawer liable, and within a reasonable time after its endorsement, in order to render the endorser liable; and in determining what is a reasonable time, regard shall be had to the nature of the bill, the usage of trade with regard to similar bills, and the facts of the particular case;**

18. The Respondent bank was bound to pay the 12 cheques drawn on it under section 73 (1) of *the Act* which states a cheque is a bill of

exchange drawn on a banker payable on demand.

19. Section 75 of the same *Act* says that;

The duty and authority of a banker to pay a cheque drawn on him (the banker) by his customer are determined by

(a) Countermand of payment;

(b) notice of the customer's death

20. Section 74 of *the Act* on the other hand provides that:

Subject to the provisions of this Act: -

(a) Where a cheque is not presented for payment within a reasonable time of its issue, and the drawer or the person on whose account it is drawn had the right at the time of the presentment as between him and the banker to have the cheque paid and suffers actual damage through the delay, he is discharged to the extent of that damage, that is to say, to the extent to which the drawer or person is a creditor of the banker to a larger amount than he would have been had the cheque been paid;

(b) In determining what is a reasonable time regard shall be had to the nature of the instrument, the usage of trade, and of bankers, and the facts of the particular case.

21. It is well known that a cheque bearing a date six months or more prior to its date of presentation to the drawee bank for payment may be dishonoured as 'stale', section 74 paragraphs (a) and (b) are not about stale cheques but cheques which are not presented for payment within a reasonable time. It seems to me that whether or not a cheque is stale is a matter of fact and not a matter of law. As such that fact has to be proved by the party alleging it and the question of the Court taking judicial notice merely because the cheque in question is six or more months old does not arise.

22. The Appellant did not cancel the cheques and a mere statement from the Appellant and the Respondents that the 12 cheques were stale does not make them stale as, not only was the Respondent under a contract with the drawer, but it was also under a statutory duty to pay the cheques on demand.

23. Having said that, I find that the trial court rightfully found that the Respondent acted lawfully when it debited the Appellant's account with the sum of money in the 12 cheques. The trial court's decision in favour of the Respondent cannot therefore be faulted.

24. From the foregoing analysis, I am not persuaded that this appeal has merit. The same is disallowed with costs to the Respondent.

DATED AND DATED IN KISUMU THIS 03rd DAY OF October 2019

T. W. CHERERE

JUDGE

Read in open court in the presence of-

Court Assistant - Amondi/Okodoi

For the Appellant - N/A

For the Respondent - Mr Bagada/Mr Yogo