



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

CIVIL APPEAL NO. 59 OF 2017

STANCOM SACCO LIMITED.....APPELLANT

-VERSUS-

KENYA COMMERCIAL BANK LIMITED.....RESPONDENT

(Appeal arising from the judgment and decree of Hon. M. M. Wachira, Senior Resident Magistrate in Migori Chief Magistrate's Court Civil Case No. 2688 of 2015 delivered on 04/05/2017)

JUDGMENT

Background:

1. The appeal herein arose from the dismissal of **Migori Chief Magistrate's Court Civil Case No. 2688 of 2015** (hereinafter referred to as '**the suit**') wherein the Appellant had claimed general damages for breach of contract, loss of business, loss of credibility, shame and humiliation as well as special damages of Kshs. 169,800/=, costs and interest.
2. The suit was premised on failure by the Respondent to honour the Appellant's instructions to transfer some money from one of its accounts held by the Respondent by way of RTGS. Whereas the Appellant contended breach of contract and negligence on the part of the Respondent, the Respondent on its part contended that it could not give effect to the Appellant's instructions as the account the Appellant held with the Respondent in which the transaction was to be carried out had been rendered dormant and until and unless the Appellant re-activated the said account no single transaction could be undertaken in that account.
3. At the hearing of the suit the Appellant was represented by its Chairman one **Graham Kagali (PW2)**. The Respondent was represented by **Ann Zawadi (DW1)**. The evidence of the witnesses was buttressed by documents and at the close of the respective cases the court considered the pleadings, the evidence, the submissions and the law and rendered its judgment which is the subject of this appeal.

The Appeal:

4. Being dissatisfied with the judgment and decree, the Appellant preferred an appeal and filed a Memorandum of Appeal in this Court dated 23/05/2017 on the same day where it wholly challenged the judgment in 10 somehow repetitive grounds.
5. Directions were subsequently taken and upon consensus of the Counsels and the approval of this Court the appeal was to be disposed of by way of written submissions and both parties duly complied hence this judgment. Each party vouched for its position and relied on various judicial decisions.

Analysis and Determinations:

6. As the first appellate Court it is now well settled that the role of this Court is to revisit the evidence on record, evaluate it and reach its own conclusion in the matter. (See the case of **Selle & Ano. vs. Associated Motor Boat Co. Ltd (1968) EA 123**). This court nevertheless appreciates that an appellate Court will not ordinarily interfere with findings of fact by the trial Court unless they were based on no evidence at all, or on a misapprehension of it or the Court is shown demonstrably to have acted on wrong principles in reaching the findings. This was the holding in **Mwanasokoni – versus- Kenya Bus Service Ltd. (1982-88) 1 KAR 278** and **Kiruga –versus- Kiruga & Another (1988) KLR 348**).
7. To that end, I have keenly read and understood the contents of the Memorandum of Appeal, the suit, the parties' submissions and the respective decisions tendered in support of each of the parties' cases. The main issue for determination in this appeal is whether the Respondent rightly declined to give effect to the Appellant's instructions since all the other issues raised by the Appellant derive from that principal issue.

8. From the record there is no dispute that the Appellant operated Account No. 1130194086 at the Respondent's Migori Branch and that the signatories to that account were **Eliud Papo, Isaya Matiko Chacha** and **Tom Mboya Ongel**. There is also no dispute that the last transaction in that account was on 18/01/2012. That being the case, it means that as at the time the Appellant lodged the application to transfer funds from that account by way of RTGS on 27/10/2015 the account had been dormant for close to 4 years.

9. In such a case it does not require rocket science for one to know that an account left untransacted for such a long period is automatically rendered dormant and any other transaction is restricted to *inter alia* prevent fraud and that no further transaction could be undertaken without first activating the account. Further, an inactivated account may become an unclaimed asset. That is clearly laid down in the Respondent's Operating Manual as approved by the Central Bank of Kenya as the regulator. The Manual was produced as an exhibit with the consent of the Appellant and DW1 duly cross-examined on its contents. Needless to say, the practice of re-activating dormant accounts is common in the banking industry and Courts of Law would ordinarily take judicial notice of such. However, in this case the Manual was rightly produced as an exhibit.

10. Having found as such, the resultant issue is how the Respondent handled the matter when the Appellant lodged their application. I must state that opening and maintaining a bank account creates a contract between the bank and the holder. That contract is usually contained in the account opening documents and is regulated by the law. Therefore, in this case there was and so is a valid contract between the Appellant (through the three signatories) and the Respondent. The Respondent could only deal with the signatories on matters that account. I have noted from the record that none of the signatories to the account testified. It was only the Chairman to the Appellant (PW2) who testified on behalf of the Appellant. One of the signatories, **Tom Mboya Ongel (PW1)**, was stepped down as he began testifying so as to avail some documents relating to the account, but was never recalled. PW2 was hence not privy to the transactions in the account in issue and could not positively attest to matters relating to the account. PW2 did not either lodge the application for funds transfer. His testimony was hence largely of very little probative value if at all any.

11. The evidence of DW1 on the other hand was by the officer who dealt with the account signatories in the afternoon of 27/10/2015 and thereafter. That evidence carries more weight than that of PW2. What this Court must now do is to ascertain if the evidence by DW1 is believable. I have perused the evidence of DW1 alongside all the exhibits produced. The evidence expounded the Respondent's procedures on dormant accounts and how DW1 dealt with the signatories. It was her testimony that all applications for transfer of funds by way of RTGS must be received by 1400 hrs. to be able to be processed that day otherwise they are usually processed on the following day. That, as the Assistant Customer Manager at the Respondent's Thika Branch she received the Appellant's application on 27/10/2015 at 1429 hrs. and since it was way passed the normal processing times DW1 marked the application for processing at the back office on the following day.

12. In the morning of 28/10/2015 the application was dealt with and it was found that the account was dormant. DW1 then called one of the account signatories one **Isaya Matiko Chacha** through No. **0721912126** which she obtained from the customer database and informed him of the status of the account and that the signatories were to visit any of the Respondent's branches countrywide and re-activate the account before the RTGS application was acted upon. Isaya Matiko Chacha told DW1 that he was passing the information to the other signatories and promised to revert to DW1 but in vain. Since Isaya Matiko Chacha did not testify then the evidence of DW1 on the issue remained uncontroverted. The submission by the Appellant's Counsel that there was no evidence that the number belonged to the said Isaya Matiko Chacha cannot hold as the evidence of DW1 gave a basis and the genesis of the number and as such that evidence could only be controverted by the said signatory or by any other legally acceptable means but not by PW2 or by Counsel's submissions more so given that the standard of proof in civil cases is on a preponderance of probabilities. Although the submission may appear to be persuasive it has the effect of raising the standard of proof in a civil case to the one in criminal cases; proof beyond any reasonable doubt, an act which is not permissive in civil litigation.

13. It is on the foregone that the Respondent's action must be weighed to ascertain whether it acted negligently. At this point it is imperative to look into a bank's duty to a customer. The Court in **Shalmar Flowers Self Help Group v. Kenya Commercial Bank (2016) eKLR** dealt with the issue and in quoting from the case of **Simba Commodities Ltd vs. Citibank N.A. (2013) eKLR** the said duty was explained at **paragraph 42** as follows: -

'...a bank has a duty under its contract with its customer to exercise 'reasonable care and skill' in carrying out its part with regard to operations within its contract with its customer. The standard of that reasonable care and skill is an objective standard applicable to bankers. Whether or not it has been attained in any particular case has to be decided in the light of all the relevant facts, which can vary almost infinitely. The relevant considerations include the prima facie assumption that men are honest, the practice of bankers, the very limited time in which banks have to decide what course to take with regard to a cheque presented for payments without risking liability for delay, and the extent to which an operation is unusual or out of the ordinary course of business. An operation which is reasonably consonant with the normal conduct of business (such as payment by a stock broker into his account of proceeds of sale of his client's shares) of necessity does not suggest that it is out of the ordinary course of business. If 'reasonable care and skill' is brought to the consideration of such an operation, it clearly does not call for any intervention by the bank. What intervention is appropriate in the exercise of reasonable care and skill again depends on circumstances.'

14. As to whether the Respondent exercised reasonable care and skill in this case, I am so convinced. I say so because the Respondent immediately it realized that the account was dormant called one of the account signatories and explained the status and even advised on the way forward with caution that the intended transaction by way of RTGS could only be completed upon the re-activation of the account. The account signatory promised to revert but in vain. Reasonably, there was nothing more the Respondent was supposed to do than to notify the Appellant of the account status and advise on what to be done. The Respondent duly complied with **Article 46(1)(b)** of the **Constitution**.

15. Given that the said Isaya Matiko Chacha promised to update DW1 on the re-activation, the Appellant remained adequately notified of the fact that no funds shall be transferred as requested until the re-activation of the account was done. The Respondent cannot therefore be held responsible by the Appellant's failure to re-activate the account and subsequent issuance of third-party cheques on the basis of the RTGS transaction. Infact a reasonable account holder has a duty to ascertain the availability of funds in an account prior to issuance of a cheque otherwise one may not only be liable, but criminally so.

16. The Respondent therefore benefitted from the exclusion clause on the RTGS Application Form as it proved that it acted with reasonable care and skill on its part in the circumstances of the matter.

Disposition:

17. Having found in favour of the Respondent on the main issue none of the other issues raised could legally stand. It is on that score that this Court affirms the decision of the trial court to dismiss the suit. The appeal is hence unmerited and is hereby dismissed with costs. As part of the directions in this matter, this judgment shall apply to **Civil Appeal No. 58 of 2017**.

18. Orders accordingly.

DELIVERED, DATED and SIGNED at MIGORI this 4^h day of October, 2018.

A. C. MRIMA

JUDGE

Judgment delivered in open Court and in the presence of: -

Messrs. Nyauke & Co. Advocates for the Appellant.

Mr. Abisai instructed by Messrs. Abisai & Co. Advocates for the Respondent.

Evelyne Nyauke – Court Assistant