



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 606 OF 2015

AKIBA BANK LIMITED.....APPELLANT

VERSUS

LITELINE ENTERPRISES LIMITED.....RESPONDENT

(Being an appeal from the Judgment and Decree of Hon. SPM A. Lorot (Mr) delivered on 13th November, 2015)

JUDGMENT

The plaintiff operated the business of a bank providing services to clients which included the respondent herein. The respondent operated an account with the appellant whereby at some stage a sum of Kshs. 2,669,000/= was withdrawn at the instance of the respondent's employee one Pius Sikuku.

When the directors of the respondent discovered the said withdrawals they contacted the appellant who confirmed that indeed this sum had been withdrawn, yet the only signatories to the cheques were the two co-directors who were brothers. In the meantime the directors of the respondent discovered that the cheque books were missing from their employee's office who by then had gone missing. This compelled the respondent's directors to take account of the money that had been lost and came to a total of Kshs. 2,669,000/=. By that time the employee had disappeared and was subsequently arrested and charged with some criminal offences.

The respondent blamed the appellant for the loss, holding that it owed them a duty to enquire why a third party was making withdraws of such large sums from the account. The appellant denied the respondent's claim and stated that they operated their account in line with standing instructions.

After the hearing, the lower court found the appellant liable to the respondent and ordered that the appellant pays the sum of Ksh. 2,669,000/= plus interest and the costs of the suit. The appellant was aggrieved by that judgment and filed this appeal raising 11 grounds of appeal to challenge the lower court judgment.

The summary of the appeal is that the lower court erred in law in failing to appreciate that the respondent did not adduce sufficient evidence to prove particulars of breach of fiduciary duty set out in the plaint or any imputed negligence or breach of statutory duty owed to it.

The lower court was also faulted for relying on the evidence of a document examiner, yet it involved rigorous investigations where a simple bank teller could not be expected to make a similar discovery on the basis on cursory glance during the transaction. The respondent was also faulted for the failure to keep the cheque book in safe custody thereby facilitating the fraud that occurred.

Parties have filed their submissions which I have noted alongside the authorities cited. On discovering the withdrawals without their authority, the directors of the respondent wrote to the appellant in the following terms,

“Irregular cash withdraws:

.....Further to this we have noticed that you have paid severally cash cheques without confirming with the signatories. In our opinion we feel that is pure negligence on your part and therefore shall hold you responsible.”

Whereas the respondent insisted that the appellant ought to have called the directors to confirm whether or not instructions or authority had been given, the appellant stated there was no obligation to call any of the directors, because such instructions should have come from the company and none had been given.

As the first appellate court, it is my duty to evaluate the evidence adduced before the trial court with a view to arriving at an independent conclusion. Whereas it may be true that the appellant had no duty to confirm the withdrawals, there was evidence that this account was not prone to frequent movement of cash. It was expected therefore that, the frequency of the withdrawals should have triggered some suspicion so as to compel the appellant's employees or cashiers to call the client to confirm the withdrawals. This would not have caused any inconvenience except a slight delay in making those payments.

It is noted that the cash withdraws were frequent and substantial. The particulars of negligence set out in paragraph 8 of the plaint pointed to lack of due diligence on the part of the appellant. The practice of verification employed by the appellant was wanting, to say the least, and open to abuse.

In arriving at the conclusion that the appellant was liable to the respondent, the trial court cited some cases on the responsibility of the appellant. In the case of **Thackwell vs. Barclays Bank Limited [2002] ALL ER 676** the court said as follows,

“The collecting banker has a contractual duty to make enquiries where the circumstances in which the cheque was presented for collection are unusual and out of the ordinary course of business.”

In yet another case, **Barclays Bank PLC vs. Quincecare Limited & Another [1992] 4 ALL ER 57-76** the court said as follows,

“Certain transactions are so out of the ordinary course that they ought to arouse doubt and put the bank on inquiry. If the bank fails to enquire, it cannot be said to have acted without negligence in converting a bill.”

The transactions complained of in the case at hand cannot be said to be ordinary, and the trial court correctly observed that large withdrawals were made by the employee of the respondent, including two withdrawals on the same day and that all the withdrawals were in cash. This should have raised sufficient ground on the part of the appellant to inquire from the account holders. The failure to do so was in breach of the duty of care expected of a financial institution to its clients.

Notwithstanding the resistance mounted by the appellant to the respondent's claim, I find that sufficient evidence was adduced to justify the respondent's claim against the appellant. I agree with the findings of the lower court and uphold the judgment thereof.

I find that the appeal herein is lacking in merit and therefore dismiss the same with costs to the respondent.

Dated, signed and delivered at Nairobi this 6th day of December, 2018.

A. MBOGHOLI MSAGHA

JUDGE