



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL APPEAL NO. 111 OF 2012

BANK OF AFRICA KENYA LIMITED..... APPELLANT

- V E R S U S -

FORTUNE MARK PORTFOLIOS LIMITED.....RESPONDENT

(Being an appeal from the judgement of Hon. Mr. Boaz Olao (Mr) Chief Magistrate in Civil Suit no. 6975 of 2008 in the Chief Magistrate's Court, Nairobi delivered on 1st March 2012)

JUDGEMENT

1) Fortune Mark Portfolios Ltd, the respondent herein, maintained an account with Bank of Africa (K) Ltd, the appellant herein. It is said that on or about the 8th day of October 2008, the respondent's director discovered some unauthorised debit of ksh.2,215,400/= which had been effected on 4th September 2008 allegedly in favour of **Glory Forex Bureau** effected through payment of bankers cheque no. 0022987. The respondent's director also went to the appellant bank on 11.10.2008 for a follow up meeting where he was informed that the appellant issued the bankers cheque on the instructions of a handwritten note allegedly written by the respondent's directors. The respondent demanded that the appellant reverses the transaction. The appellant failed to abide by the respondent's demand. By an amended plaint dated 14.11.2008, the respondent filed an action against the appellant alleging that the appellant had debited the respondent's account with ksh.2,215,000/= without instructions from the respondent therefore it was wrongful and fraudulent. The appellant filed a defence to the amended plaint dated 13.7.2011. In the aforesaid defence the appellant stated that it acted on the written instructions of the respondent's Director James M. Karanja vide the letter dated 4th September 2008. The respondent's director was personally known to the appellant Bank's Manager Jothan Muthoka and the two are said to have actually met at the appellant's premises the same day the written instructions were issued to the bank. The suit was heard and determined in favour of the respondent as prayed in the plaint and against the appellant. Being aggrieved, the appellant preferred this appeal.

2) On appeal, the appellant put forward the following grounds of appeal.

1. The magistrate erred in law and in fact in finding that the appellant's conduct was fraudulent when no evidence was adduced to support this fact.

2. The magistrate erred in law and in fact by relying on the document examiner's report when the report was not produced by the maker nor was the maker called as a witness.

3. The magistrate erred in law and in fact by finding that the document examiner's report was not rebutted.

- 4. The magistrate erred in law by failing to find that the document examiner's report was inadmissible.**
- 5. The magistrate erred in law by failing to consider the correct name of the respondent.**
- 6. The magistrate erred in law and in fact in finding that the letter dated 4th September 2008 authorising the bank to pay the sum of kshs.2,215,000 was a forgery.**
- 7. The magistrate erred in law by failing to consider normal banking and trade practice.**
- 8. The magistrate erred in law and in fact by failing to consider the appellant's evidence.**
- 9. The magistrate erred in law and in fact in finding that the appellant failed to exercise due diligence.**
- 10. The magistrate erred in law and in fact by finding that the debiting of the respondent's account was illegal and fraudulent.**
- 11. The magistrate erred in law by failing to consider the demeanor of the witnesses.**
- 12. The magistrate erred in law by granting the respondent the reliefs claimed in the amended plaint.**
- 13. The magistrate erred in law by failing to give an opportunity to appellant's advocates to appear before him personally and take a date for highlighting written submissions.**
- 14. The magistrate erred in law by contravening Article 159 of the Constitution.**
- 15. The magistrate erred in law by refusing to allow the appellant's application to arrest the delivery of judgment to allow the appellant's advocates to file and highlight their submissions.**
- 16. It is proposed to ask the court for orders that:**
 - a. The appeal be allowed and the decree delivered on 1st March 2012 be set aside and the respondent's suit in the subordinate court be dismissed with costs to the appellant.**
 - b. The cost of this appeal be awarded to the appellant.**

3) When the appeal came up for hearing, learned counsels recorded a consent order to have the appeal disposed of by written submissions.

4) I have re-evaluated the case that was before the trial court. I have also considered the rival submissions and the authorities cited by the parties. Though the appellant put forward a total of 15 grounds of appeal the same may be summarised to four main grounds.

5) **First**, it is argued that the learned trial magistrate erred when he found that the appellant's conduct was fraudulent yet there was no evidence tendered to support the holding. The appellant stated that the only document which the trial court relied upon is the report by the document examiner who had been hired and remunerated by the respondent. The appellant pointed out that the document examiner was not summoned to testify and produce the report. The respondent was of the view that the trial magistrate arrived at the correct decision in finding the appellant's conduct fraudulent. The respondent stated that it presented evidence showing it never authored the letter instructing the appellant to prepare a banker's cheque of the amount stated in this matter. The respondent argued that the appellant failed to discharge proof that the disputed signature belonged to the respondent's director. It was further argued by the respondent that the document examiner's report was produced by consent hence obviating the need to summon the maker of the document. It is not in dispute that the document examiner's report was

produced as an exhibit in evidence by consent of learned counsels. I have also perused the letter dated 14.10.2008 jointly written by Jotham Muthoka the appellants Branch Manager Uhuru highway and Jean – Geo Pastouret, the appellant’s general manager. It is apparent from the letter that the appellant acted on the basis of a telephone conversation allegedly between Mr. Jotham Muthoka and one who introduced himself as James Michugu Karanja. It is also clear from the letter that the appellant further acted on a letter purportedly written and signed by James M. Karanja which was presented to the appellant by Mr. Jackson Nguire. The appellant prepared the bankers cheque in favour of Glory Forex Bureau and released it to Mr. Jackson Nguire. It is also not in dispute that S. M. Mweu a document examiner was hired by the respondent to examine the known signature of James Michugu Karanja and that appended to the letter in dispute presented to the appellant. The document examiner found the signatures not tallying. Therefore the document examiner was of the view that the signature appended to the letter the appellant acted upon to be a forgery. What comes out clearly is that the appellant’s Uhuru Highway Branch Manager did not personally meet with James Michungu Karanja on the date he effected the transaction. He basically relied on telephone conversations and on a letter. In view of the fact that the document examiner’s report was produced by consent, I find the argument put forward by the appellant that the maker should have been summoned to testify not justified. The issue should have been taken up at the time of production of the document. The respondent’s witness James Michugu Muthoka (PW1) was consistent that he never sent an agent to the appellant bank to take the instructions letter and collect the bankers cheque. PW1 denied making a phone call nor visiting the appellant on the material date. Jotham Muthoka (DW1) confirmed in his evidence that he did not personally meet PW1 on the material date. DW1 further stated that he did not personally verify the signature in the letter of instructions allegedly coming from the respondent. He claimed that the signature was verified by the officers processing the banker’s cheque. DW1 further confirmed that the telephone and fax numbers written in the letter of instructions did not belong to the respondent. DW1 claimed PW1 called him and introduced himself and that he recognised his voice though the appellant’s witness i.e DW1 stated that the person who verified the signature appended on the letter of instructions, the appellant did not deem it fit to summon those officer to explain the manner they handled the situation before processing the bankers cheque. Having considered the evidence tendered by both sides, the learned trial chief magistrate made the following observations and conclusions:

6) First, that the appellant had failed to cite the relevant provision or provisions of the Bank’s general terms and conditions which authorised the appellant to transact business on phone followed by written instructions.

7) Secondly, that Jotham Muthoka did not personally verify the signature on the purported letter of instructions.

8) Thirdly, that if PW1 spoke to DW1 giving instructions to withdraw ksh.2,215,000/= from the respondent’s account, the letter giving such instructions ought to have been handled by DW1.

9) Fourthly, that in the circumstances, there was lack of due diligence on the part of the appellant’s officials and employees.

10) Fifthly, there was a breach of duty on the part of the appellant therefore the entry made against the respondent’s account on 4th September 2008 debiting the said account with sums of ksh.2,215,000 and a further sum of ksh.400/= as commission was illegal and fraudulent. The learned chief magistrate’s analysis of the evidence with what this court had come up with by way of re evaluation I find fault in the matter the learned chief magistrate dealt with the matter. I find the first ground to be without merit.

11) In the process of determining the first ground of appeal, this court also determined the second of appeal which is a combination of grounds 2, 3, 4 and 6. Essentially the aforesaid grounds questions the admissibility of the document examiner’s report without summoning the document examiner to produce it. I have already stated that the document examiner’s report was produced by the consent of learned counsels from both sides. It cannot now lie in the mouth of the appellant to question its admissibility on appeal yet its counsels sanctioned its production by consent. The appellant had the right to object to its production before the trial court but its legal advisor’s consented to its production without the necessity of summoning the author. The appellant is bound by the agreement executed on its behalf by its lawyers.

The learned chief magistrate cannot be faulted for admitting and relying on the document examiner's report which was produced by consent of both sides. The learned chief magistrate came to the correct conclusion that the evidence of the document examiner was not rebutted and therefore the letter of 4.9.2008 was a forgery.

12) In the third ground of appeal, the appellant has challenged the trial court's decision on the basis that it failed to consider the respondent's correct name. The appellant argued that the name appearing in the memorandum and articles of association provided to the bank and produced by the respondent as evidence had the name of the respondent as "Fortune Mark" and not "FortunemMark". Accordingly, the appellant argued that the court should have made a finding that the name on the letter dated 4.9.2008 was the correct name of the respondent. I have carefully perused the record and it is apparent that the issue touching on the correct name was argued before the trial court but the same was not given due consideration by the court. The appellant's argument over this issue seems to suggest that had the court ruled in its favour it would not have come to the conclusion that the letter of instructions was a forgery. In my humble view, I do not think the same would have made a difference. I have already given a brief outline of the various findings the learned chief magistrate made. It is apparent that the trial chief magistrate considered several factors before reaching at a conclusion that the letter was a forgery. Some of those factors include the document examiner's report and the fact that there was no due diligence to identify the signature appended on the aforesaid letter. I find no merit in this ground.

13) The fourth ground is a combination of grounds 7, 8, 9, 10 and 11 of appeal. It is the submission of the appellant that the trial magistrate failed to consider the general terms and conditions in respect of the account relationship. The appellant pointed out that clause 1 mandated the appeal to *inter alia* honour and debit to its account all cheques, drafts, bills promissory notes, acceptances, negotiable instruments and orders drawn or made out by him and to carry out any instructions it may give in connection to its account. The appellant further argued that there was no condition requiring the person giving the written instructions to personally appear at the bank. It is stated that the appellant's manager met the respondent's director and soon thereafter the bank manager received a telephone call giving instructions to the bank to prepare a banker's cheque. This line of submission does not tally with the DW1's evidence given in cross-examination where the aforesaid witness categorically stated that he did not personally meet PW1 on 4.9.2008. The appellant also argued that at all times the appellant bank followed the correct procedure and exercised due diligence in handling the respondent's account and the debiting of the respondent's account was legal, procedural and warranted in the circumstances. The respondent is of the view that the trial court took into account all factors into consideration and found the evidence of the respondent's witness believable. I have also examined the manner in which the learned chief magistrate handled the question relating to the general terms and conditions governing the relationship between the appellant and the respondent. PW1 told the trial chief magistrate that he was familiar with the general terms and conditions of the appellant. The evidence seems to suggest that the bank customer would only obtain a banker's cheque after personally visiting the bank and signing the requisite forms unlike in this case. This submission contradicts that of the appellant. The appellant's witness (DW1) stated that it was normal to transact on phone especially when the instructions are followed up with written instructions. The learned chief magistrate stated in his judgement that he took into account the general terms and conditions produced in court as an exhibit and concluded that there was no term that supports the averments that the appellant was allowed to act in the manner the appellant did. With respect, I agree with the holding of the learned chief magistrate. Even on appeal, the appellant miserably failed to pinpoint an express provision that supported the manner in which the appellant handled the respondent's account. The appellant cited clause 1 of the general terms and conditions to support its stand. However, a critical examination of the clause means that it will take a comprehensive interpretation for the clause to support the way the appellant handled the respondent's account. Again, nothing turns out on this ground.

14) In the end, the appeal is found to be without merit. The same is dismissed in its entirety with costs to the respondent.

Dated, Signed and Delivered in open court this 10th day of February, 2017.

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent