



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL APPEAL NO. 422 OF 2010**

**NATIONAL BANK OF KENYA LTD.....APPELLANT**

**- V E R S U S -**

**FINERATE FOREX BUREAU LTD..... RESPONDENT**

*(Being an appeal from the judgment/order delivered by the Hon. Mr. S. A. Okato,*

*Principal Magistrate on the 21<sup>st</sup> September 2020 at Nairobi in Milimani*

*Commercial Courts case no. CMCC no. 11234 of 2004)*

**JUDGEMENT**

1. The respondent herein, Finerate Forex Bureau Ltd sued the appellant, National Bank of Kenya Ltd before the Chief Magistrate's Court, Nairobi, vide the plaint dated 31.5.2000. In the aforesaid plaint the respondent prayed for payment of kshs.735,000/= plus interest at the rate of 22% p.a. from 29.6.1999 until full payment. The appellant filed a defence to deny the respondent's claim. The suit was heard and determined in favour of the respondent. Being aggrieved, the appellant preferred this appeal.

2. On appeal, the appellant put forward the following grounds:

- 1. The learned magistrate erred in law and fact by failing to find that the plaintiff could not sue the defendant on the strength of the Bankers cheque issued to it by a stranger.***
- 2. The learned magistrate erred in law and intentionally failed to find that the defendant's filed written submissions were intentionally removed from the record/file before judgment and went ahead to lie that he has read the submissions without making reference to the authorities and the law attached thereto.***
- 3. The learned magistrate erred in law and fact by failing to find that the plaintiff was not a holder in due course of the negotiable instrument.***
- 4. The learned magistrate erred in law and fact by failing to find that the defendant or any of its employees never made any representation to the plaintiff that the bankers cheque was good and valid and that they had no capacity to authenticate the bankers cheque aforesaid drawn by another banker and went ahead to admit hearsay evidence.***

**5. The learned magistrate erred in law and fact in failing to find that the plaintiff did not suffer any loss or damage.**

**6. The learned magistrate erred in law and fact in failing to find that there was accord and satisfaction after the agreement between the plaintiff and the defendant that converted the debit balance as a result of the dishonoured cheque into a loan account and the plaintiff providing adequate security.**

**7. The learned magistrate erred in law and fact in failing to find that the defendant never exerted any undue influence or apply economic duress on the plaintiff.**

**8. The learned magistrate erred in law and fact in failing to apply the principle of economic duress adequately to commercial transactions of the nature between the plaintiff and the defendant and accordingly the learned magistrate failed to appreciate and apply the law.**

**9. The learned magistrate erred in law and fact in failing to appreciate and consider the defendant's written submissions properly on record and clear and accurate on points of law and ignored the submissions and the undisputed documentary evidence attached thereto and the law applicable, and thus arriving at a wrong decisions.**

**10. The learned magistrate fell into error and thus misdirected himself, when he failed to consider adequately and/or at all the principles of law applicable to the nature of the suit before him and as a result of which he arrived at an erroneous conclusion by failing to rationally apply the law.**

**11. The learned magistrate failed to appreciate the law in all circumstances of the suit and thus arrived at an erroneous unreasoned judgment.**

3. When the appeal came up for substantive hearing, this court gave orders directing the appeal to be determined by use of written submissions.

4. I have re-evaluated the case that was before the trial court. I have also considered the rival submissions and the case law relied upon. Though the appellant forward a total of 11 grounds of appeal, I am persuaded by the respondent's proposal that the following questions are the issues which should be determined on appeal.

**i. Whether the appellant made any representation to the respondent that the banker's cheque was good.**

**ii. Whether the respondent suffered loss and damage as a result of the said act.**

**iii. Whether the appellant exerted economic duress upon the respondent respecting the purported loan crated to cover the resultant debit of kshs.735,000/=.**

**iv. Whether there was any breach of contract and duty of care and if so whether the same was compromised by way of accord and satisfaction.**

5. Before considering the substance of the above questions, let me first set out in brief the case that was before the trial court. Two witnesses testified in support of the respondent's case while the appellant summoned a single witness in support of its case. It is the evidence of Alfred Nefat Mwaniki (PW1) that he called Mr. Stephen Mburi, an employee of National Bank of Kenya that he was sending a banker's cheque with instructions to confirm the cheque and credit the respondent's account so that the funds would be available to the respondent. PW2 who had investigated the mater and had even questioned Mr. Mburi confirmed that PW1 had called and made inquiries on the authenticity of the banker's cheque. It was the evidence of PW1 that Mr. Mburi told him that the cheque was in order. This assurance prompted PW1 to release the dollars the respondent had in form of cash. PW1 avers that had the bank not

confirmed the genuineness of the cheque it would not have released the dollars. The learned Senior Principal Magistrate analysed the evidence and came to the conclusion that the respondent (plaintiff) enjoyed direct credit facility on the subject current account no. 031-173-357. In his evidence Majorine Muthoni Nyaga (DW1) told the trial court that the direct credit facility had been created formally in writing and that a customer must request for the direct credit facility either orally or formally. It was the evidence of the appellant that the respondent's account enjoyed direct credit facility. It is the evidence of the respondent that the bank tried to intimidate the respondent into accepting to bear the resultant debit. After analysing the evidence, the learned Senior Principal Magistrate found that the appellant bank had told lies through the evidence of DW1.

6. Having given the background of this appeal in brief, I now turn my attention to the substance of the appeal.

**First, whether or not the appellant any representation to the respondent to the effect that the banker's cheque it presented was good.** The appellant has maintained its denial that it made a representation to the respondent confirming the genuineness of the banker's cheque. I have re-evaluated the evidence tendered and I am convinced that indeed the appellant represented to the respondent through a phone call Stephen G. Mburi had with Alfred Nefat Mwaniki (PW1) represented to the respondent that the banker's cheque was good. The learned Senior Principal Magistrate therefore cannot be faulted in his findings over this question.

7. **The second** issue is whether the respondent suffered loss as a result of the resultant consequences. I think the answer to this question is discernable from what happened thereafter. The respondent's account was overdrawn and the debit was converted into a loan to the utter detriment of the respondent. There is no justification to rule otherwise in this question.

8. The third issue which needs an answer is whether the appellant exerted economic duress. According to the appellant no economic duress was exerted on the respondent thus contradicting the respondent's assertion. The evidence on record show that the appellant converted the debit balance into a loan. I am persuaded by the respondent's evidence that it would have faced serious peril to its business in the face of threats by the appellant to cancel the existing facility of kshs.850,000/= without which the respondent cannot carry out its daily business. In other words if the appellant carried out its threat to cancel the existing facility, the respondent would have closed its business. I find that the appellant exerted economic duress on the respondent.

9. The final question to determine is whether the appellant breached the contract and duty of care it owed the respondent. The evidence presented before the trial court clearly indict the appellant as having acted negligently. The appellant bank was obligated to offer to the customer the services sought with care and due diligence. The banker's employee acted in a reckless manner. The appellant was in breach of the obligation to act with due diligence. The trial magistrate arrived at the correct conclusion.

10. In the end, the appeal is found to be without merit. It is dismissed with costs to the respondent.

Dated, Signed and Delivered in open court this 10<sup>th</sup> day of March, 2017.

**J. K. SERGON**

**JUDGE**

In the presence of:

..... for the Appellant

..... for the Respondent