



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KITALE
CIVIL APPEAL No. 6 OF 2011

JITENDRA HEMRAJ GUDHKA

t/a GUDHKA TEXTILES APPELLANT

VERSUS

KENYA COMMERCIAL BANK LIMITED RESPONDENT

(An appeal original from the Judgment of Hon. Esther Maina, Chief Magistrate in Civil Case No. 271 of 2009 delivered on 8th February, 2011 at Kitale.)

J U D G M E N T

1. This appeal arises from the Judgment of the Chief Magistrate at Kitale in CMCC.271 of 2009, in which the appellant, ***Jitendra Hemraj Gudhka t/a Gudhka Textiles***, sued the respondent, ***Kenya Commercial Bank Ltd.***, for general and exemplary damages for breach of contract and libel and for a declaration that the appellant was not indebted to the respondent at all.
2. The defence by the respondent was a denial of the claim and a counterclaim for the sum of Kshs.337,777/= with interest being the overdraft created in the appellant's account. The counterclaim was denied by the appellant.
3. After a full trial, the appellant's claim was dismissed with costs and judgment entered in favour of the respondent for the counterclaim in the sum of Kshs.337,777/= together with interest at court rates from the date of filing the counterclaim. The respondent was also entitled to the costs of the counterclaim.
4. Being aggrieved by the decision, the appellant preferred seven (7) grounds of appeal contained in the memorandum of appeal dated 10th February 2011.

The appeal was argued by way of written submissions and in that regard both sides filed the same on 23rd February 2015 and 10th November, 2014, respectively

5. Having considered the rival submissions in the light of the grounds in support of the appeal, the duty of this court was to revisit the evidence and draw its own conclusion bearing in mind that the trial court had the opportunity of seeing and hearing the witnesses.
6. In that regard, the appellant's commercial manager, ***Tejas Chandulala Gudhka*** (PW1) testified that their business was registered on the 20th May, 1992, to carry out retail and wholesale trade of household goods and foodstuffs and for which business they operated a bank account No. held at the respondent's branch in Kitale.

7. The signatories of the account were himself (PW 1) and the appellant Jitendra. It was on the same account that cheques No.2137 for Kshs.334,950/=, No.2138 for Kshs.334,950 and 2139 for Kshs.143,550/= were drawn. But, on 7th May 2009, instructions were given to the respondent to stop the payments of the said cheques dated 11th April, 2009, 18th April, 2009 and 25th April, 2009, respectively. The instructions were given in written form (P.Ex.2) but were disobeyed by the respondent since two of the cheques ie. No.2137 and No.2139 were already paid thereby overdrawing the account by Kshs.50,556/50cts.
8. It was further the testimony of the commercial manager (PW1) that before cheque No.2137 was presented there were no funds to satisfy the same. No loan facility had been sought from the respondent, neither did the respondent consult the appellant prior to the payment of the cheque. The respondent later returned other cheques issued to other people which had been dishonoured with remarks “ **insufficient funds – refer to drawer.**”
9. Among those cheques, was cheque No.002192 for Kshs.89,299/= dated 11th May 2009 (**PE.4**). The appellant wrote to the respondent on 15th May 2009 (**see, PE.6**) and a response was received from the respondent dated 20th May 2009 (PE.7). Later, on the 27th May 2009, the respondent wrote to the appellant (**see, P.Ex.8**) referring to a technical fault as having led to the payment of cheque No.2137.
10. The appellant testified and contended through its commercial manager that it returned goods worth Ksh.1,357,490 to its supplier, Santan Ltd., on 6th May 2009, and that is why it stopped the cheques. That, its suppliers Melvins Marsh International and County Mattresses completely stopped the supply of goods after the cheques bounced.
11. It was also contended by the appellant that the cheques paid by the respondent enabled its (appellant's) account to be overdrawn otherwise the account would have had sufficient funds to pay the bounced cheques issued to the aforementioned suppliers. That the suppliers lost faith in the appellant and stopped the supply of goods.
12. The appellant further contended that the respondent had no basis to demand that they (appellant) regularize their account by depositing a sum of Kshs.334,950/= which they (respondents) were not entitled to. That, they (appellant) suffered damages as a result of the respondent's action and therefore prayed for damages for breach of contract and for defamation. They also prayed for dismissal of the counter-claim against them and contended that their account was negligently handled by the respondent.
13. **Samuel Cheboi (DW1)** testified on behalf of the respondent to the effect that the appellant was their customer holding a current bank account in the name of Gudhka Textiles which was at the time dormant. The account was operated by the appellant and its agent (PW1) who on the 7th May 2009, forwarded a stop order (PE.2) in respect of cheques No.2137, No.2138 and 2139 all payable to Santan Limited.
14. The cheques had already been presented for payment and could not therefore be stopped. The cheque No.2127 dated 11th February 2009, for kshs.334,950/= was actually paid. Banking practices did not allow stoppage of cheques when presented for payment. Therefore, the instructions to stop the cheques could not be acted upon.
15. The respondent testified further that since there was no money in the appellant's account to satisfy the three cheques, they were to be returned to the payee unpaid but this was not done. Other than cheque No.2138, the other two cheques Nos. 2137 and 2139 were paid to Santan Limited but without funds in the appellant's account because the cheques were returned to the respondent by the collecting Stanbic Bank Limited with remarks “ **Time barred**” meaning that the respondent had returned them on the fourth (4th) instead of the third(3rd) day since presentation by the collecting bank where the payee had already received value for the cheques .
16. The respondent contended that it could not be blamed for payment of the cheques and said that

after the payment of the material two cheques in the absence of funds, the appellant's account was overdrawn since there was non-existence of an overdraft facility. The appellant was therefore liable to pay the overdrawn amount since post dated cheques were issued with the knowledge that there was an obligation to be met. No payment was forthcoming from the appellant although its account was overdrawn by Kshs.774,935/= which was reduced by off-setting it from the available deposits.

17. The respondent stated that the appellant's account had a debit balance and as such, it (respondent) could not be blamed and was not guilty of libel as claimed by the appellant. The respondent contended that the appellant was indebted to it in the sum of Kshs.337,777/= which it claimed together with costs and interest.
18. The trial court considered all the foregoing evidence and contended that the appellant was not entitled to the reliefs sought and that the respondent was entitled to the counter-claim in the sum of Kshs.337,777/=. Accordingly, the appellant's case was dismissed with costs and judgment was entered for the respondent for the counter-claim together with interest at court rates from the date of filing the counter-claim.
19. On its part, this court agrees that no dispute arose with regard to the issuance of the three material cheques No.2137, NO 2138 and No.2139 by the appellant and also with regard to the stoppage order made by the appellant directed to the respondent. The order was issued in writing on the 7th May 2009 but according to the respondent it was also too late for it to be acted upon since the cheques had already been presented for payment and save for cheque No.2138, the other two cheques were paid to the payee "**Santan Ltd**" despite the lack of sufficient funds in the appellant's account and lack of overdraft facilities in that account.
20. It was thus apparent that although the respondent was under a duty to act and stop the payment of the cheques, it was nonetheless powerless to do so as the "**horse had already bolted.**" Indeed, the respondent was not at the time under any obligation to do what was not within its power regard being given to the fact that it could not stop cheques which had already been presented for payment.
21. Perhaps, the appellant shouldered the blame for belatedly giving instructions for stoppage of the cheques and rather than let him be embarrassed, the respondent deemed it fit to pay the appropriate amount and overdraw the appellant's account notwithstanding the absence of an overdraft facility and lack of sufficient funds in the account. The action by the respondent was appropriate in the circumstances. The respondent could not therefore be blamed for the appellant's supposed wounded standing before business partners and associates. Neither, could the action be translated into libel for which damages would issue as a remedy.
22. Cheque No.2137 for Kshs.334,950/= was issued on 11th 2009 and was presented to CFS Stanbic Bank for payment on 2nd day 2009, while cheque No.2139 for Kshs.143,550/= was issued on 25th April 2009, and presented to CFC Stanbic Bank for payment on 4th May 2009. All these transactions took place before the 7th May 2009, when the request to stop the payments of the cheques was made on grounds that the cheques were lost. Fortunately or unfortunately the third cheque No.2138 was presented for payment on the same 7th day 2009, thereby giving the respondent the lucky opportunity to have it stopped before it could be paid.
23. Apparently, the appellant was in the habit of issuing cheques on its account in the absence of funds and had been cautioned by the respondent to desist from the habit. This was evidenced by the letter dated 27th May 2009 to the appellant from the respondent.

It may therefore be inferred that the appellant issued the three material cheques with full knowledge that there was insufficient funds in its account. This was the more reason why it belatedly issued the stoppage order under the cover that the cheques were lost.

24. The appellant was thus estopped by its conduct from saying that the respondent breached its duty

by presenting for payment the two cheques and overdrawing its account without an existing overdraft facility.

The appellant knew that its account had insufficient funds when it issued the three cheques so that by the time the stop order arrived, two of the cheques had been paid meaning that the account was overdrawn and a debit account / balance automatically created over the account meaning that the appellant became indebted to the respondent in the outstanding balance reflected in the debit account said to be kshs.337,77/= subject of the respondent's counter-claim.

25.The subsequent deposits made into the account by the appellant were thus utilized towards reducing the outstanding debt and this explained why the appellant's cheques were returned unpaid with the remarks “*insufficient funds refer to drawer.*” In the circumstances, such remarks did not and could not have amounted to libel. The money deposit standing to the credit of the appellant's account was a debt due from the appellant to the respondent (*See Plumbelt & Another vs Barclays Bank Ltd [1936]1 ALLE.R 653*).

26.With insufficient funds in the appellant's account, the presentation of the suspect cheques was construed as the appellant's request for an overdraft facility to permit payment thereof.(*See, pg 298 of Byles on Bills of Exchange and Cheques.*) Indeed, the appellant readily admitted that its account would at times be overdrawn despite the lack of formal overdraft facility.

27.From all the foregoing it is apparent that none of the seven (7) grounds of appeal is sustainable. This court fully agrees with the Judgment of the trial court to the effect that the appellant's case was dismissed with costs and the respondents counter-claim was allowed.

In sum, this appeal is devoid of merit and is hereby dismissed with costs to the respondent.

J. R. KARANJA

JUDGE

[Delivered & Signed this 9th day of June 2015.]

J. R. KARANJA

JUDGE