



**REPUBLIC OF KENYA**

**High Court at Nairobi (Nairobi Law Courts)**

**Civil Appeal 971 of 2005**

**CHARLES NGARE KARAYA. .... APPELLANT**

**VERSUS**

**FLORENCE MUTHONI. .... 1<sup>ST</sup> RESPONDENT**

**BARCLAYS BANK OF KENYA LTD. .... 2<sup>ND</sup> RESPONDENT**

***(From the Judgment and decree of C W Meoli, Senior Principal Magistrate in Milimani SPCC No. EJ 196 OF 1997)***

**J U D G M E N T**

In a plaint dated 13<sup>th</sup> February, 1997 filed in court on 1<sup>st</sup> April, 1997, the Plaintiff (herein the 1<sup>st</sup> Respondent) sought judgment against the Attorney General, Barclays Bank of Kenya Ltd and Charles Ngare Karaya, of a sum of Kshs.477,150/-, General damages for conversion, costs and interests.

The facts which the plaintiff pleaded were that a cheque No. CR16-00389 for Ksh.477,150/- drawn in her favour by the Permanent Secretary, Ministry of Wildlife and Tourism, was without her consent or knowledge, unlawfully and fraudulently endorsed in favour of the 3<sup>rd</sup> Defendant by the 3<sup>rd</sup> Defendant himself and then unlawfully and negligently, paid to the 3<sup>rd</sup> Defendant by the 2<sup>nd</sup> Defendant without the knowledge and/or consent of the plaintiff.

The 1<sup>st</sup> and 2<sup>nd</sup> Defendants denied liability in their defences dated 23<sup>rd</sup> June, 1997 and 24<sup>th</sup> April, 1997. The 3<sup>rd</sup> Defendant in his Defence dated 6<sup>th</sup> May, 1997, denied liability generally but in the 1<sup>st</sup> alternative, pleaded that the Plaintiff was not entitled to the sum claimed as contained in the pleaded cheque No. CR 16-00389. In a further alternative, the 3<sup>rd</sup> Defendant averred that the Plaintiff had no interest in the claimed sum and that she suffered no damage or loss on the endorsement and payment of the cheque to the 3<sup>rd</sup> Defendant.

In their evidence during the hearing of the lower court suit, the Plaintiff therein who is the 1<sup>st</sup> Respondent, testified that she was at all material times, a customer of the 2<sup>nd</sup> Respondent, the Barclays Bank of Kenya Ltd, holding account No. 4048860 at Nairobi Branch since 1978. That the 3<sup>rd</sup> Defendant, herein, having received a cheque drawn in favour of the plaintiff for a sum of Ksh.477,150/- deliberately and without the consent of the plaintiff, endorsement it to be payable to himself and then banked the same at Barclays Bank of Kenya Ltd, Narok Branch. That the cheque which should have regularly taken 14 days to be cleared, was cleared in favour of the endorsee, the 3<sup>rd</sup> Defendant, within 7 days. That the 3<sup>rd</sup> Defendant had fraudulently and without the knowledge or consent of the plaintiff, endorsed the said

cheque and that the 2<sup>nd</sup> Defendant, in collusion with the 3<sup>rd</sup> Defendant or negligence cleared and paid the cheque to the 3<sup>rd</sup> Defendant, to the detriment, loss and/or damage of the plaintiff leading to this claim.

The Defendants however, filed and later testified in support of their defence. The 2<sup>nd</sup> Defendant as the bank, admitted that the cheque in question was indeed presented endorsed by the 3<sup>rd</sup> Defendant in his own favour and was cleared within 7 days instead of the fourteen days then provided. The bank also admitted that although the cheque was crossed (although without restriction of payment to the drawee only), the bank did not contact the plaintiff to confirm the lawfulness of the endorsement thereon, but proceeded to clear the same for payment. The bank however denied negligence or collusion with the 3<sup>rd</sup> Defendant and thus denied liability.

The 3<sup>rd</sup> Defendant also testified in his defence. He stated that the Plaintiff was not entitled to the cheque nor the money it represented since he was the one who farmed and sold agricultural products in respect of which the cheque amount was a payment. That the plaintiff had no knowledge of it although he was his divorced wife since all the arrangement to put the cheque in Plaintiff's name were made without the knowledge or participation of the Plaintiff. The 3<sup>rd</sup> Defendant, therefore, claimed that the Plaintiff had no interest in the cheque and had no reason to have filed the claim.

The 3<sup>rd</sup> Defendant, however, admitted that he had collected the cheque from the drawer Ministry, he had endorsed the cheque in his own favour, had presented the cheque for payment at Narok Branch, and finally, that the cheque was cleared and paid to his account by the 2<sup>nd</sup> Defendant. He however, nevertheless, denied liability and sought that the suit be dismissed, after calling one witness who testified in his support.

The honourable trial magistrate in her judgment dismissed the claim against the 1<sup>st</sup> and 2<sup>nd</sup> defendants on the basis that neither of them participated in the benefits from the endorsement and payment of the cheque. She neither saw negligence in the conduct of the 2<sup>nd</sup> Defendant who cleared and paid the cheque.

The honourable trial magistrate, however, found that the Plaintiff had proved her claim against the 3<sup>rd</sup> Defendant, (herein the Appellant) on the balance of probability and entered judgment against him for Ksh.477,150/- with costs and court interests. That is what provoked this appeal by the 3<sup>rd</sup> defendant.

I have carefully perused the record of evidence, the submissions by both sides before the court below and this court, and the grounds of appeal. There is no dispute that the Appellant, without the authority or consent of the 1<sup>st</sup> Respondent, received a cheque drawn in the 1<sup>st</sup> Respondent's favour. He, without a similar consent or knowledge, purported to and endorsed it in his own favour. He without same consent or authority deposited the cheque in his up-country account at Narok and, finally, he received funds upon the clearance and payment of the cheque.

In this court's opinion and finding, the Appellant had no right and authority to endorse the cheque in his own favour since the cheque was in the first place, not drawn in his favour. It cannot be denied by the Appellant therefore, that in allowing himself to endorse a cheque drawn in favour of another person, he forged the endorsement signature of the drawee of the cheque. The fact that the drawee was his wife, present or divorced, did not make a difference. The bank rules as we all know them to date, do not allow any person, apart from the drawee of a cheque, or any of his agents having a power of attorney, to endorse a cheque in favour of himself or a third party.

In this court's further view the Appellant did not only commit a civil tort in unlawfully endorsing the cheque, but also clearly, may have committed several criminal offences including forgery, uttering a false document and stealing or defrauding funds. It is sad that the police, who took up investigation of the Appellant's conduct, did not charge him with any criminal offences in a court of law.

The Appellant complained that the trial court admitted inadmissible evidence. This court finds that a

photocopy of a document is secondary evidence. The trial court admitted it because the original were in the custody of the defendants who did not object to the admission of the secondary evidence at the material time. The court further notes that the Appellant at no time denied receiving the original cheque to which the photocopy produced in court was a copy. Indeed, had the photocopy of the cheque not been produced by the Plaintiff, the Appellant himself would have been forced to admit the cheque as he did and failure to produce the photocopy would have had little adverse effect to the case.

It is the opinion of the court also, that the cheque represented the sum of Ksh.477,150/- a valuable sum of money which was intended to pass to the 1<sup>st</sup> Respondent if it was not unlawfully diverted by the Appellant. To argue that the 1<sup>st</sup> Respondent lost nothing when she lost the whole sum stated above, is unrealistic. It was only the 1<sup>st</sup> Respondent who was entitled to receive the said amount. If after she received it she may have passed it to the Appellant or any other person, is neither here nor there. The overarching point is that the Ministry had drawn the cheque in the name of the 1<sup>st</sup> Respondent whom the Government Ministry, owed.

As to the pleadings upon which the claim was based, this court finds no defect in them. The plaintiff had sufficiently and indeed properly stated the sum claimed and the events and material upon which the cause of action was based. All relevant particulars had been pleaded.

In so far as the claim against the bank, the 2<sup>nd</sup> Respondent was concerned, it is the view of this court that the conduct of the 2<sup>nd</sup> Respondent in clearing the said cheque as it did was below the standards set in such business. In this court's view, the bank was under business and professional obligation to contact the drawee of the cheque to ascertain or confirm such endorsement by her before clearing it for payment. Moreso because the face of the cheque was crossed although not with the words restricting payment to the drawee only. Such crossing on the cheque was in my understanding as good as any restrictive crossing and it definitely demanded better attention of the bank than the bank gave it.

Furthermore, the cheque was banked up-country and required 14 days for clearance. How the Bank cleared it in seven days, was not adequately explained by the 2<sup>nd</sup> Respondent and the same attracted logical conclusions that clearance of the cheque was done with possible collusion of the Bank. All in all, had the 1<sup>st</sup> Respondent cross-appealed against release from liability of the Bank by the trial court, this court would have spread liability to include the bank on the ground of negligence.

As to costs, the trial court was right in awarding them against the Appellant who lost the case and the costs followed the event. This court sees little in the complaint against the order for costs. On the other hand, as this court has stated above, the 2<sup>nd</sup> Respondent should have been made jointly liable with the Appellant. But since there was no cross-appeal, I find no reason to interfere with the lower court orders, even on costs.

In the circumstances, this court finds this appeal without merit and hereby dismisses it with costs. Orders accordingly.

Dated and delivered at Nairobi this 7<sup>th</sup> day of March 2013.

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**D A ONYANCHA**  
**JUDGE**