Barclays Bank of Kenya Limited v Mahamud

High Court, at Nairobi April 18, 1985

Trainor J

Civil Case No 3334 of 1981

Statutes

1. Cheques Act (cap 35)

2. Banking Act (cap 488)

April 18, 1985, Trainor J delivered the following Judgment.

Mohamed Maalim Mahamud had a current account in the branch of Barclays Bank of Kenya Limited in Garissa. I shall hereafter refer to that branch as Barclays. On December 20, 1980 he drew a cheque on the bank in favour of one, Ali Haji Abdi for Kshs 70,000, to whom I shall hereafter refer as Ali. Ali lodged the cheque with his bank in Nairobi, The Kenya Commercial Bank Limited, Tom Mboya Street, (to which I shall refer as the Commercial Bank). He was given credit for it and allowed to draw money against that credit.

It is the banking practise in Kenya, I was told, and I accept it to be so, that when a cheque from a country branch of a bank is presented for payment to a bank in Nairobi it is sent to a central clearing branch of that bank which in turn sends it to a clearing branch of the bank on which the cheque was drawn. That branch then sends it back to its country branch. The Moi Avenue branch of the Kenya Commercial Bank Limited is the clearing centre for that bank, and the branch of Barclays Bank of Kenya Limited in Queensway is the clearing centre for that bank.

It is accepted among the banks of Kenya that the time required for a cheque to get back to the country branch on which it was drawn is 14 days from the date on which it was presented for payment. On the return of the cheque the country branch will then arrange to have the value of the cheque transferred to the branch of the bank which cashed it. If, however, there are inadequate funds the bank which cashed it will be notified within the 14 days period. If no such notification is received the bank that cashed the cheque is entitled to assume that the bank on which it was drawn will reimburse it, and will then give credit for it to its customer, if it has not already done so. Conversely, if the bank on which the cheque was drawn notifies the other bank within 14 days that there are no funds to meet it, it will be under no obligation to the other bank. Such notification is given by sending back the cheque endorsed “R D”, meaning refer the matter to the drawer of the cheque. On receipt of it the bank which cashed the cheque will have to look to its customer for reimbursement if it has paid him.

In the instant case the Commercial Bank received the cheque on December 22, 1980, and passed it through the Moi Avenue Branch to reach Barclays Bank in Queensway on the 24th. The cheque was forwarded to Barclays and reached it in Garissa on January 9, 1981 ie 18 days after it had been presented in Tom Mboya Street.

There were insufficient funds to meet the cheque and on January 10, it was endorsed “R D”, but dated as of the 9th, and returned to the Commercial Bank. The Commercial Bank returned it to Barclays endorsed “Time barred”, meaning that Barclays was too late to repudiate liability as it had not done so within the 14 days.

On three further occasions the cheque was sent back to the Commercial Bank, with a new endorsement of R D, and on each occasion the Commercial Bank returned it without further comment.

The cheque was returned to Barclays for the fourth time on March 17, 1981, and the manager returned it to the Commercial Bank on the same day with a covering letter. The letter informed the manager of the Commercial Bank that the cheque, though deposited with his branch on December 22, 1980 only reached Garissa on January 9, 1981 due to delay in delivery. It ended by saying that the writer would be grateful if the Commercial Bank would “accept” the cheque, which was enclosed, again marked; ‘Refer to drawer’

So far as I am aware the defendant was all the time left happily unaware of what was going on. The first time he was informed that anything had happened was when a letter dated April 8, 1981 was sent to him.

It reads:

“Dear sir,

Re: Your Cheque No GA/AA 71149 Dated 20/12/80 for Kshs 70,000 payable to Ali Haji Abdi

We write to advise you that on December 20, 1980, you issued your above cheque to a Mr Ali Haji Abdi for the amount shown.

There were no funds available on your account and we therefore dishonoured the cheque with the answer “Refer to Drawer”. However, the payee of the cheque had been allowed by his Bankers Kenya Commercial Bank Ltd to withdraw against the proceeds of this cheque, and he has therefore refused to accept this unpaid item.

In view of the foregoing, we are therefore left with no option but to request you to deposit sufficient funds to meet this cheque within seven days from the date of this letter.

For your information, the balance of your account as to today’s date is Kshs 726.65 credit.

Yours faithfully,”

The manager of Barclays at the relevant time gave evidence. He said that as a result of that letter the defendant came to see him about two weeks later. He said that the defendant undertook to refund Kshs 70,000 by instalments of Kshs 2,000 per month until he recovered the Kshs 70,000 from Ali, when he would repay the balance then outstanding. The witness did not say if the defendant gave any reason why Ali should repay the Kshs 70,000. In any case, the defendant, according to the witness, never paid anything, so the witness instructed advocates to institute proceedings for recovery of the Kshs 70,000.

On November 17, 1981 the plaintiff filed a plaint, subsequently amended, claiming Kshs 70,000 with interest from the defendant “being the amount due and owing by the defendant to the plaintiff in respect of monies paid for and on behalf of the defendant particulars whereof are known to the defendant and at his request, express or implied, to one A H Abdi.” On January 21, 1982 the defendant filed a defence. In it he “categorically” denied that he owed the money as claimed by the plaintiff. He pleaded in the alternative that the plaintiff’s action was misconceived and that no cause of action lay because:

“(a) The defendant did not have any sufficient funds in his account or overdraft facilities to meet payment for a sum of Kshs 70,000 this fact of which the plaintiff was fully aware.

(b) The plaintiff dishonoured a cheque written by the defendant to one Ali Haji for the sum of Kshs

70,000.

(c) The plaintiff informed the defendant that Kenya Commercial Bank Limited who were the bankers for Ali Haji Abdi had however paid the said Ali Haji Abdi despite the fact that the plaintiff had dishonoured the cheque."

The defendant contended, therefore, that the defendant in this suit should be the Kenya Commercial Bank Limited and not himself as the said bank paid out on a dishonoured cheque."

I must confess that I am unable to understand that defence, but nothing was raised on it by the plaintiff.

The defence continued:

"3(a) Alternatively, the plaintiff is estopped from claiming from the suit amount (sic) by virtue of the provisions of the Cheques Act (cap 35) and in particular as a result of its negligence in failing to give any or any adequate notice to the Kenya Commercial Bank Limited of its intention not to honour the cheque."

The defence then proceeded to give particulars of the negligence, the first of which, it is alleged, is failure to give notice to the Commercial Bank of its intention not to honour the cheque in accordance, "ÖÖwith banking regulations under the Banking Act (cap 488)."

As to that particular, I heard nothing, neither by citation of nor reference to those regulations, and after a certain amount of research I can find no such regulations to exist in 1980 nor even today.

Still under the heading of "Particulars of Negligence" one reads:

"(b) The defendant avers that the plaintiff is further estopped from filing an action against him in view of the fact that the said Ali Haji Abdi has make (sic) a written offer to accept liability for and to pay the said sum of Kshs 70,000."

How that constitutes a particular of negligence on the part of the plaintiff is utterly beyond me, just as it is utterly beyond me to understand how the principle of estoppe arises from it.

The final plea was that the defendant denied owing the plaintiff Kshs 70,000 or at all, thus putting the plaintiff on proof.

No point was raised on the defence, nor did the defendant give or call evidence. The only evidence I had was from the plaintiff's witness, and I have to decide if that it sufficient to establish the plaintiff 's claim.

I do not propose to repeat what transpired between the presentation of the defendant's cheque to the Commercial Bank in Tom Mboya Street, Nairobi and its receipt in Barclays in Garissa save to say that Barclays at that time had no alternative but to comply with banking procedure and pay the Commercial Bank.

But what was the situation so far as the defendant was concerned? It is such a well established principle of banking, that if a customer draws a cheque on his bank in excess of the amount standing to his credit it is an implied application by the customer to the bank for an overdraft, that it requires no development. The bank is perfectly entitled to refuse to meet the cheque, and thereby refuse the overdraft, or meet the cheque and, by implication, grant the overdraft. Sometimes when such a cheque reaches the bank, the manager may call in the customer and make an arrangement with him to meet the cheque and grant an overdraft, but meeting the cheque has the same effect.

So far as I am aware the manager of Barclays made no effect to contact the defendant or inform him of the situation until the letter of April 8, to which I have referred. I have no idea of the precise date the defendant visited the manager and promised to liquidate the Kshs 70,000 by monthly instalments of Kshs 2,000 until he could pay off the balance when he received a payment from Ali, but the manager informed

me that on April 7, 1981 he opened a second account in the defendant's name and debited it with the Kshs 70,000. He produced it, and it is headed "Memorandum Account" and has a reference, "Un" which, I understand, means "Unpaid item". He also produced a statement of the defendant's then current account covering the period from January 31, 1981, when it was in credit in the sum of Kshs 1,704.45, with various credit and debit entries thereafter, to June 16, 1981, when there was a credit balance of Kshs 606.65.

All that suggests that before the Manager saw the defendant he decided that he would make the best of an unfortunate situation and try to recover from the defendant the Kshs 70,000 he had been forced to pay on the defendant's cheque. The first step was to open the 2nd account, and the next was to write the letter of April 8. From what he told me, and it was not contradicted, the defendant accepted liability for the Kshs 70,000 when he visited the manager about two weeks later, and undertook to repay it by the means to which I have already referred.

Let me then review the situation as it was when the defendant visited the manager of Barclays about two weeks after April 8, the date of the manager's letter to him.

On December 20, 1980 the defendant gave or sent a cheque for Kshs 70,000 to Ali. As a cheque must be presumed to be for valuable consideration until the contrary is proved, and as I have had no evidence to the contrary I must hold that the cheque was for valuable consideration. That means that the defendant fulfilled an obligation of some sort to Ali by giving him that cheque. Had the defendant not given the cheque, Ali would have been entitled to proceed against him to compel him to fulfil his obligation: if he gave a cheque which was not met Ali might have sued him on the cheque.

As I said earlier, if a person draws a cheque on his bank when he has no, or no sufficient funds to meet it he is asking the bank to permit him to borrow up to the amount of the cheque to enable him to meet his obligation. The bank may refuse to meet the cheque or cash it. If it cashes it, it is, I feel sure, unnecessary to add that there is an implied assurance by the drawer that he will repay the bank.

The only difference between the usual situation and that in the instant case is that Barclays had no choice in the matter. When it received the cheque on January 9, it was, by banking practice, under an obligation to pay. It made no difference that the cheque was held up in the post, as I had been told, Barclays were obliged to pay the Commercial Bank. When it did not pay the defendant's obligation to Ali was fulfilled no matter what reason the bank had for paying up. Had the defendant not given the cheque to Ali, Ali could have sued him for the consideration for which the cheque was given. When Ali accepted the cheque, his right to sue changed to a right to sue on the cheque. When Barclays paid up Ali no longer had any right to sue the defendant and a new situation arose: the right of Barclays to stand in the shoes of Ali. The situation may be visualised as a transaction between Ali and Barclays with Commercial Bank as the agent of Ali, or as the conduit. Ali had a claim against the defendant and a right to to sue him. His agent, the Commercial Bank, got from Barclays the money which liquidated Ali's claim. I hold that the right of Ali passed to Barclays and the plaintiff as if there had been an assignment or a subrogation. But the unchallenged evidence is that the defendant accepted his liability to reimburse Barclays but failed to do so. In such circumstances I hold that the plaintiff was entitled to sue the defendant as it has done to recover the money it paid on the defendant's behalf when the defendant failed to repay it.

There will be judgment for the plaintiff as prayed in the plaint.