IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Madan, Law JJ A & Miller Ag JA)

CIVIL APPEAL NO 35 OF 1978

Between

STANDARD BANK LTD...APPELLANT

AND

JOHN HENRY AKELLO...RESPONDENT

JUDGMENT

This appeal is brought by the Standard Bank Ltd against the dismissal of its suit in Civil Case 1102 of 1976 by the High Court at Nairobi (Platt J).

The plaintiff had prayed for judgment against one John Henry Akello for the sum of Shs 135,211/15, part of a total amount of Shs 167,000/50 allegedly paid to him under a mistake of fact as to mandate and consequently received to the use of the appellant. The principal allegations of the plaintiff were:

> 3. At all material times a company named Burns & Blane maintained an account at the Kenyatta Avenue branch of the [appellant] in Nairobi.
>
> 4. On or about 11th February 1975 a cheque purporting to be drawn by the said Burns & Blane Ltd on the said account for the sum of Kenya Shs 167,000/50 in favour of the [respondent] was presented to the [appellant] by the Government Road branch of Barclays Bank International Ltd on behalf of the [respondent] for payment.
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> 5. The [appellant] accordingly paid the said sum of Kenya Shs 167,000/50 to the said Government Road branch of the said Barclays Bank International Ltd and the account of the [respondent] at that branch was credited therewith.
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> 6. It was subsequently discovered that the signature of the said cheque on behalf of the said Burns & Blane Ltd was a forgery, with the result that, having had no true mandate from that company to pay the said sum of Kenya Shs 167,000/50 to the [respondent], the [appellant] was obliged to refund it to that company.

In his filed defence the respondent denied knowledge of the existence of the appellant and all the allegations of the plaintiff and averred that, as to the acts from which the alleged mistake arose:

> The cheque in question was not processed by Barclays Bank and the [appellant] through any mistake of fact as to mandate and that if there was any mistake the same was not caused by him;

and the [appellant] cannot have a cause of action against him in law.

The respondent also counterclaimed for the sum of Shs 12,789/15, ie the balance of the sum of Shs 167,000/50 which Barclays Bank debited to his account in the indemnifying of the appellant.

The grounds of appeal attack the judgment of the trial Court on these two main grounds:

1. The trial judge erred in his finding that the appellant had not laid the foundation of its claim by providing that the missing cheque was a forged cheque which purported to be drawn on the appellant by Burns & Blane Ltd.

2. The trial judge also erred in his apparent view that the case for the appellant depended on proof that the respondent was implicated in the fraud.

The second ground of appeal lists six *indicia* by which counsel for the appellant sought to support the contentions in the two criticisms above; and asked the Court to "re-appraise the evidence and to draw inferences of fact" as provided by rule 29.

In my humble view, and as was obviously conceded by advocates on both sides, the case bristles with irregularities. The appellant's plaint itself alleges forgery of the signature on the cheque which purported to have been drawn by Burns and Blane Ltd. Further, it is common ground and was satisfactorily established at the trial that the cheque upon which the appellant transferred the Shs 167,000/50 to Barclays Bank (the respondent's bank) was not in fact drawn by Burns & Blane Ltd, a customer of the appellant bank.

Mr Kwach for the appellant asked the Court to conclude that, whatever may have been the uncertainties surrounding the cheque (and I understood him to mean either by its nature or treatment by the appellant's officers), the fact remained that the money requisitioned by it was in fact transferred to the respondent's bank and the respondent withdrew most of it. Viewing the matter from the Barclays Bank end, there is undoubtedly some merit in this suggestion; because it is difficult to see how the respondent could ordinarily fully hold himself aloof from the knowledge of an operation which was to take place between his bank (Barclays) and some other bank; but inferences must largely be based on the evidence. The respondent said at the trial that one Mustapha from Tanzania, whom he had met casually in a bar, sold a diamond to one Sadru in Nairobi; that he, ie the respondent, permitted Sadru to use his bank account for purposes of depositing the money by a banker's cheque to pay Mustapha; and the respondent was to get 10 per cent commission on the transaction. That the respondent therefore gave Sadru his account number. He was later told by Sadru that the money had been deposited and, upon checking at his bank, he found that this was in fact done. He therefore made two visits to the bank; spoke to Mr Sethi, who finally told him that the money was his and assisted him in making the first withdrawal of Shs 90,000; and he withdrew other amounts and paid Mustapha Shs 140,000. As a result of investigations which apparently started when Burns & Blane Ltd questioned the debit of their account with the appellant, the respondent was charged and acquitted. Mr Sethi of Barclays Bank who, on the evidence, was actually involved in certifying or satisfying Barclays Bank that the money from the appellant was destined to the credit of the respondent's account was at no stage called as a witness. On the evidence before Platt J the respondent showed himself free from any complicity with respect to the transfer of the money from the appellant to Barclays Bank and, of course, from that point he was completely within the ordinary banker and customer relationship with respect to the withdrawals he made.

It is perhaps certainly not without reason that the cheques for the amounts drawn off by the respondent (commencing with that for the first withdrawal of the substantial amount of Shs 90,000) disappeared, although those amounts have been posted up in his bank statement. The net result is that documentarily at Barclays Bank as well as at the appellant bank there was evidence of actual knowledge of the fraudulent nature of the transaction by concealment or the destruction of evidence. Moreover, suspicion apart, the respondent's story of Mustapha, Sadru, loan of account, receiving and paying agent and seemingly open dealing with Barclays Bank, places him almost firmly within the principle:

> The recovery of money paid under mistake of fact is barred where it has been innocently received by an agent, and that agent, before notice of the mistake, has paid it over to the principal, or otherwise materially, and irrevocably altered his position.

I say "almost firmly within this principle" because it is clear from the record that a good deal more evidence concerning the Barclays Bank juncture of the improper transaction should have been forthcoming if it were to be shown that the respondent knew anything more than he said, that he knew his name and account number were to be used as repository of a banker's order transfer from some bank. At the time of his drawing Shs 90,000 and Shs 40,000 from Barclays Bank he used counter cheques; and on both occasions Mr Sethi of Barclays Bank personally assisted him through the withdrawals by counter-signing the cheques. Mr Sethi was not called as a witness. The eight witnesses called for the appellant were from the appellant bank, Barclays Bank, Burns & Blane Ltd and the police.

The evidence from both banks only showed that there were entries related to the cheque for Shs 167,000, the pay-in-slip, debit of Burns & Blane Ltd and withdrawals from Barclays Bank as having been made, but the documents themselves were declared lost or missing. Even the respondent's counter cheques used by the police in the criminal case against the respondent and returned to the police for safe keeping are missing.

Platt J correctly observed:

> It seems to me that one cannot say on the balance of probability on the evidence here that reliance can safely be placed on the accounting system by itself at any rate on the evidence as it stands in this case.

The appellant's case is based on the cheque forwarded by Barclays Bank to it and it alleges that it was a forgery. I think that it is correct to say that forging a document is making the document tell a lie upon itself. The appellant claimed that the signature on the cheque was a forgery; but, apart from conjecture, there is not a shred of evidence tending to identify the forger. In the simplest of terms, it was the falsehood against Burns & Blane Ltd expressed on the cheque which caused money standing to the credit of Burns & Blane Ltd with the appellant to be moved to the disposal of Barclays Bank. In my view the mention of any name on the cheque as the intended payee of the proceeds was secondary. It was said in evidence for the appellant that Burns & Blane Ltd never drew a cheque to that amount on them and it is usual to make some sort of an inquiry regarding such large drawings. This apparently was not done on this occasion. Much of the evidence was directed to considering whether the cheque, which was supposed to have borne the number 11354, was a genuine cheque used by Burns & Blane Ltd with suggestions that it might have been a printer's duplicating error; but that exercise could have been to no avail; and at all events it is the account of Burns & Blane Ltd which was primarily aimed at and the scrutiny into the numbers of the cheques drawn by that company never took place until the fraud was discovered.

Returning to the question of the alleged forgery of the cheque which on the evidence disappeared at the appellant bank after action was taken upon it, the plaint firmly alleges that "the signature of the said cheque was a forgery". There is no definition or interpretation of "forgery" either in the Bill of Exchange Act or the Cheques Act; the most that can be said is that the term "forgery" has been adopted from the criminal law and that section 3(2) of the Interpretation and General provisions Act applies. There has been no opportunity in the entire case to explore and determine whether or not, as a matter of fact the signature which appeared on the cheque was forged". It is good guide in the assessing of evidence, that regard must be had to "what a person in the position of the person deponing is most likely to say; therefore where a witness for the appellant, Harriet Ngwije, employed by the appellant, testified as to the expected routine duty steps taken in the treatment of the cheque, there remains uncertainty where that witness's assurance of the genuineness of the signature on the cheque is not aided by examination of the cheque itself before the Court. The appellant ought not to be heard to say in effect, "when my employee saw the cheque it was genuine", when the plaint claims that it was a forgery by signature. The true position by the evidence in this behalf is that the cheque was satisfactorily proved to have been unauthorised as contemplated by section 347(a)(c) of the Penal Code, and hence a forgery.

Reviewing the evidence as a whole I find that it has been proved beyond a mere balance of probability that the appellant at the instance of Barclays Bank parted with its money, that Barclays Bank thereupon placed the money at the disposal of the respondent in circumstances of knowledge of the transfer, its availability at Barclays Bank, withdrawals therefrom by the respondent and concealment or destruction of evidence of the culminating strokes of the fraudulent device as make the withdrawals by the respondent irresistibly referable to the respondent's being found the recepient of the proceeds of the fraud. In *Holt v Markham* [1923] 1 KB 404, 513, Sctutton L J remarked that an action for money had and received to the plaintiff's use was a particularly troublesome class of action; but the form of action has been recognised as capable of being founded on mistake of fact on the part of the payer and it was held in *Westminister Bank Ltd v Arlington Overseas Trading Co* [1952] 1 Lloyd's Rep 211 that it is not directly material whether the recipient was alike mistaken". In the present case there is no doubt that on the facts Barclays Bank could not contend, for what that may have been worth, that it paid over the proceeds of the mistake to the respondent as principal or otherwise and materially and irrevocably altered its own position. The question therefore arises as to whether or not the respondent can avail himself of his contention of innocent receipt of the proceeds of the mistake on the grounds of his story of being receiving and paying agent of a supposed Mr Mustapha. The statutory position of the appellant as payer is set out in section 60(1) of the Bills of Exchange Act:

> When a bill payable to order on demand is drawn on a banker and the banker on whom it is drawn pays the bill in good faith and in the ordinary course of business it is not incumbent on the banker to show that the endorsement of the payee or any subsequent endorsement was made by or under the authority of the person whose endorsement it purports to be, and the banker is deemed to have paid the bill in due course, although such endorsement has been forged or made without authority and in this subsection "bill payable to order or demand" includes a prescribed instrument within the meaning of the Cheques Act 1968 which is payable to order.

Further to this, section 24 of the Act provides:

> Subject to the provisions of this Act, where a signature on a bill is forged or placed thereon without the authority of the person whose signature it purports to be, the forged or unauthorised signature is wholly inoperative, and no right to retain the bill or to give a discharge therefore or to enforce payment thereof against any party thereto can be acquired through or under that signature, unless the party against whom it is sought to retain or enforce payment of the bill is precluded from setting up the forgery or want of authority. Provided that nothing in this section shall affect the ratification of an unauthorised signature not amounting to a forgery.

For the purpose of the facts of this particular case I would say that these two statutory provisions read in conjuction with each other, go beyond the legal premises and consequences they dictate and, in addition, form the basis of equitable remedies. The ability of the payer to recover on payment due to a mistake of fact is one of those equitable remedies and may even (in appropriate cases) extend to what is usually termed "following the money". As explained above, the respondent must be seen as stepping into the shoes of Barclays Bank (the immediate recipient of the process of the mistake) and, on the facts of the case, he cannot enjoy an immunity to which Barclays Bank is not entitled. He should therefore yield up the proceeds of the mistake of fact from which he has unjustly benefited to the amount of Shs 154,211/15, as was prayed in the plaint.

For these reasons I would allow this appeal, with costs. I would set aside the judgment and decree in the court below, and substitute a judgment and decree in favour of the appellant for Shs 154,211/15, with interest at court rates on the decretal amount as claimed, and the costs of the suit.

Law JA. I have had the advantage of reading in draft the judgment prepared by Miller Ag JA, in which the facts are fully set out. I agree with his conclusion.

On my own evaluation of the evidence, I am satisfied, after applying a standard of proof higher than a mere balance of probabilities, that the cheque which has given rise to this litigation was forged. The respondent had no knowledge of the cheque and never even saw it, but he must have been the payee

named on it, as the cheque when presented to Barclays Bank, Government Road branch, was credited to the respondent's account there. The cheque was not endorsed over to the respondent, so he must have been the named payee. After being credited to the respondent's account, the cheque was returned to the Standard Bank, Kenyatta Avenue branch. It was debited to the account of Burns & Blane Ltd, who had an account at that branch. Then it disappeared and has never been seen since.

There can be no real doubt to my mind that the cheque purported to have been drawn by Burns & Blane Ltd. It was never in fact issued by that company and was a forgery. I say this for several reasons. According to the paying-in-slip, which is signed illegibly, the cheque which is the subject of these proceedings bore the number 11354. A genuine Burns & Blane Ltd cheque bearing that number had been drawn on 24th August 1974, and duly negotiated by the payee, Farm Machinery (Distributors) Ltd. That the suit cheque purported to have been drawn by Burns & Blane Ltd is supported by the fact that it was debited to their account.

Of course, it has been known for cheques to be debited or credited to the wrong account owing to carelessness on the part of a clerk; but in this case the clerk who posted the debit, Harriet Ngwije, deposed that she posted the debit to the correct account. She saw the cheque, debited it to Burns & Blane Ltd's account, and it is certain that there was no mistake. It thus being established to my satisfaction that the cheque purported to have been drawn by Burns & Blane Ltd, it is clear beyond peradventure that it did not emanate from Burns & Blane Ltd. The manager and accountant of that company deposed that no such cheque was ever issued by it. The numbers on their cheque forms run serially and are never duplicated. Clearly, the suit cheque was signed by unauthorised persons on a bogus cheque form specially printed for the purpose. It was a forgery, and that is why it disappeared from the bank's custody, no doubt with the connivance of an employee of the bank, having served its fraudulent purpose.

Having held it proved to my satisfaction that the suit cheque was a forgery in the sense that it must have been signed by a persons or person not having the authority to do so, it is by section 24 of the Bills of Exchange Act "wholly inoperative as between the parties. We are not concerned, as in another recent case, *Urmila w/o Mahendra Shah v Barclays Bank International Ltd*, page 76, *ante*, with the position of a holder in due course for value. A cheque which has been forged is not in law a cheque or a negotiable instrument, but a mere sham piece of paper; see the judgment of Kerr J in *National Westminister Bank Ltd v Barclays Bank International Ltd* [1974] 3 All ER 834. In *Urmila w/o Mahendra Shah v Barclays Bank International Ltd*, the trial judge had found that the cheque was forged by employees of the bank acting in the course of their employment. In that case the cheque purported to be a bank cheque. In this case it was a private cheque, and no suggestion has been made that it was forged within the bank. Indeed, all indications are to the contrary. The sum claimed in the plaint represents money paid by the appellant to the respondent under a mistake of fact and is recoverable. I would allow this appeal, and I concur in the order proposed by Miller Ag JA.

Madan JA. I agree that this appeal should be allowed.

There is no need to repeat the facts which are related in detail in the judgments of both Miller Ag JA, and Law JA which I have the advantage of reading in draft. In my opinion, it was indisputably proved that the cheque in question was a forgery; therefore, under section 24 of the Bills of Exchange Act, the forged or unauthorised signature was wholly inoperative and no right to enforce payment thereof against any party thereto could be acquired through or under that signature, unless the party against whom it was sought to enforce payment was precluded from setting up the forgery or want of authority, which was not the case here. In *National Westminister Bank Ltd v Barclays Bank International Ltd* [1974] 3 All ER 834, 836, Kerr J said: "… a forged cheque is of course in law not a cheque or negotiable instrument but a mere sham piece of paper …"

A forged cheque is not enforceable against anyone, although I will say that in this case the swindle nearly came off inasmuch as the respondent was acquitted in the criminal proceedings against him, and he successfully resisted the appellant's claim in the High Court. However, law is a longthinking mechanism. I can see no bar to the appellant's right to recover the money as having been paid under a mistake of fact.

I would also allow the appeal with costs. As Law JA and Miller Ag JA agree, there will be an order in the terms proposed by Miller Ag JA.

Appeal allowed.

Dated and delivered at Nairobi this 20th day of March 1979.

C.B MADAN

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JUDGE OF APPEAL

E.J.E LAW

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JUDGE OF APPEAL

C.H.E MILLER

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Ag. JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR