REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

CIVIL CASE NO. 2057 OF 1975

HILTON W N OSINYA ……...……..…….. PLAINTIFF

VERSUS

KENYA COMMERCIAL BANK LTD……....…… DEFENDANT

JUDGMENT

The Kenya Commercial Bank Ltd., the defendant, was granted an order under order LI, rule 8 of the Civil Procedure Rules for a point of law pleaded in the defence to be argued as a preliminary point of law.

The plaintiff instituted this action claiming damages alleged to have been suffered as a result of alleged negligence on the part of the defendant in dishonouring a cheque drawn by the East African Community in favour of the plaintiff and which cheque was duly presented to the plaintiff's bank endorsed for "Special Clearance" by the defendant. The cheque was returned to the plaintiff through his bank marked "No 2 signature unknown to us". In the meantime, the plaintiff had drawn his own cheque on his bank on the strength that the East African Community cheque would be honoured and cleared in time. The East African Community cheque thus having been dishonoured by the defendant, the plaintiff's cheque was also dishonoured by his own bank. He alleged that he suffered embarrassment and humiliation as a result of what he attributed to the defendant's negligence and wrongful dishonour of the East African Community cheque. These facts and particulars of negligence are pleaded in the plaint.

The defendant pleaded in its defence that it owed no duty of care or otherwise to the plaintiff in respect of the East African Community cheque, or in respect of any cheque. In paragraph 4 of the amended defence, the defendant pleaded as follows: The plaint discloses no cause of action there being no contractual relationship between the parties and no duty of care owned by a paying bank to the holder of a cheque.

This is the issue to be determined as a preliminary point of law. The East African Community cheque was drawn in favour of the plaintiff and was presented to his own bank. His bank was then to present the cheque to the defendant which was to pay or credit the proceeds to the plaintiff's account with his own bank which was a different bank altogether from the defendant.

It is clear, therefore, that since the plaintiff did not have a bank account with the defendant, in absence of any special arrangements with the defendant, the plaintiff was a stranger to the defendant. There existed no contractual relationship between him and the defendant. The plaintiff never banked with the defendant at the material time. If he had a bank account there and presented the cheque to that account, then the position would, perhaps, be different.

The plaintiff obtained the cheque from the customer of the defendant, a fact quite unknown to the

defendant. He banked the cheque in another bank; another fact unknown to the defendant. The cheque was presented for special clearance and, before that special clearance was given, the plaintiff drew his own cheque on his bank; another fact unknown to the defendant. The plaintiff's cheque was then dishonoured by his own bank; another fact unknown to the defendant. In these circumstances, is the plaintiff entitled to any relief for what happened within the defendant to which he was a stranger? Clearly not. There appears to be no privity of contractual relationship between the defendant and the plaintiff who is a stranger. What the defendant did was within its banking management to protect the interests of its own customers, including the East African Community, to which it owed a duty of care as their banker.

Suppose the plaintiff presented the East African Community cheque for payment at the defendant's counter and that cheque was dishonoured there and then because one of the signatures was not known: would the plaintiff sue the defendant either to obtain the proceeds of the cheque or for negligence in failing to decipher one of the signatures? Clearly not. There would be no privity of contractual relationship between the defendant and the plaintiff. The plaintiff's remedy is against the drawer of the cheque, in this case, the East African Community, which would in turn have a right of indemnity by the defendant with which there exists a contractual relationship.

Still on a hypothetical proposition: suppose the defendant (being uncertain of the signature of the drawer of the cheque) paid the cheque to a stranger who was not entitled to the proceeds; whatever other remedies the defendant may have, it cannot sue the stranger in contract for the return of the money. The East African Community could sue the defendant in contract to make good the sum lost through the defendant's negligence in failing to discharge the duty of care owed by it, as a bank, to its customer. Such duty of care includes ascertaining the authenticity of the cheque and signatories as well as the identification of the payee. It would be stretching too far the contractual duties of the bank to include strangers who are customers of a paying bank. *Paget's Law of Banking* (8th Edn) states at page 299:

Of course, on whatever ground a cheque is refused payment, the banker is only responsible to his customer, unless he had bound himself by making the cheque or giving some equivalent personal undertaking to the holder. A cheque is not … an assignment of funds and the holder has no claim of any sort on it against the banker on whom it is drawn.

In this case the defendant owed a duty of care to its customer, the East African Community, but not to the plaintiff, the holder of the East African Community cheque. The defendant did not make the cheque nor did it give some equivalent undertaking to the plaintiff. The plaintiff had presented the cheque to his bank for special clearance but, before such clearance was given, he drew his own cheque on his own bank. If he wanted the defendant to give some undertaking, he should have waited for remarks from the defendant. The plaintiff's embarrassment and humiliation were his own creation and cannot be stretched to fix any liability to the defendant with which there existed no contractual relationship. Nor did the defendant owe any duty of care to the plaintiff. The plaintiff's remedy does not lie in contract and (if there be any) it can only be considered as founded in tort.

In order that the plaintiff succeeds it must be shown that there exists special relationship between the plaintiff and the defendant. On looking at the pleadings, no such special relationship is pleaded. The common law duty to take care to avoid causing injury to others is restricted to physical injury either to a person or to property. This common law duty of care is extended with reluctance. This reluctance should not be construed to mean a refusal to admit into the list of torts claims based on a duty of care quite apart from strict contractual obligations and an absence of consideration. This category will include those persons possessed of "special skill" and who undertake, quite irrespective of contract, to apply that skill for the assistance of another person who relies upon such skill; in such an instance, a duty of care will a rise (see *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465, 502, per Lord Morris of Borth-y-Gest). In *Winther v Arbon Langwish & Southern Ltd* [1966] EA 292 Harris J having reviewed the decisions with regard to special relationship irrespective of contractual obligations and in the absence of consideration held that the relationship of insurance broker and assured between the defendant and the owners gave rise to a duty of care on the part of the defendant independent of contract. That the defendant, in the circumstances of that case, had not sufficiently discharged the duty of care cast upon it and was answerable for the damage which resulted.

In the instant case, the plaintiff was a stranger to the defendant. He was not a customer of the defendant. The defendant did not undertake, expressly or by implication, to do anything for the plaintiff. In effect, the special clearance of the East African Community cheque by the defendant was after the plaintiff had drawn his cheque on his bank, which cheque was subsequently dishonoured by the plaintiff's bank. No special relationship is pleaded in the pleadings on which the plaintiff may prove its existence. I will quote Lord Devlin in his speech in *Hedley's* case at pages 528 and 530:

I think, therefore, that there is ample authority to justify your lordships in saying now that the category of special relationships which may give rise to a duty to take care in word as well as in deed are not limited to contractual relationships or to relationships of fiduciary duty, but include also relationships which in the words of Lord Shaw in *Nocton v Lord Ashburton* [1914] AC 932, 972 are 'equivalent to contract', that is, where there is an assumption of responsibility in circumstances in which, but for the absence of consideration, there would be a contract…

I shall therefore content myself with the proposition that wherever there is a relationship equivalent to contract, there is a duty of care. Such a relationship may be either general or particular. Examples of a general relationship are those of solicitor and client and of banker and customer. For the former *Nocton v Lord Ashburton* [1914] A C 932 has long stood as the authority and for the latter there is the decision of Salmon J in *Woods v Martins Bank Ltd* [1959] 1 QB 55 which I respectfully approve. There may well be others yet to be established . Where there is a general relationship of this sort, it is unnecessary to do more than prove its existence and the duty follows. Where, as in the present case, what is relied on is a particular relationship created ad hoc, it will be necessary to examine the particular facts to see whether there is an express or implied undertaking of responsibility.

I find nothing in this case to suggest existence of special relationship between the plaintiff and the defendant. In absence of such special relationship no duty of care can properly follow. I am of the opinion that this suit was misconceived and it does not disclose any cause of action. It follows, therefore, that I must dismiss the suit with costs.

Action dismissed with costs.

Dated at Nairobi this 17th day of November 1976

M.G. MULI

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JUDGE