

**IN THE COURT OF APPEAL
AT NAKURU**

(CORAM: WARSAME, MATIVO & GACHOKA,

JJ.A.) CIVIL APPEAL NO. NAK E009 OF 2021

BETWEEN

REUBEN KIOKO MUTYAENE.....APPELLANT

AND

KCB LIMITED.....RESPONDENT

(Being an appeal against the judgment and decree of the High Court of Kenya at Nakuru (R. Ngetich, J.) dated 24th September 2020

in

HCCA No. 163 of 2019).

JUDGMENT OF THE COURT

1. Reuben Kioko Mutyaene (the appellant) seeks to overturn the judgment delivered by *Ngetich, J.* (as she then was) on 24th September 2020 in Nakuru High Court Civil Appeal No. 163 of 2019, Reuben Kioko Mutyaene vs. KCB Limited. In order to contextualize the parties diametrically opposed arguments in support of their respective positions, it is crucial for us to briefly highlight the history of the litigation which culminated in this appeal.
2. The appellant initially filed his suit against the respondent in

the High Court at Nakuru being, Nakuru HCC No. 34 of 2017. Subsequently, the suit was transferred to the Chief Magistrate's Court at Nakuru where it was assigned case number CMCC No. 107 of 2018.

3. In his amended plaint dated 25th May 2018 filed at the Chief Magistrate's Court at Nakuru, the appellant described himself as an astute businessman carrying on business at Nakuru and Machakos. There is no dispute that the respondent was one of his bankers. According to the appellant, for a smooth business operation, he relied on bank loans/overdrafts. Sometimes in March 2016, he issued a cheque for Kshs. 80,350/- payable to his advocates M/s Gordon Ogola, Kipkoech & Co. Advocates believing he had sufficient funds in his account. However, upon receiving his bank statement on 7th April 2016, he noted that the cheque was unpaid on 4th April 2016 on account of insufficient funds despite the fact that he had an overdraft facility. He also noted that a sum of Kshs.3,300/- was debited from his account on account of bank charges for an unpaid cheque. He claimed that he wrote several letters to the respondent seeking an explanation why the cheque was unpaid. Ultimately, by a letter dated 9th May

2017, the respondent informed him that the cheque was unpaid due to a technical error, an explanation he described as wanting. He contended that the words “*unpaid cheque*” and “*unpaid cheque charge*” damaged his reputation. He also complained that he issued cheque number 000655 for Kshs 933,654.80/- which was returned unpaid with the remarks “*crossing stamp cancelled.*” However, this cheque was cleared 4 days later at the respondent’s Masii branch. According to him, his request for his accounts to be transferred to the respondent’s Masii branch was ignored leaving his cheque transactions in a limbo. He accused the respondent of *inter alia* malice, violating his constitutional rights and portraying him as untrustworthy. He claimed he suffered damage, ridicule and he has been shunned by business associates. He prayed for:

- a. A declaration that the respondent's actions amounted to negligence, ignorance, breach of statutory duty of care and breach of contract.**
- b. A declaration that the respondent’s action was in violation of his constitutional rights and fundamental freedoms.**
- c. A declaration that the respondent's failure to act/respond to his letters and emails was in violation of the Fair Administrative Action Act and the Consumer Protection Act.**

- d. A declaration that the respondent's actions and inactions were in full contravention of the Banking Act, Bills of Exchange Act, Central Bank of Kenya Act, the Cheque Act, the Central Bank Prudential Guidelines and the Defamation Act.**
 - e. An order directing the respondent to permanently expunge from his statement the "unpaid cheque" and "unpaid cheque charges" entries.**
 - f. An order directing the respondent to pay damages in lieu of apology for the inconveniences caused to him.**
 - g. Special damages of Kshs.60,000/-.**
 - h. General & aggravated damages.**
 - i. Any other relief the Court may deem fit.**
 - j. Cost of this suit.**
4. In its amended statement of defence, the respondent refuted the appellant's claims and the allegations of negligence and maintained that as at the time the cheque was presented for payment, his account was overdrawn to the tune of Kshs. 863,738.95/-. It maintained that considering that the account was already overdrawn, the appellant ought to have brought the cheque to its attention.
5. After addressing her mind to the evidence, the submissions, the authorities and the law, the trial Magistrate in a judgment dated 3rd September 2019 stated:

“The Constitutional declarations sought by the plaintiff are not within the jurisdiction of this court. The plaintiff has pleaded what appears to

the court to be a claim for damages for negligence on the part of the defendant in the manner it handled two cheques he issued. The plaintiff has stated that he was operating on overdraft facility with the bank. He issued a cheque in March 2016 which was only cleared after he intervened personally. The court has considered the plaintiff's pleadings and testimony. The plaintiff has not shown that he suffered loss and damages as a result of the defendant's negligence. Neither has he demonstrated how the defendant's alleged negligence manifested itself. From his testimony, the plaintiff relied on an overdraft facility extended to him by the defendant and it appears cheques normally took time and his personal intervention to be paid. That alone does not prove that the defendant was negligent. Further, the plaintiff has not stated the terms of the overdraft facility for the court to determine whether the defendant was in breach or not.

As regards that claim for special damages, the amount expended on preparing the pleadings would have been recovered as costs had the plaintiff's claim succeeded. The court finds that the plaintiff has failed to prove his case against the defendant. The suit herein is dismissed with costs to the defendant."

6. Aggrieved by the above verdict, the appellant appealed to the High Court at Nakuru in HCC Appeal No. 163 of 2019, Reuben Kioko Mutyaene vs KCB Bank Limited citing 11 grounds of appeal which can be summed up as follows, the Magistrate erred in (a) finding the respondent was not to blame for failing to honour the two cheques despite the

account having funds within the authorized overdraft facility; (b)

finding that the appellant had shown that he suffered loss and damages due to the respondent's negligence in dishonoring the two cheques; (c) failing to consider his evidence; (d) failing to appreciate the facts; (e) failing to find that the respondent breached the Fair Administrative Action Act, the Consumer Protection Act, the Banking Act and the Central Bank of Kenya Prudential Guidelines; (f) failing to find that the Constitutional declarations were within the trial court's jurisdiction; (g) failing to consider that the suit arose from admitted facts; (i) failing to find the respondent breached the law by failing to respond to his correspondence; (j) failing to find that his assertions were unrebutted; (k) failing to find that the words "*un paid cheque charges*" injured his reputation; (l) failing to find that the trial court took into account irrelevant considerations; and, (l) failing to consider relevant considerations.

7. After considering the record, the grounds of appeal and the parties' submissions, the learned Judge in the definitive paragraph stated:

"26. I however note from the statement and evidence adduced by appellant in cross

***examination that the error was corrected
the***

same day and Kshs.80,350/- paid. The statement shows entry of the cheque on 4th April 2016, indicated as unpaid the same day and the charges of kshs.3,300/- was entered. On the same day 4th April 2016 there is entry showing the cheque was paid out. Any reasonable person reading the statement can tell that the entry was an error and the respondent promptly rectified the same.

27. Record also shows in cross examination of the appellant, that he never showed court any document to demonstrate that he was denied loan from Housing Finance because of the bank statement. In response to cross examination, he said he did not have loan application. There is no doubt that the bank was expected to exercise due care while clearing the cheque. Appellant further said the charges of Kshs.3,300/- was also paid.

28. In respect to special damages of kshs.60,000/- the appellant stated in the lower court that they were made up of costs for preparing pleadings. On this, the trial Magistrate rightfully found that it should come under costs of the suit.

29. From the foregoing I find that the appellant failed to prove his case on a balance of probabilities. The trial Magistrate rightfully dismissed his case."

8. Undeterred, the appellant appealed to this Court in this appeal faulting the learned Judge for: (a) failing to properly consider the pleadings, the evidence, submissions, binding authorities and arriving at an erroneous decision; (b) failing to find that the respondent was in breach of bank/customer

contract; (c) failing to honour cheques on demand despite his account being sufficiently funded; (d) failing to find that the appearance of the word unpaid cheque on the bank statements and the bank charges levied were unlawful and injurious to his reputation; (e) failing to resolve the issue relating to the transfer of his bank account to KCB, Masii branch; (f) failing to adjudicate, determine and offer redress for violation of Constitutional rights and fundamental freedoms; (g) finding that he had not shown that he suffered loss and damage as a result of the respondent's action of dishonoring the two cheques; (h) disregarding the principle of *stare decisis*; (i) awarding costs of the suit to the respondent.

9. The appellant prays that his appeal be allowed, the judgment dated 24th September 2020 and decree arising therefrom be set aside and all the reliefs sought in his amended plaint dated 25th May, 2018 be granted. He also prays for costs of this appeal; costs of the appeal before the High Court, and the proceedings before the subordinate court, and, any other order(s) this Court deems fit.

10. In support of his appeal the appellant who was

unrepresented highlighted his written submissions citing a
catena of

authorities all of which we have carefully considered. However, for the sake of brevity, we will concisely highlight the germane issues urged in his submissions and some of the decisions cited in support of his arguments.

11. The appellant submitted that even though the duty of a second Appellate Court is to confine itself to matters of law, it is obligated to delve into matters of facts if it is shown that the two courts below considered matters they should not have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse. In support of this assertion, he cited **Stanley N. Muriithi & another vs. Bernard Munene Ithiga [2016] eKLR** cited in Kenya **Breweries Limited vs. Godfrey Odoyo [2010] eKLR** in support of the proposition that failure by a first Appellate Court to reevaluate the evidence tendered before the trial court and as a result, arriving at a wrong decision is a point of law.

12. In a nutshell, the appellant's submissions and authorities were all geared to persuading this Court to fault the learned Judge for upholding an erroneous decision. He urged this Court to set aside the said decision and award

the reliefs sought in his amended complaint mentioned earlier.

13. This Court's jurisdiction in a second appeal is strictly confined to matters of law, not facts as established in cases like **Otieno, Ragot & Company Advocates vs. National Bank of Kenya [2020] eKLR** and **Stanley Murithi & Ano. vs. Bernard Munene Ithiga [2016] eKLR**. This Court will only interfere with concurrent findings of fact if they are perverse or unsupported by evidence.
14. The germane issue in this case is whether the appellant proved negligence on the part of the respondent. The determination of this issue either way will impact on the other two issues, namely, whether the appellant was entitled to an award of general and aggravated damages and the special damages. It is settled law that a bank-client relationship is primarily contractual, creating a duty of care to act with reasonable skill and care in executing instructions. Therefore, negligent conduct arises when a bank breaches this duty, specifically for example, when it fails to act as a "*reasonable banker*" in honoring payments, protecting against fraud or handling customer information.

15. The leading decision in **Joachimson vs. Swiss Bank Corporation [1921] 3 KB 110** established the foundational duty for banks to exercise reasonable care and skill in all dealings, especially in carrying out customer instructions. This position was reiterated in **Equity Bank of Kenya & Another vs. Robert Chesang [2016] eKLR**. Therefore, negligent conduct in a bank-client relationship generally involves a breach of this duty, which is measured against the standard of a reasonable prudent banker. Though not a closed list, examples include acting in breach of a mandate, failing to stop suspicious transactions, providing careless advice or wrongful dishonor of a cheque. In **Flemming vs. Bank of New Zealand (1900) AC 577** it was established that a bank is liable if it dishonours a cheque while the customer has sufficient funds, confirming the contractual duty to pay.
16. However, a bank is not held liable for wrongful dishonour if the refusal is justified by legal, contractual or technical grounds. If a bank acts in good faith and without negligence, complying with its contractual terms, it is generally protected when refusing payment. The onus is on the customer to show that the cheque was wrongfully

dishonoured, meaning funds

were available and no legal impediment existed.

17. In the excerpt cited earlier, the trial Magistrate who had the benefit of seeing and hearing the witnesses was persuaded that the appellant did not demonstrate the alleged negligence. The learned Magistrate stated that the appellant relied on an overdraft facility extended to him by the respondent, therefore, the cheques normally took time and the appellant's personal intervention to be paid. According to the learned Magistrate, that alone did not prove that the appellant was negligent and that the appellant did not state the terms of the overdraft facility for the Court to determine whether the appellant was in breach or not. Our understanding of this finding is that the trial Magistrate found the evidence in support of the alleged negligence to be wanting. Agreeing with the trial court, the 1st Appellate Court held that the appellant failed to prove his case on a balance of probabilities.

18. As stated above, a bank is not liable for dishonouring a cheque if it acted in "*good faith*" meaning the bank acted without negligence and based on a genuine reasonable belief that the payment should be refused. As was held by

the Supreme Court of India in **Bank of Maharashtra vs.**
M/s Automotive

Engineering Co. (1993) 2 SCC 97, a bank is not liable for acts done in good faith and without negligence. The test here is that the bank must have acted in good faith and without negligence. However, the bank actions must comply with the standard banking practices. If these conditions are met, the bank is not liable to the owner of the cheque for not paying it.

19. The threshold for "Good Faith" is absence of negligence, a term defined in **Charleswoth & Percy on Negligence, 8th Edition, London: Sweet & Maxwell, (1990), page 3** as follows:

"...In current forensic speech, negligence had three meanings, they are: (a) state of mind, in which it is opposed to intention; (2) careless conduct; and (3) the breach of a duty to take care that is imposed by either common law or statute. All three meanings are applicable in different circumstances but any one of them does not necessarily exclude the other meanings." (Emphasis added).

20. "Absence of negligence" means that the bank must not have acted carelessly. There is no dispute that the account had an overdraft facility. As the respondent stated, the appellant issued the cheque without prior communication to the bank despite knowing the status of the account. This

assertion was not contested. No evidence was tendered to suggest that the respondent acted carelessly. In fact, as a matter of prudence,

the cheque was paid the same day after the appellant raised the issue. Similarly, the bank charges were reversed the same day.

21. The other threshold for good faith is due diligence. The Supreme Court of India in **Canara Bank vs. Canara Sales Corporation [1987]** elucidated the importance of "*due care and diligence*" in the banking industry. We have examined the entire record. We find nothing to suggest that the appellant demonstrated absence of due diligence on the part of the respondent, which is primarily an objective standard of care, often operating as a statutory defence. It requires taking all "*reasonable precautions*" and exercising "*all due diligence*" in the performance of a defined duty. In **Singularis Holdings Ltd vs. Daiwa Capital Markets Europe Ltd [2019] UKSC 50**, the U.K. Supreme Court affirmed that a bank cannot execute payment instructions if there are reasonable grounds to suspect fraud. In **Barclays Bank plc vs. Quincecare Limited [1992] 4 All ER 363**, it was established that a bank breaches its duty of care if it fails to pause and verify instructions if there are reasonable doubts on the transaction.

22. The legal burden of proof for negligence generally lies with the claimant (the customer). However, the evidentiary burden shifts to the bank once the customer makes a *prima facie* case that a breach of duty occurred. This principle of law was laid down by the Privy Council in **Tai Hing Cotton Mill Ltd vs. Liu Chong Hing Bank Ltd [1986] AC 80** which established that burden shifts to the bank to prove it exercised reasonable care. Banks owe their clients a duty of care to act with reasonable skill, diligence, and good faith, often described as a mandate to act non-negligently. Negligence in this context is defined by a failure to act as a reasonable banker.

23. To establish a negligence claim in a customer-bank relationship, a plaintiff must prove four key elements: the bank owed a duty of care, the bank breached that duty, the breach caused the harm, and actual damages occurred. (See **Karak Brother Company Ltd vs. Burden [1972] 1 All ER 1210**).

24. The duty of care is not disputed. However, the alleged breach of duty of care is contested. Other than the assertion that the cheques were unpaid, which is not

disputed, the appellant does not deny the fact that the account had an overdraft

facility and the respondent's contention that given the status of the account, the appellant did not alert the respondent about the cheque. It is also not in dispute that the cheque was paid the same day after the appellant contacted the respondent and the bank charges were reversed. This demonstrates absence of bad faith. Therefore, it is our finding that negligence was not proved.

25. As stated earlier, the determination of the claim for damages rested on the findings of the allegations of negligence. Having concluded that the claim for negligence was not proved, it follows that the claim for damages has no legs to stand on. Therefore, it will add no value for us to address it. It will suffice for us to state that the lower Court and the 1st Appellate Court rightly found that the claim for general damages and aggravated damages was not recoverable nor was the alleged loss proved. Similarly, we agree with the 1st Appellate Court that regarding the special damages of Kshs.60,000/-, the appellant stated in the lower Court that they were made up of costs for preparing pleadings and the trial magistrate rightfully found that it should come under costs of the suit. In any event, the claim for negligence having collapsed, it follows that the

plea for special damages also failed.

26. Regarding the claim premised on the alleged violation of Constitutional rights, the trial Magistrate rightly found that it lacked jurisdiction. Such a claim falls within the exclusive jurisdiction of the High Court by dint of Article 165 (3) of the Constitution. The mere fact the case was transferred to the lower Court by the High Court could not confer jurisdiction to the lower Court. The appellant knew his case, but he did not object to the transfer of the case to the lower Court.

27. Lastly, the appellant faults the learned Judge for failing to consider his submissions and authorities. However, requiring a court to consider and weigh all evidence, submissions and authorities does not mean that the judgment of the court must also include a complete embodiment of all evidence led, submissions and authorities as if it comprises a transcript of the proceedings. In order to determine whether there is any merit in this assertion, this Court must consider the entire court record, juxtapose it against the impugned judgment, and finally determine whether there is any basis for

interfering with the said judgment. We have read the record and the judgment, we find no merit in this line of argument.

28. The upshot is that we entirely agree with the High Court that appellant failed to prove his case on a balance of probabilities. Therefore, his case was rightly dismissed by trial court and the 1st Appellate Court. We find no reason to interfere with the concurrent finding by the two courts below. Therefore, this appeal fails and it is hereby dismissed with costs to the respondent.

Dated and delivered at Nakuru this 17th day of March, 2026.

M. WARSAME

.....
JUDGE OF APPEAL

J. MATIVO

.....
JUDGE OF APPEAL

M. GACHOKA C.Arb, FCIArb.

.....
JUDGE OF APPEAL

*I certify that this is
a true copy of the
original.*

Signed.

DEPUTY REGISTRAR