CFC Stanbic Bank Limited v Kenya Programmes for Sustainable Development (Civil Appeal 140 of 2018) [2024] KECA 154 (KLR) (23 February 2024) (Judgment)

Neutral citation: [2024] KECA 154 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 140 OF 2018

SG KAIRU, F TUIYOTT & JW LESSIT, JJA

FEBRUARY 23, 2024

BETWEEN

CFC STANBIC BANK LIMITED ..... APPELLANT

AND

KENYA PROGRAMMES FOR SUSTAINABLE DEVELOPMENT ..... RESPONDENT

(An appeal against the Judgment and Decree of the High Court of Kenya at Nairobi (F. Ochieng, J.) dated 19th July, 2017in HCCC No. 682 of 2009)

JUDGMENT

1. Kenya Programmes for Sustainable Development (KPSD or the respondent) is a Non-Governmental organization duly registered under the *Non-Governmental Organizations Co-ordination Act*. Through a meeting of its Board of Trustees held on 16th July 2018, KPSD resolved to open and operate an account with CFC Stanbic Kenya Limited (the Bank or the appellant). The resolution was to the effect that instruments or indemnities were to be signed by any two/any one of the following authorized signatories, James Muhia Njuguna, Susan Kabogo or Moulding Muigai James. Subsequently, on 28th July, 2008 account number xxxx was opened in the name of KPSD at the Harambee Avenue branch of the Bank. In a document designated "signature cards" the signing instructions read "three to sign" and the three signatories each gave a sample of their signatures.

2. On 28th February, 2009, cheque no xxxx of the same date drawn by KPSD and signed by all the three signatories was presented for payment. The cheque was for a sum of USD 32,000.00 in favour of Moulding Muigai James. Remember the drawee was one of the three signatories. The proceedings from which this appeal arises were prompted by payment of this cheque. KPSD asserts that the Bank was negligent in paying the cheque in the face of its letter of 18th February, 2009 received by the Bank on 23rd February, 2009 in which it instructed to stop payment of the cheque and upon which Bank had in

fact debited its account with USD 27.83 being the charges for acting on the instructions. At the High Court, the customer sued the Bank for the sum of ksh 2,552,540.00 worked out as the equivalent of US Dollars 32,032.00 at an exchange rate of 79.6872 said to be the one prevailing on 28th February 2009. The sum of US Dollars comprised of USD 32,000.00 being the value of the sum paid out and US Dollars 32.00 being charges for paying the cheque.

3. At trial, James M. Njuguna the Chairman and Director of KPSD explained the circumstances surrounding the drawing, presentation and stoppage of the cheque. It was explained that KPSD ran many programmes, one of which Moulding was responsible. A decision was, in the course of time, made that the programme be deferred to a later date. The controversial cheque had been issued and given to Moulding who did not return it for cancellation.

4. On its part, the Bank's response was that it could not act on the purported instructions owing to two abnormalities:

    i. The letter was signed by one of the three approved signatories to the account contrary to the signing instructions in the signature card.

    ii. The letter was dated 18th February 2009, ten clear days before the cheque was issued.

5. Testifying on behalf of the Bank, Joshua Ratemo denied that the charges of USD 27.83 were in respect to stop charges for the cheque stating that:

    " The commission of USD27.83 was charges before the cheque was drawn."

6. In the face of this rival positions, Ochieng, J. (as he then was) held that:

    "46. In my considered opinion, whereas the bank was not obliged to act on instructions which were not in accordance with the mandate, the bank ought to have made inquiries from the customer. I so find because it was not a normal thing for the chairman of the organization to sign a cheque and then also sign letter to countermand the payment which he (together with other 2 signatories) had sanctioned.

    47. Contrary to the bank's submissions, I find the conduct of the plaintiff's chairman should have evoked suspicion in the mind of the bank."

7. Ultimately, the trial court held in favour of the customer. The Bank is aggrieved by that decision and placed before this Court seven grounds of appeal which it invited us to consider under the following headlines:

    a. Whether the appellant could honour the alleged countermand instructions of James Muhia Ng'ang'a to stop payment of cheque numbers xxxx, xxxx and xxxx dated 18th February 2009 and received by the appellant on the 23rd February 2009 which cheques had not been issued.

    b. Whether the appellant breached the duty of care to the respondent in honouring the payment of USD 32,000.00 vide cheque number xxxx.

    c. Whether the learned trial Judge erred in law in failing to hold the respondent liable for the loss alleged to have been suffered by maintaining duly signed cheques without dates and payee thereon.

    d. Whether the learned Judge of the Superior Court erred in failing to hold that the respondent's remedy lay in pursuing the recipient of the said cheque as the said recipient probably stood to gain twice.

e. Whether the learned trial Judge erred in awarding costs to the respondent who was represented by its employee in the Superior Court contrary to section 40 of the *Advocates Act*.

8. The words of Viscount Dunedin in *Westminster Bank Ltd v Hilton* [1926] UKHL J11261, a decision cited to us by counsel for the respondent are apt in describing the facts in this matter. They are in a small compass! In addition, they are very substantially uncontested. For that reason, while our remit as a first appellate court would ordinarily involve re-evaluation of the evidence at trial, akin to denovo hearing, this appeal invites us to simply consider a question or questions of law.

9. And, as we set out the arguments made by the parties, we have to call out the appellant for taking up two issues before us which go beyond the defence it set up and framed at trial, and where matters that were not presented to trial and cannot, obviously, properly arise now. One is the notice against payment was in regard to a different cheque than that presented for payment. The cheque was number xxxx but the letter countermanding its payment was xxxx (notice the additional zeros). Making the argument that the stop notice was ambiguous. This was never part of the defence case. Second, it was never a proposition by the appellant that the respondent probably stood to benefit twice if its claim was upheld. A contention that the respondent would be unjustly enriched.

10. To the issues properly before us, it is submitted by the appellant Bank that by dint of section 75(a) of the *Bills of Exchange Act*, it was obligated to honour the said cheque in the absence of a countermand. That the respondent's letter dated 18th February 2009 did not inform the appellant that the respondent had signed cheques that were undated and did not have the payee endorsed thereon so as to put the appellant on notice of any subsequent cheques drawn by the respondent herein. The countermand was, at any rate, ambiguous and the respondent was to blame for the loss it suffered. The decision in Westminster Bank Ltd *supra* is cited for the argument that a principal who gives unclear and ambiguous orders cannot disown the agent's authority.

11. The appellant submits, further, that the learned trial Judge erred in failing to hold the respondent solely liable for the loss alleged to have been suffered for maintaining duly signed cheques without dates and payee thereon. In support of this agreement, the appellant cites section 91 of the *Bills of Exchange Act*:

> " A thing is deemed to be done in good faith within the meaning of this Act where it is in fact done honestly, whether it is done negligently or not."

In, addition, the Bank relies on section 3 (2) of the *Cheques Act*.

12. The respondent's answer is that the appellant failed to appreciate the operations of a corporate body which is bureaucratically organized in three layers and to the extent that the bank failed to make a distinction between the account holder and the authorized signatories. The argument, as we understand it, is that the written contract which contained the mandate was restricted to bills of exchange, cheques or money instruments. And since the letter of 18th February, 2009 did not take a form of a cheque, bill or instrument, it was only James Muhia Njuguna who was both the CEO and the Chairperson who could write it on behalf the account holder and not those who acted on a delegated authority.

13. The respondent submits that the letter countermanding the cheque was received on 23rd February 2009, honoured and executed, as evidenced by the debit of US Dollars 27.83. We are also told to note that there is no prescribed manner for countermanding a cheque under the *Banking Act*, the *Cheques Act*, and the *Bills of Exchange Act*. It is posited that the Bank understood the letter as a countermand as James Muhia Njuguna had appended his signature on it and it is for that reason that the words "limit signatory" was endorsed on top of the cheque by the Bank.

14. The respondent argues, further, that the letter did not give reasons for stoppage but it ordinarily should have warned and put the appellant on notice. The respondent supports the learned trial Judge's finding that the appellant was under an obligation to make inquiries and by so doing the appellant would have enjoyed the protection of the law and would have, also, met its obligation of duty of care (*Simba Commodities Limited v Citibank N.A* [2013] eKLR)

15. The following facts are uncontested; sometime in July 2008, likely 28th July 2008, the customer opened a dollar account with the Bank with operating instructions of "three to sign"; the customer issued an undated cheque no xxxx for the sum of USD 32,000 on that account; on18th February 2009 a letter in the letterhead of the customer and signed by James was written to the Bank stopping payment of the cheque; the letter was received by the Bank by at least by 23rd February 2009; on that same day the Bank debited the customer's account with a sum of USD 27.83 as commission for acting on the countermand instructions; on 28th February, 2009 the Bank paid the cheque. The Bank's attempt to attribute the commission charged to a different countermand was unsuccessful because it failed to demonstrate which other countermand it had received other than that in the letter of 18th February, 2009.

16. A bank is obligated to honour a cheque presented to it, if money is available in the customer's account, in the absence of a countermand. In this matter, this obligation was contractual as expressly provided in the account opening request by the customer accepted by the Bank. This duty was reinforced by section 75 (a) of the *Bills of Exchange Act* which reads:

> " The duty and authority of a banker to pay a cheque drawn on him by his customer are determined by –
>
> (a) countermand of payment."

17. While statute does not prescribe the form in which a countermand should take, it must clearly convey the instructions as to which cheque is to be stopped and there must be no ambiguity as to the intention to stop payment. It also seems to be, as a matter of logic and common sense, that the countermand must be in writing and signed by those who have the mandate to sign cheques. The signatures which can countermand payment can only be those that make up for a proper and lawful authority to pay. For that reason, the letter dated 18th February, 2009 fell short of a proper countermand because it was not signed by all the three signatories who were contractually mandated to sign cheques, bills of exchange, promissory notes and other instruments.

18. That said, the law is that there will be circumstances that arouse suspicion as to whether a payment should be made and in those special circumstances, the Bank has a duty to make inquiries from the customer as to whether to pay (*Auchteroni & Co. v Midland Bank, Ltd.* [1928] 2 K. B. 294). The Bank is only excused from the duty to inquire if it can be demonstrated that deferring the payment will put it at a risk of breaching its duty to honour the cheque, thereby exposing it to a claim for damages for injuring the customer's credit. In this regard, the bank bears the burden of proving that it will be in risk of breach of duty if it defers payment so as to make an inquiry.

19. Here, the letter of 18th February 2009 while not amounting to an effective countermand, for the reason we have explained, was a special circumstance sufficient to trigger an inquiry of the customer by the Bank because it has to be unusual for only one signatory out of three to instruct stoppage of payment of a cheque he had just signed. The Bank did not present any evidence that pausing for a moment and deferring payment so as to make the inquiry would open it to a breach of duty. Indeed, as the stop order reached the Bank five days before the cheque was presented, the Bank had sufficient lead time

to make an inquiry about the apparent countermand. For that reason, the Bank defaulted in it's duty of care in failing to make the inquiry and we cannot find error in the reasoning and holding of the learned trial Judge.

20. We reach this result fortified that when the Bank received the letter, it debited the customer's account with commission charges for the countermand. This belies an intention of the Bank to carry out the instruction. Why this was not followed through was not explained and can only be attributed to an oversight or negligence on the Bank and its staff.

21. Turning to the issue of costs the learned trial Judge stated; "The plaintiff is also awarded 50% of the costs of the suit" We do not understand this order to mean that those costs be taxed as though the respondent was represented by an advocate. While a party who appears in person cannot seek instruction and court attendance fees still, he/she would be entitled to recover disbursements incurred in prosecuting or defending a matter, such as court fees paid and transport costs. The quantum of costs to be paid is to be determined in taxation proceedings and think that the complaint raised by the appellant that the Judge erred in awarding costs to the respondent is misplaced. We agree with the respondent that the issue will be settled by the taxing officer and not this Court.

22. The upshot is that this appeal is without merit and is dismissed with costs.

DATED AND DELIVERED AT NAIROBI THIS 23RD DAY OF FEBRUARY 2024.

S. GATEMBU KAIRU, FCIArb.

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JUDGE OF APPEAL

F. TUIYOTT

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JUDGE OF APPEAL

J. LESIIT

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JUDGE OF APPEAL

I certify this is a true copy of the original.

Signed

DEPUTY REGISTRAR