



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KARANJA, ODEK & KANTAI, JJA)

CIVIL APPEAL NO. 123 of 2017

BETWEEN

MES MWEU.....1st APPELLANT

FRANCIECA MWEU.....2nd APPELLANT

AND

KENYA COMMERCIAL BANK.....RESPONDENT

(Appeal from the judgment of the High Court of Kenya at Nairobi (Ougo, J.) dated 11th October 2013

in

H.C.C.C No. 207 of 2010)

JUDGMENT OF THE COURT

1. The relationship between the respondent and the appellants is bank-customer relationship. At all material times, the appellants held a joint account with the respondent bank.

BACKGROUND FACTS

2. On or about 10th August 2007, the appellants drew a cheque in favour of *Nyaga Stock Brokers* for the sum of Kenya Shillings One Million Three Hundred Thousand only (Ksh.1,300,000). It is not in dispute that there was sufficient funds in the appellants' bank account. On the same day, the cheque was presented for payment by *Nyagah Stock Brokers*. The monies were to be used to purchase shares for the appellants. On 13th August 2007, the respondent bank debited the appellants' account with the sum of Ksh. 1,300,000. However, the respondent bank stopped clearance of the cheque on 15th August 2007; the cheque was thus dishonoured.

3. By a plaint dated 31st March 2010, the appellants filed suit against the respondent bank seeking general damages for loss of business bargain and opportunity; damage to their reputation by the Stock Broker; loss of confidence by the Stock Broker and damages for emotional distress and shock. Interest at the rate of 20% per annum was sought for any damages awarded.

4. The respondent bank in its statement of defence conceded a cheque of Ksh. 1,300,000 was presented to it for clearance on or about 13th August 2007. However, it averred that in line with banking custom and tradition, it decided to conduct due diligence as the cheque was for a huge amount compared to the regular and prior transactions of the appellants in their account with the bank. Upon trying to seek confirmation, the bank stopped clearance of the cheque after failing to contact the appellants on their known telephone contacts despite numerous diligent efforts.

5. The respondent averred that the practice of seeking prior confirmation before clearing cheques for large amounts is necessitated by increased and rampant fraudulent transactions on bank accounts by way of cheques; the practice is aimed at protecting customer's funds; that in the instant matter, the collecting bank was advised that the reason why the cheque was not cleared was due to lack of confirmation as to its issuance by the purported drawer. For the foregoing reasons, the respondent bank denied liability for any damages to the appellants.

6. Upon hearing the parties by way of oral evidence and submission, the trial Judge dismissed the appellants' suit with costs. In dismissing the suit, the trial court *inter alia* expressed:

“The cheque was stopped as confirmation was awaited. I am persuaded that the bank was unable to reach the plaintiff. I agree with the defendant their actions were in tandem with the banking practice in Kenya and not discriminatory in its application. I therefore find that there was no unlawful dishonor of the plaintiff's cheque.... I find there was no breach of contract on the part of the defendant or any unlawful or illegal actions by the defendant as the defendant acted in due diligence in the circumstances.....

On whether the plaintiff suffered loss and damages as a result of the action and conduct of the defendant;... I find that the plaintiff has not established any loss. In his plaint, he claims loss of business bargain and opportunity. ...To claim that he had lost business it was important for the plaintiff to adduce evidence on the nature of business he was transacting and the loss he incurred. The plaintiff did not adduce any evidence from Nyaga stock brokers to show that as a result of the dishonored cheque he lost the shares he intended to buy. He admitted in court that he could have re-banked the cheque but he choose not to; as a prudent businessman, he ought to have re-banked the cheque. I therefore find that his evidence does not show that there was any loss of business bargain opportunity.

On damage to their reputation and loss of confidence by the stock brokers....a witness from the stock broker firm or a letter on his conduct from the stock broker on the transaction could have assisted in justifying his claim of loss of confidence and damage to reputation....

On emotional distress and shock, PW1's evidence is that he stopped the car on receiving the call from the Stock Brokers and he called the bank. In my view, this is insufficient evidence to prove emotional distress and shock.”

GROUND OF APPEAL

7. Aggrieved by dismissal of their suit, the appellants have lodged the instant appeal citing the following grounds:

“(i) The judge erred in finding the appellants had not proved their case.

(ii) The judge erred in failing to consider and find there was loss of business opportunity occasioned to the appellants by the respondent.

(iii) The judge erred in failing to find the respondent was in breach of banking laws and the contract between the parties.

(iv) The judge erred in failing to consider the primary evidence of the appellant.

(v) The judge erred in failing to consider there is no legal or factual basis for the respondent failing to honour its contractual obligations to the appellants.”

8. During hearing, the appellants were represented by learned counsel **Mr. Titus Koceyo**. The respondent was represented by learned counsel **Mr. D. Makori** holding brief for **Mr. Kimani** of the firm of Macharia Mwangi & Njeru Advocates.

APPELLANTS SUBMISSION

9. Counsel rehashed background facts to the dispute between the parties. The gravamen of the appeal is that the Judge erred in failing to consider that there existed a contractual relationship between the appellant and the respondent bank; the respondent was required in law to act upon instructions of the appellants; the Judge erred in failing to put into consideration that the respondent was obliged to clear the cheque of Ksh.1,300,000. It was urged that there is no requirement in law or in the contract between the parties that the respondent could only honour the cheque upon confirmation by the appellants. It was further submitted that the Judge erred in placing reliance on alleged Central Bank Prudential Guidelines which require prior confirmation before a cheque is cleared for payment; that the said Central Bank Prudential Guidelines were not produced in court; there is no law that limits the maximum amount for which a cheque has to be drawn and cleared. In support of their submissions, the appellants relied on the case of **Bank of Baroda -v-Timwood Products Limited, Civil Appeal No. 132 of 2001**. It was urged that the instant appeal is *in pari materia* to the **Timwood Case** (supra) where damages was awarded by this Court.

RESPONDENT'S SUBMISSION

10. The respondent in opposing the appeal submitted that the Judge properly evaluated the primary evidence on record to determine if the appellants suffered any loss, damage or emotional distress; the Judge correctly held the appellants did not adduce any evidence from **Nyaga Stock Brokers** to show that as a result of the dishonored cheque they lost the shares they intended to buy. It was further urged that the appellants did not demonstrate any loss of business opportunity. Citing the case of **Capital Fish Kenya Limited -v-Kenya Power & Lighting Company Limited [2016] eKLR**, it was submitted that evidence must be led to prove the business bargain that was lost. It was further submitted that even when the cheque was dishonored, the money still remained in the appellants account and they should have re-banked the cheque but chose not to.

11. The respondent submitted that it was in the appellants' interest that the bank sought confirmation before honouring the cheque; that seeking confirmation was paramount especially when the appellants had not transacted in amounts in excess of Ksh.1,000,000 before. Counsel submitted that the decision in **Bank of Baroda Limited -v- Timwood Products Limited** (supra) is distinguishable.

ANALYSIS and DETERMINATION

12. We have considered the written submissions and authorities cited by the parties. This is a first appeal and we are obliged to abide by the provisions of **Section 78** of the **Civil Procedure Act** to evaluate and examine the record and arrive at our own conclusion. In **Selle -v- Associated Motor boat Co. Ltd (1968) EA 123** Sir Clement De Lestang stated:

“This court must consider the evidence, evaluate it itself and draw its own conclusions though in doing so it should always bear in mind that it neither saw nor heard witnesses and should make due allowance in this respect. However, this court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he had clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally (Abdul Hammad Sarif -vs- Ali Mohammed Solan (1955, 22 EACA 270).”

13. Likewise, in **Mbogo -v- Shah & Another (1968) EA 93** , this Court set out circumstances under which an appellate court may interfere with a decision of the trial court as follows:-

“I think it is well settled that this court will not interfere with the exercise of discretion by the inferior court unless it is satisfied that the decision is clearly wrong because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into account and consideration and in doing so arrived at a wrong conclusion.”

14. The undisputed fact in this matter is that the appellants held a joint bank account with the respondent bank. The appellants drew a cheque for Ksh. 1,300,000 payable to **Nyaga Stock Brokers**. The appellants had sufficient funds in their account. The cheque was presented but was not paid.

15. The appellants contend that the respondent bank in failing to honour and pay the cheque was in breach of the contract between the parties. It is contended that the bank wrongfully dishonored the cheque; there was no good reason not to clear and pay the cheque.

16. Conversely, the respondent bank contends that it was not in breach of contract as it had tried in vain through telephone to contact the appellants to confirm clearance and payment of the cheque; that failure to reach the appellants through their known telephone contacts led the bank to return the cheque as unpaid with remarks “confirmation awaited.” It was submitted that the bank acted with due diligence in seeking confirmation prior to payment to protect the appellants interest.

17. Crucial to this appeal is whether from the undisputed facts the bank is liable to the appellants for failing to honour and pay the cheque of Ksh. 1,300,000. In **Halsbury’s Laws of England, 4th Edition, Volume 3** at para 155 on wrongful dishonor of a cheque, it is stated:

“If without justification, a banker dishonours his customer’s cheque, he is liable to the customer in damages for injury of credit... Proof of actual injury to credit is not necessary to secure substantial damages, either for a business customer or for personal customers. The answer on a cheque dishonored on presentation by a third person may constitute libel, but such cases are rare; in such cases general damages may be awarded.”

18. In this matter, there existed a bank-customer relationship between the parties. In law, there is a duty placed on the respondent bank to honour instructions and cheques issued by a customer if there is sufficient funds in the account.

In honouring its customer’s instructions, a bank is under duty to exercise due diligence as well as reasonable care and skill. In **Karak Brothers Company Ltd -v- Burden(1972) 1 All ER 1210** it was expressed:

‘... a bank has a duty under its contract with its customer to exercise “reasonable care and skill” in carrying out its part with regard to operations within its contract with its customer. The standard of that reasonable care and skill is an objective standard applicable to bankers. Whether or not it has been attained in any particular case has to be decided in the light of all the relevant facts, which can vary almost infinitely. The relevant considerations include the prima facie assumption that men are honest, the practice of bankers, the very limited time in which banks have to decide what course to take with regard to a cheque presented for payment without risking liability for delay, and the extent to which an operation is unusual or out of the ordinary course of business. An operation which is reasonably consonant with the normal conduct of business (such as payment by a stockbroker into his account of proceeds of sale of his client’s shares) of necessity does not suggest that it is out of the ordinary course of business. If “reasonable care and skill” is brought to the consideration of such an operation, it clearly does not call for any intervention by the bank. What intervention is appropriate in the exercise of reasonable care and skill again depends on circumstances.’

19. In the instant appeal, it was testified for the respondent bank that upon presentation of the cheque of Ksh.1,300,000 efforts were made to reach the appellants through their known telephone contacts without success; that upon failure to reach the appellants, the cheque was returned and endorsed with the remark “confirmation awaited.” It was stated that the history of transactions in the appellants account showed that no cheque or transaction of over Ksh.1,000,000 had been made and out of abundance of caution, the bank sought confirmation from the appellants that indeed they had issued the cheque of Ksh.1,300,000. As already stated, the bank was unable to reach the appellants through their known telephone contact.

20. In **Patel & Ors v Standard Chartered Bank (2001) All ER 66** it was held that where the bank’s mandate is held to be ambiguous, it was the duty of the bank to seek clarification from its customers. Comparatively, in the Uganda case of **John Kawanga & Remy Kasule -v- Stanbic Bank (U) Limited, High Court Civil Suit No. 410 of 2002**, it was stated:

“The law is that if a customer’s account has funds on it or the customer has arranged credit facilities beforehand and the cheque he has drawn is in legal form, his banker must honour the cheque to the letter. If he does not do so, he is in breach of contract. (See Halsbury’s Laws of England Fourth Edition Reissue pages 142-152.) However, the above is not exhaustive in addition to it a reasonable and honest banker must honour a cheque after ascertaining that there is no real possibility (not amounting to a probability) that a third party is endeavouring to defraud the customer. (See Halsbury’s Laws of England Supra.) In short, if there were funds on a customer’s account a banker would only be justified in refusing to pay a cheque if it is ambiguous in form, in that it raises in the banker’s mind reasonable suspicion that a third party might be endeavouring to misappropriate the customer’s money. (See Halsbury’s Laws of England Supra).” (Emphasis supplied)

21. In this matter, the learned Judge arrived at the conclusion that the respondent bank exercised due diligence in attempting to seek prior confirmation from the appellants before dishonoring the cheque of Ksh.1,300,000. In arriving at her decision, the Judge expressed that she was satisfied the respondents effort to seek confirmation was in tandem with the banking practice in Kenya.

22. In this appeal, the appellants contend that the respondent bank had no good reason to dishonor the cheque. Our perusal and analysis of the evidence on record shows that the appellants have not disputed that efforts were made by the respondent bank to reach them through their known telephone contacts. In this regard, we are persuaded by the reasoning and dicta of the High Court in **Standard Chartered Bank Kenya Ltd -v- Intercom Services Ltd & 4 others [2004] eKLR**, where the trial court expressed:

“The question that is uppermost in the mind of this Court is whether the bank, in the face of what everyone agrees was an unusual transaction, was entitled to make inquiries about the cheque.

My unequivocal answer is “yes” most definitely “yes”. A bank is under a duty to act with reasonable care, to protect the interests of the true owner of the cheque, as per their banking practice. In this case, it simply had no choice, but to make inquiries. (Emphasis supplied)

23. The record of appeal further reveals that the appellants did not controvert the respondent bank’s assertion that the cheque of Ksh.1,300,000 was an unusual transaction in the account. In the absence of contrary evidence, we are inclined to believe the bank that the said cheque was unusual. To this end, the dicta by Lord Diplock in **Marfani & Co Ltd -v- Mindland Bank Ltd [1968] 2 All ER 57, 579** applies to the facts of this case. Lord Diplock expressed himself thus:

“What facts ought to be known to the banker, i.e. what inquiries he should make and what facts are sufficient to cause him reasonably to suspect that the customer is not the true owner, must depend on current banking practice and change as that practice changes....”

24. This Court in **Tricon International Limited -v- Giro Commercial Bank Limited [2012] eKLR** recognized the obligations on banks to make enquiries in relation to Central Bank Prudential Guidelines and noted that such requirements were of a legal nature. In **Dennis Mukhulo Ochwada -v-Kenya Commercial Bank Ltd [2003] eKLR** it was noted that postponement of payment of a cheque for further verification was justifiable and such postponement does not amount to a breach of the bank-customer relationship. The court stated:

“The customer has no right to put upon a banker, and the banker is not bound to accept any risk or inability not contemplated in or essentially arising out of the ordinary routine of business. In banking practice contingencies arise where, in the interests of the banker and the customer alike, the only reasonable course is to “postpone” payment in appropriate and innocuous terms. In the instant case what the defendant bank did was merely to postpone payment in view of the unusual circumstances and the customer was paid a few days later after confirmation.” (Emphasis supplied)

25. On our part, we are persuaded by the good law and merits of the dicta in the cases of ***Standard Chartered Bank Kenya Ltd vs. Intercom Services Ltd & 4 others*** (supra), ***Tricon International Limited vs. Giro Commercial Bank Limited*** (supra) and ***Dennis Mukhulo Ochwada vs. Kenya Commercial Bank Ltd*** (supra). Guided and persuaded by these authorities, we come to the conclusion that the respondent bank was justified to make inquiry and seek confirmation before clearing and paying the appellants cheque of Ksh. 1,300,000. We find that the respondent was not in breach of any contractual obligations to the appellants. No liability attaches to the respondent for dishonoring the cheque. Further, it is our considered view that the obligations in bank-customer relationship is reciprocal. A customer is under obligation to give his banker a correct contact address and or reliable telephone contact or mode of service and communication. We find that the learned Judge did not err in arriving at the determination that the appellants had not proved their case against the respondent.

26. Having determined that the respondent bank is not liable to the appellants for breach of contract, the other grounds urged in this appeal have no merit. We hasten to add that we affirm the reasoning, analysis of evidence and the determination by the learned Judge on the issue of loss of business opportunity, loss of reputation and claim for emotional distress. We affirm that no general damages are due to the appellants as the respondent was not in breach of any contractual obligations.

27. The upshot of our analysis and re-appraisal of the evidence on record and the applicable law is that we find this appeal has no merit and is hereby dismissed with costs.

Dated and delivered at Nairobi this 5th day of July, 2019

W. KARANJA

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JUDGE OF APPEAL

J. OTIENO-ODEK

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR