IN THE COURT OF APPEAL

AT NYERI

[CORAM: NAMBUYE, SICHALE & KANTAI, JJ.A]

CIVIL APPEAL NO. 84 "A" OF 2016

BETWEEN

KENYA COMMERCIAL BANK LIMITED.....APPELLANT

AND

SHALIMAR FLOWERS SELF HELP GROUP.....RESPONDENT

(Being an appeal from the Judgment of (**C. Meoli**, J.) dated 18th March, 2016 **in Naivasha Hccc No. 17 Of 2015) (Formerly Nakuru HCCC No. 297 OF 2009)**

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JUDGMENT OF THE COURT

This is an appeal arising from the Judgment of **Hon. Lady Justice C**. **Meoli,** dated and delivered on 18th March, 2016 in Naivasha HCCC No. **17 of 2015** (Formerly Nakuru **HCCC No. 297 of 2009**).

The background to the appeal is that the respondent is a self-help group duly registered as a society under the Societies Act. Its membership was mainly drawn from flower farm workers at **Shalimar Flowers Company, Naivasha.** In the year 2008, when the impugned transactions were undertaken, the respondent' office bearers were **Amos Sitati Wamalwa** (Chairman), **Mark Odongo** (Vice Chairman), **Philip Hambani (Ambani) Ngutuku** (Secretary) and **Sitienei Yego** (Treasurer). The group operated several bank accounts with the appellant. Among them were the two bank accounts subject of this appeal. The signatories to the said bank accounts at any one particular time were any four (4) current top officials of the respondent with **James Kelmanson**, the then General Manager of **Shalimar Flowers Company,** and a **Fair Trade Officer** as the mandatory signatories. The group was also a beneficiary of cash commissions under the Fair Trade arrangements given by the company's flower customers, abroad. The funds received under the Trade Fair arrangement were deposited into the respondent's Euro account for the benefit of its members.

Vide a plaint dated 14th October, 2009, the respondent, through **Mark Odongo, Julius Njuguna and Edwin Ayieba,** in their capacities as the then Chairman, Secretary and Treasurer of the respondent respectively, sued the appellant seeking recovery of **Kshs 2,216,182.00** and **43,817.00 Euros**, citing negligence and breach of implied and express contractual obligations on the part of the appellant in the manner in which it conducted the impugned transactions resulting in the loss of Kshs **2,216,182.00** from the savings account number **042-115337922;** and **43,813.00** Euros from the Euro account number **042-73240039.**

To facilitate the operations on the said bank accounts, the respondent's top four (4) officials furnished the appellant with specimen signatures on a specimen signature card for each account; while the appellant availed cheque books for that purpose. The Euro account on the other hand was operated through requests in causing for the release of funds from that account. The funds variously deposited into the said bank accounts by the respondent were to be held by the appellant in trust for the respondent, and were to be released as and when demanded for by the respondent through its duly authorized officials; and upon verification of the authenticity of the requesting officials' signatures as against the specimen signatures provided for on the specimen signature cards.

In the year 2009, the respondent discovered that cheque leaves numbers **000151, 000158, 000174** and **000193** which were found missing from the cheque book(s) issued to the respondent by the appellant had been used to access funds from the respondent's savings account between **June and July, 2008** to the total tune of **Kshs 2,216,182.00,** while funds held in the Euro account had likewise been accessed through requests in writing between **December, 2008 and January, 2009**, to the total tune of **Euro 43,817.00.** According to the respondent, the impugned transactions in both accounts were irregularly and negligently effected by the appellant in favour of Messers **Marrs Innovations and Tri-Systems Technology**, without the consent, approval and or knowledge of the respondent.

The appellant resisted the respondent's claim through a defence dated 4th November, 2009, admitting: the existence of a banker/ customer relationship between them; that it held funds deposited into the subject accounts in trust for the respondent; that it issued cheque-books to the respondent to facilitate the respondent's access to the funds held in those accounts; and that it also held specimen signature cards for the respondent's signatories to those accounts.

In response to the respondent's grievances as raised against the impugned transactions, the appellant denied responsibility or any knowledge of the alleged loss of cheque leaves as it assumed no responsibility of the custody, proper care and prudent operational control of the cheque books once released to the respondent. It maintained that all the transactions undertaken on the subject accounts were properly authorized by the respondent's top officials and verified against the specimen signatures on the specimen signature cards held by the appellant before being released to 3rd parties; that if any loss was suffered by the respondent as a result of the impugned transactions, then such loss was occasioned by the respondents' own negligence in the manner it operated those accounts.

The opposing pleadings were canvassed by way of oral testimonies and written submissions. The respondent called two witnesses in support of its case, while the appellant called one witness to rebut the respondent's claim.

At the conclusion of the trial, the trial Judge analyzed and assessed the record, identified issues for determination and considering these in light of the opposing pleadings, evidence and submissions, she made findings thereon, *inter alia* that the mandate of the bank was to ensure that all transactions on the respondent's accounts were properly authorized by the duly recognized signatories to those accounts; that the bank was only to allow outward payments to 3rd parties from those accounts upon verification of the authenticity of the authorization by the four signatories inclusive of the mandatory signatories; that although there was no evidence of additional requirement for the bank to call any of the authorized signatories through the telephone numbers provided on the specimen signature cards to confirm payments before releasing such funds to 3rd parties, it was prudent for the appellant to take that precautionary measure in the best interests of both parties.

The Judge reviewed both case law as well as statutory provisions more particularly those contained in the Cheques & the Bills of Exchange Acts, Caps 35 & 27 Laws of Kenya respectively; and considering these in light of the record, ruled that the burden lay with the respondent to prove the particulars of negligence attributed to the appellant; that no evidence was tendered by the appellant to demonstrate that the signatures on the impugned cheques used to release payments to M/s **Tri-System Technology and Marrs Innovations,** from the savings account were verified as was required of the appellant; and that D.W.1, the only witness tendered by the appellant in rebuttal of the respondent's case was categorical in his testimony that he never dealt with the impugned cheques, as they were processed in Nairobi.

Turning to the impugned transactions on the Euro account, the Judge made findings thereon that D.W .1 admitted having passed all of them for payment upon verification of the signatures and confirmation of authorization by calling the same telephone number on all the five (5) occasions when funds were released from the said account to third parties; and that D.W. 1 also admitted that all the telephone calls he made were always received and answered by one of the signatories to the said account, namely, **Amos Sitati Wamalwa.** In light of D.W. 1's admission as above, the Judge took into consideration the following factors before drawing out conclusions on the manner the transaction on the Euro account were handled. These were; first that the said **Amos Sitati Wamalwa** was among the respondent's former officials who were prosecuted and convicted in connection with the loss of funds resulting from the impugned transactions on both accounts. Secondly, that the respondent was a self-help group which used to receive commissions from flower buyers abroad, under the Fair Trade Program. Thirdly, that the account was not being used for trading. Fourthly, that the Farm Manager of the Flower Farm was made a mandatory signatory to the said account in order to protect the interests of the entire membership of the respondent.

In light of the above reasoning, the Judge drew out conclusions therein, *inter alia,* as follows:

> "**Did the paying bank pay in good faith and ordinary course of business while exercising reasonable care and skill? Possibly, D.W. 1 acted in good faith? But as to whether he exercised reasonable care and skill is another matter. While it was not expected of him to go outside the remit of the mandate of the customer, ordinarily, it is my view that the cash transfers he approved were exceptional by purpose, amount and chronology, especially considering the nature of the plaintiff group. In quick succession, large sums were moved from the foreign currency account to pay for what appears to be items out of consonance with the nature and purpose of the account and the raison d'ettre of the group itself- welfare group".**
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> **.....**
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> **In my considered view, the circumstances surrounding the nine payments from the group's account required that the Defendant in exercise of reasonable skill and care makes a more extensive inquiry beyond the minimum verification of signatures and placing a call to the self-same number and signatory who, on all accounts misled the bank. In this case, it mattered not that there was no requirement to confirm payments with the mandatory signatory. It mattered not, in my opinion that the signatures were on the face of it genuine. What the mandatory signatory really implied is a matter of common sense.**
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> **The excuse by D.W.1 that his telephone details were not on the specimen card cannot hold water. The bank ought to have satisfied itself that the signatories were not misusing their positions to defeat the intentions and purposes of the group.**
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> **All the red flags were waving in this case in my view but the Defendant by not exercising reasonable care and skill, missed or ignored them, thereby allowing the withdrawal, in quick succession, of large sums of money donated to flower workers as Commissions. I find on a balance of probability that the defendant bank was negligent in the manner in which it handled and approved the nine payments and is 100% liable.**

Being aggrieved, the appellant appealed against that decision raising six (6) grounds of appeal subsequently condensed into two main issues in the written submissions dated 30th May, 2018, namely;

> **i. Whether the appellant was negligent and or failed to exercise due diligence.**
>
> **ii. Whether it would have been right for the appellant to inquire into the internal issues of the respondent herein.**

The appeal was canvassed by way of written submissions fully adopted and highlighted by learned counsel **Mr. Opondo H.O** of **Mukite Musangi & Company Advocates,** on behalf of the appellant and learned counsel **Mr. Mburu F.J of Mburu F.J & Company Advocates** on behalf of the respondent.

With regard to issue number 1, **Mr. Opondo** submitted that all the cheques subject of the impugned transactions on the savings account were passed for payment by the appellant following due verification of the signatures thereon as against the specimen signatures of the top four (4) approved signatories to that account as provided for on the specimen signature card held by the bank; that the Judge when pinning liability against the appellant in negligence as a result of the impugned transaction, failed to appreciate that the respondent as a customer of the bank also owed the bank a duty of care to take reasonable care of its cheque books against theft and forgery; and also that the appellant acted diligently, reasonably and in good faith in the manner it conducted the impugned transactions on both accounts.

Counsel relied on the provisions of section 4 of the Cheques Act (supra), and section 60 (1) & (2) of the Bills of Exchange Act (supra) to support its submissions that on the facts as laid before the Judge, it acted within the law and had therefore rebutted any claims of negligence attributed to it by the respondent. Counsel also cited the case of **London Joint Stock Bank Limited –versus- Mac Millan [1918] A.C. 777** and **Green Wood –versus- Martins Bank Ltd [1933] A.C. 51,** in support of their submission that the appellant having discharged its burden of proof by demonstrating that it had acted with due diligence, in good faith and within the law when it released the funds subject of the impugned transactions, the burden of proof shifted onto the respondent to demonstrate that it had also taken reasonable precaution, care and control in the manner it handled the cheque leaves forming the subject of the impugned transactions on the savings account. Counsel also cited the case of **Roberts and others –versus- Tucker [1851] 16 QB 560, 117 ER 994** and **the Governor and Company of Ireland –versus- the Trustees of Evans [1855] 5.HCC 389; 10 ER 950,** in support of the submissions that any loss suffered by the respondent as a result of the impugned transactions was occasioned by to the respondent's own negligence.

Opposing the appeal, learned counsel **Mr. Mburu F.J** submitted that the respondent's claim against the appellant was based on negligence and breach of implied and express contractual obligations, leading to the loss of the claimed amounts, and that likewise, the appellant in its defence denied the respondent's claim, also pleading negligence on the part of the respondent occasioning loss of the amounts forming the impugned transaction; that P.W.1 and P.W.2 tendered uncontroverted evidence that the respondent's instructions to the bank were that: for any withdrawal from the savings account, all the signatories to the accounts were to be notified for them to approve or decline the outward payment to third parties; that the Judge rightly discounted D.W. 1's evidence with regard to the impugned transactions on the savings account as D.W. 1 admitted in his testimony that he never dealt with those transactions; that the appellant's failure to confirm and verify the authenticity of the signatures on the cheques before releasing funds from the respondent's savings account was sufficient demonstration of the appellant's negligence and breach of the contractual obligations between a banker and its customer.

Turning to the amounts forming the complaint on the Euro account, counsel submitted that D.W.1's conduct of calling the same person on the five (5) different occasions when funds were released from this account and within short succession, coupled with his failure to observe a practice that had gained notoriety of calling for verification from either the Fair Trade Officer or the Manager of the Flower Farm as alluded to in the uncontroverted testimonies of P.W.1 & P.W.2 rightly created doubt in the Judge's mind as regards the propriety of the verifications allegedly carried out by D.W.1 with regard to the transaction on the Euro account. On account of the totality of the above submissions, we were urged to affirm the Judge's decision to pin 100% liability as against the appellant for the loss of the amounts claimed against it.

Counsel invited us to be persuaded by two High Court decisions namely; **Kenya Garage Vehicle Industries Ltd -versus Southern Credit Banking Corporation Ltd** [2014] **eKLR** and **Simba Commodities Limited -versus Citibank N.A.** [2013] **eKLR**, both on the principles that govern the rights and obligations of a banker/customer relationship.

This is a first appeal. In the case of **Selle & Another versus Associated Motor Boat Company Ltd and Others [1968] 1 EA 123,** the Court of Appeal for Eastern Africa set out the principles to be considered when determining an appeal from the High Court as follows:-

> **"An appeal from the High Court is by way of retrial and the Court of Appeal is not bound to follow the trial Judge's findings of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression of the demeanor of a witness is inconsistent with the evidence generally."**

We have considered the record in light of the rival submissions as well as principles of law relied upon by the parties in support of their opposing positions. In our view, the issues that fall for our determination are the same as those condensed by the appellant in its written submissions. Both issues are interrelated and we shall therefore deal with them as such. From the record, it is not disputed that a bank/customer relationship existed between the appellant and the respondent. Neither was it disputed that pursuant to the above relationship, the appellant held funds deposited into those bank accounts in trust for the respondent or that those funds were to be released to the respondent as and when demanded for through its authorized signatories.

To facilitate the operations on the said bank accounts, the respondent furnished the appellant with the names and specimen signatures of top four (4) authorized signatories to those bank accounts. The appellant on the other hand issued cheque books to the respondent to facilitate its access to the said funds.

It is also not disputed that funds forming the respondent's claim against the appellant were released, by the appellant to 3rd parties. What the appellant has disputed throughout the entire proceedings is the respondent's assertion that the said sums were negligently released by the appellant to third parties without due care, diligence and prior verification of the signatures of those 3rd parties, as against the authentic signatures of its top four (4) managers as endorsed on the specimen signature cards.

As correctly held by the trial Judge, the burden lay with the respondent in the first instance to prove its allegations against the appellant in terms of the provisions of section 107, 109 and 112 of the Evidence Act Cap 80 Laws of Kenya. These provide as follows:-

> ***"107*. (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist,**
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> **(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person"**
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> **"109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person".**
>
> **"112. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him".**

In satisfaction of the above requirement, the respondent tendered two witnesses in support of its case, namely, **Mark Odongo Okaka** (P.W.1) and **Julius Njuguna Mwangi** (P.W.2). The sum total of that evidence is that the respondent did not authorize the withdrawal of the funds lost through the impugned transactions; that any of the three mandated officials inclusive of the mandatory signatories could sign for the release of funds; that any transfers from the Euro account had to be authorized by the Fair Trade Officer or the Farm Manager; that none of the transactions carried out on the Euro account were sanctioned by the above named officials; that two of their officials were among the persons who were investigated, prosecuted, and convicted in connection with the loss of funds forming the impugned transactions; that the bank was aware of the requirement and the practice that the Fair Trade Officer and the Farm Manager were to be involved in the release of any funds from the two subject bank accounts.

In rebuttal, the appellant called one witness namely, **Christopher Karanja,** (D.W.1). The sum total of his evidence is that sums allegedly lost through the savings account using the impugned cheque leaves were handled from Nairobi, while he himself authorized all the five requests for funds transfers from the Euro account and that he kept on ringing the same number and talking only to one official on all of the five occasions when he verified and released the subject funds from the Euro account.

Bearing all the above in mind, it is our finding that on the record, the respondent discharged its burden of proof on its assertions that withdrawals from the savings account were unauthorized as the appellant failed to tender evidence through its employees who handled the impugned transactions to shed light on how the transactions were undertaken. We appreciate the requirement in section 143 of the Evidence Act that no number of witnesses is required to prove a fact unless provided for to that effect by law. Further, that an adverse inference for the failure to tender a witness or evidence is only permissible where there is demonstration that a party against whom such inference is intended to be drawn had reason to believe that, had the evidence not tendered been called for, the same would have been adverse to its case. In our view, allegations of breach of contractual obligation; failure to exercise due care, diligence and good faith levelled against the appellant, called for evidence in rebuttal. None were called. Neither was any explanation given by the appellant for this omission. The only reasonable inference that can be drawn from that omission, in our view is that had that evidence been tendered, it would have been adverse to its case.

Turning to the Euro account, it is not disputed that D.W. 1 authorized all the five (5) requests for the transfer of funds from this account to 3rd parties. The reasons the Judge gave for the failure to absolve D.W. 1 from blame for the loss of those funds were because firstly, D.W.1 failed to consider that the funds so held in this account were for the benefit of the larger membership of the self-help group. Secondly, he failed to take note of the short succession at which the funds were being withdrawn from the account and yet the self-help group was not engaged in any trading business. Thirdly, he also failed to pay heed to a practice that had gained notoriety and which was alluded to in the un-rebutted testimonies of P.W.1 and P.W.2, that funds from this account could only be released with an additional mandatory signatory of either the Trade Fair Officer or the Farm Manager.

We have considered the above observations in light of the record. We find that these were well founded both on the facts and the law. We find no reason to fault the Judge for finding the appellant 100 % liable for the loss of funds claimed by the respondent from the appellant.

The upshot of the above assessment and reasoning is that we find no merit in the appeal. It is accordingly dismissed in its entirety. The respondent will have costs of the appeal and the proceedings in the court below.

Dated and delivered at Nyeri this 22nd day of November, 2018.

R. N. NAMBUYE

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JUDGE OF APPEAL

F. SICHALE

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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