



IN THE COURT OF APPEAL

AT NYERI

(SITTING IN NAKURU)

CIVIL APPEAL NO. 189 OF 2011

(CORAM: WAKI, NAMBUYE, & KIAGE, JJA)

BETWEEN

SAID ABDALLAH AZUBEDI..... APPELLANT

AND

TRUST BANK LIMITED..... RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Nakuru (Mwera, J.) dated on 19th day of May, 2011

in

H. C. C. C. No. 609 OF 1996)

JUDGMENT OF THE COURT

Introduction.

1. This matter has had a chequered history since it made its debut in the High Court 20 years ago. For 15 years until the Chief Justice intervened, it oscillated between several Judges of the High Court in Nairobi and Nakuru stations where it generated its own drama including several amendments to the pleadings, mysterious loss of evidential documents and some court proceedings. It was ultimately allocated to Mwera J. (as he then was) to hear and determine, and the learned Judge did so when he delivered his judgment on 19th May 2011. That is the decision that has given rise to the appeal before us.

2. It is a dispute between a bank (**Trust Bank Ltd**) and its customer, **Said Abdallah Azubedi**. The customer generally complains that the bank so negligently and fraudulently managed his account with it that it occasioned serious loss of large amounts of money. He sought to stop the bank from demanding the repayment of a loan advanced to him and the refund of sums of money he claimed to have overpaid the bank. At the hearing before us, the customer (hereinafter '**the appellant**') was represented by learned counsel **Mr. P. Lutta**, instructed by M/S Lutta & Company Advocates; while the respondent (hereinafter '**the bank**') was represented by learned counsel **Mr. Gitonga Murugara**, instructed by M/S Hamilton, Harrison & Matthews.

The claim.

3. The appellant was a wholesale and retail distributor of soft drinks in Nakuru. To facilitate the operation of his business, he opened Current Account No. 0202-0003646-0001 with the bank in 1994 and negotiated an overdraft facility of Ksh. 4 million which the bank granted on the security of three properties owned by the appellant in Nakuru town. His claim is pleaded in a **“Further Further Amended Plaint”** dated 28th April 2000 and is captured in the following paragraphs:-

“6a. The bank failed, refused and/or neglected to provide the plaintiff periodically or at all the statement of account showing the debits and credits made thereon. By reason of such refusal the plaintiff did not become aware, until late 1996 when the statements were after repeated requests supplied that the bank had repeatedly made unauthorized debits in the account and also failed to make timeously or at all credits for payments made in the account. (The particulars of the debits are given amounting to Ksh. 14,256,355)

6b. The plaintiff had repeatedly queried the above debits and generally the operation of this account but the bank has refused and/or neglected to provide appropriate explanation thereof.

7. Further the bank negligently and/or fraudulently failed or refused to make timeously or at all credits for monies paid to it by the plaintiff and also debited commission on bank drafts when the plaintiff provided sufficient cash to meet the costs and the bank's charges in respect of such drafts.

8. By reason of the fraudulent and/or negligent operation of the plaintiff's said account the plaintiff has lost large sums of money and suffered loss and damages. (No particulars of fraud were pleaded)

9. The defendant has now threatened to advertise the charged properties unless the amount due is paid, and unless restrained by this Honourable Court, will continue to do so which action will cause the plaintiff loss.

10. The plaintiff contends that the bank is under a duty as a bank to provide a true and full account of the operation of the account and that until such an account has been provided the statutory power of sale contained in the charge cannot properly be exercised, and the purported exercises of such power is therefore unlawful and wrong.”

4. His prayers were for the following orders.

“a) A permanent injunction to restrain the defendant either by itself, its agents, servants or otherwise howsoever from advertising, or selling by public auction all those parcels of land known as Nakuru Municipality/Block 18/20, Nakuru Municipality/Block 12/53 and Nakuru Municipality/Block 4/217.

b.... (Abandoned)

c. General damages for breach of contract.

d. A declaration that the intended sale is premature and unlawful.

e. Any other or such further relief as this Honourable Court may deem fit to grant.”

The defence & Counterclaim

5. The bank denied any negligence and asserted that it had professionally conducted itself in respect of the appellant's account and supplied regular statements on the state of the account which the appellant never questioned. It denied making any unauthorized debits on the account amounting to Ksh. 14,256,355 and asserted that the debits made on the account were lawful. The bank then counterclaimed all the loan and other financial advances made to the appellant through the current account in the sum of

Ksh.13,634,904.90 as at 10th March 1998 with interest thereon at 39% p.a until payment in full.

6. Issues were joined in the reply to the defence and defence to counterclaim and the stage was set for the trial.

The evidence

7. The appellant went to school up to Standard five and left for employment as a shop attendant before going into business. He testified and gave the history of the opening of the account in 1994 and the overdraft facility of Sh. 4 million repayable at 34% p.a. He claimed that although he operated the account thereafter, the bank never sent him any statements until he demanded them in 1996 and they were supplied. That is when he discovered that the bank had made the various debits he listed in his claim in excess of Sh. 14 million without his authority. He sought explanation but none was forthcoming from the bank. When it was put to him that he had two suppliers who did business with him; **M/S Nakuru Wholesalers** and **M/S Flamingo Bottlers Ltd**, he admitted that he was their customer but asserted that he paid for the supplies in cash. He was shown several cheques presented for clearance by the said suppliers through his account, but he could not recall issuing such cheques since the suppliers never used to give him statements. He insisted that the cheques were fake and certainly unauthorized by him. Asked to produce the counterfoils of his cheque books for the years 1995 and 1996, he claimed they had been stolen during a robbery in his house in 1997, but the report made to the police on the robbery did not indicate that any cheques were stolen. In his evidence, he had deposited Sh.93,925,425 in the account while the bank had paid out Sh. 80,508,074 which payments he did not have a problem with. At some point when the bank started issuing demand notices for payment of the overdraft facilities, the appellant promised to reduce the debt from Sh. 6m by end of December and to Sh. 5 million by end of January 1996. That was on 7th December, 1995. He wrote again in February 1996 pleading for more time to reduce the overdraft. He explained, however, that he made those admissions because he was under pressure from the bank. He did not owe any money to the bank and therefore his securities should be disencumbered and returned to him.

8. The appellant called **Benjamin Rotich (PW2)**, an accountant whom he had instructed to audit the accounts for the years 1995 to 1997. Rotich was not given any cashbooks, receipt books, cheque books or cheque counterfoils, or bank statements because the appellant said he had been robbed of the documents. In the absence of such documents, he was unable to prepare a proper audit report and the document he attempted to produce as evidence was rejected. The other witness was **P.C Hassan Mbuara Simgenya (PW3)** of Bondeni Police Station Nakuru who confirmed that the appellant made a report of robbery at his house in 1997. The officer, however, confirmed that there was no report of stolen books of accounts or cheque books made in the official Occurrence Book (OB) entry. Only stolen cash was reported.

9. On its part the bank called one witness, **Atul Kumar Dave**, the Branch Manager at the time material to this case. He produced documents pertaining to the opening of the current account as well as the loan application and approval documents. He also produced account statements showing that at some point in 1995 and 1996, the bank had to issue demand notices for the loan repayment when the appellant defaulted and the appellant made promises to pay which he did not. As at March 1998 the bank was owed Sh. 13,634,904.90 but when it tried to realize the securities held, it was stopped by the court since the appellant had filed this suit in December 1996. Instead the bank made a counterclaim for the money within the suit. The witness testified that the bank sent monthly statements to the appellant at his address and sometimes the appellant collected them from the bank premises. As for the debits complained about, the witness explained that they were for cheques issued by the appellant to his suppliers, especially Flamingo Bottlers Ltd, who deposited them with their banks and they were cleared through the account in the normal banking procedure. A large volume of relevant documents were produced to support the procedure and the cheque clearances.

10. The witness was cross examined at length on the cheques issued to, and deposited by Flamingo Bottlers Ltd in their Barclays Bank account which were then submitted to the bank for payment. As the bank sent statements to the appellant every month and there was no complaint, the transactions were presumed to be regular. In the witness's view, the appellant should have complained to his suppliers if the

payments were not proper but never did. The appellant had also filed this suit in 1996 and therefore the claim of cheque books and counterfoils being stolen in 1997 had no bearing on the claim. There was also no application to the bank to stop any particular payments on account of lost cheques, he concluded.

The findings

11. Upon considering the evidence on record and the extensive submissions filed by counsel on both sides, Mwera J. framed issues for determination and answered them as follows:-

“i) Did the defendants fail/neglect to supply the plaintiff with bank statements?”

On a balance of probabilities, the plaintiff had all the material, including statements and letters to regulate his account which had gone over the limit of Sh. 4 million overdraft and rising due to interest rates and cheques issued by him. The statements were furnished to the plaintiff regularly as per the banking practice and he has not demonstrated otherwise.

ii) Did the defendant enter unauthorized debits or fail to make timeous credits into the plaintiff's account?

The plaintiff bought sodas from Flamingo and paid by his cheques. Flamingo paid the cheques into its bank, Barclays, who sent them to the defendant bank for clearance. At the end of the day the plaintiff had gotten the sodas and his bank, the defendant, had cleared his cheques. Quite normal. On the claim of late credits being entered in the plaintiff's account, no evidence was led. The court was in fact left with the impression that the plaintiff's claim here was not only fallacious but also untrue.

iii) Did the defendant's alleged conduct in (ii) above, amount to negligence and fraud?

No particulars were set out in the plaint to constitute either. Second, there was no evidence placed before the court in this regard. In sum, these were unwarranted and unjustified claims not worth focusing on.

iv) Did the plaintiff suffer loss and therefore was justified to stop the sale of his properties?

There is no evidence of this. The plaintiff took an overdraft facility of Kshs 4 million and pledged his 3 properties as securities. He overshot that limit and, mark you with interest being charged. He made offers to reduce his indebtedness and apparently did not do much. He pleaded with the bank to defer legal action which included moving to realize its securities. But without much to receive for its indulgence, the bank issued a valid statutory notice. As a sign of desperation, but still without disposing of his liability, the plaintiff filed this suit and got an injunction to stop the sale of his properties – an order he has unjustifiably enjoyed since. This cannot stand any more.

v) Is the plaintiff indebted to the defendant in the sum counter-claimed?

The bank was entitled to what it claimed – Kshs 13,634,904.90 as at 10.3.98. This it claims at 39% interest p.a until payment in full. The defendant regularly serviced the plaintiff's account having given him an over-draft carrying an interest rate. Although the offer carried an interest of 34% p.a as at 01.11.94, it will not be surprising that in its discretion to vary this rate, after a time it stood at 39% p.m as at March 1998. Both rates definitely appear high even as in the nineties, but that is what the parties agreed. The defendant has proved its debt and is therefore granted its prayers.

vi) Remedies, costs and interest.”

Suit dismissed with costs while the counterclaim succeeds with costs and interest.”

The issues raised on appeal and submissions of counsel.

12. Six grounds were set out in the memorandum of appeal but Mr. Lutta abandoned one, and urged the rest as three grounds. He submitted, firstly, that the High Court fell into error in finding that the appellant's account was properly operated by the bank when there was evidence of cheques in excess of Sh. 14 million having been cleared through the account unlawfully. He pointed out three documents which the appellant had complained about and which the bank rectified in 1995. Counsel further drew our attention to the bundle of documents produced by the bank to support payment of the disputed sum of Sh. 14 million and observed that they all relate to Flamingo Bottlers' account with Barclays Bank. In counsel's submission, it was improper for the bank to rely on another bank's records to resist the claim when it was the custodian of the records relating to the appellant's account and should have been able to produce its own documents. Failure to produce the documents was evidence of negligence.

13. Secondly, urged counsel, the overdraft was admittedly given for Sh. 4 million but the bank was demanding in excess of Sh. 13 million in its counterclaim without proof. There were no paid cheques produced by the bank to prove the debt and it was improper to rely on Barclays Bank documents to prove it. There were no statements showing the principal sum plus the rates of interest charged on it over the period and explaining the differential of 34% to 39% p.a. Relying on purported admissions of the debt by the appellant does not absolve the bank from proving its counterclaim.

14. Thirdly, Mr. Lutta urged, the High Court was in error when it entered judgment for the counterclaim despite the finding that the appellant had charged its properties to secure the debt. In effect, the Court exposed the appellant to double jeopardy. The bank retained its statutory power of sale throughout and therefore, according to counsel, it was unnecessary to enter judgment on the counterclaim. It should have been dismissed and the bank directed to exercise its statutory powers. He called for an order allowing the appeal or sending the suit back to the High Court for retrial.

15. In response to those submissions, Mr. Murugara submitted that the appellant's account was properly kept and there was evidence from the record of appeal of a large bundle of bank statements issued by the bank to show how the account was operated. It would otherwise have been impossible for the appellant to complain if there were no statements to go by. The appellant's only problem, submitted counsel, was his inability to keep the cheque counterfoils and original paid cheques to track the payments he had made to his suppliers. He said they had all been stolen but there was no cogent evidence on that. That is why, continued counsel, the bank sought the assistance of Flamingo Bottlers who gave out details of the cheques issued to them by the appellant and they were traced to Barclays Bank which supplied authentic copies of the documents. All these, pointed out counsel, were produced in evidence by consent of the parties as an agreed bundle and the appellant cannot turn around and claim they were strange documents. The complaints lodged by the appellant on the statement of accounts were also addressed and explained orally in evidence.

16. As for the counterclaim, he pointed out that there were on record demand letters served on the appellant which he did not dispute but instead prayed for time to pay instead of showing that he had paid in full. The rate of interest charged on overdrawn amounts was the contractual one and the High Court was right in so finding. Responding to the submission on double jeopardy, Mr. Murugara stated that the bank was stopped by injunction from exercising its power of sale and it opted to file a counterclaim in the suit to achieve the same end and there was no possibility of recovering the debt owed twice over. He called for dismissal of the appeal.

Analysis and determination.

17. We have examined at length the facts and the findings made by the trial court in this matter because the appellant expects of us to do so as the first appellate court. This approach was better put by *Sir Clement De Lestang, V.P.* in *Selle v. Associated Motor Boat Company [1968] E.A. 123* at p.126:

“An appeal to this Court from a trial by the High Court is by way of re-trial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that, this Court

must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witness and should make due allowance in that respect. In particular this Court is not bound necessarily to follow the trial Judge's findings of fact if it appears either that he has 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."

18. We perceive four issues raised by the parties which call for our decision:-

i. Whether the appellant's account with the bank was properly operated.

ii. Whether the counterclaim was proved.

iii. Whether the appellant was exposed to double jeopardy.

iv. What orders are appropriate in the circumstances of the case.

19. On the first issue, it is clear to us that the main complaint by the appellant relates to the 56 debit entries, which are enumerated in paragraph 6a of his "Further, Further Amended Plaintiff", made into his account by the bank amounting to Sh. 14,256,355 which he asserts were unauthorized. According to him, he discovered all this when he demanded and received the statements on his account in 1996 for the first time since he opened it in 1994. Before then, again according to the appellant, the bank never sent any statements to him hence the breach of its duty of care to its customer. For an astute businessman who the appellant testified he was for a period of 15 years transacting millions of shillings, we express grave doubts that he never bothered to monitor the state of his account for over two years until statements were furnished to him on demand in 1996. On this issue, we assess the evidence presented by the bank as more probable that monthly statements were either sent to or collected by the appellant. The High Court made no error in so finding.

20. The onus was on the appellant to prove, as asserted in his pleadings, that the bank negligently or fraudulently made the 56 debit entries complained about. The High Court found, and correctly so, that there was no pleading with any particularity as by law required, on the allegation of fraud and there was no proof of it tendered. There was an opportunity for the appellant to produce all the original cheques paid on his account or cheque counterfoils to show that he never issued any cheques to his suppliers, particularly Flamingo Bottlers, and that he always paid them in cash. But all he did was to put forward a mysterious story about all his account related documents having been stolen in 1997 after he had filed this case in 1996. It did not help that the police witness he called to confirm the incident did not confirm the loss of such documents or the result of any investigations. His accountant was also handicapped by lack of documents and was unable to prepare a proper audit report. He himself confirmed in oral evidence that he was issuing cheques in addition to paying cash to his suppliers. His case was thus tenuous.

21. It was left to the bank to seek the assistance of the supplier and to obtain documents relating to the cheques issued to it by the appellant and cleared through the account. We have examined those documents which were admitted in evidence without objection, indeed with the appellant's consent, and, in our view, virtually all the debit entries emanated from cheque payments made by the appellant to his suppliers. The rest were explained in oral evidence given by the bank manager who was believed as truthful by the trial Court. The debits escalated the appellant's overdraft with the bank leading to threatening demand notices which the appellant at first promised to redress before turning around and filing suit. It is our finding that the appellant's account with the bank was properly operated, which answers the first issue.

22. Having found that the bank supplied regular bank statements which ought to have enabled the appellant to monitor the account and the state of his overdraft with the bank, we cannot but find that the counterclaim was validly made. The running statement exhibited in the record of appeal from 1994 to the date of the counterclaim in 1998 shows how the figure of Sh. 13,634,904.90 arose. As correctly observed

by the trial court, the rate of interest at the time between 34% and 39% p.a was on the high side but it was contractual. In any event, Ground 4 of the memorandum of appeal which sought to challenge the interest rate as “grossly exaggerated” and “unrealistic” was withdrawn by the appellant at the hearing of the appeal. It is therefore a non issue. The answer to the second issue is in the affirmative.

23. The third issue on double jeopardy is, in our view, illusory. The bank had the option to maintain and exercise its statutory power of sale after successfully defending the suit without making any counterclaim. But it chose to file a counterclaim after the exercise of the statutory power of sale was blocked by the court. Both options are legal and the bank would be in abuse of the court process to pursue them concurrently. Indeed we understood the submissions of Mr. Murugara to concede this legal position. The fear of double jeopardy is therefore unfounded and we answer the issue in the negative.

24. Finally, the appropriate orders. In view of our findings on the main issues this appeal is for dismissal. However, the decree ensuing from the High Court was for recovery of a civil debt of Sh. 13,634,904.90 at the rate of interest of 39% p.a until payment in full. With respect, we think this is erroneous. The interest payable on the decretal sum from the date of judgment ought to have been at court rates until payment in full, and we so order. To that extent only does the appeal succeed.

25. As the respondent bank was substantially successful in the appeal, we award 75% of the costs to it.

Dated and delivered at Nakuru this 17th day of November, 2016

P. N. WAKI

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JUDGE OF APPEAL

R. N. NAMBUYE

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JUDGE OF APPEAL

P. O. KIAGE

.....

JUDGE OF APPEAL

I certify that this is a true

copy of the original

DEPUTY REGISTRAR