IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: GITHINJI, MWERA & MUSINGA, JJ.A.)

CIVIL APPEAL NO. 88 OF 2005

BETWEEN

DOMINIC ALOIS GEORGE OMENYE

T/A OMENYE & ASSOCIATES …….……..…… APPELLANT

VERSUS

PRIME BANK LIMITED ……..…….. RESPONDENT

(Appeal from the Decision and Final Decree of the High Court of Kenya at Nairobi (Azangalala, J.) dated 25th October, 2004

in

HCCC No. 1649 of 2001)

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JUDGMENT OF THE COURT

This is a first appeal from the judgment of the High Court of Kenya at Nairobi, (Azangalala, J; as he then was) in HCCC No. 1649 of 2001. The trial court entered judgment in favour of the respondent in the sum of **Kshs.3,215,182.15** together with interest at court rates.

In **SELLE & ANOTHER v ASSOCIATED MOTOR BOAT COMPANY LTD & OTHERS, [1968] E.A. 123**, the role of this Court is considering an appeal from the High Court was properly re-stated in the following words:

> ***"An appeal to this court from a trial by the High Court is by way of retrial 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 witnesses and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he 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."***

It is therefore imperative that we set out the brief facts of the case that gave rise to this appeal as well as the learned judge's findings, evaluate them and reach our own conclusion.

The respondent was the plaintiff in the aforesaid suit. The respondent claimed against the appellant **"the sum of Kshs.4,449,182.15 as at 18th September, 2001 together with interest thereon at the rate of 23.5% (revisable) per annum with effect from 19th September, 2001 being the outstanding amount due and owing by the defendant to the plaintiff being the monies lent and/or advanced by the plaintiff to the defendant and/or overdraft facilities received by the defendant from the plaintiff on the said account detailed particulars whereof have been duly rendered by the plaintiff and are well known to the defendant".**

The appellant filed a statement of defence and denied the aforesaid claim. He stated that the banking facilities with the respondent were predicated upon express terms and conditions and the most fundamental one was that his liability would be limited to an overdraft of **Kshs.1,000,000/=,** which arrangement the respondent varied and converted into a term loan whose terms and conditions were to be communicated and agreed upon with the respondent. The appellant accused the respondent of unilaterally turning the facility into a term loan, and loading his account with unreasonable and exorbitant interest changes. The appellant further alleged that the respondent acted negligently in failing to ensure that the sum advanced would adequately be secured in the event of any default. In that regard, he stated, *inter alia*, that the respondent exposed itself to loss of money by continued operation of his account even when the agreed limit had been surpassed. The appellant also alleged that the respondent had employed incompetent and poorly trained staff and hence they had not kept their records properly.

In view of the aforesaid statement of defence, the respondent filed an application for summary judgment. **Nyamu, J.** (as he then was), entered judgment for **Kshs.1,000,000/=** in favour of the respondent since the said sum had been admitted by the appellant. In respect of the balance of **Kshs.3,449,182.15**, the suit was ordered to proceed to full trial unless parties were able to take accounts and reach an agreement. The parties chose to proceed with the trial.

The respondent called one witness, **Nitin Amlani**, a Credit Officer at its Westlands branch, Nairobi. The witness produced a bank statement in respect of the appellant's account which showed that as at the date of filing the suit the appellant was indebted to the respondent in the sum of **Kshs.4,449,182.15**. He also produced the respondent's General Terms and Conditions applicable to customers' accounts. The appellant had by its letters dated 19th November, 1997 and 14th January, 1997 complained about some entries in his account. The said complaints were adequately explained, save for cheques amounting to Kshs.234,000/= whose original leafs were not produced.

The witness further explained two credit entries in favour of the appellant for **Kshs.2,891,456.60** and **Kshs.3,412,412.65** that had been entered into his bank statement. He said that the two entries do not represent payments made by the appellant. The entries had been made by the respondent because the appellant's account was not being run satisfactorily. He explained that the respondent's head office had made provision for the sums due from the appellant which were classified as a bad debt and the accruing interest transferred to a suspense account.

The appellant, an Auditor by profession, testified that he had been a customer of the respondent at its Mombasa branch since the year 1995 when he applied and was granted an overdraft facility upto a limit of Kshs.500,000/=. He operated the account satisfactorily upto the year 1997. He alleged that after 1997 the respondent maintained his account in an improper manner. On several occasions he received statements that had balances that were incorrect and consequently complained about the same. After a while he requested that the overdraft facility be converted to a term loan. The request was accepted and the respondent demanded monthly payments of Kshs.100,000/=. After some time, he received two credit advice slips indicating that his account had been credited with Kshs.2,891,456.60 and Kshs.3,412,411.65, which according to him were in response to his complaints regarding various errors made by the respondent. Following the said credits the account showed a credit balance of Kshs.1,000/=, he alleged. The appellant further alleged that he made further deposits upto a credit balance of Kshs.14,000/=. He stated that on 7th July, 2004 he withdrew a sum of Kshs.5,000/= and in his view, such withdrawal could

not have been allowed if his account had been overdrawn. He denied that he owed the respondent any money.

The trial judge held that the two credits aforesaid were entries made by the respondent purely for its accounting purposes. The complaints made by the appellant related to alleged cheques which he had issued but which cheques did not have any cheque numbers in the statement. The judge was satisfied that the appellant's complaints were satisfactorily addressed by the respondent.

The trial judge further held that the respondent had not produced some original leafs issued by the appellant amounting to Kshs.234,000/= but otherwise the rest of its claim had been proved on a balance of probabilities. A judgment was entered in favour of the respondent in the sum of **Kshs.3,215,182.15** together with interest at court rates with effect from the date of filing suit to payment in full. The respondent was also awarded costs of the suit.

Being dissatisfied with the aforesaid judgment the appellant preferred and appeal to this Court. The grounds of appeal are as follows:

> ***"1. The Learned Judge erred in law and fact in finding that the two credit notes dated 3/6/2003 for Kshs.2,891,456.60 and 2/7/2003 for Kshs.3,412,411.65 and duly posted on the Appellants Account represented payments made by the Respondent purely for its accounting purposes, as there was no proof or regulation to that effect as indeed those payments reflected interest and penalties which had been the center of dispute between the Appellant and the Respondent.***

2. ***The Learned Judge erred in law and fact in finding that the complaint raised by the appellant as to the operation and running of the appellants account with the respondents was satisfactorily explained as no such explanation was ever given before or during the proceedings in the High Court.***

3. ***The Learned Judge erred in law and fact in failing to consider the appellants contention that the credit entries of 3/6/2003 and 2/7/2003 were effected in response to the appellants complaints whereas the evidence pointing to this conclusion was overwhelming and the effect of the credits returned, the appellant account into a credit balance whereupon he continued to operate the account.***

4. ***The Learned Judge erred in law and fact in not considering the inconsistency in the respondents evidence to the effect that the appellant could not effect any withdrawals from his account with the respondent whereas there was clear evidence of such withdrawal on 7/7/2004 which demonstrated that the appellants account was in credit and continued to run as such. The respondent even gave the appellant bankers cheques from the account, permitted withdrawals and credit transactions.***

5. ***The Learned Judge erred in law and fact in finding that the appellant did not plead payment and merely speculated with the Honourable Court whereas the appellants defence clearly denied liability of the debt allegedly owed to the respondent and the credits having been given during the pendency of the suit and the account being operated after June 2004 was evidence of such payments.***

6. ***The Learned Judge erred in law and fact in totally disregarding the appellants evidence that the respondents accounts were improperly managed, moreso the suspense account and based his decision on an accounting practice that was inconclusively explained by the respondent as no such accounting regulations were even produced to the court nor any practice rules.***

7. ***The Learned Judge erred in law and fact in failing to find that the appellant had produced satisfactory evidence to enable the court to come to a finding that the respondents claim had been overtaken by events.***

8. ***The Learned Judge erred in law and fact in relying on the provisional judgment (Preliminary Decree) of the Honourable Justice Nyamu to come to his finding whereas the provisional judgment provided for the taking of accounts as between the appellant and the respondent and after such accounts were taken by the respondent, it gave creditors which returned the account into credit and back to operation.***

9. ***The Learned Judge erred in law and fact in finding that the respondents claim against the appellant had been proved on a balance of probabilities whereas there was overwhelming evidence to suggest otherwise.***

10. ***The Learned Judge erred in law and fact in upholding the sanctity of bank statements selectively. Whereas the judge held that the statements from the bank were proof of transactions thereon, he proceeded to ignore such sanctity when it related to statements given after July 2004 showing that the appellant that the appellant no longer owed the bank any money and the account was in credit.***

11. ***The Learned Judge erred in law and fact in arriving at a wrong decision and not appreciating that the interest effect on the sums not proved by the bank (Kshs.234,00/=) in untraceable cheques from 1996 – 1997 is what constituted the interest and penalties in the account which forced the basis of the suit and in their absence, no suit could be sustained."***

When the appeal came up for hearing on 19th July, 2013, **Mr. K'Opere** and **Mr. Wanjohi,** learned counsel for the appellant and the respondent respectively, agreed by consent that the appeal be canvassed by way of written submissions, which they subsequently filed. On 20th January, 2015 the appeal was listed for highlighting of the submissions but counsel chose to rely entirely on their respective submissions.

The appellant's counsel clustered several grounds of appeal together as shown hereunder and we shall dispose of the appeal in the same format in which the grounds were presented.

GROUNDS 1, 3 AND 4

These mainly relate to the two credit notes given by the respondent on 3rd June, 2003 for Kshs.2,891,456.60 and on 2nd July, 2003 for Kshs.3,412,411.65. The appellant argued that the two credit notes were as a result of the respondent's correction of errors pointed out by himself in his letter dated 14th January, 1998. Mr. K'Opere submitted, *inter alia,* that the learned judge failed to consider that the respondent could not have issued the appellant with a banker's cheque of Kshs.5,000/= on 7th July, 2004 if indeed his account was overdrawn. Counsel further submitted that the respondent's statements in respect of the period before 1st July, 1997 did not have any supporting documents by way of cheques or vouchers to justify the entries made.

In response to the three grounds aforesaid, Mr. Wanjohi submitted, *inter alia,* that the learned judge rightly chose to believe the respondent's evidence that the two credit notes had been made purely for the bank's accounting purposes. There was no evidence that the credit notes were made in response to the appellant's complaint. He added that the complaint contained in the appellant's letter dated 14th January, 1998 and the accompanying analysis were in respect of disputed cheques and debits into the account, which complaint was appropriately responded to by the respondent.

We have looked at the two credit notes appearing at pages 142 and 143 of the record of appeal. The first one which is dated 3rd June, 2003 stated that:

"We have credited your account as under – provision held now written off" (Kshs.2,891,456.60.)

The second one dated 7th July, 2003 stated that:

"***We have credited your account as under – provision received from H/O on 3/6/03 written off" (Kshs.3,412,411.65).***

From the evidence of **Nitin Amlani**, **PW1**, on behalf of the respondent, it was clear that the respondent's head office had made a provision for the amounts reflected in the two credit notes, being bad and doubtful debts. Following that provision, the bank's profit was reduced by the respective amounts shown in the credit notes. The appellant had not made any payments in respect of the amounts shown in the two credit notes. The witness explained that the documents were no more than inter-bank credit advice -from the bank's headquarters at Nairobi to its branch in Mombasa.

We are inclined to accept the learned judge's holding that the credit notes were purely for the bank's accounting purposes and were not reflective of any accounting errors as alleged by the appellant. We reject grounds **1, 3 and 4** of the appeal.

Grounds, **2, 6 and 8** relate to the manner in which the appellant's accounts were operated by the respondent. The appellant submitted that the accounts were not properly operated under the Banking Rules and Regulations. The appellant stated, *inter alia*, that the respondent's witness conceded that the bank had no record of transactions prior to 1st July, 1997 and so it was not clear where the figure of Kshs.956,775.70 that was claimed to have been outstanding on 1st July, 1997 came from. It was also not properly explained why the overdraft limit of Kshs.500,000/= was exceeded. Counsel further submitted that in **Criminal Case No. 1511 of 1999 at Mombasa,** two staff members of the respondent were charged with fraudulent false accounting. Although they were acquitted of the said charge, the trial court noted that the bank's records were very poorly managed.

On the other hand, the respondent submitted that there was no sufficient evidence to prove that the appellant's accounts with the bank were not properly operated. The respondent's counsel submitted that all the credits and debits in respect of the appellant's account were properly explained by PW1. The observation by the trial magistrate in Criminal Case No. 1511 of 1999 to the effect that the respondent's records were poorly managed was not relevant to his case, counsel contended.

We have considered the evidence adduced by the appellant regarding the respondent's management of his account and contrasted the same with the evidence adduced by respondent's witness. Whereas we agree that there were a few discrepancies that were evident, we do not think that there was any material evidence to enable the trial court reach a finding that the appellant's account was so poorly managed by the respondent that it was not possible to tell what the appellant's indebtedness to the bank was as at 22nd October, 2001 when the suit was instituted. The record of appeal shows that on 2nd July, 1996 the appellant was granted an overdraft facility of Kshs.500,000/= at an interest rate of 30% per annum (revisable). If the appellant were to draw funds in excess of the sanctioned limits he was liable to pay higher penal rates of interest. The appellant kept on overdrawing his account and as at 6th October, 1998 the outstanding sum amounted to Kshs.1,903,209.50.

We are satisfied that the respondent's witness explained all the material issues relating to the manner in which the appellant's account was operated. We find no merit in grounds 2, 6 and 8 of the appeal and

dismiss the same accordingly.

In ground **5**, the appellant faulted the learned judge's finding to the effect that the appellant failed to plead that he had made full payment in his defence.

In ground **7**, the appellant complained that the trial judge failed to find that he had produced satisfactory evidence that the respondent's claim had been overtaken by events.

In respect of ground No. 5, it appears to us that the appellant was contending that in view of the two credit notes aforesaid, he had a credit balance and therefore he owed the respondent no money at all. The learned judge observed, and in our view rightly so, that if the appellant's contention that he had a credit

balance was true, the appellant could have amended his defence and so pleaded. In paragraph 3 of his statement of defence, the appellant merely denied the respondent's claim. If the appellant was serious about his allegation that his account reflected a credit balance in his favour, he ought to have pleaded that in his defence. He had an opportunity to amend his defence but he did not do so. It is trite law that a court ought to base its decision on the pleadings on record, except where it appears from the record of the trial court an unpleaded issue was argued and left for the court's determination. See **ODD JOBS v MUBIA [1970] E.A. 476.**

As regards ground 7, we would simply state that a careful reading of the proceedings and the resulting judgment does not lead to any inference that the respondent's claim had been overtaken by events as alleged by the appellant.

Turning to grounds **9, 10 and 11**, we agree with the trial judge that the respondent's claim was proved on a balance of probabilities. The judge was not satisfied that the respondent had proved a claim of Kshs.234,000/= and it was accordingly discounted. That sum was in respect of 4 entries made to the appellant's account on 10th March, 1997, 1st April, 1997 (two payments) and 22nd April, 1997. The claims were rejected because the respondent did not have the original cheques to support the debit entries. Several other cheques that had been shown by the appellant in his analysis for 1997 statement were proved to have been properly issued by the appellant and duly honoured. The appellant did not demonstrate that it is the interest element on the disallowed sum that formed the basis of the respondent's claim. The final sum of Kshs.3,215,182.15 for which judgment was entered was duly proved and the interest thereon was ordered to be paid at court rate but not at the rate of 23.5% per annum as claimed in the plaint.

All in all, we find no basis for interfering with the trial judge's findings. The appeal is lacking in merit and is accordingly dismissed with costs to the respondent.

Dated and Delivered at Nairobi this 6th day of March, 2015.

E.M. GITHINJI

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JUDGE OF APPEAL

J.W. MWERA

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR