



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KIHARA KARIUKI, PCA, SICHALE & KANTAI, JJ.A)

CIVIL APPEAL NO. 275 OF 2009

IN THE MATTER OF AN INTENDED APPEAL

BETWEEN

AFRO FOREX BUREAU LIMITED APPELLANT

AND

WILEX GmbH RESPONDENT

(Being appeal against the Judgment and Decree of the High Court of Kenya at Milimani (Hon. Lady Justice Lesiit) dated 30th January, 2009

in

H.C.C.C. NO. 253 OF 2006)

JUDGMENT OF THE COURT

The claim, the subject matter of this appeal, was commenced by filing of a plaint dated 13th May 2006 by the respondent **WILEX GmbH** (the plaintiff therein) against the appellant, **AFRO FOREX BUREAU LTD**, (the defendant therein). The respondent alleged that on 22nd June 2006 it gave the appellant a sum equivalent to Kshs.500,000/= for purposes of remitting it by telegraphic transfer to Germany. It was the respondent's case that the appellant failed to remit a sum equivalent to Kshs.500,000/= to Germany and that the said sum was for purchase of spare parts by the respondent on behalf of a client. The respondent further pleaded that by the said failure the respondent suffered loss and damage. It sought the following orders:

“(a) General damages for breach of contract

(b) General damages for loss of expected profits, business reputation and credibility

(c) Costs of this suit

(d) Any other relief that this Honourable Court may deem fit and just to grant.”

On its part, the appellant filed a defence dated 16th June 2006 and averred that it received a circular from Central Bank of Kenya (CBK) dated 2nd December, 2005 prohibiting it from telegraphically transferring money without the consent of CBK. The appellant further averred that it did not contract with the respondent to telegraphically transfer money on its behalf to Germany. The appellant denied occasioning loss or damage to the respondent.

The case proceeded before Lesiit, J who in a judgment dated 30th January 2009 found in favour of the respondent. The appellant was dissatisfied with the outcome of the case and hence this appeal.

In a memorandum of appeal dated 23rd November, 2009, the appellant listed no less than five grounds of appeal. These were that the learned trial judge: erred in finding that there was a contractual relationship between the appellant and the respondent; erred in not finding that the transaction, the basis of the claim had been outlawed by CBK; failed to take judicial notice of CBK's circular outlawing the transaction under consideration; disregarded that a sum equivalent to Kshs.500,000/= had been refunded to the respondent and finally that the trial judge erred in finding the appellant liable on the basis of an illegal contract.

During the plenary hearing before us on 6th October 2015, Mr. Akhulia learned counsel for the appellant urged us to find that the CBK's circular dated 5th December 2005 had outlawed the transfer of money by bureaus without its approval and that the respondent was informed of the contents of the circular and it requested that the appellant holds onto the money, pending review of the CBK's circular.

It was Mr. Akhulia's further contention that the trial court failed to take judicial notice of CBK's circular, that the anticipated transaction had been outlawed, and that the contract was illegal and hence unenforceable. Finally, Mr. Akhulia contended that the respondent was not entitled to damages as the respondent had actually purchased the diagnostic machine inspite of the non-wiring of the money and that the equipment had been rejected for other reasons, other than late delivery.

In opposing the appeal, Miss Nduta, learned counsel for the respondent urged us to find that the respondent lost business as it could not honour its part of the bargain with its customer and that the appellant owed the respondent a duty of care.

In a brief rejoinder, Mr. Akhulia wound up the appellant's case by submitting that it would be against public policy to enforce an illegal contract.

This is a first appeal before us. The position of the law as regards a first appeal is that we are entitled to re-evaluate and re-analyze the evidence tendered in the trial court and come to our own conclusion but bearing in mind that the trial judge had the advantage of seeing and assessing the demeanor of the witnesses (see **Selle & Another vs Associated Motor Boats Co. Ltd [1968] EA 123**). In undertaking that obligation we are guided by the principle that an appellate court will not normally interfere with a finding of fact of the trial court unless it is based on no evidence or on misapprehension of the evidence or the judge is shown to have acted on a wrong principle in reaching the findings she did (see **Jabane vs Olenja [1986] KLR 661**).

We have carefully perused and considered the record of appeal and the rival submissions made by the counsel.

It is not in dispute that the appellant and the respondent had had previous business dealings as relates to telegraphic transfer of money. However, on 22nd

January 2005 the respondent placed a sum of Kshs.500,000/= with the appellant for purposes of remittance to its Germany account. The respondent had entered into an arrangement with one of its customers, namely Pyramid Hauliers, to deliver to it a diagnostic equipment within 6 weeks of 26th

January 2006.

On its part, the appellant's contention was that it could not telegraphically transfer the sum of Kshs.500,000/= as CBK vide its circular dated 2nd December 2005 had barred the appellant from undertaking any such business. It was the appellant's assertion that it made it known to the respondent that the appellant could not wire the money. It was the appellant's further contention that it continued to hold the money on the instructions of the respondent pending the waiver of the bar issued by CBK.

One of the grounds of appeal was that the learned trial judge erred in finding for the respondent in the absence of a contractual relationship between the appellant and the respondent. However, it is important to note that the appellant and the respondent had had a long standing relationship between September 2004 up to March 2006. During this period, the respondent used the services of the appellant to wire money by telegraphic transfer to Germany. It was on the basis of this long standing relationship that in January 2006 the respondent gave the appellant the sum of Kshs. 500,000/= for onward transmission to Germany. The appellant in receiving the said sum accepted to transfer the money to Germany. The money was to be sent to a supplier of equipment who would in turn ship the equipment to the respondent. We therefore agree with the learned judge's finding that by the appellant's action of receiving the money from the respondent who instructed that the money be transferred to Germany, there existed a contractual relationship between the two, albeit oral.

The appellant further faulted the trial judge on the basis that it ought to have found that the contract (if any) was unlawful. In our view, there was nothing illegal about the respondent giving the appellant the sum of Kshs. 500,000/= for onward transmission to Germany. The appellant had done so for the respondent from September 2004. However, since CBK had vide its circular dated 2nd December, 2005 outlawed the wiring of money by the appellant, the appellant ought to have informed the respondent of the changed situation. To this extent, it should have declined to receive the respondent's money. The circular from CBK was issued to the appellant and the onus was on it to inform its clients. The respondent did not at anytime ask the appellant to breach the regulations issued by CBK and it is incorrect to argue that the trial court failed to take judicial notice of the circular and that the court purported to enforce an illegal contract. The appellant ought not to have received and retained the money until April 2006 when it returned the same to the respondent, knowing that it could not wire the money on behalf of the respondent.

In our view the trial judge considered the rival positions of the appellant and the respondent and rightly found in favour of the respondent. In her judgment, the trial court found as follows:

“I do find that the defendant has not denied that it received Kshs.500,000/= from the plaintiff. The defendant's explanation as to why its employee Najma was left with the money by Al Fayaz is untenable. It is not reasonable that such a large sum of money could have been left with Najma to hold. I do not accept that explanation. I do not also accept the explanation that Al Fayaz had requested Najma to purchase for him the equivalent in US dollars. I find that also untenable. It would have been different if Najma bought the US dollars as that would be conclusive proof that their agreement was that if the circular was not withdrawn, the (sic) Najma should buy the dollars. Now that she did not buy the US dollars but held on to the money between January 2006 and April 2006, until the time when the plaintiff took up the matter with the defendant through their advocates.”

We too find the explanation by the appellant that it held the money from January 2006 to April 2006 awaiting the withdrawal of CBK's circular untenable.

Further, the learned judge found:

“..... that there was an agreement between the parties that the defendant would offer telegraphic transfer services to the plaintiff. I also find that on the 22nd

January 2006 when Kshs.500,000/= was deposited with Najma, which is not denied, the parties entered into an oral agreement that the defendant would provide telegraphic transfer services to the plaintiff by sending the equivalent of the said sum less their charges, to their German account. I do find that the defendant failed, refused or neglected to offer the said services to the plaintiff in breach of their said agreement.”

Similarly, we are of the same view that the appellant failed to remit the sum of Kshs. 500,000/= as agreed between them. It is as a result of this failure that the respondent’s client namely Pyramid Hauliers cancelled the order for the diagnostic machine. The trial court awarded the respondent special damages in the sum of Kshs. 7,218.53 with interest at court rates and costs of the suit. This award had nothing to do with the refund of the equivalent of Kshs. 500,000/= made to the respondent, as contended by the respondent. We see no reason to interfere with the award.

In view of our concurrence with the findings of the learned judge, we find no merit in this appeal and order that it be and is hereby dismissed with costs.

Dated and delivered at Nairobi this 13th day of November, 2015.

P.KIHARA KARIUKI (PCA)

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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