



**REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT NAIROBI**

CIVIL APPEAL 276 OF 2002

OMEGA CHEMICAL INDUSTRIES LTD.

CRISPUS M. MURIUKI APPELLANTS

AND

BARCLAYS BANK OF KENYA LTD..... RESPONDENT

(Appeal from the judgment and decree of the High Court of Kenya at Nairobi (Lady

Justice Rawal) dated 24th July, 2001

in

H.C.C.C. NO. 1247 OF 1996)

JUDGMENT OF THE COURT

This is an appeal from the judgment and decree of the superior court (Rawal J) dated 24th July, 2002 whereby the superior court dismissed the appellants' suit and ordered the appellants to pay costs in respect of one claim.

By an amended plaint filed in the superior court, the appellants pleaded two causes of action and claimed distinct sums of money in respect of each of the two causes of action.

The first cause of action arose from an import financing transaction between the appellants and the respondent. Under this cause of action, the appellants claimed Shs.509,692/60 plus interest and penalty charges all amounting to Shs.1,815,787/15 being the loss the appellants incurred in the transaction allegedly due to fraud or negligence of the respondent. The basis of that claim is briefly as follows.

The first appellant *Omega Chemical Industries Ltd.* was a customer of the respondent *Barclays Bank of Kenya Ltd.*, Enterprise Road Branch (the bank) since 1983. The bank granted overdraft facilities to Omega which were secured by a second charge on L.R. No. 12596/5 Nairobi registered in the name of *Cripus M. Muriuki* (2nd appellant) and personal guarantees of three directors. The 2nd appellant was the Managing Director of Omega. In or about July 1992 *Omega Chemical Industries Ltd.* (Omega) through the 2nd appellant negotiated a Letter of Credit (L.C.) for Swiss Francs (SFR) 27,959 to finance the importation of some chemicals from *CIBA-GEIGY LIMITED, BASLE, SWITZERLAND* (Ciba Geigy). Thereafter on or about 21st July, 1992, the respondent bank opened an irrevocable L.C. No. 9218/286 for

SFR. 27,959 in favour of Ciba Geigy payable in 120 days after date of shipment with a maturity date of 25th January, 1993. The import/export transaction between Omega and Ciba Geigy was successfully completed.

The respondent bank instructed its correspondent bank – Barclays Bank of Switzerland to pay Ciba Geigy on the due date and reimburse itself by debiting the respondent bank's Swiss account. Thus Ciba Geigy was paid by Barclays Bank Switzerland on the maturity date, i.e. 25th January, 1993. However, the respondent bank did not debit Omega's account until 31st May, 1993 when the Kenya shilling had massively depreciated, not only against the Swiss Franc but also against the other major foreign currencies. The appellants averred that as at 25th January, 1993 the exchange rate was Kshs.35.14 per SFR; that the rate on 31st May, 1993 had risen to Kshs.53.337 per SFR; that as a result of the delayed debiting of the appellants' account they incurred a loss of Kshs.509,692/60 which had been attracting interest and penalty charges since 31st May, 1993 and that the appellants ultimately borrowed money and paid Shs.1,875,787/15 to the respondent bank on or about 6th October, 1997. The appellants averred in paragraph 15 of the Amended Plaintiff that the respondent acted fraudulently and/or negligently in the transaction and specified the particulars of fraud and of negligence thus:

“(a) The defendant received authority from 1st plaintiff to pay SFR 27,959 on maturity date i.e. 25th January, 1993;

(b) The defendant remitted the payment on the due date or deliberately failed to honour the 1st plaintiff's instructions to the detriment of the plaintiffs;

(c) The defendant fraudulently delayed debiting the 1st plaintiff's account until 31st May, 1993 when the foreign exchange rate had escalated to the defendant's advantage from Kshs.35.14 per Swiss Franc to Kshs.53.37 per one Swiss Frank (sic)”.

The bank denied being fraudulent or negligent and pleaded in paragraphs 5 of the Defence, thus:

“5. The Defendant contends that if which not admitted, the first plaintiff and defendant entered into an agreement in 1992 for letter of credit for Swiss Francs SFR 27,959, the defendant's delay in debiting the First Plaintiffs account in January was because of an acute shortage of foreign exchange in the country and when the same was availed by the CBK in May the Kenya shilling was massively devalued.

The defendant will be arguing at the hearing that the Exchange risk is borne by the customer”.

Although the respective counsel had framed and filed agreed issues before trial, the trial Judge nevertheless framed four issues in the judgment, the first and the main issues being:

“(1) On which date the company's account should have been debited to wit – The date on which the correspondent Bank paid to its supplier or the date when the Bank obtained foreign currency for the transaction”.

The trial Judge then considered clause 2 and four sub-clauses contained in the standard form of the application for a Letter of Credit, which form was produced by the bank at the trial as an exhibit, and which according to the bank was identical to the application for L.C. which Omega executed in July 1993. We set out below in full clause sub-clauses (b) (e) (p) and (q) of clause 2, thus:

“Clause 2..

(b) We hereby undertake and agree that unless you have previously been provided with funds for this purpose, we will reimburse you on your demand three (3) days before maturity in the case of acceptances or on presentation in the case of sight drawings for all drafts drawn on and paid by you,

your branches or your correspondents in the terms thereof together with interest and commission. It is understood that where any drafts are drawn in a foreign currency your demand on us for reimbursement will be calculated, unless you shall have previously agreed in writing to the contrary, at your selling rate of exchange for the currency concerned on the day you effect payment or receive advice from your branch or correspondent that payment has been made and that interest where applicable from the date of payment by your branch or correspondent, until the reimbursement currency and your actual disposal will be for our account.

(e) It is understood and agreed that all risks, including exchange risks, arising out of or consequent on the issue of this credit are to be borne by you and alone (sic) and that the Bank and or its agents are not to be held responsible for any error or delays on the part of post or telegraph or cable companies or authorities in the transmission of any instruction or correspondence regarding the credit.

(p) The bank reserves the right to apply a provisional rate of Exchange to negotiation under this credit pending the foreign currency and confirmation of the rate by the Central Bank of Kenya.

(q) We authorize you to debit our account with any interest charged to your overseas (sic) account pending receipt of reimbursement/cover of the foreign exchange from the Central Bank of Kenya”.

The bank called one witness at the trial – Richard Katwa Maungu (PW1) who testified, among other things, that Omega made an application for L.C. in July 1992; that the bank opened the L.C. with a maturity date of 25th January 1993; that the bank could not effect payment on due date because of shortage of foreign exchange in the country; that during the year 1992 any foreign exchange payment had to go through the Central Bank of Kenya (CBK); that the bank had to apply for allocation of foreign currency; that in this case, the bank applied to CBK for allocation of foreign currency on 14th December 1992 but could not get the foreign exchange allocation until 31st May 1993 when it debited Omega’s account; that through an arrangement with Barclays Bank, Switzerland, the exporter was paid on maturity date and the bank’s account at Barclays Bank of Switzerland was debited but the actual funds were not remitted through the bank; that a letter of credit is deemed to be paid when the customer’s account is debited and that according to clause 2 (e) of the standard application form for L.C. exchange risks are borne by the customer.

Similarly, the appellants called one witness at the trial, Crispus Mukiya Muriuki (PW1). His evidence in summary was that the appellants discovered that the bank paid the exporter on 25th January 1993 which was the maturity date hence the appellants were liable to reimburse SFR 27,959 at the rate of exchange ruling on that date and that the risk up to 25th January 1993 was to be borne by the appellants. The trial Judge agreed with the appellant’s construction of clause 2 holding in the relevant part:

“Plain reading of those sub-clauses specifically that of sub-clause (p) and (q) makes it clear that the relevant or applicable rate was the rate at the date of the payment to the supplier by the correspondent Bank. The Bank has preserved its risks by binding the company to pay the interest until the reimbursement currency is at its disposal as well as to pay the interest charged to its overseas account pending receipt for reimbursement of the foreign exchange from the Central Bank of Kenya.

Sub-clause (e) in my opinion is limited in its application and is not relevant in view of the other terms specified by me above.

Mr. Gaira (Ngaira) (for the bank) took me through the text describing various stages of the agreement of letter of credit. But in view of the specific provisions stipulated in the said form, those provisions should be applicable to the present transaction. In any event, the passages cited by Mr. Gaira do not envisage or deal with the issues on hand”.

The superior court nevertheless held that the claim of Shs.1,815,787/15 had not been proved and dismissed it saying:

“The company has pleaded the loss of Kshs.509,692/60 with interest and penalties since 31st May, 1993. There are averments for taking a loan to pay Kshs.1,815,787/15 and the payment thereof.

However there is nothing before me to prove the averments of loan and the payment of the Shs.1,815,787/15. Similarly no statements from the bank or accounting or calculation of interest to be charged are before me to show how the sum of Shs.509,692/60 inflating (sic) itself to the sum of Kshs.1,855,787/15 (sic). The company had produced a schedule showing detailed claim analysis. But that is not the proof of its claim. I am not shown what was the rate of interest or the penalties imposed since 31st May, 1993 or what would be the rate of interest or penalties if the account was debited on its due date. This court is not expected to conjure up those rates and calculations for the company, which in my view has absolutely failed to prove its claim to the required standard.

Tragic as it may sound, I have no alternative but to dismiss the companys prayer Nos. (a), (b) & (c) with costs”.

The superior court in addition dismissed the 2nd appellant’s claim for injunction to restrain the bank from realizing the security.

There are several grounds of appeal. We need only refer to ground 2 which sets out the appellants grievance very clearly, thus:

“2. The learned Judge erred in law and fact by failing to award the 1st appellant Kshs.509,692 or any sum thereafter despite clear and unequivocal evidence that the respondent did not simultaneously debit the 1st appellant’s account with local currency equivalent when they (the respondent) effected the said overseas payment on 25/1/1993 and only did so on 31st day of May, 1993, a whole five (5) months later when the foreign exchange rates had significantly changed to the advantage of the respondent, since the Kenya shilling had by then depreciated to Kshs.53.37 for/ per one (1) Swiss Franc thus making the 1st appellant incur a total loss of Kshs.509,692/= plus interest and penalties thereon as was claimed in prayer (a) and (b) of the said Amended Complaint”.

Most of the primary facts were not in dispute. More specifically, there was no dispute that the date of maturity of the L.C. was 25th January, 1993; that the exporter Ciba Geigy was paid on the maturity date by Barclays Bank of Switzerland and that Omega’s account was debited on 31st May, 1993; that the shilling had massively depreciated vis – a – vis the SFR between January 1993 and May, 1993 and that Omega suffered exchange loss. The fundamental issue, as correctly framed by the superior court, was whether the Omega’s account should have been debited on the date Ciba Geigy was paid i.e. 25th January, 1993 or on the date the bank obtained foreign currency in respect of the L.C. – i.e. on 31st May, 1993.

The bank’s case was that the delay in debiting Omega’s account was due to failure by CBK to allocate SFR for payment of the imports; that an L.C. is deemed to be paid when the customers account is debited and that by clause 2 (e) of the agreement the exchange loss was to be borne by Omega.

The trial Judge considered the evidence and the documents and made a specific finding that the relevant or applicable rate was the rate at the date of payment to Ciba Geigy by Barclays Bank of Switzerland. It is clear from the judgment that the trial Judge found the bank liable for exchange loss by Omega but declined to enter judgment for Omega because in the Judge’s view, the actual loss was not specifically proved. Thus, the bank’s case that it was not liable for the exchange loss suffered by Omega was rejected by the trial Judge and instead the court found in favour of Omega. Surprisingly, the bank has not cross-appealed against the part of the decision which in effect rejected its defence on liability. The bank was required pursuant to **Rule 90 (1)** of the Court of Appeal Rules to file Notice of cross – appeal if it desired that any part of the decision of the superior court should be reversed. By failing to file a cross appeal, the bank has denied this Court a chance to verify the correctness of the decision of the superior court on this technical aspect of the case. It follows therefore that we lack jurisdiction to re-open the issue of liability of the bank for the exchange loss incurred by Omega and that the findings of the

superior court whether correct or otherwise must stand.

The appeal is clearly against the decision of the superior court rejecting the claim as computed by the appellant on the ground that it was not proved.

Regarding the claim of Shs.1,815,787/15 the finding of the superior court that the appellants did not prove how the loss of Shs.509,692/60 accelerated to Shs.1,815,787/15 cannot be faulted. The rate of interest at 27% p.a. applied as shown in the DETAILED CLAIM ANALYSIS, a schedule prepared by the appellant and produced at the trial, was not supported by concrete evidence.

Furthermore, it is clear from that schedule and the appellant's written submissions in this Court that interest was calculated for 51 months from 31st May, 1993 to 30th September, 1997 the period before Omega repaid the overdraft on 6th October, 1997. The documents produced in the superior court show that the bank was claiming repayment of over Shs.2,500,000/= advanced by the bank to Omega which was not specifically restricted to the L.C. in issue.

Had the appellants paid the overdraft soon after the account was debited with the equivalent in Kenya shillings for the L.C. no interest would have been charged on the overdraft for the 51 months. It would be wrong to penalize the bank for default by appellants to pay the overdraft on the due date.

However, it was admitted that Omega in fact incurred exchange loss. In our view, the loss of Shs.509,692/60 was sufficiently proved and 1st appellant was entitled to judgment for that sum with interest at court rates from the date of filing the suit.

The second cause of action is based on the delay by the bank in forwarding two insurance claims for Shs.155,722/95 made by Omega to United Insurance Company Ltd under a burglary policy. The appellants claimed Shs.56,914/15 being the cumulative interest charged on the sum of Shs.155,722/95 for 14 months from July, 1996 to September, 1997. The evidence in support of this claim was that the Burglary policy had endorsed Barclays Bank as a beneficiary and that the proceeds were directly payable to the bank to reduce Omega's overdraft. Sometime in 1991, the first appellant sent the two discharge vouchers to forwarded to the insurance company but the bank misplaced them. The first appellant sent replacement discharge vouchers in May 1996 and the bank was ultimately paid by the insurance company in June, 1997.

The bank denied the claim and pleaded that the delay in forwarding the claim forms was occasioned by the delay by first appellant in giving an undertaking that the money would be payable to the bank. Richard Katiwa Maungu who gave evidence on behalf of the bank testified that the delay in payment was occasioned by the insurance company and that the appellants had an obligation to chase payment from the insurance company.

This claim is fraught with difficulties.

Firstly, there was no evidence to show how the claim was computed and the interest rate applied or that the appellants in fact paid Shs.56,914/15 as interest. Secondly, and more importantly, the appellants did not establish the legal basis for the claim. Was it a claim in contract or in tort and was there a legal relationship between the appellants and the bank giving rise to liability for delay?

Lastly, the appellants did not factually prove that the bank was solely to blame for the delay.

For those reasons, we are not satisfied that the claim is maintainable.

The transactions which gave rise to the two causes of action were between the first appellant and the bank. The first appellant is a distinct legal entity from the 2nd appellant. The 2nd appellant was apparently joined as a plaintiff because he wanted an injunction to restrain the bank from selling his property which had secured the overdraft. The charge had been discharged at the time the suit was heard

and the 2nd appellant did not pursue his claim. Thus the 2nd appellant had no *locus standi* in the suit and his suit was properly dismissed by the superior court.

The first appellant's appeal has partially succeeded. It is just in the circumstances that it should be awarded half the costs in this Court and in the court below.

In the result, we allow the appeal to the extent that we set aside the judgment of the superior court dismissing the claim for Kshs.1,815,787/15 in its entirety and in substitution therefor, enter judgment for the first appellant against the respondent for Shs.509,692/60 with interest at court rates from date of filing the suit until payment in full.

We award half of the costs of this appeal and half of the costs in the superior court to the 1st appellant. The 2nd appellant's appeal is dismissed with costs to the respondent.

Dated and delivered at Nairobi this 14th day of December, 2007.

E. M. GITHINJI

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JUDGE OF APPEAL

J. W. ONYANGO OTIENO

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JUDGE OF APPEAL

W. S. DEVERELL

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR