IN THE COURT OF APPEAL
AT NAIROBI
CORAM: SHAH, BOSIRE & OWUOR, JJ.A
CIVIL APPEAL NO. 324 OF 2000

BETWEEN

FINERATE FOREX BUREAU LTD ..... APPELLANT

AND

NATIONAL BANK OF KENYA LTD ..... RESPONDENT

(Appeal from the Ruling of the High Court of Kenya at Nairobi (Hewett, J) dated 4th October, 2000
in
H.C.C.C. NO. 1071 OF 2000)
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JUDGMENT OF THE COURT

The appellant, **Finerate Forex Bureau Limited** , on 19th June 2000, filed, in the superior court, a suit against the respondent, **National Bank of Kenya Limited** , claiming a sum of Shs.735,000/00 with interest thereon at the rate of 22% per annum from 20th June, 1999 until date of payment in full.

So far as is material the appellant's allegations in the plaint, against the respondent are as follows:

"6. On or about 28th June, 1999 the plaintiff company received a banker's cheque for the sum of Kshs.735,000/= from a rather unfamiliar customer and being knowledgeably uncertain about its authenticity requested the defendant bank to verify the same.

7. The defendant bank agreed to confirm the authenticity of the aforesaid banker's cheque and the plaintiff company duly presented and/or deposited the same for the purpose at the defendant's aforesaid branch on the same day, viz, 28th June 1 999.

8. Further to the foregoing paragraph the plaintiff company pleads that the defendant bank soon after depositing the aforesaid banker's cheques on the said occasion confirmed to the plaintiff company by telephone that the said banker's cheque was g ood whereupon the said plaintiff company proceeded to complete a pending transaction worth Ksh.735,000/00.

9. On 29th June, 1999 the plaintiff company proceeded to withdraw Kshs.700,000.00 against the allegedly good bankers cheque which money was requir ed for the plaintiff company's immediate operations as the defendant well knew upon being so notified on the occasion of being requested to confirm the authenticity of the said bankers cheque.

10. The aforesaid bankers cheque was on 29th June 1999 disho noured and denounced by the purported issuing bank, namely, Habib Bank Limited, as a forgery whereupon the defendant posted a debit of Kshs.735,000/00 to the plaintiff company's aforesaid account.

11. The plaintiff company further states that the defend ant proceeded on 31st July 1999 in a recriminatory and high handed manner and upon illegitimate exertion of economic dures on the said plaintiff company to transform the aforedescribed debit of Kshs.735,000.00 into a loan purported sought by the plaintiff company.

12. The plaintiff company contends that the defendant acted in breach of contract and its duty to the plaintiff in failing to properly execute the aforesaid instructions respecting the bankers cheque or at all and misrepresenting to the plainti ff that it had established the authenticity of the said banker's cheque whereas apparently it had not.

13. By reason of the matters aforesaid the plaintiff company suffered loss and damage to the value of the said bankers cheque, that is, Kshs.735,000.0 0 and the interest charged on the loan facility aforedescribed at the rate of 22% per annum amounting to Kshs.134.750.00 as at 30th May, 2000."

It is clear beyond peradventure that Order VI rule 13(1)(a) of the Civil Procedure Rules permits striking out of a pleading only on the ground that it discloses no reasonable cause of action or defence, as the case may be. It is equally clear that no evidence is admissible under that sub-rule. The learned Judge in the superior court quite properly proceeded on the basis that for the purposes of the application before him he had to assume that all the facts alleged in the plaint were true.

It would, in our view, be proper at this stage, to consider what cause of action the appellant is basing his claim on. It alleges that as it was suspicious of the bona fides or authenticity of the banker's cheque in question it requested the respondent to verify the same. It goes on further to say that the respondent confirmed to it the next day that the cheque was good and relying upon such confirmation it proceeded to complete a pending transaction worth Shs.735,000.00. It withdrew Shs.700,000/= on the strength of the cheque allegedly being good. However, the cheque was, on the 29th June, 1999 dishonoured as it turned out to be a forgery. The respondent then debited the sum in question to the appellant and transformed that debit into a loan purportedly sought by the appellant.

What the appellant purports to do is to hold the respondent liable for breach of contract, the contract being that the respondent agreed to inform it of the genuinness or otherwise of the cheque prior to the appellant drawing moneys against that cheque. We understood Mr. Ahmednasir for the respondent as saying that there was no cause of action available to the appellant as there was no valuable consideration for the cheque; such valuable consideration is referred to in section 27 of the Bills of Exchange Act, Cap. 27, Laws of Kenya (the Act). He urged on behalf of the respondent that the appellant was not a holder in due course; that there was no contract between the two contestants in regard to the cheque and that no consideration had passed from the appellant to the respondent. What is pleaded in paragraphs 6 and 7 of the plaint, urged Mr. Ahmednasir, does not give the appellant a right to sue. At this stage it would be relevant to consider the effect of section 24 of the Act which reads:

"24. Subject to the provisions of this Act, where a signature on a bill is forged or placed thereon without the authority of the person whose signature it purports to be, the forged or unauthorized signature is wholly inoperative, and no right to retain the bill or to give a discharge therefore or to enforce payments thereof against any party thereto can be acqu ired through or under that signature, unless the party against whom it is sought to retain or enforce payment of the bill is precluded from setting up the forgery or want of authority: Provided that nothing in this section shall affect the ratification of an unauthorized signature not amounting to a forgery."

If the cheque was forged the appellant acquired no title thereto and the "cheque" would not be a negotiable instrument but a mere sham piece of paper. But whether the cheque was forged or not would

eventually be a matter of evidence. It is alleged that at first the respondent said the cheque was good. At this stage what the appellant alleges must be considered as correct. Eventually it would be a matter of evidence. However, to say that the facts as pleaded do not show a cause of action, is to assume that the cheque was forged. There is no such proof as yet. The presumption that the appellant is a holder in due course for value of the Habib Bank cheque is a fact, which, at this stage, stands. The presumption may be rebutted at a proper trial.

Mr. Ahmednasir went further and urged that the appellant having accepted the transformation of the debit into a loan was deemed to have accepted the fait accompli of accord and satisfaction. Accord and satisfaction presupposes that the parties thereto are ad idem. At this stage and for the purposes of this appeal, we have to accept the appellant's version to the effect that the said transformation of the debit into a loan was a form of economic duress exerted on it by the respondent. Whether that is so is a matter for the trial court. The reliance by the respondent on the case of **Hirachand Punamchand & others vs. Temple** [1911] 2 K. B. 330 is, at this stage premature. In that case it was held that if a creditor agrees to accept the sum due to it by the debtor from a third party he cannot sue the debtor any more. That situation arose as a result of the debtor's father agreeing to pay his son's debt to the creditor. It was clearly pointed out by Farwell L.J. in the Hirachand case as follows:

> ***"Whether the facts in this case would support a plea of accord and satisfaction appears to me to be really immaterial. In my opinion it is clear that in the events that have happened the debt became extinguished. Assuming that an accord and satisfaction must be by agreement between the debtor and the creditor, it occurs to me from what was said by Willes, J. In Cook v. Lister [(1863) 13 C.B. (BS) 543,] that the facts in this case might support such a plea."***

Mr. Ahmednasir is quite right in pointing out that an agreement by one party to accept satisfaction for a breach of contract or a tort followed by performance of such agreement by the other party, extinguishes the first party's right of action in respect of such breach or tort. But this submission presupposes that the accord and satisfaction was by agreement which factor (the agreement) would be a matter for trial court. He however, did concede, quite properly in our view, that had it not been for the said accord and satisfaction the appellant would have had a cause of action. The appellant has instituted proceedings against the respondent for recovery of a specific sum of Shs.735,000/= with interest at the rate of 22% per annum from 29/6/99 until date of payment in full together with the total interest paid on the said converted loan facility. It was claimed that the cause of action was not properly pleaded. True, the prayer, as it stands, makes no mention of damages but one has to look at the prayer, not in isolation, but with reference what the same is based upon. It is obviously based on paragraph 13 of the plaint reproduced earlier by us.

It is arguable whether if a bank gives a customer an assurance that a cheque deposited by him is good and the customer acts on that assurance to his detriment the customer has a cause of action against the banker.

For these reasons we think that the learned Judge erred in concluding that there was no cause of action shown by the appellant or that it stood extinguished by accord and satisfaction. We therefore allow this appeal, with costs and set aside the striking out of the suit in the superior court. That suit is restored to hearing. The appellant will have costs of the application dated 24th July, 2000 filed in the superior court. These are our orders.

Dated and delivered at Nairobi this 30th day of November, 2001.

A.B. SHAH

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JUDGE OF APPEAL

S.E.O. BOSIRE

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JUDGE OF APPEAL

E. OWUOR

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR.