THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(CIVIL DIVISION)
CIVIL APPEAL NO. 37 OF 2018
(ARISING FROM CIVIL SUIT NO. 181 OF 2012)

KCB BANK UGANDA :: APPELLANT

VERSUS

PAUL ALINDA :: RESPONDENT

BEFORE: HON. JUSTICE BONIFACE WAMALA

JUDGMENT

Introduction

[1] The Appellant being dissatisfied with the judgement and orders of His Worship Karemani Jamson, Chief Magistrate (as he then was), delivered on 11th April 2018 at Nakawa Chief Magistrates Court, brought this appeal seeking orders that the appeal be allowed, the decision in Civil Suit No. 181 of 2012 be set aside and costs of the appeal and in the trial court be awarded to the Appellant.

Brief Background to the Appeal

[2] The Respondent filed Civil Suit No. 181 of 2012 against the Appellant in the Chief Magistrates Court of Nakawa for recovery of UGX 21,695,000/= allegedly being money drawn by way of cheques from the Respondent's bank account without his knowledge, for general damages, interest and costs of the suit. The Respondent was a holder of a current account No. 032291000566 with the Appellant bank and was issued with cheque books to enable him transact business. The Respondent claimed that he discovered that the Appellant had on various occasions unlawfully paid out to persons unknown to the Respondent a total sum of UGX 21,695,000/=. The Respondent further claimed that when he complained about the anomaly, he was advised to produce the cheque book where it was found that the alleged cheques purportedly issued to the payees were unused in his cheque book and the said cheque book was confiscated and remained in the possession of the bank. Later on, the

Respondent closed his account and his balance was paid to him but was denied refund of UGX 21,695,000/=.

[3] In the suit, the Appellant (defendant) denied the Respondent's (plaintiff's) claims and averred that the Respondent opened different accounts in different banks and used forged cheques to cause the alleged withdraws. The Appellant also stated that the Respondent authored and signed the cheques in issue and was privy to the withdrawal of the monies from the Appellant bank. The trial Chief Magistrate entered judgment and decree in favor of the Respondent, thus this appeal.

Representation and Hearing

[4] At the hearing of the appeal, the Appellant was represented by **Mr. Opio Moses** and **Mr. Jesse Kitenda** from M/s Sekabanja & Co. Advocates while the Respondent appeared in person. It was agreed that the hearing proceeds by way of written submissions. However only Counsel for the Appellant made and filed written submissions as directed by the Court. I have considered the submissions in the determination of the matter before the Court.

The Grounds of Appeal

[5] The Appellant raised five grounds of appeal in their memorandum of appeal namely;

a) The Trial Magistrate erred in law and fact when he failed to evaluate evidence on record thereby arriving at a wrong decision.
b) The Trial Magistrate erred in law and fact when he failed to rely on the evidence of the handwriting expert and report from the Electoral Commission which all pointed out that the Respondent was fraudster thereby arriving at a wrong decision.

c) The Trial Magistrate erred in law and fact when he raised the issue of negligence which was neither in issue nor raised in the pleadings thereby arriving at wrong decision.
d) The Trial Magistrate erred in law and fact when he placed a higher standard of proof on the Appellant than required by the law.
e) The Trial Magistrate erred in law and fact when he unjustifiably awarded the Respondent the sum of UGX 4,000,000/= as a general damages.

Duty of the Court on Appeal

[6] The duty of a first appellate court is to scrutinize and re-evaluate the evidence on record and come to its own conclusion and to a fair decision upon the evidence that was adduced in a lower court. See: *Section 80 of the Civil Procedure Act Cap 71*. This position has also been re-stated in a number of decided cases including *Fredrick Zaabwe v Orient Bank Ltd CACA No. 4 of 2006*; *Kifamunte Henry v Uganda SC CR. Appeal No. 10 of 1997*; and *Baguma Fred v Uganda SC Crim. App. No. 7 of 2004*. In the latter case, **Oder, JSC** stated thus:

> *"First, it is trite law that the duty of a first appellate court is to reconsider all material evidence that was before the trial court, and while making allowance for the fact that it has neither seen nor heard the witnesses, to come to its own conclusion on that evidence. Secondly, in so doing it must consider the evidence on any issue in its totality and not any piece in isolation. It is only through such re-evaluation that it can reach its own conclusion, as distinct from merely endorsing the conclusion of the trial court".*

Consideration of the Grounds of Appeal

[7] Counsel for the Appellant argued grounds 1 & 2 together; then grounds 3, 4 & 5 separately. I will adopt the same approach.

Ground 1: The Trial Magistrate erred in law and fact when he failed to evaluate evidence on record thereby arriving at a wrong decision.

Ground 2: The Trial Magistrate erred in law and fact when he failed to rely on the evidence of the handwriting expert and report from the Electoral Commission which all pointed out that the Respondent was fraudster thereby arriving at a wrong decision.

Submissions by Counsel for Appellant

[8] It was submitted by Counsel for the Appellant that the trial magistrate failed to evaluate the evidence adduced on record in regard to the conduct and character of the Respondent in as far as the relationship of the Respondent and the Appellant bank was concerned. Counsel stated that the Appellant adduced evidence by way of a voter's card (EXP2) used while opening an account with the Appellant and a report by Electoral Commission (EXD7) to the effect that the Respondent is part of a racket which forged identity documents with intention to defraud. Counsel faulted the learned trial Chief Magistrate for not considering the evidence in the handwriting expert report (EXD5) which revealed that it was indeed the Respondent who had authored and signed the cheques in issue. Counsel prayed that the Court reviews the evidence before it and come to a conclusion that the cheques in issue were issued by the Respondent and that Respondent's claim is tainted with illegalities and immorality as the Respondent has not come to court with clean hands.

Determination by the Court.

[9] The major contention under the combined grounds one and two of the appeal is that the learned trial magistrate erred in his evaluation of the evidence of the handwriting expert and wrongly refused to rely upon the said evidence. The settled position of the law is that opinions of experts are not binding on courts of law and must be considered along with all the other available evidence. The court may choose to reject such evidence if it is, in the

view of the court, not hinged on a sound basis. See: *Kimani v Republic [2002] 2 EA 417* and *Dr. Henry Kamanyiro Kakembo v Roko Construction Limited, CA Civil Appeal No. 05 of 2005*. In the case of *Davie v Magistrates of Edinburg (1953) CS 34*, it was held that expert witnesses cannot usurp the functions of a judge any more than a technical assessor can substitute his advice for the court's judgment. Experts must furnish the judge with necessary scientific criteria for testing the accuracy of their conclusions to enable the judges to form their independent judgment by applying the criteria to the facts proved in evidence. The above is a restatement of the old long adage that, even in presence of expert evidence, the court remains the expert of experts.

[10] In the present case, the learned trial Chief Magistrate in his judgment considered the evidence of the hand writing expert and concluded that "*resemblance is not conclusive that the author of the signature is the same. They may resemble when the authors are different. I am not convinced that the plaintiff had knowledge of the withdrawal of the money from his account"*. In the handwriting expert report, on record as EXD5, the handwriting expert stated under paragraph 4.1 as follows;

> *"The disputed signatures bear a close resemblance with the specimen signatures which indicates that either the disputed signatures were written by a forger while copying the formation of letters from a specimen signature or the disputed signatures were written by Mr. Paul Alinda the writer of the specimen signatures."*

[11] It is clear from the above statement which forms part of the examination and findings of the expert that the witness put up two hypotheses, namely that; either the disputed signatures were written by a forger while copying the formation of letters from a specimen signature or the disputed signatures were written by Mr. Paul Alinda the writer of the specimen signatures. The learned trial magistrate was at liberty to adopt either hypothesis or none of them in

reaching a conclusion that best fitted the evidence before him. In the instant case, the learned trial magistrate chose to believe the possibility that was in connection with the first hypothesis, that is, that the disputed signatures could have been written by a forger while copying the formation of letters from a specimen signature. The trial magistrate found no evidence linking the Respondent to the possible forgery and was not convinced that the Respondent was involved in forgery of the cheques in issue. I would find no fault in the approach and view that was taken by the learned trial magistrate. It is clear to me that the learned trial magistrate was alive to the relevant position of the law and gave reasons for rejecting the final conclusion of the handwriting expert. I have not found an error of law or fact in the reasons and findings of the learned trial magistrate in that regard.

[12] I am alive to the evidence adduced by the Appellant that attempted to link the Respondent to opening of multiple bank accounts and using of different identities for purpose of committing fraud. My view however is that the pieces of evidence adduced in that regard were not sufficiently tested and verified before the Court. To begin with, the letter from the Electoral Commission (EXD7) only reports that the voter's details under the number that was contained on the card sent to them for verification were for another person different from the Respondent. Contrary to what is stated for the Appellant, the letter from the Electoral Commission did not state that the Respondent was part of a racket which forged identity documents with intentions to defraud. This kind of conclusion does not appear in the letter EXD7.

[13] Surprisingly, the card sent to the Electoral Commission for verification, by appearance, looks like any other voter's card. However, the Electoral Commission did not pronounce itself on its fate; the letter only states that the Voter ID Personal Number on the said card belongs to another person whose details are stated in the letter. That is definitely different from saying that this

impugned card was invalid or forged. The evidence leaves other possibilities such as issuance of two cards by the Commission with the same number or the Respondent having been given a forged voter's card without his knowledge and participation. These possibilities were material and ought to have been explored before a conclusion could be reached that the Respondent was involved in identity forgeries.

[14] The other piece of evidence was the forensic investigation report (EXD6) which set out the background facts and the conclusion that the Respondent was involved in the forgery of the questioned cheques. However, the facts stated in the said report were not sufficiently tested and verified in my view. The copy that was admitted in evidence was not signed by the authors of the report. None of the authors or makers of the report was called as a witness. As such, the allegations made in the report were not tested in evidence. I find that the learned trial magistrate was well placed in refusing to place reliance on these pieces of evidence. Like he stated, there was no evidence to convince him that the Respondent had knowledge of the withdrawal of the money from his account. I have found no sound basis for interference with the reasons and findings of the learned trial magistrate. In the circumstances, I have found no merit in the first and second grounds of appeal and they accordingly fail.

Ground 3: The Trial Magistrate erred in law and fact when he raised the issue of negligence which was neither in issue nor raised in the pleadings thereby arriving at wrong decision.

Submissions by Counsel for Appellant

[15] Counsel for the Appellant referred the Court to page 5 of the judgment where the trial magistrate made a finding that the Appellant bank failed its duty and hence was negligent and argued that from the plaint, there was no pleading as regards to negligence by the Appellant bank. Counsel stated that

the Appellant's evidence was that the Respondent was a fraudster from the onset. Counsel argued that the creation of the cheques in issue was premeditated with a view to defraud the bank. Counsel further stated that the issue of whether the bank had to make a call or not before sanctioning payment could not have stopped the Respondent's fraudulent acts. Counsel concluded that negligence was not part of pleadings nor issues raised.

Determination by the Court

[16] The issue that was being investigated by the trial court was whether or not the sum of UGX 21,695,000/= was withdrawn with the knowledge of the plaintiff. The allegation by the Respondent (plaintiff) was that the said sum was wrongly debited from his account and the bank was liable to have it refunded. The answer by the Appellant (defendant) was that the money had been removed from the Respondent's account by use of forged cheques and that the Respondent was part of the forgery. To the Appellant, the Respondent had knowledge of the circumstances in which the withdrawals were made and was not entitled to be compensated. In resolving the above contention, the trial magistrate had to and dealt with the customer-bank relationship. He found that the bank (the Appellant) acted in breach of its duty to apply reasonable skill and diligence in order to avoid the debiting of a customer's account without authorization. As a matter of fact, the court found that by not insisting on the call to the customer going through before endorsing the debit, the Appellant acted negligently thus leading to the loss in issue.

[17] The contention raised by the Appellant in this regard requires an examination of the nature of the bank-customer relationship. The relationship between a bank and customer is both contractual and fiduciary in nature. The term fiduciary refers to a duty of utmost good faith, trust, confidence and condour owed by a fiduciary to the beneficiary. The bank is the fiduciary and the customer is the beneficiary. It is a duty to act with the highest degree of

honesty and loyalty toward another person and in the best interest of the other person. See: **The Black's Law Dictionary 7th Edition at page 523** and *Eric Butime Katabarwa v Standard Chartered Bank, HCCS No. 963 of 2020*. In that regard, the bank is under an obligation to treat the accounts of its depositors with meticulous care, always having in mind, the fiduciary nature of their relationship. In *Philippine National Bank v Norman Y Pie, Philippines Supreme Court (Second Division) G.R. No. 157845 September 20, 2005*, it was stated that the fiduciary relationship imputes the bank's obligation to observe the highest standards of integrity and performance; the relationship requires the bank to assume a degree of diligence higher than that of a good father of a family. In that regard, therefore, the customer expects the bank to treat his/her account with the utmost fidelity, whether such account consists only a few hundred or millions of monies.

[18] It is clear to me that one way the duty on the part of the bank to act with meticulous care or with due diligence may be breached is upon an occurrence of a negligent act on the part of a bank. As such, where a customer relies on the ground of breach of the bank-customer relationship, it is not necessary for the party to expressly plead negligence in order to prove that the bank acted in breach of its duties towards the customer. In the present case, I find that such was the context in which the trial magistrate made a finding based on negligence on the part of the Appellant going by the facts that were before the court. In the circumstances, I do not find any error of either law or fact on the part of the trial magistrate in this regard. It is not true that the trial magistrate raised a new issue that was neither pleaded nor raised during the trial. To my finding, the learned trial magistrate rightly applied the test of negligence in line with the bank's duty to act with care and diligence towards its customers. This ground of appeal also fails.

Ground 4: The Trial Magistrate erred in law and fact when he placed a higher standard of proof on the Appellant than required by the law.

Submissions by Counsel for the Appellant

[19] It was submitted by Counsel for the Appellant that the burden of proof lies on who asserts and that the standard of proof is on a balance of probabilities. Counsel stated that the Appellant adduced evidence which portrayed the Respondent as a fraudster which evidence was turned down by the trial magistrate who instead criticized the Appellant for not verifying the payment. Counsel reasoned that had the trial magistrate properly considered the evidence adduced before him in regard to the personality of the Respondent, then he should have found that it was not necessary to make a phone call since the Respondent was part and parcel of the racket of fraudsters and the Court should have dismissed the Respondent's claims for being bad in law.

Determination by the Court

[20] My understanding of this contention is that by the Appellant challenging the way the trial court applied the standard of proof, Counsel for the Appellant acknowledges that the Appellant bore a burden to prove some peculiar facts raised by the Appellant (defendant in the suit). Be that as it may, I will set out the law on the burden and standard of proof in civil matters. The law is that in civil proceedings, the burden of proof lies upon he who alleges. Section 101(1) of the Evidence Act, Cap 6 provides that; *"Whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he or she asserts must prove that those facts exist"*. Section 101(2) of the Act provides that; *"When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person"*.

[21] Furthermore, Section 103 of the Evidence Act provides that "*the burden of proof as to any particular fact lies on that person who wishes the court to believe*

in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person". Accordingly, the burden of proof in civil proceedings normally lies upon the plaintiff or claimant. The standard of proof is on a balance of probabilities. The law however goes on to classify between a legal burden and an evidential burden. When a plaintiff has led evidence establishing his or her claim, he/she is said to have executed a legal burden. The evidential burden thus shifts to the defendant to rebut the plaintiff's claims.

[22] In the present case, the Appellant (defendant) sought to prove that the Respondent was a fraudster, involved in a racket that was in the habit of opening and operating multiple bank accounts and abuse of personal identities for fraudulent purposes. In effect, the Appellant was duty bound to prove existence of fraud in the subject transactions and to attribute it to the Respondent. The position of the law is that allegations of fraud are of a serious nature and must be strictly proved, calling for a standard, although not as high as proof beyond reasonable doubt, that is higher than the ordinary balance of probabilities that is normally applicable to civil matters. See: *Ratlal G. Patel v Baiji Makayi (1957) EA 31 at 317* and *Fredrick Zaabwe v Orient Bank & Others, SCCA No. 4 of 2006*.

[23] In the present circumstances, in order to prove fraud, the Appellant needed a higher standard than the ordinary balance of probabilities. Although the learned trial magistrate did not specifically point out the standard of proof that he was applying, it is clear that he had in mind the fact that involvement of allegations of fraud required a higher standard of proof. I do not find any reason to fault the position taken by the learned trial magistrate in this regard. This ground of appeal also fails.

Ground 5: The Trial Magistrate erred in law and fact when he unjustifiably awarded the Respondent a sum of UGX 4,000,000 as general damages.

Submissions by Counsel for the Appellant

[24] It was submitted by Counsel for the Appellant that the Respondent adduced no evidence of any suffering or damage that was caused to him. Counsel argued that had the Trial Magistrate properly evaluated the evidence on record and considered the Appellant's evidence regarding the character of the Respondent, then the court would not have come to such conclusion and awarding the Respondent damages in the sum of UGX 4,000,000/=.

Determination by the Court.

[25] The position of the law is that general damages are awarded at the discretion of the court arising out of the natural and probable consequence of the defendant's act or omission. See: *Erukana Kuwe v Isaac Patrick Matovu & Anor, HCCS No. 17 of 2003* and *James Fredrick Nsubuga v Attorney General HCCS No. 13 of 1993*. It is also the position of the law that an appellate court should not interfere with the discretion of a trial court unless it is satisfied that in exercising its discretion, the trial court misdirected itself in some matter and as a result arrived at a wrong decision or unless it is manifest from the case as a whole that the court has been clearly wrong in the exercise of discretion and that as a result there has been a miscarriage of justice. See: *NIC v Mugenyi [1987] HCB 28*.

[26] On the question of damages, an appellate court shall not interfere in an award of damages unless it is satisfied that the trial court acted on some wrong principles or the amount awarded is too high or too low as to amount to an entirely erroneous estimate of the damages to which the successful party is entitled to. See: *Impressa Federici v Irene Nabwire, SCCA No. 3 of 2000* and *Administrator General v Bwanika James & Others, SCCA No. 7 of 2003.*

[27] In the instant case, the facts that were before the trial magistrate according to the record were that the Respondent had suffered some inconvenience including being arrested, detained and prosecuted. He was acquitted upon the court finding no case to answer. Although the trial magistrate did not make specific mention to this evidence while making the order for general damages, I have no doubt that the trial magistrate had such evidence in mind when he made the award of general damages. As a matter of principle, the trial court had a duty to take such evidence into consideration. As such, I do not find any fault in the way the trial court exercised its discretion in that regard and I have found no reason to interfere with the decision to award the general damages in the said sum. This ground of appeal also fails.

[28] In all, therefore, all the grounds of appeal have been found to be without merit and have failed. The appeal is accordingly dismissed with costs to the Respondent. The judgment and decree of the lower court is upheld and shall be enforced.

It is so ordered.

Dated, signed and delivered by email this 29th day of January, 2024.

Boniface Wamala
JUDGE