**Nkoloma v NBC Holdings Corporation Ltd**

Division: Court of Appeal of Tanzania at Dodoma

Date of judgment: 15 September 2000

Case Number: 44/97

Before: Ramadhani, Lubuva and Lugakingira JJA

Sourced by: L J S Mwandambo

Summarised by: H K Mutai

*[1] Bank – Loan – Overdraft account – Banker’s Order Card – Combination of accounts – Transfer of*

*funds from an account in credit to loan account in debit – Whether bank justified in combining accounts*

*– Whether plea of* non est factum *regarding BOC could be maintained – Whether bank could hold a lien*

*over customer’s account in credit – Whether a bank was obliged to give notice to a customer before*

*combining accounts.*

**JUDGMENT**

**RAMADHANI JA:** The Appellant unsuccessfully sued the Respondent bank in the High Court and being dissatisfied with that judgment he has come to this Court on appeal. At the High Court the following facts were not in dispute. The Appellant had two accounts with the Respondent bank at Kuu Street Branch, Dodoma: Nos 18-0009 and 25/549. In 1991 he obtained a term loan of TShs 9 300 000 for a hotel project payable in six years from 1992 through his account number 18-0009. On his account number 25/549, the Appellant got an overdraft facility for a shop project during the period of 1991 to 1994. The overdraft carried a higher interest rate than the tern loan. At various times the Respondent bank transferred some monies totaling TShs 16 719 837 from account 25/549 to account 18-0009 and used it to service the term loan. The case of the Appellant is that the Respondent had neither a legal justification nor his permission to deduct that sum and prayed that that amount, together with interest of TShs 14 004 264, be repaid to him. The Respondent bank, on the other hand, claims that that amount was deducted on the strength of a Banker’s Order signed by the Appellant on 14 October 1992 authorizing such deductions to service the term loan. On behalf of the Appellant was Mr Paul *Nyangarika*, learned advocate, while the Respondent had the services of Mr Richard *Rweyongeza*, learned counsel. The Appellant has a five-ground memorandum of appeal. The first ground is very general and it transcends all other grounds. It avers that the Learned trial Judge did not properly evaluate the evidence in favour of the Appellant. Obviously, then we have to deal with the first ground in every one of the other four grounds. The four grounds are that: One, the finding that the money was justly deducted was wrong. Two, it was wrong to have found that the Respondent bank had a lien on the money. Three, the plea of *non est facutm* was wrongly rejected. Four, the Learned Judge erred to hold that an account with an overdraft facility could also be an ordinary account. Before we examine the merits and/or demerits of the appeal, we think that it is necessary to go over some other established facts that, unfortunately, the lower court either overlooked or did not adequately come to grips with. The loan contract was signed on 6 April 1990, and according to paragraph 3(*i*) of the loan agreement (exhibit P2), there was a period of grace of 23 months before repayment. The letter of 5 March 1990 (exhibit P1) in which the Respondent notified the Appellant the approval of the loan, fixed repayment to start on 31 March 1992. The payment was to be quarterly at TShs 475 000 per quarter, that is, a total of TShs 1 900 000 per year. An interest at the rate of 27,5% per annum was also to be paid from the time the Appellant started “using the term loan”. That, too, was to be paid quarterly on March, June, September and December of each year. Again, there was a commitment fee at the rate of 1% per annum “on the committed but undrawn [*sic*] balance” of the loan. The fee accrued from 6 April 1990, that is, the date of signing the loan agreement. The repayment of the loan and the payment of interest thereon were to be executed as provided in the repayment schedule, appendix 1, to the loan agreement. However, that appendix is conspicuously absent from the court record and neither party has said anything about it. So, we have never been in a position to know what was the repayment schedule, how much interest and commitment fee was to be paid and when. The Appellant was to open both an ordinary account and a Banker’s Order Card (BOC) authorizing the Respondent bank to debit loan instalments as and when they fell due. That account was never opened but a BOC (exhibit P8) was signed on 14 October 1992 and was to take effect from 27 October 1992 for a deduction of TShs 292 000 every quarter. We should put it on record here that the first deduction from the account 25/549 was on 28 September 1991 and was of TShs 1 046 250. Mr *Rweyongeza* submitted that there were three ways in which the loan could have been repaid. One, it could have been repaid directly in cash by the Appellant. Two, repayment installments could have been deducted through the BOC. Lastly, the Respondent could use the banking practice of debiting a borrower’s account with a credit balance. It is significant to note that the Appellant has never explained how he effected the loan repayments and has been absolutely mum as to how much he had repaid. It is abundantly obvious to us, therefore, that the Appellant did not repay a single cent directly in cash. So, we have to see whether it could be said that he repaid the loan by any of the other two methods or by a combination of both. As already stated above, the BOC was signed on 14 October 1992 and was to take effect from 27 October 1992 for TShs 292 000 each time. However, and as pointed out again, the first deduction from account 25/549 was on 28 September 1991 and it was TShs 1 046 250. That was followed by four other deductions on 30 December 1991, 28 March 1992, 29 June 1992 and 2 October 1992 totaling TShs 3 943 959-50. It is crystal clear that these could not have been deducted on the strength of the BOC because it was not in existence, as appropriately pointed out by Mr *Nyangarika*. Indeed, the date for the repayment of the loan, that is 31 March 1992 was not yet due when the first three deductions of 28 September 1991 and 28 March 1992 were effected. So, it could not be said that those amounts were for the repayment of the loan. But Mr *Nyangarika* did not question this fact. Was it an oversight or was the deduction justified? As we have said earlier, interest at the rate of 27,5% was chargeable immediately upon the use of the term loan. We are not told when the term loan started to be used. Also the commitment fee at the rate of 1% on the amounts already committed but not drawn, accrued from the date of signing the loan agreement, that is, from 6 April 1990. Is it possible, then, that the first deduction on 28 September 1991 for TShs 1 046 250 was for servicing interest and the fee? On that date six instalments should have been paid since the signing of the Agreement but none had been made. Couldn’t the payment of the two commitments amount to that total? The onus was on the Appellant to show that the deducted amount was wrongly taken. It is trite law that it is up to the Appellant, as the Plaintiff, to establish that the Respondent was not entitled to be paid that amount and any other subsequent amounts. He did not do that. So, we are left with the only deduction that the Respondent was entitled to those monies. This is what Mr *Rweyongeza* argued and, on the balance of probabilities, we think that is so. However, we are satisfied, as already pointed out, that the first five deductions were made when the BOC had not become operative. So, the Respondent did not deduct account 25/549 on the strength of the BOC. The other eight deductions, from that of 28 December 1992 to that of 29 December 1994, were made at time BOC was operative and so, were authorized by the BOC. Mr *Nyangarika* submitted that the Appellant signed the BOC blindly, that the terms were not read out to him and that it would have been better if the BOC was attached to the loan agreement. We do not buy that. Mr *Nyangarika* conceded that the opening of a BOC was one of the terms of the loan agreement signed by the Appellant in the presence of his advocate. The Appellant himself admitted in cross-examination that the loan agreement was read to him by the bank manager. So, he cannot not disown the BOC. We, therefore, hold that the eight deductions, from the one of 28 December 1992 to that of 29 December 1994, were made under the BOC. The question is under what authority were the first five deductions made? That disposes the ground of appeal that the plea of *non est factum* was wrongly rejected: the Appellant was not at all mistaken as to the character or effect of the transation embodied in the loan agreement. Mr *Rweyongeza* has maintained that the first five deductions were effected under the inherent powers of a bank to debit a borrower’s account with a credit balance. In addition, the learned advocate also claimed that the Respondent bank had a lien on the monies in the bank belonging to the Appellant. Is there such an inherent power by which a bank can deduct one account of a customer to pay the liabilities of the customer under another account? There is a common law right of combination of accounts. A customer may have more than one account with a bank. In that case the bank has a right to combine the accounts and treat them as one. This is what is called combination of accounts. The accounts may be in one branch of the bank or in different branches of the same bank. But here we shall deal with the former situation because that is what concerns us in this appeal; the two accounts of the Appellant are both in the same branch of the Respondent bank. Combination of accounts is also referred to as a right of set-off. This is a monetary cross-claim made in an action by a Plaintiff, that is, a legal right by which a debtor is entitled to take into account a debt owing to him by a creditor when sued for a debt due from him to the creditor. However, the right of combination of accounts or set-off is only exercisable in the context of the relationship of a banker and a customer (*Rouxel v Royal Bank of Cananda* [1918] 2 WWR 791 cited in *Modern Banking Law* by EP Ellinger and E Lomnicka, Oxford (2 ed) at 184). There are two instances in which a bank is entitled to combine accounts or to set-off. First, where a customer is unable or unwilling to repay an overdraft incurred in one account although another account is in credit. Secondly, where a customer draws a cheque for an amount exceeding the balance standing to the credit of the account involved but the deficiency can be of the funds deposited in another account. (See *Ellinger and Lomnicka* at 179.) Combination of accounts, has three other exceptions: One, the right could be abrogated by a special agreement. Two, the right is inapplicable where the property was remitted to the bank and appropriated for a special purpose. Lastly, a customer’s account cannot be combined with a trust account or an account to be utilized by the customer as a trustee. (See *Greenwood Teale v William*, *Williams, Brown and Co* (1984) 11 TLR 56 cited in *Ellinger and Lomnicka* at 185.) As already shown, both accounts 25/549 and 18-0009 belong to the Appellant and are in the same branch of the Respondent bank. The accounts are neither for special purposes nor are they for trusteeship. There is also no evidence that there is any agreement to prohibit them from being combined. However, there is one question: could the Respondent bank have done that without notifying the Appellant? There are two “apparently” conflicting decisions on the matter of notice to a customer. The Court of Exchequer gave an equivocating answer in *Garnett v M’Kewan* (1872) LR 8 Ex 10, where Kelly CB said, at 13: “In general it might be proper or considerate to give a notice to that effect, but there is no legal obligation on the bankers to do so, arising either from express contract or the course of dealing between the parties”. But in *Buckingham Co v London and Midland Bank* (1895) 12 TLR 70, Mathew J held that a reasonable notice to a customer is essential. However, the two decisions have been reconciled by pointing out that in Garnett there was no agreement between the bank and the customer to keep the two accounts separate. So, the bank could exercise its right without notice. In *Buckingham and Co* however, that right was abrogated by an agreement based on a course of dealing and it could only be displaced by reasonable notice to the customer. But even in such cases, agreements to keep the two accounts separate can be abrogated by subsequent developments. It is our considered opinion that where there is no agreement to keep more than one account separate, then there is no need to give notice before exercising the right to combine accounts. However, where there is such agreement, then reasonable notice is required. But even in such situation, if the words of the agreement indicate that the agreement would cease upon the occurring of an event, notice is equally not required. Our opinion is supported by what Lord Cross of Chelsea, in his dissenting opinion, said in the judgment of the *House of Lords in National Westminister Bank Ltd v Halesowen Presswork and Assemblies Limited* [1972] AC 785 at 810: “On any footing the bank would be obliged to honour cheques drawn to the limit of the apparent credit balance before the company became aware that the bank was consolidating the accounts and so it might be said that notification to the customer was not a condition precedent to the exercise by the bank of its right of consolidation but only a measure of precaution which the bank might take to end its liability to honour cheques”. But we would go further and say that where, as we have abundantly shown in this appeal, a customer is well aware of his commitments to a bank but deliberately avoids meeting them, then the bank is entitled, without notice, to combine accounts even if there is an agreement not to do so. So, the Respondent bank had the right to combine the two accounts and use the credit in account 25/549 to make due repayments of the loan in account 18–0009. Courts should not be used to assist individuals who want to take undue advantage of the credit system. For the avoidance of doubt we have to point out that in this appeal there was an agreement for opening up a new account for repaying the loan. This could only mean that the parties intended to keep the three accounts separate. However, from what we have said above, the Respondent bank was entitled to combine the two accounts and deduct funds from account 25/549 to repay the loan on account 18–0009. As for lien, we can only say that it does not attach to the balance standing to the credit of the customer’s account with his bank. The balance is part of the bank’s general funds and also a debt due from the bank to the customer. This is because of the nature of the relationship between a banker and a customer. The bank uses customer’s deposits as its own but undertakes to repay an amount equal to that paid in, with or without interest either at call or at fixed time. Thus the role of the bank is that of a debtor while that of the customer is of a creditor. (The roles are reversed where an account is overdrawn.) So, the balance is treated as if it were the property of the bank. Now, a person cannot have a lien over his own property and especially when the property is also in his possession. (See *Ellinger and Lomnicka* at 107–111, 183 and 692.) Therefore, for the reasons given above, we dismiss the appeal with costs. It is so ordered.

(Lubuva and Lugakingira JJA concurred in the judgment of Ramadhani JA.)

For the Appellant:

*P Nyangarika* instructed by *G Mbezi and Co*

For the Respondent:

*R Rweyongeza* instructed by *Rweyongeza and Co*