Co-operative Bank of Kenya Limited v Kojo alias Victor Brian Owino alias Victor Brian Owino Kojo & another; Jenks Auctioneers (Interested Party) (Civil Appeal 26 of 2022) [2024] KEHC 11422 (KLR) (30 September 2024) (Judgment)

Neutral citation: [2024] KEHC 11422 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BUNGOMA

CIVIL APPEAL 26 OF 2022

DK KEMEI, J

SEPTEMBER 30, 2024

BETWEEN

CO-OPERATIVE BANK OF KENYA LIMITED ..... APPELLANT

AND

OWINO KOJO ALIAS VICTOR BRIAN OWINO ALIAS VICTOR BRIAN OWINO KOJO ..... 1ST RESPONDENT

KHETIA DRAPERS LIMITED ..... 2ND RESPONDENT

AND

JENKS AUCTIONEERS ..... INTERESTED PARTY

(Being an appeal from the judgement and decree in the Chief Magistrate's Court at Bungoma in CCM Civil Suit No. 664 of 2016 delivered by the Honourable S.Mogute (Principal Magistrate) on 8th September 2011)

JUDGMENT

1. This judgment is in respect to the Appeal and the Cross-Appeal in this matter. The main appeal was preferred by Co-operative Bank of Kenya Limited whereas the Cross-Appeal was instituted by Owino Kojo alias Victor Brian Owino alias Victor Brian Owino Kojo who is the 1st Respondent herein.

2. The Appellant and Respondents were among the parties in Bungoma Chief Magistrate's Court Civil Suit No. 664 of 2016 Owino Kojo alias Victor Brian Owino alias Victor Brian Owino Kojo v Co-operative Bank of Kenya Limited & Another (hereinafter referred to as 'the suit'). The suit related to breach of contract and defamation.

3. The suit was fully heard and allowed against Co-operative Bank of Kenya Limited vide a judgment rendered on 6th March 2019. It was decreed to pay Owino Kojo alias Victor Brian Owino alias Victor Brian Owino Kojo the sum of Kshs. 500,000/= with costs and interest. The other Defendant in the suit (Khetia Drapers Limited) who is the 2nd Respondent herein was discharged having not been found liable.

4. Both Owino Kojo alias Victor Brian Owino alias Victor Brian Owino Kojo (hereinafter referred to as 'Kojo') and Co-operative Bank of Kenya Limited (hereinafter referred to as 'Co-op') were aggrieved by the judgment. Co-operative Bank of Kenya Limited filed the main appeal while Owino Kojo alias Victor Brian Owino alias Victor Brian Owino Kojo filed a Cross-Appeal.

5. Co-operative Bank of Kenya Ltd filed a Memorandum of Appeal dated 14th March 2022 in which it challenged the judgment on seven grounds. It prayed that the impugned judgment be set-aside and an order dismissing it in its entirety be issued. It also prayed for costs of the appeal and the lower Court suit.

6. The 1st Respondent herein on his part filed his Memorandum of Appeal dated 29th June 2024 in which he challenged the judgment on the aspect of quantum and failure to give due consideration to the defamation aspect by the actions of the Appellant herein. He prayed that the damages awarded by the trial Court be set-aside and this Court do re-assess appropriate and enhanced damages to Kshs.8,000,000/=; that the Appellant's appeal be dismissed with costs; that his Cross-Appeal be allowed with costs.

7. On the directions of this Court issued on 21st February 2024, this Court dispensed with the Appellant's Notice of Preliminary Objection dated 6th March 2024 by deeming the 1st Respondent's Cross-Appeal dated 29th January 2024 as duly filed.

8. Subsequently, this Court, directed that the appeals be canvassed by way of written submissions. The Appellant and the 1st Respondent duly complied by filing separate written submissions on the Appeal and the Cross-Appeal.

9. I have given due consideration to the entire record and the parties' submissions as well as the decisions referred to.

10. The High Court, as the first appellate Court, is enjoined to revisit the evidence on record, evaluate it and reach its own conclusion in the matter. (See the case of Selle & Ano. v Associated Motor Boat Co. Ltd [1968] EA 123).

11. This Court, nevertheless, appreciates the settled principle that an appellate Court will not ordinarily interfere with findings of fact by the trial Court unless they were based on no evidence at all, or on a misapprehension of it or the Court is shown demonstrably to have acted on wrong principles in reaching the findings. This was the holding in Mwanasokoni v Kenya Bus Service Ltd. [1982-88] 1 KAR 278 and Kiruga v Kiruga & Another [1988] KLR 348).

12. The gist of this matter is that, vide an Amended Plaint filed in Court on 27th November 2018, The 1st Respondent herein averred that he was a holder of a Co-op Bank Visa Card No. 4407830045820751issued by the Appellant herein. He tendered his evidence in Court as PW1. According to him, he proceeded for shopping on 27th November 2015 at Khetia's Supermarket in Bungoma wherein he selected goods worth Kshs. 15, 391/=. On presenting his Co-op Bank Visa Card for payment, the same was rejected. He averred that there existed a contract between him and the Appellant herein in regard to the said Visa Card and that the rejection prompted him to return some of the selected items and thus decided to just pay for items worth Kshs. 13,653/=. He averred that at the

time of the incident, his current account balance was Kshs. 181, 596.50/=. He averred that the same incident occurred while he was shopping at Naivas Supermarket Westlands Branch on 23rd January 2018. He averred that as a member of high standing in the society and of a noble profession, the said action caused him mental agony and subjected him to humiliation.

13. PW2 was Herbert Kojo, who adopted his statement recorded on 9th November 2016, as his evidence in chief. According to him, he is a nurse by profession and that he was in the company of the 1st Respondent on that fateful date. He observed the 1st Respondent's Co-op Visa Card getting declined due to insufficient funds in his account as the 1st Respondent tried to pay for the selected items. He told the Court that the 1st Respondent tried to make the purchase using the Visa Card thrice and that the same was declined due to insufficient funds. He told the Court that the Supermarket allowed the 1st Respondent to purchase the goods he could afford vide cash.

14. PW3 was Naftali Ogeto who adopted his recorded statement dated 9th November 2016, as his evidence in chief. According to him, he met the 1st Respondent at the Supermarket on 27th November 2015 where he told the Court that he was at the supermarket doing his shopping and on arriving at the teller after the 1st Respondent and PW2, he noted that the 1st Respondent elected to pay for his items, via Co-op Visa Card. The Supermarket accepted the Visa Card as a form of payment but on inserting his card and doing the necessary, the payment kept on declining and the teller told them that the 1st Respondent had insufficient funds. The supermarket advised the 1st Respondent and PW2 to make their payment via cash and that the 1st Respondent elected to have some items returned to the shelf as he did not have enough funds to pay for everything.

15. The Appellant entered appearance and on 4th September 2018 filed its Amended Defence wherein it denied the averments of the Amended Plaint noting that the supermarket had no authority to inquire into the account status of the 1st Respondent. It denied rejecting the 1st Respondent's Visa Card as alleged and further alleged that 1st Respondent successfully carried out the contested transactions as the same were captured in his statements. It also averred that if any attempted transaction by the 1st Respondent were made, the same never reached their card system and that the fault was on the PDQ machine or bank system that issued the PDQ machine.

16. DW1 was Anthony Wanaswa who adopted the contents of his recorded statement. He averred that he could not confirm whether the Visa Card the 1st Respondent presented at the supermarket was declined and that he lacked any evidence to present before the Court to indicate that the transactions which were declined at that material time were recorded. According to him, he could not testify to whether other transactions as conducted by the 1st Respondent were declined and that by the time the 1st Respondent visited Khetia Supermarket on 27th November 2015, he had sufficient funds in his account. He told the Court that the Appellant did not establish that the PDQ machine was faulty at the material time.

17. Having revisited the evidence on record, it is within my purview to re-evaluate it and reach my own conclusion in the matter.

18. Bearing the above in mind, this Court has come up with the following issues for determination: -

    i. Whether the Cross-Appellant (1st Respondent) proved his case to the required standard.

    ii. Whether the remedies made were appropriate.

19. It was the duty of the Cross-Appellant to prove his case to the required standard in civil cases which is on a balance of probabilities.

20. The above issues will be addressed in seriatim.

i. Whether the Cross-Appellant (Kojo) proved his case to the required standard.

21. The Appellant in their Amended Statement of Defence argues that the Cross-Appellant's suit is statute time barred. I find that the claim in respect of libel was filed after one year and that the same is time barred.

22. Section 4(2) of the Limitation Act agrees with Section 20 of the *Defamation Act* states as follows;

> " An action founded on tort may not be brought after the end of three years from the date on which the cause of action accrued: Provided that an action for libel or slander may not be brought after the end of twelve months from such date."

23. In the case of Wycliffe A Swanya v Toyota East Africa & another [2009] eKLR in which Court held that;

> " ....the *Limitation of Actions Act* cap 22 Laws of Kenya, ... says in case of libel or slander no action may be filed after the end of 12 months from the date the cause of action accrued and we understand this to mean from the date the slanderous remarks are made."

24. In the case of Bosire Ogero v Royal Media Services [2015] eKLR the Court held as follows;

> " The law of limitation of actions is intended to bar the Plaintiffs from instituting claims that are stale and aimed at protecting Defendants against unreasonable delay in the bringing of suits against them. The issue of limitation goes to the jurisdiction of court to entertain claims and therefore if a matter is statute barred, the court has no jurisdiction to entertain the same. And even if the issue of limitation is not raised by a party to the proceedings, since it is a jurisdictional issue, the court cannot entertain a suit which it has no jurisdiction over. See the case of Pauline Wanjiru Thuo vs David Mutegi Njuru CA 2778 of 1998".

25. It is clear that the incident occurred on 27th November 2015 but this respective suit was instituted in Court vide an Amended Plaint filed on 27th December 2018, that is more than three years.

26. Jurisdiction of a Court is conferred by a Statute or *the Constitution* and it is no doubt that the issue of limitation of time goes to the root of the jurisdiction of a Court. The law speaks for itself, thus, an appeal, whether successful or not, cannot be used to confer jurisdiction to a Court where there was none.

27. In the case of Gathoni v Kenya co-operative Creameries Ltd [1982] KLR 104 Potter, JA stated the rationale of the Law of Limitation as follows: -

> " The law of limitation of actions is intended to protect defendants against unreasonable delay in bringing of suits against them. The statute expects the intending plaintiff to exercise reasonable diligence and to take reasonable steps in his own interest."

28. At this juncture, it is essential to note that the ground of cross-appeal on the aspect of defamation of the Cross-Appellant duly fails as this Court as the trial Court lacks the requisite jurisdiction to contemplate on it. The claim for defamation is dismissed with no orders as to costs.

29. Apart from seeking damages for defamation, the Cross-Appellant also pleaded for damages for breach of contract.There is sufficient evidence that on 27th November 2015, the Appellant on three attempts

withheld the Cross-Appellant's funds which declined respectively. The Appellant's witness, DW1, told the Court that the Cross-Appellant had sufficient funds on that fateful date and that he was aware that a complaint was made by the Complainant with regard to a declined transaction on 23rd January 2018 but was not aware of the one for 27th November 2015. DW1 established that there was no defect of any kind with the POS/PDQ machine used on that date and that he did not witness any Visa Card getting declined.

30. From the record, the Appellant failed to file a response to the Cross-Appellant's Amended Plaint thus the issue of another declined transaction on 23rd January 2018 at Naivas Westlands was not controverted. DW1 testified that a complaint was raised when the Cross-Appellant's transaction which was above 100,000/= declined as the maximum amount allowed is Kshs. 100,000/=. The Complaint was sorted and that the Cross-Appellant reduced his purchased items to Kshs. 90,000/= only for his transaction to decline again and that the Appellant did not avail any explanation.

31. From the foregoing, it is clear that the relationship between a bank and its customer is that of a principal and agent. In the case of Bpi Express Card Corporation V M.A. Antonia R. Armovit (G.R No.163654, 8, October, 2014, First Division); UST Law Review Voll LIX No.1, May 2015), Ms Antonia Armuit treated her British friends to lunch at a restaurant. She gave out her credit card to the waiter to settle the bill. To her astonishment, the waiter returned the card and told her that it had been cancelled after verification with the card issuer, BPI Express Credit (BPI). She called BPI and was told that her credit card had been summarily cancelled for failure to pay her outstanding obligations. She was not at fault and demanded compensation for the shame and embarrassment she suffered. The credit card company apologized for the incident. She sought moral damages, exemplary damages and costs. The court framed the issue for determination as follows:-

> " Is Armorit entitled to moral and exemplary damages despite the absence of bad faith on the part of BPI."
>
> The Court answered the above issue in the positive and held:-
>
> "Yes. The relationship between the credit card issuer and the credit card holder is a contractual one that is governed by the terms and conditions found in the card membership agreement. Such terms and conditions constitute the law between the parties. In case of their breach, moral damages may be recovered where the defendant is shown to have acted fraudulently or in bad faith." (emphasis added)

32. The Appellant in their evidence stated that the point-of-sale device did not belonged to them. They stated that it was due to that fact that the transaction by the Cross-Appellant could not be received by the Appellant. No evidence was availed to that effect.

33. I find that the Appellant did not enjoin the alleged institutions who handled the customers visa cards on its behalf as 3rd party to this suit and therefore they are liable for breach of contract since they are the ones who issued the Cross-Appellant with the visa card.

34. I find that the Cross-Appellant proved his case on both transactions in the respective supermarkets. Further, I find that after the Appellant declined to honor the said transactions and printed the words "Insufficient Funds" and subsequently forced the Cross-Appellant to use other modes of payments to pay for less the items he had purchased as he could not afford to pay for everything in both instances despite DW1 admitting that the Cross-Appellant did have sufficient funds in his account. I do find that the Appellant did breach the contractual relationship with the Cross-Appellant. The Cross-Appellant is entitled to damages for breach of contract.

ii. Whether the remedies made were appropriate.

35. The next issue would be the quantum of damages to be awarded to the Cross-Appellant for breach of contract. The trial Court awarded the Cross-Appellant Kshs.500,000/= as general damages. The award took care of the prayers in the Amended Plaint which had sought General damages and special damages. According to the Cross-Appellant, the award of Kshs.500, 000/= be set aside and substituted with an award of Kshs. 8,000,000/= for injury to reputation. On without prejudice basis, counsel for the appellant settled on the sum of Kshs.559,595/35 which is equivalent to what was the balance in the respondent's account as reasonable solatium for the 1st Respondent.

36. In the case of Butler v Butler [1984] KLR 225 the Court held: -

> " The assessment of damages is more like an exercise of discretion by the trial judge and an appellate court should be slow to reverse the trial judge unless he has either acted on wrong principles or awarded so excessive or so little damages that no reasonable court would; or he has taken into consideration matters he ought not to have considered, and in the result arrived at a wrong decision."

37. I have considered the submissions by both parties and i find that the Cross-Appellant is seeking Kshs.8,000,000 in respect of general damages for defamation and breach of contract; and special damages.

38. Having found that the Cross-Appellant's case on defamation is statute barred, he is not entitled to any general damages for defamation.

39. On the issue of damages for breach of contract, it is trite law that general damages are not payable for breach of contract.

40. In in the case of Consolata Anyango Ouma v South Nyanza Sugar Co. Ltd [2015] eKLR the Court explained why general damages cannot be awarded in cases of breach of a contract as hereunder;

> " The next question is whether the appellant was entitled to damages as a result of the breach. As a general principle, the purpose of damages for breach of contract is, subject to mitigation of loss, the claimant is to be put as far as possible in the same position he would have been if the breach complained of had not occurred. This principle is encapsulated in the Latin phrase restitution in integrum (see Kenya Industrial Estates Ltd v Lee Enterprises Ltd NRB CA Civil Appeal No. 54 of 2004 [2009] eKLR, Kenya Breweries Ltd v Natex Distributors Ltd Milimani HCCC No. 704 of 2000 [2004] eKLR). The measure of damages is in accordance with the rule established in the case of Hadley v Baxendale [1854] 9. Exch. 341 that the measure of damages is such as may be fairly and reasonably be considered arising naturally from the breach itself or such as may be reasonably contemplated by the parties at the time the contract was made and a probable result of such breach (see Standard Chartered Bank Limited v Intercom Services Ltd & Others NRB CA Civil Appeal No. 37 of 2003 [2004] eKLR). Such damages are not damages at large or general damages but are in the nature of special damages and they must be pleaded and proved (see Coast Bus Service Ltd v Sisco Murunga Ndanyi & 2 others, NRB CA Civil Appeal No. 192 of 92 (UR) and Charles C. Sande v Kenya Co-operative Creameries Ltd, NRB CA Civil Appeal No. 154 of 1992 (UR))".

41. The Appellant in their submissions in this case, beseeched this Court to dismiss the Cross-Appeal and the lower Court suit. Anson's Law of Contract 28th Edition at page 589 which states that;

> " 1. Every breach of contract entitles the injured party to damages for the loss he or she has suffered"
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> Further, at page 590 where the Author states that;
>
> "Damages for breach of contract are designed to compensate for the damage, loss or injury the claimant has suffered through that breach. A claimant who has not, in fact, suffered any loss by reason of the breach, is nevertheless entitled to a verdict, but the damages recoverable will be purely nominal..."

42. In the current case, i find that the Cross-Appellant proved that his visa card was declined and even on one occasion he was assured that he had sufficient funds in his account only that his transaction could not be beyond the set maximum limit of Kshs. 100,000/=.

43. In the case of Hadley & Another v Baxendale 1854] 9 EX. CH 341; 156 ER 145, the Court observed as follows:

> " ... Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i.e., according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it. Now, if the special circumstances under which the contract was actually made where communicated by the plaintiffs to the defendants, and thus known to both parties, the damages resulting from the breach of such a contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated. But, on the other hand, if these special circumstances were wholly unknown to the party breaking the contract, he, at the most, could only be supposed to have had in his contemplation the amount of injury which would arise generally, and in the great multitude of cases not affected by any special circumstances, from such a breach of contract. For such loss would neither have flowed naturally from the breach of this contract in the great multitude of such cases occurring under ordinary circumstances, nor were the special circumstances, which, perhaps, would have made it a reasonable and natural consequence of such breach of contract, communicated to or known by the defendants."

44. In the case of Shiraku v Commercial Bank of Africa [1988] KLR 67 it was stated as follows:

> " To wrongly dishonour any cheque is to do some injury in fact. If that is right, then it is not necessary to plead and prove damages. But in ordinary circumstances, the damages will be quite modest. They will be more than nominal damages but not so greatly more as to be excessive."

45. I do find that the Cross-Appellant is entitled to nominal damages which should not be so low as to amount to no compensation as the harm caused was minimal and that the amounts should not so high as to amount to severe punishment to the Appellant who breached the contract. The term "nominal

damages" was defined in the case of Kanji Naran Patel v Noor Essa And Another, [1965] E.A. 484 while referring to the case of The Mediana [1900] AC 116, as follows:

> " Nominal damages' is a technical phrase which means that you have negatived anything like real damage, but that you are affirming by your nominal damage that there is an infraction of a legal right which, though it gives you no right to any real damages at all, yet gives you a right to the verdict or judgment because your legal right has been infringed. But the term nominal damages does not mean small damages. The extent to which a person has right to recover what is called by the compendious phrase damages, but may be also represented as compensation for the use of something that belongs to him, depends upon a variety of circumstances, and it certainly does not in the smallest degree suggest that because they are small they are necessarily nominal damages."

46. There is a slight difference between dishonouring a cheque and having an electronic transaction declined. In the case of the former, the bank has ample time to check the account involved or even call the account holder before deciding whether to honour it or not. In this scenario, the transaction is instant. The concerned bank may not even have been aware that a transaction has been declined. It only takes a matter of seconds or few minutes and the transaction is declined. The client, of course, in both cases, suffers the same fate. However, when it comes to electronic transaction, the Court has to take into consideration the instantaneous nature of the transaction.

47. Given the circumstances of the case, i do find that a sum of Kshs. 1,000,000/= (one million shillings) is sufficient damages for the embarrassment, pressure, anxiousness and discomfort suffered by the Cross-Appellant. This, in my view, sufficiently compensates the Cross-Appellant for the breach of contract by the Appellant.

48. The upshot is that the main appeal subject of this judgment, must fail. On the other hand, the Cross-Appeal partly succeeds on the aspect of quantum. I do find that the decline of the Appellant's card at the shopping outlets did amount to breach of contract by the Appellant. The award of Kshs. 500,000/= (five hundred thousand shillings) by the trial Court is hereby set aside and replaced with an award of Kshs. 1,000,000/= (one million shillings). The Cross-Appellant shall have costs and interest awarded by the trial Court. Parties shall meet their own respective costs of the appeal.

It so ordered.

DATED AND DELIVERED AT BUNGOMA THIS 30TH DAY OF SEPTEMBER 2024.

D. KEMEI

JUDGE

In the presence of:

Miss Mukao for Appellant

Kojo 1ST Respondent/Cross-Appellant

No appearance for 2nd Respondent

Kizito Court Assistant