



**Family Bank Limited v Mochache (Civil Appeal E1460 of 2023)  
[2024] KEHC 16861 (KLR) (Civ) (27 September 2024) (Judgment)**

Neutral citation: [2024] KEHC 16861 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL**

**CIVIL APPEAL E1460 OF 2023**

**JM OMIDO, J**

**SEPTEMBER 27, 2024**

**BETWEEN**

**FAMILY BANK LIMITED ..... APPELLANT**

**AND**

**ROBERT MACHOGU MOCHACHE ..... RESPONDENT**

*(Being an Appeal from the Judgement and Decree of Hon. R.L Musiega, Senior Resident Magistrate delivered on 8th December, 2023 in Milimani Commercial Courts CMCC No. 36 of 2023)*

**Bank's refusal to process a transaction over signature mismatch is a breach of bank-customer relationship where the customer presented identification documents**

*The appeal was based on a claim of tortious liability (defamation) and breach of contract by the appellant (a bank) for refusing to allow the respondent to transact due to his signature not matching the one in the bank's system. The court found that the respondent was well known to the bank's staff and that he had presented identification documents to the bank's staff, who still declined to allow him to transact. The court held that the denial to transact amounted to a breach of duty on the part of the bank. The bank was under duty to exercise reasonableness in allowing access to the respondent's account. The court further found that the appellant breached the bank/customer relationship by denying the respondent services. The court also highlighted the distinction between general compensatory damages, aggravated damages and exemplary or punitive damages.*

Reported by Kakai Toili

**Commercial Law** – banks – duties of banks in transactions - refusal of a bank to allow a customer to transact on the ground that his signature differed from that in the bank's system - whether the refusal to allow the customer to transact amounted to a breach of duty to reasonably allow a customer to access his/her funds where the customer was well known to the bank's staff and had presented his identification documents.



*Civil Practice and Procedure – damages – types of damages - general compensatory damages, aggravated damages and exemplary or punitive damages - what was the distinction between general compensatory damages, aggravated damages and exemplary or punitive damages.*

### **Brief facts**

The claim before the trial court was one based on tortious liability (defamation) and breach of contract whereby the respondent sought for among other orders; damages for breach of contract; and damages for defamation and injury to reputation. The respondent claimed that he held and operated a business account with the appellant. He explained that on June 11, 2020, he physically visited and instructed the respondent at its Cargen House Branch to transfer wide real time gross settlement (RTGS) Ksh.100,000 but the application was rejected on the basis that his signature appeared different from that which he had submitted to the bank, despite the fact that he was well known at the branch, having severally transacted thereat, and despite having presented his national identity card, Law Society of Kenya identification card and driving licence.

The respondent stated that the payment was intended to be university fees for his daughter who had a deadline of June 12, 2020 to pay the same, failure of which she would not be allowed to sit for her classes and continuous assessment tests (CATS). The respondent stated that following the hitch at the bank, he did not get to pay his daughter's university fees and was instead treated to ridicule in the banking hall by being referred to one officer after another and finally being asked to change his signature at the bank. That even so, the change was rejected by the appellant's staff on the premises that his repeat signature was different from the one in the bank's system. His offer to submit his thumb print was rejected. His request to apply for online banking was also declined on the same ground that his signature did not match.

It was the respondent's position that the rejection by the appellant to serve him was occasioned by the fact that he had filed another case against the appellant and its actions were therefore actuated by malice to portray him in bad light as a fraudster. The trial court found that the respondent had proved its case and awarded him general damages for breach of contract in the sum of Ksh.2,500,000 and damages on aggravated, exemplary and punitive damages. Aggrieved, the appellant filed the instant appeal.

### **Issues**

- i. Whether the refusal of a bank to allow a customer to transact on the ground that his signature differed from that in the bank's system amounted to a breach of duty to reasonably allow a customer to access his/her funds where the customer was well known to the bank's staff and had presented his identification documents.
- ii. What was distinction between general compensatory damages, aggravated damages and exemplary or punitive damages?

### **Held**

1. Being the first appellate court, the court was required under section 78 of the Civil Procedure Act to reassess, reanalyze and reevaluate the evidence adduced in the trial court and draw its own conclusions while bearing in mind that it did not see or hear the witnesses when they testified.
2. The appellant and the respondent were in a bank-customer relationship and the respondent's account held at the appellant's Cargen House Branch had sufficient funds to honour the RTGS request of Ksh.100,000 that the respondent made on June 11, 2020.
3. Banks were under legal obligations in the nature of a fiduciary duty to put into place elaborate procedures and mechanisms of identifying and honouring their customers' instructions in situations where a particular customer's signature did not match with the one provided to the banks as a sample/specimen, or even where the customer was completely unable to sign or submit his/her signatures because there may be situations where a customer, as a result of illness, incapacity, and disability could be unable to sign or could be unable to tender a signature similar to that earlier submitted as a sample/specimen to the bank. In such situations, other forms of identification or verification ought to be



- considered and should suffice so as to reasonably ensure that a customer had access to his/her funds whenever the same were required.
4. Although DW1 denied the respondent's claims that he produced his identification documents, the grounds the bank gave for the refusal to serve the respondent did not include the ground that he did not present his identification documents. That being so, the respondent produced his identification cards.
  5. The respondent was well known to the bank staff including DW1, and further considering that he presented identification documents to the bank's staff, who still declined to allow him to transact on the ground that his signature differed from that in the appellant's system amounted to a breach of duty on the part of the appellant as the said staff, in particular DW1 did not hold or express any doubts that the respondent was the holder of the account. Moreover, a person's signature could not have exact similarities and/or features with his/her earlier signature.
  6. DW1 stated that among the documents that the respondent submitted to the bank at the time of opening the account was his national identity card. That was the very same document that the respondent stated that he presented on June 11, 2020. The bank was under duty to exercise reasonableness in allowing access to the account by honouring the requested RTGS transaction, which it failed to do.
  7. Banks had a duty to reasonably allow a customer to access his/her funds deposited with them whenever the customer required the same. A bank that breached such a duty was liable to the customer in damages for injury of credit.
  8. The trial court's findings that the appellant, a bank, was expected to exercise reasonable care and/or act reasonably in undertaking its obligations to the respondent, who was its customer, could not amount to the court re-writing the contract between the two parties. The respondent proved his case on a balance of probabilities that the appellant breached the bank/customer relationship by denying the respondent services on June 11, 2020 on the basis of the claim that the signature that the respondent submitted was different from the one that was in the appellant's system.
  9. The respondent proved on a balance of probabilities that the appellant's employees acted towards him actuated with oppression and malice because he had sued the appellant in the other case that was at the time pending before court. That was clear from the fact that the bank declined to serve the respondent despite the fact that he was well known to DW1 and had his identification documents with him.
  10. The respondent had a daughter in school in respect of whom he needed the money to pay university fees and that payment of the same had a deadline. He explained that as a result of the conduct of the appellant's banking staff, he was unable to pay the fees resulting in his daughter missing CATS and classes. The respondent suffered distress as a result. The appellant breached its duty to the respondent, causing him injury, and in law such a breach ought to be remedied.
  11. The respondent was entitled to recover damages for the injury that he suffered. Award of damages was an exercise of the trial court's discretion and the instant court, sitting in its appellate capacity could only set the same aside or interfere with the awards upon good reasons.
  12. The purpose of an award of general compensatory damages was to compensate the injured party for the loss suffered as a result of a breach, rather than (except for very limited circumstances) to punish a party to a suit. In other words, damages were awarded to compensate the party and not to punish.
  13. Aggravated damages were awarded to a party who proved that he had suffered mental distress and aggravation due to the actions of the offending party. The purpose of that type of damages was to compensate the party for that distress. Exemplary or punitive damages may be awarded when the offending party's actions were so arbitrary and oppressive. They were awarded as an emphatic statement that the kind of outrageous behaviour that the offending party had shown was not tolerable in society, so as to punish and discourage the offending party and others from similar conduct in the future. In cases where punitive damages were available, they were generally in addition to compensatory damages.



14. The respondent successfully proved to the required standard that the appellant breached the bank/customer relationship which was in effect a breach of contract by the appellant between the two parties. For that, he was entitled to an award of general damages for breach of contract and the trial court proceeded to correctly order for such compensation.
15. The conduct of the bank staff was driven by malice and oppression and as a result, the respondent suffered injury in the nature of humiliation and mental distress. He was entitled to awards of general damages and both exemplary/punitive and aggravated damages, and the trial court could not be faulted for making the awards under those heads.
16. The trial court considered the circumstances under which the breach of contract and intentional torts were committed. The trial court noted that the respondent's requests to transact were declined twice and he was kept for long hours at the banking hall and was exposed to bank employees and customers and that he suffered mental anguish. The award of general damages of Ksh.2,500,000 was not inordinately high or excessive in the circumstances.
17. The instant court did not disturb the award of damages that the trial court made. It had not been demonstrated by the appellant that the awards were so inordinately high or low as to represent an entirely erroneous estimate. The appellant had also not shown that the trial court erred by applying wrong principles in arriving at the figures.

*Appeal dismissed; the appellant shall bear the costs of the appeal.*

## **Citations**

### **Cases**

#### **Kenya**

1. *Butt v Khan* Civil Appeal 40 of 1977; [1978] KECA 24 (KLR) - (Explained)
2. *Equity Bank Limited & Lucy Ndururi v Robert Chesang* Civil Appeal 571 of 2012; [2016] KEHC 2558 (KLR) - (Explained)
3. *Iskorostinskaya Svetlana & Susanna Sciacovelli v Gladys Naserian Kaiyoni* Miscellaneous Civil Application 39 of 2017; [2019] KEHC 10353 (KLR) - (Explained)
4. *Johnson Evan Gicheru v Andrew Morton & another* Civil Appeal 314 of 2000; [2005] KECA 307 (KLR) - (Mentioned)
5. *Kemfro Africa Limited t/a "Meru Express Services (1976)" & another v Lubia & another (No 2)* Civil Appeal 21 of 1984; [1985] KECA 137 (KLR) - (Mentioned)
6. *Southern Engineering Company Ltd v Mutia* Civil Appeal 46 of 1983; [1985] KECA 49 (KLR) - (Mentioned)

#### **United Kingdom**

1. *Karak Brothers Company Ltd v Burden* [1972] All ER 1210 - (Explained)
2. *United Rubber Estate Ltd v Cradock (No 3)* [1968] All ER 1073 - (Explained)

#### **Regional Court**

1. *Mbogo & another v Shah* [1968] EA 93 - (Explained)
2. *Selle v Associated Motor Boat Co Ltd* [1969] EA 123 - (Explained)

### **Statutes**

#### **Kenya**

Civil Procedure Act (cap 21) sections 27, 78- (Interpreted)

### **Advocates**

*Mr Karani* for the appellant

*Mr Mochache* for the respondent



## JUDGMENT

1. This appeal emanates from the judgement and decree of Hon RL Musiega delivered on December 8, 2023 in Milimani Commercial Courts CMCC No 36 of 2023.
2. The grounds of appeal presented by the appellant vide the memorandum of appeal dated December 20, 2023 upon which it seeks to upset the judgement and decree of the lower court are as follows:
  - i. The learned trial Magistrate erred in law and in fact in failing to consider the defendant's witness evidence and submissions on record.
  - ii. The learned trial magistrate erred in law and in fact in trying to rewrite the contract between the parties herein on issue of differing signatures and/or putting himself in the shoes of the respondent by taking judicial notice when opening an account what a client avails and stipulating what the bank should resort to instead of being impartial.
  - iii. The learned trial magistrate erred in law and in fact in finding that the plaintiff had proved his case and was entitled to damages.
  - iv. The learned trial magistrate erred in law and in fact in awarding the general damages for breach of contract in the sum of Ksh 2,500,000/-.
  - v. The learned trial magistrate erred in law and in fact in awarding damages on the foot (sic) of aggravated, exemplary and punitive damages in the sum of Ksh 2,000,000/-.
  - vi. The learned trial magistrate erred in law and in fact in awarding the damages when the plaintiff did not specifically plead and prove the same.
  - vii. The learned trial magistrate erred in law and in fact in awarding the damages when the plaintiff never availed the terms of contract.
3. The court directed that the appeal proceeds by way of written submissions and gave the parties herein time lines for filing their respective submissions. Both parties filed their respective submissions.
4. This being the first appellate court, I am required under section 78 of the *Civil Procedure Act* and as was espoused in the case of *Sielle v Associated Motor Boat Co Ltd* [1969] EA 123 to reassess, reanalyze and reevaluate the evidence adduced in the Magistrate's Court and draw my conclusions while bearing in mind that I did not see or hear the witnesses when they testified.
5. In *Sielle*, Sir Clement De Lestang observed that:

“This court must consider the evidence, evaluate it itself and draw its own conclusions, though in doing so it should always bear in mind that it neither heard witnesses and should make due allowance in this respect.

However, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he had clearly failed on some point to take account of particular circumstances or probabilities, materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.”



6. The claim before the lower court, as per the plaint dated December 18, 2020, was one based on tortious liability (defamation) and breach of contract whereby the respondent herein (the plaintiff before the trial court) sought the following reliefs against the appellant (the defendant):
  - a. Damages for breach of contract.
  - b. Damages for defamation and injury to reputation.
  - c. Damages on the foot (sic) of aggravated, exemplary and punitive damages on (a) and (b) above.
  - d. Interest on (a), (b) and (c) above.
  - e. Costs of the suit.
  - f. Any other relief deemed fit by the court.
7. The suit was resisted and to that end the respondent filed a statement of defence dated January 25, 2021 and sought that the suit be dismissed in its entirety with costs.
8. The respondent testified before the trial court as PW1 and stated that he was a practising Advocate of the High Court of Kenya in good standing, having been called to the bar and admitted as such in the year 1992. He stated that he was also a Certified Public Secretary and a member of the International Commission of Jurists and had in the past served as a Judicial Officer and as the Chief Executive Officer to the County Service Board, Nyamira County Government.
9. The respondent told the trial court that he held and operated a business account number 0104 with the appellant since 2009. He explained that on June 11, 2020, he physically visited and instructed the Respondent at its Cargen House Branch, where his office was also located, to transfer vide Real Time Gross Settlement (“RTGS”) Ksh 100,000/- but the application was without tenable reason rejected on the basis that his signature appeared different from that that he had submitted to the bank, despite the fact that he was well known at the branch, having severally transacted thereat, and despite having presented his national identity card, Law Society of Kenya identification card and driving licence.
10. The respondent stated that the payment was intended to be university fees for his daughter who was a student at the United States International University – Africa (USIU) , who had a deadline of June 12, 2020 to pay the same, failure of which she would not be allowed to sit for her classes and continuous assessment tests (“CATS”).
11. The respondent stated that following the hitch at the bank, he did not get to pay his daughter’s university fees and was instead treated to ridicule in the banking hall by being referred to one officer after another and finally being asked to change his signature at the bank. That even so, the change was rejected by the appellant’s staff on the premises that his repeat signature was different from the one in the bank’s system. His offer to submit his thumb print was rejected. His request to apply for online banking was also declined on the same ground that his signature did not match.
12. As a result of the appellant’s act of rejecting his instructions, the respondent was forced to borrow money the next day to pay fees for his daughter, which then meant that she missed her classes and CATS, in spite of the fact that he had Ksh 227,000 in his account.
13. The respondent stated that the signature he had submitted to the appellant was captured into the bank’s system on September 27, 2019 and that he had thereafter severally transacted using the same signature and had signed successfully for those transactions.



14. It was the respondent's position that the rejection by the appellant to serve him was occasioned by the fact that he had filed another case against the appellant, being HCCC No 70 of 2018 and the appellant's actions were therefore actuated by malice to portray him in bad light as a fraudster.
15. The respondent produced the following documents to support his case: Copy of the respondent's national identity card. Copy of the respondent's Family Bank visa card no 4657. SMS, text message said to have been sent to the respondent from cell phone no. 070608, which the respondent stated belonged to USIU. Application for swift transfer dated June 11, 2020. Two static data amendment forms, both dated June 11, 2020. Copy of the respondent's bank account statement for account no. 0104. Mobile banking application form dated April 29, 2020. 6A – application for swift transfer dated April 8, 2020. 6B – swift transfer form dated January 16, 2018. Swift transfer form dated January 16, 2018. Customer receipt dated September 18, 2021. Application for swift transfer dated May 8, 2020. Screenshot WhatsApp message. Demand letter dated September 23, 2020.
16. Upon cross examination, the respondent stated that he submitted to the Appellant all the required account opening documents prior to the account being opened and signed against the terms and conditions issued by the appellant and executed the required forms, which included one where he submitted his specimen signatures. He stated that he had filed the other suit before the court when the bank failed to honour a cheque that he issued.
17. The respondent stated that he transacted successfully on the account on June 12, 2020 through ATM and counter services whereby a total of Ksh 110,000/- was withdrawn in several transactions. All his transactions were honoured on that day and his signatures were accepted by the appellant at its Kilimani Branch.
18. The respondent called Harun Mosiria Nyachoti who testified before the trial court as PW2. The witness told the court that on June 12, 2020, the respondent approached him and borrowed Ksh 100,000 from him, stating that his bank had denied him access to his money on the reason that his signature appeared different from that in the bank's system. The witness gave the money to the respondent.
19. Monica Wairimu Kung'u, a Branch Operations Supervisor at the appellant's Cargen House Branch testified before the trial court in support of the appellant's case as DW1. The witness adopted the contents of her statement dated September 25, 2023 and told the court that the respondent operated a business account at the branch that was opened on January 7, 2009. He presented his specimen signature at the time of opening the account.
20. The witness stated that bank operation policies and Central Bank of Kenya Prudential Guidelines required that for RTGS transactions, the customer's signature had to match with that provided to the bank as a specimen. That on several occasions, the respondent instructed the Appellant to settle claims with a signature that differed with the one in the appellant's system.
21. The witness further stated that on September 27, 2019, the respondent visited the branch to change his signature after the one he had provided failed to match with the one in the system, following which a transaction was refused, which was the genesis of HCCC No 70 of 2018.
22. The witness's further evidence was that on June 11, 2020, the respondent again provided a signature that was different to that in the appellant's system and his transaction was declined.
23. That on August 13, 2020, the respondent successfully renewed his visa card. He filled in a form to update his signature in the bank's system.



24. The witness stated that the appellant had honoured all transactions in which the respondent had provided a proper, matching signature and blamed the respondent for the hitch that he faced on June 11, 2020, stating that the RTGS transaction was refused because the respondent provided a signature that did not match the one that was in the bank's system and that he was promptly informed of the same.
25. Upon being cross-examined, DW1 told the trial court that she had worked at the branch for 8 years and that the respondent was well known to her. She stated that the signature that the respondent supplied on June 11, 2020 was materially different from the one that was in the system, the respondent having updated it on September 27, 2019. She added that she was at the branch on June 11, 2020 and that the respondent did not produce any identification documents.
26. The witness produced in the lower court the following documents in support of the appellant's case: Copies of the respondent's account opening documents. Static amendment form dated September 27, 2019. RTGS form dated June 11, 2020. Static amendment form dated August 13, 2020.
27. I have considered the grounds of appeal as set out in the memorandum of appeal, the submissions by the parties herein and the record of the lower court. The issues for determination, as discernible from the record are as follows:
- a. Whether the respondent proved his case on a balance of probabilities that the appellant breached the bank/customer relationship by denying the respondent services on June 11, 2020 on the basis of the claim that the signature that the respondent submitted was different from the one that was in the appellant's system.
  - b. If the answer in (a) above is in the affirmative, whether the appellant subjected the respondent to humiliation, ridicule and embarrassment and whether the appellant's actions defamed the respondent.
  - c. Whether the trial court erred in arriving at the decision that it made by awarding the respondent under the various heads of damages and whether the respective awards were appropriate?
  - d. What is the appropriate order as to costs?
28. With regard to issue (a), there is no dispute that the appellant and the respondent were in a banker-customer relationship and that the respondent's account number 0104 held at the appellant's Cargen House Branch had sufficient funds to honour the RTGS request of Ksh 100,000 that the respondent made on 1 June 1, 2020. The other undisputed fact is that the RTGS instructions by the respondent were not honoured by the appellant, on the ground that the appellant gave, that the signature that the respondent submitted did not match that in the appellant's system.
29. As to the nature of the relationship, the trial court in my view correctly observed as follows:
- “It is imperative to note that banks have procedures that guide them in dealing with their clients to ensure they meet their contractual obligations. I am persuaded by the *Encyclopedia of Banking Law C 21 Selangor United Rubber Estate Ltd v Cradock (No 3)* [1968] ALL ER 1073 cited in *Iskorostinskaya Svetlana & another v Gladys Naserian Kaiyoni* [2019] eKLR where it was held that:
- “A bank has a duty under its contract with its customer to exercise reasonable care and skill in carrying out its part with regard to operations within its contracts with its customers. The duty to exercise reasonable care and skill extends over the whole range of banking business with the contract with the customer. Thus



the duty applies to interpreting, ascertaining and acting in accordance with the instructions of a customer.”

I am of the view that the bank is under an obligation to honour the instructions of the client however the same must be done with reasonable skill and care in order to avert loss associated with fraudsters. This would mean therefore that a bank would put in place elaborate procedures to identify and honour a client’s instructions while at the same time taking into account and addressing eventualities such as instances where a client’s signature wouldn’t match the original signature.”

30. The reason as to why I say that I am in agreement with the learned trial magistrate, particularly on the observation that banks are under legal obligations in the nature of a fiduciary duty to put into place elaborate procedures and mechanisms of identifying and honouring their customers’ instructions in situations where a particular customer’s signature does not match with the one provided to the banks as a sample/specimen, or even where the customer is completely unable to sign or submit his/her signatures is because there may be situations where a customer, as a result of illness, incapacity, disability etc. may be unable to sign or may be unable to tender a signature similar to that earlier submitted as a sample/specimen to the bank.
31. In such situations, other forms of identification or verification ought to be considered and should suffice so as to reasonably ensure that a customer has access to his/her funds whenever the same are required. In the present case, the respondent’s position, which was admitted by DW1 was that he was known by the witness, who was also aware that he operated the particular account. The respondent further stated that he offered his national identity card, Law Society of Kenya identity card and driving licence to the appellant’s staff but his instructions were still not taken by the appellant.
32. It is to be noted that although DW1 denied the respondent’s claims that he produced his identification documents, the grounds the bank gave for the refusal to serve the respondent did not include the ground that he did not present his identification documents. That being so, it was safe for learned the trial Magistrate to hold that indeed the respondent produced his identification cards.
33. The foregoing, particularly that the respondent was well known to the bank staff including DW1, and further considering that he presented identification documents to the bank staff, who still declined to allow him to transact on the ground that his signature differed from that in the appellant’s system, in my view amounted to a breach of duty on the part of the Applicant as the said staff, in particular DW1 did not hold or express any doubts that the respondent was the holder of the account. Moreover, I doubt that a person’s signature can have exact similarities and/or features with his/her earlier signature.
34. It is noteworthy that DW1 stated that among the documents that the respondent submitted to the bank at the time of opening the account was his national identity card. That is the very same document that the respondent stated that he presented on June 11, 2020.
35. The bank was under duty to exercise reasonableness in allowing access to the account by honouring the requested RTGS transaction, which it failed to do. Indeed, in *Karak Brothers Company Ltd v Burden* [1972] All ER 1210, the court observed as follows:

“A bank has a duty under its contract with its customer to exercise “reasonable care and skill” in carrying out its part with regard to operations within its contract with its customer. The standard of that reasonable care and skill is an objective standard applicable to bankers. Whether or not it has been attained in any particular case has to be decided in the light of all the relevant facts, which can vary almost infinitely.”



36. Banks have a duty to reasonably allow a customer to access his/her funds deposited with them whenever the customer requires the same. A bank that breaches such a duty is liable to the customer in damages for injury of credit. In *Equity Bank Limited & another v Nairobi Robert Chesang* [2016] eKLR the court stated thus,
- “...The bank is also under a contractual duty to diligently handle accounts of a customer, to ensure that funds-deposited on account are available when required by the customer. Any deviation from that understanding without justifiable reasons which should be communicated to the customer well in advance or immediately, the bank is in breach of a contract with the customer and is liable in damages.”
37. On the same breadth, there is also the case of *Equity Bank & another v Robert Chesang* [2016] eKLR which was cited by the trial court and in which, in a self-explanatory manner, the Court of Appeal held thus:
- “Where the bank declined to honour a customer’s order for the money held in account, without any sufficient explanation, that refusal or failure constitutes a breach of contract for which the bank is held liable in damages.”
38. The trial court’s findings that the appellant, a bank, was expected to exercise reasonable care and/or act reasonably in undertaking its obligations to the respondent, who was its customer, cannot in my view amount to the court re-writing the contract between the two parties, as was urged by the appellant in its submissions.
39. For the reasons stated above, I reach the result that the learned trial Magistrate cannot be faulted for finding that the respondent proved his case on a balance of probabilities that the appellant breached the bank/customer relationship by denying the respondent services on June 11, 2020 on the basis of the claim that the signature that the respondent submitted was different from the one that was in the appellant’s system.
40. I now turn to issue (b), which is whether the appellant subjected the respondent to humiliation, ridicule and embarrassment and whether the respondent was defamed by the appellant. The Respondent stated in his evidence that the Ksh.100,000/- was meant for his daughter’s university fees and the same had timelines set for payment. The respondent stated that he was physically at the bank and requested to change his signature in the appellant’s system or use his thumb print but his pleas fell on deaf ears. He stated that he was kept in the banking hall for long hours and did not receive the desired service ultimately.
41. In my view, looking at the available evidence, the respondent proved on a balance of probabilities that the appellant’s employees acted towards him actuated with oppression and malice because he had sued the appellant in the other case that was at the time pending before court. This is clear from the fact, as seen above, that the bank declined to serve the Respondent despite the fact that he was well known to DW1 and had his identification documents with him.
42. It is further to be noted from the undisputed evidence of the Respondent that he had a daughter in school in respect of whom he needed the money to pay university fees and that payment of the same had a deadline. He explained that as a result of the conduct of the appellant’s banking staff, he was unable to pay the fees resulting in his daughter missing CATS and classes. I am persuaded that the respondent suffered distress as a result.



43. In his analysis on the issue, the learned trial Magistrate rendered himself as follows:
- “As a result of the above alleged actions of the defendant, the plaintiff felt humiliated, degraded and otherwise inconvenienced and the university having given the deadline for payment of school fees, his daughter was locked out of the virtual classes thereby causing her a lot of embarrassment and anxiety in return, the plaintiff was equally embarrassed and his dignity compromised. It is on that foot that the plaintiff termed the actions of the defendant as a breach of contract of agency as a banker towards him, to hold funds for the plaintiff and release them as to when called for. The plaintiff particularizes the breach of contract, injury to his reputation, loss and damage in paragraphs 6, 8 and 13 of the plaint.”
44. The trial court went on to conclude as follows:
- “I find that the defendant’s failure to assist the plaintiff by alternative means as their client well known to them and as requested by him to be malicious.....
- .....the plaintiff has demonstrated that the breach of contract occurred on two occasions. Further, he has proved the damage caused to him as he was unable to settle his daughter’s school fees causing her to be locked out of her classes.”
45. The evidence of the respondent that he felt humiliated and frustrated and further that he was kept waiting at the banking hall until the time the bank closed business, coupled with the fact that his daughter did not sit for her CATS as a result, in my view sufficiently portrayed the injury or damage that the respondent suffered. I am therefore on the same page with the trial Magistrate that the respondent proved that the appellant subjected him to humiliation, ridicule and embarrassment and that he suffered injury as a result.
46. Having reached the finding that the appellant breached its duty to the respondent, causing him injury, in law, such a breach ought to be remedied. The respondent is entitled to recover damages for the injury that he suffered.
47. In his judgement, the learned trial Magistrate assessed damages under the different heads as follows:
1. General damages for breach of contract Ksh 2,500,000/-.
  2. Aggravated, exemplary and punitive damages Ksh 2,000,000/-.
48. He further ordered that the awards would attract interest at court rates from the date of judgement, ie December 8, 2023.
49. The appellant proffered the grounds that the learned trial Magistrate erred in law and in fact in awarding the general damages for breach of contract in the sum of Ksh 2,500,000 and aggravated, exemplary and punitive damages in the sum of Ksh 2,000,000.
50. On that, I will now turn to the third issue, which is whether the trial court erred in arriving at the decision that it made by awarding the respondent under the various heads of damages stated above and whether the respective awards were appropriate?



51. Award of damages is an exercise of the trial magistrate’s discretion and this court, sitting in its appellate capacity can only set the same aside or interfere with the awards upon good reasons. Indeed, that was the holding in the case of *Butt v Khan* [1981] KLR 349, where the court observed as follows;

“An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the Judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low”.

(See also generally, *Southern Engineering Company Ltd v Mutia* [1985] eKLR; *Kenfro Africa Ltd t/a Meru Express Services v Lubia & Another (No 2)* [1985] eKLR; and *Gicheru v Morton & another* [2005] 2 KLR 333).

52. Further in *Mbogo & another v Shab* [1968] EA 93, it was held that:

“An appellate court will interfere if the exercise of the discretion is clearly wrong because the Judge has misdirected himself or acted on matters which he should not have acted upon or failed to take into consideration and in doing so arrived at a wrong conclusion. It is trite law that an appellate court should not interfere with the exercise of the discretion of a Judge unless it is satisfied that the Judge in exercising his discretion has misdirected himself and has been clearly wrong in the exercise of the discretion and that as a result, there has been injustice”.

53. The outstanding question on the issue then is whether the trial court, in assessing damages under the above heads reached awards that were inordinately high (or low) as to represent an entirely erroneous estimate; and/or whether the trial court proceeded on wrong principles; and/or that the learned trial Magistrate misapprehended the evidence in some material respect, and so arrived at figures which were inordinately high (or low).

54. The purpose of an award of general compensatory damages is to compensate the injured party for the loss suffered as a result of a breach, rather than (except for very limited circumstances) to punish a party to a suit. In other words, damages are awarded to compensate the party and not to punish.

55. Aggravated damages are awarded to a party who proves that he has suffered mental distress and aggravation due to the actions of the offending party. The purpose of this type of damages is to compensate the party for this distress.

56. Exemplary or punitive damages may be awarded when the offending party’s actions are so arbitrary and oppressive. They are awarded as an emphatic statement that the kind of outrageous behavior that the offending party has shown is not tolerable in society, so as to punish and discourage the offending party and others from similar conduct in the future. In cases where punitive damages are available, they are generally in addition to compensatory damages.

57. The question this matter then poses is whether the matter before the trial court presented a situation where the court would award damages under the heads that it did and whether the damages awarded appropriate in the case.

58. To begin with, we have seen that the respondent successfully proved to the required standard that the appellant breached the bank/customer relationship which was in effect a breach of contract by the appellant between the two parties. For that, he was entitled to an award of general damages for breach of contract and the learned trial magistrate proceeded to correctly order for such compensation.



59. I have in my analysis above also reached a finding that the conduct of the bank staff was driven by malice and oppression and that as a result, the respondent suffered injury in the nature of humiliation and mental distress. He was in my opinion entitled to awards of general damages and both exemplary/punitive and aggravated damages, and I cannot fault the trial magistrate for making the awards under those heads.
60. As to the whether the amounts awarded were inordinately high, the learned trial Magistrate considered the circumstances under which the breach of contract and intentional torts were committed. He noted that the respondent's requests to transact were declined twice and that he was kept for long hours at the banking hall and was exposed to bank employees and customers and that he suffered mental anguish. In my view, the award of general damages of Ksh 2,500,000 was not inordinately high or excessive in the circumstances.
61. With respect to aggravated damages, the trial court noted that the appellant did not offer or tender any apology to the respondent for the actions of its staff towards the respondent. It is instructive from the record of the trial court that the learned Magistrate took guidance from the authority of *Equity Bank Limited & another v Robert Chesang* [2016] eKLR where the High Court (Aburili, J.) upheld an award of Ksh 1,500,000 under the head of aggravated damages for conduct that was described as humiliating, embarrassing and contemptuous and where no apology was made. I do not think that the award of Ksh 2,000,000 that the learned trial Magistrate made under the combined heads of punitive/exemplary and aggravated damages was excessive and/or inordinately high in the circumstances.
62. All the above taken into consideration, I am not persuaded that I should disturb the award of damages that the learned trial magistrate made. As I have stated above, it has not been demonstrated by the appellant that the awards were so inordinately high or low as to represent an entirely erroneous estimate. The appellant has also not shown that the trial court erred by applying wrong principles in arriving at the figures.
63. Being of the inclinations above, I find no merit in the appeal before me. I proceed to dismiss it.
64. Section 27 of the *Civil Procedure Act*, cap 21 Laws of Kenya dictates that costs should follow the event. Thus then, the appellant shall bear the costs of the appeal.

**DELIVERED (VIRTUALLY), DATED & SIGNED THIS 27<sup>TH</sup> DAY OF SEPTEMBER, 2024.**

**JOE M. OMIDO**

**JUDGE**

For Appellant: Mr. Karani.

For Respondent: Mr. Mochache.

Court Assistant: Ms. Njoroge.

Mr. Karani: I pray for 30 days stay of execution.

Mr. Mochache: I oppose the application. This court stands functus officio.

Court: Stay of execution is granted for 7 days to allow the Appellant to file a formal application for stay.

**JOE M. OMIDO**

**JUDGE**

