



Trinity Prime Investments & another v Guardian Bank Limited (Civil Case 1506 of 2005) [2024] KEHC 13328 (KLR) (29 October 2024) (Judgment)

Neutral citation: [2024] KEHC 13328 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CIVIL CASE 1506 OF 2005
AN ONGERI, J
OCTOBER 29, 2024**

BETWEEN

TRINITY PRIME INVESTMENTS 1ST PLAINTIFF

ERIC ANANDA 2ND PLAINTIFF

AND

GUARDIAN BANK LIMITED DEFENDANT

JUDGMENT

1. The plaintiffs filed this suit vide plaint dated 15/12/2005 seeking the following remedies against the defendant;
 - i. Damages for breach of contract.
 - ii. Damages for libel.
 - iii. Special damages of ksh.19,144.10
 - iv. Costs of the suit.
 - v. Interest at court rates.
 - vi. Any other or further relief the court may deem fit to grant.
2. The plaintiff averred as follows in the plaint
3. The Defendant is a bank within the meaning of the Banking Art, Chapter 488 of the laws of Kenya, carrying on business in Kenya. Its address of service is P. O. Box 67437-400200 Nairobi. Service of Summons shall be effected through the Plaintiffs Advocates offices.
4. At all material times, the 1st Plaintiff maintained an account with the Defendant at its main Branch at the Guilders Center, Moi Avenue, Nairobi, this being Account No. 0612018152, which as the



Defendant knew, was operated for the purposes of, and in connection with the Company's trade and business, and the account was at all material times in credit, with an average annual turnover of approximately Kshs.10,000,000/=, over the period of eight years that the account had been maintained with the Defendant.

5. The 2nd Plaintiff was at all material times the Managing Director of the 1st Plaintiff, and was a signatory to the 1st Plaintiff's bank accounts, including the one that the 1st Plaintiff held with the Defendant at its main Branch at Guilders Center, Moi Avenue, Nairobi above mentioned. The 2nd Plaintiff in his capacity as the 1st plaintiff's Managing director was entitled to benefits such as the use a credit card service by the 1st Plaintiff aforesaid on this strength the 2nd Plaintiff obtained credit card services form M/s BARCLAYCARD.
6. On or about 29th March 2004, the 1st Plaintiff through the 2nd Plaintiff drew and/or issued Cheque No.680032 for Kshs.142,349.30/ payable to M/s BARCLAYCARD hereinafter referred to as the "Payee" or order in payment of money due and owing to the Payee.
7. The said cheque was issued in part settlement for credit facilities obtained under the International Gold Master Card Franchise, which the 2nd Plaintiff, was availed on the basis of the credit standing of the 1st Plaintiff held with M/s Barclays Bank of Kenya Limited, vide their card company M/s Barclay Card.
8. The Payee presented the cheque to its bankers M/s Barclays Bank of Kenya Limited, who on or about 31st March 2004 duly presented the cheque for payment, but the same was dishonoured by the Defendant herein and returned unpaid with remarks "RD" meaning "Refer to Drawer".
9. It is the Plaintiffs' case that the said words, "RD" in their material and ordinary meaning meant, and were understood to mean that the Plaintiffs being the makers/drawers of the cheque had defaulted as to the time of performance of their legal and ethical obligation to provide for payment by the bank on presentation of a cheque issued for immediate payment.
10. The Plaintiffs sought an explanation from the Defendant as to why the said cheque was dishonoured, but no reason whatsoever was forthcoming. To date no such reason has been given. The Plaintiff's aver that at the time of the said dishonour, there were sufficient funds in the 1st Plaintiff's account to meet the unpaid cheque.
11. That the said cheque was thereafter honoured and paid unconditionally by the Defendant on or about 6th April 2004.
12. The Plaintiffs aver that by reason of the Defendant's wrongful dishonour of the said cheque, the Defendant acted in breach of its duties to the Plaintiffs.

Particulars Of Breach

- a. Failing to pay the Payee for no sufficient reason or at all.
 - b. Failing to pay the Payee when there were sufficient funds to meet the amount drawn in the cheque.
 - c. Breaching the known debtor-creditor relationship existing between the Defendant and the Plaintiffs.
 - d. Acting recklessly and negligently.
 - e. Exposing the 1st and 2nd Plaintiffs to injury to their credit and reputation.
13. By reason of the said dishonour, the 1st Plaintiff has been injured in its reputation, and its creditworthy as a trading company has been put into question. Further, the 2nd Plaintiff as a person has been injured



in his credit and reputation and has been brought to odium and contempt on his character and occupation as a trader and businessman held in high esteem by the payee.

14. The plaintiffs have further suffered loss amounting to kshs.19,164.05 as follows;

1st plaintiff

Unpaid cheques charges ksh.500.00

Surcharged by M/s Barclay card

Being a 10% penalty summon the unpaid ksh.14,234.95

Excess limit charge ksh. 3,929.15

Barclays Bank Kenya Limited

Unpaid cheque charges ksh. 500.00

Total ksh.19,164.05

The Plaintiff's claim a refund of the said sums paid by them by reason of dishonour.

15. Subsequently, M/s Barclaycard halted the 2nd Plaintiff's usage of his credit card, pending the payment and clearance of the unpaid cheque, upon its being re-banked, and in essence regularizing the account. They further denied him usage of the credit card facilities despite the fact that they had there before upgraded his credit status from an ordinary local credit card to an international credit card in view of his previous good credit history and relationship.
16. As a result thereof, the 2nd plaintiff was not able to enjoy an organized family Easter holiday April 2004, which had to be cancelled at the last minute, since the only means of payment (Barclaycard) could not be used to access the usual credit facilities. Barclaycard declined to give credit authorization when the same was presented by the travel agent; hence no bookings could be made.
17. The 1st plaintiff as a trading company has been injured in its repute, credit and business, and has consequently suffered loss and damage, for which it claims damages;

PARTICULARS

The 1st plaintiff is

- a. An uncredit worthy company, which did not have sufficient funds.
 - b. A company whose financial transactions are questionable.
 - c. A company incapable of issuing a cheque that can be honoured.
 - d. A company whose financial standing was unsound.
 - e. A company incapable of maintaining of a current account.
18. By reason of the foregoing, the 2nd Plaintiff has been injured in his person has lost custom of the payee, and has consequently suffered loss and damage for which he claims damages.

PARTICULARS

The 2nd plaintiff is:-

- a. A person who obtains credit and issues cheque knowing that payment cannot be honoured.
- b. A person whose financial standing was unsound.



- c. A person whose financial transactions are questionable.
 - d. A person incapable of operating a top class international Gold Master Card issued to him by M/s Barclays Bank of Kenya Limited vide Barclay Card.
19. The defendants filed a defence dated 13/02/2006 denied that the 2nd plaintiff was the 1st plaintiff's financial director.
 20. The 2nd plaintiff testified in court on 4/10/2016. He said he is the managing director and financial director of the 1st plaintiff.
 21. PW 1 adopted his written witness statement dated 16/9/2016 as his evidence in chief.
 22. He said the Banker was the defendant bank which was initially National Finance Bank Ltd but was taken over by Guardian Bank Limited.
 23. PW 1 said he operated account no. 0612018152 as a current account at Biashara Street from 1995 to June 2001 when it was moved to Guardian Bank Limited.
 24. PW 1 said he enjoyed a credit card with Barclays card Kenya since 1992 and the card was enhanced to a gold card international in June 1998.
 25. He said the card was upgraded on 15/6/1998. He said on 29/3/2004, he issued a cheque to the defendant amounting to ksh.142,349.50.
 26. He said the defendant received the cheque and returned it with the remarks "return to the drawer". He said the cheque was dishonored on 30/3/2004. He said the cheque was returned on 31/3/2004 when his account was still in credit.
 27. The defendant called one witness, JOSEPH WACHIRA (DW 1) who was working as the operation manager of the defendant. DW 1 produced his written statement dated 3/11/2016 as his evidence in chief and a list of documents filed by the defence advocate on 3/10/2016.
 28. DW 1 said the plaintiff's account had only ksh.20,037.05 on 29/3/2004 and there wasn't enough to pay the cheque of kshs.142,349.30.
 29. DW 1 said it was expected that there should be funds in the account before customer issues a cheque.
 30. DW 1 said a credit of kshs.130,000 was put in the account on 31/3/2004 16.25 hours.
 31. DW 1 the plaintiff was under an obligation to ensure there were sufficient funds in his account before issuing the cheque or to make arrangement with the bank to honour the cheque.
 32. DW 1 said the defendant was in the correct position to unpay the cheque.
 33. He said another case no. 887059 for ksh. 1 million was issued by the 2nd plaintiff when the account had a balance of ksh.46,288.50.
 34. He said the 2nd plaintiff issued another case no. 774940 for ksh.800,000 was issued when the account balance was 833,85cts and many other cheques highlighted in their bundle of documents.
 35. DW 1 said the 2nd plaintiff used to apply for banker's cheque for payment of fees meaning others did not have confidence in his personal cheques.
 36. I took over this case at the stage of cross-examination of DW 1.



37. DW 1 said in cross examination that the systems at the bank did not have a problem. He said the documents were not manipulated to show the payment into the account was made after the cheque was dishonoured.
38. DW 1 maintained that a debit of ksh.142,349 was done on 31/3/2004.
39. He said the 2nd plaintiff was supposed to make arrangements with the defendant before placing the cheque.
40. DW 1 said there were no sufficient funds when the cheque for kshs.142,349 was banked and that is why it was returned unpaid.
41. DW 1 said the cheque of ksh.142,349.30 was banked on 31/3/2004 when the account had only 30,032.05.
42. The credit of ksh.130,000 was processed later and there was a mismatch and the funds were placed in a suspense account and reconciliation was done at the end of the month.
43. DW 1 said the best practice is to have funds in the account before issuing cheques.
44. The parties filed written submissions as follows; the plaintiff submitted that the defendant's argument that the suit is statute barred is baseless.
45. That the defendant's wrongful dishonor of the plaintiffs' cheque gave rise to the claim for libel. The defendants admitted the same and by reason of this the defendant is estopped in equity from escaping liability to compensate the plaintiff's by invoking the provisions of the Limitation of Actions Act.
46. The plaintiff further submitted that at the time of the wrongful dishonor of its cheque for Kshs 142,349.30 on 31/3/2004, the 1st Plaintiff's account had a total sum of Kshs 150,037.05 being the account balance of Kshs 20,037.05 as at 26/3/2004 in addition to Kshs 130,000/= deposited therein on 31/3/2004 by the 2nd Plaintiff. The plaintiff argued that the account herein was therefore in credit up to Kshs. 150,037.05 at the time of the wrongful cheque dishonor on 31/3/2004.
47. The plaintiff argued that the defendant alleged that the plaintiff cheque had already been dishonored by the time the 2nd plaintiff deposited Kshs. 130,000 in cash on 31/3/2004. The defendant however did nothing to provide a separate and corrected statement of accounts to back up the allegations. The defendant supplied documents as proof of the same but failed to call the maker of the electronic records to produce them.
48. The defendant had honored the plaintiff's cheque and paid it on 31/3/2004 before wrongfully reversing the transaction and again re-honoring it on 6/4/2004. The defendant wrote an apology letter and testified that their systems were faulty and that the plaintiffs were not to blame for the error.
49. The Plaintiffs submitted that having deposited additional funds on 31/3/2004, property in the cash duly passed from them to the Defendant thus creating a corresponding obligation on the Defendant's part to pay the Plaintiffs' orders as at that date to the extent of the available balance at the time and in particular, the payment of Kshs 142,349.30 to Barclaycard on 31/4/2004. The Defendant's failure to honour the cheque in accordance with their instructions breached the contractual debtor/ creditor relationship that existed to their detriment.
50. On whether the actions by the defendant were defamatory the plaintiffs argued that by reason of the Defendant's wrongful dishonour of the cheque, the Plaintiffs have been injured in their person and trade reputations for being portrayed as persons unable to meet their financial obligations as and when they fell due, persons who were not creditworthy and which should be shunned by right thinking



members of the society, merchants and business associates alike for lacking integrity by issuing cheques when they had no intention of having them paid.

51. The plaintiff submitted that they are entitled to special damages of Kshs. 19,164.10. The wrongful dishonour of the cheque payment to Barclaycard by the Defendant, the Plaintiffs were subjected to penalties totalling Kshs 19,164.10 being late payment charges levied on the account in the sum of Kshs 14,234.95, Kshs 3,929.15 on account of excess limit charge and Kshs 500 on account of the unpaid cheque penalty.
52. On general damages the plaintiffs proposed an award of Kshs. 6,000,000 and in support cited Bank of Baroda (Kenya) Limited v Timwood Products Limited [2008] eKLR, the court of appeal upheld an award of Kshs. 3,000,000 general damages for loss of credit and business reputation in 2008 thus;

“But despite that misdirection, the learned Judge still thought a composite sum of Kshs.3 million would suffice on the head of claim of loss of credit, business reputation and loss of profit. We think that in all the circumstances of the case, the learned Judge was right. Put another way, we do not think the award of Kshs.3 million on the compendious head of loss of business credit, reputation and loss of profit was so inordinately high that the application of a wrong principle must be inferred and thus call for our intervention. Damages for wrongful dishonour of a cheque by a bank is clearly awardable – see GIBSON OMBONYA SHIRAKU V. COMMERCIAL BANK OF AFRICA, Civil Appeal No. 16 of 1985, (unreported), and also KPOHRAROR V. WOOLWICH BUILDING SOCIETY [1964] 4 ALL E.R. 119. The Bank’s complaint in ground eleven is not that the sum was not awardable. All Mr. Fraser told us was that a temperate award is the usual thing in such matters and that the Kshs.3 million awarded was excessive and unjustified . We do not think so. Timwood was a trading company and the Bank knew that.”

53. Finally, the plaintiff submitted that they are also entitled to aggravated damages in view of the high-handed conduct and malice exhibited by the defendant. The Defendant’s witness testified that they did not consider the Plaintiffs worthy customers which was spiteful of them despite still doing business together to date as the 1st Plaintiff’s account continues to operate. The Defendant also apologized for the inconveniences it meted on the Plaintiffs and in a malicious change of tone, denied any error on its part. The plaintiff proposed Kshs. 1,500,000 under this head and in support cited Equity Bank Limited & Another -Vs- Robert Chesang [2016] eKLR, the Nairobi High Court upheld an award of Kshs 1,500,000/= aggravated damages in view of the Appellant’s high handedness thus:

“According to the plaintiff, on 22nd February 2010 he went to Nakumatt Supermarket to shop. He used his ATM card with Equity Bank to pay for the goods. Regrettably, the transaction failed with results “transaction declined account nonexistent.” That despite all the embarrassment he was going through, he had 8 accounts with the 1st defendant bank and all of them had funds totaling to shs 800,000...

the plaintiff/ respondent was awarded a sum of shs 11,450 special damages, shs 1 million general damages for libel and breach of contract; and shs 1.5 million aggravated punitive and exemplary damages all totaling shs 2,511,450 plus costs of the suit and interest...

In the end, I find that the trial magistrate correctly exercised his discretion in awarding to the respondent kshs 1 million general damages for libel and breach of contract and shs 1.5 million aggravated damages in view of the humiliating, embarrassing and contemptuous manner in which the appellants treated the respondent...”



54. The defendants alternatively submitted that the primary relationship that existed between the parties was that of a principal and agent, the onus was on the 1st plaintiff to show how the relationship transformed from either one where the customer is the creditor and the bank the debtor.
55. The defendants argued that the 2nd plaintiff never entered to any contract with the defendant. He has never been a customer of the defendant and as such there has never existed a bank-customer relationship between them. It was the defendants submission that the 2nd plaintiff is therefore a stranger to the contract and thus lacks locus standi to claim against the defendant.
56. The defendant further submitted that at the time of receiving the cheque from Barclay Card (K) Ltd, the 1st plaintiff account had no sufficient funds and hence the cheque was correctly returned unpaid as the 1st plaintiff purported to make a deposit at the close of business on the 31/3/2004 after the cheque had been received and dishonored. The defendant argued that legitimate mandatory expectation is placed on the 1st plaintiff to be fully aware of the status of its accounts and not issue cheques knowing very well that the funds are insufficient to the issued cheque. That similarly an expectation rest on the 1st plaintiff to accord the bank sufficient time to carry out book keeping operations before making the banked monies available to the customer.
57. The defendant further submitted that the purported libelous remarks were made on 31/3/2004 and the latest the suit should have been filed was the 30/3/2005 according to section 4 of the Limitations of Actions Act. The plaintiffs filed the present suit on the 30/3/2005 which was out of the statutory limitation period of 12 months. The defendants argued further that it was evident that the plaintiff was not of good standing or repute having issued numerous bounced cheques which were properly dishonored and therefore its credit reputation was low, the bank/defendant has very little to no confidence in the customer as shown by the evidence produced.
58. On whether the plaintiffs are entitled to the damages sought, the defendants argued that the plaintiffs have failed to prove their case to the required standard and as such not entitled to the damages as sought.
59. It is the duty of the plaintiffs to prove their case to the required standard in civil cases which is on a balance of probabilities.
60. The issues for determination in this case are as follows;
 - i. Whether the plaintiffs have proved their case to the required standard in civil cases.
 - ii. Whether the defendant is liable to pay the plaintiffs the remedies they are seeking against them.
 - iii. Who pays the costs of this suit?
61. On the issue as to whether the plaintiffs have proved their case to the required standard, the evidence on record is that the 2nd plaintiff did to have funds in the account when cheque for ksh.142,349.30 was placed.
62. The 2nd plaintiff did not make arrangements with the bank to honour the cheque and neither did he ensure the funds were in the account before placing the cheque.
63. Unless the plaintiffs had an overdraft facility with the bank they were duty bound to issue cheques when the account had a credit balance sufficient to pay the cheque.



64. In the case of Jitendra Hemraj Gudhka T/A Gudhka Textiles v Kenya Commercial Bank Limited [2015] eKLR it was held that;

“With insufficient funds in the appellant's account, the presentation of the suspect cheques was construed as the appellant's request for an overdraft facility to permit payment thereof. (See, pg 298 of Byles on Bills of Exchange and Cheques.)”

65. I find that there is evidence that at the time of receiving the cheque from Barclay Card (K) Ltd, the 1st plaintiff's account had no sufficient funds and hence the cheque was correctly returned unpaid as the 1st plaintiff made a deposit at the close of business on the 31/3/2004 after the cheque had been received and dishonored.

66. The 1st plaintiff was under a duty be fully aware of the status of its accounts and not issue cheques before ensuring that there were sufficient funds in the account.

67. There is also no evidence that the defendant committed the tort of libel.

68. The purported libelous remarks were made on 31/3/2004 and the latest the suit should have been filed was the 30/3/2005 according to section 4 of the Limitations of Actions Act.

69. This suit was filed on the 30/3/2005 which was out of the statutory limitation period of 12 months.

70. Further, libel is defined in the case of Hayward v Thompson & Others [1981] 3 ALLER Lord Denning stated thus,

“One thing is of essence in law of libel. It is that the words should be defamatory and untrue and should be published if and concerning the plaintiff. That is the plaintiff should aimed at or intended by the defendant.....”

71. In the scholarly by Gatley on libel and slander 6th Edition, the legal meaning of defamation is stated as follows:

“A man commits the tort of defamation when he publishes to a third person words (or matter containing an untrue imputation against the reputation of another.”

72. In English Law publication to the person himself defamed, “is not actionable, though it may be criminal. The interest protected is not personal pride broadly speaking, if the publication is made permanent form or is broadcast. The matter published is libel, if in fugitive form it is slander. The most important distinction of the two is that the law presumes that some damage will flow from the publication of a libel.”

73. In the circumstances, the plaintiffs have failed to prove their case against the defendant to the required standard.

74. The defendant is not liable to pay the plaintiffs the remedies they are seeking against them.

75. The charges levied by the defendant were legitimate since they were in respect of transactions for running the current account.

76. I dismiss the plaintiffs case for want of evidence that at the time the cheque was dishonored, there were sufficient funds in his account.

77. The Plaintiffs submitted that they deposited additional funds on 31/3/2004 and I find that the 2nd plaintiff was supposed to make arrangements with the defendant before placing the cheque.



78. On the issue of costs, I direct that each party bears its own costs of this suit for reasons that the plaintiffs made the funds available after the cheque had been dishonored.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 29TH DAY OF OCTOBER, 2024.

A. N. ONGERI

JUDGE

In the presence of:

..... for the Plaintiff

..... for the Defendant

