



**Harit Sheth and Richard Kariuki T/A Harit Sheth Advocates v NIC Bank Limited (Civil Suit 280 of 2010) [2023] KEHC 18933 (KLR) (Commercial and Tax) (26 June 2023) (Judgment)**

Neutral citation: [2023] KEHC 18933 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
CIVIL SUIT 280 OF 2010  
A MABEYA, J  
JUNE 26, 2023**

**BETWEEN**

**HARIT SHETH AND RICHARD KARIUKI T/A HARIT SHETH  
ADVOCATES ..... PLAINTIFF**

**AND**

**NIC BANK LIMITED ..... DEFENDANT**

**JUDGMENT**

1. Vide a plaint dated 3/5/2010 and amended on 10/12/2013, the plaintiffs prayed for judgment against the defendant for special, general, exemplary, aggravated and punitive damages. They also sought costs of the suit and interest thereon.
2. The plaintiffs' case was that they were partners in the named Law Firm. The Law Firm was a customer of the defendant bank at the defendant's city centre branch, Nairobi where the plaintiff was operating a client account number CA1 1-100-000264 ('the client account').
3. That it was an express or implied term of their contract under which the client account was opened that the defendant would duly honor and effect payment of cheques drawn by the plaintiffs on their client account provided that the cheque was properly signed by the plaintiffs in accordance with the operating mandate held by the defendant and provided there was sufficient credit in the client account.
4. That on 30/4/2009, the plaintiffs drew and signed, in accordance with the operating mandate held by the defendant, a cheque number 26 for Kshs. 13,233,520/- ('the cheque') in favor of one of their clients by the name Mark Properties Limited ('the payee'). That on that date, the client account had Kshs. 29 million which was in excess of the amount of the cheque.



5. The client banked the cheque in its account at I & M Bank Limited (herein payee's bank) on 4/5/2009 on which date the client account had a credit balance of Kshs. 37,653,797.68. That the defendant received the cheque on 5/5/2009 for payment. However, on 6/5/2009, the defendant wrongfully and without just cause dishonored the cheque.
6. The plaintiffs claimed that as a consequence of that wrongful dishonor, they had suffered loss, damage and injury. That their reputation, character and credit was seriously damaged and injured and their integrity, trustworthiness, ethical conduct inter alia diminished or destroyed. That their high standing in society had been lost as they were put into public scandal and contempt.
7. They pleaded that they had a joint experience of 48 years and their reputation, trustworthiness and credit was their most valuable asset but the same was damaged by the defendant's actions. That the payee's bank was also where one partner Mr. Harit Sheth had his bank accounts and the wrongful dishonor of the cheque also harmed his reputation.
8. They contended that the dishonor led to loss of business and profits of Kshs. 56,335,282/= being fees that would have been earned from the payee's 'Le Mac' project which the payee declined to instruct them as a direct consequence of the defendant's wrongful dishonor of the cheque.
9. That the defendant also caused to be published to the payee and several of its staff maliciously and wrongly the number '80' on cheque. The said number signified that there were insufficient funds in the client account to meet the cheque. That the publication of the number '80' coupled with the dishonor of the cheque, the defendant was understood to mean that the plaintiffs did not have sufficient funds in the client account to meet the cheque but were dishonest in issuing it; they had stopped payment of the cheque despite issuing it thus were dishonest; were unworthy of credit and had committed an offence of professional misconduct by issuing their client a cheque that was dishonored.
10. That by reason of the banker-customer relationship between them and the defendant, the defendant owed them a duty of care not to negligently or recklessly act in a manner that their reputation and otherwise harm their business as practicing advocates. That despite demand for an apology/explanation and compensation for the damages incurred, the defendant had declined to comply.
11. The plaintiff therefore claimed damages against the defendant for the wrongful dishonor of the cheque and for defamation.
12. The defendant defended the suit vide the amended defence dated 24/3/2014. The defendant admitted that the plaintiffs were its customer and had issued them with a cheque book. It however, contended that it was the primary duty of the plaintiffs to comply with the bank's standard terms and conditions of operating a current account at the bank.
13. The defendant denied breaching any of its duties or causing any injury or damage to the plaintiffs. It denied being negligent. It contended that there was no implied or express term that the defendant would in all cases honor and effect payments on the plaintiffs' cheques merely because they were properly signed and there was a credit balance. That in certain cases, or purposes of stemming fraud, the bank would carry out further confirmation including contacting the plaintiffs to verify that they had drawn or issued the cheque. That failure by the plaintiffs to confirm or verify would entitle bank to withhold payment.
14. That when the cheque was presented for payment, the plaintiffs failed to verify the particulars of the cheque when called upon to do so by the bank and considering the value of the payment, the defendant became entitled to dishonor payment of the cheque.



15. That the alleged loss was too remote and the plaintiffs were the authors of their own misfortune having failed to verify that they had issued the cheque when called upon to do so. That the plaintiffs claim for Kshs. 56,335,282/= was speculative, remote and baseless. The defendant further denied publishing to the payee or any other third-party defamatory material concerning Mr. Harit Sheth.
16. That the mere insertion of a number '80' on the cheque received by the payee did not amount to defamation on the plaintiffs capable of giving rise to a tortious cause of action or the impressions claimed by the plaintiffs.
17. The defendant also denied owing the plaintiffs any duty of care nor breaching any duty of care. That the defendant acted in good faith and no injury was suffered by the plaintiffs. That the suit was malicious and an attempt by the plaintiffs to enrich themselves unjustifiably and the same ought to be dismissed.
18. At the hearing, the plaintiff called two witnesses. PW1 was Ravji Kinverji Vasta, a director of the payee. He adopted his witness statement dated 19/8/2014 and identified the bundles of documents dated 12/6/2012 and 24/6/2018, respectively.
19. He testified that the payee had retained the plaintiffs' Law Firm as the payee's sole advocates in two development projects that it was constructing. These were Mac Apartments on L.R. No. 330/268 comprising of 44 apartments and Mac Gardens on L.R No. 3734/379 comprising of 22 apartments.
20. That on 30/4/2009, the plaintiffs issued them with a cheque in their favour being part of sale proceeds of an apartment in Mac Apartments for Kshs. 13,233,520/- against their account number CA1 1-100-000264 with the defendant.
21. The cheque was presented for payment at I & M Bank Limited. However, the payee was disappointed when the same was not honoured for lack of sufficient funds in the plaintiffs' account. That afterwards, the payee was apprehensive about engaging the plaintiffs for more work. Though the plaintiffs concluded their legal works for the two projects, there was no more trust with the Firm to carry out other instructions and handle the substantial legal work and finances that the nature of developments the payee was undertaking entailed.
22. The payee therefore decided to give legal work for any future developments to other law firms. The legal work for the project known as 'Le Mac' worth 6 billion for development of some property was therefore given to Coulson & Harney. That before the dishonor, the payee was satisfied with the plaintiffs' services as they handled the two projects as expected and would have received more work.
23. In cross-examination, PW1 testified that it was his bank that informed him of the dishonor. That the payee re-banked the cheque about a week later and it was honored. That his bank orally informed him that there were no sufficient funds. That the 'Le Mac' project started in 2013. That the payee was not opposed to Mr. Harit acting for them in the development. At the time he was testifying, the 'Le Mac' project was complete and 50-60% thereof had been sold.
24. PW2 was Richard Mundia Kariuki. He relied on his statement dated 26/4/2019 as his evidence in chief and produced PExh 1 and 2, respectively. His testimony was a rehash of the plaint. He maintained that the plaintiffs lost the payee as a client as a direct consequence of the defendant's dishonor of the cheque and this caused them harm on their reputation as well as damages of financial loss of Kshs. 750 million in legal fees.
25. He further testified no one called regarding the cheque despite the defendant having their numbers. That verification was through a phone call from the bank but they never received any call. That the cheque was published to the payee's bank though he did not know who at the defendant's bank published it.



26. In cross-examination, he admitted that they had signed the general terms and conditions of the defendant. That the cheque was banked on 4/5/2009 and as long as there were funds in the account, the cheque ought to have been honored.
27. As regards Clause 18 of the terms and conditions, he told the Court that if there were any doubts about instructions, the defendant would call the plaintiff but in this no one called. That the 'Le Mac' project was conceptualized in 2012. On the claim for loss of business or profits, he stated that there was no reason to believe that all units would not be sold. That he was unaware of what transpired in the project and no other factors contributed to their loss of instructions from the payee. That the plaintiffs suggested an amicable settlement but the bank refused.
28. On re-examination, he testified that they had a good relationship with the payee until the cheque was dishonored. That the payee was unhappy. That it was their expectation that they would receive all legal work from the payee for any development.
29. That the project that would have attracted the legal fees of Kshs. 56.3 million was included in the pleadings as a guidance or example on the business lost due to the defendant's action.
30. The defendant called one witness. DW1 was Stephen Atenya. He adopted his witness statement dated 26/4/2019. He admitted that the plaintiffs opened an account with the defendant and it was an express condition that the operations of the account would be subject to the defendant's general terms and conditions which they signed on 24/7/2008.
31. He further admitted that the cheque was presented on 5/5/2008 for Kshs. 13,233,520/- but since the amount was hefty, the defendant endeavored to contact the plaintiffs as per the aforementioned terms and conditions to confirm whether the defendant could honor the cheque. That despite several attempts to contact the plaintiffs, the plaintiffs failed or neglected to confirm the same thereby giving rise to reasonable suspicion as to the legitimacy of the transaction.
32. That due to the defendant's obligation to protect the plaintiffs' funds and the plaintiffs' refusal to validate the transaction, the defendant stopped payment of the cheque pending confirmation of the transaction. That the number '80' written on the cheque was not intended to carry the meaning ascribed to it by the plaintiffs and would not be carried by a reasonable person to have such meaning.
33. That the writing of the number '80' cannot be described as a published statement that could form a foundation for a claim in tort. That the damages claimed were too remote and the payment was stopped due to the plaintiffs' failure to confirm the transaction thus the defendant was not the author of any harm faced.
34. On cross-examination, he told the Court that he joined the defendant on 2/1/2018 and was not working with it at the time of the dishonor. That he did not know what a cash cheque was. That a cash cheque is a cheque drawn on an account with the bank but presented through a different bank such that the bank is required to honor that transaction.
35. That clause 18(a) of the terms and conditions was for where the cheque is paid at the defendant's counter. That clause 18(b) did not necessarily mean that the cheque is to be paid immediately in cash.
36. He further testified that not all cheques are cash cheques such as banker's cheque. That cash cheques are usually paid immediately or presented through another bank. That the cheque in question was a cash cheque. He confirmed that he did not have any evidence to show the attempts by the bank to reach the plaintiffs.



37. He further testified that code ‘80’ meant that call back had failed. That the defendant did not inform the payee why the cheque was dishonored. He admitted that the defendant knew that the payee was the plaintiffs’ client and that the subject account was a client account. That the plaintiffs had provided their physical address which was about 400 meters from the branch. That the bank also had the plaintiffs mobile numbers and it was for the bank to call the customer.
38. The parties filed written submissions in support of their cases. The plaintiffs’ submissions were dated 27/10/2022 whereas those of the defendant were dated 18/9/2022. The parties also filed a list of agreed issues dated 4/9/2012.
39. The Court has considered the pleadings, evidence and submissions on record. The Court identifies three issues for determination. These are: -
- i. Did the defendant breach its duty of care to the plaintiffs by dishonoring the cheque?
  - ii. Is the defendant liable for the alleged breach of duty of care?
  - iii. If so, what quantum of damages ought to be awarded to the plaintiffs?
40. All these issues are inter-related and will be determined together.
41. The undisputed facts include that the parties had a banker-customer relationship. The plaintiffs maintained account number CA1 1-100-000264 with the defendant. It was also not in dispute that on 30/4/2009, the plaintiffs issued the cheque for Kshs. 13,233,520/- on their client account in favor of the payee. That at the time, the client account had more than enough to satisfy payment of the cheque.
42. It was common ground that the defendant received the cheque and declined to make payment despite the account having a credit balance of Kshs. 37,653,797.68 at the time. The plaintiffs submitted that the banker-customer relationship was a contractual one and the defendant owed certain obligations to the plaintiffs as its customer including a duty of care, exercise of skill and diligence in undertaking its operations as well as a duty to obey the customer’s instructions when they’re given in accordance to the bank’s mandate.
43. The question that begs for an answer is whether the defendant bank owed the plaintiff a duty of care as alleged.
44. The protection accorded by statute to a paying bank is to be found in section 4 (1) of the [Cheques Act](#), Cap 35 which provides: -
- “
- “ a) Where a banker, in good faith and in the ordinary course of business, pays a prescribed instrument drawn on him to a banker, he does not in doing so incur any liability by reason only of the absence of, or irregularity in, endorsement of the instrument, and—  
in the case of a cheque, he is deemed to have paid it in due course, and
  - (b) the case of any other prescribed instrument, the payment discharges the instrument”



45. The protection is reinforced in section 60 of the *Bills of Exchange Act* Cap 27 which provides: -

“(1) When a bill payable to order on demand is drawn on a banker, and the banker on whom it is drawn pays the bill in good faith and in the ordinary course of business, it is not incumbent on the banker to show that the endorsement of the payee or any subsequent endorsement was made by or under the authority of the person whose endorsement it purports to be, and the banker is deemed to have paid the bill in due course, although such endorsement has been forged or made without authority; and in this subsection “bill payable to order on demand” includes a prescribed instrument within the meaning of the *Cheques Act* which is payable to order.

(2) Any draft or order (other than a bill or a cheque) drawn upon a banker for a sum of money payable to order on demand which shall, when presented for payment, purport to be endorsed by the person to whom it shall be drawn payable, shall be a sufficient authority to the banker to pay the amount of the draft or order to the bearer thereof; and it shall not be incumbent upon the banker to prove that the endorsement, or any subsequent endorsement, was made by or under the direction or authority of the person to whom the draft or order was or is made payable either by the drawer or endorser thereof.”

46. From the fore-going, the paying banker is to pay in good faith and in the ordinary course of business. The burden lies with a claimant customer in such case to prove negligence whilst the paying bank will be showing that it did not act negligently.

47. In *Simba Commodities Ltd vs Citibank N.A.* Civil Case No. 236 of 2003 (2013) eKLR, the court citing the case of *Karak Brothers Company Ltd versus Burden* (1972) ALLER, held: -

“As to the nature and extent of the contractual duty of care owed by a paying bank to its customer when called on to honour a cheque drawn by the customer; and in particular, in the case of a corporate customer which has given the usual mandate to its bank, to what extent the bank is entitled to place exclusive reliance on the fact that the cheque is signed by the corporation’s duly authorized signatories the conclusion reached by Ungood-Thomas J was 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. The relevant considerations include the prima facie assumption that men are honest, the practice of bankers, the very limited time in which banks have to decide what course to take with regard to a cheque presented for payment without risking liability for delay, and the extent to which an operation is unusual or out of the ordinary course of business. An operation which is reasonably consonant with the normal conduct of business (such as payment by a stock broker into his account of proceeds of sale of his client’s shares) of necessity does not suggest that it is out of the ordinary course of business. If “reasonable care and skill” is brought to the consideration of such an operation, it clearly does not call for any intervention by the bank. What intervention is appropriate in the exercise of reasonable care and skill again depends on circumstances.’



As between the company and the bank, the mandate, in my view, operates within the normal contractual relationships of customer and banker and does not exclude them. These relationships include the normal obligation of using reasonable skill and care; and that duty, on the part of the bank, of using reasonable skill and care, is a duty owed to the other party to the contract, the customer, who in this case is the plaintiff company, and not to the authorized signatories. Moreover, it extends over the whole range of banking business within the contract. So the duty of skill and care applied to interpreting, ascertaining, and acting in accordance with the instructions of a customer; and that must mean his really intended instructions as contrasted with the instructions to act on signatures misused to defeat the customer's real intentions. Of course, *omnia praesumuntur rite esse acta*, and a bank should normally act in accordance with the mandate – but not if reasonable skill and care indicate a different course.” (emphasis supplied)”

48. This Court reiterates the foregoing here. The basic duty in respect to the contractual relationship between the defendant and the plaintiffs herein was the obligation on the part of the defendant to pay the Plaintiffs' cheques as per the mandate provided. However, in so doing, the defendant had to act in good faith and in the ordinary course of business while exercising reasonable care and skill.
49. The issue is, whether the defendant breached that duty by declining to honour the cheque.
50. The defendant's defence was that under Clause 18 of the terms and conditions between the parties, the bank was under a duty to first confirm or verify the transaction before paying the cheque. That it tried reaching the plaintiffs but they were unavailable thus the bank exercised its discretion and declined payment taking into consideration the colossal amount in the cheque. That the bank was protecting the plaintiffs by declining payment in order to avoid fraud.
51. That by declining to verify the transaction by virtue of being unreachable, the plaintiffs authored their own misfortune and were liable for any consequences arising therefrom.
52. On the other hand, the plaintiffs' position was that no such duty to verify the transaction existed. That the defendant made no attempt to reach the plaintiffs for verification.
53. Though the defendant tried to show that the cheque was a cash cheque under clause 18 and verification was mandatory, it was unable to prove that it indeed contacted the plaintiffs unsuccessfully for verification thus had grounds to decline payment.
54. Clause 18 of the general conditions that was relied on by the defendant provided at the relevant part as follows: -

“Where a cash cheque is presented not by the customer but by a third party, the Bank may require confirmation from the customer or from a representative of the Customer before it makes payment. ...”
55. The above provision in my view only gave the discretion to the defendant to seek confirmation from the plaintiffs. The provision is not mandatory. The defendant is to exercise discretion based on the circumstances such as, was the transaction out of the ordinary? Was this the first time the plaintiffs were issuing a cheque for such a huge sum or they were in the habit of issuing such cheques on that account bearing in mind that it was a client account? Was anything suspicious with the payment? There was no evidence that was led along these lines. All that was stated was that the amount was huge.



56. PW2 testified that in other circumstances, the defendant would call for verification. This meant that the defendant had the plaintiffs contacts and had contacted them in previous times. When called upon to produce any records of failed calls on this transaction, there was none forthcoming from the defendant.
57. DW1, the defendant's witness was not helpful on the issue of liability having joined the defendant nearly 10 years after the cheque was dishonoured. He could not verify that the call was made. Whether the cheque was a cash cheque or otherwise, the fact remains that the defendant did not contact the plaintiffs for verification as alleged.
58. There was no justification in declining payment of the cheque. The cheque was duly drawn and executed as per the mandate held by the defendant. More-so, there was sufficient funds to effect payment of the cheque. There was no good reason to decline payment and the defendant failed to properly exercise its duty of care to the plaintiffs by failing to carry out the plaintiffs' instructions.
59. This Court finds that the defendant breached its duty of care to the plaintiff.
60. The next issue is whether, as a result of the defendant's action, the plaintiffs suffered any damage. The plaintiffs pleaded and testified that as a result of the dishonor of the cheque, their reputation and credit was damaged, their creditworthiness and trustworthiness was severely diminished, that the dishonor amounted to a serious ethical offence and professional misconduct. Further that they lost a business wherein legal fees to be earned was Kshs. 56,335,282/=.
61. This was a special damage claim. Special damages must be both pleaded and proved before they can be awarded by a court. In *Hahn V. Singh*, Civil Appeal No. 42 Of 1983 [1985] KLR 716, the Court of Appeal held: -
- “Special damages must not only be specifically claimed (pleaded) but also strictly proved.... for they are not the direct natural or probable consequence of the act complained of and may not be inferred from the act. The degree of certainty and particularity of proof required depends on the circumstances and nature of the acts themselves.”
62. The plaintiffs did specifically plead the special damage claim of Kshs. 56,335,282/=. At the trial, the plaintiffs called two witnesses to prove the claim.
63. Pw1 was a director of the payee. He narrated to Court how the payee had retained the plaintiffs to act for it on its two previous projects which they had handled with satisfaction. That the payee was prepared to retain the plaintiffs in its next project known as 'Le Mac'. However, after the dishonor, the payee was lost trust in the plaintiffs and gave that project and subsequent legal work to another law firm, Messrs Coulson & Harney, Advocates. That the dishonor diminished the payee's confidence and trust in the plaintiffs.
64. There was evidence that the payee had a project 'Le Mac' in the offing at the time. The same was estimated to cost Kshs.6 billion. The legal work in respect of the sale of the resultant apartments was destined for the plaintiffs but with the dishonor, it was given to another law firm.
65. According to Pw1, the plaintiffs lost fees of Kshs. 56,335,282/= as a result of the 'Le Mac' project being diverted to another law firm. That the 'Le Mac' project was diverted elsewhere, Coulson & Hanney, Advocates as a result of the dishonor. He gave a detailed calculation on how the said figure was arrived at based on the estimated prices for each apartment which was to be sold and for which they were to act for the payee in the transaction.



66. I do not agree with the defendant's submission that the loss of that fees was too remote. It should be recalled that the subject account in respect of which the cheque was dishonored was a client account. The plaintiffs are advocates and that was a fact well known to the defendant. An Advocate's Client's account holds client money.
67. Dishonoring a cheque on that account has a devastating effect on an advocate. It means the advocate is not holding any monies for his clients. And for a client like the payee who had two projects whose legal work was being handled by the plaintiffs and were holding the payees' funds from the sales so far effected must have been a shocker.
68. In this regard, it should have been in the contemplation of the defendants that dishonoring a cheque written on a clients' cheque would have dire consequences on its customers, the plaintiffs. It is no surprise that the plaintiffs lost a valued client like the payee with the attendant loss of business. The loss of instructions from the payee and the consequent loss of fees cannot be said to be so remote as claimed by the defendant. If it were another client who was not affected by the dishonor, such an argument may hold, but not in respect of the payee who was directly affected by the dishonor.
69. Accordingly, the claim was not so remote as claimed. I am satisfied that the same was proved to the required standard and it is sustainable and I award the same.
70. The plaintiffs' other contention is that the defendant's actions were defamatory in that it was implied that they were untrustworthy, lacked integrity and were dishonest in issuing a cheque without sufficient funds in their client's account or issued the cheque then stopped payment.
71. That the defendant indicated code '80' on the dishonored cheque and signed in red and returned it to the payee's bank thereby publishing the defamation. That such action injured the plaintiffs' reputation to their client (the payee), the payee's bank and its officials, as well as to the defendant's officials who dealt with the cheque.
72. The defendant on the other hand submitted that the mere writing of code '80' on the cheque could not have been taken to mean that the account had insufficient funds nor did it damage the plaintiffs' reputation. That it signified failure of confirmation of verification.
73. In the Treatise of cheques in Law and Practice, Fifth Edition by M.S Parthasarathy, at P. 491 – 492 it is stated in part as follows: -

“Damages for breach of contract

Where a cheque has wrongfully been dishonored by the paying bank, the drawer may make a claim of damages for breach of contract. Where the paying bank has also made a statement which is libelous about the drawer in explaining the reason for the cheque unpaid, the drawer may make a claim for damages for the libel in addition, or in the alternative to, the claim for breach of contract.

In accordance with the general principle, substantial damages for breach of contract by the paying bank in failing to honor the mandate, insufficient funds or facilities, that they are capable of being libelous. Similarly, “Present again” has been held to be libelous and so has “No 10, 317 unpaid” the number being the number of cheques.

The claim for damages for libel is often combined with a claim for damages for breach of contract by the paying bank, since the drawer must succeed in showing that the paying bank was not entitled to dishonor the cheque before establishing that the words used were libelous. The kind of damage for which damages for libel are recoverable is the kind of



damage that might reasonably be supposed to have been in the contemplation of both parties at the time of when the contracts were made.”

74. Pw1 a director of the payee narrated to Court how the payee had retained the plaintiffs to act for it on its two previous projects. That after the dishonor, the payee lost trust in the plaintiffs and gave subsequent work to another law firm. That the dishonor diminished the payee’s confidence and trust in the plaintiffs.
75. There was no evidence to support that code ‘80’ was a code in the banking industry that signified failure to confirm verification. The Court accepts the interpretation given by the plaintiffs and their client the payee, through Pw1, that the same either meant insufficient funds or stop payment. The effect was swift and substantial. The payee concluded that the plaintiffs were not trustworthy and it ceased giving them any further instructions, the immediate one being the ‘Le Mac’ project.
76. In this regard, the Court notes that, the plaintiffs account had sufficient funds to pay the cheque. That there was no good or any reason to decline payment of the cheque. That there was no effort at all to contact the plaintiffs to confirm payment of the cheque. That the failure to pay the cheque made the plaintiffs lose their professional estimation in the eyes of the eyes of the payee leading the latter to stop any further instructions to the plaintiffs.
77. Accordingly, the Court is satisfied that the publication of the code ‘80’ on the cheque and followed with the failure to pay the cheque was defamatory of the plaintiffs. It not only lowered their estimation in the eyes of the payees directors and managers but also the defendants officers who handled the cheque as well as the officers of I& M Bank who handled the cheque.
78. The publication was defamatory of the plaintiffs. It was false as the plaintiffs’ clients’ account was in sufficient credit. The publication was malicious as there was no effort to confirm clearance of the said cheque. Considering the risk involved, the distance of 400 meters as too short a distance for the defendant not to send a representative to the plaintiffs’ offices to make the confirmation if phone calls, if at all they were made were not going through. In any event, there was no evidence to show that there was any attempt to contact the plaintiffs.
79. In *Musikari Kombo v Royal Media Services Limited* [2018] eKLR, it was held that: -
- “As succinctly put by this Court in *S M W vs. Z W M* [2015] eKLR, a statement is defamatory of the person of whom it is published if it tends to lower him/her in the estimation of right thinking members of society generally or if it exposes him/her to public hatred, contempt or ridicule or if it causes him to be shunned or avoided.
- ...
- The test for whether a statement is defamatory is an objective one. It is not dependent on the intention of the publisher but on what a reasonable person reading the statement would perceive.”
80. In *Halsbury’s Laws of England* 4th Edition Vol. 28 at page 23, the authors opine: -
- “In deciding whether or not a statement is defamatory, the court must first consider what meaning the words would convey to the ordinary man. Having determined the meaning, the test is whether, under the circumstances in which the words were published, a reasonable man to whom the publication was made would be likely to understand them in a defamatory sense.”



81. rawer’ and those in the banking industry would have understood the code. The defendant maintained that there was no malice and the code was not defamatory.
82. In *Habihalim Company Limited v Barclays Bank of Kenya Limited* [2019] eKLR, the court stated that: -
- “In my humble view, a reasonable person will consider the words to mean that the person who issued the cheque had no funds in the account or the same was countermanded. It becomes very difficult for a person to conclude that the cheque was dishonoured because of the bank’s administrative reasons. I find the words used to be defamatory of the plaintiff.”
83. In the present case, the fact that the payee grew cold feet to give the plaintiffs further instructions meant that it had concluded that it was risky to deal with the plaintiffs in the mega projects and the heavy financial implications connected therewith. Any reasonable person who got to know the transaction would form the conclusion that the cheque must have been dishonoured due to insufficient funds and not internal issues as suggested by the defendant.
84. In the end, this Court finds that the defendant breached the banker-customer contract, and that the marking of the bankers cheque ‘80’ meaning “refer to maker” or “refer to drawer” was defamatory of the plaintiffs.
85. On quantum, the plaintiff quoted several authorities and submitted that damages of Kshs. 10 million for each plaintiff was sufficient. Though the defendant has been found to be liable for libel, apart from Pw1, the plaintiffs did not call any evidence to show that after knowing the transaction or event, they had low estimation of the plaintiffs.
86. The Court considers the amount suggested by the plaintiffs to be on a higher side. Considering the standing of the plaintiffs as long experienced advocates in the legal profession, a sum of Kshs. 5 million for each plaintiff would be more reasonable.
87. The plaintiffs are hereby awarded Kshs. 5 million each plus costs of the suit. The aforesaid sum to attract interest at court rate from the date of judgment until full payment. The prayer for exemplary and punitive damages is refused since there was no evidence that was led to justify the same. The only evidence led was demand for apology and withdrawal of the defamatory material which in the Court’s opinion was not sufficient.
88. In the end the Court finds that the plaintiffs have proved their case to the required standard and enters judgment in their favour against the defendants as follows: -
- a. Special damages - Kshs. 56,335,282/=.**
  - b. General damages - Kshs. 10,000,000/-.**
  - c. Aggravated, Exemplary and/or punitive damages dismissed.**
  - d. Interest on the damages from the date of Judgement until payment in full.**
  - e. Cost of the suit to the plaintiffs.**

It is so decreed.

**DATED** and **DELIVERED** at Nairobi this 26<sup>th</sup> day of June, 2023.

**A. MABEYA, FCI Arb**

**JUDGE**



