REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CIVIL APPEAL NO. 154 OF 2019

CONSOLIDATED BANK OF KENYA LIMITED.....APPELLANT

VERSUS

KEN MURIUKI & PETER KIRIMI MBOGO t/a MBOGO & MURIUKI ADVOCATES.....RESPONDENT

(Being an appeal from the Judgment of the Hon. Stella Abuya (SPM) delivered on 30/10/2019 in Meru CMCC No. 122 of 2018)

JUDGMENT

1. Before the trial court, the respondent filed a plaint dated 09/07/2018, and sought judgment against the appellant payment of general and aggravated damages for breach of contract together with costs and interest at court rates from the time of deposit till payment in full. The respondent contended that the appellant's employees unlawfully pilfered money from their account thus making the money unavailable when demanded and thus subjecting them to public humiliation, ridicule, embarrassment and odium before their client to whom the money was due.

2. By a defence dated 02/08/2018, the appellant denied having breached the customer-bank relationship as it had remitted to the respondent Ksh. 606,918.60, being the principal sum plus interest less withholding tax. It further denied that its employees had withdrawn money from the respondent's account either as alleged or at all.

3. After trial, the trial court found that the respondent had proved their case against the appellant and awarded general damages of Ksh.1Million for breach of bank-customer contract plus interest and cost. It is that decision that aggrieved the appellant who then preferred the present appeal raising only two (2) very succinct grounds. On the grounds, the appellant complains that the award of Ksh.1 Million as general damages to the respondent was in contravention of the law on breach of contract which only provides for compensation in the form of special and/or nominal damages and not general damages and that the award of Kshs 1,000,000 for general damages for the appellant's eight days' inadvertent delay in releasing Kshs 606,918 was erroneous and grounded upon the unproven claims that the respondent had been subjected to public humiliation, ridicule, embarrassment and odium.

4. In evidence, **PW1 Ken Muriuki,** the respondent's managing partner, testified that his firm, jointly with the firm of Mithega & Kariuki Advocates, deposited Kshs 588,320 in an interest earning account with the appellant pending the finalization of Meru High Court Civil Appeal No.15 of 2016. After the finalization of the appeal on 07/06/2018, he visited the appellant on 20/06/2018 with a view of transferring the cumulative amount to the respondent for onward transmission to their client but was given spurious reasons why the money was inaccessible. That on 26/06/2018 he went to the appellant's branch manager who after vigorous inquiry disclosed that the money had been withdrawn by the appellant's employees after which the respondent reported the matter to Meru Police Station as a consequence of which the erstwhile employees were arrested and charged. After the delivery of the judgment on Appeal, the respondent added, the client demanded the immediate payment of her money, threatened to report the matter to the Law Society of Kenya hence they were forced to pay her with their own money. That on 04/07/2018, the appellant reluctantly forwarded to the respondent a cheque for Kshs 606,918.60, which was far less the accumulated interest from the initial deposit, on the basis that once the fixed term expired, the deposit ended and no interest was earned because there were never renewal instructions. He contended that due to the breach of their customer-bank relationship, by failure to pay on demand, they were subjected to mental torture, public humiliation, ridicule, embarrassment and odium. He produced the OB extract, list of documents dated 09/07/2018, 2nd list of documents dated 22/08/2018 and a further list of documents dated 06/06/2019 containing letter dated 29/08/2018, and cheques dated 20/06/2018 in support of their case.

5. PW2 Manases Kariuki Karoki, an Advocate practicing in the firm of Mithega & Kariuki Advocates, in buttressing the testimony of PW1 further told the court that the delay by the appellant in releasing the money was from 20/06/2018 to 04/07/2018.

6. DW1 Earnest Manyara, the appellant's branch manager, told the court that the fixed account opened by the respondent was for a period of 6 months at an interest rate of 7.5% and he did not receive any instructions to extend it after its maturity. That upon request by the respondent for release of the money, the same could not be done as the money had been stolen by its former employees. That the situation was immediately remedied and Kshs 606,918.60, being the principle sum plus interest less withholding tax for the period of 6 months, paid

to the respondent on 28/06/2018. That there was no breach of customer-bank relationship as the respondent was fully paid by the appellant and as such appellant fulfilled its obligation in the contract between the parties by reinstating the respondent to the position they would have been in, had the theft not occurred.

7. The parties filed their submissions in respect to the appeal on 29/10/2020 and 10/11/2020 respectively. In the submissions, appellant contended that the trial court erred in awarding the respondent excessive and oppressive general damages of Kshs1,000,000 for an eight days' delay by the appellant in releasing their money, it being contended that there was no justification whatsoever for the amount awarded by the trial court as the respondent had failed to adequately demonstrate the aggravated injury they had suffered. It was concluded that since the respondent and their client were aware of the delay by the appellant in releasing the money, they did not suffer any injury. The appellant cited the case of **CFC Stanbic Bank Ltd v Otieno –Omunga & Ouma Advocates (2019) eKLR** in support of its submissions that where the information is limited in publication, it is an important matter to be taken into account and if not taken into account, an appellate court would interfere with the resultant award.

8. On their part, the respondent maintained that the award of Ksh.1,000,000 as general damages was extremely reasonable in the circumstances. The respondent relied on **African Corporation Bank Ltd v Zulfiquar Ali Jaffery(2016)eKLR, Kenya Grange Vehicle Industries Ltd v Southern Credit Banking Corporation Ltd(2016)eKLR and Otieno – Omunga & Ouma Advocates v CFC Stanbic Bank Ltd (2019) eKLR** in support of their submissions on when an appellate court would interfere with an award and for the position that a bank with whom a deposit is made is a debtor not a trustee.

9. This being a first appeal, the court is duty bound to re-appraise and re-analyse the evidence afresh, draw its own conclusions and make its own independent findings, bearing in mind that it did not have the advantage of seeing the witnesses testify. See ***Selle -v- Associated Motor Boat Co. Limited 1968 E.A. 123***. **T**he court has to appreciate that in the discharge of the aforesaid mandate, it should be slow in moving to interfere with the finding of fact by a trial court unless it was based on no evidence, misapprehension of the evidence or the trial court acted on a wrong principle in reaching the finding it did. See ***Musera Vs Mwechelesi & another (2007) 2KLR 159.***

10. It is not disputed that there existed a bank- customer relationship between the appellant and the respondent. It is also not in contention that the respondent deposited money with the appellant. It is further conceded that the money was subsequently pilfered by the appellant's employees who were later arrested and charged. It is also conceded that the money was restored to the respondent's account 14 days after the demand had been made and more than one year after the fact of its theft had been brought into the attention of the appellant. What now remains for determination is whether the amount of Kshs1,000,000 awarded for general damages was properly made and if properly made whether the same is exorbitant and excessive.

11. It was in the evidence by the respondent that their client camped in their offices demanding immediate payment of her money and further threatened to report them to LSK which exposed them to public ridicule, humiliation and odium. It was further alleged that as a result of the appellant's actions and delay, they were forced to pay the client from their own money. In my opinion, the relationship between advocate and client is that of utmost fidelity imposed by law in handling client's property and giving of true accounts therewith related. It was thus expected that if the only reason the client was kept away from her money was the pending appeal then, once the appeal was decided in her favour, no further justification could be proffered by the advocate. I take notice that, erroneously or rightfully, most Kenyan and the world over, the jokes and prototypes given to lawyers are never flattering. From such profiling of the law profession as dishonest and cheats, every time an advocate offers a reason for not paying his client now, the obvious conclusion would be that the client is being cheated. Of course when an advocate is honest but is incapacitated by the action or omissions by a third party, it can only result in frustration and humiliation. Such is the scenario that casts an advocate in bad light, shutters his reputation and in appropriate cases attract damages even for defamation. In this matter no such damages were sought and to my mind the evidence led on how the client reacted was thus peripheral to the dispute even though it proved an injury to personal professional esteem.

12. This appeal however is mounted upon the general principle of law that general damages are not ordinarily awardable for breach of contract. That principle is not new but well established and indeed trite. The Court of Appeal in ***Kenya Tourism Development Corporation Vs Sundowner Lodge Ltd 2018 eKLR*****,** affirmed the general rule that general damages are not recoverable in cases of breach of contract. The rationale for that rule was explained by the court in the case of **Consolata Anyango Ouma vs. South Nyanza Sugar Co. Ltd (2015)e KLR** to be: -

> **"the next question is whether the appellant was entitled to damages as a result of the breach. As a general principle, the purpose of damages for breach of contract, subject to mitigation of loss, is to put the claimant as far as possible in the same position he would have been if the breach complained of had not occurred. This principle is encapsulated in the Latin phrase *restitutio in integrum.* The measure of damages as established in the case of Hadley v Baxendale (1854) 9. Exch. 341 is such as may be fairly and reasonably considered arising naturally from the breach itself or such as may be reasonably contemplated by the parties at the time the contract was made and a probable result of such breach.**

13. However, in reality the Rule is a general one with also known exceptions. The court of appeal in ***Capital Fish Kenya Limited v Kenya Power & Lighting Company Limited (2016)*** **eKLR ,** observed that there are known exceptions to the general rule. The court said:

> **"…whereas the general legal principle is that courts do not normally award damages for breach of contract, there are exceptions such as when the conduct of the respondent is shown to be oppressive, high handed, outrageous, insolent or vindictive."**

14. It is thus not the law that no general damages are ever awardable where a clear breach is established. My appreciation of the law is that every time there is a breach of a contract, the innocent party is, from the onset, entitled to nominal damages but will also get general damages where he proves an injury flowing as a natural consequence from the breach. I find this to be the congruent position in both text books and stare decisis. The author of **Anson's Law of Contract, 28th Edition at page 589 and 590** takes the position that: -

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

15. On the same subject, the author of **The Halsbury's Laws of England, Third Edition vol. II**, writing on remedies available to the victim of breach of contract says : -

> **"where a plaintiff whose rights have been infringed has not in fact sustained any actual damage therefrom, or fails to prove that he has; or although the plaintiff has sustained actual damage, the damage arises not from the defendant's wrongful act, but from the conduct of the plaintiff himself; or the plaintiff is not concerned to raise the question of actual loss, but brings his action simply with the view of establishing his right, the damages which he is entitled to receive are called nominal. Thus in actions for breach of contract nominal damages are recoverable although no actual damage can be proved.**

16. In ***Kinakie Co-operative Society Vs Green Hotel (1988) KLR 242***, the Court of Appeal while taking the position that damages are indeed awardable for breach of contract in deserving cases held: -

> **"where damages are at large and cannot be quantified, the court may have to assess damages upon some conventional yardstick. But if a specific loss is to be compensated and the party was given a chance to prove the loss and did not, he cannot have more than nominal damages."**

17. That being the position of the law I am unable to accede to the appellant's main contention that general damages are never awardable for breach of contract. Before the trial court, breach was in deed admitted by DW1 when he conceded that there had been a breach but contended that there had been no convenience (sic) to the respondent because the money was restituted soon thereafter.

18. With an admitted breach of contract on record, the only question that outstands for determination is whether the sum awarded was exorbitant to merit interference by this court as a first appellate court. In coming to the award, the trial court gave the following reasons:

> **"Taking into account all the circumstances of this case and the aggravated nature of the injury the plaintiff suffered of his client camping at his office for several days and threatening to report him to LSK which forced the plaintiff to pay the client using his personal funds and the delay of 8 days the defendant took before he paid the plaintiff his money after the plaintiff reported the matter to the DCIO, I award to the plaintiff a global figure of Kshs 1 million as GD for breach of contract"**

19. I get it that the trial court took into account the fact of the plaintiff money having been converted, unlawfully, that pressure was put to bear upon the client for immediate payment leading to the client using own resources to pay together with the fact that it took the plaintiff's demand for the appellant to discover the loss or take steps as aggravating factors. I am not convinced that any of such matter was irrelevant or undue for. Instead, I consider those to have been the relevant factors for consideration. I also do not consider the sum of to be inordinately high or exorbitant.

20. That is the approach I read the High Court and the Court of Appeal to stress in the decisions of **Otieno Omuga & Ouma advocates vs CFC Stanbic Bank Ltd [2015] eKLR, CFC Stanbic Bank Limited v Otieno-Omuga & Ouma Advocates [2019] eKLR** and **Obongo & Others vs Munucipal Council of Kisumu [1971] EA91.** The same approach was adopted by the trial court.

21. Based on the above principles, I do find no error committed by the trial court in reaching the decision it did reach. I find that the court did not take any irrelevant factor into consideration but indeed gave regard the relevant matters she was bound to consider. The upshot is that the entire appeal lacks merit and I therefore order that it be dismissed with costs.

DATED, SIGNED AND DELIVERED AT MERU, ONLINE, THIS 19TH DAY OF MARCH, 2021.

PATRICK J O OTIENO

JUDGE