



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CIVIL CASE NO 124 OF 2014

DANIEL KARURU MWAURA

T/A KARURU MWAURA & CO ADVOCATES.....PLAINTIFF

VERSUS

BARCLAYS BANK OF KENYA LIMITED.....DEFENDANT

JUDGMENT

INTRODUCTION

1. By a Plaint dated 25th April 2014 and filed on 7th May 2014, the Plaintiff sought the following reliefs against the Defendant herein:-
- 1. Restitution of Kshs 1,000/= deducted from the Plaintiff's account as cheque stopping fees.**
 - 2. Kshs 40,000/= per month from 1/2/2014 for 37 years or Kshs 17,760,000/=.**
 - 3. Interest on Kshs 8,800/= as 25 % per month deducted from the Plaintiff's account on 21st January 2014 until the 24th January 2014.**
 - 4. General damages.**
 - 5. Interest on (a), (b) and (c) above at 25% or any other rate for the tie being charged n overdrafts by the Defendant.**
 - 6. Aggravated and exemplary (sic).**
 - 7. Interest at 25% per annum on Kshs 497,285/= illegally debited to (sic) the Plaintiff's account from 16th January to 24th January 2014.**
 - 8. An order requiring the Defendant to issue a written apology detailing the unprofessional, clumsiness, incompetency and criminal manner in which the defendant conducted itself in handling the plaintiff's case.**
 - 9. An audit to be conducted on the Plaintiff's accounts held with the Defendant from 1998 to date the Defendants (sic) expense to establish if there were other illegal deductions from the Plaintiff's account.**
 - 10. Costs and interest.**
2. His Further List and Bundle of Documents dated 28th March 2017 was filed on 29th March 2017. Pursuant to the court's directions of 16th January 2019, on 28th February 2019, the Plaintiff filed his Witness Statement cross-referencing its Bundle of Documents of even date.
3. On its part, the Defendant entered appearance on 18th July 2014. On 7th August 2014, it filed its Statement of Defence dated 30th July 2014. The Witness Statement of its Branch Operations Manager, Evans Kamau (hereinafter referred to as "DW 1"), was dated 30th October 2017 and filed on 31st October 2017. Pursuant to the aforesaid directions of 16th January 2019, the Defendant filed its fresh Bundle of Documents on 2nd April 2019.

4. In her Ruling of 16th February 2017, Njuguna J dismissed the Plaintiff's Notice of Motion application dated 27th August 2017 in which he had sought that judgment on admission be entered against the Defendant herein and/or that the Defendant's Statement of Defence be struck out.

5. Both DW 1 and the Plaintiff herein adopted their respective Witness Statements as their evidence-in-chief. After the close of their respective cases, the Plaintiff filed Written Submissions dated 11th June 2020. His List and Bundle of Authorities dated 23rd June 2020 were filed on 24th June 2020. The Defendant's Written Submissions were dated 6th July 2020.

6. Parties asked this court to deliver its Judgment based on their respective Written Submissions, which they relied upon in their entirety.

THE PLAINTIFF'S CASE

7. The Plaintiff opened two (2) accounts with the Defendant herein in 1998. These were Account No 075-22238790 (hereinafter referred to as

"the Client account") and 075-1743165. On 19th January 2014, he issued two (2) cheques, namely, Cheque No 101673 for Kshs 123,738/= and Cheque No 101674 for Kshs 280,847/= to Patrick Muchiru Githuka t/a M.G. Stores Ltd and Suprema Dry Cleaners and Lucy Wairimu Githuka (hereinafter referred to as "the Clients"). At the material time, his Client account had Kshs 585,866.99 which was sufficient to honour the aforesaid two (2) cheques and leave a credit balance of Kshs 181,281.99.

8. On 23rd January 2014, the said Patrick Muchiru Githuka called and informed him that the said two (2) cheques had bounced on account of there having been insufficient funds in his account. Upon enquiring from the Defendant, he was informed that his Client Account had a debit balance in the sum of Kshs 391,000/= following withdrawal of Kshs 497,285/= through the credit card on 9th January 2014. He denied ever having been issued with a credit card on the Client Account which was a current account.

9. He also obtained the bank statement for the said Client Account No 075-22238790 and noted that it had been indicated that he had issued a cheque to Nairobi Water Company for Kshs 497,285/=. On checking the counterfoil, it showed that he had paid Nairobi Water Company Kshs 4,972.86, which he duly notified the Defendant.

10. As there was no response from the Defendant to make the necessary reversals to the said Client account, he paid his client the sum of 404,585/= from other sources. He took issue with the Defendant for not having called him regarding the amount of Kshs 497,285/= as it was routine that it would call him whenever there was a cheque worth Kshs 20,000/= to be paid out of the Client Account.

11. A sum of Kshs 8,800/= was debited from his Client Account. His Statement from 1st to 31st January 2014 showed that the Defendant debited a sum of Kshs 1,100/= for stopping the cheques which he averred he did not do. After complaining about the same, on 23rd January 2014, the Defendant debited a sum of Kshs 12,800/=.

12. As a result of the Defendant's actions, his Clients terminated instructions for collecting rent on their behalf from which he used to earn 10.98% per month on all rents collected. He used to earn a sum of Kshs 40,000/= every month and a guaranteed sum of Kshs 500,000/= annually from offering the Clients conveyancing services. He also lost business from Broadways Limited and Suprema Dry Cleaners Limited, which he had incorporated.

13. Despite explaining to his Clients what had transpired, he was unable to get back the business. The Plaintiff had suffered as he was unable to get business from multinational and government institutions which had required audited accounts for at least six (6) years. The Law Society of Kenya (LSK) also wrote to him demanding to explain why he had issued bounced cheques which amounted to professional misconduct.

14. He thus urged the court to allow his Complaint as prayed.

THE DEFENDANT'S CASE

15. On 9th January 2014, the Defendant erroneously posted in the Plaintiff's Client account a cheque in favour of Nairobi Water and Sewerage Company in the sum of Kshs 4,927.85 as Kshs 497,285/=. This happened at a time when there was a countrywide malfunction of its banking system. Before the said system could be rectified, the Plaintiff's aforesaid cheques were presented for payment. The same could not be honoured because the Client Account reflected that it had insufficient funds.

16. Upon being notified of the error, it reversed the entries as well as the levies that had been deducted from the Client Account. It gave the Plaintiff a detailed account of what had transpired and to maintain a ban-customer relationship, it proposed to pay him a sum of Kshs 1,000,000/=.

17. It was emphatic that the Plaintiff's claim was unjustified and urged this court to dismiss the same.

LEGAL ANALYSIS

18. There was no dispute that the Defendant debited the Plaintiff's Client Account with a sum of Kshs 497,285/= and bank charges. It was also not in dispute that the Defendant made the necessary reversals. What was in contention was whether or not the Plaintiff was entitled to the prayers that he had sought in his Complaint as the said reversal was not done immediately he brought it to the attention of the Defendant herein. The error was corrected after fourteen (14) days of the wrongful debiting of the Plaintiff's Client Account.

19. As the Plaintiff correctly stated, the Defendant was under a contractual obligation not to expose him to injury. He placed reliance on several cases amongst them **John Wambugu Njoroge vs Kenya Commercial Limited Civil Appeal No 179 of 1992** (unreported) and **C.H. Mehta & Co Advocates vs Standard Chartered Bank Limited [2014] eKLR** where the common thread was that damages would be awarded to compensate a party for injury suffered.

20. In this respect, he urged this court to award him a sum of Kshs 6,000,000/= as reasonable and fair compensation for the injury that he suffered to his reputation as a consequence of the dishonour of the two (2) cheques.

21. On its part, the Defendant argued that it had made amends to rectify the situation which was a clear demonstration of its honest conduct. It submitted that the Plaintiff did not give any justification why he applied a multiplier of thirty seven (37) years. It placed reliance on the case of **Henry Kuria Karara t/a Westminster Merchants vs Nation Media Group Limited [2015] eKLR** where the court therein dismissed the case for failure by the plaintiff to justify the multiplier he adopted. It also argued that his claim for interest was misleading as the error was reversed two (2) days after it was notified of the same.

22. It was categorical that the letters the Plaintiff produced to show that he had collected and forwarded rent to the Clients could not be deemed to have been evidence of his engagement as the Clients had not acknowledged the same. It added that he had submitted a letter dated 20th January 2014 terminating the engagement yet the cheques were presented for payment on 21st January 2014 and dishonoured on 23rd January 2014.

23. It placed reliance on the case of **Nyamongo & Nyamongo Advocates vs Barclays Bank of Kenya Ltd [2015] eKLR** that the Plaintiff also relied upon where the court awarded a sum of Kshs 500,000/= for breach of contract and **Barclays Bank of Kenya vs Francis Manthi Masika t/a Manthi Masika & Co Advocates [2020] eKLR** where Odunga J awarded the Respondent therein a sum of Kshs 2,000,000/= where its cheque had been dishonoured. It urged this court not to award aggravated damages as the same was not justified.

24. A perusal of the Plaintiff's Written Submissions appear to have focused only on the award for damages for breach of contract. He did not submit on the other reliefs that he had sought and merely stated that he was entitled to the prayers he had sought in the Plaint. This made it difficult for the court to analyse his claim for loss of business. Indeed, as the Defendant argued, he failed to justify why he was entitled to a multiplier of thirty seven (37) years. It was the view of this court that that claim was speculative and was not reasonably foreseeable by the Defendant in case of its breach of contractual obligations to the Plaintiff herein.

25. The Plaintiff did not also lead any evidence and/or justify why he would have been entitled to twenty five (25%) per cent interest on the sums that had been debited from his account. He did not also demonstrate that he lost the opportunity to utilise the sum of Kshs 181,281.99 that was the credit balance that would have been left in his Client account had it not been erroneously debited and/or that he incurred loss to which interest needed to be paid for him to be restored to the same position as he had been before the erroneous debit was effected.

26. Having said so, this court agreed with him entirely that he was owed a duty of care by the Defendant. The Defendant had a fiduciary duty not to expose him to loss, damage, embarrassment and/or ridicule by not honouring his cheques where there were sufficient funds in his Client account. Indeed, failing to honour a cheque from a Client Account amounted to professional misconduct for which disciplinary proceedings could be commenced.

27. The Plaintiff was clearly distressed and put in a humiliating position by the Defendant's omissions. It was irrelevant that the error was caused by a hitch in its banking systems. The Defendant therefore ought to be held liable for the inconvenience and loss of reputation that the Plaintiff suffered.

28. General damages connotes a generic term for the different heads of claims, which are monetary award but where no particular value can be attached. At the very least, it can only be assessed to compensate an injured party but not to bring him to the exact position he was in before such injury or loss.

29. It must be understood that money can never really compensate a person who has suffered a loss, be it loss of reputation, loss of business or injuries sustained. No amount of money can remove the pain that a person goes through no matter how small or insignificant an injury or loss may appear to be. It would in fact be difficult to say with certainty that a particular amount of money would be commensurate with the injuries or loss that a person has sustained. It is merely an assessment of what a court would find to be reasonable in the circumstances to assuage a person who has suffered an injury or loss.

30. However, this assessment is not without limits. A court must have presence of mind to ascertain to itself the sum of general damages that courts and especially appellate courts would ordinarily award in respect of a particular injury or loss. A court must therefore be guided by precedents.

31. This court noted that the Defendant offered to pay the Plaintiff a sum of Kshs 1,000,000/= to compensate him for the inconvenience that he suffered. It is not clear whether the Plaintiff rejected this figure. Bearing this in mind and the fact that the Plaintiff did not demonstrate what loss he suffered, it was the considered view that a sum of Kshs 2,000,000/= would be adequate to compensate him for the inconvenience that he suffered.

32. In this respect, this court had due regard to the cases of **Nyamongo & Nyamongo Advocates vs Barclays Bank of Kenya Ltd**, **Barclays Bank of Kenya vs Francis Manthi Masika t/a Manthi Masika & Co Advocates**, **C. Mehta & Co Ltd vs Standard Bank Limited (Supra)**, **CFC Stanbic Bank Ltd vs Otieno Omuga & Ouma Advocates [2019] eKLR**.

DISPOSITION

33. For the foregoing reasons, the upshot of this court's decision was that the Plaintiff's suit that was filed on 7th May 2014 was partially

merited and as a result, judgment be and is hereby entered in favour of the Plaintiff against the Defendant for the sum of Kshs 2,000,000/= together with interest thereon at court rates from the date of judgment plus costs.

34. It is so ordered.

DATED and DELIVERED at NAIROBI this 27th day of October 2020

J. KAMAU

JUDGE