



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 197 OF 2012

PETER NGANGA MAKURA.....PLAINTIFF

VERSUS

STANDARD CHARTERED BANK KENYA LIMITED.....DEFENDANT

JUDGMENT

1. The plaintiff, *Peter Nganga Makura* instituted suit against the defendant *Standard Chartered Bank Kenya Limited* by way of a plaint dated 26th April 2012 which was amended on 29th March 2016. In his amended plaint, the plaintiff sought the following reliefs:

A. Damages for breach of contract;

B. Loss of credit and reputation;

i. General and Special damages in defamation;

ii. Aggravated and Exemplary damages;

iii. Costs of the suit;

iv. Such additional damages as the court may consider appropriate in the circumstances; and

v. Interest on A, II and III above.

2. The plaintiff averred that he was a holder of a current account number [particulaes withheld] which he operates in the defendant's Kiambu Branch and by virtue of the customer bank relationship, he had a contract with the defendant whose express and/or implied terms required the defendant to offer him banking services which included honouring of cheques drawn by him provided he had sufficient funds in his account.

The plaintiff further claimed that on 9th February 2012, he drew a personal cheque number 000055 for KShs.450,000 against his aforementioned account in favour of *Autocruise Car Dealers Limited* and despite having a balance of KShs.1,101,100.65 in his account, the defendant failed to honour the cheque; that dishonouring the cheque in those circumstances amounted to a breach of the defendant's duty towards the plaintiff as particularized in paragraph 10 of the Amended plaint(hereinafter the plaint); that subsequently on 15th February 2012, the defendant caused to be written, printed and published words in reference to him and the dishonoured cheque as follows:

“payment stopped – confirmation awaited.”

4. It is the plaintiff's case that the said words in their natural and ordinary meaning were meant and were understood to mean inter alia that the plaintiff is deceitful and lacks integrity; that he is not capable of honouring his debts; that he is fraudulent and that he was a criminal. He in addition claimed that the defendant published the words maliciously, out of spite and ill will towards him as shown in the particulars stated in paragraph 18 (a) to (d) of the plaint; that the said words were written, printed and published with the aim of undermining him and assassinating his character; that the words damaged his reputation among persons to whom they were published who included his family and friends.

5. The plaintiff also pleaded that the dishonoured cheque was meant to be a deposit for purchase of a motor vehicle which he intended to use in his hardware shop business and after it was dishonoured, he was unable to purchase and use the vehicle as intended as a result of which he suffered loss as he was compelled to source alternative transport at a fee and he was also charged KShs.1,500 as penalty for bouncing the cheque. He pledged to give better particulars of the alleged loss during the hearing. He also claimed that he had promised to offer transport

services to his niece during her wedding on 21st April 2012 which promise he was unable to keep since the vehicle he intended to use for that purpose is the vehicle he had intended to purchase.

6. In its statement of defence dated 29th May 2012, the defendant denied the plaintiff's claim *in toto* and put the plaintiff to strict proof thereof. It invited the court to dismiss the suit with costs.

7. The case proceeded to full trial and during the hearing, each of the parties called one witness in support of their respective cases.

In his evidence, the plaintiff testified that on 8th February 2012, he had a discussion with the defendant's Kiambu Branch manager who advised him to transfer KShs.1,000,000 held in a fixed account in his favour to his current account to credit it with funds against which he could draw a cheque of KShs.450,000 which he required to place a deposit for the purchase of the vehicle he needed for his business and personal use. The internal transfer of the money was effected on the same day and he drew a cheque in favour of *Autocruise Limited* (the vehicle dealer) dated 9th February 2012. A week later, he was surprised to hear from the dealer that upon presentation to his bank, the cheque had been dishonoured. He confronted his bank manager with the information. The manager informed him that the cheque had been returned unpaid by their head office. That being a member of the Kiambu Golf Club and a respected member of the society, when word got out to his golfing friends; business associates and family members that his cheque had been dishonoured, they started viewing him negatively as an untrustworthy person whose credibility and integrity was questionable which in turn tarnished his reputation and character.

8. In his evidence under cross examination, the plaintiff alleged that the cheque was dishonoured because of lack of sufficient funds in his bank account but he admitted that the return cheque advise from Equity Bank showed that payment was stopped awaiting confirmation. He also admitted that between 4th July 2011 and 13th February 2012, he had not withdrawn any large amount from his bank account and that he had signed the terms and conditions that governed his contract with the defendant. The plaintiff denied that the bank tried to contact him on phone before dishonouring the cheque and averred that the bank did not have a good reason for failing to pay his cheque as presented.

9. The defendant's witness *Justus Mumo* testified that he worked in the bank's validation department. In his written and oral evidence, he stated that the Central Bank which regulates the entire banking industry requires through the Central Bank of Kenya Prudential Guidelines that all cheques must go through the validation process before they are paid. The paying bank must confirm that the cheque was properly drawn and must verify its authenticity before it is paid in order to safeguard its customer's funds. Validation involved *inter alia* checking the specimen signature of the customer and studying the customer's account operations; that if in the process of validation doubts arise as to the authenticity of the cheque, the call back system is activated and the customer is called to confirm or deny having drawn the cheque in question; that in this case, there were doubts regarding the signature on the cheque and the cheque's authenticity since the operations of the plaintiff's account showed that he had not issued big cheques in a long time; that when efforts to contact the plaintiff to confirm whether or not he had issued the cheque failed, a decision was made to return the cheque unpaid in order to safeguard his funds. He denied the plaintiff's claim that the cheque was dishonoured for lack of sufficient funds. He produced as D exhibit 1 the call log S/No. 0000/55 to prove his claim that the defendant had indeed called the plaintiff before dishonouring the cheque and the contract executed by the parties as D exhibit 2.

10. In his evidence under cross examination, DW 1 denied the plaintiff's claim that the defendant had refused to honour his instructions to pay the cheque as drawn and claimed that at the time the cheque was returned unpaid awaiting confirmation, given the transactions in his account, the defendant had reason to believe that the plaintiff had not issued the said cheque.

11. After both parties concluded their cases, they filed written final submissions to buttress their respective positions. The plaintiff filed his submissions on 15th November 2018 while those of the defendant were filed on 28th November 2018.

12. After carefully considering the pleadings, the evidence tendered by both parties as well as their written submissions and the authorities cited, I find that it is not disputed that at the material time, there was a contract between the plaintiff and the defendant for banking services and that as of 9th February 2012 when the plaintiff drew the cheque in favour of the vehicle dealer, there were sufficient funds in his account to cover the amount of the cheque but this notwithstanding, the cheque was dishonoured.

13. What is strongly contested which in my view constitutes the issues for determination in this case is whether the defendant's action of dishonouring the cheque as drawn and presented amounted to a breach of the contract executed by the parties and whether the defendant's above stated action was defamatory to the plaintiff. Depending on the answer to the above two issues, the other issues the court needs to consider is whether the plaintiff is entitled to the reliefs sought in the plaint and what orders should be made on costs.

14. Starting with the first issue, as noted earlier, it is not disputed that the plaintiff held a current account with the defendant which he had operated for about 40 years. The plaintiff in his evidence under cross examination admitted that his relationship with the defendant was governed by a contract whose terms and conditions were produced by DW 1 as D exhibit 2.

15. I have carefully read through the said terms and conditions. I note that they are standard terms applicable to all the bank's customers who included the plaintiff herein. Clause 2 thereof deals with the duties and obligations of both parties to the contract in relation to the operation of accounts held by the bank's customers. It specifically provides for the manner in which customers should issue instructions to the bank and the bank's duty to honour such instructions subject to three exceptions specified in *Clause 2 (c) (i) and (ii)*.

16. Under *Clause 2 (b) (i)*, the bank had an obligation to make payment of cheques, draft bills, promissory notes, acceptances, negotiable instruments, standing orders, direct debits, mail and telegraphic transfers, purchases and sales of foreign currencies and to accept any other instructions duly authorized by the customer but it did not have any obligation to pay if the instructions were not clear or if it had reason to doubt that the instructions had not been issued by its customer.

It is important to reproduce the full text of *Clause 2 (c) (i) and (ii)* in order to have its full import appreciated. *Clause 2 (c)* provides as

follows:

“The bank may refuse to act on instructions if:

the instruction is not clear;

i. The Bank has reason to believe that the customer did not give the instructions; or

ii. The Bank believes that a law, regulation, code or other duty which applies to the bank may be broken by carrying out the instruction.”

17. In addition, *Clause 28 (b)* stipulates the extent of the bank’s liability to its customer and provides that:

“The Bank shall not be liable to the customer for not acting on the customer’s instructions for any reason under condition 2 (c) or 2 (i), or if the Bank cannot carry out its responsibilities under these conditions as a result of anything that is beyond the bank’s reasonable control. These include machine failure and industrial disputes.”

18. A perusal of *Dexhibit 2* clearly shows that the aforesaid terms and conditions were duly executed by both parties and needless to state, both parties were bound by them.

Given the foregoing and considering the evidence presented by the parties in this case, can it be said that the defendant’s failure to honour the cheque in question was unlawful and amounted to a breach of their contract?

19. To answer this question, it is important to examine the reason given by the defendant for failure to honour the plaintiff’s cheque.

According to *DW 1*’s evidence, the defendant’s decision to return the cheque unpaid to the drawer’s bank *Equity Bank* despite sufficiency of funds in the plaintiff’s account was made after doubts arose regarding the authenticity of the cheque during its validation process and efforts to contact the plaintiff to confirm the validity of the instructions contained in the cheque failed as he could not be reached on his phone. The defendant tendered evidence to support this claim through call log S/No. 000055 produced as *Dexhibit 1*.

The call log confirms that a call was placed to the plaintiff through the defendant’s call back system on 14th February 2012 at 9:05am but the telephone number used namely 071176421 had no tone meaning that the call did not go through. The plaintiff in his evidence confirmed that this is the telephone number he was using at the time and it is the same number he had given to the bank as his telephone contact.

20. The defendant through the evidence of *DW 1* and in its submissions stated that the reason for not paying the cheque was that it doubted its authenticity because of the signature on it and the fact that the plaintiff had not issued big cheques in a long time and the amount on the cheque was not therefore in sync with the operation of the account; that when these doubts were not cleared as the plaintiff could not be reached on phone, in compliance with the *Central Bank of Kenya Prudential Guidelines*, the cheque had to be returned unpaid.

21. The plaintiff in his evidence and submissions disputed the reason offered by the defendant and asserted that its action was unlawful as the defendant was duty bound to honour his instructions to pay the cheque given that he had more than sufficient funds in his account; that his bank statements which he produced as *Pexhibit 3* revealed that he had transacted large sums of money through his account which ranged from KShs.200,000 to 1,000,000.

22. A close look at the said bank statements however reveals that for a period of about 11 months from 10th March 2011 to 13th February 2012 when the cheque was presented for payment, the outgoing debits in the plaintiff’s account did not exceed KShs.40,000. In my view, considering that the cause of action arose in the year 2012 when KShs.450,000 cannot be said to have been a small amount bearing in mind the operations of the plaintiff’s account just before the said cheque was presented for payment, the defendant cannot be faulted for having had serious misgivings about the authenticity of the cheque given that there were also queries regarding the genuineness of the signature on the cheque. Given the facts disclosed in this case and the material placed before me, I am persuaded to find that the defendant’s reason to stop payment of the cheque was plausible and fell within the exceptions covered under *Clause 2 (c) (i)* of the terms and conditions that governed the contractual relationship that existed between the parties.

23. In my opinion, *Clause 2 (c) (i) and (ii)* is an expression of the bank’s obligation to act prudently and diligently when dealing with funds entrusted to it by its customers like the plaintiff in order to protect their interests by ensuring that no part of the funds is paid to unauthorized persons. Banks and their customers have a fiduciary relationship which places a duty of care on the bank to its customers to ensure that their funds are secure and that they are not exposed to any injury. The defendant’s apprehension regarding the validity of the instructions on the cheque and its diligence is confirmed by the fact that it made efforts to contact the plaintiff to verify the instructions but the call placed to the plaintiff went unanswered. This is confirmed by the call log extracted from the banks system (*Dexhibit 1*).

24. Given the evidence on record, I have no doubt in my mind that the defendant’s action of returning the cheque unpaid was done in good faith in accordance with its duty to protect its customer’s funds. There is nothing to suggest that the action was done maliciously or out of spite as alleged by the plaintiff.

25. I have studied the authorities cited in the plaintiff’s written submissions in support of his case. These are: ***C Mehta & Co Ltd V Standard Bank Ltd, HCC No. 586 of 2009; Bank of Baroda Kenya Ltd V Timwoods Products Ltd, CA 132 of 2001 [2008] eKLR; Equity Bank Ltd & Another V Robert Chesang HCCA No. 571 of 2012*** and ***Hon. Nicholas R.O. Ombija V Kenya Commercial Bank, HCC No. 547 of 2008***. I find that the authorities are distinguishable from the present case in that the decisions made in those authorities were based on

facts which are completely different from the facts in the instant case. In *C Mehta & Co Ltd V Standard Bank Ltd*, the defendant was found liable for breach of contract mainly because it had refused to honour four cheques issued by the plaintiff on grounds of insufficient funds in the plaintiff's account while in truth the account had sufficient funds to pay three of the four cheques. In *Bank of Baroda Kenya Ltd V Timwoods Products Ltd*, the bank had cited existence of a court order as the reason for not paying 18 cheques issued by the plaintiff which reason was rejected by the court. The other two cases related to the respective banks refusal to honour payment of credit cards and ATM card presented by their customers as a mode of payment for purchase of goods in various establishments even though the customers had sufficient funds in their respective bank accounts to meet the cost of the goods. It is thus clear that none of the authorities cited related to failure of the bank to honour payment of a cheque on grounds that the bank had reason to believe that the cheque had not been drawn by its customer.

26. For all the foregoing reasons, I have come to the conclusion that the defendant's action was justified and was lawful as it was covered by *Clause 2 (c) (i)* and *Clause 28* of the terms and conditions of the contract executed by the parties.

I am hence satisfied that the plaintiff has failed to prove on a balance of probabilities that the defendant's action of returning the cheque unpaid amounted to breach of their contract.

It may be worth noting that even if the plaintiff had succeeded in proving his claim for breach of contract, he would only have been entitled to an award of nominal damages since he did not adduce any evidence to prove that as a result of the alleged breach, he suffered any loss.

27. Regarding the claim for damages for defamation, the plaintiff has alleged that the defendant's aforesaid action and subsequent publication of the words "*payment stopped – confirmation awaited*" on the return cheque advise was defamatory as it injured his reputation and exposed him to ridicule, odour and contempt by his business associates, family members and friends. This allegation was denied by the defendant.

28. To properly address this issue, it is important to remind ourselves of the essential elements of the tort of defamation. For a plaintiff to succeed in an action for defamation, he must prove on a balance of probabilities that the words complained of were published by the defendant in reference to him; that the words were false and malicious and lastly, that the words were injurious to his reputation. Publication means communication of the offending words or information to a third party or other persons other than the person claiming to have been defamed.

29. In this case, the defendant has admitted having published the words on the return cheque advice to Equity Bank, which in turn relayed the information to its customer in whose favour the cheque was drawn. There is therefore no doubt that the words were published to Equity Bank and to Autocruise Dealers Ltd. The question that this court needs to answer is whether the plaintiff has proved to the required standard that the words were false, malicious and injurious to his reputation and character as alleged.

30. In my view, a plain and natural interpretation of the words on the return cheque advice reveals that the cheque was dishonoured not because of insufficiency of funds in the plaintiffs bank account but because payment was stopped pending confirmation. According to the evidence on record, the words reflected the true position regarding why payment of the cheque was stopped. The plaintiff has not adduced any evidence to prove that this was not the factual position and that the cheque was dishonoured for other reasons from which malice on the part of the defendant could be inferred. The words on the cheque return advice are self-explanatory. Any reasonable person who read the words would see why payment of the cheque was stopped. The plaintiff did not avail any witness to support his claim that publication of the said words injured his reputation in any way. The letter dated 15th February 2012 from Autocruise Car Dealers did not suggest that the dealer thought any less of the plaintiff after publication of the words complained of. In the premises, I am satisfied that the plaintiff has failed to prove his claim for defamation against the defendant to the standard required by the law.

31. In the end, I have come to the conclusion that the plaintiff has failed to prove his entire case against the defendant on a balance of probabilities. He is thus not entitled to any of the reliefs sought in the amended plaint dated 29th March 2016. It is my finding that the plaintiff's case lacks merit and it is consequently dismissed with costs.

It is so ordered.

DATED, DELIVERED and SIGNED at NAIROBI this 31st day of January, 2019.

C. W. GITHUA

JUDGE

In the presence of:

Mr. Njue for the plaintiff

Mr. Dar for the defendant

Mr. Salach: Court Assistant