REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVL SUIT NO. 13 OF 2014

HABIHALIM COMPANY LIMITED.....PLAINTIFF

VERSUS

BARCLAYS BANK OF KENYA LIMITED.....DEFENDANT

JUDGEMENT

1) Habilhalim Co. Ltd, the plaintiff herein, purchased bankers cheque no. 10072049 from Barclays Bank (K) Ltd, Nkurumah Brand, the defendant herein for USD 29,127/20 in favour of Bollore Africa Logistics Ltd. The cheque was returned unpaid upon presentation on its due date with the remarks 'refer to maker'. Being aggrieved the plaintiff filed this suit seeking for *inter alia*:

i. General damages for slander plus interest at court rate from the date of filing suit until judgment is entered.

ii. General damages for the breach of the duty of care between the plaintiff and defendant plus interest at court rate from the date of filing suit until judgment is entered.

iii. Exemplary and punitive damages.

iv. Costs of the suit.

v. Any other relief that the honourable court may deem fit and appropriate in the circumstances of the case.

2) The defendant filed a defence denying the plaintiff's claim. The plaintiff successfully applied for the defence to be struck out and for entry of judgment. The suit therefore proceeded for hearing as a formal proof.

3) When this suit came up for hearing, the plaintiff presented the evidence of a single witness namely Adan Dahir Ibrahim (PW1). The aforesaid witness adopted the contents of his written witness statement as his evidence in chief. PW1 stated before this court that he is a director of the plaintiff company which does transport business. He also stated that the plaintiff company operated a La Riba, United States Dollar account no. 0227249587 with the defendant bank.

4) PW1 further stated that on 24.9.2013, the plaintiff purchased bankers' cheque no. 10072049 for USD 29,127/20 drawn in favour of M/s Bollore Africa Logistics Ltd. He averred that at that time, the plaintiff's dollar account had a credit balance of USD107,001/74. PW1 said that on 15.10.2013, the plaintiff was shocked when it was informed that the bankers' cheque it it issued to M/s Bollore Africa Logistics Ltd had been dishonoured due to lack of sufficient funds.

5) The plaintiff stated that the defendants' act was negligent and reckless. The plaintiff further stated that it never received any explanation from the defendant as to why the bankers cheque was dishonoured yet there was sufficient funds in its account despite making several requests. The plaintiff felt defamed and was therefore prompted to file this compensatory suit.

6) PW1 further stated that the defendant's use of the words **"insufficient funds**" greatly injured the plaintiff since those words were understood to mean inter alia:

a) That the plaintiff has no integrity.

b) That the company has no funds to carry out its core business.

c) The company is untrustworthy

d) *That the company is fraudulent and dishonest*.

7) PW1 went further to aver that the defendant's failure to honour the bankers' cheque constituted a flagrant breach of duty ofcare the bank owed to the plaintiff.

8) The plaintiff also stated that the defendant's act damaged the plaintiff's reputation in the transport industry and has been perceived by its customers and peers with ridicule and odium.

9) PW1 said that the beneficiary of the dishonoured cheque immediately declined to accept any further payments via bankers' cheques drawn on the defendant bank. The plaintiff stated that the defendant failed to tender an apology despite the plaintiff making a demand.

10) At the close of the plaintiff's case, learned counsels appearing in this matter were invited to file submissions. After considering the evidence and the rival submissions three issues arose for the determination of this court vizly:

i. Whether the use of words 'insufficient funds' by the defendant were defamatory of the plaintiff.

ii. Whether the defendant was in breach of the banking contract?

iii. **Whether the plaintiff is entitled to quantum and if yes how much?**

11) The first two issues are interrelated therefore I will determine them together. It is not in dispute that the relationship between the plaintiff and the defendant is that of a banker and a customer. Before determining the matter on its merits, the defendant has raised a preliminary issue while cross-examining the plaintiff's witness (PW1). The defendant appears to have taken up that issue in its written submissions.

12) It is the defendant's submission that the plaintiff instituted this suit without a board resolution authorizing the institution hence this suit is incompetent and in breach of Order 4 rule 1(4) of the Civil Procedure Rules. The defendant pointed out that the plaintiff through PW1 admitted. In response to the defendant's submissions, the plaintiff through its advocate forwarded to court vide the letter dated 4th June 2019 copies of the plaintiff's board resolutions in the minutes of 15.4.2019.

13) The aforesaid minutes clearly show that the board authorized the institution of this suit after it had already been filed. It would appear the company resolution were to operate retrospectively. It should be pointed out that the issue arose while PW1 was being cross-examined by the defendant's advocate. It was never raised as an issue in the defendant's defence which was struck out and that can explain the reason why no resolution was filed. The affidavit verifying the plaint is sworn by a person duly authorized by the plaintiff company. The law does not expressly state that company resolution cannot be made to operate retrospectively. For the above reasons I find the suit to be competently before this court.

14) Having disposed of the preliminary issue I now turn back to the first twin issues. It is the evidence of PW1 that the unpaid bankers' cheque was never returned to the plaintiff by the defendant but the plaintiff was only informed by the beneficiary that the cheque was returned due to insufficiency of funds by the beneficiary's bank Citi bank. According to the defendant the cheque was actually marked "refer to drawer" and not insufficient funds as intimated by PW1. I have already stated that it is not disputed that the relationship between the parties to this dispute is that of a banker and a customer.

15) Among the obligations that fall within the purview of a bank in the course of a contractual relationship with its customer is the obligation to obey and follow through with the instructions of its customer particularly where the customer's account is in credit. Such was the position taken in the case of ***Eunice Wairimu Muturi & another v James Maina Thuku & another [2018] eKLR*** as hereunder:

> ***"The general principles of law are that, the relationship between the Bank and its customer is contractual. The main basis of this relationship is one of debtor and creditor. As held in the case of; Foley vs Hill (1848), where the customer's account is in credit, then the bank is in effect the customer's debtor, that is to say that the bank owes the money to the customer. Where it is in debit, then the customer is the banker's debtor. In this contractual relationship, the bank owes the customer several duties which includes but not limited to: a duty to comply with the customer's mandate…It is important to realize that this duty not only refers to the original mandate completed when the customer opened the account but also various other documents which are interpreted as mandates, including standing orders, direct debits and cheques. Therefore, the Bank owes its customer an obligation to obey the customer's instructions based on the mandate given."***

16) It is evident that on the material day, the plaintiff purchased Bankers' cheque no. 10072049 from the defendant bank and thereafter gave clear instructions to the defendant to debit its account and remit the sum of USD 29,127.20 to Bollore Africa Logistics Limited through its bankers, namely Citibank Kenya.

17) In fact, whereas the aforesaid cheque was drawn by the defendant, it is clear that the said defendant was at all material times acting on the plaintiff's instructions pursuant to the existing relationship between them. The evidence on record, namely the bankers' cheque, confirms this position.

18) Further to the above, it is evident from the plaintiff's statement of account tendered in evidence that the abovementioned sum of USD 29,127.20 was debited from its account on the material day which goes to establish that the plaintiff's account had sufficient funds at the time. However, the cheque was subsequently dishonoured and hence returned to the defendant by Citibank Kenya. At no point was the plaintiff informed of the reason for such dishonour by the defendant.

19) It is therefore the submission of the plaintiff that once a cheque was wrongly returned unpaid when the plaintiff's account was in credit, the defendant is regarded as being in breach of its duty to the plaintiff to pay the customer.

20) The defendant has argued that it did not breach the banker-customer contract because the applicable clearing period of 21 days was that of Barclays Bank in New York. It is clear in my mind that the internal and external arrangements between Barclays Bank in Kenya and Barclays Bank in New York should not concern the plaintiff. The defendant was bound to explain in advance the applicable regulations in different jurisdictions where the bank operated.

21) The defendant cannot shift blame at all.The defendant in my view breached the bank customer relationship. 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**
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> **Where a cheque has wrongfully been dishonoured 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 returning 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.**
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> **In accordance with the general principle, substantial damages for breach of contract by the paying bank in failing to honour 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.**
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> **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 libellous. 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."**

22) In view of the foregoing, I find the defendant liable for breaching the contract by not only dishonouring the banker's cheque but doing so wrongfully and without any justification.

23) The other issue concerns itself with the questions as whether the words associated with the dishonoured cheque can be inferred as being defamatory in their natural and original meaning.

24) In seeking to determine what would amount to defamation, I make reference to the definition given by the Court of Appeal in ***Musikari Kombo v Royal Media Services Limited [2018] eKLR***, cited by the defendant as follows:

> ***"As succinctly put by this Court in S M W vs. Z W M [2015] eKLR:-***
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> ***"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 Court of Appeal further stated that:

> ***"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. In Halsbury's Laws of England 4th Edition Vol. 28 at page 23 the authors opined:***
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> ***"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."***

25) In this matter the defendant intimated that the remarks on the unpaid cheque were "refer to drawer". The plaintiff urged this court to find the aforesaid remarks to be libellious. The defendant is of the view there was no malice and that the words were not obviously and directly defamatory.

26) 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.

27) The plaintiff further submitted that the defendant asked it to redeposit or otherwise present the bankers' cheque for deposit afresh, and which position was not controverted by the defendant. Looking at the two (2) scenarios set out hereinabove, I am convinced that a reasonable or an ordinary person could very well have interpreted this to mean that the plaintiff had insufficient funds to complete the transaction, thereby injuring his reputation.

28) In the end, I find the defendant to have breached the banker-customer contract. I also find that the marking of the bankers cheque "refer to maker" or "refer to drawer" is defamatory of the plaintiff.

29) On quantum the plaintiff has asked this court to award it damages of ksh.6 million. The defendant is of the view that the plaintiff is not entitled to damages. Having found the defendant liable for breach of contract and for defamation, I am convinced that the plaintiff is entitled to be paid damages. The figures suggested by the plaintiff in my view appear to be exhorbitant. A sum of ksh.4 million appears to be reasonable. The plaintiff is awarded ksh.4,000,000/= plus costs of the suit. The aforesaid sum to attract interest at court rates from the date of judgment until full payment. The prayer for exemplary and punitive damages is refused since the same is not justified.

Dated, signed and delivered at Nairobi this 27th day of September, 2019.

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J. K. SERGON

JUDGE

In the presence of:

……. for the Appellant

……. for the Respondent