



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL APPEAL NO. 125 OF 2015**

**(CORAM: F. GIKONYO J.)**

**BARCLAYS BANK OF KENYA.....APPELLANT**

**Versus**

**MERCY WANJIRU MAINA .....RESPONDENT**

**(An appeal against the judgment of the Hon. Ms. Chepseba delivered on 26.2.2015 in NBI CMCCC  
No. 3509 of 2015)**

**JUDGMENT**

[1] The appellant was sued by the respondent for loss of Kshs. 8,059.24/-; being the difference between what had been spent from the 30<sup>th</sup> day of May 2008 to 29<sup>th</sup> Day of October 2012, interest of Kshs. 48,904/- from the 30<sup>th</sup> day of May 2008 to the 29<sup>th</sup> day of October 2012 at bank court rates, general damages as well as costs of the suit with interest. On 26<sup>th</sup> February 2015 the trial court awarded the plaintiff Kshs. 8,059/- , Kshs. 48,904/-, general damages of Kshs. 1,000,000/- as well as costs of the suit with interest. The appellant being aggrieved by the said decision filed this appeal citing six (6) grounds which may be collapsed into two:

- a) **THAT the Learned Trial Magistrate erred in law and fact in awarding a sum of Kshs. 1,000,000/- as general damages which was excessively high in the circumstances**
- b) **THAT the Learned Magistrate erred by failing to properly analyze the evidence and finding that the appellant was wholly liable for the alleged loss incurred by the respondent**

**Submissions**

[2] The appeal was canvassed through written submissions. The appellant submitted that they agreed to pay Kshs. 8,059.24/-, Kshs. 48,904/- as well as costs and interest of the suit. As for quantum of damages the respondent did not pray for any specific amount. Moreover, the learned magistrate did not apply any reasonable principle in arriving at the general award. She made an inference of malice on the part of the appellant to frustrate the respondent which was not the case as the appellant was ready and willing to pay the sums claimed. In addition, the trial magistrate erred when she held that it was due to an inaction of the appellant that led to the suffering and embarrassment of the respondent where in actual fact she chose to disregard the contractual duty of good faith and fair dealing owed by the respondent vis-à-vis the terms and conditions of the usage of the card. The respondent was aware of her responsibilities as to how to use and care for the credit card and measures to take in the event of a loss. The appellant did not breach the duty of good faith on its part under the contract it is therefore erroneous and unjust to impose liability on

the appellant.

[3] The respondent submitted that the trial court correctly held that the respondent was liable and that she had proved her case on a balance of probabilities. Upon noticing the unauthorized transactions of her Barclays Card the respondent reported to the appellant who failed or refused to take any action. The trial court noted the embarrassment suffered by her was due to the inaction on the part of the appellant to stop the usage of the respondent's credit card despite her promptly reporting its loss. The appellant failed to exercise responsibility, proper care and prudent operational control to stop the unauthorized transactions. The award of Kshs. 1,000,000/= as general damages is adequate taking into account her economic and psychological suffering, the time spent, negligence and unwarranted actions of the appellant who damaged her creditworthiness.

## **ANALYSIS AND DETERMINATION**

[4] This being a first appeal, this court is to re-evaluate, re-assess and re-analyze the extracts on the record and to make its own determination having in mind that it did not have the advantage of hearing witnesses.

### **Issues**

[5] The issues of determination before this court are:

- a) **Whether the respondent proved her case on a balance of probability**
- b) **Whether the award of Kshs. 1,000,000/- as general damages was excessive?**

[6] The respondent being the plaintiff in the trial court bore the legal burden of proof; needed to prove her case on a balance of probability. She alleged that she had a written agreement with the appellant for the issuance of a Barclay Card No. 4222723105525001. On or about 28<sup>th</sup> May 2008 the respondent reported at the Central Police Station that the card had been stolen among other things. Shortly afterwards on 30<sup>th</sup> May 2008 she reported the incident to the appellant. But the Appellant failed to stop the use of the card to prevent fraudulent transactions. Following their failure to act on her report, the Appellant forwarded her name to the Credit Reference Bureau (CRB). On or about 26<sup>th</sup> October 2012 she received a letter from the appellant dated 18<sup>th</sup> October 2012 asking her to clear all outstanding debts so that they could remove her from the list of defaulters from CRB. Due to this she was denied a loan from Standard Chartered Bank Koinange Street on 15<sup>th</sup> October 2012.

[7] The appellant filed their statement of defence on 15<sup>th</sup> August 2012 but it was struck out vide the trial court's ruling delivered on 21<sup>st</sup> March 2014. The appellant did not appeal.

[8] It is trite law that a court of law determines matters pleaded by parties. The Court of Appeal in the case of **David Sironga Ole Tukai v Francis Arap Muge & 2 others [2014] eKLR** held as follows:

**“The court, on its part, is itself bound by the pleadings of the parties. The duty of the court is to adjudicate upon the specific matters in dispute, which the parties themselves have raised by their pleadings. The court would be out of character were it to pronounce any claim or defence not made by the parties as that would be plunging into the realm of speculation and might aggrieve the parties or, at any rate, one of them. A decision given on a claim or defence not pleaded amounts to a determination made without hearing the parties and leads to denial of justice.”**

[9] I have thoroughly perused the record as well as the trial court file and it shows that the respondent reported the theft of her card on 29<sup>th</sup> May 2008 to the police. She then notified the bank who received the report on 3<sup>rd</sup> June 2008, as per their letter dated 9<sup>th</sup> September 2008. By doing so, she acted prudently as required of her by the rules of engagement. The Appellant is a bank with the responsibility and duty of

care towards its customers. Even after reporting this theft, the appellant did not stop the use of the card or prevent fraudulent transactions on the subject card. Therefore the Appellant did not act with due care and attention; it was negligent and as a result the Respondent suffered. To make matters worse, following these unfortunate events the respondent was referred to the CRB by the Appellant bank and the said custodian continued to make demands from her. In the appellant's letter dated 18<sup>th</sup> October 2012 the appellant informed her that she should pay the outstanding balance so that they may provide her with clearance letter and send a copy of it to the Credit Reference Bureau.

[10] The fact that the appellant offered to pay the sums claimed in the plaint does not mean that there ought not to be an inference of malice from the stated facts. I say so because the incident took place in 2008 and the Appellant was duly informed of the loss of the card. In addition, from the record, the respondent followed up the matter with the appellant for four years in vain. She eventually had to come to court for relief. A bank that recognizes the centrality of good faith and due diligence ought to have taken immediate action to prevent loss and more so soothe the respondent's loss through amicable settlement of the matter. The Respondent who was their client went through such anguish for four years; which is quite a substantially long amount of time, and eventually had to come to court. It bears repeating that the fact that the appellant offered to pay the amounts claimed by the respondent does not erase or atone for the suffering, embarrassment and anguish the Respondent was put through by the attitude and conduct of the Appellant. Reference of the Respondent to the CRB is a grave matter for in light of the interlinked service provision- courtesy to technology- one expects that the person referred will be affected by such reference and will not access services or credit in any reputable institution. Here I am forced to state that reference to CRB should not be taken lightly for the reason I have stated. Again, by making demands of payment of the money imposed on the card in such circumstances only helped to aggravate her injury. All the above are depiction of malice and a reckless disregard of the Respondent's legal rights. Therefore, I find that the respondent proved her case on a balance of probabilities and was entitled to the relief granted by the trial court.

[11] On whether the award of Kshs. 1,000,000 for general damages was excessive I say these. The test when appellate court will interfere with assessment of damages by the trial court was laid by the Court of Appeal in the case of **Kemfro Africa Limited t/a "Meru Express Services (1976)" & another v Lubia & another (No 2) [1985] eKLR** as follows:

**"The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial Judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either that the Judge, in assessing the damages, took into account an irrelevant factor, or left out of account a relevant one, or that, short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage. See *Ilanga v Manyoka*, [1961] EA 705, 709, 713 (CA-T); *Lukenya Ranching and Farming Co-operative Society Ltd v Kavoloto*, [1979] EA 414, 418, 419 (CA-K). This Court follows the same principles."**

[12] In awarding the amount of Kshs. 1,000,000 as general damages the trial magistrate made reference to the case of **Hon. Nicholas R. Ombija v Kenya Commercial Bank Limited (2009) eKLR**. She stated as follows:

**"In the current suit the Plaintiff's social standing is not emerging clearly from both the plaint and the witness statement. However considering the immense hardship she faced in the course of purging her credit worthiness for 4 years, I find that a sum of Kshs. One million would be adequate to compensate her as general damages and I award the same."**

[13] General damages is defined in the Black's Law Dictionary Ninth Edition at page 472 as:

**"Damages that the law presumes follow from the type of wrong complained of; specif., compensatory damages for harm that so frequently results from the tort for which a party has sued that the harm is reasonably expected and need not be alleged or proved. General damages do not need to be specifically claimed. – Also termed direct damages; necessary**

**damages.**

[14] From the plaint the respondent pleaded for general damages. She was not required by law to specify the amount as such damages are at large and are assessed by the court. She was awarded the damages for the hardship she incurred in the course of reclaiming her credit worthiness for 4 years. In the case of Hon. Nicholas R. Ombija v Kenya Commercial Bank Limited (2009) eKLR. Hon. Nicholas R. Ombija, a judge of the High Court was awarded Kshs. 2,500,000/- for the effect on his reputation when his card was denied three times when undertaking transactions.

[15] In light of my findings I made in respect of the hardship, anguish and effect on the creditworthiness of the Respondent by the actions of the Appellant coupled with the that she had to fight for vindication for 4 years, the award of Kshs. 1,000,000/- as general damages was not inordinately high or excessive as to be erroneous estimate of damages but a fair and reasonable compensation. I stated earlier that the circumstances of this case are aggravating. The trial court did not also take into account or leave out of account important factors in making the assessment of damages. Consequently, I find that the trial magistrate did not err in her interpretation of the law as well as application thereof to the evidence before her. Her evaluation of evidence was judicious. The respondent proved her case on a balance of probability and the award of general damages was fair compensation. Accordingly, I dismiss the appeal with costs to the Respondent.

**Dated and signed at Meru this 23<sup>rd</sup> day of October 2019**

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**F. GIKONYO**

**JUDGE**

**Dated, signed and delivered in open court at Nairobi this 30<sup>th</sup> day of October, 2019**

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**L. NJUGUNA**

**JUDGE**