



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CIVIL CASE NO.113 OF 2014

JOE OWAKA AGER.....PLAINTIFF

VERSUS

BARCLAYS BANK OF KENYA LIMITED.....DEFENDANT

JUDGMENT

(1) The Plaintiff herein **JOE OWAKA AGER**, filed before the High Court the Plaintiff dated **10th March 2014** seeking the following prayers as against the Defendant **BARCLAYS BANK OF KENYA LIMITED**.

“(a) General damages and damages for defamation.

(b) Special damages for the lost funds amounting to Kshs.1,880,000/=

(c) Interest on (b) above at commercial rates.

(d) Interest on (a) at court rates.

(e) A written apology to the Plaintiff which he will use to mitigate the now unfolding loss.

(f) Costs of this suit.”

The Defendant in response to the Plaintiff filed the Defence dated **15th May 2014**.

(2) This matter commenced before **Hon Lady Justice Olga Sewe** on **22nd November 2017**. The Honourable Judge only heard one witness before she was transferred to Eldoret High Court. I then took over the matter and heard the case to its conclusion. The Plaintiff called two (2) witnesses in support of its case. The Defendant did not call any witness but urged the court to rely on the witness statement dated **2nd December 2016** filed by one **Alice Kihonge** a Manager at the Voucher Processing Unit of the Defendant Bank. The said witness was said to have left the employment of the bank and therefore was not available to testify in person.

BACKGROUND

(3) The Defendant Bank is a limited liability company duly incorporated in Kenya under the **Companies Act CAP 486** Laws of Kenya. During the material time, the Plaintiff was a customer of the Defendant Bank and maintained several accounts at the **Waiyaki Way Branch** of the Bank. The Plaintiff who testified as **PW1** relied entirely upon his witness statement dated **1st December 2014**.

(4) The Plaintiff told the court that in December 2013 he travelled to the **United Kingdom** for a business trip having left in his account a credit in the amount of **Kshs.2.0 Million**. These funds were to be used to cover payments relating to a sale transaction which he (the Plaintiff) had entered into with **SICHUAN HUASHI DEVELOPMENT COMPANY**, to whom he had issued two (2) cheques worth **Kshs.500,000/=** each in relation to this transaction. Whilst he was abroad the Plaintiff received information that the two cheques he issued had been dishonoured due to lack of funds.

(5) On **20th December 2013**, upon his return from the United Kingdom the Plaintiff attempted to access funds from his account using the **ATM** machine but was unable to do so as it was indicated that his account had insufficient funds.

(6) The Plaintiff immediately paid a visit to the Bank to seek clarification. He was informed that on or about **12th December 2013** the Defendant Bank had paid out several cheques amounting to **Kshs.1,880,000/=** drawn from the Plaintiff's account. The cheques which were all drawn on the Plaintiff's **Account No.036-1022882** were as follows:-

- Cheque Number 200179 dated **5-12-2013** for **Kshs.500,000/=**
- Cheque Number 200178 dated **5-12-2013** for **Kshs.870,000/=**
- Cheque Number 200181 dated **6-12-2013** for **Kshs.480,000/=**
- Cheque Number 200180 dated **6-12-2013** for **Kshs.900,000/=**

TOTAL KSHS.2,750,000/=

Apparently the bank paid out two (2) of the above cheques totalling **Kshs.1,880,000**. The Plaintiff denied ever having issued the said cheques and indeed denied knowing any of the payees indicated on said cheques.

(7) Upon scrutiny of the cheques in question, the Plaintiff noted that the signature thereon was not his. He further noted that the disputed cheque leafs did not correspond with the series of numbers in the cheque book which had been issued to him. The Defendant Bank also undertook investigations into the matter and later confirmed that the cheques in question had been forged by a third party.

(8) The Bank then sought to have the Plaintiff execute a Discharge Indemnity Form to absolve itself from any liability in the matter but the Plaintiff declined to execute the same his position being that the entire fiasco was due to the negligence and mistake of the Bank. Four months later on **7th March 2014** the full amount of **Kshs.1,880,000/=** which had fraudulently been withdrawn from the Plaintiff's account was refunded to him.

(9) The Plaintiff was aggrieved that as a result of this incident he lost out in the sale transaction with **Sichuan Huashi Development Company** and he further claimed that the issue of the dishonoured cheques had damaged his reputation in the eyes of both the Vendor and **PW2 DR JOHN ONDEKO** the friend who had introduced the Plaintiff to the Vendor in the sale transaction.

(10) It is the Plaintiff's case that the Defendant bank failed to exercise due care and to adhere to standard commercial practice in the Banking sector in failing to contact the Plaintiff to confirm the payments where large cheques were presented for payment within a span of two days. The Plaintiff further contends that the Bank failed to verify the cheque series and his signature. That as the General Manager then of **Ketriaco a State Corporation**, the entire incident exposed the Plaintiff to disrepute as a man who was incapable of meeting his financial obligations despite his holding such an important position in society. In addition the incident damaged the Plaintiff's reputation in the eyes of Vendor of the property the Plaintiff was seeking to purchase, who now considered the Plaintiff to be a man of questionable character. Lastly it was claimed that the incident had negatively affected the Plaintiff's credit ratings. The Plaintiff submits that the Defendant Bank ought to be held responsible for his loss of business in respect of the proposed sale transaction and for defamation of his character.

(11) The Defendant admits that the Plaintiff was their customer and admits that due to the incidence of forgery of cheques an amount of **Kshs.1,880,000/=** was fraudulently withdrawn from the Plaintiff's account. However the Defendant denies that it was negligent and denies having maliciously defamed the Plaintiff. The Defendant states that the cheques in question appeared regular on their face and there was nothing to cause them to inquire as to whether said cheques had in fact been authorized by the Plaintiff. That upon receiving the Plaintiff's complaint the Bank commenced investigations into the matter and established that the cheques were forgeries by third parties. The Defendant states that it then duly refunded the Plaintiff the full amount of **Kshs.1,880,000**, which had been fraudulently withdrawn through a credit of **7th March 2014**, into the Plaintiff's account. As stated earlier the Defendant did not call any witness but relied entirely upon the written statement of one **Ms Alice Kihonge** who at the material time was an employee of the Bank. This witness was not availed to testify in court thus her evidence was not able to be tested by way of cross-examination.

ANALYSIS AND DETERMINATION

(12) I have carefully considered all the evidence adduced in this matter. The following issues arise for determination:-

- (i) Did the Defendant act negligently and in breach of its duty of care to the Plaintiff?
- (ii) If so did the Defendant's negligence subject the Plaintiff to commercial loss.
- (iii) Has the allegation of Defamation made by the Plaintiff against the Defendant been proved.
- (iv) Is the Plaintiff entitled to damages?

(i) NEGLIGENCE

(13) In **BRITE PRINT (K) LTD & GEORGE MAINA KINGORI –VS – BARCLAYS BANK (K) LTD [2014] eKLR Hon Justice Gikonyo** in defining the Tort of Negligence held as follows:-

“For the Plaintiffs to succeed in the tort of Negligence, they are required to demonstrate to the Court that:-

(i) **The Defendant owed them a duty of care.**

(ii) **The Defendant breached that duty by failing to act the way a prudent man [Bank] would have been expected to act under similar circumstances; and**

(iii) **That they suffered harm or loss as a result of such breach of duty.”**

(14) The fact that the disputed cheques were processed and paid out is not in any doubt. The debits are clearly captured in the Bank statement annexed to the Defendant’s list of Documents filed on **4th December 2015**. The Plaintiff submits that in processing and paying out the disputed cheques the Defendant breached the duty of care owed to himself as a customer.

(15) The relationship between the Plaintiff and the Defendant was that of Bank to customer, which is contractual in nature. The Bank therefore had a duty to exercise reasonable skill and care in dealing with the customer’s funds and account. Accordingly the Bank was required to act in good faith and exercise caution in conducting its business. In **SELANGOR UNITED RUBBER ESTATES LTD –VS- CRADDOCK [1968] 1 WLR**, it was held that:-

“...a bank has a duty under its contract with its customer to exercise reasonable care and skill in carrying out its part with regard to operations within its contract with its customer. The standard of that reasonable care and skill is an objective standard applicable to bankers. Whether or not it has been attained in any particular case has to be decided in the light of all relevant facts which can vary almost infinitely.”

(16) The Defendant whilst admitting that the fraudulent cheques were paid out from the Plaintiff’s account insists that the payment were made in good faith and that the Bank did not act negligently in honouring those cheques. The Defendant sought to rely on the case of **POPE JOHN PAUL’S HOSPITAL & Another –VS – BABY KAKOSI 1974 E.A 221** where the East African Court of Appeal held as follows:-

“...the professional must bring to his task a reasonable degree of skill and knowledge and must exercise a reasonable degree of care...the burden is to prove that the damage was caused by negligence and was not a question of misadventure, and that burden must be discharged on a preponderance of evidence.”

(17) The Plaintiff alleges that the Defendant Bank acted negligently and breached the duty of care owed to himself as a customer in two aspects. Firstly the Defendant failed to exercise what is now standard commercial practice in the Banking sector by failing to contact the Plaintiff to seek confirmation for the cheques and by failing to verify the Plaintiff’s signature on the said cheques.

(18) The Defendant Bank had a duty to verify the signatures appearing on the cheques before proceeding to pay out the amounts indicated on said cheques. Banks do have sample signatures of their customers in their possession against which they would check to confirm if the signature appearing on any of the cheque presented for payment was genuine. The disputed cheques were annexed on pages 3 to 6 of Plaintiffs bundle of documents filed on **21st January 2015**. Although the Plaintiff denies that the signature on those cheques is his, a look at the signature with the naked eye and a comparison with the Plaintiff’s signature as it appears on his witness statement dated **14th July 2014** reveal that they are in fact quite similar. It is therefore quite probable that without expert forensic evidence one may not be tell that the signature was forged.

(19) Having said that I note that the disputed cheques were dated between **5th December 2013** and **6th December 2013**, with two cheques being presented for payment on each day. Further the amounts of each cheque was quite substantial. Upon receiving cheques for such large sum being presented on the same day or on succeeding days any prudent bank would have sought to contact their customer for confirmation. The account had about **Kshs.2.0 Million** to its credit and it is clear the aim was to withdraw this entire amount within the shortest time possible. This ought to have raised a red flag to the bank. In **ROSS CRANSTON’S PRINCIPLE OF BANKING LAW 2nd Edition at Page 187** it is stated:-

“There is a long established authority, in the context of bills of exchange that a bank can be in breach of its duty of reasonable care and skill in failing to make inquiries. Certain transactions are so out of the ordinary course that they ought to arouse doubts and put the bank on inquiry. If the bank fails to inquire, it cannot be said to have acted without negligence in converting a bill...”[own emphasis]

(20) In **HALSBURY’S LAWS OF ENGLAND 4th EDITION Volume 3(1)** on the “**Business of Banking**” at page 142 paragraph 163, which discusses the obligations of banks in so far as paying cheques are concerned it is stated that:-

“A banker must not continue to pay cheques without inquiry if a reasonable and honest banker with knowledge of the relevant facts would have considered that there was a serious or real possibility, albeit not amounting to a probability, that the customer was being defrauded or that money was being misappropriated. Failure to inquire would not be excused merely because of a conviction that the answer would be false.”[own emphasis]

(21) In the case of **MARFANI & CO. LTD VRS MIDLAND BANK LTD [1968] ALL ER 573**, the Court held as follows:-

“What facts ought to be known to the Banker, i.e what inquiries he should make, and what facts are sufficient to cause him reasonably to suspect that the customer is not the true owner, must depend on current banking practice and change as practice changes. Cases decided thirty years ago, when the use by the general public of banking facilities was much less widespread, may not be a reasonable guide to what the duty of a careful banker, in relation to inquiries as to facts which

should give rise to suspicion, is today. The duty of care owed by the Banker to the true owner of the cheque does not arise until the cheque is delivered to him by his customer. It is then, and then only, that any duty to make inquiries can arise. Any antecedent inquiries that he has made are relevant only in so far as they have already brought to his knowledge facts which a careful banker ought to ascertain about his customers before accepting for collection the cheque which is the subject matter of the action, and so have relieved him of any need to ascertain them again when the cheque which is the subject matter of the action is delivered to him. What the Court has to do is to look at all the circumstances at the time of the acts complained of, and ask itself were those circumstances such as would cause a reasonable banker possessed of such information, about his customer as a reasonable banker would possess, to suspect that his customer was not the true owner of the cheque.”

(22) The question of whether the failure by the Bank to contact the Plaintiff in regard to the cheques being drawn on his account can be attributed to negligence is a subjective one. In my view the Defendant bank failed this test of care and was in the circumstances negligent in failing to seek clarification from the Plaintiff before honouring those cheques. Given that large amounts of money were being withdrawn in quick succession from the Plaintiff’s account, with two cheques being presented per day there was sufficient basis for the Defendant Bank to be suspicious of the withdrawals. Therefore in failing to contact the Plaintiff to confirm the withdrawals the bank failed in its duty of care to its customer. In **SHALI MAR FLOWERS SELF HELP GROUP –VS- KENYA COMMERCIAL BANK [2016] eKLR** it was stated:-

“All the red flags were waving in this case in my view but the Defendant by not exercising reasonable care and skills missed or ignored them, thereby allowing the withdrawal, in quick succession, of large sums of money donated to flower workers as commissions. I find on a balance of probability that the Defendant Bank was negligent in the manner in which it handled and approved the nine payments and is 100% liable.”

(23) Additionally it was found (and is admitted by the Defendant) that the disputed cheques in question were out of sequence i.e the cheques presented for payment did not correspond with the serial numbers of the cheques in the cheque book issued to the Plaintiff by the Bank. The serial number on the disputed cheque exceeded the last serial number in the cheque book which the Bank had issued to the Plaintiff. At Page 23 of the Plaintiffs Bundle of Documents is a **“Cheque Book Ordering Voucher”** which indicates that the serial number of the next cheque book to be issued to the Plaintiff was **200151**, yet the cheques which the bank accepted as genuine and caused to be paid out bore serial numbers **200179 to 200181** which is way beyond the serial number **200151** which even then was yet to be issued to the Plaintiff. This is again a clear red flag and a clear indication that the cheques were not genuine. A simple check against the serial numbers in the cheque book issued to the Plaintiff (which records the Bank had in its possession) would have revealed to the Bank that the cheques in question did not originate from the cheque book which had been issued to the Plaintiff. The fact that Bank failed to notice this glaring anomaly can only have arisen out of their failure to conduct due diligence prior to processing the fraudulent cheques for payment. The defendant confirmed that after investigating the matter it was realized that the cheques were fraudulent and the fact that the Defendant reimbursed the Plaintiff the full amount debited from his account is further confirmation of this fact.

(24) Based on the above I find that the Defendant bank breached the duty of care it owed to the Plaintiff in the running of his account. The bank failed to conduct due diligence before paying out the cheques and was negligent, resulting in the fraudulent debit of a sum of **Kshs.1,880,000** from the Plaintiff’s account. Based on the above, I am satisfied that the tort of negligence has been proved.

Did the Defendants negligence occasion commercial loss to the Plaintiff?

(25) The Plaintiff testified that prior to his travel to the United Kingdom for a business trip in December 2013, he had issued two (2) cheques for **Kshs.500,000/=** each. These cheques were made payable to **Sichuan Hiashi Development Company** with whom the Plaintiff had entered into a sale agreement as a deposit for purchase of two (2) office units. At page 11 of the Plaintiff’s Bundle of Documents filed on **21st January 2015** in the letter of Offer dated **7th October 2013** for purchase of an office unit 2-9 & 10 at **Top Plaza, Kindrumba Road/Kambara Drive L.R No.1/100 Nairobi**. The Vendor is indicated as **Sichuan Huashi Developments Company** and the Purchaser is named as **Joe Owaka Ager** (the Plaintiff herein). Having left a sum of **Kshs.2.0 Million** in his account, the Plaintiff was confident that he had sufficient funds in his account to cover the two cheques.

(26) The Plaintiff went on to state that to his shock and consternation while in the United Kingdom he received a phone call from a representative of the Vendor company informing him that the two cheques he had issued to cover payment of the deposit for the purchase, had been dishonoured upon presentation due to lack of funds. In distress the Plaintiff called his bank for an explanation only to be informed that cheques worth **Kshs.1,880,000/=** had been paid from the funds in his account which payments had depleted his account. These were the cheques which were later found to have been fraudulent. The Plaintiff claims that as a result of this two cheques being dishonoured, the Vendor pulled out of the transaction and the entire purchase of the office units was frustrated.

(27) **DW2 Dr. John Ondeko** told the court that it was he who introduced the Plaintiff to a **Mr. Li** the Sales Manager of **Sichuan Huashi Development Company**, from whom the Plaintiff intended to purchase vacant office units at **Top Plaza Building**. Later the Plaintiff informed **PW2** that he was to pay the Company a deposit of **Kshs.1.0 Million** towards the said purchase. In mid-December **Mr. Li** complained to **PW2** about having been issued with cheques by the Plaintiff which were later dishonoured. **Mr. Li** told **PW2** that he could no longer trust the Plaintiff and despite entreaties from **PW2** cancelled the sale transaction. When **PW2** contacted the Plaintiff to enquire why he had embarrassed him by commencing the sale transaction, when he was not financially able to support the same, the Plaintiff responded that he had more than enough funds in his account to cover the two cheques.

(28) It is clear that the Plaintiff’s attempt to pay the deposit towards the purchase of the two office units was frustrated by the lack of sufficient funds in his account to cover the deposit. This led the Vendor to pull out of the transaction. The insufficiency of funds in the Plaintiff’s account was solely and directly caused by the negligence of the Defendant Bank in failing to properly vet the cheques presented to it for payment from the Plaintiff’s account. I find and hold that the Defendant’s negligence amounted to a breach of the Defendant Bank’s obligation to its customer, the Plaintiff. I further find that said negligence did cause the Plaintiff Commercial Inconvenience for which he is entitled to an award of damages.

DEFAMATION

(29) The Plaintiff in his plaint has claimed that the Defendant Bank defamed him. That by the cheques having been dishonoured, the impression was created that the Plaintiff was a man who was in the habit of issuing cheques knowing fully well that his account was out of funds. This caused the vendor to view the Plaintiff in bad light. The Plaintiff alleges that this Vendor even communicated to its sister Company warning them against transacting with the Plaintiff. The Plaintiff further alleges that the Defendant's negligence has had a negative implication upon his credit ratings.

(30) **Black Law Dictionary** defines Defamation thus:-

“The act of harming the reputation of another by making a false statement to a third person.”

In the case of **MURPHY –VS- La MARSH [1970]** the **Supreme Court of British Columbia** defined Defamation in the following terms:-

“(Defamation is where) a shameful action is attributed to a man (he stole my purse), a shameful character (he is dishonest), a shameful course of action (he lives on the avails of prostitution), (or) a shameful condition (he has smallpox). Such words are considered defamatory because they tend to bring the man named into hatred, contempt or ridicule. The more modern definition (of defamation) is words tending to lower the Plaintiff in the estimation of right-thinking members of society generally.”

(31) In **PHINGAS NYAGAH –VS- GITOBU IMANYARA 2013 eKLR**, **Hon Justice Odunga** defined Defamation in the following terms:-

“Defamation is a tort and is defined as the publication of a statement which, tends to lower a person in the estimation of right thinking members of the society generally or which tend to make him be shunned or avoided. The defamatory statement is one which has tendency to injure the reputation of the person to whom it refers by lowering him in estimation of the right thinking members of society generally and in particular to cause him to be regarded with feeling of hatred, contempt, ridicule, fear, dislike and disesteem and typical examples are an attack upon the moral character of the Plaintiff attributing to him any form of disgraceful conduct such crime, dishonesty, cruelty and so on. Publication is the communication of the words to at least one other person other than the person defamed. Publication to the Plaintiff alone is not enough because defamation is an injury to one's reputation and reputation is what other people think of a man and not his own opinion of himself. An action for defamation is essentially an action to compensate a person for the harm done to his reputation. Defamation is not about publication of falsehoods against a person; it is necessary to show that the published falsehoods against a person ; it is necessary to show that the published falsehood disparaged the reputation of the Plaintiff or tended to lower him in the estimation of right thinking members of society generally. An injurious falsehood may not necessarily be an attack on the Plaintiff's reputation. The words must be maliciously published and malice can be inferred from a deliberate or reckless or even negligently ignoring of facts.”[own emphasis]

(32) In the case of **SELINA PATANI & ANOTHER –VS- DHIRANJI V. PATEL [2019] eKLR**, the ingredients of the tort of Defamation were summarized as follows:-

- (i) The statement must be defamatory.
- (ii) The statement must refer to the Plaintiff.
- (iii) **The statement must be published by the Defendant;** and
- (iv) The statement must be false.

(33) Publication is the communication of the offending words or information to a third party or to persons other than the person claiming to have been defamed.

In this present case there is no evidence of the **publication** of any statement whatsoever by the Defendant bank to a third party. The bank made no statement to the Vendor, to **PW2** or to the Credit Reference Bureau regarding the Plaintiff or the state of his account. **PW2** in his evidence told the court that after the Plaintiff's cheques were dishonoured he formed a negative opinion regarding the Plaintiff. However the opinion of this witness did not arise from any statement made to him by the Defendant Bank.

(34) Similarly although the Plaintiff has alleged that **Mr. Li** of **Sichuan Huashi Development Company** communicated to their sister company, warning them against transacting with the Plaintiff, there is no evidence that such communication ever took place. Even if there was proof of such communication the same did not originate from the Defendant Bank but originated (or was published) by **Mr. Li**. Similarly there is no evidence that this incident affected the rating of the Plaintiff with the Credit Reference Bureau or with any other body for that matter.

(35) Accordingly I find no evidence that there was publication to any third party by the Defendant Bank of any information which could be said to have been defamatory towards the Plaintiff. Whilst it is true that a man has a right to protect his reputation, the fact is that the Defendant did not in any way defame the Plaintiff. Accordingly I find that this claim for defamation has no merit and I dismiss the claim.

DAMAGES

(36) The Plaintiff seeks the sum of **Kshs.1,880,000/=** as special damages for loss of the funds. He also seeks for an award of General

Damages with interest at commercial rates. In respect of the prayer for special damages the money paid out of the Plaintiff's account was not strictly speaking lost. Upon conclusion of their investigations and upon establishing that a fraud had occurred the bank refunded this money in full on **7th March 2014** by a credit into the Plaintiff's account). (receipt of which the Plaintiff confirmed). Therefore the Plaintiff did not lose any money. As such I find no merit in his claim for special damages and the same is dismissed.

(37) Regarding the prayer for general damages this Court has found that the Plaintiff did suffer commercial loss and inconvenience as a result of the Defendants negligence. He is therefore entitled to damages. Under this Head I do award the Plaintiff the sum of **Kshs.500,000/=** general damages plus interest at Court rates from the date of this judgment until payment in full.

(38) Finally the Prayer (3) of the Plaintiff sought for a written apology to be used to mitigate the unfolding loss of the commercial transaction. This prayer has now have been overtaken by events, in light of the evidence that the commercial transaction fell through. I therefore decline to grant Prayer (3) of the Plaintiff.

The costs of this suit are awarded to the Plaintiff.

Dated in **Nairobi** this **17th** day of **December 2019**.

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Justice Maureen A. Odera