



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

HIGH COURT CIVIL CASE NO. 270 OF 2009

PATRICK KIMITI MUREITHI.....PLAINTIFF

T/A P. K. MUREITHI & CO. ADVOCATES

VERSUS

BANK OF AFRICA KENYA LIMITED.....DEFENDANT

JUDGMENT

1. The Plaintiff, Patrick Kimiti Mureithi T/A P. K. Mureithi & Co. Advocate was at all material times a customer of the Defendant, Bank of Africa Kenya Limited. The Plaintiff sued the Defendant vide a plaint dated 21st May, 2009 (amended) seeking damages for libel, exemplary damages and costs.

2. The Plaintiff's claim is that on 15th January, 2009, he drew a cheque of Ksh.1,500/= on his office account payable to the Advocates Benevolent Association but the cheque was dishonoured by the Defendant on account of insufficient funds. It is pleaded that the Plaintiff's office account held nominal credit funds but that there was an understanding between the parties that the Defendant would grant an overdraft and honour the Plaintiff's cheques then the Plaintiff would subsequently put funds in the said account.

3. It is further pleaded that the dishonouring of the cheque injured the Plaintiff's reputation and lowered his estimation in the eyes of the right thinking members of the society. That the Defendant in a letter dated 23rd February, 2009 admitted liability and paid the sum of Ksh.3,500/= to the Advocates Benevolent Association which was a replacement of the Ksh.1,500/= dishonoured cheque and Ksh.2,000/= bank charges incurred by the Advocates Benevolent Association.

4. The claim was denied through a statement of defence (amended) dated 28th April. It is stated that the Plaintiff had a client account and an office account with the Defendant which accounts were governed by terms and conditions of the Bank. That the client account was also governed by the provisions of the Advocates Act. The Defendant denied having granted the Plaintiff an overdraft facility or having made any representations to the Plaintiff to honour the Plaintiff's cheques even when the funds in the account were insufficient, hence the dishonour of the cheque for Ksh.1,500/=. That the dishonour of the cheque was therefore not defamatory. Admission of liability was denied.

5. The Plaintiff gave evidence in support of the averments made in the plaint. His evidence was that the account in question would be overdrawn when need arose but the bank through established practice would first honour the cheques then inform him and he would put funds in the account. He further testified that he had no overdraft facility with the bank but that the bank would charge him interest.

6. Sylvester Kivindu (DW1) a Senior Banking Officer testified on behalf of the bank. He adopted his witness statement as his evidence herein. He referred to the General Terms and Conditions of the bank at the material time which provided that where there was no overdraft agreement, the bank could refuse to carry out instructions which would result in there being an overdraft. That at the time the cheque in question was dishonoured, the Plaintiff's account was overdrawn by Ksh.2,691.53, hence the bank dishonoured the cheque. That the bank could not apply the funds in the clients account as this would be contrary to the provisions of the Advocates Act and that a transfer of funds from the clients account to the office account could not be carried out without instructions. It was contended that the sum of Ksh.3,500/= was paid by the bank later as part of the customer care exercise.

7. At the close of the hearing, parties opted to file written submissions which I have considered.

8. It is not in dispute that the Plaintiff and the Bank had a customer bank relationship which was governed by the terms and conditions of the bank. It is common ground that the Plaintiff had an office account and a clients account with the bank. It is also not in dispute that the Plaintiff's office account against which the cheque in question was drawn was overdrawn. It is also not in dispute that the cheque in question was dishonoured by the bank and the words "R/D" (Refer to drawer) inscribed on the same.

9. The Plaintiff's evidence has established that the bank had in the past honoured cheques drawn by the Plaintiff on the office account even when there were insufficient funds in the said account. This was not denied by the Defendant. The bone of contention is whether the relationship between the parties had established a practice concerning the operation of the office account in question such that cheques drawn on it would always be honoured even when there were no funds in the accounts. It comes out clearly from the evidence herein that the Plaintiff had not executed an overdraft facility in the said account. The account was governed by terms and conditions. One of the said terms in clause No. 1 provided for an overdraft facility in the following terms:

“Where no overdraft has been agreed or the limit of overdraft agreed has been reached, the bank may nevertheless refuse to carry out any instructions which would result in there being an overdraft or any overdraft greater than that agreed as the case may be.”

10. The said clause reflects that the bank could refuse to carry out any instructions which would result in an overdraft. That was the written agreement between the parties. It appears if the Plaintiff issued a cheque without sufficient funds in the account, the bank could exercise discretion but had no obligation to pay. There were attendant consequences e.g if a new officer at the bank was handling the transaction, like happened in the case at hand.

11. As stated by the Court of Appeal in the case of **National Bank of Kenya Ltd v PipePlastic Samkolit (K) Ltd & another (2002) EA 503:**

“This, in view, is a serious misdirection on the part of the learned judge. A court of law cannot rewrite a contract between the parties. The parties are bound by the terms of their contract unless coercion, fraud or undue influence are pleaded and proved. There was not the remotest suggestion of coercion, fraud or undue influence in regard to the terms of the clause. As was stated by Shah JA in the case of Fina Bank Ltd v Spares and Industries Ltd (2000) 1 EA 52: “It is clear beyond peradventure that save for those special cases where equity might be prepared to relieve a party from a bad bargain, it is ordinarily no part of equity function to allow a party to escape from a bad bargain.”

12. See also the case of **Suraya Property Group Ltd & Another v W & K Estates Ltd [2012] eKLR** where the court observed as follows:

“I agree with the Defendants that once parties have entered into an agreement that has been reduced into writing, the same can only be varied by a similar agreement in writing executed by both parties.”

13. The elements of defamation were stated by the Court of Appeal in case of **Wycliffe A Swanya v Toyota East Africa Limited & another Nbi CA No. 70 of 2008** as follows:

“It is common ground that in a suit founded on defamation the plaintiff must prove:-

(i) That the matter of which the plaintiff complains is defamatory in character.

(ii) That the defamatory statement or utterances was published by the defendants. Publication in the sense of defamation means that the defamatory statement was communicated to someone other than the person defamed.

(iii) That it was published maliciously.

(iv) In slander subject to certain exceptions that the plaintiff has suffered special damages.”

14. In the circumstances of this case, I hold that the cheque was not wrongly dishonoured. Consequently, I hold that the dishonour of the cheque was not defamatory as the bank reflected the true state of the account in question. The Plaintiff is therefore not entitled to damages for defamation.

15. If the Plaintiffs claim had succeeded, taking into account the circumstances of this case, I would have awarded Ksh.2,000,000/= as general damages for libel. I would not have awarded any exemplary damages as the Defendant made amends by way of apology and payment of the penalties associated with the bounced cheques.

16. With the foregoing, I hold that the Plaintiff's case has not been proved on a balance of probabilities. I hereby dismiss the same. Taking into account the circumstances of the case, each party to bear own costs.

Date, signed and delivered at Nairobi this 27th day of Feb., 2018

B. THURANIRA JADEN

JUDGE