



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL COURTS
COMMERCIAL AND ADMIRALTY DIVISION
CIVIL SUIT NO. 75 OF 2012

OTIENO-OMUGA & OUMA ADVOCATES.....PLAINTIFF

Versus

CFC STANBIC BANK LIMITED.....DEFENDANT

JUDGMENT

The Plaintiff and Plaintiff's documents

[1] By an Amended Plaint dated 21st August 2012 and filed in Court on 22nd August 2012, the Plaintiff sought for the following relief:

- a. **Special damages amounting to Kshs. 11,700/-, with interest thereon at the Defendant's prevailing rates.**
- b. **General damages for breach of bank-customer contract between the Plaintiff and the Defendant.**
- c. **Aggravated damages for triggering events which subjected the Plaintiff to public humiliation, ridicule, embarrassment and odium of the Plaintiff and its partners.**
- d. **Costs of the suit and interest thereon at the Defendant's rates.**

[2] The Plaintiff also filed the following other pleadings in the case:

- a. Witness Statement by **Maurice Otieno Omuga** dated 3rd February 2012;
- b. List of Documents dated 3rd February 2012 and Bundle of Documents dated 3rd February 2012; and
- c. Supplementary Witness Statement by **Maurice Otieno Omuga** dated 31st August 2012 with an annexed exhibit marked "A".

Documents filed by the Defendant

[3] The claim was defended and the Defendant filed the following documents:

- i. Statement of Defence dated 6th August 2012;
- ii. Witness Statement by **George Murungi** dated 16th April 2013; and
- iii. List of Documents dated 19th October 2012 and Bundle of Documents dated 19th October 2012.

Witnesses

[4] At the trial the Plaintiff called two witnesses namely **Maurice Otieno Omuga (PW1)**, a partner in the Plaintiff's law firm and **Cheryl Onindo (PW2)**, also a partner in another law firm namely **Onindo Onindo & Associates Advocates**. The defendant, on its part, called one witness **George Murungi (DW1)**, who is a manager at the Defendant's bank.

THE PLAINTIFF'S CASE

Testimony by PW1

[5] **Maurice Otieno Omuga (PW1)**, a partner in the Plaintiff's law firm was the first Plaintiff's witness. He adopted his two witness statement as his evidence in support of the Plaintiff's claim. He also produced all the Plaintiff's documents as a bundle. He stated that the Plaintiff and the Defendant had a customer-bank relationship as his firm had two accounts with the Defendant bank, namely, 1) CLIENTS A/C NO 10000655443 (Initial No 0140022981401); and 2) OFFICE A/C NO 10000655486 (Initial No 0140022981402). The accounts were at the Bank's Kenyatta Avenue Branch Nairobi. He testified that that his claim against the Defendant is based on breach of said customer-bank relationship by the Defendant.

[6] According to the Witness and the Plaintiff's documents on record, on **25th August 2011**, the Plaintiff issued three (3) cheques numbers 001008 (for Kshs. 903,700/-), 001009 (for Kshs. 900,000/-) and 001010 (for Kshs. 900,000/-) all drawn in favour of Onindo, Onindo & Associates Advocates on its said clients' Account number 0140022981401 (10000655443). The total amount of the said cheques was Kshs. 2,703,700. All the three cheques were banked by the payee at Imperial Bank Limited, IPS Building Branch Nairobi on **26th August 2011**, and reached the defendant for clearance on **30th August 2011**. Copies of the three cheques are exhibited at page 17 of the plaintiff's bundle of documents and a covering letter forwarding the same to the firm of Onindo Onindo & Associates Advocates is at pages 15 – 16 of the said bundle.

[7] On 30th August 2011, the same date that the three cheques reached the defendant's bank for clearance, one of the defendant's staff members called PW1 (**Mr. Maurice Omuga**) to confirm if the cheques were payable and PW1 duly authorized the caller to effect payment. PW1 stated that after he had confirmed payment of the cheques to the Bank, he was not bothered by anything else. He believed that the three cheques were paid. A copy of a note by the defendant confirming receipt of authorization from PW1 to the defendant's staff to pay cheques is exhibited at page 21 of the plaintiff's bundle.

[8] However, on **2nd September 2011**, PW1 was shocked to receive a libelous letter from Onondo & Onindo Advocates, **the payee** notifying his firm that one of the three cheques being cheque number 001010 dated **25th August 2011**, for **Kshs. 900,000/-**, had been dishonoured and returned to the payee under banking code number 63 with endorsement thereon "**insufficient funds- refer to drawer**". The letter was authored by PW2. A copy of the said letter is exhibited at pages 18 – 19 of the plaintiff's bundle and copy of the unpaid cheque is at page 20 of the same bundle. Also exhibited at page 22 is an advice slip from the payee's banker notifying the payee of the dishonor of the cheque and charging the payee's account with a penalty of Kshs. 1,500/- for

the dishonor of the cheque. In that letter, PW2 demanded that the Plaintiff should replace the dishonoured cheque with a banker's cheque together with bank charges of **Kshs. 1,500/-** which their firm had incurred as a result of the non-payment of that cheque hence a total of **Kshs. 901,500/-**. PW2 also threatened to report the Plaintiff and its partners to the Advocates' Complaints Commission and the Law Society of Kenya for misconduct, and to the Police for issuing a dishonoured cheque and further to circulate an advisory to all the advocates in Kenya, not to accept the Plaintiff's professional undertakings and cheques.

[9] PW1 testified that, he went to the bank in person and enquired why the cheque was dishonoured whereas the account had sufficient funds to pay the cheque. Nonetheless, on 3rd September 2011 the Plaintiff issued another cheque being cheque **number 001012** for **Kshs. 901,500/-** being the value of the cheque which was dishonoured plus the bank charges of **Kshs. 1,500/-**. The said cheque was forwarded to the payee vide the plaintiff's letter dated 5th September 2011 which was acknowledged by the law firm of Onindo Onindo & Associates Advocates vide a letter dated 12th September 2011, except they declined to retract the libelous contents of their previous letter. Copies of the forwarding letter and the replacement cheque are exhibited at pages 23 – 24, and the acknowledgement letter is at page 30 of the plaintiff's bundle. The bank also penalized the Plaintiff a sum of **Kshs. 10,200** for a default that was their own.

[10] As a result of the unfortunate events described above, the plaintiff, vide a letter dated 5th September 2011 and delivered much later on 10th October 2011 instructed the defendant to close its two accounts with the bank. PW1 gave the reason he delayed the delivery of the letter for closure of the accounts to be that he was hoping that the defendant would see its mistake and apologize to the plaintiff to forestall the closure, but nothing of the sort happened. The letter is exhibited at page 29 of the bundle. The bank duly obliged and the two accounts were closed. Evidence of closure of the two accounts and cheques paying the balances in respect thereof are exhibited at pages 31 – 32 of the plaintiff' bundle of documents.

[11] PW1 stated that as at 30th August 2011, the Plaintiff's account had a credit balance of **Kshs, 6,015,867.78**, which was more than sufficient to pay all the three (3) cheques it had issued in favour of Onindo, Onindo & Associates Advocates. The total value of the three cheques was **Kshs. 2,703,700**. At the time the three cheques reached the defendant's bank for payment its account had enough credit balance to pay all the cheques. Copies of the Statements of Accounts are exhibited at pages 25 – 28 of the plaintiff's bundle of documents which supports this assertion. There was no any other transaction in the account which could have diminished the funds.

[12] PW1 told the court that the bank admitted in its defence at paragraph 3 that it received a sum of **Kshs. 6,000,000** on 26th August 2011 at 2.00pm except it says that they had problems in tracing the account because some digits of the account were missing. But according to PW1 Banks use the name of the firm to trace the accounts and the name of the firm had been given in full in the RTGS. According to PW1, the said argument is hollow as the money was already in the account of the Plaintiff. Similarly, the argument that they were investigating the money i.e. **Kshs. 6,000,000** for it was huge is a side show as the Plaintiff's account had previously received **Kshs. 6,000,000** in December 2010 and **Kshs. 68,188,909.40** on 17th December 2010. In any case, money in the clients' account is not Plaintiff's money. In the premises, PW1 testified that it was not, therefore, true that the Plaintiff's account had insufficient funds incapable of paying all the three cheques it had issued in favour of the payee. PW1 further testified that upon receiving statement of accounts he noted that the defendant had initially dishonoured all the three cheques before changing its mind to pay two and dishonor one. Accordingly, the bank was not justified in dishonouring the cheque as it did.

[13] The Plaintiff's lawyer wrote a demand letter dated 13th December, 2011 but it was never responded to by the Bank. PW1 stated that he made several phone calls to the bank manager in vain. Despite these efforts, the bank did not even apologize for this unfortunate event. Instead they

treated the partners with contempt. Now therefore, the Plaintiff prays for:-

- 1) Re-imburement of the sum of Kshs. 11,700;
- 2) General damages for breach of Bank-Customer contract;
- 3) Aggravated and punitive damages for dishonour of the cheque;
- 4) Costs; and
- 5) Interest.

[14] In cross-examination, PW1 explained that special damages consist in the bank charges incurred on the unlawful dishonour of the cheques in issue. He said he was not issued with the closing accounts and so he will not know whether the charges were reversed. Therefore, to PW1, the charges were not reversed by the bank. The issue is nonetheless unclear. He stated that he had no funds as at 25th August 2011 and he did not collect advice from the bank on his balances on 26th August 2011. But he had called the bank, i.e. an officer in the clearance department, on 26th August 2011 to be advised on the balances after he had been informed by his client that RTGS had been done to the clients' account he had provided. PW1 was categorical that banks are not under any obligation to pay a cheque on funds which have not been cleared, but any dishonour on that basis should be clearly indicated to be on "un-cleared effects". He emphasized that Note 59 of the RTGS clearly shows it is in respect of the Plaintiff's account No 0000655443 and is immediately above the firm's name OTIENO-OMUGA & OUMA ADVOCATES. The said account appears in the same form in the cheque book at page 20 of the Plaintiff's bundle of documents. He stated that he is not aware that a prefix is required to be added before 0000655443. He gave out to the client the account as it appears in the cheque book.

[14] PW1 said that RTGS is honoured the same day by the bank as it is real time transmission. This is the practice in the banking industry. Therefore, it is not correct to say that the RTGS in question was cleared on 30th August 2011. The bank did not even explain the claim they are putting forth on the difference between "date" and "value date".

Testimony by PW2

[15] PW2, Onindo Cheryl told the court that he wrote the letter dated 2nd September 2011 appearing at page 18 of the Plaintiff's documents after cheque No 001010 for Kshs. 900,000 issued by the Plaintiff bounced. The letter is not signed but he authored it. He admitted that the language he used in the said letter was prompted by a number of factors, namely; 1) the fact that PWW1 was his senior in the legal profession, PW2 could not fathom how such advocate of the stature of PW1 could issue a bad cheque to a junior advocate; 2) PW2 had been called by his bank on the matter and the bank expressed displeasure on the event as a bounced cheque portend bad image on his accounts; and 3) PW2 had already informed his client that he had received the money and was now at a loss as to what he would tell his said client of the bounced cheque. Nonetheless, the Plaintiff issued a replacement cheque which included the bank charges of Kshs. 1,500. The Plaintiff was also courteous and wrote to PW2 explaining the circumstances of the entire unfortunate event. PW2 insisted that he did not apologize for the contents of his letter.

[16] On cross-examination, PW2 said that he did not report the matter because PW1 issued a replacement. He also stated that he did not stop trusting PW1 and he still holds him highly.

Plaintiff's submissions

[17] The Plaintiff filed submissions. The Plaintiff filed its Issues on 24th September 2012. According to the Plaintiff, the following are the major issue for determination:

- i. **Whether or not the Plaintiff's account had sufficient funds to pay for all the three as at the date the cheques were presented for payment?**
- ii. **Whether or not the Defendant was justified in failing to pay one of the three cheques namely cheque No. 001010 for Kshs. 900,000/=?**
- iii. **Whether or not the Defendant, by not paying the said cheque, acted in breach of bank/customer relationship it had with the Plaintiff?**
- iv. **Whether or not the Plaintiff is entitled to the prayers set forth in the Amended Pleat?**

[18] The submissions supported the testimony provided by PW1 and PW2 and answered the issues above mentioned. They emphasized that a demand was made by its former Advocates **M/s Odhiambo & Weda Advocates** in a letter dated **11th October 2011** seeking *inter alia* an apology from the defendant but the defendant neither offered the apology sought nor bothered to respond to the letter at all. The said Advocates sent a reminder vide a letter dated **13th December 2011** but the defendant did not respond. Copies of the two letters are exhibited at pages 37 of the plaintiff's bundle. According to the Plaintiff its case is that the defendant's decision to dishonour the three cheques in the first instance, then changing its mind and paying two cheques and dishonouring the third cheque coupled with the bank's conduct subsequent to the said dishonor was actuated by malice, spite, arrogance and amounted to a breach of the bank- customer contractual relationship between the parties. And therefore, the plaintiff is entitled not only to an award of general damages, but also aggravated damages as the conduct of the defendant subsequent to the event demonstrated total lack of remorse. As a matter of fact the defendant's conduct manifested extreme sense of arrogance and a very mean view of the plaintiff as a customer. The said breach by the defendant triggered a chain of events which subjected the plaintiff and its partners to unnecessary embarrassment, public ridicule, humiliation and odium.

[19] The Plaintiff submitted that, from the evidence on record as a consequence of the said breach the plaintiff and its partners were subjected to libelous, humiliating and embarrassing reaction by their colleagues in the legal profession who by a letter dated **2nd September 2011** wrote to the plaintiff a nasty and defamatory letter whose contents implied that;

- i. **The Plaintiff and its partners were fraudulent and had converted their clients' property (to wit, money in client's account) thereby failing to honour their obligation as advocates.**
- ii. **The Plaintiff and its partners were ignorant of the provisions of law including the penal code and Advocates' Accounts Rules.**
- iii. **The Plaintiff and its partners lacked professional integrity and, therefore, unfit to practice law.**
- iv. **The Plaintiff and its partners were guilty of the offence of issuing a cheque on clients' account while knowing that they did not have sufficient funds in the account.**
- v. **The Plaintiff and its partners were guilty of the offence of conversion of client's property and theft by agent.**

[20] The Plaintiff urged that, **PW2. Cheryl Onindo** who was the author of the libelous letter testified and confirmed that indeed he had a deem view of the plaintiff's firm of Advocates after the third cheque was dishonoured and that he had no regrets for authoring the letter in the manner he did. The Plaintiff argued that PW1 and his partner are senior advocates of the High Court who have practiced law for over 20 years and to suffer the kind of humiliation and ridicule from their junior colleagues in the manner they did is to say the least injurious and unacceptable. Unfortunately, the defendant arrogantly refused to appreciate the magnitude of the damage it had subjected the plaintiff to. This demonstrated total lack of remorse and extreme arrogance which should entitle the

plaintiff to an award of aggravated damages in addition to general damages for breach of bank-customer relationship. They made this prayer for the following reasons:

- a. In dishonoring the cheque the defendant employed strong words and phrases **“63, Insufficient funds-Refer to drawer”**, when it knew or ought to have known the amount of damage likely to be caused to the plaintiff’s reputation among professional colleagues by the use of such strong words and phrases.
- b. There was no basis either in the banking law or practice for the defendant to dishonour all the 3 (three) cheques or any of them when the account had sufficient funds to meet all of them.
- c. The claim that the RTGS lacked initial digits **“010”** cannot hold because the transfer was in favour of the plaintiff as payee and the plaintiff’s name was inscribed on the transmission slip. There was no other customer of the defendant by the same name at that particular time.
- d. The allegation to the effect that the sum of **Kshs. 6,000,000/-**, which was wired into the plaintiff’s account was unusually large to the extent that it called for investigation by the defendant, is totally untrue as the same account had in the past received bigger deposits. In its Supplementary Witness Statement the plaintiff exhibited statements of accounts for December 2010 which showed that the account had received **Kshs. 68, 188,909.40** in one deposit. It is the plaintiff’s case that defendant’s said contention is not only spiteful of the plaintiff but extremely arrogant of the defendant in the circumstances of this case.
- e. The conduct of the defendant in denying the plaintiff access to funds in its account between 26/08/2011 and 30/08/2011 amounted to unlawful conversion of its credit for the defendant’s own purposes.
- f. Refusal by the defendant to offer to the plaintiff an apology or explanation for its said impugned conduct despite telephone requests by the plaintiff and written demands by the plaintiff’s advocates to do so and even after the defendant had realized that the mistake was committed by it was a clear demonstration of unmitigated spite, extreme arrogance.

[21] On the claim of general damages for breach of bank-customer relationship, the Plaintiff emphasized that its case rests on the fact that the defendant flagrantly and unapologetically breached the contract it had with the plaintiff by for the following reasons:

- i. The change of mind to dishonoured all the 3 (three) cheques and later paid two cheques numbers 001008 (for Kshs. 903,700/-) and 001009 (for Kshs. 900,000/-) and dishonoured cheque number 001010 (for Kshs. 900,000/-), when the account had a credit balance of Kshs. 6,015,867.78- a sum that was more than sufficient to pay all the 3 cheques.
- ii. The bank failed to contact the Plaintiff or give any ground for not honouring cheque number 001010, when it was presented for payment.
- iii. The bank failed to offer to the plaintiff any explanation for breach of bank- customer relationship between itself and the plaintiff, despite receiving telephone requests and written demands for the same.
- iv. The bank treated the plaintiff with utter contempt by failing to apologize to the plaintiff for the humiliation to which its wrongful act subjected the plaintiff.

[22] The Plaintiff discounted the entire evidence by the Defendant about the missing ‘‘010’’ and investigations on the account and insisted that they admitted that the funds reached them on 26th August 2011 and should have paid the three cheques. There is no provision in law mandating a banker to withhold a customer’s money on suspicion of the source thereof. DW1 admitted as much in cross examination but maintained that it was the Defendant’s own internal policy. According to the Plaintiff, such policy was not only unlawful but also contrary to business practice. Furthermore, the Plaintiff’s account in issue was a client’s account as prescribed by the Advocates Act, for the sole purpose of all money received by the Advocate in trust of its clients. Accordingly, the Advocate has no control of the monies which come to the account, the amounts or frequency thereof as that depends entirely on trust funds that come the Advocate’s way in the

course of practice. The account is not open to the bank for investigations as to the source of funds received therein. This position has been captured in **Halsbury's Laws of England, 4th Edition, Volume 3** at para 136 as follows:

“Where a solicitor keeps an account with a bank or a building society, the bank or society does not incur any liability, nor is it under any obligation to make any inquiry, nor is it deemed to have any knowledge of any right of any person to any money paid or credited to the account, which it would not incur or be under or be deemed to have in the case of an account kept by a person entitled absolutely to all the money paid or credited to it and the bank or society does not have any recourse or right against money standing to the credit of the account, in respect of any liability of the solicitor to the bank or society , other than a liability in connection with the account...

Money paid into a client account is a debt owing from the banker to the solicitor...”

[23] The Plaintiff is therefore convinced that the Defendant wrongfully, unlawfully and without any justification whatsoever withheld the Plaintiff's funds and in wanton breach of its relationship with the Plaintiff proceeded to dishonor cheques drawn upon it by the Plaintiff when it was aware that the Plaintiff had sufficient funds in the said account. The Defendant, on its own accord, decided not to credit the said funds into the Plaintiff's account until on 30/08/2011 thereby creating artificial low credit balance in the account and thereafter using the said artificial low credit balance as an excuse for not paying cheque(s) drawn on that account. See **Halsbury's Laws of England, 4th Edition, Volume 3** at para 125 on banker-customer relationship and obligations thereto, thus:

“The characteristics usually found in bankers are: (1) that they accept money from and collect cheques for their customers and place them to their credit; (2) that they honour cheques or orders drawn on them by their customers when presented for payment and debit their customers accordingly; and (3) that they keep current accounts in their books in which the credits and debits are entered.”

See **Halsbury's Laws of England, 4th Edition, Volume 3** at para 155 on wrongful dishonor of a cheque:

“If without justification, a banker dishonours his customer's cheque, he is liable to the customer in damages for injury of credit... Proof of actual injury to credit is not necessary to secure substantial damages, either for a business customer or for personal customers. The answer on a cheque dishonoured on presentation by a third person may constitute libel, but such cases are rare; in such cases general damages may be awarded.”

In the premises, the defendant wrongfully dishonoured the cheque in question, and was, thus, in breach of the Bank-Customer relationship.

[24] In sum, the Plaintiff submitted that it has proved its case on the balance of probabilities and is entitled to reliefs sought in the plaint, except special damages should be Kshs. 1,500 as during trial it emerged that the bank charges amounting to Kshs. 10,200/= had actually been reversed.

[25] Contrary to the assertion by the Defendant, the Plaintiff urged that in law, general damages are available as a remedy for breach of contract. The cited literary work of **Anson's Law of Contract, 28th Edition** which states at 589 states:

“(1) Every breach of contract entitles the injured party to damages for the

loss he or she has suffered.”

And also the author’s writing at page 590 that:

“Damages for breach of contract are designed to compensate for the damage, loss or injury the claimant has suffered through that breach. A claimant who has not, in fact, suffered any loss by reason of the breach, is nevertheless entitled to a verdict, but the damages recoverable will be purely nominal...”

[26] And, the Plaintiff proceeded to quantify the damages it believes it is entitled to for loss of credit and reputation as a result of the non-payment of its cheque. The stressed that, the Plaintiff is a firm of Advocates and it had issued the cheques on its client’s account. The dishonor prompted Onindo Advocate to threaten taking of several adverse steps against the Plaintiff which included posting the Plaintiff to the Law Society of Kenya, placing a notice to the entire legal fraternity against the plaintiff and reporting the matter to police. These matters are relevant and the court should take them into consideration in assessing the magnitude of the Plaintiff’s loss. They submitted that they are entitled to a sum of damages not less than **Kshs.6,015,867.78-** the amount it had to its credit when the cheque was presented and dishonoured. They urged the court to assess damages at **Kshs. 6,000,000/=** as the adequate compensation for the Plaintiff’s loss. They persuaded the court to follow in the footsteps of the decision in **Milimani HCCC No. 1036 of 1997 Timwood Products Ltd –Vs- Bank of Baroda (K) Ltd** in which **Hewitt, J** awarded a sum of Kshs. 3 million as damages in a case where the plaintiff had a credit balance of same amount at the time of dishonour of its cheques by the bank. While making the award the learned Judge pronounced himself thus:

“Taking one thing with another including the other amounts awarded and the order for costs herein I intend to make, I think a fair award of damages in all the circumstances and taking into account the factors set out in fourth Hulsbary Volume 2 paragraph 366 and volume 11 paragraphs 471 and 472, I award general damages of Kshs. 3 million. I am not making an award of exemplary or aggravated damages; this figure is entirely compensatory.”

[27] They also cited the decision of the Court of Appeal in **Civil Appeal No. 132 of 2001 Bank of Baroda (Kenya) Limited –Vs- Timwood Products** in which the above decision was upheld was stated that:

“... We think the learned Judge was not right in simply dismissing the failure to produce evidence proving loss of profit on the basis that in a topsy-turvy economy such evidence would not be useful. But despite that misdirection, the learned Judge still thought a composite sum of Kshs. 3 million would suffice on the head of claim of loss of business credit, business reputation and loss of profit. We think that in all the circumstances of the case, the learned Judge was right. Put another way, we do not think the award of Kshs. 3 million on the compendious head of loss of business credit, reputation and loss of profit was so inordinately high that the application of a wrong principle must be inferred and thus call for our intervention. Damages for wrongful dishonor of a cheque by a bank is clearly awardable – see GIBSON OMBONYA SHIRAKU V. COMMERCIAL BANK OF AFRICA, Civil Appeal No. 16 of 1985, (Unreported), and also KPOHRAROR V. WOOLWICH BUILDING SOCIETY (1964) 4 ALL E.R. 119. The Bank’s complaint in ground eleven is not that the sum was not awardable. All Mr. Fraser told us was that a temperate award is the usual thing in such matters and that the Kshs. 3 million awarded was excessive and unjustified. We do not think so. Timwood was a trading company and the Bank knew that. In quick succession the Bank dishonoured a total of eighteen cheques amounting to Kshs.646,258/85; Timwood had a total of Kshs. 3 million to its credit with the

Bank. The reason given for the dishonor of the cheques was wholly untrue, i.e. that “cheque stopped.” That could have been interpreted to mean that it was Timwood itself which had stopped the cheques. As the trial Judge pointed out other more innocent words could have been used – like cheque not countersigned etc. We think and are satisfied that the Kshs. 3 million awarded, in the circumstances of the case, was temperate, i.e. it is not so inordinately high that it calls for our intervention. We reject ground eleven of the Bank’s grounds of appeal.”

[28] The reason given for the dishonor of the cheque was wholly untrue and unnecessarily strong, i.e. that **“insufficient funds - Refer to Drawer.”** That reason clearly depicted the Plaintiff in bad light as it was interpreted by the payee, also a firm of Advocates to mean that the Plaintiff had misappropriated client’s money which it had received for the transaction the two firms were engaged in. Indeed, the payee law firm wrote as much in its letter of complaint to the Plaintiff. My Lord, nothing could be more damaging to the Plaintiff than that impression. Other decisions cited are **Shiraku –Vs- Commercial Bank of Africa (1988) KLR 67** and **Davidson –Vs- Barclays Bank Ltd (1940) 1AllER 316**. The court should award a sum of Kshs. 6 million in damages for loss of credit and reputation.

[29] On aggravated damages, the Plaintiff argued that the claim thereof is based on the conduct of the Defendant before and after the dishonor of the cheque which clearly showed arrogance, spite and malice against the Plaintiff. The Defendant did not even show any remorse for the injury it visited upon the Plaintiff. It did not even find fit to respond to three letters written to it by the Plaintiff and/ or its Advocates. In other words, after dishonouring the cheque the Defendant continued to aggravate the Plaintiff’s suffering, a fact that compelled the Plaintiff to close its accounts with the Defendant. Such conduct should attract sanction of this Honourable Court through an award of aggravated damages. In the case of **Obongo and another –Vs- Municipal Council of Kisumu (1971) E.A. 91**, the Court of Appeal set out factors to consider for an award of aggravated damages, and at page 95, para F of the report the court observed as follows:

“...I would add, to avoid misunderstanding, that the restriction on the power to award exemplary damages does not affect the power of the court when making an award of general damages to take into account the conduct of the defendant as an aggravating factor.”

The court went further at page 96, para B to say the following:

“It might also be argued that aggravated damages would have been more appropriate than exemplary. The distinction is not always easy to see and it is to some extent an unreal one. It is well established that when damages are at large and court is making general award, it may take into account factors such as malice or arrogance on the part of the defendant and this is regarded as increasing the injury suffered by the plaintiff, as for example, by causing him humiliation or distress. Damages enhanced on account of such aggravation are regarded as still being essentially compensatory in nature.”

[30] They received the money to the Plaintiff’s clients account yet kept it away from the Plaintiff’s account for a period of more than five days for reason of alleged self-imposed investigations. They realized the folly of dishonouring all the three cheques and intercepted two of them. The bank did not attempt to alert the Plaintiff of or apologize for the unfortunate action if indeed the bank was well-meaning. No explanation was even offered when the Plaintiff confronted the bank on the matter. Worse still, even after the Plaintiff received threats of action from the payee and brought this to the attention of the Defendant, the Defendant ignored the same. Again, even after formal demands and requests for apology, the Defendant not only declined to apologize but did not feel pricked enough to respond to any of the demand letters, let alone an acknowledgement of receipt of the said letters. The Defendant’s said conduct was tempered with malice and certainly arrogant and highly spiteful of the Plaintiff. The conduct, no doubt

aggravated the Plaintiff's misery and distress not only with its client who had issued the RTGS but also with its professional colleagues who were the beneficiaries of the proceeds of the dishonoured cheque and who in their letter to the Plaintiff minced no words on how negatively they viewed the Plaintiff firm professionally, post the dishonor of the cheque. It need not be gainsaid that a simple apology from the Defendant would have achieved a lot in mitigating the Plaintiff's loss.

[31] For the forgoing reasons, the Plaintiff urged the court to find that it has made out a strong case for, and award aggravated damages. On this head, the Plaintiff claimed for Kshs. 3,000,000 as adequate compensation in the circumstances of the case. They also prayed for costs of the suit based on the principle that "Costs follow the event". In conclusion, the court should enter judgment for the Plaintiff as follows:-

- a. Special damages – **Kshs. 1,500/=**;
- b. Damages for dishonor of cheque leading to loss of credit and reputation – **Kshs. 6,000,000/=**;
- c. Aggravated damages – **Kshs. 3,000,000/=**; and
- d. Costs and interest.

THE DEFENDANT'S CASE

Testimony

[32] The Defendant called one witness, Mr. GEORGE MUGENDI MURUNGI (DW1). DW1 is an employee of the Defendant since 2007 and works as Manager in Customer Care Centre for the last two years. He said he is familiar with the facts of this case. He adopted his statement in evidence in support of the Defendant's case. He produced the Defendant's documents in a bundle. He testified that the Defendant considered the RTGS in question to have been in respect of an account whose details were incomplete. According to the RTGS received, the Beneficiary was account No 0000655443. The said account was missing "010" thus, incomplete. He referred to the statement of account at page 25 to support his assertion. The complete account for the Plaintiff was 010000065543. Therefore, the account number in the RTGS was not the account number for the Plaintiff. The bank remitting the RTGS should capture the beneficiary's account number correctly.

[33] The witness also stated that the incoming transaction was for a sum of Kshs. 6,000,000 and was not consistent with the Plaintiff's account as no such huge amount of money had come into the said account for the last three months. According to their internal policies such transaction required an inquiry. He also spoke to the cheques drawn by the Plaintiff and stated that as at the date of the cheques, i.e. 25th August 2011, the account did not have funds to pay the cheques. But after inquiry, they found the cheques should be paid. The decision, however, came after the cheques had been unpaid. Two of the cheques were unpaid on 30th August 2011. The said cheques were presented on 29th August 2011. He said that the bank made efforts to salvage the situation through communication with the remitting bank and two of the cheques were re-represented and were paid but one had already left the said banks and was not paid. DW1 told the court that he is prepared to give the beneficiaries an explanation of these events.

[33] On cross-examination, DW1 stated that the Plaintiff had been issued with a cheque book on the account in question. He said that the three cheques bear the account number to be 0000655443. He was emphatic that the cheques will be paid despite the fact that the account number is incomplete. He also confirmed that the account of the beneficiary of the funds in issue was OTIENO, OUGA & OUMA ADVOCATES, and so the bank was able to identify and locate the account using the details of the account name. But he did not know how long such exercise would take. He said that the bank reached the said firm to confirm the details of the

account. He also confirmed that the bank received the RTGS on 26th August 2011.

[34] About the inquiry and due diligence, he said it was an internal policy and he did not know whether it is founded on any regulation by CBK. Due diligence started on 26th and was completed on 29th August 2011. During the inquiry, the funds were in the Bank's Central Bank Account until 29th August 2011. According to his statement, he said that the cheques were to be paid on 29th August 2011. But the three cheques were dishonoured on 30th August 2011 for reason of "insufficient Funds-Refer to drawer". He said the money had not been credited to the customer's account due to the inquiry. He confirmed that there was further information on the RTGS which read "FOR LAND" but he could not tell exactly what that meant. He confirmed that the account had previously received a sum of Kshs. 68,000,000.

[35] DW1 contended that the two cheques which were paid had been re-represented by the transmitting banks at the request of the Defendant bank. He could not, however, tell the court why the Defendant could not have requested for all the three cheques to be re-banked again by the transmitting bank. One cheque was eventually not paid. He told the court that the purpose of the stamp at the back of the cheques was to show confirmation to pay the cheques had been sought from the customer. They sought the confirmation on 30th August 2011 from Omuga. He confirmed that there was nothing wrong with the Plaintiff issuing the three cheques as it did. The replacement cheque was also paid from the proceeds of the RTGS. He could not tell whether the bank ever responded to the letters by the Plaintiff. He thought the relations manager was in a better position to answer the question. Despite all the complaints by the Plaintiff, DW1 was of the view that the bank handled the Plaintiff well in the circumstances of the case. When he was asked by the court whether the request for the cheques to be re-presented expressly made in respect of all the three cheques, he answered that he did not know.

Submissions

[36] The Defendant filed submissions. The Defendant denied the claims and the consequent reliefs sought on the basis of the Defence filed on 7th August 2012. They relied on the bundle of documents filed on 21st February 2013, witness statement filed on 16th April 2013 and all authorities referred to in the submissions. They do not deny that there was a bank-customer relationship between the Plaintiff and Defendant. There is also no dispute that on Friday 26th August 2011 at 2:00pm the Defendant received an incoming RTGS payment of KES 6,000,000 by order of Milling Corporation of Kenya from Standard Chartered Bank which named the Plaintiff. They only had two quarrels; 1) that the account number provided was wrong; and 2) that the Defendant was obliged to conduct due diligence checks as the transaction was unusual for the account. The transaction was subsequently approved on Monday 29th August 2011 when the Plaintiff's account was credited with the proceeds of the RTGS.

[36] According to the Defendant, the following are the issues for determination-;

- i. **Whether or not the Plaintiff's account had available funds to pay for all the three cheques as at the date the cheques were presented for payment**
- ii. **Whether the defendant by not paying all the cheques in issue herein was in breach of the bank-customer relationship**
- iii. **If at all the Defendant breached its obligations, the loss and damages the Plaintiff suffered and the compensation that should remedy that loss.**

[37] As to whether the Plaintiff's Account had available funds to pay the cheques in issue the following is material-;

- i. In law, a customer must be taken to know the state of each of his accounts. If the balance on the whole is against him, he has no right to expect cheques he draws will be cashed. In addition, money is not available immediately it is paid into an account even if the payment is by cash as the bank

must be allowed sufficient time to carry out book keeping operations before crediting the account. (**See Paget's Law of Banking page 93 of the Defendant's authorities**)

- ii. In this case, there was an inward RTGS transmission message which was received by the Defendants on Friday 26th August 2011 at 2pm. The cheques issued by the Plaintiff on the account were drawn on 25th August 2011 on which date the account did not have funds to honour the cheques. The Plaintiff admitted to this on cross examination. In law, a customer of a bank who is aware that they have insufficient funds in hand at the time of drawing cheques is not relieved of liability flowing from the failure by any bank to carry out such instructions. (**Carew v Duckworth [1869] LR 4 Exch 313 cited in Braz V Afonso 1998 (1 SA) 573 (SCA page 20 to 22 of the Defendants Authorities)**)
- iii. Further, where funds are to be credited to a customer's account, to be used to clear such cheques as aforesaid, the banker is entitled to a reasonable time for clearing and collection according to the respective nature of the documents. (See **Halsburys Laws of England 4th Edition at Volume 3 at para 53 This was also the finding in Forman V Bank of England [1902] 18 TLR 339 See page 29, 43 to 45 of the Defendants Authorities the Highlighted portions.**) It is submitted on the part of the Defendant, there was no inordinate or unreasonable delay in the account of the Plaintiff being credited by the RTGS. The time lapse was in fact reasonable.
- iv. Importantly, the account number provided by the RTGS transmission slip was erroneous because it lacked three digits crucial for the identification of the account as highlighted on document 1 in the Defendants bundle of documents dated 19th October 2012. This prompted the inward swift team to conduct enquiries to establish the correct account number. The Plaintiffs submitted that the bank ought to have used the name provided on the transmission slip as a basis for crediting their account. But it is worth noting that the responsibility of a banker who receives erroneous account details with payment instructions has received judicial consideration which is relevant in this matter. See the case of **Tidal Energy v Bank of Scotland [2014] EWCA Civ 1107(Page 30 to 45 of the Defendant's submissions)** where the majority noted the paying bank, in this case the Defendant, could not be held to account for an error on a transmission slip as it had no control over the care with which the originating customers, who are not its own clients, fill the funds transfer form and the way in which the receiving bank processes and transmits the electronic transfer. The Court further noted that it would be economically impossible for the paying bank to be required to bear the responsibility of verifying an account by the holder's name rather than the designated number in order to conduct an electronic transfer.
- v. The Defendant submitted that the practice in Kenya is for banks to remit electronic transfers using account numbers and designated bank codes and that the Defendant's actions in verifying the account numbers were in the best interest of the Plaintiff.
- vi. It is further submitted that users of the RTGS system and users of the banking system generally submit themselves to the mode of conduct of business of the system they have elected to use. This position was upheld in **Tidal Energy** above.
- vii. The court in **Barclays Bank of Kenya Limited v Mahamud [1985] eKLR (Page 46)** also accepted and considered the ordinary course of business in the funds clearing process in making its determination. As such, the Defendants actions were in compliance with the accepted standards and in the ordinary course of business and the Defendant in actual fact acted in the best interest of its client by verifying the account number provided. In this respect, the delay was warranted.
- viii. A further delay was occasioned by the need to make further enquiries prior to posting the amounts to the client's account as the transaction was flagged as an unusual transaction.
- ix. Contrary to the Plaintiff's assertion that the due diligence check was unfounded, the **Prudential Guidelines of 2006 (Page 51 to 53 of the authorities)** issued by the Central Bank of Kenya, under the Banking Act , place a duty on all licensed banks to make enquiries regarding the legitimacy of funds and transactions. The Guidelines require at the minimum that enquiries must be made on a case by case basis for large, frequent or unusual transfers in relation to the parties and the nature of the transaction. The Guidelines specifically flag large or unusual transactions.
- x. The Prudential Guidelines are legally enforceable and their breach would result in sanctions from the Central Bank. The Court in **Tricon International Limited V Giro Commercial Bank Limited [2012] eKLR (Page 54 to 61 of the Defendants authorities)** recognised the obligations on banks to make enquiries in relation to Prudential Guidelines and noted that such requirements were of a legal nature.

- xi. Moreover, the Court in **Dennis Mukhulo Ochwada Vs Kenya Commercial Bank Ltd [2003] eKLR (Page 69 of the Defendants Authorities)** in approving the defendant's decision to delay payment noted:-

“the customer has no right to put upon a banker, and the banker is not bound to accept any risk or inability not contemplated in or essentially arising out of the ordinary routine of business. In banking practice contingencies arise where, in the interests of the banker and the customer alike, the only reasonable course is to “postpone” payment in appropriate and innocuous terms. In the instant case what the defendant bank did was merely to postpone payment in view of the unusual circumstances and the customer was paid a few days later after confirmation.”

- xii. The Defendant humbly submits that any failure to comply with the requirement to make enquiries on transactions would have placed the banker in direct contravention of the Central Bank Regulations and would have exposed the Defendant to risks of sanctions by the regulator. Indeed the delay occasioned by the erroneous account number and the duty to investigate were in the first instance outside the control of the Defendant and on the latter, a statutory requirement.
- xiii. The Plaintiff having drawn the cheques on 25th August 2011 with full knowledge that there were insufficient funds to meet the cheques it had drawn, ought to have granted the Defendant sufficient time to effect the RTGS which in any case was received a day after the cheques were drawn on a Friday .
- xiv. From the foregoing, the Defendant is convinced that it was indeed justified in dishonouring the cheque as at the time of presentment there were insufficient funds to meet the cheques which state was occasioned by factors outside its control as demonstrated above. They respectfully beseeched this Honourable Court to find that the Defendant's actions were not unlawful, unjustified or calculated to create an artificial deficit in funds. The Defendant acted in good faith to ensure the correct credit was made to the correct account and in compliance with the requirements of the industry regulator.

[38] On the basis of the above, the Defendant submitted that it did not breach the bank/customer relationship between it and the plaintiff. See the case of **Dennis Mukhulo Ochwada Vs Kenya Commercial Bank Ltd [2003] eKLR (page 69)** that the postponement of payment of a cheque for further verification was justifiable and such postponement did not amount to a breach of the bank-customer relationship. The plaintiff is not entitled to the reliefs sought in the Amended Plaint. Special damages should only be on the charges levied on the unpaid cheque issued to the firm of Onindo Onindo & Associates, i.e. Kshs. 1,500. But as the Plaintiff drew cheques without confirmation of availability of funds, it should meet the obligations of those cheques. The Defendant should not pay this liability.

[39] With respect to general damages, the Defendant submitted that the award for general damages flowing from a breach of contract is limited to instances where the bank dishonours a cheque without a justifiable reason. There were no justifiable reasons here and so general damages cannot be awarded. Even if the Defendant were liable, which is vehemently contested, the award proposed by the Plaintiff is grossly exaggerated. It is indicative that the only persons to whom the Plaintiffs credit would have been injured were Onindo & Onindo Associates Advocates and their bankers. At paragraph 8 of the witness statement of PW1 he testifies that he in fact issued a replacement cheque which was accepted. A modest award of not more than Kshs 100,000 would be sufficient for that very limited injury.

[40] The Defendant urged the court to reject the claim for Aggravated damages as these damages are awardable only in instances of demonstrable spite, malice or arrogance. The Defendant was constrained by the error of the paying party; who was not its client, and took extra measures to ensure the accuracy of the credit as part of its duty of care. In addition, the Defendant was further constrained by the legal requirement of the Central Bank Prudential Guidelines, 2006 to look into any large transfer. From the foregoing, the Defendant humbly beseeched this Court to dismiss the Plaintiff's suit with costs.

DETERMINATION

[41] This is a claim for special damages; general damages for breach of bank-customer contract; aggravated damages for subjecting the Plaintiff to public humiliation, ridicule, embarrassment and odium of the Plaintiff and its partners; Costs of the suit and interest thereon. The claim for special damages has not been really disputed although the liability thereof will depend on the outcome of the overall liability or otherwise of the Defendant. Only Kshs. 1,500 would be payable if at all. Let me determine the major issues which have emerged from in the case.

Issues

[42] Ultimately, the court will have to determine:

- i. **Whether or not the Defendant, by not paying cheque No. 001010 for Kshs. 900,000/= breached the bank/customer relationship it had with the Plaintiff?**

But to reach the penultimate decision outlined in the first issue, the court will invariably determine the following issues:-

- ii. **Whether or not the Plaintiff's account had sufficient funds to pay for all the three cheques in question as at the date the cheques were presented for payment?**
- iii. **Whether or not the Defendant was justified in failing to pay one of the three cheques namely cheque No. 001010 for Kshs. 900,000/=?**
- iv. **Whether or not the Plaintiff is entitled to the prayers set forth in the Amended Plaintiff?**

[43] One thing should be cleared before I proceed any further. The fact that the three cheques in question were written on 25th August 2011 is not the issue here. The issue is when they were presented for payment and whether at the time, there were sufficient funds to pay the said cheques. The Defendant seems to assign great significance to that fact, but, I must state that, from the evidence before the court, such reliance of the said fact is just but missing the point. I will so proceed.

[44] It is not in dispute that there existed a banker-customer relationship between the Defendant and the Plaintiff respectively. The Plaintiff had two accounts in the Defendant bank, namely 1) Clients A/C No 10000655443 (Initial No 0140022981401); and 2) Office A/C No 10000655486 (Initial No 0140022981402). It is also not in dispute that, on 26th August 2011 at 2.00pm, the Defendant bank received an RTGS for the sum of Kshs. 6,000,000. The Beneficiary Customer was described as /0000655443, OTIENO OMUGA AND OUMA ADVOCATES. Remittance Information/RFB/FOR LAND. The major defences by the Defendant are three. One; that there were errors in the RTGS as the account number of the beneficiary customer was incomplete. The details of the account given in the RTGS omitted the prefix "010" which was crucial in identifying the beneficiary account. Two; that the Defendant was enjoined under the Prudential Guidelines by the Central Bank of Kenya on large or unusual transactions. Three; due to the two foregoing matters, there was some delay in crediting the RTGS value to the Plaintiff's account. Therefore, as at the time the cheques were presented, there were no sufficient funds to pay the said cheques. Thence, the Defendant claimed it did what the law required of them and were not liable for breach of the bank-customer contract as alleged. Let me examine the entire circumstances of the case in order to reach a just decision.

[45] The court is aware of the obligations on the bank under the Prudential Guidelines which had been issued by the CBK. Although Kenya had not enacted a law on how to deal with proceeds of crime and money laundering, the said guidelines had been issued by the Regulator of banks and in step with the international best practices arising from the United Nations Convention against Trans-national Organized Crimes (UNCATOC) which Kenya had signed and ratified. Therefore,

contrary to the arguments I have heard from the Plaintiff that the said guidelines lacked proper legal grounding and had not force of law; my view is that they were capable of enforcement, were effective and were indeed enforced by CBK as the regulator of banks. The lacuna was, however, removed with the enactment of the Proceeds of Crime and Anti-money Laundering Act which spells out the obligations of the banks as reporting institutions on unusual or suspicious transactions financial. Therefore, there was nothing wrong for the Defendant to have carried out an inquiry on the transaction of the sum of Kshs. 6,000,000 herein. The only question is: did they act expeditiously or reasonably in this case especially when they were already aware that payment cheques had been issued by the beneficiary customer? And, that they were dealing with a clients' account held by an advocate on behalf of a client?

Inquiry completed by 29/8/2011

[46] According to the Defendant's witness, the inquiry ended on 29th August 2011. Therefore, without much ado, the credit to the customer account should have been made immediately without delay. The three cheques reached the Defendant bank for payment on 30th August 2011. The bank even called Mr. Omuga for confirmation that the cheques should be paid. Mr. Omuga gave his confirmation in respect of all the three cheques. The confirmation was produced in court and was confirmed by DW1. See page 21 of the Plaintiff's documents. From the statements provided, it seems that the bank had given the RTGS value date to be 26th August, 2011. The entry is, however, made on 30th August 2011. In the same statement, it is apparent that before crediting the RTGS value of Kshs. 6,000,000 the bank had decided to pay the three cheques on 29th August, 2011 and the account was overdrawn in the sum of Kshs. 2,677,632.22. On 30th August 2011 the bank seems to have credited the RTGS value of Kshs. 6,000,000, and the balance on the account was now a credit balance of Kshs. 3,322,367.78 after the overdrawn sum was taken into account. But again, and in a surprising turn of events, the three cheques were unpaid on 30th August 2011. Note that the bank had called for and received confirmation from Mr. Omuga on payment of the cheques on 30th August 2011. Now, consider all these facts in light of the following evidence by DW1 in court:-

“During the inquiry, the funds were in our Central Bank Account. For abundance of caution, we did not credit it to their account until 29/8/2011. Cheques were presented to the bank on 29/8/2011 according to my statement. 29/8/2011 was the date we were to pay the cheques. The three cheques were dishonoured on 30/8/2011 for reason “insufficient Funds-Refer to drawer”.

Wrongful dishonour of cheque

[47] The turn of events as described by the witness and revealed in the documents before the court bear visible act of carelessness and negligence on the part of the Defendant bank. The bank admitted and confirmed through DW1 that the inquiry was completed on 29/8/2011 and that was the date they were supposed to have paid all the three cheques. On one hand, the witness admitted that the RTGS value was not credited until 29/8/2011. The witness could not even tell why the said money could not have been credited on 29/8/2011 and pay off the three cheques. Notably, there is absolutely nothing which prevented the bank from crediting the said sum of money on 29/8/2011 and paying the cheques when they were first presented for payment. Therefore, the inquiry is not to blame here because it was complete by 29/8/2011. Further, whereas the banker is entitled to a reasonable time for clearing and collection according to the respective nature of the documents, all evidence adduced, the admission by the bank and the technological advancement in 2011 suggest that crediting of the RTGS value was due on 29/8/2011. In the circumstances, it is unexplainable why even on 30/8/2011, the bank dishonoured the cheques. All these things lead to one thing; that as at 29/8/2011 the Plaintiff's account was in sufficient funds to pay off the three cheques. Even if the court was to be liberal enough, still, as at 30th August 2011, the Plaintiff's account had sufficient funds to pay off the three cheques. The bank had no reason not to pay any or all the cheques as at 30/8/2011. The non-payment of cheque Number 010010 for Kshs. 900,000

was without any justification whatsoever and the bank is liable to the customer in damages for injury of the customer's credit. See **Halsbury's Laws of England, 4th Edition, volume 3** at para 155 on wrongful dishonor of a cheque:

“If without justification, a banker dishonours his customer's cheque, he is liable to the customer in damages for injury of credit... Proof of actual injury to credit is not necessary to secure substantial damages, either for a business customer or for personal customers. The answer on a cheque dishonoured on presentation by a third person may constitute libel, but such cases are rare; in such cases general damages may be awarded.”

In the premises, the defendant wrongfully dishonoured the cheque in question, and was, thus, in breach of the Bank-Customer relationship. The actions by the Bank is not an act of postponement of payment in appropriate and innocuous terms or a contingency which arises in ordinary course of business in the sense of the case of **Dennis Mukhulo Ochwada Vs Kenya Commercial Bank Ltd [2003] eKLR**. It was an act sheer carelessness which was not going to benefit any party or the law except injuring the customer and for which liability must attach.

Claim of error on account details insincere

[48] Given the facts of this case, does the incomplete details of the account a culprit? The Defendant in this case was most insincere and was out to justify its action at whatever cost. The bank had already identified the account of the beneficiary as early as 26/8/2011 when it received the RTGS and embarked on an inquiry. They also carried out extensive inquiry up to 29/8/2011 and they are expected to have verified the identity of the customer account as at 29/8/2011. The alleged error was not, therefore, responsible for the bank's act of not honouring the cheque in issue. The effort to recall the cheques from the transmitting banks for payment is an acknowledgment that the action by the bank was not enviable at all; it was an effort to correct the mess they had created but in vain. I should also state here that the bank's own documents especially the cheques bear the account number 0000655443 and the account name Otieno Omuga and Ouma Advocates. DW1 confirmed that when these cheques bearing the said account number and name are presented they are paid. He did not say the account as it appears in the cheques would affect or make it difficult to locate or identify the customer account. Indeed, the bank did not claim that the cheques were not drawn upon the account in question despite bearing the account number that appeared in the RTGS. Each case must be decided on its own facts. By its documents, in this case the cheques which are issued by the bank to its customers, citing account number as 0000655443 and the name OTIENO OMUGA AND OUMA ADVOCATES was sufficient detail to locate and identify the account and its holder. Therefore, the alleged error is just an excuse and I find it is not the kind of error in the category of the error in the case of **Tidal Energy v Bank of Scotland [2014] EWCA Civ 1107**. The Defendant as the paying bank had all the details it needed to act on the transmission of RTGS to the beneficiary account without any difficulty. From the evidence, the details in the RTGS were sufficient to identify both the account and the holder's name. It bears repeating therefore, that the Defendant's actions in dishonouring one of the cheques was not in compliance with the accepted standards in customer care and in the ordinary course of business; the Defendant did not act in the best interest of its client in the manner it dishonoured the cheque in question. The act of dishonour was wrongful and hurtful. The bank breached the banker-customer contract it had with the Plaintiff.

Customer credit injured

[49] Based on the foregoing, I find that the Defendant bank was not justified to cheque No 001010. The dishonour thereof injured the credit of the Plaintiff for which general damages are payable. To set the record straight, in law, general damages are awardable for breach of contract. I will now move to the next level on assessment of quantum of damages. But before I do that, the plaintiff has also claimed for aggravated damages. I wish to examine the issue and determine how I shall deal with the claim for aggravated damages.

Aggravated damages

[50] The Court of Appeal stated in the case of **Obongo and another –Vs- Municipal Council of Kisumu (1971) E.A. 91** that:

“...I would add, to avoid misunderstanding, that the restriction on the power to award exemplary damages does not affect the power of the court when making an award of general damages to take into account the conduct of the defendant as an aggravating factor.”

The court went further to state the following:

“It might also be argued that aggravated damages would have been more appropriate than exemplary. The distinction is not always easy to see and it is to some extent an unreal one. It is well established that when damages are at large and court is making general award, it may take into account factors such as malice or arrogance on the part of the defendant and this is regarded as increasing the injury suffered by the plaintiff, as for example, by causing him humiliation or distress. Damages enhanced on account of such aggravation are regarded as still being essentially compensatory in nature.”

[51] In light of the above, I will consider the alleged Defendant’s arrogance, malice and spite in handling the entire transaction for the Defendant. I will then make an overall impression on the matter and take into account my findings thereof within the global award for damages.

Quantum of damages: General and aggravated

[52] The Defendant proposed a modest sum of Kshs. 100,000 as appropriate compensation for any injury the Plaintiff may have been occasioned by the action of dishonour of cheque herein. Their argument is that the injury is very limited as the only persons to whom the Plaintiffs credit would have been injured were Onindo & Onindo Associates Advocates and their bankers. They also relied on the fact that the replacement cheque was accepted and the matter rested there. They termed the proposed award of Kshs. 6,000,000 to be exaggerated. On aggravated damages, the Defendant suggested that they were justified in dishonouring the cheque in issue and so they cannot be penalized for that.

[53] The Plaintiff on the other hand stated that the court should use the amount of money that was in their account as the measure for damages. They therefore proposed a sum of Kshs. 6,000,000 as general damages. They also proposed an additional award of Kshs. 3,000,000 as aggravated damages. No doubt the action by the Defendant was not justified and as a result it injured the credit of the Plaintiff. It should be noted that the Plaintiff are practising advocates and the dishonour was of a cheque drawn upon clients account. The advocates received the money in issue on behalf of a client and were paying it out on instruction from their client. The kind of dishonour herein would, therefore, be of great injury to the advocates herein. I would also add that in modern world there is exchange of information amongst banks, any adverse information to the relevant credit bureaus will have great repercussions on any person affected. It is not claimed here that a reference was made, nor this is the basis of my decision, only that it is a way of demonstrating the gravity of wrongful dishonour of cheques by banks. The fact that the dishonour is of a cheque issued upon clients account would suggested that they are untrustworthy or that they have misused client’s funds. In so far as the particular client is concerned, I do not think the effect of dishonour of a cheque drawn on clients account on behalf of a client who had transmitted money to the advocate is diminished by the fact that the persons who were reached by the information were few. The payee were also advocates and from the tone of their letter, the dent on the credit of the plaintiff as advocates was not of small or nominal proportion as the Defendant is portraying it. I should also consider the fact that the Defendant bank did not bother at all to apologize or reply to any of the correspondences written to them on the matter. They remained adamantly silent; even

during the hearing of the case, DW1 only stated that they are prepared to offer an explanation on what transpired but they did not yet offer any belated apology. Such is the height of arrogance and spite from a banking institution to a customer. This is not a case where nominal damages will suffice given the circumstances of the case. Equally, lack of definite measure of damages in such cases does not bar the court from assessing fair compensation in damages. The court should consider all factors in the case and make a fair assessment of damages. I have found that the dishonour was wrongful because funds were sufficient to pay off the cheque in issue. Dishonour on account of "Insufficient Funds-Refer to Drawer" was wholly untrue and hurtful and breach of contract. Cases such as **Bank of Baroda** (supra) the amount of money in the bank was used as the measure of damages. See also the cases of **Shiraku –Vs- Commercial Bank of Africa (1988) KLR 67** and the English decision in the case of **Davidson –Vs- Barclays Bank Ltd (1940) 1AllER 316**. Therefore, taking into account all the circumstances of the case and the aggravated nature of the injury, I will award the Plaintiff a global sum of Kshs. 6,000,000 as compensation in general damages. I will also award special damages in the sum of Kshs. 1,500, costs of the suit and interest. The interest will be at 12% pa; on the special damages from the 3rd September 2011; and on the general damages from the date of judgment; until payment in full. That is the judgment of the court.

Dated, signed and delivered in court at Nairobi this 16th day of June 2015.

F. GIKONYO

JUDGE