



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)
Civil Case 547 of 2008**

HON. NICHOLAS R.O. OMBIJA PLAINTIFF

VERSUS

KENYA COMMERCIAL BANK LTD.DEFENDANT

JUDGMENT

The plaintiff is Hon. Nicholas R.O. Ombija, appointed and serving as a Judge of the High Court of Kenya. He has served in that position for about 8 years presiding in various courts in stations of High Court all over the Republic.

At all material times the plaintiff was a holder of KCB Serena Card No.5201 9300 0000 0467 issued by Kenya Commercial Bank Ltd., defendant. There was a contract between the plaintiff and the defendant that the plaintiff maintains the authorized credit limit and to make payments due to the defendant in accordance with the said contract and for defendant to accept all transactions on the said card made at the plaintiff's instance and request.

It is pleaded that on or about 14/4/08, the plaintiff in compliance with the terms of the said contract deposited a cheque in the sum of Kshs.19,500/= with the defendant as payment for the aforesaid card. The said cheque was banked at Nairobi Standard Chartered Bank and ought to have been honoured within 4 days. On or about the 19/4/2008, the defendant, in breach of the said contract failed/refused and/or neglected to accept 3 transactions made at the plaintiff's request at Hotel Intercontinental. In further breach of the aforesaid contract on/or about 3rd May 2008, the defendant declined to accept a transaction made at Nakumatt Holdings Ukay at Westlands in Nairobi. Again on 4/5/08 in breach of contract declined another two transactions at Nakumatt Holdings Ukay at Nairobi.

The particulars of breach are set out namely; declining to accept the transactions made at the instance and request and failing to update the plaintiff's account and honour the transactions done by the plaintiff using the KCB Serena Card No.5201 9300 0000 0407. As a consequence of the said breach, the defendant in declining the said 3 transactions falsely and maliciously printed and published or caused to be printed and published the words defamatory of and about the plaintiff:-

“INSUFF.. FUNDS”

“TRANSACTION DECLINED”

The evidence of these prints is exhibited. The said words in their natural and ordinary meaning meant and were understood to mean:-

“The plaintiff is not in a position to meet his financial obligations. The plaintiff is not credit worthy and should be shunned by the right thinking members of the public and particularly merchants and

business associates. And that the plaintiff was not honest and lacked integrity considering his position in society.”

The innuendo was pleaded as required under **Order VI Rule 6A (1)**. It is pleaded that the said words were calculated to disparage the plaintiff, both professionally and socially. Furthermore, the plaintiff pleads that he has suffered distress, agony, mental torture, humiliation, scandal, odium, suspicion, opprobrium and contempt in the eyes of the public and has been injured in his character, credit and reputation and has been brought into public scandal, odium and contempt. Furthermore, the plaintiff has suffered damages as a result of various breaches as stated in paragraphs 3 to 9 in the plaint. The defendant was grossly negligent acting in its obligations and contractual duty of care it owed to the plaintiff.

For various events occurring the suit was listed for formal proof and plaintiff gave evidence and called witness. The plaintiff took oath and testified in support of his case. He said he has been in law for 30 years, 22 as a practicing advocate and 8 as a Judge of the High Court. He produced his card as exhibit ‘1’. He is a member of the Intercontinental Hotel and the card entitles him room and food service and he visits the hotel often. He is well known there. He holds a credit card issued to him by defendant under contract terms as stated above.

On 19/4/2008 he visited Intercontinental Hotel on City Hall Way in Nairobi. His Intercontinental card is No.2541002913. He went to the counter at about 9.00 p.m. He handed his card to an attendant. There were about 6 attendants and several customers at the counter. It took a long time, about 10 minutes. The attendant said there was no money on the card. The plaintiff asked him to check at Card Centre. The Judge was told to wait at the lobby and he waited for a longer time and then asked for the Manager who then returned, he said “No money” and suggested the plaintiff produce cash.

The plaintiff had no money. He asked for the Manager who came after 20 minutes and the plaintiff explained. He told the Manager that the payment would be paid the following day. He said he had come from gym and laundry. There were some airline people employees. They were annoyed asking plaintiff to give way. The plaintiff went to the lobby and there were people also. The plaintiff said:-

“I felt embarrassed and humbled.”

The following day he went and paid cash.

“Since that time whenever I present my card, the waiters say, do you not have cash? They always appear to doubt my credibility” He said:-

“These days I do not feel confident using the card,” he said.

Plaintiff further testified that on 3rd May 2008 he had traveled from Malindi to see his family in Nairobi. He entered Nakumatt Ukay on his way home in Loresho wanting to purchase things for the family. He filled the whole trolley with an assortment of goods. At the counter he gave the card to pay. He was kept longer than necessary only to be told he did not have cash. He went to the cashier. There were many people on the queue. He talked to the supervisor. He checked and said there is no money on his account. They checked and checked again and the customer queue was lengthening. It was month end some customers said if he had money he should pay or use other card. The plaintiff had to return the trolley of purchases himself. He became nervous. The matter took about 45 minutes to one hour.

On 4/5/08 he returned to the shop, this time with a Master Card which did not function. He paid in cash after the Card Centre people said “no money”. Plaintiff came to the conclusion that someone in the bank (defendant) wanted to embarrass him maliciously. He exhibited the letter dated 20/5/08 “exhibit 3”. The letter shows there was money in the account. The letter was not “on without prejudice” basis. He testified that he has worked in Nairobi City for 4 years and Nairobians know him well and feels that his character has been put to doubt.

At this time he had more than Kshs.1 million in the bank. He produced statements to show. He said he was introduced to the bank by a colleague Judge then, Justice Ringera. There was a letter of apology but when the defence was filed the defendant pleaded to the contrary. This is evidence of malice.

The plaintiff was cross-examined extensively by counsel for defendant, Mr. Achach. He confirmed that he gets rebate in the hotel after the event. He confirmed that when he comes to Nairobi he uses that supermarket only. The plaintiff called witness George Nyamongo, an assistant manager at Nakumatt Ukay.

He witnessed the two events on 3rd and 4th of April. He had known the plaintiff who was a regular customer in the supermarket. He testified that he called the Card Centre and the credit was rejected. This witness was cross-examined by Mr. Achach, the learned counsel for the defendant. In his plaint the plaintiff seeks:-

- 1. Damages for breach of contract;**
- 2. Damages for libel, punitive damages, interest and costs.**

A statement is said to be defamatory when it has a tendency to bring a

person to hatred, ridicule or contempt or which causes him to be shunned or avoided or which a tendency to injure him in his office or calling. The plaintiff is a professional lawyer now holding high office of Judge of the High Court of Kenya. The ingredients of defamation are:-

“that the statement must be defamatory and must refer to the plaintiff. The statement must be published by the defendant and it must be false.”

The basis of this cause of action is that the defendant declined to honour plaintiff’s credit cards in three transactions. And in the cause of those three transactions, the defendant communicated to employee at Nakumatt and Intercontinental Hotel. The plaintiff had no “Funds – transaction denied”. The plaintiff stated that it was false to state that he had no funds. He produced his bank statement which shows his account was with funds and he said he had deposited in his card account with the defendant Kshs.19500/=.

He did concede that the application form for the card indicated that the card could be suspended but his card was delayed because of no sufficient funds. He could not remember any other instance when his card was declined. The letter exhibited written to him by defendant and dated 20/5/2008 shows that the limit of credit was Kshs.50,000/= and for a man of his status you did not give notice that you had suspended his account, instead the defendant chose to publish the plaintiff’s inability to pay to members of the public and shop assistants.

An examination of the letter to the plaintiff by the defendant dated 20/5/08, the defendant:-

“deeply regret the unfortunate incidents that you experienced at the merchants sites on 19/04/08, 3/5/08 and 4/5/08 where your card could not be honoured.

We received your payment of Kshs.19,500/= on 15/4/08 which regularized the account. Cheque was cleared on the evening of 19/4/08.

Once again, Hon. Justice we wish to tender our unreserved apologies to you for the inconvenience and embarrassment this has caused to you.

We assure you that this lapse will not be allowed to recur again.”

The plaintiff pleads that the defendant acted maliciously and printed and published the words complained of which in their natural and ordinary meaning mean and were understood to mean:-

“The plaintiff is not in a position to meet his financial obligations and is not credit worthy and should be shunned by merchants and business associates and lacked integrity.”

There is evidence that no notice had been given to the plaintiff of the fact that his account was in debit and the defendant was well aware that the plaintiff in making an effort to update his account had on 14/4/2008 paid in Kshs.19,500/=. However, although the money was received on 15/4/08 which regularized the account by 19/4/08 and 3rd May 2008 and 4/5/09 the defendant declared the plaintiff having “insuff... funds” and “transaction declined”. These words were false and calculated to disparage the plaintiff both professionally and socially.

The defendant has tried to show that communication was only to attendants and the plaintiff but evidence is that these events were at the counter in the hotel and at payment counter at the supermarket at the end of the month. The scene is clear with the plaintiff presenting his card at the counter, there were workers of the hotel and customers. There was delay when the attendant was trying to run the card. There was delay to airline workers rushing through and the plaintiff standing there.

Again the events occurring at Nakumatt on 3rd and 4th May 2008, the plaintiff did stand in the cashiers place on the queue where other customers were waiting to pay for their purchases. There was a scene with the plaintiff trying to explain the situation and directing the attendant to check with Card Centre. There is no doubt that there were several persons who were able to hear and see what was happening to the embarrassment of the plaintiff.

The contract document is on the record annexed to the affidavit of William Maiyo. The plaintiff’s position in the Judiciary was clearly stated as a Judge of High Court and he was recommended by Justice Aaron Ringera and Justice Onyancha, both very highly placed persons. Would the defendant not have known that the plaintiff is not an impecunious person? The argument by the defendant that the use of the card was at the discretion of the defendant. To exercise discretion needs to consider facts before taking decision either way. The defendant should not have decided to suspend the plaintiff’s card knowing his position. Judges are vulnerable members of society. They regard their character highly in their community. That is what gives them the moral right to judge other people.

In handling of his transaction, like the present one, one should be careful not to embarrass him. As it is, these transaction embarrassed the plaintiff being a member of the Intercontinental Hotel using the laundry and gymnasium, he must have been known well by the personnel of the hotel and its environs. The supermarket, Nakumatt Ukay, is on his way home. He was shopping there frequently since his house was nearby. Many persons must have recognized him a Judge of the High Court.

It is also argued that the words “INSUFF FUNDS” and “TRANSACTION DECLINED” are not defamatory. It is clear meaning is that, there is no money in the bank. It is said that the failure of the card to operate could be machine defect or such other mechanical reason. In this case the defendant said the card did not operate because there were no funds and they decided to suspend the account to regularize the account, not for any other reason.

The defendant relies on the case of **John Ward vs. The Standard Ltd. [2006] KLR** where the ingredients of defamation are stated. In this case the matter in question is defamatory in that a judge is impecunious and is trying to obtain purchases on credit. The statement refers to the plaintiff. It is not in doubt that this is so. The statement must be published by defendant. In this case, the information was printed and published to hotel personnel and customers who were around. There was also communication to Card Centre which confirmed that there was “no money”. And the statement was false.

The plaintiff was not notified that his account was without money. He was nevertheless making effort to add the money to the account. The issue of damages for breach of contract and libel appears to me to have formed one single transaction. The defendant failed to honour its obligation to the plaintiff at the same time publishing defamatory material to persons in the supermarket, Nakumatt and the hotel, Intercontinental. The other issue raised by defendant is that the plaintiff failed to mitigate loss in that he failed to communicate with defendant directly when the problems occurred. He did visit the supermarket

on the following day after suffering humiliation on 3/5/08. It is my view taking of these actions would not have mitigated loss, the event had already passed and no amount of mitigation could have healed the shame and embarrassment caused.

Judges do take steps to protect their characters. They are professional men and women and they earn their living by upholding good character, honesty and uprightness. In the case of **John Evan Gicheru** the present Chief Justice, Court of Appeal **No.314/2000**, the Hon. Judge (CJ) took up a case in defamation to protect his reputation. In the case of **Richard Otieno Kwach vs. The Standard Ltd. & another – HCC No.1099 of 2004**, retired Hon. Justice Kwach filed a suit to protect his reputation.

It is my opinion therefore the plaintiff suffered defamation in the hands of the defendant. It was a single transaction of breach of contract and in libel, in assessing damages in a case such as this it was said in the case of **John vs. MGN Ltd. [1997] QB 586:-**

“In assessing the appropriate damages for injury to reputation the most important factor is the gravity of libel. The more closely it touches the plaintiff’s personal integrity, professional reputation, honour, courage, loyalty and the core attributes of his personality, the more serious it is likely to be. The extent of publication is also very relevant. A libel published to millions has greater potential to cause damage than a libel published to a handful of people.”

In this case, I have said it was a single transaction repeated 3 times at Intercontinental Hotel and twice at Nakumatt Ukay. The number of people involved was not many. However, it has to be noted that the plaintiff’s high position was known to the people in the hotel and supermarket, those places being his frequent visiting places. The events must have been witnessed by a quite a number of people.

For the above reasons, I find the injury cause by the defendant to the plaintiff serious. The plaintiff is entitled to compensation. A sum of Kshs.2,500,000/= seems to me to be adequate for all damages that can be assessed, which I do assess.

I enter judgment against the defendant in favour of plaintiff in the said sum of Kshs.2,500,000/= together with interest at court rates from the date hereof together with costs until payment in full.

It is so ordered.

DATED, SIGNED and DELIVERED at Nairobi this 27th day of July, 2009.

JOYCE N. KHAMINWA

JUDGE

The court is now functus officio in this matter at 3.20 p.m.

JOYCE N. KHAMINWA

JUDGE