



**Co-operative Bank of Kenya Limited v Olendo (Civil Appeal  
373 of 2019) [2024] KEHC 10897 (KLR) (Civ) (5 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 10897 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL**

**CIVIL APPEAL 373 OF 2019**

**BK NJOROGE, J**

**JULY 5, 2024**

**BETWEEN**

**CO-OPEARTIVE BANK OF KENYA LIMITED ..... APPELLANT**

**AND**

**SAMSON OWINO OLENDU ..... RESPONDENT**

*(Being an appeal against the judgment and decree of the Honourable court (The Hon. P. N. Gesora (Mr.) Chief Magistrate delivered on 4th June 2019 in Nairobi CMCC No. 7523 of 2019)*

**JUDGMENT**

1. The Appeal raises the question whether a cause of action arises when a debit card transaction is declined, despite sufficient funds in the account.
2. The Appeal is against the decision of Hon. P. N. Gesora (CM) delivered on 4/6/2019. He awarded the Respondent Ksh.4,000,000/= as general damages for defamation. This together with Ksh.500,000/= as aggravated damages plus costs and interest.
3. This matter was flagged for the Rapid Results Initiative (RRI) for the month of June 2024. Directions for filing written submissions having issued on 14/11/2023, parties confirmed filing submissions on 6/6/2024. The court has considered the submissions filed as well as the authorities referred to.

**Background facts**

4. The Respondent was a customer of the Appellant bank. He held a bank account whose particulars are not in dispute. He had also been issued with an ATM/VISA card. While on a holiday at Mombasa, his attempt to pay a hotel accommodation bill of Ksh.53,450/= while at Mombasa Beach Hotel was declined. He had taken his family for a holiday. The transaction was declined with remarks “payment



Declined refer to your bank.” This happened when he had sufficient funds in the bank account. He was embarrassed and humiliated. He sought general and aggravated damages plus costs and interest.

5. The Appellant denied declining the payment or failing to honour the transaction. It blamed the network connectivity on a faulty machine. It denied that the Respondent had been humiliated or that he was entitled to an award of general damages or aggravated damages.
6. The trial court found in favour of the Respondent.

### **Issues for determination**

7. This appeal can be disposed through two (2) issues
  - a. Whether the Appeal is meritorious?
  - b. What are the reliefs that the court may proceed to grant?
8. This is a first appeal. This court is bound to follow the principles laid down in *Selle & Another v Associated Motor Boat Co. Limited* [1968] E.A 123. The court should look at the evidence afresh, analyse it and evaluate the same. It should reach its own independent decision. Care should be taken noting that this court did not hear or see any of the witnesses.

### **Analysis**

9. Having framed the issues, the court proceeds to dispose of them as follows

#### **a. Whether the Appeal is meritorious?**

10. The memorandum of appeal raises twelve (12) grounds. The court is of the considered opinion that they can be condensed to three (3) as follows
  - i. Did the trial court err in finding that the Appellant breached the bank customer relationship?
  - ii. Did the trial court err in finding that the Respondent was entitled to an award of general and aggravated damages?
  - iii. Was the quantum of damages of Ksh.4,500,000/= excessive?
11. The evidence presented before the trial court was that of the Respondent and the Appellant.

#### **i. Did the trial court err in finding that the Appellant breached the bank customer relationship?**

12. The Respondent’s claim was that when he went to pay for the hotel’s bills the payment was declined with message received Declined Refer To Your Bank. He had sufficient funds to his credit in his account. To be precise Ksh.306,079/=, that ought to have covered the bill of Ksh.53,450/=. The point of sale (POS) machine that declined the payment was from Equity Bank.
13. He claimed to have tried the debit card on 5 other machines. No evidence by way of receipts was presented. He was embarrassed at the scene caused in the full glare of other guests.
14. No witnesses were called to testify as to the Respondent’s reputation or how his credit card was ruined or affected by this incident.
15. The Respondent borrowed some money from elsewhere and paid the bill.
16. He sought an apology in writing. The explanation he was given by the bank was not satisfactory.



17. The Respondent was aware of the bank's terms and conditions.
18. On the part of the bank, the witness confirmed the customer's payment was declined. He said such is a rare case. The explanation could be no connectivity or a faulty gadget. The witness blamed connectivity problem between the gadget and the bank. However, he had no physical proof that the gadget was failing or not connecting.
19. The trial court after evaluating the evidence found that the payment using the card was declined. The trial court was not convinced that there was a connectivity problem. It found that the customer's bank account was in credit. Hence failure to settle the card payment constituted a breach of the bank customer relationship.
20. Counsel for the Appellant argues that the Record of Appeal is incomplete as it does not capture the proceedings correctly. That the evidence of the Appellant's witness before the trial court was not captured correctly. The court notes that the Record of Appeal was prepared and filed by the Appellant, so it cannot lie upon the Appellant to complain that it is incomplete. Such an issue should have been raised earlier and preferably at the directions stage. Alternatively, before the hearing of the Appeal. The court has perused the original handwritten transcript of the proceedings of the trial court. The evidence of DW. 1 as set out in the handwritten proceedings and the typed proceedings is similar. The court is bound to follow the proceedings of the trial court, as that is the record.
21. The bank's employee DW.1 in cross examination admitted that cases of the lack of connectivity between the point-of-sale machine (the gadget) and the bank are rare. He stated that the problem arose from lack of connectivity between the gadget and the bank. He also conceded that he had no proof that the gadget was failing. The trial court was not convinced of this explanation.
22. This court sees no reason to interfere with the finding that the defence of lack of connectivity did not move the trial court.
23. This means that the evidence before the court shows that the payment was declined. The question to be answered is whether this constituted a breach?
24. To the mind of this court, it is not every failed debit or credit card that will give rise to an action for a breach. If the Bank or card issuer is able to explain the reasons for failure to pay, it will exonerate itself from such a claim. Looking at cases where the courts have been confronted with similar cases the court notes the following scenarios. In *Barclays Bank of Kenya Limited v Hellen Seruya Wasilwa* [2021] eKLR the card had been declined twice on different occasions. *Nicholas R.O. Ombijav Kenya Commercial Bank Ltd* [2009] eKLR the card had been declined on 3 separate occasions. *Njoroge v Cooperative Bank of Kenya Ltd* [2023] eKLR the card had been declined on 3 separate occasions. *Mwongeli v Stanbic Bank (A Member of Standard Bank)* [2023] eKLR the card was declined 3 times. Multiple declines of a credit or ATM card by a bank make an easy case for a claim of breach of customer and bank relationship.
25. In *Halsbury's Laws of England 4th Edition VOL 3 paragraphs 155* on wrongful dishonor of a cheque. It is stated;

“If without justification, a banker dishonors 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 dishonored on presentation by a third person may constitute libel, but such cases are rare; in such cases general damages may be awarded.” (Emphasis added).



26. In Paget's Law of Banking, 13th Edition the learned author states: -

“The Credit of a customer may be seriously injured by the wrongful dishonor of a cheque. Yet it is rare that a customer will be able to prove special damage. His claim is for general damages in respect of injury to his reputation. As regards trading customers, the law presumes injury without proof of actual damage. The special position of traders was recognized by the House of Lords in *Wilson v United Counties Bank Ltd* [1920] AC 102, where, after reviewing the authorities, Lord Birkenhead said: ‘The Ratio decidendi in such cases is that the refusal to meet the cheque, under such circumstances, is so obviously injurious to the credit of a trader that the latter can recover, without allegation of special damage, reasonable compensation for the injury done to his credit’”.

27. In T. G Reeday, Law Relating to Banking, 2nd Edition on the Obligations of the Bank in honouring cheques. The author writes thus: -

“The opening of a current account implies a contract that the bank will pay at the branch concerned cheques drawn by the customer in correct form and with funds available, whether consisting of a credit balance or an authorized overdraft limit. If a bank dishonours a cheque wrongfully i.e. where funds are available and no legal impediment to payment exists, then this is a breach of contract for which the customer can sue for damages and the measure of the damages is not the amount of the cheque but such sum as is reasonable compensation for the injury to his credit..... However, in the case of a tradesman, and by analogy is that of a professional man or a commercial agent, reasonable compensation can be recovered without proof of special damages.”

And *Patel v National and Grindlays Bank Ltd* [1959] E.A. 76 the Court held:

“Where a banker dishonours a cheque when the customer's account is in funds, it is the commercial credit of the customer that is injured and the inference arises that pecuniary loss will necessarily ensue. In *Vanbergen Vs St. Edmonds Properties Ltd.*, 1933 I K.B. 345, where a bankruptcy notice was wrongly served on a trader, *Macnaughten J.*, said at page 348;

“With regard to damages, I do not think that the cases with regard to contracts for sale of goods have any bearing on a case such as this. The Plaintiff is a trader, and the service of a bankruptcy as the jury have found in this case, is an act which would very likely affect the direct of a trader. In my view, those cases are opposite in which it has been held that if a banker, with funds in his hands belonging to a customer, dishonors a cheque drawn by the customer, he is liable to substantial damages to the customer for breach of contract.”

28. In the case of *BPI Express Card Corporation v M.a. Antonia R. Armovit*(G.R No.163654, 8, October, 2014, First Division); *UST Law Review Voll LIX No.1*, May 2015), Ms. Antonia Armuit treated her British friends to lunch at a restaurant. She gave out her credit card to the waiter to settle the bill. To her astonishment the waiter returned the card and told her that it had been cancelled after verification with the card issuer, BPI Express Credit (BPI). She called BPI and was told that her credit card had been summarily cancelled for failure to pay her outstanding obligations. She was not at fault and demanded compensation for the shame and embarrassment she suffered. The credit card company apologized for the incident. She sought moral damages, exemplary damages and costs. The court framed the issue for determination as follows:-

“Is Armorit entitled to moral and exemplary damages despite the absence of bad faith on the part of BPI.”



The court answered the above issue in the positive and held:-

“Yes. The relationship between the credit card issuer and the credit card holder is a contractual one that is governed by the terms and conditions found in the card membership agreement. Such terms and conditions constitute the law between the parties. In case of their breach, moral damages may be recovered where the defendant is shown to have acted fraudulently or in bad faith.” (emphasis added)

29. This court is satisfied that the Bank was under an obligation to honour the card payment. This put the two parties in a bank customer relationship. The Respondent’s bank account was in credit. The bank did not pay. No justification or reason for failure to pay was advanced. This amounted to a breach of the bank customer relationship.

**ii. Did the trial court err in finding that the Respondent was entitled to general and aggravated damages?**

30. The judgment of the court refers to general damages for defamation, while the Respondent had sought for general damages arising out of breach of bank customer relationship.
31. There was no independent witness to vouch for the Respondent’s credit and reputation. The reputation of the Respondent cannot be what he thinks or says it is. It has to be the reputation of the Respondent, as held by the right thinking members of the society. No such member of the society was summoned, to testify.
32. The claim for defamation cannot succeed. There were no particulars of defamation set out. The Respondent did not plead a cause of action in defamation. Both parties have referred the court to the Supreme Court decision in Raila Amolo Odinga v IEBC & 2 others [2017] eKLR. Parties at all time remain bound by their pleadings. They cannot use evidence to advance an unpleaded cause. Therefore, a suit based on breach of contract cannot morph into a defamation suit. Even so if the witnesses were to lead evidence on defamation.
33. It follows that the trial court fell into error when it proceeded to assess and make an award of damages for defamation. The Respondent submits that they are damages anyway and the award should be allowed to stand. This court is not persuaded so for the reason that general damages, special damages, punitive damages etc. are all forms of damages but assessed using different parameters and guiding principles. As the trial court fell into this error in zeroing in on defamation, though not pleaded, it follows that it applied the wrong principles in assessing the damages. It therefore arrived at a wrong decision.
34. For the reasons above, this court is entitled to interfere with such an award and will set it aside.

**iii. Was the quantum of damages of ksh.4,500,000/= excessive?**

35. To award a sum of Ksh.4,000,000/= for failure to settle a bill of Ksh.53,450/= appears excessive, harsh and oppressive. There is no evidence that the Respondent was detained at the hotel for any prolonged period. The award represents about 74 times the amount of the bill that was declined.
36. Even the award of aggravated damages at Kshs.500,000/= is excessive and unsupported by any evidence. There is proof that the bank did respond to the letter of demand before action. There is no evidence of malice, over reach or high handedness The same is also set aside.
37. In this case, the court finds that the trial court misapprehended the evidence and also ignored or acted on the wrong principles of the law, thus arriving at a wrong decision in assessing damages. The court



applies *Ephantus Mwangi & ano. v Wambugu* [1983] 2KCA 100. This court is aware that it should be hesitant in interfering with findings of fact of a trial court, unless this court is satisfied that the trial court was plainly wrong. This court is of the considered view that the trial court misapprehended the evidence and hence reached a wrong decision.

**b. What are the reliefs that the court may proceed to grant?**

38. This court finds that the appeal is merited. The decision of the trial court ought not to be allowed to stand.
39. Since there was a breach, the Respondent as the aggrieved party is entitled to some compensation by way of general damages. The general principle of law is that general damages do not lie from the breach of a contract. This is with a few exceptions. The damages would be the loss that would flow from the breach itself. The Respondent paid the bill (using other means) so that cannot be said to be the loss flowing from the breach.
40. In Anson's Law of Contract 28th Edition it states at page 589 that:
- “(1) Every breach of contract entitles the injured party to damages for the loss he or she has suffered.”
- Page 590. “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.”
41. The trial court relied on the case of *Otieno-Omuga & Ouma Advocates v CFC Stanbic Bank Limited Civil Suit No.75 of 2012* where an award of Kshs.6,000,000/= was awarded.
42. To this Court, in *Barclays Bank of Kenya Limited v Hellen Seruya Wasilwa* [2021] eKLR a nominal award of Kshs.1,000,000/= was made to a very respected Kenyan Judge. The decline of the card involved 2 transactions and amounts larger than those in this case. The Judge had her card declined when she was in USA which would have caused her a lot of anxiety. The court notes this case involves a one off transaction. Taking all factors in to consideration the court awards nominal damages of Kshs.300,000/=.

**On costs**

43. Costs ordinarily follow the event. The Appellant as the successful party ought to have been awarded the costs of this appeal. The court is concerned that the Respondent gave a very causal response to Respondent's letter of demand.
44. The letter was vague as to the reasons behind the decline of the payment. It did not empathise with their customer's situation. It did not offer an apology for any inconveniences that the customer may have suffered, even without an admission of liability. It did not seek to have audience with the esteemed customer of the bank to explain face to face what could have happened. The bank braced for a legal fight and dared the customer that any misconceived litigation shall be strenuously defended to his peril. A different customer care approach would have saved the parties the costs that they have incurred. The court declines to award any party costs herein.



**Determination**

- 45. The appeal succeeds and the same is allowed.
- 46. The judgment and decree of 4<sup>th</sup> June 2019 in CMCC No. 7523 of 2016 Samson Owino Olendo –vs- The Co-operative Bank of Kenya Limited is hereby set aside. It is substituted with an award for General damages for breach of bank customer relationship of Kshs.300,000/=.
- 47. Each party to bear their own costs of this appeal and the Respondent to have the costs of the suit before the lower court, assessed in terms with the award made herein.
- 48. It is so ordered.

**DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 05TH DAY OF JULY, 2024.**

.....

**NJOROGE BENJAMIN K.**

**JUDGE**

In the presence of:

..... for the Appellant

..... for the Respondent

