



**Co-operative Bank (Kenya) Limited v Karuma (Civil Appeal
E075 of 2021) [2023] KEHC 2141 (KLR) (17 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 2141 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CIVIL APPEAL E075 OF 2021
MM KASANGO, J
MARCH 17, 2023**

BETWEEN

CO-OPERATIVE BANK (KENYA) LIMITED APPELLANT

AND

DAVID MAINA KARUMA RESPONDENT

*(Being an Appeal from the judgment/decree of the Chief Magistrate's Court at
Thika (E. Riany, SRM) in Civil Case No. 596 of 2017 dated 21st April of 2021)*

JUDGMENT

1. David Maina Karuma (David) filed an action before the Thika Chief Magistrate's court against his banker the Co-operative Bank (kenya) Limited (the Bank). In that action, David pleaded that the Bank had breached its fiduciary duty of care for which he prayed for an award of special and general damages. David's claim was denied by the Bank.
2. It is worthwhile to set out the background of this matter.
3. David is the registered proprietor of two parcels of Land namely LR 14284 and LR 14286 which are leaseholds from the Government of Kenya. It is admitted by both parties that David obtained Loan facilities from the bank on December 10, 2008 and January 13, 2013. David alleged that since acquiring those properties in 2008, he annually without fail, paid the Land rent due to the Government of Kenya, the Lessor. That he paid land rent Ksh 310.00 annually for property and LR 14286 and Ksh 395 for property LR 14284. That however on visiting on November 18, 2015 the Bank's Thika branch where he held an account, he was informed that the Branch had paid to the Kenya Government land rent for his stated properties and that accordingly his bank account was debited with that payment and was overdrawn. On further inquiring, David was shown by the Bank unsigned invoices of the Ministry of Lands demanding payment of land rent Ksh 197,126.00 in respect to property LR 14284 and Ksh 2,824.00 in respect to the property LR 14286. David pleaded that the Bank paid those amounts



without informing him and then debit the amount from his bank account. After particularizing the Bank's breach and injury he suffered, David prayed for general damages for pain, suffering and loss of status; and for special damages for Ksh 199,152.02.

4. The Bank by its defense pleaded that David failed to pay the Land rent and it therefore instructed a Law firm to obtain the amount owed as Land rent. The Bank proceeded to pay Ksh 2824.36 for property 14286 and Ksh 197,126.56 for the property 14284. On making that payment it debited David's account with the same. The bank denied the particulars of loss and damage and pleaded that its action was lawful.
5. The Bank sought from trial court and was granted on January 11, 2018 an order to join the Chief Land Registrar and the Attorney General in this action but I did not see any pleading joining those parties. It follows that the Chief Land Registrar and the Attorney General were not parties to the action.
6. The trial court gave judgment for Davis of Ksh 199,115.02 in special damages; Ksh 2.8 million in general damages; and costs and interests. That judgment aggrieved the Bank and hence this appeal.
7. This Court is the first appellate court. In considering the present appeal this Court is required to review the trial court's evidence to determine whether the conclusion of the trial court should stand. This jurisdiction should however be exercised with caution if there is no evidence in support of a particular conclusion or if it is shown the trial court failed to appreciate the weight or was plainly wrong the appellants court should not hesitate to so decide: see the case *Peters -v- Sunday Post Limited* (1958) EA 424.
8. Appellant presented six grounds of appeal which essentially require this court to consider only two broad issues, that is:-
 - a. Did the respondent prove on the required standard his case?
 - b. If the answer to (a) above is in the positive, did the trial court err in awarding general and special damages?
9. David at the trial relied on his written witness statement. In that statement he confirmed he is the registered owner of both properties No 14284 and 14286. Property No 14284 land rent is Ksh 385 annually while that of property 14286 is Ksh 310 annually. He confirmed he obtained two financial facilities from the bank in the years 2008 and 2013. He stated he paid the land rent for both properties without fail. However, on visiting the bank on November 18, 2015, he was informed by his banker that his bank account was overdrawn due to the debit made by the Bank in his bank account of Ksh 197,126.00 and 2,824.00. This was the money the Bank paid for land rent of his two properties. David denied receiving demand for unpaid land rent from the government and further that although he regularly visited his bank, the appellant, he had not been informed of the said payment of land rent by the bank on his behalf. He further stated that the Bank in making that payment used the services of a law firm other than that firm that had prepared the security document which supported the loan facility granted to him. David concluded his evidence by stating:

“It is evident from the foregoing that there was no basis for such an outlandish demand and that the defendant's (appellant's) employees and with other parties to unlawfully debiting my account by siphoning money out of my account with the defendant. I have since suffered great loss and damage”.
10. In further oral evidence, David stated that at no time did the bank pay on his behalf the land rent. That he personally paid the same. That he had a personal banker who did not consult him when the Bank made the stated payment. He also stated that the payment advice presented to him by the bank omitted



his pin number, the address reflected thereon and the particulars of ownership were not correct. That the debit of his account by the bank affected his business and as a consequence, he failed to pay his employees.

11. On being cross-examined, David stated that he had not obtained land rent clearance certificate confirming his payments were up to date.
12. The Bank's evidence was adduced by Migwi and Mungai Advocate. He was instructed by the Bank to obtain from the government demand for land rent of the subject properties. He obtained the Land rent demand from the Ministry of Lands which indicated the Land rent due for property 14284 was Ksh 197,126.56 and in respect to property 14286 was Ksh 2824.36. These demands were forwarded to the Bank and the Bank forwarded to the law firm the stated demand which was paid to Kenya Revenue Authority (KRA) and receipts were issued. This witness further stated:-

“We were later on informed by the customer David Maina Karuma that the land rent payment requests were wrong as he had made payments in previous years. We advised him (sic) to Land Office attaching previous payments so that the office could reimburse him if the same was found to be erroneous”.

13. On being cross-examined, the witness stated that it was the Bank that instructed the law firm to inquire of the outstanding land rent. He responded to a question by stating that it was not his responsibility to know how the Ministry of Lands had calculated the Land rent demanded. He was unable to state whose pin number was reflected in the receipt he obtained on making payment of the land rent. He however went to the Ministry of Land to confirm the land rent demands were genuine. He also stated that there was no evidence before court showing that the payment made by the law firm was not received.

Analysis and Determination:

14. David pleaded that his land rent payments for the two properties were up to date. He pleaded that he paid the Government of Kenya the land rent “without fail”. That pleading was denied by the Bank and accordingly David had a burden to prove the same. David provided payment and receipts dated May 27, 2014 for the two properties of Ksh 500 for each property; and a receipt dated December 14, 2015 in respect to property 14286 for Ksh 2,824.36 whose annual land rent is Ksh 310; and receipt dated December 11, 2015 being payment of land rent of property 14284 of Ksh 438.45.
15. It will be noted that the two payments made by David in December 2015 were made a month after the Bank debited David's account with the amount the bank alleged it paid on his behalf. David presented receipts he made of the land rent but did not present in evidence the demand of the Ministry of Land. It is therefore not clear how David ascertained how much was due and payable when he made the payment. David also admitted while being cross-examined that he did not produce in evidence land rent clearance certificate proving as his pleadings stated that he paid his land rent annually without fail.
16. I have also noted from the Grant (the title) that although the land rent of property 14284 was as at September 1, 1989 at Ksh 395 annually, the same as provided under clause below was revisable. That clause is as follows:

“The commissioner of lands reserves the right to revise the annual ground rent payable on the first day of January 1989 and thereafter at the expiration of every ten years of the term. Such rental will be at the rate of 2% pa of the unimproved free hold value of the Land as at



December 31, 1988 as assessed by the Commissioner of Lands as at the rate in force on the December 31, 1988, whichever is the greater.”

17. The above clause clearly shows that the Land rent stated by David for property 14284 of Ksh.395 was not correct. That was the rent due as at September 1, 1989. The above as stated before clause provided for its revision.
18. The evaluation of the above clause clearly indicates that David erred to state the land rent was Ksh 395. It follows that David did not conclusively prove he was up to date on his land rent payment.
19. Even though I reach the above conclusion I do find that the bank failed to lay a basis in law that justified it to pay any outstanding land rent owed by David and failed to justify debiting the amount from David’s bank account. This finding is made because the Bank did not produce in evidence any contract that authorized it to deal with David’s account as it did. It did not adduce evidence advancing the reason why it debited David’s bank account. The bank through its written submissions in support of this appeal cited clauses of the legal charge which justified its action but no such legal charge was submitted in evidence. It follows that the bank erred to submit evidence in its submission which was not supported by oral evidence at the trial. I draw the bank’s attention to the case of [Robert Ngande Kathathi –v- Francis Kivuva Kitonde](#) (2020) eKLR thus:

“21. As stated by the Court of Appeal in Daniel Toroitich Arap Moi Vs Mwangi Stephen Muriithi & Another [2014] eKLR:-

“Submissions cannot take the place of evidence. The 1st respondent had failed to prove his claim by evidence. What appeared in submissions could not come to his aid. Such a course only militates against the law and we are unable to countenance it. Submissions are generally parties’ “marketing language”, each side endeavouring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed, there are many cases decided without hearing submissions but based only on evidence presented.”

22. The Court of Appeal in Avenue Car Hire &; Another Vs Slipha Wanjiru Muthegu Civil Appeal No 302 of 1997 held that no judgement can be based on written submissions and that such a judgement is a nullity since written submissions is not a mode of receiving evidence set out under Order 17 Rule 2 of the Civil Procedure Rules [now Order 18 rule 2 of the Civil Procedure Rules]. The same Court in Muchami Mugeni Vs Elizabeth Wanjugu Mungara & Another Civil Appeal No 141 of 1998 found the practice of making awards on the basis of the submissions rather than the evidence deplorable.”

20. It follows the banks legal authorities, cited in the written submission, which focused on the binding force of all contractual clauses of a contract are not useful to this court since the legal charge was not produced in evidence at trial.
21. What is however plain is that the bank owed David a duty to exercise reasonable care. The Bank unilaterally, without informing David instructed a law firm to inquire of the land rent due on the two properties. After obtaining that advice on land rent due, the Bank did not inform or demand David to pay the demanded amount and again without informing David, debited David’s account. No evidence was presented as stated before of the obligations David owed to the Bank, if any, to pay the land rent. And there was additionally no evidence of David’s breach which justified his bank account to



be debited without notice to him. In the case of *Equity Bank Limited And Another –v- Robert Chesanyo* (2016) eKLR discussed the bank’s duty thus:

“C 21 Selangor United Rubber Estate Ltd V Cradock (No 3) [1968] 2 All Er 1073):-

“A bank has a duty under its contract with its customer to exercise reasonable care and skill in carrying out its part with regard to operations within its contracts with its customers. The duty to exercise reasonable care and skill extends over the whole range of banking business within the contract with the customer. Thus, the duty applies to interpreting, ascertaining and acting in accordance with the instructions of the customer.”

22. The Bank in paying the land rent and debiting David’s account without notice to David failed to exercise reasonable care and skill. The Bank was not entitled to have a “whether you like it or not” attitude towards David. Further, even though David engaged the Bank both verbally and in writing, the Bank failed to respond and to explain its actions. It is because of this finding that David was entitled to be awarded damages.
23. David apart from stating in evidence that the debiting of his account led to his account being overdrawn, did not present evidence of such overdrawn account. David similarly did not provide evidence of the effect of the wrong he suffered in the hands of the Bank. Although David particularized the injury he suffered as consequence of the Bank’s wrong, that is; that his account was reflecting loan arrears while there were no arrears; or injury of failing to meet several outstanding orders; or injury of his aversion toward financial institutions and applying for financial facility; or his loss of business focus; and or suffering emotional anguish: David did not prove any of those particulars in evidence at the trial. It follows that the damages that ought to have been awarded should have been nominal. This is what was stated in the case *Equity Bank Ltd And Another –v- Robert Chesang* (supra) Viz:

“60. On damages, although the appellants submitted that no damages are awardable for breach of contract, in law, damages are available for breach contract as stated in the literary works of Anson’s Law of Contract 28th Edition which 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..”

24. The trial court in awarding David Ksh 2.8 million in general damages relied in error on a case that was set aside by the court of appeal, that is Hon *Nicholas R O Ombija –v Kenya Commercial Bank Ltd* (2009) eKLR. The award in general damages in that case of Ksh 2.5 was set aside by the Court of Appeal in the case *Kenya Commercial Bank Limited –v- Nicholas R O Ombija* (2015) eKLR. The trial court therefore erred in relying on the aforesaid case. This Court can then then disturb that award of damages since the trial court proceeded on the wrong principle: See the case of *Butt –v- Khan* Klr 349, and also because David did not provide evidence of injury he suffered. I will therefor interfere with the award of general damages.
25. David having not proved injury, he will be awarded nominal award in general damages of Ksh 300,000 (Three Hundred Thousand). The trial court’s award of Ksh 2.8 million in general damages is set aside.



26. The award of special damages is accurate since it represents the amount debited from David's account and that debiting is admitted by the Bank. The award by the trial court of Ksh 199,152.02 in special damages is upheld.
27. On costs both for the trial court and this appeal are awarded to David which costs are assessed at Ksh 80,000.

Disposition

28. The judgment of this Court is:-
- a. The trial court's award in general damages awarded to the Respondent is hereby set aside and is substituted with an award for the Respondent for Ksh 300,000 with interest at court rate from the date of trial court's judgment until payment in full.
 - b. The award of the trial court of special damages is upheld.
 - c. The costs of the suit awarded by the trial court to the Respondent is hereby set aside and are substituted with an award of Ksh 80,000 being costs of the trial and this appeal.

JUDGMENT DATED AND DELIVERED AT KIAMBU THIS 17TH DAY OF MARCH, 2023.

MARY KASANGO

JUDGE

In the presence of:-

Coram

Court Assistant:- Mourice/Julia

Instructed by Kiruki and Kayika Advocates for Appellant:- Ms. Abogo

Instructed by Jessee Kariuki and Co Advocates for Respondent:- Mr. Kariuki

COURT

JUDGMENT delivered virtually.

MARY KASANGO

JUDGE

