



**Kenya Commercial Bank Limited v Obae (Civil Appeal E338 of 2022)
[2023] KEHC 18594 (KLR) (Civ) (15 June 2023) (Judgment)**

Neutral citation: [2023] KEHC 18594 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
CIVIL
CIVIL APPEAL E338 OF 2022
JN NJAGI, J
JUNE 15, 2023**

BETWEEN

KENYA COMMERCIAL BANK LIMITED APPELLANT

AND

KENNETH ONDIEKI OBAE RESPONDENT

*(Being an appeal from the judgment and decree of Hon. Lesootia Saitabau,
Principal Magistrate, in Nairobi MCCC No. E4275 of 2020 delivered on 28/4/2022)*

JUDGMENT

1. The Respondent/Plaintiff herein instituted a suit against the Appellant/Defendant at the lower court seeking to recover general damages for breach of contract and defamation after the Appellant debited the Respondent's bank account with a sum of Ksh.378,531/=. The trial court awarded the Respondent a sum of Ksh.3,500,000/= for breach of contract. The Appellant was aggrieved by the award and filed the instant appeal.
2. The grounds of appeal are:
 1. That the learned Magistrate erred in law and in fact in finding for the Respondent against the Appellant on both liability and general damages while there was no evidence in support thereof.
 2. That the learned Magistrate erred in law and in fact by treating the evidence by witnesses in an unbalanced manner to wit: -
 - a. While the learned Magistrate was willing to take the Respondent's witness evidence as its face value he rejected the Appellant's evidence.



- b. The learned Magistrate ignored settled principles on proof and assessment of general damages.
 3. That the learned Magistrate erred in law and in fact by making a decision on excessive and extraneous damages that was against the weight of evidence and not supported by law.
 4. That the learned Magistrate erred in law and in fact by finding that the Respondent has proved his case against the Appellant to the required standard on a balance of probabilities.
 5. That the learned Magistrate erred in law and in fact in failing to properly analyze the evidence adduced by the Appellant.
 6. That the learned Magistrate erred in law and in fact by totally ignoring/disregarding the Appellant's pleadings and submissions.
3. It was the case for the Respondent that he was operating a bank account with the Appellant. It is common ground that on the 10th March 2019 the Appellant debited the Respondent's account with a sum of Ksh.378,531/=. The Respondent contends that he came to learn of the debit in January 2020. That the debit was unilaterally and irregularly effected using forged documents purported to have been signed and executed by him. That as a result of the unlawful debit his business and financial plans that were being funded by the said account were grossly frustrated and inconvenienced. That he was embarrassed and occasioned loss and damage as he could not pay his bills and meet his financial obligations. That despite demands to refund the money, the Appellant declined to do so. He sued and sought for:
 - a. A declaration that the action of the defendant to unilaterally and irregularly debit the Plaintiff's account to the extent of Kenya Shillings 378,531/- and effectively transfer such funds from his account was unlawful.
 - b. A refund of Kenya Shillings 378,531/- to the Plaintiff.
 - c. General damages for breach of contract.
 - d. General damages for loss and damage suffered on account of damage to the plaintiff's reputation.
 - e. Any other relief that this Honorable court may deem just and fair to grant.
 - f. Costs of the suit and interest.
4. It is common ground that after being sued in the month of August 2020, the Appellant refunded the sum of Ksh.378,531/= on the 15th October 2020. They thereafter filed a defence on the 5th November 2020 in which they contended that the Respondent was not occasioned any loss and damage by the said debit. After a full trial the trial Magistrate found that the Appellant debited the Respondent's account without his instructions. That by looking at the bank statement in respect of the account, it was clear that the account was active and therefore the debit must have affected transactions of the account and created inconvenience to the Respondent. That the Appellant was negligent and was thus liable for breach of contract. The court awarded Ksh.3,500,000/= for the breach which prompted the filing of this appeal.

Submissions

5. The Appellant through the firm of Amolo & Gacoka Advocates, submitted that the evidence before the lower court was that the said sum was erroneously debited on the Respondent's account and



refunded on or about 15th October 2020. That there was no evidence to support the allegation by the Respondent that he suffered damage or loss to his business. That a look at his bank statement of accounts does not show that he was unable to do business due to shortage of funds. That by granting an award of general damages for breach of contract the lower court acted contrary to law by purporting to write the contract between the parties. Therefore, that the award of Ksh.3,500,000/= in general damages has no basis. The Appellant relied on the case of *National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & another* (2001)eKLR where the Court of Appeal held that:

...A Court of law cannot re-write a contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved. There was not the remotest suggestion of coercion, fraud or undue influence in regard to the terms of the charge.

As was stated by Shah JA in the case of *Fina Bank Limited v Spares & Industries Limited* (Civil Appeal No 51 of 2000) (unreported):

“It is clear beyond peradventure that save for those special cases where equity might be prepared to relieve a party from a bad bargain, it is ordinarily no part of equity’s function to allow a party to escape from a bad bargain.

6. It was submitted that the trial court erred in making a finding that by looking at the bank statement in respect of the account, it was of the considered view that the debit must have affected transactions of the account and therefore created inconvenience to the Respondent. That there was no evidence to support that finding. It was submitted that there can be no damages without loss and therefore the case was for dismissal.
7. The Appellant submitted that general damages cannot be awarded on a claim anchored on a breach of contract. Reliance was made on the case of *James Maranya v South Nyanza Sugar Co. Ltd* (2017) where the court stated that:

16 ...It is well settled in law that general damages cannot be awarded on a claim anchored on a breach of contract. In affirming that position, the Court of Appeal in the case of *Joseph Urigadi Kedeva v Ebby Kangishal Kawai* Kisumu Civil Appeal No. 239 of 1997 (UR) emphatically expressed itself thus:

“.....As to the award of Kshs. 250,000/= as general damages, Mr. Adere submitted that there can be no award of general damages for breach of contract.....We respectfully agree. There can be no general damages for breach of contract.....”

17. The reason as to why general damages cannot be awarded in cases of breach of a contract was explained in the case of *Consolata Anyango Ouma v South Nyanza Sugar Co. Ltd* (2015)eKLR as follows:

“The next question is whether the appellant was entitled to damages as a result of the breach. As a general principle, the purpose of damages for breach of contract is, subject to mitigation of loss, the claimant is to be put as far as possible in the same position he would have been if the breach complained of had not occurred. This principle is encapsulated in the Latin phrase restitution in integrum (see *Kenya Industrial Estates Ltd v Lee Enterprises Ltd* NRB CA Civil Appeal No. 54 of 2004 [2009]eKLR, *Kenya Breweries Ltd v Natex Distributors Ltd* Milimani HCCC No. 704 of 2000 [2004]eKLR). The measure of damages is in accordance with the rule



established in the case of *Hadley v Baxendale* (1854) 9. Exch. 341 that the measure of damages is such as may be fairly and reasonably be considered arising naturally from the breach itself or such as may be reasonably contemplated by the parties at the time the contract was made and a probable result of such breach (see *Standard Chartered Bank Limited v Intercom Services Ltd & Others* NRB CA Civil Appeal No. 37 of 2003 [2004] eKLR). Such damages are not damages at large or general damages but are in the nature of special damages and they must be pleaded and proved (see *Coast Bus Service Ltd v Sisco Murunga Ndanyi & 2 others*, NRB CA Civil Appeal No. 192 of 92 (UR) and *Charles C. Sande v Kenya Co-operative Creameries Ltd*, NRB CA Civil Appeal No. 154 of 1992 (UR))”.

8. The court was thus urged to allow the appeal.
9. The Respondent on the other hand through the firm of Odhiambo Ouma & Co. Advocates, submitted that the Appellant and the Respondent enjoyed a bank-customer relationship and the bank was contractually obligated to abide by the express terms of the contract and the law that governs such a relationship. That the Appellant admitted in its defence that it was indeed understood by both parties that all operations and transactions in the account held by the respondent as spelt out, would be executed upon express authorization and approval of the respondent in terms of compliance with the provisions of the Banking Act and the applicable laws. That it was in recognition of its failure to comply with the law in debiting the Respondent’s account that the Appellant effected a refund of the said sum.
10. It was submitted that the Respondent had proved his case by production of relevant documents and called one witness, PW1, who led evidence in support of the case.
11. The Respondent submitted that he suffered loss and damage on account of actual monies lost and damage to his reputation. That the Appellant completely refused and ignored the Respondent’s incessant pleas that it refunds and make good the refund of the said sum but the Appellant only managed to effect the refund well after the Respondent filed the suit in court. That the Respondent is an advocate of many years of practice and whose reputation is key to his practice. That the action by the Appellant frustrated his business and financial plan with the obvious resultant loss and damage considering the unforseeable unavailability of the said sum that the Respondent stated he had factored into his plans and projections for the month thereby exposing the Respondent to considerable loss, damage, inconvenience and embarrassment to the noble character that he so painstakingly built over the years.
12. It was also submitted that the Respondent need not go into pains of detailing the loss and damage he suffered on his reputation as it is obvious for a person of his standing professionally and socially.
13. The Respondent submitted that the Appellant’s witness DW1 in her evidence failed to render any justification as to why the Respondent’s account was unlawfully debited. That the witness acknowledged that indeed the said funds were not available for the Respondent’s use and the Respondent no doubt suffered loss, damage and inconvenience. That even after admitting all this the Appellant curiously maintained that the respondent suffered no loss and damage on account of their mistake.
14. The Respondent submitted that the Appellant in unilaterally and irregularly debiting the Respondent’s account without his authorization, the Appellant breached the contract that existed between the parties and therefore the Respondent was entitled to damages. In support of this legal position, the Respondent relied on the case of [*Otieno-Omuga & Ouma Advocates v CFC Stanbic Bank*](#)



- Limited*, Nrb HCCC No.74 of 2012 where similar circumstances obtained and the court found that the bank was in breach of its contractual obligation and awarded the plaintiff some damages.
15. The Respondent also relied on the case of *Nicholas R.O. Ombija v Kenya Commercial Bank Limited*, Nrb HCCC No. 75 of 2012, where the bank failed to honour cheques drawn by the plaintiff and presented for payment by the bank to a third party and the court found that there existed a contractual relationship between the bank and the customer and proceeded to award damages for breach of contract in the sum of Ksh.6,000,000/=.
 16. It was submitted that the Respondent is an advocate of the High Court of Kenya. That considering the extent of the injuries and the loss that he suffered, the trial Magistrate correctly made the award of general damages for breach of contract.

Analysis and Determination

17. This being a first appeal, the duty of the court is as was stated by the Court of Appeal in *Gitobu Imanyara & 2 others v Attorney General* [2016] eKLR that:

This being a first appeal, it is trite law, that this Court is not bound necessarily to accept the findings of fact by the court below and that an appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowances in this respect.
18. The appeal is on an award of general damages. The principles under which an appellate court may interfere with an award of damages made by a lower court are similarly settled. These are as was stated by the Court of Appeal in *Kemfro Africa Ltd v Lubia & another* (1987) KLR 30 to be as follows:

“The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either the judge, in assessing the damages, took into account an irrelevant factor, or left out of account a relevant one, or that , short of this, the amount is so inordinately low or so inordinately high that it must be wholly erroneous estimate of the damage.”
19. I have considered the grounds in support of the appeal, the grounds in opposition thereto and the submissions by the respective advocates for the parties. The issues for determination are:
 1. Whether the appellant was in breach of contract.
 2. Whether the respondent was entitled to the award for general damages.
20. The trial court on the issue of liability found that there was a banker and customer relationship between the two parties. The court cited the case of *Karak Rubber Co. Ltd v Burden* (1972) 1All ER 210 and the Supreme Court of Uganda case of *Stanbic Bank of Uganda v Uganda Cross Ltd*, Civil Appeal No.4 of 2004 where it was held in both cases that in a banker and customer relationship, a bank had an obligation to exercise reasonable skill and care while interpreting, ascertaining and acting in accordance with the instructions of the customer. That in the present case the appellant debited the Respondent’s account without his instructions and did not exercise reasonable skill and care. That the appellant failed in its obligation and therefore acted with negligence and was thus liable for breach of contract.



21. I do not think that the trial court can be faulted in reaching the above finding. That a bank is under obligation to diligently take care of a customer's money is not in dispute. In the case of *Equity Bank of Kenya & Another v Robert Chesang* [2016] eKLR, the Court held that:

“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 with 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 ...The bank/customer relationship is based on utmost good faith. The bank is also under a contractual duty to diligently handle accounts of a customer, to ensure that funds deposited on account are available when required by the customer. Any deviation from that understanding without justifiable reasons which should be communicated to the customer well in advance or immediately, the bank is in breach of a contract with the customer and is liable in damages.”

22. In this case the bank debited the Respondent's money into another account without his authority. The witness for the Appellant, DW1, said that the money was erroneously debited. The witness however did not give a plausible explanation as to why they did the transaction without the express authority of the Respondent. She did not show that there was reasonable skill and care before the money was transferred. In the premises, I am in agreement with the trial court that the Respondent had established that the Appellant did not exercise due diligence in transferring the money. The Appellants were therefore negligent and were in breach of the contract between them and the Respondent.

23. Having arrived at the above conclusion, the question that was before the trial court was whether the Appellant was liable in damages for breach of contract. The trial Magistrate appreciated the general rule that damages are not recoverable in alleged cases of breach of contract. This view has been stated in various decisions of the High Court and the Court of Appeal. Examples are in *Trans Mara Sugar Co Ltd & another v Ben Kangwaya Ayiamba & another* [2020] eKLR; *Kenya Tourism Development Corporation v Sundowner Lodge Ltd* 2018 eKLR (COA); *Securicor Courier (K) Ltd v Benson David Onyango & another* [2008] eKLR (COA) and *Consolata Anyango Ouma v South Nyanza Sugar Co. Ltd* (2015)eKLR. In the referred to case of *Kenya Tourism Development Corporation v Sundowner Lodge Ltd* the High court had awarded general damages of Ksh.30,000,000/= for breach of contract. On appeal, the Court of Appeal held that as a general rule, general damages are not recoverable in cases of alleged breach of contract. It emphasized that damages for breach of contract are compensation to the aggrieved party and a restitution of what he has lost by the breach.

24. In *Trans Mara Sugar Co Ltd & another v Ben Kangwaya Ayiamba & another* [2020] eKLR, Mrima J. dealt with the issue and held as follows:

In Migori High Court Civil Appeal No. 92 of 2015 *James Maranya v South Nyanza Sugar Co. Ltd* (2017) eKLR I dealt with the issue of the remedies in breach of contracts. This is what I stated: -

16. It is well settled in law that general damages cannot be awarded on a claim anchored on a breach of contract. In affirming that position, the Court of Appeal in the case of *Joseph Urigadi Kedeva v Ebby Kangishal Kavai* Kisumu Civil Appeal No. 239 of 1997 (UR) emphatically expressed itself thus:

.....As to the award of Kshs. 250,000/= as general damages, Mr. Adere submitted that there can be no award of general damages for



breach of contract.....We respectfully agree. There can be no general damages for breach of contract.....

25. The reason why general damages are not awardable for breach of contract was explained in the case of *Total (Kenya) Limited formerly Caltex Oil (Kenya) Limited v Janevams Limited* [2015] eKLR where it was observed that:

“This case has been accepted by this court as an authority for the proposition that general damages cannot be awarded for breach of contract and that proposition makes sense because damages arising from a breach of a contract are usually quantifiable and are not at large. Where damages can be quantified they cease to be general...”

26. The nature of damages for breach of contract was explained in the case of *Dharamshi v Karsan* [1974] EA 41 where the Court of Appeal for East Africa stated as follows: -

“As a general principle, the purpose of damages for breach of contract is, subject to mitigation of loss, the claimant is to be put as far as possible in the same position he would have been if the breach complained of had not occurred. The measure of damages is in accordance with the rule established in the case of *Hadley v Baxendale* (1854) 9. Exch.341 that the measure of damages is such as may be fairly and reasonably be considered arising naturally from the breach itself or such as may be reasonably contemplated by the parties at the time the contract was made and a probable result of such breach. Such damages are not damages at large or general damages but are in the nature of special damages and they must be pleaded and proved.”

See also Majanja J. in *Consolata Anyango Ouma v South Nyanza Sugar Co. Ltd* (2015) eKLR (supra).

27. From the foregoing, it is clear that general damages are not recoverable for breach of contract. Such damages are in the nature of special damages that must be pleaded, quantified and proved. However, in *Kinakie Co-operative Society v Green Hotel* (1988) KLR 242, the court of Appeal held that where damages are at large and cannot be quantified, the court may have to assess damages upon some conventional yardstick. But if a specific loss is to be compensated and the party was given a chance to prove the loss and did not he cannot have more than nominal damages – See *Nyamogo & Nyamogo Advocates v Barclays Bank of Kenya Limited* (2015) eKLR.
28. The question in this case was whether the Respondent suffered any loss as a result of breach of contract by the Appellant. The Appellant insisted that the Respondent did not suffer any loss as a result of the erroneous debit.
29. The Respondent relied on his written statement wherein he stated that the withdrawal without his consent subjected him to a lot of embarrassment, inconvenience and trauma given the fact that he was not accessible to the amount for his personal business use. In his evidence in court he stated that the effect of the transaction was that he had been put into financial challenge and that his business was affected. That he could not meet his financial obligations to his clients and customers. That his reputation was ruined.



30. The trial court in its judgment held that the Respondent did not have access to his money for a period of one and a half years even after the issue was brought to the attention of the Appellant. The court notably stated as follows:

I have looked at the bank statement in respect of the account and I'm of the considered view that that the bank account was active and therefore a debit of funds therein must have affected transactions on the account and therefore created inconvenience to the plaintiff.

31. I have considered the issue whether the Respondent suffered loss as a result of the debit. The Appellant in paragraph 6 of the plaint pleaded as follows:

The Plaintiff's said account was at the time of the said irregular and unlawful debt and transfer of funds amounting to Kenya Shillings 378,531, fully funded and the Plaintiff's business and financial plans were grossly frustrated with resultant loss and damage considering the unforeseeable unavailability of the said sum of Kenya Shillings 348,531 that the Plaintiff had factored into his plans and projections for the month thereby exposing the Plaintiff to considerable loss, damage, inconvenience and embarrassment .

In paragraph 7 he pleaded that:

The Plaintiff has account of the irregular, unilateral and unlawful actions of the Defendant, suffered loss and damage on account of the actual monies lost and damages, damage to his reputation and damages for breach of the Defendant's obligations considering its fiduciary relationship with the Plaintiff and the utter abuse of the Banking Act and conventional banking best practices.

32. The Appellant in his final prayers sought for the refund of the money, general damages for breach of contract and general damages for defamation. The money in issue was refunded after the Respondent filed suit. There was therefore nothing on the issue save for one on costs.

33. The claim on damages for defamation was dismissed by the trial court. There was no counter-appeal and I therefore need not dwell on the issue.

34. That left the only remaining issue being the claim on general damages for breach of contract. As observed from the authorities cited above, general damages are not recoverable for breach of contract. It is clear from the pleadings and the evidence adduced before the trial court that the Appellant was seeking for damages for financial loss as a result of the irregular debit of his bank account. Financial loss is something that can be quantified. In my view the claim was in the nature of special damages as the damages that were being claimed were not damages at large. The Appellant however did not plead nor quantify the specific loss. There was no evidence that he was unable to do business due to the debit. It is trite law that special damages must be specifically pleaded and proved with a degree of certainty – see the Court of Appeal decision in [*John Richard Okuku Oloo versus South Nyanza Sugar Company Limited*](#) [2013] eKLR. The Appellant failed to do that and he therefore did not prove his claim on damages.

35. The claimed money in the sum of Ksh.378,5631/= was refunded after the Appellant filed suit. It is trite law that damages for breach of contract are not recoverable in addition to quantified or special damages as it would amount to duplication - see *Dharamshi v Karsan* [1974] EA 41. Since the Respondent was refunded the money he could not be awarded general damages for breach of contract as that would amount to double compensation. The refund of the money placed the Respondent in the original position he was before the money was debited which is the very purpose of payment of damages for



breach of contract. It is therefore my humble view that the trial court erred in awarding general damages for breach of contract after the Appellant had refunded the money that was said to have been lost.

36. The Respondent cited the cases of *Otieno-Omuga & Ouma Advocates v CFC Stanbic Bank Limited* (supra) *Nicholas R.O. Ombija v Kenya Commercial Bank Limited* (supra) where damages for breach of contract were awarded. These cases can however be distinguished in that they involved failure by the banks to honor cheques issued to third parties when there was money in the clients' accounts. These were therefore clear cases where the damages were at large hence general damages were awarded. In the case of the Respondent herein the claim was based on loss of known amount of money which was refunded. There were no damages at large so as to warrant award of general damages. Taking into account that the money was refunded, the Respondent should, in my view have claimed for interest that the money would have earned for the period that the money was kept away from his account.
37. In the final end, I find that the trial court applied wrong principles of law and thus fell into error in awarding general damages to the Respondent for breach of contract. In the premises, the appeal herein is allowed and the award of the trial court is set aside.
38. As the appeal has succeeded, I award the costs of the appeal to the Appellant. Since the Appellant refunded the money after the Respondent had filed the suit at the lower court, I order that the Appellant bears half of the costs at the lower court.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 15TH JUNE 2023.

J. N. NJAGI

JUDGE

In the presence of:

Mr. Chege for Appellant

M.r M. C. Ouma for Respondent

Court Assistant- Amina

