



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CIVIL APPEAL NO. 9 OF 2018

JULIUS ODHIAMBO AWUONDA.....APPELLANT

VERSUS

KENYA COMMERCIAL BANK LIMITED.....RESPONDENT

[Being an appeal arising from the Judgment of the Hon. Odawo (RM) delivered in Kisumu CMCC No. 84 of 2015 on 24th January, 2018]

JUDGMENT

By the Judgment dated 24th January 2018 the trial court dismissed the Plaintiff's claims save for that of breach of contract.

1. The trial court held that the Defendant was in breach of its contract with the Plaintiff when it ran two accounts in the name of Plaintiff, whereas the Plaintiff was only aware of one account.
2. The Defendant acknowledged the error of running the said 2 accounts and did close one of them. Before closing the account which had been opened in error, the Defendant refunded Kshs 77,921.40 to the Plaintiff.
3. In respect to the claim for general damages for the breach of contract, the trial court awarded compensation in the sum of Kshs 100,000/=.
4. Although the trial court awarded that sum to him, the Plaintiff was dissatisfied with the judgment because the court had rejected the following reliefs, which he had sought in the Plaint dated 26th January 2015;

“(a) Kenya Shillings 195,179 representing the unaccounted balance with interest from 26/8/2011.

(b) A refund of Kenya Shillings 18,000/= and Kenya Shillings 207,057 repaid by the plaintiff with interest from 6/2/2014 and 2/05/2014, respectively.

(c) The deductions of Kenya Shillings 16,071 per month with effect from October 2012 with interests.

(d) A refund of Kenya Shillings 72,035, Kenya Shillings 6,237.05, Kenya Shillings 19,493.40 and Kenya Shillings 49,563 with interests from 29/12/2011, March 2014, April 2014 and May 2014 respectively.

(e) A Declaration that the Account Number MG1225700211 opened and operated in the names of the plaintiff by the Defendant is unlawful and the refund of all the money recovered from the plaintiff in offsetting the non-existing loan in the said account together with interests.

(f) General Damages for breach of Contract.

(g) General Damages for loss and damage suffered on account of damage to the plaintiff's reputation.

(h) Any other relief that this Honourable Court may deem just and fair to grant.

(i) Cost of the suit and Interests.”

5. The Appellant was dissatisfied with the Judgment, for the dismissal of the bulk of his claims, and he lodged an appeal.

6. On its part, the Respondent was also dissatisfied with the decision by the trial court, when it awarded General Damages of Kshs 100,000/= to the Appellant. Therefore, the bank also filed an appeal, in that respect.

7. On 5th November 2019, the 2 appeals were consolidated. This judgment is in relation to the two appeals, which were consolidated.

8. Having given due consideration to the submissions made by the parties, I find that the issues for determination in the appeal are as follows;

(i) Should the trial court have ordered the bank to refund all monies recovered as prayed for in the Plaintiff?

(ii) Should the trial court have awarded General Damages in favour of the appellant for breach of Contract?

(iii) Should the trial court have awarded General Damages to the appellant for defamation?

9. The law requires this Court, being the first appellate court, to re-evaluate all the evidence tendered at the trial, in order to be able to derive my own conclusions therefrom.

10. However, whilst re-evaluating the evidence on record, I must be mindful of the fact that I did not have the benefit of observing the witnesses when they were testifying.

11. It is common ground that the Appellant, **JULIUS ODHIAMBO AWUONDA**, was a customer of the Respondent, **KENYA COMMERCIAL BANK LIMITED**.

12. In that capacity, he sought a loan of Kshs 1,202,414/= from the bank, and he says that his application was successful. The said loan was, in the first instance, intended for use in defraying a loan facility which the Appellant had at Barclays Bank Limited.

13. According to the Appellant, the outstanding loan balance at Barclays Bank was Kshs 722,446.10. Therefore, the Appellant expected to have a credit balance of Kshs 479,968.90, after the Respondent had defrayed the loan balance at Barclays Bank.

14. However, instead of getting a credit of Kshs 479,968.90, the Appellant's account was credited with Kshs 284,789/=. Therefore, the Appellant asked the court to order the Defendant to pay him the sum of Kshs 195,179.90, which the Defendant had failed to account for.

15. In that respect, the Appellant conceded, during cross-examination, that the Respondent remitted to Barclays Bank, the sum of Kshs 838,329/=, to defray the Appellant's loan balance.

16. The Respondent provided documents which gave the breakdown of how the sum of Kshs 838,329/= was made up, being;

(i) Loan Balance.....Shs 722,446.10

(iii) Early Repayment Fee.....Shs 113,792.00

(iii) Cheque Clearing Fee.....Shs 2,090.00

Shs 838,328.10

17. I find that there was no sum which remained un-accounted for by the Respondent. Therefore, prayer (a) in the Plaintiff was properly rejected by the trial court.

Prayer (b)

18. The Appellant's testimony was that he was not given the sums of;

(i) Shs 18,000/= which was the loan sought on 6th February 2014; and

(ii) Shs 207,057/= which was the loan sought on 2nd May 2014.

19. During cross-examination, the Appellant conceded that the sum of Kshs 18,000/= was released to him through his Savings Account. He therefore confirmed that the evidence provided by the bank, was a complete answer to the complaints in paragraph 5 of the Plaintiff.

20. As regards the claim for Kshs 207,057/=, the Appellant testified thus;

"I was asking for a loan Kshs 1,950,000.00. It has my passport- size photo.

There is a loan account on which, on that account, I applied for a top-up. It was a real. It's the top-up ultimately became 207,057.55.

12. In the light of that testimony, the assertions in prayer 6 of the Plaintiff had no basis. I so find because the Appellant acknowledged that he had applied for the said sum, and also that he received it.

22. Accordingly, the trial court was right to have rejected the claim in prayer (b) of the Plaintiff.

Prayer (c) and (d)

23. The Appellant had asserted that the Respondent credited his account with Kshs 27,082/= monthly from October 2012, yet during that period, the Respondent actually deducted Kshs 43,153/= monthly.

24. For that reason, he wanted the court to compel the bank to account for the difference between the sums it deducted from his salary and the portion thereof which it remitted as loan repayment.

25. During cross-examination, the Appellant confirmed that the sums which he had alleged were not being accounted for by the Respondent, were never received by the Respondent. He said;

“I have pay slips for September – December 2011. They show deductions of Kshs 19,361.00 for each month payable to Barclays. The Ministry was remitting money to the wrong bank. This was from September and October 2011.

For November 2011, similar mistake was done. For December 2011 correct banking being Kenya Commercial Bank was paid Kshs 27,082.00. It was deducted according to my pay-slip, from September – November 2011, money wasn't remitted to Kenya Commercial Bank.

Yes Kenya Commercial Bank was justified to claim I was in arrears for 3 months.

It was the 72,035.50 from loan application form. If check-off failed, bank was entitled to recover money from my account.”

26. In the light of that evidence, I find that the Appellant fully appreciated why the bank had recovered the sum of Kshs 72,035.50. He was in arrears, because his employer failed to remit the monthly repayments to the Respondent.

27. Due to an error made by the Appellant's employer, the instalments of Kshs 27,082/= were remitted to Barclays Bank.

28. The Appellant is thus not right to assert, as he has done in his submissions herein, that the deduction of Kshs 72,035.50;

“..... Allegedly to recover the arrears in the Appellant's loan account and which deductions were unlawful and unjustified considering that such arrears would not arise because of the strict and express check-off deductions from the Appellant's salary at source into the loan account.”

29. As I have already held, (based on the Appellant's own testimony) the Appellant's employer deducted the money from his employee, but sent it to Barclays Bank, instead of Kenya Commercial Bank.

30. Consequently, the arrears were real.

Prayer (g)

31. In the light of the fact that the Appellant was in arrears, the Respondent would have been entitled to notify the Credit Reference Bureau about that fact.

32. By a letter dated 2nd October 2014 the Respondent notified the Appellant about its intention to share the Appellant's credit information with the licensed Credit Reference Bureaus.

33. The Respondent gave a 30 days' Notice to the Appellant, that if his account continued to remain non-performing, the Appellant would be adversely listed with the Credit Reference Bureaus.

34. The Notice to the Appellant indicated to him that;

“To avoid an adverse listing, you are advised to clear the outstanding arrears which continue to accrue default penalty interest charge.”

35. The Respondent even drew the attention of the Appellant to the fact that he had a right to access his Credit Report at the Credit Reference Bureaus; and that he could dispute any erroneous information.

36. I find no evidence that the Appellant tendered to prove that the Respondent defamed him.

37. There was no false information that emanated from the Respondent, concerning the Appellant. Furthermore, there was no evidence that the Respondent caused the publication of false or damaging information about the Appellant, to third parties.

38. **Halbury's Laws of England, 3rd Edition Vol. 24** defines defamation thus;

“A defamatory statement is a statement which, if published of and concerning a person, is calculated to lower him in the estimation of right-thinking men, or cause him to be shunned or avoided or to expose him to hatred, contempt or ridicule, or to convey an imputation on him disparaging or injurious to him, in his office, profession, calling, trade or business.”

39. I find that the Appellant failed to prove the ingredients of defamation. Therefore, the trial court was right to have rejected the claim for compensation for the alleged damage to his reputation.

Prayer (f)

40. The Appellant had prayed for the award of General Damages for breach of Contract.

41. The trial court held that the Respondent had erred by running 2 loan accounts in the Appellant's name. The court held the view that;

“Though it took a corrective action by closing down the account and refunding the recovered monies, damage had been occasioned upon the plaintiff, as he had been double charged. I find that for this he is entitled to damages.”

42. On the basis of that finding, the trial court awarded General Damages of Kshs 100,000/=.

43. In its cross-appeal, the Respondent submitted that the trial court erred by awarding General Damages for breach of Contract. In the opinion of the bank, the fact that it had refunded the total amount which had been “recovered” from the Appellant, was sufficient compensation.

44. On the other hand, the Appellant submitted that the sum of Kshs 100,000/= which the trial court had awarded, was too little to compensate him.

45. According to the Appellant, the said quantum was too little;

“..... because, the Respondent herein opened a fictitious account in the Appellant's name and irregularly operated the Appellant's Account Number MG1225700211 and unlawfully forwarded his name to Credit Reference Bureaus for listing, which dented and Undermined the Appellant's credit reputation with other financial institutions.”

46. I find that there was no evidence on record that showed the impact, if any, on the Appellant's credit reputation with other financial institutions.

47. In any event, I have already found that the claim founded on defamation had been properly rejected.

48. In the circumstances, it would not be right to rely on the alleged defamation as a basis for seeking greater compensation for a claim founded upon breach of contract.

49. But even if the claim relating to defamation had not been dismissed, the compensation relating to it would have been distinct from the compensation, if any, relating to breach of contract.

General Damages for Breach of Contract

50. The Appellant relied on the decision in **SAFARICOM PLC Vs IPHONE GLOBAL SYSTEMS LIMITED HCCC NO. E409 OF 2018** to support his claim for general damages.

51. In that case the Court awarded Kshs 20 Million as general damages for breach of contract.

52. It is noteworthy that that award was made in an uncontested case, which proceeded by way of formal proof.

53. When determining that case the learned Judge made reference to the following words which were spoken by the Court in the case of **SPEED WALL BUILDING TECHNOLOGIES LTD. Vs COUNTY GOVERNMENT OF MIGORI [2016]eKLR:**

“The general principle in the award 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 as he would have been if the breach complained of had not occurred.”

54. That is why I understand the Respondent to have been saying that when it refunded all the money which had been debited against the Appellant's account, that step served to return the Appellant to the same position as he would have been in, if the breach in issue had not occurred.

55. In the case of **CAPITAL FISH KENYA LIMITED Vs KENYA POWER & LIGHTING COMPANY LIMITED, CIVIL APPEAL NO. 189 OF 2014**, the Court of Appeal expressed itself thus;

“On the second issue, the appellant conceded that whereas the general legal principle is that courts do not normally award damages for breach of contract, there are exceptions such as when the conduct of the respondent is shown to have been oppressive, high handed, outrageous, insolent or vindictive.”

56. The learned Judges of Appeal observed that it was therefore incumbent upon the Appellant to lead evidence so as to bring the Respondent’s conduct into the exceptions alluded to above.

57. In this case I find that the Appellant did not lead evidence that could have brought the conduct of the Respondent into the realm of exceptions to the general rule, which is that courts do not normally award damages for breach of contract.

58. In the case of **KENYA TOURIST DEVELOPMENT CORPORATION Vs SUNDOWNER LODGE LIMITED, CIVIL APPEAL NO. 120 OF 2017**, the Court of Appeal said;

“With the greatest respect to the learned Judge, we think that the reasoning is quite flawed. We are not persuaded that the authorities cited by the learned Judge support the proposition that in cases of breach of contract there does exist a large and wide-open discretion to the court to award any amount of damages.

The opposite is in fact the case: as a general rule, general damages are not recoverable in cases of alleged breach of contract and that has been the settled position of law in our jurisdiction and with good reason.”

59. On the strength of those authorities, which are binding upon this court, I find that general damages ought not to have been awarded to the Appellant.

60. In the final result, the appeal is dismissed, whilst the counter-appeal is allowed.

61. Costs of the appeal and of the counter-appeal are awarded to the Respondent.

DATED, SIGNED and DELIVERED at KISUMU This 10th day of February 2021

FRED A. OCHIENG

JUDGE