



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 474 OF 2013

MONICA HARDWARE LIMITED.....PLAINTIFF

-VERSUS-

DIAMOND TRUST BANK.....DEFENDANT

JUDGEMENT

1. The plaintiff herein lodged a suit against the defendant vide the plaint dated 1st November, 2013 and sought for the following reliefs:

- a) Damages for breach of contract.*
- b) General damages for libel.*
- c) Damages for loss of business.*
- d) Punitive damages.*
- e) Interest thereon on (a) and (c) above at court rates from the date of breach.*
- f) Costs of the suit.*
- g) Any other reliefs that this Honourable Court may deem fit to grant.*

2. The plaintiff was at all material times a customer of the defendant, operating Account No. [xxxx] at its Capital Centre Branch, Mombasa Road in Nairobi ("the account").

3. The plaintiff pleaded in its plaint that it was a term of the contract between the parties herein that the plaintiff maintains the authorized credit limit in respect to its bank account and makes the requisite payments to the defendant, and that the defendant accepts all cheques drawn by the plaintiff.

4. The plaintiff further pleaded in its plaint that sometime on or about 1st September, 2011 the defendant neglected to and/or refused to honour two (2) cheques drawn by the plaintiff in favour of Mombasa Cement Co. Limited; namely cheque numbers 000125 and 000134; in total breach of the contract. The particulars of breach were set out under paragraph 5 of the plaint.

5. It was pleaded by the plaintiff that further to dishonouring the cheque, the defendant failed and/or declined to guarantee Mombasa Cement Co. Limited as to the financial status of the plaintiff, thereby making it difficult for the plaintiff to get credit advances previously made to it by Mombasa Cement Co. Limited.

6. It was further pleaded by the plaintiff that as a result of the breach and negligence, it suffered loss/damage wherein it lost a number of business opportunities.

7. Upon service of summons, the defendant entered appearance and filed its statement of defence on 19th December, 2013 to refute the plaintiff's claim.

8. More particularly, the defendant pleaded that while it is true that a contract existed between the parties at all material times, it was not a term thereof that the defendant was bound to accept all transactions on the plaintiff's account; rather, it was only bound to honour cheques subject to the availability of funds.

9. In its statement of defence, the defendant admits to declining to honour the two (2) cheques particularized in the plaint for the sums of Kshs.150,000/= and Kshs.175,000/= respectively for the reason that the plaintiff's account lacked sufficient funds and hence the defendant was not at all in breach of the contract as claimed in the plaint.

10. The defendant also denied the particulars of breach of contract and the averment that it acted negligently towards the plaintiff.

11. Moreover, the defendant denied the allegations of loss/damage pleaded in the plaint.

12. At the hearing of the suit, the plaintiff and the defendant summoned one (1) witness each.

13. Anthony Mwangi Mbutia (a businessman) who was PW1 produced his signed witness statement as evidence and further produced the plaintiff's bundle of documents as P. Exh 1 to 4.

14. The witness stated that arising from the alleged breach of contract by the defendant, his properties were sold to cover the outstanding debts and to cater for the school fees for his children.

15. In cross-examination, the witness stated that he did not have any documentation in court to show that he had school-going children, nor did he have any documents to prove that his business collapsed and that his assets were sold.

16. PW1 also stated in his evidence that he came to learn that the cheques in question had bounced upon being contacted by his supplier and that consequently, he suffered a loss of over Kshs.50,000,000/=. The witness is of the view that as at the time of depositing the cheques with the defendant, there were sufficient funds to enable the defendant honour the said cheques.

17. In re-examination, it was the testimony of the witness that prior to the material incident, he had never experienced a bouncing of his cheques due to insufficient funds.

18. It was equally the testimony of PW1 that following the bouncing of his cheques, people lost confidence in his business to the point of him being blacklisted with the Credit Reference Bureau (CRB) and his lifestyle went down. This marked the close of the plaintiff's case.

19. For the defence, Vilda Coutinho who was DW1 stated that he was at all material times a Branch Manager at the defendant's Capital Centre Branch and adopted his executed witness statement as evidence and further produced the defendant's bundle of documents as D. Exh 1 to 8.

20. The witness then testified that the plaintiff's account only had a sum of Kshs.2,000/= at the time the cheques in question were drawn.

21. The witness further testified that by the time the plaintiff deposited sufficient funds into its account, the cut-off time agreed upon had run out.

22. DW1 stated that the defendant has a policy regarding clearance of deposited cheques and that an account ought to have sufficient funds by 2.00 pm of the date the respective cheque becomes due.

23. In cross-examination, the witness gave evidence *inter alia*, that the contents of the letter dated 7th September, 2011 addressed by the defendant to one of the plaintiff's customers, Monica Hardware, indicating that it is not true that the cheques in question were dishonoured for lack of funds; is false. In the view of the witness, the defendant only wrote the erroneous letter to maintain a good bank-customer relationship with the plaintiff.

24. In re-examination, DW1 clarified that the aforementioned letter though erroneous was not necessarily untrue, and that it was based on a genuine mistake. This marked the close of the defence case.

25. Upon close of the hearing, this court invited the parties to file and exchange written submissions. In its submissions dated 16th January, 2020 the plaintiff argues that it was a term of the contract between the parties that the defendant would honour all cheques drawn by the plaintiff but it did not.

26. The plaintiff further argues that at the time of drawing the material cheques, its account had sufficient funds and hence by failing to honour the said cheques, the defendant breached the mutual contract.

27. It is also the submission of the plaintiff that the letter dated 7th September, 2011 drafted by a representative of the defendant indicating that the cheques did not bounce as a result of insufficiency of funds is a clear admission of liability on the part of the defendant.

28. The plaintiff refers this court to the provisions of **Section 120** of the **Evidence Act, Cap. 80 Laws of Kenya** thus:

“When one person has, by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed, in any suit or proceeding between himself and such person or his representative, to deny the truth of that thing.”

29. The plaintiff also cites *inter alia*, the case of **Choitram v Nazari [1984] eKLR** where the Court of Appeal reasoned that:

“For the purpose of order XII rule 6, admissions can be express or implied either on the pleadings or otherwise, eg in correspondence. Admissions have to be plain and obvious, as plain as a pikestaff and clearly readable because they may result in judgment being entered. They must be obvious on the face of them without requiring a magnifying glass to ascertain their meaning. Much depends upon the language used. The admissions must leave no room for doubt that the parties passed out of the stage of negotiations onto a definite contract.”

30. On quantum, it is the simple submission of the plaintiff that it is entitled to damages resulting from the breach of contract.

31. In its reply submissions dated 27th February, 2020 the defendant contends that since there were insufficient funds in the plaintiff’s account at the time of drawing the cheques and the plaintiff did not have any overdraft facility, the defendant was not bound to honour the cheques.

32. The defendant urges this court to consider the material presented before it in totality and not to examine the aforementioned letter dated 7th September, 2011 in isolation, citing the case of **Equity Bank Limited & another v Robert Chesang [2016] eKLR** in which the court held thus:

“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...”

33. The defendant is therefore of the view that the plaintiff has not proved that there was either negligence or a breach of contract by the defendant.

34. Furthermore, it is the contention of the defendant that the plaintiff did not adduce any evidence to show the loss/damage claimed to have been suffered as a result of the alleged breach of contract.

35. On damages, it is the contention of the defendant that the plaintiff is not deserving of any of the reliefs sought in the absence of proof of loss of business.

36. The defendant further contends that in the absence of any evidence to show that it acted in a vindictive or otherwise callous manner, the plaintiff would similarly not be entitled to an award of general damages for breach of contract. It borrowed *inter alia*, from the authority of **Ronyad Enterprises Limited v Kenya Commercial Bank Limited [2019] eKLR** where the court reasoned that as a general rule, damages are not available for breach of contract unless it can be shown that the defendant in question acted in a high-handed or outrageous manner.

37. It is the argument of the defendant that the plaintiff is equally not entitled to punitive damages in the absence of proof.

38. In the end, the defendant pleads with this court to dismiss the plaintiff’s suit with costs.

39. I have considered the evidence tendered in court and the submissions filed plus the authorities cited, and I have identified the following as the key issues for determination:

- i. Whether the contract between the parties provided for the honouring of cheques drawn by the plaintiff and to what extent;***
- ii. Whether the plaintiff’s account No. [xxxx] had sufficient funds as at the time of drawing and/or dishonouring cheque numbers 000125 and 000134;***
- iii. Whether there was a breach of the contract by the defendant;***
- iv. Whether the plaintiff suffered loss/damage as a result; and***
- v. Whether the plaintiff is entitled to the reliefs sought.***

40. On the **first** issue, upon my examination of the evidence on record and more particularly the account opening form and the General Terms and Conditions of the defendant. The account opening form dated 13th September, 2007 indicates the type of account as a ‘current account.’

41. Clause 1 of the General Terms and Conditions dated 13th September, 2007 stipulates that a customer can request the bank to honour or debit into his or her account all cheques, drafts, bills et cetera and to carry out further instructions in respect to the account notwithstanding that any such debiting or instruction may result in the overdraft of the account in question. The Clause goes on to stipulate that where no overdraft has been agreed upon between the bank and customer, or where the overdraft amount is limited, the bank may refuse to carry out any instructions which may either result in an overdraft or exceed the amount agreed upon between the parties.

42. From the above material and the evidence tendered as a whole, there is nothing to indicate the plaintiff had executed an overdraft facility with the defendant.

43. Consequently, and going by Clause 1 of the Terms and Conditions mentioned hereinabove, the defendant; in my view; was not obligated to honour all cheques or carry out all instructions by the plaintiff particularly in instances where the circumstances would give rise to an overdraft. The parties are bound by the terms of their agreement.

44. I associate myself with the following finding offered by the court in the case of **Patrick Kimiti Mureithi t/a P K Mureithi & Co Advocates v Bank of Africa Kenya Limited [2018] eKLR** cited by the defendant:

“It comes out clearly from the evidence herein that the Plaintiff had not executed an overdraft facility in the said account. The account was governed by terms and conditions. One of the said terms in clause No. 1 provided for an overdraft facility in the following terms:

“Where no overdraft has been agreed or the limit of overdraft agreed has been reached, the bank may nevertheless refuse to carry out any instructions which would result in there being an overdraft or any overdraft greater than that agreed as the case may be.”

The said clause reflects that the bank could refuse to carry out any instructions which would result in an overdraft. That was the written agreement between the parties.”

45. In respect to the **second** issue for determination, upon my study of the evidence, I observed that the two (2) material cheques were deposited with the defendant on 30th August, 2011 by which time the account had a balance of Kshs.2,473.01.

46. The statement of account shows that as at 1st September, 2011 the account balance stood at Kshs.326,012.89- and that a cash deposit and internal cheque transfer were subsequently made into the account on the same date, in the respective sums of Kshs.230,000/= and Kshs.100,000/= respectively, and totaling a sum of Kshs.330,000/=.

47. The statement of account shows that later on the aforementioned 1st September, 2011 the material cheques were unpaid for lack of sufficient funds and penalty charges of Kshs.2,400/= accrued for each cheque.

48. It is apparent from the evidence that by the time the cheques were declared unpaid, the plaintiff had already deposited monies into its account earlier that day, which differs from the account given by DW1 in his statement that the sum of Kshs.330,000/= was deposited after the cheques had been unpaid.

49. Going by the evidence availed, I am convinced that though the funds in the account fell short at the time of depositing the material cheques, by the time the cheques were being declared unpaid, there were sufficient funds in the plaintiff's account to cater for the cheques.

50. This brings me to the **third** issue, to do with whether the defendant was in breach of the contract. Upon my study of the evidence, the timelines by which the plaintiff had instructed the defendant to honour the cheques remain unclear. In addition, none of the parties herein availed copies of the cheque for this court's reference.

51. Be that as it may, having noted that by the time the cheques were declared unpaid the account had sufficient funds, I am of the view that it fell upon the defendant to exercise due diligence in confirming the position before deciding to dishonor the cheques. The defendant's representative ought to have taken into consideration or noted the deposits made earlier on the material date; had it done so, it would have realized that the account had been credited thereby making it possible to honour the cheques.

52. Moreover, I looked at the letter dated 7th September, 2011 addressed to the plaintiff by the defendant indicating that the unpaid cheques were not due to insufficient funds and essentially apologizing for the inconvenience. While DW1 sought to explain that the aforesaid letter was erroneously made, I am not convinced as to that position, in the absence of any credible evidence to support it.

53. For all the foregoing reasons, I am satisfied that the plaintiff has reasonably demonstrated that the defendant acted negligently and/or in breach of the contract.

54. Concerning the **fourth** issue, upon considering and examining the evidence on record, I note that while PW1; the proprietor of the plaintiff; set out in his evidence the nature and extent of loss he suffered, he did not adduce any credible evidence in support thereof.

55. However, it is reasonable to state that given the nature of business that the plaintiff is engaged in, it is plausible that resulting from the dishonoured cheques by the defendant, the plaintiff's business relationship with Mombasa Cement Co. Limited (the intended recipient of the funds drawn in the cheques) may have been negatively affected.

56. The **fifth** and final issue for determination is on the reliefs sought. Concerning the damages for libel sought, it is clear from the record that following a preliminary objection raised by the defendant earlier in the suit, the court found that the cause of action for defamation is time barred and therefore struck out the paragraphs touching on the tort of defamation. In view of the foregoing, I find no basis on which to consider or grant any damages under this head.

57. Similarly, I note that the plaintiff sought for punitive damages. Nonetheless, in the absence of any extenuating factors, I decline to grant

any such damages.

58. On damages for loss of business, in the absence of any actual proof of loss of business, I decline to award any damages here.

59. This leaves me with the subject on general damages for breach of contract. I observed that none of the parties offered any proposed sums under this head.

60. I considered the reasoning in the case of **Ronyad Enterprises Limited v Kenya Commercial Bank Limited [2019] eKLR** that as a general rule, damages are not available for breach of contract.

61. All the same, I am convinced that the plaintiff would still be entitled to nominal damages in the absence of proof of actual loss/damage suffered. I am persuaded by the holding in case of **Peter Umbuku Muyaka v Henry Sitati Mmbasu [2018] eKLR** in which the court held thus:

“A claimant for general damages for breach of contract who does not prove that he suffered loss is all the same entitled to damages, though nominal. In the Anson’s Law of Contract, 28th Edition at pg 589 and 590 the law is stated to be that:-

“Every breach of a contract entitles the injured party to damages for the loss he or she has suffered. 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 that breach, is nevertheless entitled to a verdict but the damages recoverable will be purely nominal.”

62. I therefore considered the case of **Ronyad Enterprises Limited v Kenya Commercial Bank Limited [2019] eKLR** cited by the defendant, where an award of Kshs.100,000/= was upheld under this head and the case of **Supinder Singh Sagoo v Kenya Commercial Bank [2020] eKLR** in which the court awarded a nominal sum of Kshs.100,000/= on general damages. In my opinion, the sum of Kshs.100,000/= would constitute reasonable nominal damages for breach of contract.

63. In the end therefore, judgment is hereby entered in favour of the plaintiff and against the defendant as follows:

a) **General damages for breach of contract Kshs.100,000/=**

Total Kshs.100,000/=

b) **Interest on (a) at court rates from the date of judgment until the date of full payment.**

c) **Costs of the suit.**

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 12TH DAY OF MARCH, 2021.

.....

J. K. SERGON

JUDGE

In the presence of:

..... **for the Plaintiff**

.....**for the Defendant**