



IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL AND TAX DIVISION

CORAM: D. S. MAJANJA J.

CIVIL CASE NO. E381 OF 2019

BETWEEN

CHARLES HENRY MANGUA.....PLAINTIFF

AND

FAMILY BANK LIMITED.....DEFENDANT

JUDGMENT

Introduction and Background

1. At the time material to this suit, the Plaintiff was the holder of account number 014000018542 at the Defendant's Cargen House branch, Nairobi. His claim against the Defendant ("the Bank") is set out in the Plaint dated 29th October 2019. The thrust of the Plaintiff's case is that Bank debited his account with unauthorized Excise Duty arrears for the years 2015 and 2016 amounting to KES. 406,001.68. On 27th September 2019, he deposited KES. 200,000.00 in his account but when he sought to withdraw it on 7th October 2019, he was informed that his account was overdrawn.
2. The Plaintiff's case is that the Bank committed fraud, violated its fiduciary duty to him and committed breach of contract. He also claims that the Bank defamed him by stating that his account was overdrawn. He seeks general, special and aggravated damages, a permanent injunction restraining the Bank from levying any charges, interest, demanding and or taking any action towards recovering any amounts from his account, reversal of all unprocedural debits made by the Bank in his account, costs and interest.
3. The Bank denies the Plaintiff's claim in its Statement of Defence dated 20th April 2020. It states that in accordance with the *Excise Duty Act, 2015*, it was required to charge and remit 10% duty on Overdraft Processing fees on customers between 2013 and 2017 and 20% duty thereon in 2018. It contends that these fees were notified to its customers by a notice dated 4th September 2019 and in accordance with the law and the notice it recovered KES 406,001.68 from the Plaintiff's account as he had a running overdraft in his account which attracted the Excise Duty. The Bank also denies that the Plaintiff is entitled to the reliefs claimed.
4. At the time of filing this suit, the Plaintiff filed a Notice of Motion dated 29th October 2019, inter alia, under **Order 40 rule 2** of the *Civil Procedure Rules*, seeking an interlocutory injunction restraining the Bank from levying any charges, interest, demanding and or taking any action towards recovering any amounts from his account pending hearing and determination of the suit. I heard the application and dismissed it by a ruling dated 19th December 2019.
5. The matter was set down for hearing. The Plaintiff (PW 1) testified on his behalf and the Bank called a Relationship Officer, Antony Waweru Mbugua (DW 1) as its witness. The tenor of the evidence testimony mirrored what is outlined above. The parties filed written submissions advancing their respective positions.
6. The facts leading up to the suit are not really disputed. It common ground that the Plaintiff was at all material time a customer of the Bank and the Bank debited his account with KES 406,001.68 on account of Excise Duty.
7. The issues for determination are whether the debits made on the Plaintiffs account were authorised and if so, whether the Bank notified the Plaintiff. The reliefs are consequential on finding these issues in the affirmative.

The Plaintiff's Case

8. The Plaintiff's case can be gathered from the Plaintiff. The Plaintiff states that he is the holder of account number 014000018542 at the Bank's Cargen Branch and that on 27th September 2019 he deposited the sum of KES. 200,000.00 into the said account. That two week later, being 7th October 2019, he went to withdraw part of the said KES. 200,000.00 only to be told that there was a serious mistake on his part as the account had been overdrawn by over KES. 207,000.00. The Plaintiff avers that he was then referred to the Bank's Credit Officer who informed him that the Bank had accorded him a KES. 406,001.68 overdraft facility on the 21st September 2019 which was equal to and made up of 10% Excise Duty on bank charges associated with loan processing fees that the Bank's system had failed to capture in the years 2015 and 2016.

9. The Plaintiff further contends that in essence, the Bank charged him KES. 4,060,016.80 loan processing fee which he says is unknown to him, erroneous, and a fraudulent debit on his account. The Plaintiff states that he is only aware of a 1 year KES. 20,000,000.00 overdraft facility for which the Bank charges were KES. 200,000.00 therefore attracting KES. 20,000.00 as Excise Duty which was extended for one more year on similar terms and for which the Plaintiff states he paid relevant charges and duty. The Plaintiff thus avers that the total Excise Duty due should have been and was KES. 40,000.00, thus if there was any demand for unpaid Excise Duty associated with the Plaintiff's account, the total sum would be KES. 40,000.00.

10. The Plaintiff thus holds that he has suffered loss for the overdraft amount and attendant bank charges; loan processing fees unlawfully levied on the account and; interest income lost by virtue of the loan processing fee. The Plaintiff further states that the Bank failed and refused to communicate to him that he allegedly owed Excise Duty to the Kenya Revenue Authority ("KRA") and failed to communicate its intention to overdraw/debit his account when the Bank knew or had reason to know that it should have been communicated.

11. The Plaintiff avers that the Bank subjected him to embarrassment, occasioned by the failure to access his money and the humiliating referral and abandonment to junior staff who in turn chose to educate him about the Bank's policy and operational procedures put in place to justify the unsolicited overdraft, which was reckless, negligent and akin to adding salt to injury.

12. The Plaintiff accuses the Bank of breach of its duty and unilateral action and that he has suffered injury to his person, character, esteem, credibility as being able to keep his word, integrity and reputation. The Plaintiff further avers that the Bank deliberately and without any justification published words that depicted him negatively and he is claiming damages from the Bank for breach of contract, breach of fiduciary duty, defamation and libel.

The Defendant's Case

13. The Bank case is that it was justified in collecting the Excise Duty from the Plaintiff's account. It contended that the **Finance Act 2012** introduced amendments to the **Customs and Excise Duty Act (Cap 472) Laws of Kenya (now repealed)** levying a 10% Excise Duty on fees charged for various financial services and on other fees charged by financial institutions. In due course, the **Excise Duty Act, 2015** which repealed the **Customs and Excise Duty Act** defined "other fees" to include any fees, charges or commissions charged by financial Institutions related to their licensed financial services but excluded interest on loan or return on loan or an insurance premium or premium based on related commissions.

14. The Bank states that the Overdraft Processing Fees charged by banks on overdrafts to customers falls within the definition of "other fees" in the **Excise Duty Act 2015** and it was thus under a legal duty to remit to KRA the 10% Excise Duty on Overdraft Processing fees on all Overdraft Processing Fees charged to customers between 2013 and 2017 and 20% Excise Duty on Overdraft Processing fees charged to customers from 2018.

15. The Bank states KRA demanded from it KES 170,352,104.00 being Excise Duty on "Other fees" charged by the Bank to its customers within the meaning of the **Excise Duty Act 2015** by a notice dated 29th January 2019. Thereafter, the Bank issued the notice dated 4th September 2019 to its customers stating that it would proceed to collect all uncollected excise duty on bank fees/charges recoverable between 2013 and 2018 from customers' accounts where the excise duty had not been recovered. The notice specified that the Excise Duty deductible was 10% of the charges between 2013 and 2017 and 20% of the charges in 2018 under the **Excise Duty Act** effective August 2013.

16. The Bank states that the Plaintiff applied for and obtained an Overdraft facility running through his account between 2015 and 2016 and which attracted 10% Excise duty pursuant to the **Excise Duty Act, 2015** as follows:

- i. In 2015, there was an Overdraft Processing Fee of KES. 200,000.00 which attracted 10% Excise Duty of KES. 20,000.00 payable to KRA.
- ii. In 2016, there was an Overdraft Processing Fee of KES. 3,860,016.80 which attracted 10% Excise Duty of KES. 386,001.68.

17. The Bank thus contends that the total Excise Duty recoverable for 2015 and 2016 was KES. 406,001.68 and that it is this sum that was lawfully recovered for the Plaintiff's account. It further states that at the date of recovery, the Plaintiff's account had a credit of KES. 244.22 causing the account to be overdrawn in the sum of KES. 405,757.46. Thus when the Plaintiff deposited the cheque of KES. 200,000.00 on 27th September 2019, the overdraft was reduced to KES. 207,067.17.

18. The Bank further stated that it remitted KES. 155,385,678.00 to KRA on 20th November 2019 on account of the Excise Duty on charges recovered from customers' accounts in accordance with KRA's demand. The Bank therefore states that it acted lawfully by debiting the Plaintiff's account with the sum of KES. 406,001.68 in accordance with the requirements of the **Excise Duty Act 2015**.

19. The Bank denies the allegations of injury suffered by the Plaintiff or that it uttered and published or wrote any words or article of and concerning the Plaintiff and his account or that the Plaintiff has been injured in his credit and reputation.

Analysis and Determination

20. It is common ground that the Bank debited KES. 406,001.68 from the Plaintiff's account. According to the Bank, this amount was to clear outstanding Excise Duty for overdraft facilities requested by the Plaintiff and granted to him by the Bank in 2015 and 2016 which the Bank failed to capture in those years.

21. At Para. 14 and 15 of the Plaint, the Plaintiff pleads as follows:

[14] The Plaintiff avers that he is only aware of a 1 year Kshs. 20,000,000/= overdraft facility for which the bank charges were Kshs. 200,000/= therefore attracting Excise Duty of Kshs. 20,000.00 which was extended for one more year on similar terms and for which the Plaintiff paid relevant charges and duty

[15]. Virtue of 14 above, the Plaintiff avers that the total Excise Duty due would therefore have been and was Kshs. 40,000/= thus if there was any demand for unpaid Excise Duty associated with the Plaintiff's account the total sum would be Kshs. 40,000/=.

22. In the aforementioned averments, the Plaintiff admits that he was granted overdraft facilities and that he was indeed charged Excise Duty. As I understand, the Plaintiff does not dispute the fact the Bank was entitled to charge Excise Duty on overdraft facilities. What I hear him to state is that there was no basis for the Bank to charge the KES. 406,401.00 as he only had one facility. The Bank has produced a letter written by the Plaintiff, in his own hand, received by the Bank on 15th August 2016 where he was seeking to increase the KES. 35,000,000.00 overdraft facility to KES. 40,000,000.00. This leaves little or no doubt that the Plaintiff had overdraft facilities for which the Bank was entitled to charge Excise Duty.

23. The Plaintiff is aggrieved that the Bank did not serve notice of its intention to debit his account with the said KES. 406,001.68 and that this debit caused him injury to his reputation, credibility, integrity, character and esteem. Therefore, the issues that fall for determination are:

- (a) Whether the Bank was entitled to recover KES 406,001.68/- as outstanding Excise Duty for the overdraft facilities granted to the Plaintiff in 2015 and 2016.
- (b) Whether the Bank notified the Plaintiff that it would recover KES. 406,001.68/- on account of outstanding Excise Duty.
- (c) Whether the Plaintiff suffered injury as a result of the KES. 406,001.68 debit on his account.

Whether the Bank was entitled to recover KES. 406,001.68.

24. The Bank produced the Plaintiff's request for an overdraft facility which was received on 15th August 2016. In the letter, the Plaintiff confirms that he has an overdraft of KES 35,000,000.00 which he seeks to be increased to KES 40,000,000.00. This letter supports the Bank's contention that these admitted overdraft facilities attracted a total Excise Duty of KES. 406,001.68 and which amount was never recovered from the Plaintiff initially.

25. In view of the additional overdraft facility which the Plaintiff took, I am unable to find that the Plaintiff was only liable to pay KES 40,000.00 as Excise Duty for the two facilities. I am satisfied that the Bank was entitled to recover KES. 406,001.68 in accordance with the **Excise Duty Act, 2015**.

26. The Plaintiff argued that the Bank had not demonstrated that it had not paid or remitted the duty to KRA by failing to produce evidence showing that it paid the amount demanded. The Bank produced evidence of payment of KES 155,385,618 on account of Excise Duty to KRA. That notwithstanding, the legal obligation imposed on the Bank to deduct Excise Duty imposed by the law remains.

Whether the Bank notified the Plaintiff of the recovery of KES. 406,001.68

27. The Plaintiff's case is that the Bank ought to have notified him of the notice by communicating to him before taking adverse action of causing his account to be overdrawn. Counsel for the Plaintiff cited the case of **Equity Bank Limited and Another v Robert Chesang NRB HCCA No. 571 of 2012 [2016] eKLR** where the court held that Bank had a contractual duty to diligently handle the customer's account. The Plaintiff expected that he would be notified through his address and telephone that the Bank would deduct the outstanding Excise Duty.

28. The Bank's case is that the notice it issued was displayed in all of the Bank's branches notifying customers that the Bank would proceed to collect all uncollected excise duty on bank fees/charges recoverable between 2013 and 2018 from customers' accounts where the Excise duty had not been recovered.

29. In regard to the duties of the Bank, in **Equity Bank Limited & Another v Robert Chesang (Supra)** the court observed:

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.

30. While I have no doubt that a Bank has a contractual duty to handle accounts diligently, the issue in this case is whether the Bank gave notice in the manner contemplated under the agreement. It was the burden of the Plaintiff to demonstrate that the contract between it and the Bank required notice by mail, through the physical address or by telephone call. I did not see the contract or terms of engagement between

the Plaintiff and the Bank. On the other hand, there is no evidence that a notice by the Bank in the manner it communicated is not permitted by the agreement. At the end of the day, there is no dispute that the Bank was entitled to recover Excise Duty from the customer's account which it did.

31. In the circumstances, I find the notice given by the Bank to its customers was sufficient.

Whether the Plaintiff suffered injury to his reputation

32. The Plaintiff averred that the Bank deliberately and without any justification published words that depicted him negatively and he is claiming damages from the Bank for breach of contract, breach of fiduciary duty, defamation and libel. The Plaintiff pleaded that on 21st September 2019, the Defendant, through its cashier caused to be uttered and published of and concerning the Plaintiff and his account, the word, "Recovery of Excise Duty Overdraft ...". He further stated that the cashier added words to the effect that there was serious mistake on the part of the plaintiff since his account was overdrawn by KES 207,000.00.

33. The ingredients for a claim for libel, were summarized in by Mativo J., in **Joseph Njogu Kamunge v Charles Muriuki Gachari Civil Appeal No. 42 of 2014 [2016] eKLR** as follows:

Black's Law Dictionary defines defamation as "the act of harming the reputation of another by making a false statement to a third person." The book Gatley on Libel and Slander authoritatively states that a statement is defamatory of the person of who it is published if it tends to lower him in the estimation of right thinking members of the society generally or it exposes him to public hatred, contempt or ridicule or it causes him to be shunned or avoided. A plaintiff in a defamation case must prove that the words were spoken or written by the defendant, that those words refer to him/her, that those words are false. That the words are defamatory or libelous and that he/she suffered injury as a result, that is, his/her reputation was injured as a result.

34. It is trite law the words uttered constitute the cause of action in a defamation case. It is those words that must be defamatory of and concerning the plaintiff. In this case, the words allegedly uttered, "Recovery of Excise Duty Overdraft ..." are not on their face defamatory in the natural or ordinary meaning unless of course there are special facts known to a reasonable person which would cause that person to conclude that they are defamatory. This is an innuendo which must be pleaded. In this case no innuendo was pleaded. The words themselves state no more than the bank is recovering Excise Duty. I therefore reject this aspect of the claim.

35. Moreover, having found that the Bank was entitled to recover Excise Duty as a result of a legislative imposition and having complied with the law, the court cannot mulct the Bank with damages.

Conclusion and Disposition

36. I have found that the deduction by the Bank from the Plaintiff's account was lawful and that he was sufficiently and timely notified of the deduction, therefore, I fail to find what injury was inflicted upon his character, esteem, integrity and/or reputation when the said deduction was lawful.

37. This suit lacks merits and is accordingly dismissed with costs to the Defendant.

DATED and DELIVERED at NAIROBI this 9th day of APRIL 2021.

D. S. MAJANJA

JUDGE

Court Assistant: Mr M. Onyango

Mr Kimathi instructed by Gikunda Miriti and Company Advocates for the plaintiff.

Mr Munene instructed by P. N. Wena and Company Advocates for the defendant.