



**Barclays Bank of Kenya Limited v Mema (Civil Appeal E011 of 2021)  
[2021] KEHC 333 (KLR) (Commercial and Tax) (3 December 2021) (Judgment)**

Neutral citation: [2021] KEHC 333 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
CIVIL APPEAL E011 OF 2021  
DAS MAJANJA, J  
DECEMBER 3, 2021**

**BETWEEN**

**BARCLAYS BANK OF KENYA LIMITED ..... APPELLANT**

**AND**

**FRANCIS MISOGA MEMA ..... RESPONDENT**

*(Being an appeal from the Judgment and Decree of Hon. B. J. Ofisi, RM dated 29th May 2020 at the Magistrates Court at Nairobi, Milimani in Civil Case No. 1877 of 2016)*

**JUDGMENT**

Introduction and background

1. This is an appeal against the judgment of the Subordinate Court dated 29<sup>th</sup> May 2020 where the court dismissed the Appellant's counterclaim and entered judgment for the Respondent as follows:
  - i. A declaration is hereby made that (the) loan advances to the Plaintiff by the Defendant has been paid in full;
  - ii. The Defendant, its servants, employees and/or agents are prohibited from claiming and/or demanding any loan arrears from the Plaintiff.
  - iii. The Defendant, its servants, employees and/or agents to desist and or clear the Plaintiff from the Credit Reference Bureau.
  - iv. General damages for breach of contract and punitive damages of kshs. 3,000,000/= with interest at court rates from the date of filing suit.
  - v. Costs of the suit.



2. The Appellant's ("the Bank") appeal against the judgment is based on its Memorandum of Appeal dated 9<sup>th</sup> February 2021 as amended on 29<sup>th</sup> September 2021.
3. As this is a first appeal, the duty of this court, is to examine matters of both law and facts and subject the whole of the evidence to a fresh and exhaustive scrutiny, drawing its own conclusions from that analysis and bearing in mind that the court did not have an opportunity to hear the witnesses first hand (see *Selle v Associates Motor Boat & Co. [1968] EA 123*). It is therefore necessary to recount the case before the trial court.
4. The Plaintiff's case as set out in the Plaint dated 23<sup>rd</sup> March 2016 is that it applied for a Home Improvement Loan of KES. 430,000.00 from the Bank on 10<sup>th</sup> June 2010. The loan was to be paid in monthly instalments of KES. 11,850.00 over a period of 42 months at an agreed rate of 19% pa. The Plaintiff pleaded that he faithfully paid the loan and the last installment of KES. 900.00 was deducted from his salary in February 2014. He was therefore surprised to learn that the Bank has listed him as a loan defaulter with the Credit Reference Bureau ("CRB") which showed in the CRB Basic Consumer Report dated 10<sup>th</sup> February 2015 that he was in arrears of KES. 243,090.75. The Plaintiff further stated that when he visited the Bank he was issued with a statement which showed that he had an outstanding balance of KES. 222,715.00 due and owing as at 2<sup>nd</sup> August 2021. He alleged that the Bank had breached the contract between them and that as a result he had suffered loss and damage.
5. In its Amended Defence and Counterclaim dated 19<sup>th</sup> February 2018, the Bank admitted that it advanced the Respondent the Home Improvement Loan on the terms pleaded by Respondent but stated that the last but not final payment of KES. 850.00 was made on 31<sup>st</sup> March 2014. It admitted that the Respondent was listed as a loan defaulter but that the listing was neither in bad faith nor malicious. The Bank also denied the particulars of breach of contract, loss and damage and urged the court to dismiss the suit. In the Counterclaim, the Bank states that the Respondent serviced the loan until 17<sup>th</sup> February 2014 when he ceased making any repayments. It states that as at 20<sup>th</sup> July 2015, the Respondent owed the Bank KES. 292,845.80 in arrears which continued to accrue interest at 19% pa. The Bank prayed for a declaration that the loan advanced to Respondent had not been repaid in full and for judgment for KES. 292,845.82.
6. At the hearing, the Plaintiff (PW 1) testified while the Defendant called Samuel Njuguna (DW 2) as its witness.

#### Issues for Determination

7. In its submissions, the Bank has condensed its grounds of appeal into two issues. The first is whether the Respondent exhausted the remedies provided in the Credit Reference Bureau Regulations, 2013 before instituting the suit. The second is whether the learned Magistrate erred in granting the Respondent KES. 3,000,000.00 for breach of contract. I shall address these two issues which the parties submitted on in their oral and written submissions.

#### Whether the Appellant exhausted remedies under the Credit Bureau Regulations

8. On the first issue, the Bank submits that a person like the Respondent, who is aggrieved with a Bank sharing information with a Credit Reference Bureau ought to first exhaust the procedure in the Credit Reference Bureau Regulations. It relies on the case of *Kennedy Nyagudi v Central Bank of Kenya NRB Pet. No. 209 of 2012 [2013] eKLR* and *Daniel Gachanja Githaiga v Credit Reference Bureau Africa ML HCCC No. 551 of 2013 [2013] eKLR* where the court held that a person aggrieved by publication of wrongful information must invoke the provisions of the Credit Reference Bureau Regulations which provide a mechanism for dispute resolution before lodging a dispute in court. It submits that



this is consistent with the principle that where a dispute resolution mechanism exists outside the courts, it must be exhausted before the jurisdiction of the court is invoked. The Bank cites [\*Geoffrey Muthinja Kabiru and Another v Samuel Munga and 1756 Others NYR CA Civil Appeal No. 10 of 2015 \[2015\] eKLR\*](#) to support this proposition.

9. In response to this submission, the Respondent submits that the issue of jurisdiction was not raised before the trial court either as a preliminary objection or in its defence or counterclaim. The Respondent further submits by failing to plead or raise the issue of jurisdiction, the Bank waived the issue of jurisdiction and as such it cannot raise this issue at this stage. He cited the case of [\*Co-operative Bank of Kenya Limited v Peter Ochieng KSM HCCA No. 83 of 2017 \[2018\] eKLR\*](#) where Ochieng' J., held that by making a conscious decision to participate in the trial without raising the objection it is deemed to have abandoned or waived the issue of jurisdiction of the court.
10. On the first issue, I agree with the Respondent that the issue of alternative remedy was neither raised as a preliminary objection nor an issue in the Statement of Defence and Counterclaim hence the Bank waived that objection and it cannot be raised at this stage. In this instance, the Credit Reference Bureau Regulations while providing an alternative remedy, they do not expressly oust the jurisdiction of the Magistrates Court, hence a party may waive the application of the alternative process either expressly or impliedly by participating in court proceeding without raising the objection. I therefore reject this argument.

Whether the Respondent is entitled to general damages for breach of contract

11. On the second issue, the Bank relies on the general principle that there can be no award of general damages for breach of contract. It cites [\*Securicor Courier \(K\) Limited v Benson David Onyango and Another NRB CA Civil Appeal No. 323 of 2002 \[2008\] eKLR\*](#) and [\*Kenya Tourist Development Corporation v Sundowner Lodge Limited NRB CA Civil Appeal No. 120 of 2017 \[2018\] eKLR\*](#) and [\*South Nyanza Sugar Company Limited v Joseph O. Onyango MGR HCCA No. 10 of 2016 \[2017\] eKLR\*](#). The Bank points out that the Respondent pleaded his case on the basis of breach of contract and despite failing to prove damages for breach of contract, it went ahead and quantified damages for defamation, loss of credit and negligence which were not pleaded. The Bank thus submits that the trial magistrate proceeded to base the award on a misapprehension of the cause of action and without regard to the principles for award of damages.
12. In response, the Respondent argues that he made his case on the basis of a breach of contract as the relationship between the Plaintiff and the Defendant was based on a contract which relationship imposes a duty of care on the Bank to exercise reasonable care and skill in its dealing with its customers. The Respondent cited [\*Reuben Kioko Mutyaene v Kenya Commercial Bank; Transunion t/a Credit Reference Bureau Africa Limited \(Interested Party\) NKU HCCC No. 38 of 2017 \[2020\] eKLR\*](#) where the court held that a duty of care can arise in both tort and contract and it is upon the customer to elect to pursue one or both, taking into account issues of limitation period and rules as to remoteness of damages.
13. The Respondent submits the Bank breached the duty of care owed to him and whether looked at through the eyes of contract law or tort law, the sum effect is the same. He asserts that the Bank breached its duty of care by the adverse listing and that he was entitled to damages. In its view, the damages awarded were reasonable and that its position that the issue of general damages not being awarded for breach of contract was never raised in the memorandum of appeal and ought to be disregarded. The Respondent cited [\*Christopher Orina Kenyariri v Barclays Bank of Kenya Limited and Another ML HCCC No. 276 of 2011 \[2018\] eKLR\*](#) where the court in a similar situation awarded the customer KES. 3,000,000.00 as general damages. He also cited [\*Eunice Nganga v Higher Education Loan Board and 2\*](#)



Others NRB HC Petition No. 91 of 2019 [2020] eKLR where the court awarded KES. 10,000,000.00 as compensatory damages for breach of fundamental rights arising from wrongful listing from with the CRB. The Respondent also submits that he is entitled aggravated and exemplary damages based on the decision in Ken Odondi and 2 Others v James Okoth Omubura t/a Okoth Omburah and Company Advocates KSM CA No. 84 of 2009 [2013] eKLR where the court awarded KES. 500,000.00 as aggravated damages.

14. I have looked at the Memorandum of Appeal dated 9<sup>th</sup> February 2021 and at Ground 9, the Bank pleads that, “The Learned Magistrate erred in law and in fact in awarding General Damages for breach of contract and punitive Damages for Ksh. 3,000,000.00 in contravention of the trite legal position that damages for breach are special in nature, which must be pleaded and proved”. I therefore reject the Respondent’s submission that this issue was not raised in the memorandum of appeal. Further, I note that the issue was raised by the Bank in its submissions before the trial court.
15. The Respondent agrees that his case was pleaded on the basis of breach of contract. This is clear from Para. 11 of the Plea. In the particulars of breach of contract at para. 11(f), the Respondent states that he was listed as a loan defaulter when he had fully repaid the loan. At para. 12, he set out particulars of loss and damage as a result of the breach of contract.
16. Resolution of the second issue depends on whether the Respondent’s cause of action is in tort or contract. This is because, the same set of facts may yield different causes of action for a claimant and it is the duty of the claimant to elect which cause of action it wishes to pursue and plead it accordingly. The difference between the law of tort and contract is not merely academic but of real and practical significance. A case grounded on tort is founded on a general duty of care imposed by the law while a case for breach of contract arises from the agreement between the parties (see *A. G. Guest, “Tort of Contract” [1961] 3 University of Malaya Law Review 191*).
17. I reiterate that a party who wishes to pursue its case, must therefore elect the cause of action it wishes to pursue and plead its case accordingly. This is what the court stated in Reuben Kioko Mutyane v Kenya Commercial Bank; Transunion t/a Credit Reference Bureau Africa Limited (Interested Party) (Supra) that, “That duty of care may also arise both in, contract and tort. It is therefore upon the customer to elect to pursue one or both, taking into account issues of Limitation periods and rules as to remoteness of damages....”.
18. The Respondent elected to pursue its claim as one for breach of contract. Indeed, the Respondent was correct to submit that the duty of care in tort and contract may be the same and arise from the same facts. Indeed, in Eric Omuodo Ounga v Kenya Commercial Bank Limited KSM HCCC No. 42A of 2015 [2017] eKLR, the court explained that:

(23) ..... The bank-customer relationship is contractual in nature and imposes a duty on the bank to exercise reasonable care and skill in its dealings with the customer. In *Karak Brothers Company Ltd v Burden* [1972] All ER 1210, the Court observed as follows:

[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 contract with its customer. The standard of that reasonable care and skill is an objective standard applicable to bankers. Whether or not it has been attained in any particular case has to be decided in the light of all the relevant facts, which can vary almost infinitely.



19. What is different is the implications of pleading the case in contract or tort. As stated above, the key difference that may arise are the periods of limitation and the nature of damages that may be awarded to the parties hence the distinction between pleading a case in tort is not a distinction without a difference. In its plaint, the Respondent not only pleaded its case on the basis of breach of contract, it also prayed for, “General Damages for breach of contract.” Can the court award general damages for breach of contract?
20. In *Dharamshi v Karsan [1974] EA 41*, the Court of Appeal for East Africa held that general damages for breach of contract are not allowed in addition to quantified or special damages. The legal position on this issue has been restated several times by the Court of Appeal in the cases cited by the Bank and others including *Postal Corporation of Kenya v Gerald Kamondo Njuki t/a Geka General Supplies NRB CA Civil Appeal No. 625 of 2019 [2021]eKLR*. As to the nature of the damages awarded in cases of breach of contract, I summarized the position in *Consolata Anyango Ouma v South Nyanza Sugar Company Limited MGR HCCA No. 53 of 2015 [2015]eKLR* as follows:
15. 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 is 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)*).
21. What of the cases where the court awarded damages for wrongful listing? In *Christopher Orina Kenyariri v Barclays Bank of Kenya Limited and Another (Supra)*, the court awarded the plaintiff KES. 3,000,000.00 for wrongly listing him as loan defaulter to the Credit Reference Bureau. In that case, the claim was based on negligence and defamation and in fact the defendant’s defence was struck out. In *Eunice Nganga v Higher Education Loan Board and 2 Others (Supra)*, the case was for enforcement of fundamental rights and freedom where the consideration for award of damages are different.
22. In the judgment, the trial magistrate made a composite award of KES. 3,000,000.00 by lumping together, “General Damages for breach of contract and punitive damages”. Apart from the finding I have made that the general damages cannot be awarded for breach for contract, I also hold that the general damages and punitive damages are different species or heads of damages awarded distinctly. Punitive damages also known as exemplary damages are awarded in two instances. First, where the Government action or conduct complained of is oppressive, arbitrary or unconstitutional. Second,



where the defendant has calculated that its conduct will result in a profit for himself and may well exceed the compensation payable to the claimant (see D. *K. Njagi Marete v Teachers Service Commission NRB CA Civil Appeal No. 316 of 2013 [2020] eKLR*, *Obonyo and Another v Municipal Council of Kisumu [1971] EA 91* and *Godfrey Julius Ndumba Mbogori and Another v Nairobi City County NRB CA Civil Appeal No. 55 of 2012 [2018] eKLR*). I have considered the evidence and record and I do not find any basis for awarding punitive damages within the established principles.

23. In awarding the Respondent damages, it is clear from the judgment that the trial magistrate did not consider the case pleaded by the Respondent was grounded on breach of contract, that the court could not award damages at large or general damages for breach of contract and that no case was made out for punitive damages. Finally, since the Respondent's case was grounded on the breach of contract, the Respondent was duty bound to plead special damages. He did not. At the end of the day, a party is bound by their pleading and it is this basis that the case must be determined.
24. For purposes of completeness, I also note that the trial magistrate erred in awarding interest on the general and punitive damages from the date of filing suit. This was also an error. It is trite law that since general and punitive damages are ascertained in the judgment, interest thereon should be from the date of the judgment and not from the date of filing suit or an earlier date (see *Prem Lata v Peter Musa Mbiyu [1965] EA 592*, *Shariff Salim and Another v Malundu Kikava [1989] eKLR* and *Royal Media Services limited and Another v Hon Jakoyo Midiwo [2018] eKLR*).

#### Costs

25. As regards costs of the appeal, the Bank limited its arguments to the two issues I have considered above. In its submissions, it did not contest that it listed the Respondent to the Credit Reference Bureau or the other reliefs granted by the court. I therefore order that each party bear its own costs.

#### Disposition

26. For the reasons I have made out, I now order as follows:
  - a. This appeal is allowed to the extent that the decree of the Subordinate Court awarding the Respondent, "General damages for breach of contract and punitive damages of Kshs. 3,000,000.00 with interest at court rates from the date of filing suit" be and is hereby set aside and substituted with an order dismissing the claim for general damages for damages and punitive damages.
  - b. There shall be no order of costs.

**DATED AND DELIVERED AT NAIROBI THIS 3<sup>RD</sup> DAY OF DECEMBER 2021.**

**D. S. MAJANJA**

**JUDGE**

Ms Muthee instructed by Muriu, Mungai and Company Advocates for the Appellant.

Mr Njuru instructed by Nkirote and Njuru Company Advocates for the Respondent.

