



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CIVIL SUIT NO 87 OF 2014

HON GEORGE B. M. KARIUKI.....PLAINTIFF

VERSUS

STANDARD CHARTERED BANK KENYA LIMITED.....DEFENDANT

JUDGMENT

INTRODUCTION

1. In his Complaint dated and filed on 8th April 2014, the Plaintiff sought the following reliefs against the Defendant:-

- a) Damages for breach of contract.**
- b) Damages for loss of credit and reputation.**
- c) Exemplary Damages.**
- d) General Damages.**
- e) Any other relief the court may deem fit to grant.**
- f) Costs of this suit and interest on (a), (b) and (c) above.**

2. He filed a Further Supplementary List of Documents dated 12th May 2014 on 13th April 2014. The Defendant's Defence was dated and filed on 14th May 2014. Its List of Witnesses, Witness Statements and List and Bundle of documents were attached to its Defence. The Plaintiff's Reply to Defence was dated and filed on 21st May 2014. On 26th July 2018, the Plaintiff filed another Bundle of Documents dated 25th July 2018.

3. The Plaintiff's Written Submissions were dated 2nd November 2018 and filed on 6th November 2018 while those of the Defendant were dated 26th July 2018 and filed on 27th November 2018.

4. The parties requested it to render its decision based on their respective Written Submissions which they relied upon in their entirety. The Judgment herein is therefore based on the said Written Submissions.

THE PLAINTIFF'S CASE

5. The Plaintiff's case was that he maintained both a Shilling account No 0100498890000 and Dollar account No 8700498890000 with the Defendant. He purchased a Bankers Cheque No 0000000002011 of Euro 12,822.49 dated 4th October 2013 that was drawn on his Dollar account. He also purchased a Bankers cheque No 0000000002012 for Euro 44,142.62 drawn on his Shilling account on 1st November 2013, he purchased a Bankers cheque No 0000000002013 for £ 5,400 drawn on his shilling account. These bankers cheques were for the purchase of a motor vehicle from D T Dobie Co Kenya Limited (hereinafter referred to as 'D.T. Dobie').

6. However, D. T. Dobie refused to release the motor vehicle to him. This was because Bankers Cheques No 0000000002012 and No 0000000002011 were returned unpaid. Bankers Cheque No 0000000002012 was endorsed with the remarks "Refer to drawer" while Bankers Cheque No 0000000002011 had no remarks endorsed thereon.

7. As he was apprehensive that Bankers Cheque No 000000002013 for Euro 5,400 would be returned unpaid, he asked the Defendant's Branch Manager to cancel the same and instead transmit the money to D.T. Dobie electronically. However, as the said Bankers cheque had already reached the clearing stage, it could not be cancelled. He therefore instructed the Defendant to effect payment to D. T. Dobie through its local Euro Account in Nairobi, which request was honoured.

8. The Plaintiff took great exception to the Defendant not having issued him with bankers' cheques drawn from his local account but drawing the same from its foreign Euro Account and the fact that the same were dishonoured after a period of twenty one (21) days.

9. He stated that his reputation as a distinguished citizen and a judge of the Court of Appeal was impaired and he suffered a considerable amount of distress, agony, mental torture, humiliation, scandal, opprobrium and contempt in the eyes of the public.

10. He itemised the particulars of his loss and damage in his Plaintiff and urged this court to allow his claim.

THE DEFENDANT'S CASE

11. The Defendant confirmed that the Plaintiff was its customer and that he operated the accounts as he had contended. Its case was that it informed him that it could not issue the Bankers cheques he had wanted expressed in Euros payable locally but that any cheques would have to be drawn in its correspondent bank in Germany and that such cheques would take twenty one (21) days to clear from the date of presentation.

12. It recommended to him that it effects payment by RTGS which he rejected. When he called its branch on 11th November 2013 to inform it that two (2) Bankers Cheque had been dishonoured, the following day, on 12th November 2013, it remitted a sum of Euro 56,965.11 through RTGS to D.T. Dobie as a replacement of the two (2) bankers cheques that had been returned unpaid. It informed him that the Bankers cheque in the sum of Euro 5,400 had already been cleared and paid to D. T. Dobie.

13. It was emphatic that it did not issue bankers cheques in Euros on its local account in Kenya. It admitted that the return of the two (2) cheques was a breach of contract with the Plaintiff but that no liability accrued in terms of General Terms and Conditions that bound it and the Plaintiff.

14. It was its case that the non-payment of the cheques did not in any way constitute defamation or reflect on the Plaintiff's integrity or probity in any way. It denied that it published any libel concerning the Plaintiff and/or that he had suffered the alleged or any injury, loss or damage.

15. It therefore urged this court to dismiss the Plaintiff's claim with costs to it.

LEGAL ANALYSIS

16. Both the Plaintiff and the Defendant were not able to agree on a joint Statement of Agreed Issues. Each of them filed a separate List of Agreed Issues.

17. The Plaintiff's Statement of Agreed Issues dated and filed on 13th January 2016 were as follows:-

1. What were the terms of the contractual relationship between the Plaintiff and the Defendant under which the Plaintiff operated accounts with the Defendant?

2. Whether the Defendant breached the terms of the contract of banker and customer between the Defendant and the Plaintiff that the customer's banker's cheques were to be honoured, as is the bank's obligation?

3. Whether the Plaintiff had a claim for damages for breach of contract, general damages for defamation and cost and whether these claims had been proved and if so, the amount of damages payable?

4. Whether the reputation of the Plaintiff was affected by the publication of the said dishonour and whether the Defendants conduct exposed the Plaintiff's credit to serious injury by wrongfully dishonouring his cheques and whether the dishonour gave the impression that the Plaintiff had no sufficient funds in its accounts to meet his financial obligations which was not correct and depicted him as un-creditworthy?

5. Whether the publications of the said dishonour inferred and/or carried the innuendoes referred to in the Plaintiff?

6. Whether the Defendant's liability for any loss or damage were excluded or limited by the terms of the contractual relationship between the Plaintiff and the Defendant?

7. Whether the matters pleaded in the Plaintiff constituted defamation of the Plaintiff or reflected on the integrity or probity of the Plaintiff, if so, did the Plaintiff suffer any loss or damage?

18. In its Statement of Agreed Issues dated 29th February 2016 and filed on 2nd March 2016, the Defendant listed the following issues for determination by this court:-

1. What were the terms of the contractual relationship between the Plaintiff and the Defendant under which the Plaintiff operated accounts with the Defendant?
2. Did the Defendant offer any advice to the Plaintiff on the method of making payment to D T Dobie? If so, what was such advice and did the Plaintiff accept such advice?
3. Who was the drawer of the three banker's cheques the subject of the Plaintiff?
4. Was the payment to D T Dobie delayed beyond the normal clearing period.
5. Did the dishonour of two of the banker's cheques prevent the Plaintiff from obtaining the motor vehicle from D T Dobie?
6. Had the Plaintiff suffered any loss or damage? If so, what was the quantum of such loss or damage?
7. Was the Defendant's liability for any such loss or damage excluded or limited by the terms of the contractual relationship between the Plaintiff and the Defendant?
8. Did the matters pleaded in the Plaintiff constitute defamation of the Plaintiff or reflect on the integrity or probity of the Plaintiff?
9. If the answer to issue 8 is positive, did the Plaintiff suffer any loss or damage?

19. Having looked at the aforesaid issues, it appeared to this court that the issues that had been placed before it for determination were as follows:-

1. What were the terms of the contract between the Plaintiff and the Defendant?
2. Was there a breach of contract and if so, by whom?
3. If the answer to (2) hereinabove was in the affirmative, what were the consequences of the breach of contract?
4. What was the payable quantum?
5. Who is to bear the costs of the suit.

20. The court opted to deal with the aforesaid issues under the separate and distinct heads shown herein below.

I. TERMS OF THE CONTRACT

21. The Plaintiff adopted his Witness Statement dated 8th April 2014 as his evidence-in-chief. The same captured all the facts contained in the Plaintiff.

22. During his Cross-examination, he confirmed having signed the account opening forms. He acknowledged the General Terms and Conditions that were shown to him. When he was Re-examined, he stated that in his understanding, the purchase of the Euros had no relation to the said Terms and Conditions.

23. In her evidence-in-chief, the Defendant's Relationship Manager, Amisa Osman Koor (hereinafter referred to as "DW 1") referred to Conditions 21 and 28 of the General Terms and Conditions. These were:-

a. By condition 21 that all payment orders, exchange operations and sales or purchases of stocks, bonds or shares in Kenya or elsewhere, undertaken by the Defendant for the account of the Plaintiff shall be at Plaintiff's own expense. Neither the defendant or any of its agents or correspondents nor any employees shall be liable for any mutilation, interruption, error or transmission, omission or delay occurring in any transmission medium (including without limitation, cables, airlines, courier services and telex and facsimile systems) however occurring.

b. By condition 28 (a) that subject to all other provisions of the General Terms and Conditions, the Defendant will be liable to the Plaintiff for any loss, injury or damage resulting from any willful or negligent failure, delay or error in carrying out the Plaintiff's clear and unequivocal instructions, but the Defendant's liability will be the lower of:-

i. The amount of such loss, injury or damage; and

ii. The amount of any interest not received or any interest that the Plaintiff has to pay as a result of such failure, delay or error.

24. As there was no dispute as to what constituted the General Terms and Conditions, this court determined that the General Terms and Conditions on pp 3-6 of the Defendant's Exh "1" bound both the Plaintiff and the Defendant herein. Whether the said Conditions were

applicable in the circumstances of this case was a different matter all together.

II. BREACH OF CONTRACT

25. The Plaintiff was emphatic that although he met his part of the bargain of the contract, the Defendant breached the same when it failed to tell him that it would draw the Bankers cheques from their associate bank in Germany and that the said Bankers cheques that would take twenty one (21) days to clear. It was his further evidence that the fact that the said cheques were returned to D T Dobie unpaid was proof that the Defendant breached the contract it had with him.

26. The Plaintiff submitted that conditions 21 and 28 of the General Terms and Conditions that were relied upon by the Defendant only applied in regard to the **operations of the Plaintiff's accounts** (emphasis Plaintiff). It was his contention that these conditions ended once the Defendant debited his accounts with the necessary sums and did not extend to the Defendant's account with its correspondent bank in Germany.

27. On its part, the Defendant argued that although there was an error in transmission of the authority of Standard Chartered Bank Germany to draw on its Nostro account so as to pay the two (2) cheques, the same fell within the ambit of second sentence of Condition 21.

28. It was its contention that Conditions 21 and 28 (a) were valid exclusion and limitations of liability binding on the Plaintiff. It relied on the case of **Securicor Courier (K) Ltd vs Onyango & Another [2008] eKLR** in this regard .

29. It was not in dispute that the Bankers Cheques the Defendant issued to the Plaintiff were not paid. They were dishonoured. Clause 20 of the General Terms and Conditions stipulates that:-

“The bank is not liable for any loss or damage suffered by any party if any dishonoured Bill is not noted or protested or both. The Bank will nevertheless endeavor to cause dishonoured bills to be noted or protested or both, provided it receives instructions to do in reasonable time.”

30. It appeared from the General Terms and Conditions that whereas the Defendant would not be liable for errors of transmissions and inadequate execution of orders, **it would be liable to the customer for any loss, injury or damages resulting from any willful or negligent failure, delay or error in carrying out the customer's clear and unequivocal instructions** (emphasis court)

31. The question of whether or not DW 1 and Enoch Mbai (hereinafter referred to as “DW 2”) explained to its Plaintiff how the cheques would be drawn or that it would be better to remit the monies by RTGS was not one that this court could answer for the reason it was one party's word against the other.

32. Suffice it to state that the Defendant breached the contract it entered into with the Plaintiff regarding the two (2) Bankers' Cheques. This was clear from the evidence of the Defendant's then, Branch Manager, Joan Ambuche Okello (hereinafter referred to as “DW 3”) when she said that due to an error in transmission of its notification to Standard Chartered Bank Germany, the Bankers Cheques were not paid on presentation. She was clear that the error in notification had nothing to do with the Plaintiff's account and admitted that it was its fault.

33. Notably, the Plaintiff performed his part of the contract. However, the omission by the Defendant to ensure that its instructions were effected by Standard Chartered Bank Germany was evidence of the Defendant's breach of the contract as its obligations under the contract with the Plaintiff were to ensure that it acted on its customer's instructions and not to act negligently.

III. CONSEQUENCES OF THE BREACH

34. In his examination-in-chief, the Plaintiff reiterated the averments in the Plaintiff. The itemised particulars of loss and damage were as follows:-

a. A failure to honour the cheques was in breach of the term of the contract of banker and customer between the Defendant and the Plaintiff that the customer's banker's cheques be honoured, as it was the bank's obligation.

b. The Plaintiff was unable to obtain the motor vehicle he had purchased from D T Dobie.

c. The circumstances attending wrongful dishonouring found a defamation claim because the action was widely understood to mean that the Plaintiff did not have sufficient funds to meet the payment of the cheque.

d. The Plaintiff averred that having regard to the community in which we live, the bank's dishonoring of the cheque had a propensity to percolate thus enlarging the number of persons to whom the libel was published.

e. The Plaintiff suffered embarrassment through the dishonor of the cheques and was further reflected as a person of dubious character who could not be relied on to pay for the motor vehicle.

f. The Defendant's actions had caused a stain in any past and/or future relationship between the Plaintiff and the car dealer, D T Dobie.

g. As a result, the Plaintiff was unable to make use of his money, to wit Kshs 5,200,000, US\$ 12,822.49 and Kshs 628,580/= from 4th October 2013 through to 26th November 2013 or to obtain the motor vehicle he had purchased from D T Dobie.

h. The Plaintiff's credit worthiness has been adversely affected in the eyes of the public.

i. There was an inordinate long delay in replacing the value of the dishonoured cheques.

j. The Plaintiff shall during the hearing hereof, seek leave of this Honourable court for, to present documentary evidence for its full import as evidence to prove the losses suffered.

35. He contended that as a judge of the Court of Appeal, reputation was everything and involved making sure that in his personal and professional life, integrity was paramount. It was his contention that with the dishonouring of the Bankers cheques, he was understood:-

a. Not to have integrity; and/or

b. Not to have sufficient funds in the account; and/or

c. Not to be responsible not to give cheques without funds

d. In the eyes of the society, not to be a person who could be trusted on another occasion; and/or

e. To be attempting to perpetuate a fraud on D T Dobie; and/or

f. To be in dire pecuniary difficulties and not even in a position to be able to pay for services rendered; and/or

g. To have committed the criminal offence of fraud.

36. During his Re-examination, he pointed out that everyone in D T Dobie Accounts Section knew that he had bought rubber cheques purporting that they were good cheques.

37. Eunice Njambi Kiarie (hereinafter referred to as "PW 2") testified in support of his case but did not allude the Plaintiff's loss of reputation and integrity. He stated that Irene Makau's (hereinafter referred to as "DW 4") evidence that the Defendant had attempted to compensate as with the Kshs 2,000,000/= was proof that the Defendant breached its contract with him.

38. The Plaintiff submitted that the Defendant did not adduce any evidence to contradict the fact that he was embarrassed and put in bad eyes of the publically the dishonour of the cheques and viewed as an unreliable customer whose cheques could not be trusted by anyone.

39. It was his argument that the words "**refer to drawer**" in the Collin's English Dictionary and Black's Law Dictionary (10th Edition) meant "**a request by a bank that the payee consults the drawer concerning a cheque because the drawer had insufficient funds in his or her account.**" He therefore averred that he had overwhelmingly proven his case on liability.

40. On the other hand, DW 2, the Defendant's Priority Operations and Service Manager testified that he called the Plaintiff immediately he became aware of the non-payment of Bankers cheques on presentation in Germany seeking details of the account for D T Dobie so that money could be remitted by RTGS. The monies were subsequently remitted to D T Dobie by RTGS. DW 3, the then Defendant's Branch Manager directed that no bank charges were to be raised.

41. It was the Defendant's submission that the motor vehicle was ready for collection on 11th November 2013 and since payment for the replacement of the two (2) cheques was made on 12th November 2013, the delay for release of motor vehicle was only for a day as the third cheque was yet to be cleared. It added that PW 2 was flabbergasted by the Defendant's omission for clearance of the cheque and that she did not attribute any lack of credit to the Plaintiff's herein.

42. It admitted that the wrongful dishonour of a bankers cheque gives rise to a claim by the drawer for breach of contract for general damages in respect of damage to reputation and to a claim of libel. It relied on **Page's Law of Banking** in this regard.

43. However, it was emphatic that for a claim of liable to succeed, the words used must be published "**of and concerning the claimant.**" It placed reliance on **Gatley or Libel and Slander 11th Edition** where it was stated that for such a claim to succeed, the claimant must identify himself as the person defamed.

44. It was its submission that since the two (2) dishonoured cheques were drawn by the Defendant, there was nothing on the face of the bankers cheques which connected the Plaintiff to the said cheques. DW 2 had testified that the dishonoured cheques had the words "**Refer to Drawer**" but that the Defendant was the drawer of the cheque.

45. It added that the publication of the dishonoured cheques was to D T Dobie staff only and any other bank the cheques passed would not have connected the said cheques to the Plaintiff. It also placed reliance on the case of **Dharamshi vs Karsan [1974] EA 41** where it was held that:-

"the fundamental principle by which courts are guided in awarding damages is the restitution in integrum..." which means that the intention of compensating a plaintiff is not for him to make a profit.

46. In the case of Wycliffe A Swanya vs Toyota East Africa Ltd & Another [2009] eKLR the Court of Appeal rendered itself on what constitutes defamation as follows:-

- i. That the matter of which the plaintiff complains should be defamatory in character.**
- ii. That the defamatory statement or utterances were published by the defendants' publication in the sense of defamation means that the defamatory statement was communicated to someone other than the person defamed.**
- iii. That it was published maliciously.**
- iv. In slander, subject to certain exceptions, that the plaintiff has suffered special damages.**

47. A perusal of the Bankers cheques shows that they were drawn by the Defendant to D. T. Dobie and were payable by the Defendant's bank in Germany. It was evident that the words "Refer to Drawer" were not written maliciously but they were due to a communication breakdown between the Defendant's offices in Nairobi and its offices in Germany.

48. As was correctly pointed out by the Defendant, those words could not be attributed to the Plaintiff as his name did not appear anywhere in the dishonored cheques. The seriousness of a plaintiff's name in any dishonoured cheque cannot be under estimated as this can affect his credit rating with the risk of him being listed in the Credit Reference Bureau.

49. The general principle is that "courts do not normally award damages for breach of contract but that there are exceptions such as when the conduct of a respondent is shown to be oppressive, high handed, outrageous, insolent or vindictive" as was also observed by the Court of Appeal in Capital Fish Kenya Ltd vs The Kenya Power and Lighting Co Ltd [2016] eKLR

50. This court did not also see the Defendant's actions to have been "oppressive, high handed, outrageous, insolent or vindictive" as it promptly contacted the Plaintiff and remitted monies to D. T. Dobie which in turn released the motor vehicle two (2) to three (3) days after 11th November 2013 when it was actually ready for delivery to him.

51. Having considered the circumstances of this case, this court formed the opinion that the breach of contract caused the Plaintiff embarrassment and inconvenience as a result of the Defendant's negligence. Although the Defendant's omission could not be equated to defamation, it was reasonable to expect that the staff at D.T. Dobie who became aware of the dishonoured Bankers cheques may have viewed the Plaintiff differently and his reputation suffered to an extent.

52. Until such time that they received the full details of why the Bankers cheques had been dishonoured, it was only human for them to have thought of him as a man who desired motor vehicles that he could not afford, which in fact was not true as he had sufficient funds in his accounts. No third party would have been able to differentiate the dishonouring of a bankers cheque and dishonouring of a personal cheque. This court was, however, not persuaded to find and hold that the Plaintiff was defamed though his reputation may have been affected albeit for a short time due to the Defendant's omission to honour its obligation under the contract with him.

IV. QUANTUM

53. The Plaintiff stated that the dishonored cheques were in the sum of Kshs 7,200,000/= and thus claimed Kshs 40,000,000/= as damages. The same was computed as follows:-

- a. For Breach of Contract Kshs 15,000,000.00**
- b. For damages Plaintiff's reputation Kshs 10,000,000.00**
- c. Exemplary damages Kshs 10,000,000.00**
- d. General damages Kshs 5,000,000.00**

54. He relied on the cases of Machira vs Mwangi & Another [2001] eKLR in which the Plaintiff therein was awarded Kshs 10,000,000/= and Hon Nicholas R O Ombija vs KCB [2008] eKLR where the Plaintiff therein was awarded Kshs 2,500,000/= general damages.

55. The Defendant had urged this court not to award any sum. However, in Bank of Baroda (Kenya) Ltd vs Timwood Products Ltd [2008] eKLR, the Court of Appeal reiterated the fact that damages for wrongful dishonor were clearly awardable. It cited with approval the case of Gibson Omanyia Shiraku vs Commercial Bank of Africa [1989] eKLR and Kpohraror vs Woolwich Building Society Society [1964] 4 All ER 119. In that case the bank's advocates had argued that a sum of Kshs 3,000,000/= was not temperate for dishonoring of a cheque which the Court of Appeal rejected and affirmed the said figure.

56. In the case of Gibson Omanyia Shiraku vs Commercial Bank of Africa (Supra), the Court of Appeal observed as follows:-

"The history of the claim of dishonored cheques began in Marzetti vs Williams (1980) 109 E.R. p 842 Lord Tenderden, C.J. explained in words that are well-known that:-

"It is immaterial in such a case whether the action in form be in tort or in assumpsit. It is substantially founded on a

contract and the Plaintiff, though may not have sustained a damage in part, is entitled to recover nominal damages....”

57. Bearing in mind the circumstances of the case, this court was of the view that a nominal sum of Kshs 500,000/= general damages for loss reputation would be fair and reasonable in the circumstances of the case as the information of the dishonoured cheques was limited to the staff at D T Dobie, the cheques did not bear the Plaintiff’s name, the omission was remedied immediately and the release of the motor vehicle was delayed only for a day.

58. In arriving at the nominal sum of Kshs 500,000/=, this court had due regard to the case of **Nyamogo & Nyamogo Advocates vs Barclays Bank of Kenya Ltd [2015 e KLR]** where the Court of Appeal affirmed a sum of Kshs 1,000,000/= for injurious falsehood and increased the nominal damages from Kshs 10,000/= to Kshs 500,000/=

59. This court was not persuaded that it should award damages under any other head as doing so would amount to double payment and enrich the Plaintiff unjustly.

DISPOSITION

60. For the foregoing reasons, this court found the Plaintiff’s case to have been partly merited to the extent shown hereinabove and hereby directs that judgment be and is hereby in favour of the Plaintiff against the Defendant for Kshs 500,000/= general damages for loss of reputation plus costs and interest thereon at court rates from date of judgment till payment in full.

61. The costs have been awarded herein as it was not clear to this court whether or not the Defendant actually offered the Plaintiff and he rejected the sum of Kshs 2,000,000/= being the Service Recovery to compensate the Plaintiff for the inconvenience that he had suffered. Had the Defendant demonstrated that it had offered the Plaintiff the said sum of Kshs 2,000,000/= and he rejected the same, this court would not have awarded the Plaintiff costs as the sum it has awarded him was less than the sum of Kshs 2,000,000/= the Defendant would have offered him.

62. It is so ordered.

DATED and DELIVERED at NAIROBI this 14th day of May 2019

J. KAMAU

JUDGE