



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CIVIL APPEAL NO. 104 OF 2018

CORAM: D. S. MAJANJA J.

BETWEEN

RONYAD ENTERPRISES LIMITED.....APPELLANT

AND

KENYA COMMERCIAL BANK LIMITED.....RESPONDENT

(Appeal from the original Judgment and Decree of Hon.P. Wamucii Nyotah, RM dated

28th September 2018 at the Magistrates Court at Kisii in Civil Case No. 324 of 2012)

JUDGMENT

1. The facts giving rise to this appeal are not in dispute. The appellant was customer of the respondent (“the Bank”) where it held an account. On 17th August 2012, the appellant drew a cheque for Kshs. 970,000/- in favour of Hellen Nyaboke and when she presented it for payment, the Bank failed to honour it and returned it her. The appellant then discovered that the Bank had transferred Kshs. 139,000/- and Kshs. 1,530,000/- to Boburia Engineering Works and Efantos Auto Agencies without its authority. It sought the following reliefs in the plaint:

a) An injunction restraining the defendant, by itself, its agents or servant from withdrawing any sums of money from account no. [...] and/or transfer elsewhere without express authority or written consent and/or knowledge of the plaintiff.

b) An account of all sums wrongfully and in breach of the defendant’s duty withdrawn and transferred to other accounts.

c) An order for payment by the defendant to the plaintiff of all sums found to have been wrongfully and in breach of their duty withdrawn from bank account no. [...].

d) Damages including special and exemplary damages.

e) Interest

f) Costs

g) Further or other relief including further necessary or appropriate accounts, inquiries and directions.

2. The Bank’s defence to the suit was that appellant maintained an account at the Bank but not the account named in the plaint. It denied all other allegations. It pleaded in the alternative that if the cheque was presented by the said HELLEN NYABOKE NYAMWEYA, it was not honoured because there were insufficient funds in the appellant’s account. It stated that, “*She transferred the sum of Kshs. 130,000/- and Kshs. 1,530,000/- from the plaintiffs account with the authority and knowledge of the plaintiff based on previous transactions between the parties.*”

3. Together with the plaint, the appellant filed an application seeking a mandatory injunction against the Bank directing the Bank to reverse the entries in its account that effectively transferred the Kshs. 130,000/- and Kshs. 1,530,000/-. The application was heard and by a ruling dated 17th September 2012, the court directed the Bank to restore the plaintiff’s account to its state before the transfer of money to Efantos Auto Agencies and Boburia Engineering Works.

4. Since the Bank did not appeal against the order of mandatory injunction or lodge a counterclaim for the said amount, the mandatory order

effectively determined prayers (a), (b) and (c) of the plaint. What remained for consideration was the issue of damages.

5. The trial magistrate heard the testimony of Hellen Nyaboke Nyamweya (PW 1) and Hellen Bundi (DW 1) on behalf of the Bank. In the judgment subject of this appeal, the trial magistrate found in favour of the appellant and awarded damages as follows:

Exemplary Damages Kshs. 50,000/-

Damages for breach of contract Kshs. 100,000/-

6. The appellant now appeals against the judgment based on the grounds set out in the memorandum of appeal dated 29th October 2018 as follows:

1. *The learned Magistrate erred in fact and misdirected herself fundamentally in not holding that the acts of breach of contract and tortious acts occasioned by the Respondent per se.*

2. *The learned trial magistrate made a wholly erroneous estimate of damage suffered by the Appellant.*

3. *The award of Kshs. 50,000/- as exemplary damages and Kshs. 100,000/- as damages for breach of contract was inordinately low in the circumstances of the case.*

4. *The learned Magistrate erred in fact and in law in rejecting part of the appellant's claim.*

7. The Bank did not cross-appeal against judgment. Counsel for both sides made brief oral submissions and cited several authorities. Since this is an appeal against the award of damages, I am guided by the well-worn principle expressed by Law JA., in **Butt v Khan [1982-88] KLR** as follows:

An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the judge proceeded on wrong principles or that he/she misapprehended the evidence in some material respect and so arrived at a figure which was either inordinately high or low.

8. As I understand, the appellant attacks the judgment on the ground that the trial court ought to have found the breach of the contract was actionable *per se* or without proof of damage and awarded general damages. Counsel for the appellant, Mr Gichana, submitted that the appellant suffered loss which was supported by evidence before the trial court and therefore the court ought to have considered reasonable compensation. He suggested Kshs 3 million based on the case of **C Mehta v Standard Bank NRB ML HCCC No. 586 of 2009 [2014] eKLR**. He further submitted that this court should further consider the issue of aggravated damages.

9. The respondent's contention is that after the mandatory injunction was granted, the money was returned to the appellant's account and any inconvenience to it did not last for more than a few days. He submitted that prayer (a) – (c) were spent and the matter was for all intents and purposes determined. Mr Ochoki, counsel for the respondent, argued that there was no basis for enhancing the exemplary damages and damages arising out of breach of contract which in any case could not be awarded.

10. Before proceeding to the main determination, I will briefly discuss the facts of the cases cited by the parties with a view of comparing them to the facts of this case in order to assess their precedential value. In doing so I adopt the statement of Mativo J., in **Republic v National Employment Authority & 3 others Ex-Parte Middle East Consultancy Services Limited [2018] eKLR** that:

Each case depends on its own facts and a close similarity between one case and another is not enough because even a single significant detail may alter the entire aspect. [27] In deciding such cases, one should avoid the temptation to decide cases by matching the colour of one case against the colour of another. [28] To decide therefore, on which side of the line a case falls, the broad resemblance to another case is not at all decisive. Precedent should be followed only so far as it marks the path of justice. [29]

11. In the **C Mehta Case (Supra)** three cheques were drawn in favour of the plaintiff's suppliers and service providers. The cheques were referred to drawer by the bank for reason that there were no funds in the account. The award of Kshs. 3 million was for breach of contract and injury to its credit.

12. In **Equity Bank Limited & Another v Robert Chesang NRB HCCA No. 571 of 2012 [2016] eKLR**, the plaintiff went to shop at a supermarket, when took out his bank card to pay, the transaction failed with the results, "*transaction declined account non-existent*". He was arrested and temporarily detained in full view of the shoppers at the supermarket. For the embarrassment, humiliation and contempt he was subjected to, he was awarded Kshs 1 million and Kshs 11,450/- as general and special damages for libel and breach of contract and Kshs. 1.5 million aggravated damages.

13. The plaintiff's case in **Patrick Mamiti Mureithi t/a Mureithi & Co. Advocates v Bank of Africa Kenya Limited NRB HCCC No. 270 of 2009 [2015] eKLR** was that his cheque drawn in favour of the Advocates Benevolent Association was dishonoured by the bank. Although the court held that the cheque was not wrongly dishonoured, the court held that it would have awarded Kshs. 2 million as general damages for libel.

14. In **Kena Holdings Limited v Consolidated Bank of Kenya Limited NRB HCCC No. 242 of 2014 [2015] eKLR**, the plaintiff drew two cheques in favour of a school but the cheques were returned unpaid with statement that the plaintiff had insufficient funds to honour the said cheques. The plaintiff was awarded Kshs. 2 Million as general damages. The court found the claim for aggravated damages unjustified. In

Otieno-Omuga and Ouma Advocates v CFC Stanbic Bank Limited NRB ML HCCC No. 75 of 2012 [2015] eKLR, the court awarded a firm of advocates Kshs. 6 million as general damages where it found that dishonor of the cheque was wrongful because there were sufficient funds to pay off the cheque hence dishonor on account of “*Insufficient Funds – Refer to Drawer*” was wholly untrue.

15. The subject of the cases cited by the appellant to support his argument were about dishonoured cheques which were accompanied by words such as “*transaction declined account non-existent*”, “*insufficient funds*”, “*bounced cheque*” “*insufficient funds-refer to drawer*” communicated to third parties. In this instant case, the Plaintiff did not plead libel or any tortious acts in its pleadings, and when the cheque was dishonoured the information was not communicated to any third party but to its director who, in law, is its agent.

16. Further, it is well established that parties are bound by their pleadings and in this case the cause of action was clearly set out in paragraphs 8 and 9 of the plaint, which after narrating the facts, stated as follows;

[8] In the premises, the Defendant has wrongfully converted the amount in the Plaintiff’s account to it’s own use hence wrongfully deprived the Plaintiff thereof, whereby the plaintiff has suffered damage to the value of the amount withdrawn and/or transferred to other accounts.

[9] The Plaintiff claim against the Defendant a true and accurate account of all sums of money wrongfully and without consent or knowledge of the Plaintiff withdrawn and transferred to other accounts.

17. I would add that the prayers in the plaint are a consequence of the facts pleaded in the body of the plaint. The appellant did not set out the words he alleged were defamatory and state how they were defamatory it. This point explained in **Gatley on Libel and Slander** at para 2611, as follows, “*The law requires the very words of the libel to be set out in the declaration in order that the court may judge whether they constitute a ground for action*”. I therefore dismiss the first ground on appeal in this regard.

18. As I have shown, the appellant’s claim was for conversion. That was remedied after the Bank complied with the mandatory order of injunction. Assuming that the claim was for breach of contract, then the appellant would be entitled to damages for actual loss incurred as a result. Such loss would constitute special damages which were neither pleaded nor proved as required by law. Further and again assuming that the claim was one of breach of contract, it is also well established that the general damages are not available for breach of contract. In dealing with the twin issues, the Court of Appeal in **Capital Fish Kenya Limited v Kenya Power & Lighting Company Limited [2016] eKLR**, observed as follows;

For all the foregoing reasons, we are satisfied that although the trial court correctly found that the special damages had been specifically pleaded, there was no credible evidence whatsoever that proved the pleaded special damages. The trial court’s finding on that score can thus not be faulted.

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 be oppressive, high handed, outrageous, insolent or vindictive. In support of this proposition, the appellant relied on the Nigerian case of Marine Management Association & Another vs National Maritime Authority (2012) 18 NWLR 504.

The respondent on the other hand maintained that there cannot be any award of general damages for breach of contract and placed reliance on the following authorities; Provincial Insurance Company EA Ltd v. Mordekai Mwangi Nandwa (supra), and Joseph Ungadi Koderia vs Ebby Kangisha Kawai, KSM C.A. No. 239 of 1997 (ur). The appellant having conceded to the general proposition regarding the award of damages for breach of contract, it was incumbent upon it to lead evidence so as to bring the respondent’s conduct into the exceptions it alluded to above.

19. The principle upon which the court awards exemplary damages was discussed by the Court of Appeal in **Godfrey Julius Ndumba Mbogori & Another v Nairobi City County NRB CA Civil Appeal No. 55 of 2012 [2018] eKLR** as follows:

*[32] The appellants claimed for exemplary and punitive damages. Exemplary damages are essentially different from ordinary damages. The object of damages in the usual sense of the term is to compensate. The object of exemplary damages is to punish and deter. We are guided by the case of **Rookes v Barnard [1964] AC 1129** where Lord Devlin set out the categories of case in which exemplary damages may be awarded which are: i) in cases of oppressive, arbitrary or unconstitutional action by the servants of the government, ii) cases in which the defendant’s conduct has been calculated to make a profit for himself which may well exceed the compensation payable to the plaintiff and iii) where exemplary damages are expressly authorized by statute.*

20. Although respondent did not cross- appeal against this aspect of the award, I find that the same was not warranted as the facts of the cases do not fall within the categories of cases recognised in **Rookes v Barnard (Supra)**. There is therefore no basis for this court to increase the exemplary damages as submitted by the appellant.

21. The Bank did not cross-appeal against the award of Kshs 100,000/- as damages and the award of Kshs. 50,000/- as exemplary damages hence I will not disturb the judgment despite the conclusions I have reached.

22. For the reasons I have set out, I do not find any merit in this appeal. I dismiss it with costs to the respondent which I assess at Kshs. 30,000/-

DATED and DELIVERED at KISII this 2nd day of MAY 2019.

D.S. MAJANJA

JUDGE

Mr Gichana instructed by Bosire Gichana and Company Advocates for the appellant.

Mr Ochoki instructed by Ochoki and Company Advocates for respondent.