



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL CASE NO. 938 OF 2006**

**C. MEHTA & COMPANY LIMITED.....PLAINTIFF**

**VERSUS**

**BARCLAYS BANK OF KENYA LIMITED.....DEFENDANT**

**JUDGEMENT**

1) C. Mehta & Co. Ltd, the plaintiff herein, sued **Barclays Bank of Kenya Ltd**, the defendant herein, vide the amended plaint dated 17<sup>th</sup> June 2015 in which it sought for inter alia:

*a) Damages for breach of contract.*

*b) Special damages of ksh.13,759/=.*

*c) Costs plus interest at court rates from the date of filing suit until full payment.*

2) The defendant filed a defence in which it denied the plaintiff's claim.

3) When this suit came up for hearing the plaintiff and the defendant each summoned one witness to testify in support of their positions. The plaintiff summoned one Anand Ranganathan (PW1) who adopted the contents of his witness statement executed on 5<sup>th</sup> December 2018. It is the evidence of PW1 that on 22.3.2005 the plaintiff requested the defendant which was its banker for a bank draft for USD14,100/= to be drawn in favour of Prime Bank Ltd. The plaintiff further stated that the defendant bank advised it to instead request for an International Money Order(IMO) whose advice the plaintiff acted upon. PW1 confirmed that the defendant issued an International Money Order (IMO) serial no. 110051680292 for USD 14,100 in favour Prime Bank Ltd.

4) The plaintiff's witness further stated that later on the same date the plaintiff learnt that it would not be requiring the said International Money Order prompting the plaintiff to make a request to countermand the same. PW1 also stated that the defendant through its employee and or agent called **Rosemary Nyaga** advised the plaintiff to re-bank the money order with the assurance that the amount would immediately be credited into the plaintiff's account.

5) It is said the plaintiff relied on the advice and on 23.3.2005, the plaintiff issued cheque no. 003000092 dated 21.3.2005 for USD14,100/= in favour of Prime Bank Ltd. On 31.3.2005, the plaintiff received an advise slip from Prime Bank Ltd stating that the aforesaid cheque had been returned with the remarks "**due to uncleared effects**" and that the plaintiff's account had been charged a sum of ksh.1000/= as a penalty for the uncleared cheque.

6) PW1 stated that the action by the defendant to refuse to honour the cheque was in breach of the bank customer relationship which action caused great prejudice to the plaintiff. The plaintiff claimed that as a result of the cheque dishonor it lost a business opportunity in that Prime Bank Ltd declined to extend credit facilities to it.

7) The defendant summoned Castro Mutai (DW1) to testify in support of its defence. DW1 told this court that upon cancellation of the IMO, it took 21 days to credit the plaintiff's account and therefore the defendant was justified in failing to honour the cheques drawn in favour of Prime bank Ltd.

8) DW1 further stated that the effect of cancellation is that the transaction would have to be reversed. The defendant's witness pointed out that the plaintiff issued a cheque while knowing very well the plaintiff's account was not in funds therefore it is to blame for being negligent.

9) At the close of evidence learned counsels appearing in the matter were invited to file and exchange written submissions which they did.

10) Having considered the evidence, the submissions and the authorities cited, I think the following issues commend themselves for the

determination of this court.

**First**, whether the defendant was in branch of the bank- customer relationship.

**Secondly**, whether the plaintiff is entitled to damages for breach of contract and how much?

11) On the first issue as to whether the defendant was in breach of the bank-customer contract, the plaintiff and the defendant hold divergent views. It is the submission of the plaintiff that the defendant by failing to credit the plaintiff's account with the plaintiff's money which was in its possession and by failing to honour the cheque, the defendant breached the bank-customer relationship and or contract.

12) The plaintiff pointed out that one of the obligations of the bank is to honour cheques of its customers with funds in the account. The defendant denied liability and shifted blame to the plaintiff arguing that the plaintiff issued a cheque while knowing that its account was not in funds until 21 days from the date of cancellation of the IMO have lapsed. The defendant argued that it was upon the plaintiff to first exercise due diligence by finding out from the bank if the funds were available due to the extra-ordinary short period of time which would not allow the clearance of the cheque.

13) The defendant further pointed out that the plaintiff does not seem to differentiate between the **"unclear effects"** and **"insufficient funds"**. The defendant stated that it did not at any time allege that the plaintiff's account had no sufficient funds. The defendant further stated that unknown to it, the issuance of the cheque was done without consulting the bank if the amounts had been reversed to enable the plaintiff transact on the same. The defendant stated that the plaintiff was therefore solely to blame.

14) The defendant did not dispute the plaintiff's assertion that it was advised by one Rosemary Nyaga, the defendant's employee and or agent to re-bank the money order. It is also not disputed by the defendant that the aforesaid employee and or agent assured the plaintiff that since the IMO was issued by the same bank and branch, the amount would be immediately credited into the plaintiff's account.

15) The defendant did not further deny that Rosemary Nyaga was its employee. I am satisfied that the plaintiff tendered credible evidence to show that the defendant breached the customer-bank relationship when it dishonoured the plaintiff's re-banked money order. It is also apparent that the plaintiff re-banked the money order within a very short time after the first one was cancelled upon being advised by the defendant's employee and or agent.

16) In my humble view and in the circumstances of this case it is immaterial that the plaintiff re-banked the cheque too soon. The plaintiff was simply misled by the defendant's employee therefore it cannot be blamed.

17) The second issue which arose for the determination of this court is the question as to whether or not the defendant admitted liability. It is the submission of the plaintiff that the defendant admitted liability through various correspondences it wrote to the plaintiff. It is the submission of the defendant that it did not admit liability save that whenever a customer raised a complaint touching on the quality of services, it writes a letter of apology and assurance of excellent services to the customer irrespective of whether it was the customer's fault which led to the inconvenience. It was pointed out that such letters are geared to preserve the bank-customer relationship and was not meant to be admission of liability.

18) I have examined the correspondences written to the plaintiff. In the letter dated 19.4.2005 the defendant stated in part as follows:

**"Your comments are important to us and we are sorry that you feel let down. We have rectified the error and the funds are available in our account....."**

**I apologise for this serious lapse on our part and assure you that we have taken measures to ensure that it does not recur."**

19) In the letter dated 8.4.2005 addressed to Prime Bank and signed by Rosemary Nyaga the defendant wrote in part as follows:

**"Please note that C. Mehta holds a satisfactorily operated account in our books hence the anomaly in their account was not of their own making."**

20) Having carefully considered the words used in the aforesaid letters amongst others, I am convinced that the defendant actually admitted having wronged that plaintiff. In fact, the defendant exonerated the plaintiff from any wrong doing. In my view, I think the aforesaid letters can be treated as admissions which at the same time act as a mitigating factor. I am satisfied that the defendant admitted liability.

21) The third and final issue is whether the plaintiff is entitled to damages for breach of contract? Both parties are in agreement that where there is a breach of contract damages should be awarded. I have already found that the defendant is liable for breach of customer-bank relationship therefore the plaintiff is entitled to damages.

22) The plaintiff beseeched this court to award it a sum of kshs.13,759/= as special damages and general damages in the sum of ksh.5,000,000/=. The defendant is of the submission that the plaintiff did not tender credible evidence to be awarded special damages. It was pointed out that the plaintiff was refunded the amount charge on its account as penalties as a result of the dishonoured cheque.

23) The defendant further argued that the plaintiff is not entitled to claim general damages since the defendant was not in any breach. The defendant did not suggest any figure on general damages. In the plaint, the plaintiff gave the particulars of special damages as loss in form of commissions for unpaid cheques and bank charges at Prime Bank totaling to kshs.13,759/=.

24) It is clear from the correspondences and in particular, the letters dated 19.4.2005 and 25<sup>th</sup> July 2005, that the defendant refunded the penalties charged and apologized to the plaintiff. The aforesaid letters were produced by the plaintiff as exhibits in evidence. With respect, I am convinced by the defendant's averments that the plaintiff is not entitled to be paid special damages because it was paid by the defendant in an attempt to resolve the dispute before this suit was filed.

25) As regards general damages, the plaintiff asked this court to award it a sum of kshs.5,000,000/=. The plaintiff cited *inter alia* the case of **Otieno Omuga & Ouma Advocates =vs= CFC Stanbic Bank Ltd (2015) eKLR** in which this court made an award of ksh.6,000,000/= as general damages. Taking into account the authorities cited and the fact that the plaintiff lost its creditworthiness in the eyes of Prime Bank Ltd, I think an award of ksh.4,000,000/= is sufficient compensation.

26) In the end, judgement is entered in favour of the plaintiff and against the defendant as follows:-

- i. General damages for breach of customer-bank relationship/contract ksh.4,000,000/=.**
- ii. Interest at court rates on (i) above from the date of judgment until full payment.**
- iii. Costs of this suit.**

Dated, signed and delivered at Nairobi this 12<sup>th</sup> day of July, 2019.

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**J. K. SERGON**

**JUDGE**

In the presence of:

..... for the Plaintiff/Respondent

..... for the Defendant/Applicant