IN THE COURT OF APPEAL

AT NAIROBI

[CORAM: OUKO (P), NAMBUYE & WARSAME, JJA]

CIVIL APPEAL NO. 267 OF 2015

BETWEEN

CFC STANBIC BANK LIMITED.....APPELLANT

AND

OTIENO-OMUGA & OUMA ADVOCATES..... RESPONDENT

(Appeal from the Judgment and Decree of the High Court of Kenya at Nairobi

(Gikonyo, J.) Dated 16th June, 2015 in Nairobi Commercial

and Admiralty Division Civil Suit NO. 75 of 2012)

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JUDGMENT OF THE COURT

This Judgment is in respect of a first appeal arising from the Judgment of **F. Gikonyo, J** dated 16th June, 2015.

The background to the appeal is that, the respondent sued the appellant (the bank) vide a plaint dated 30th February, 2012 and subsequently amended on the 21st day of August, 2012. In it, the respondent sought special damages of Kshs. 11,700/- with interest thereon at the appellant's prevailing rates, aggravated, punitive and exemplary damages for precipitating events which subjected the respondent and its partners to public humiliation, ridicule, embarrassment and odium and for which the bank had adamantly failed/refused and/or neglected to apologize to the respondent, together with an attendant order for costs of the suit and interest thereon at the appellant's rates.

The appellant resisted that claim vide a defence dated 6th August, 2012, denying the respondent's claim in toto and put the respondent to strict proof.

The cause was canvassed by way of oral testimony and written submission. The respondent tendered evidence through two witnesses namely **Morris Otieno Omuga (PW1)**, a partner in the respondent firm and **Onindo Cheryl** (PW2). PW1's testimony was that the respondent firm was acting for Messers Emco Billets & Steel Limited in a land transaction involving their firm and that of Onindo & Onindo Advocates who were acting for the sellers in the said transaction. The respondent firm received Kshs. 6,000,000 from their clients towards the said transaction which was deposited into the respondent's client account initially A/C No. 01400XXXXXXXX, subsequently changed to A/C No. 1000XXXXXXX. In fulfillment of the buyer's obligation under the said land transaction, the respondent firm issued cheques totaling Kshs. 2, 703, 7000 drawn on the clients account, payable to the firm of Onindo & Onindo advocates on behalf of their client. The cheques were duly received by Messers Onindo & Onindo advocates, who immediately banked them on 29th August, 2011. On 30th August, 2011, an officer of the bank called the respondent firm to confirm if the cheques were good for payment. PW1 is the one who received the call from the bank's officer. PW1 confirmed to the said officer that the cheques were good for payment and authorized the bank to sanction their respective payment. It transpired later on that one of the cheques was paid while the other for an amount of Kshs. 900,000/- was returned to Messers Onindo & Onindo advocates with remarks "**insufficient funds refer to drawer".** PW1 took the initiative of going to the Bank to personally inquire as to why the cheque was dishonoured considering that he had deposited Kshs. 6,000,000/ into his clients account which was sufficient to meet payment for both cheques but received no satisfactory answer from the bank.

The respondent was aggrieved because, the firm of Messers Onindo & Onindo Advocates had accused them of dishonesty through no fault of their own and had also threatened to report the respondent to police and the Law Society of Kenya (LSK) for action. PW1 brought to the banks attention vide its letter of 5th September, 2011 that the bank was at fault and requested for an apology which the bank declined to offer,

prompting the respondent to instruct their lawyer to issue a demand letter to the bank dated 31st October, 2011, which was also not responded to hence the suit resulting in this appeal.

PW2 confirmed that his firm and the respondents' firm were both involved in a land transaction on behalf of their respective clients; that it was in the course of fulfillment of their respective obligations to their respective clients under the said transaction, that he received two cheques from the respondent which he accordingly banked. One was cleared while cheque No. 001010 for Kshs. 900,000.00 bounced. He promptly informed the respondent of his disgust but never reported them either to the police or the LSK as had been threatened. PW2 conceded that he used harsh language when he brought to the respondents' attention the issue of the bounced cheque; that he suffered bank charges of Kshs. 1,500/-; that a replacement cheque was promptly issued inclusive of the bank charges suffered by his firm.

The appellant tendered evidence through one witness **George Mugendi Murungi,** (DW1) who conceded that the respondent drew two cheques on his client account which were banked by the payee on 29th August, 2011. Both were declared unpaid on 30th August, 2011 and returned to sender. One was however intercepted and paid. DW1 confirmed that the bank made inquiries with the respondent on 30th August, 2011 if the cheques were good for payment; to which the respondent responded in the affirmative, but that response notwithstanding, the cheque were declared unpaid.

When shown the subject cheques DW1 cofirmed that none of the account numbers against which those cheques were drawn started with digits 010; that digits shown in the subject cheques of 100000655443 and 0000655443 were the correct account numbers; that the bank reached out to the respondent to confirm the details which the respondent did confirm; that with the details indicated on the cheques coupled with the confirmation by the respondent were sufficient for the bank to locate the accounts and pass the payment; that the account had sufficient funds to meet those cheques, having been credited with sufficient amounts on the 29th August, 2011, the very day on which the cheques were presented for payment; that the two cheques which were not dishonoured were paid from the very funds that had been deposited in the said account. DW1 was also aware the respondent issued a cheque for Kshs. 901,500/- to replace the dishonoured cheque. He was also aware that the respondent complained to the bank about the above actions but he had no knowledge as to whether the bank responded to that complaint or not.

At the conclusion of the trial, the trial Judge after assessing and analyzing the above undisputed facts in light of the defence the appellant had raised against the respondent's claim against it drew out the following conclusion.

> **"Further, whereas the banker is entitled to a reasonable time for clearing and collection according to the respective nature of the documents, all evidence adduced, the admission by the bank and the technological advancement in 2011 suggest that crediting of the RTGS value was due on 29/8/2011. In the circumstances, it is unexplainable why even on 30/8/2011, the bank dishonoured the cheques. All these things lead to one thing; that as at 29/8/2011 the plaintiff's account was in sufficient funds to pay off the three cheques. Even if the court was to be liberal enough, still, as at 30*th* August 2011, the plaintiff's account had sufficient funds to pay off the three cheques. The bank had no reason not to pay any or all the cheques as at 30/8/2011. The non-payment of cheque Number 010010 for Kshs. 900,000 was without any justification whatsoever and the bank is liable to the customer in damages for injury of the customer's credit.**
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> **.....**
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> **In the premises, the defendant wrongfully dishoured the cheque in question, and was, thus, in breach of the Bank-Customer relationship. The actions by the Bank is not an act of postponement of payment in appropriate and innocuous terms or a contingency which arises in ordinary course of business.**
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> **....."**

When rejecting the banks assertion of alleged existence of incomplete details of the beneficiary account as a factor contributing towards the bank's failure to timeously credit the respondent's client account with the proceeds of funds, the Judge had this to say:

> **"The bank had already identified the account of the beneficiary as early as 26/8/2011 when it received the RTGS and embarked on an inquiry. They also carried out extensive inquiry up to 29/8/2011 and they are expected to have verified the identity of the customer account as at 29/8/2011. The alleged error was not, therefore, responsible for the bank's act of not honouring the cheque in issue. The effort to recall the cheques from the transmitting bank for payment is an acknowledgement that the action by the bank was not enviable at all. It was an effort to correct the mess they had created but in vain.**
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> **.....**
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> **In this case the cheques which are issued by the bank to its customers, citing account number as 0000655443 and the name Otieno Omuga and Ouma Advocates was sufficient details to locate and identify the account and its holder. Therefore, the alleged error is just an excuse ..... The Defendant as the paying bank had all the details it needed to act on the transmission of RTGS to the beneficiary account without any difficulty. From the evidence, the details in the RTGS were sufficient to identify both the account and the holder's name. "**

It is on the basis of the above assessment and reasoning that the Judge held that the bank was not justified in dishonouring cheque number 001010; that the dishonor therefore injured the credit of the respondent for which general damages were payable and proceeded to assess an appropriate award for damages.

When assessing the quantum of damages payable, the Judge reasoned as follows:

> **"I found that the dishonor was wrongful because funds were sufficient to pay the cheque in issue. Dishonor on account of "Insufficient Funds-Refer to Drawer" was wholly untrue and hurtful and in breach of contract. Cases such as Bank of Baroda (supra) the amount of money in the bank was used as the measure of damages. See also the cases of Shiraku Vs. Commercial Bank of Africa [1988] KLR 67 and the English decision in the case of Davidson Vs. Barclays Bank Ltd [1940] 1ALLER 316. Therefore, taking into account all the circumstances of the case and the aggravated nature of the injury, I will award the plaintiff a global sum of Kshs. 6,000,000 as compensation in general damages. I will also award special damages in the sum of Kshs. 1,500, costs of the suit and interest. The interest will be at 12%pa; on the special damage from the 3rd *September 2011; and on the general damages from the date of Judgment; until payment in full. That is the Judgment of the Court."***

The appellant was aggrieved and filed this appeal raising five grounds of appeal against both liability and quantum of damages. At the hearing of the appeal, learned Counsel **Mr. Paul Ogunde** abandoned grounds 1, 2 and 3 dealing with liability and pursued only grounds 4 and 5 against assessment of damages. In these, the bank complains that:

> **4. The Judge's assessment of damages for wrongful dishonor of a cheque was not temparate.**
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> **5. The finding, by the Judge, that the measure of damages for any dishonor of a cheque is the credit balance in the account the cheque was drawn is erroneous."**

The appeal was canvassed by way of written submissions fully adopted and orally highlighted by learned counsel for the respective parties. Learned counsel **Mr. Paul Ogunde** appeared for the appellant while learned counsel **Mr. Maurice Omuga** holding brief for Wakla & Company Advocates appeared for the respondent.

In support of grounds 4 and 5 of the appeal and which in our opinion was limited to mitigation as to quantum of damages awardable, learned counsel **Mr. Ogunde** submitted that the bank is allowed reasonable time to process credits; that even where there is a cash transaction, reasonable time allowance is permissible for purposes of verification; that four days was reasonable; that the law permitted the Bank to ensure that there is a credit balance in the account before processing payments; and lastly that the measure employed by the trial Judge when assessing damages payable is not well founded in law.

To buttress the above submissions, counsel relied on the case of **Nyamogo & Nyamogo Advocates versus Barclays Bank of Kenya [2015] eKLR,** to demonstrate that the facts in this appeal were materially similar to those obtaining in the **Nyamogo case** (supra) in which the court awarded Kshs.1, 000,000 as damages for injury to credit and Kshs. 500,000 as damages for breach of contract. Counsel therefore urged us to interfere with the Judge's exercise of discretion in arriving at the quantum of damages awarded and revise that figure to a lesser amount.

Opposing the appeal, learned counsel **Mr. Omuga** urged us not to interfere with the award on quantum of damages as assessed by the trial Judge as there were aggravating circumstances in this appeal which sufficiently formed the basis for the award arrived at by the trial Judge. These were enumerated as follows: that the money reached the affected account on 26th August, 2011; that details of the account from which the cheques were to be paid were all correct; appellant's own witness was unable to explain why the cheques were not paid as presented, especially after confirmation from the respondent that the cheque were good for payment. Further that no sufficient justification was given by the bank as to why they honoured two cheques and dishonoured one and yet there were sufficient funds in the affected account to pay all the three cheques; that the appellant's own witness admitted that investigation on the source of funds were completed on 29th August, 2011, a day before the cheques were due for payment on the next day of 30th August, 2011. The bank therefore not only acted unreasonably but also refused to apologize when the respondent demanded for such an apology.

To buttress the above submission, counsel relied on the case of **Peter M. Kariuki versus Attorney General [2014]] eKLR** for principles that guide a court of law when assessing an award of damages and those that guide an appellate Court when deciding whether to interfere with the trial Judge's exercise of discretion on assessment of damages or otherwise. The case of **Obongo and another versus Kisumu Council [1971] EA91** on principles of law that guide the Court in circumstances under which a court of law may award aggravated damages, was cited.

In reply to the respondent's submission, **Mr. Ogunde** reiterated his earlier submission that the Judge exercised his discretion wrongly in arriving at the award reached as the mode of assessing that award is not founded in law.

This is a first appeal arising from the trial Judges exercise of discretion in assessing an award of damages. The principles that guide the Court when determining whether to interfere with the exercise of such discretion have now been crystalized by case law. In **Butler versus Butler [1984] KLR, 225**, it was held *inter alia* that assessment of damages being an exercise of discretion by the trial Judge an appellate court should be slow to reverse the trial Judge unless he has either acted on wrong principles or awarded so excessive or so little damages that no reasonable court would in the circumstances have awarded such amount of damage; or he has taken into consideration matters he ought not to have considered and in the result arrived at a wrong decision.

In this appeal, the approach the trial Judge took in assessing the award of damages was simply to follow the trend in case law he reviewed where the amount in the bank was used as the measure of damages, hence the award of Kshs. 6,000,000.00 as the appropriate award. In **Peter M. Kariuki versus Attorney General [2014] eKLR**, observation was made *inter alia* that, the object of an award of damages is to give an injured party compensation for the damage, loss or injury that he has suffered and that the general rule regarding the measure of damages is that the injured party should be awarded a sum of money as would put him in the same position as he would have been if he had not sustained the injury.

In **Nyamogo versus Nyamogo** (supra), the following observation was made before the award of damages was arrived at:

> **"...any intended damages should not be so high because if alleged heavy losses were involved, then these should have been quantified and claimed as special damages. The Court has no quarrel with the appellant's assertion that the reputation of the appellant as a professional firm of advocates meant everything. But we also wish to add that as observed elsewhere damages to the reputation of this firm was minimized by matters in controversy being confirmed to the appellant, the respondent and the appellant's then affected client."**

The litigation resulting in this appeal also involved injury to an advocate's firm resulting from a dishonoured cheque. Just like in the **Nyamogo case** (supra), damages to the respondent's firm as a result of the wrongful dishonor of the subject cheque was limited to the knowledge of the respondent, the bank, and the firm of Messers Onindo & Onindo Advocates who never carried through their threat of reporting the issue to police or LSK. It is therefore our opinion that this was a relevant factor that the trial Judge ought to have taken into consideration but failed to take into consideration when assessing on appropriate award of damages. It is therefore our considered opinion that had the trial Judge taken this important factor into consideration, we doubt if he would have based his assessment of damages on the amount forming the account. We therefore find justification in our interfering with the exercise of the Judge's discretion in arriving at the impugned award.

Mr. Ogunde has urged us to be guided by the award in the **Nyamogo case** (supra), where Kshs. 1,000,000.00 was awarded on 8th day of May, 2015 a period of close to four (4) years ago. The above being the position, we are obligated to reflect in the resulting award an element of the rise in the rate of inflation and the purchasing power of the Kenya shilling over that period.

In the result and doing our best, we find an award of Kshs. 3,000,000.00 would be sufficient compensation for the injury suffered by the respondent. The appeal therefore succeeds to that extent only. The award of Kshs. 6,000,000.00 is set aside and substituted with an award of Kshs. 3,000,000.00 with interest at Court rates from the date of Judgment in the High Court. The appellant who has partially succeeded on his appeal will have one half of costs on appeal and the court below to be agreed or taxed.

DATED and Delivered at NAIROBI this 21st Day of June, 2019.

W. OUKO (P)

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JUDGE OF APPEAL

R. N. NAMBUYE

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JUDGE OF APPEAL

M. WARSAME

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR.