



Co-operative Bank of Kenya Limited & another v Giwells Limited & another (Civil Appeal E490 & E480 of 2023 (Consolidated)) [2025] KEHC 9161 (KLR) (Civ) (30 June 2025) (Judgment)

Neutral citation: [2025] KEHC 9161 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CIVIL
CIVIL APPEAL E490 & E480 OF 2023 (CONSOLIDATED)**

**LP KASSAN, J
JUNE 30, 2025**

BETWEEN

CO-OPERATIVE BANK OF KENYA LIMITED APPELLANT

AND

GIWELLS LIMITED RESPONDENT

**AS CONSOLIDATED WITH
CIVIL APPEAL E480 OF 2023**

BETWEEN

GIWELLS LIMITED APPELLANT

AND

CO-OPERATIVE BANK OF KENYA LIMITED RESPONDENT

(Being an appeal from the judgment of B. Cheloti (PM) delivered on 12th May, 2023 in Nairobi Milimani CMCC No. 824 of 2019)

JUDGMENT

1. Before this Court for consideration are the consolidated appeals being Nairobi Milimani HCCA No. E490 of 2023 and Nairobi Milimani HCCA No. E480 of 2023, all emanating from a judgment in Nairobi Milimani CMCC No. 824 of 2019 (hereafter the lower Court suit) delivered on 12/05/2023. That said, directions were taken on both appeals, to wit, for ease of reference this Court designated that Nairobi Milimani HCCA No. E490 of 2022 be deemed as the lead appeal file with Nairobi Milimani HCCA No. E480 of 2023, being designated as the cross-appeal.



2. Having set out the above, the proceedings before the lower Court was commenced by way of a plaint filed by Giwells Limited the plaintiff before the lower Court (hereafter the Respondent) as against Co-operative Bank of Kenya Limited, (hereafter the Appellant) seeking among others orders that a declaration that the acts of the defendant were irregular, unlawful and malicious; general damages for breach of contract; general damages and aggravated damages for defamation; Kshs. 1,033,340/- wired in the account; loss of business to be assessed by the Court; and costs of the suit; interest on Kshs. 1,033,340/- & the award on loss of business.
3. It was averred that the Respondent opened and operated an account with the Appellant at Lavington Branch of which was credited with the sum of Kshs. 1,033,340/- which amount was paid by the Ministry of Defence for goods supplied and services rendered. That despite the Respondent furnishing documents supporting the said transaction, the Appellant did not notify the Respondent of any challenges in the account and its inability to authenticate the documents supplied which related to the funds wired by the Ministry of Defence. That on accord of the above, the Appellant maliciously, unlawfully and without justification or notice, debited by reversing the funds received on the Respondent's account and denied the latter access and or use of the said funds which were meant to boost her supplies business thereby exposing the Respondent to great financial embarrassment, loss and pain.
4. It was further averred that the Appellant's unlawful act clearly portrayed and cast aspersions on the character of the Respondent and her business dealings more especially with the Ministry of Defence and or right-thinking persons, to wit, damages for defamation of her character are sought. That the action of the Appellant in failing to honour the sum deposited in the Respondent's account was clearly in contravention of the Banking Act, was irregular, unlawful and malicious and had the effect of causing foreseen damages and loss to the Respondent considering the representation by Appellant in previous transactions carried out by the Respondent in respect of the account opened by the Respondent.
5. The Appellant filed a statement of defence denying the key averments in the plaint meanwhile averred that as matter of practice in the Banking Industry and pursuant to the provisions of Proceeds of Crime and Anti-Money Laundering Act and Central Bank of Kenya (CBK) Prudential Guidelines, the Appellant is required to conduct customer due diligence for any transaction exceeding the amount of Kshs. 1,000,000/-. It was further averred that the Respondent failed to avail and or provide requisite documents in support of the funds received on account or the transaction whereas it is a matter of banking practice that if a customer does not meet the criteria for customer due diligence, a financial institution is mandated to reverse a transaction failure to which it will be deemed to be aiding and abetting criminal activities and hence be charged under the provisions of the Proceeds of Crime and Anti-Money Laundering Act. Therefore, when the Respondent failed to provide all the documentation required to authenticate the transaction, the Appellant was under an obligation to reverse the transaction thereby returning the funds to the original owner.
6. The suit proceeded to full hearing during which both parties called evidence in support of the averments in their respective pleadings. In its judgment, the lower Court found in favour of the Respondent and ordered that the Appellant's action in reversing the funds in the Respondent's account was irregular; that the Appellant allows the transaction of Kshs. 1,033,340/- being payment from the Ministry of Defence be wired into the Respondent's account; that in the event the Ministry of Defence cannot make the above stated amount, the Appellant be liable to pay the Respondent for the same; that interest on Kshs. 1,033,340/- will be at commercial rate from 06/03/2019 until payment in full; that costs of the suit be borne by the Appellant; that the prayer for damages fails as the Respondent did not prove malice on the part of the Appellant; and that the prayer for loss of business fails as the Respondent did not quantify the loss.



7. Aggrieved with the outcome, the Appellant preferred Nairobi Milimani HCCA No. E490 of 2023 challenging the lower Court's decision on the following grounds -:

- “ 1. The honorable Court erred in law and in fact by failing to appreciate that the Respondent was not entitled to any form of payment and in particular the sum of Kshs. 1,033,340/- as it contravenes the established principles of unjust enrichment.
2. The honorable Court erred in law and in fact by awarding interest and costs to the Respondent when the Respondent did not place any material before the Court to establish any loss and or damage it suffered following the reversal of the funds.
3. The honorable Court erred in law and in fact by directing the Appellant to liaise with the Ministry of Defence to have the funds reversed and or in the alternative, for the Appellant to settle the said amount with the interest if the said Ministry is not able to do so.
4. The honorable Court erred in law and in fact by failing to appreciate the intervening period between the first and second reversal and the engagement held between the Appellant and the Respondent and thereby arrived at an erroneous finding that the Appellant did not afford the Respondent sufficient time to avail the documents it requested for at the time of transaction.
5. Whereas the honorable Court appreciated that the Appellant has a statutory duty under the *Proceeds of Crime and Anti-Money Laundering Act* as read together with the Prudential Guidelines to conduct customer identification and verification exercise, the learned Magistrate failed to appreciate that the Appellant enjoys statutory immunity in discharging the said duties and cannot be held liable for reversing the sum of Kshs. 1,033,340/-
6. The honorable Court erred in law and in fact by failing to appreciate the factual background in the instant case and thereby considered extraneous matters beyond those stipulated in the law.
7. The learned Magistrate erred in law and fact in failing to consider the comparable authorities as cited by the Appellant in its submissions.
8. The learned Magistrate exercised her discretion capriciously in the circumstance.
9. The learned Magistrate erred in law and in fact by predisposing her mind to a position against the Appellant and thereby failing to properly exercise her discretion.” (sic)

8. Equally aggrieved by the said decision, the Respondent's preferred Nairobi Milimani HCCA No. E480 of 2023 challenging the lower Court's decision on the following grounds -:

1. The learned trial Magistrate erred in law and fact and misdirected herself by failing to assess damages payable for breach of contract having found that the actions of the Appellant were irregular.



2. The learned trial Magistrate erred in law and fact and misdirected herself by failing to consider the Respondent’s evidence on record and submissions on points of law and facts in failing to assess damages awardable for breach of contract.
 3. The learned trial Magistrate erred in law and fact and misdirected herself by failing to consider the Respondent’s evidence on record and submissions on points of law and facts in assessing damages awardable for defamation and aggravated damages.
 4. The learned trial Magistrate erred in law and fact and misdirected herself by failing to assess damages payable to the Respondent considering that she made a finding that the Respondent had proved their case on a balance of probability and that the Appellant’s actions in reversing the funds in the Respondent’s accounts were irregular.
 5. The learned trial Magistrate erred in law and fact and misdirected herself in holding that the prayer for damages failed, as malice was not proved by the Respondent on the part of the Appellant.”
9. The appeals were subsequently canvassed by way of written submissions of which this Court has duly considered alongside the authorities cited in support of the submissions and the record of appeal.
 10. This is a first appeal. The Court of Appeal for East Africa set out the duty of the first appellate Court in *Selle –Vs- Associated Motor Boat Co.* [1968] EA 123. Further, it is trite that an appellate Court will not ordinarily interfere with a finding of fact made by a trial Court unless such finding was based on no evidence, or it is demonstrated that the Court below acted on wrong principles in arriving at the finding it did. See *Ephantus Mwangi & Another vs Duncan Mwangi Wambugu* [1982 – 1988] 1 KAR 278. Thus, a revisit of the memoranda of appeal it is apparent that the appeals turns on the issue on whether the Appellant was liable in breach, and if so, the amount of damages awardable for the said breach. Pertinent to the determination of issues before this Court are the pleadings, which formed the basis of the parties’ respective cases before the trial Court. See;- Court of Appeal decision in *Wareham t/a A.F. Wareham & 2 Others v Kenya Post Office Savings Bank* [2004] 2 KLR 91. This Court having earlier in its judgment outlined the gist of the respective parties’ pleadings, it serves no purpose restating the same at this juncture. Further, having equally identified what the dispute before the lower Court gyrated on, the key query for determination is whether the trial Court’s findings on the issues falling for determination before it was well founded. To the foregoing end, this Court proposes to dispose of the two (2) appeals contemporaneously.
 11. However, in order to contextualize the above, it would be apposite to quote in extenso the relevant facets of the impugned judgment. The trial Court after restating the evidence tendered before it, addressed itself as follows;-
 - “12. I have reviewed the plaint, statement of defence, witness statement, submissions, annexed documents and authorities. The issues for determination is whether the Defendant’s actions were irregular or not.
 13.
 14. The operations and procedures for financial institutions such as the defendant are guided by the banking industry and regulations such as the *Proceeds of Crime and Anti-Money Laundering Act* (POCAMLA) and the Prudential Guidelines as averred by the Defendant. The Defendant was mandated to carry out due diligence and ensure that all the requisite documents concerning the transaction between the plaintiff and the Ministry of Defence were in order.



15. The defendant herein did its part and discovered in the first instance; the documents provided were in order as per the first KYC. Regardless of this, the defendant debited the plaintiff's account citing they had not been supplied with sufficient documents for verification. The plaintiff's account was once again credited and the defendant requested additional documentation which was furnished by the plaintiff. Again the defendant debited the plaintiff's account citing lack of proper documentation. The defendant debited the plaintiff's account and even though supplied with documents, found the documents still not satisfactory. The defendant averred they had requested the tender award and contract documents which the plaintiff did not supply.
 16. What I find interesting is that the defendant requested the plaintiff to furnish the tender award and contract documents however the Court is left wondering whether the plaintiff was given time to provide the abovementioned documents and failed to comply. There is no evidence to show that the plaintiff was to provide these documents.
 17. I am of the view that the defendant is guided by a standard of care which is derived from practice as well as regulation. I am of the opinion that as much as the documents required were vital, the plaintiff ought to have been given time to comply. By debiting the plaintiff's account and reversing the transactions twice, the court has to question the motive behind the defendant's actions and in so doing, I find their assertion of lack of proper documentation wanting. This begs the question whether the defendant was suspicious of the transaction? If so did it report the suspicion as required? Nonetheless, this is not what is before the Court and the Court shall not delve into it.
 18. From the foregoing, the Court finds that the plaintiff has argued its case beyond a balance of probability as the defendant has failed to satisfactorily justify its actions and the motive behind its actions. In reversing the said transaction, the burden shifted to the defendant to justify its actions.
 - 19” (sic)
12. The applicable law as to the burden of proof is found in Section 107, 108 and 109 of the *Evidence Act*. Further, it is well trodden that the same is on a balance of probabilities meaning that the Court will assess the oral, documentary and real evidence advanced by each party and decide which case is more probable. See Court of Appeal decision in *Mumbi M’Nabea v David M. Wachira* [2016] eKLR. Hence, the duty of proving the averments contained in the plaint lay squarely on the Respondent vice versa with respect to the averments contained in the Appellant’s statement of defence. See Court of Appeal decision in *Karugi & Another v Kabiya & 3 Others* (1987) KLR 347.
 13. At the core of the dispute is a banker - customer relationship of which the Respondent claimed in its pleadings that the Appellant was in breach of. There are a long line of authorities appertaining to a bank’s fiduciary duty and or duty of care to its customer. As to a bank’s fiduciary duty, the term ‘fiduciary duty’ was defined by the Black’s Law Dictionary, 11th edition, as follows:

“A duty of utmost good faith, trust, confidence, and candor owed by a fiduciary (such as an agent or a trustee) to the beneficiary (such as the agent’s principal or the beneficiaries of the trust; a duty to act with the highest degree of honesty and loyalty toward another person



and in the best interest of the other person-....Also termed as duty of loyalty, duty of fidelity; duty of faithful service; duty to avoid conflict of interest.”

14. The principle of fiduciary duty arising out of a bank-customer relationship was discussed in part by this Court in the case of *Shalimar Flowers Self Help Group v Kenya Commercial Bank* [2016] eKLR that related to local transactions considered the duty of care owed by a banker to its customer. The Court considered some decisions of the superior Court as follows-;

“ 41. In the *Barclays Bank of Kenya* case (Supra), the learned Judge (Aburili J) cited a portion of the judgment in *Simba Commodities Ltd versus Citibank N.A.* Civil Case No. 236 of 2003 (2013) eKLR wherein the case of *Karak Brothers Company Ltd versus Burden* (1972) ALLER was quoted.

42. The cited passage demonstrates the scope of the duty of a paying banker to its customer and is worth reproducing in extenso:

“ as to the nature and extent of the contractual duty of care owed by a paying bank to its customer when called on to honour a cheque drawn by the customer; and in particular, in the case of a corporate customer which has given the usual mandate to its bank, to what extent the bank is entitled to place exclusive reliance on the fact that the cheque is signed by the corporation’s duly authorized signatories the conclusion reached by Ungoed-Thomas J was 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. The relevant considerations include the prima facie assumption that men are honest, the practice of bankers, the very limited time in which banks have to decide what course to take with regard to a cheque presented for payment without risking liability for delay, and the extent to which an operation is unusual or out of the ordinary course of business. An operation which is reasonably consonant with the normal conduct of business (such as payment by a stock broker into his account of proceeds of sale of his client’s shares) of necessity does not suggest that it is out of the ordinary course of business. If “reasonable care and skill” is brought to the consideration of such an operation, it clearly does not call for any intervention by the bank. What intervention is appropriate in the exercise of reasonable care and skill again depends on circumstances.’

As between the company and the bank, the mandate, in my view, operates within the normal contractual relationships of customer and banker and does not exclude them. These relationships include the normal obligation of using reasonable skill and care; and that duty, on the part of the bank, of using reasonable skill and care,



is a duty owed to the other party to the contract, the customer, who in this case is the plaintiff company, and no to the authorized signatories. Moreover, it extends over the whole range of banking business within the contract. So the duty of skill and care applied to interpreting, ascertaining, and acting in accordance with the instructions of a customer; and that must mean his really intended instructions as contrasted with the instructions to act on signatures misused to defeat the customer's real intentions. Of course, *omnia praesumuntur rite esse acta*, and a bank should normally act in accordance with the mandate – but not if reasonable skill and care indicate a different course.” (Emphasis supplied)

See also-; *Fidelity Commercial Bank Limited v Italian Market Kenya Limited* [2017] KECA 370 (KLR)

15. With the above wisdom in reserve, before the trial Court, Gladwell Mwendwa Mwalike, testified as PW1, on behalf of the Respondent. Adopting her witness statement as her evidence in chief, the gist of which was that on 03/03/2019 her account with the Appellant was credited with Kshs. 1,033,340/- being a sum paid by the Ministry of Defence for goods supplied. That on 06/03/2019 the Appellant requested for requisite supporting documents which she supplied on 08/03/2019. She further stated that on 12/03/2019 without consent, instruction or information the Appellant reversed the transaction to the Ministry of Defence yet she had supplied all documentation in support of the payment. That once more on 04/06/2019, she upon follow up with the Ministry of Defence whereafter her account was re-credited with Kshs. 1,033,340/-, to wit, the Appellant called and requested for the requisite supporting documents among them being a copy of the payment voucher from the Ministry of Defence, of which she supplied on 13/06/2019. She further testified that once again without any notification, the Appellant reversed the transaction meanwhile did not express any challenges or inability to authenticate the supplied documents relating to the received funds. That as a consequence she was unable to utilize or access the said funds meant to boost her business, to wit, she lost business, suffered embarrassment, underwent defamation whereas the Appellant was in breach of contract. She went to adduce into evidence the documents appearing in Respondent's list of documents as PExh.1-8.
16. On cross examination, it was her evidence that she supplied the requisite documents requested by the Appellant, to wit, she was informed that the documents were okay and that her account would be activated. That she was later informed that the cash had been returned to the Ministry of Defence. That when the Appellant asked for vouchers she supplied the same however was unable to avail a quotation as the same was in possession of the Ministry of Defence, to wit, the transaction was reversed again. In re-examination, she maintained that she submitted all the requisite documents in her possession in support of the transaction.
17. On behalf the Appellant Mary Njeri Kinoti testified as DW1. She too began by adopting her witness statement and adduced into evidence the documents appearing in the Appellant's list of documents as DExh.1 -4. It was her evidence that per Central Bank of Kenya (CBK) regulations, with respect to transactions exceeding Kenya Shillings One Million one had to provide supporting documents whereafter the said funds would be released. That she received a Local Purchase Order (LPO) and invoices however did not receive delivery, payments voucher and a tender award from the Respondent. It was her evidence further that upon forwarding the documents to her manager she was informed that the same were not sufficient, to wit, she relayed the same to the Respondent. On cross-examination, it was her evidence that she asked the Respondent to provide the tender award and contract of which



she was unable to provide. In re-examination, she stated that the money was returned to the sender as the Respondent did not have all the required documents.

18. Evidently, by totality of the aforecaptioned, it is not in dispute that there existed a banker – customer relationship as between the Appellant and the Respondent. And as earlier observed, a banker – customer relationship is predicated on a bank’s fiduciary duty and or duty of care to its customer. Here, the bone of contention appears to have arose when for a second time, on or about 29/06/2019, the Respondent’s account was debited or transaction reversed to the tune of Kshs. 1,033,340/- despite the Respondent having furnished the requisite supporting documents in her possession with respect to the transaction in question. Justifying its actions, the Appellant has materially relied on specific provisions of the *Proceeds of Crime and Anti-Money Laundering Act* and the CBK Prudential Guidelines alongside the Press Release Dated 16.11.2018 (DExh.1) and Copy of the Executive Order dated 14.06.2019 (DExh.2).
19. The question that begs at this juncture is whether in carrying out of its actions, the Appellant was in breach of its fiduciary duty and or duty of care to the Respondent?
20. Ex facie understanding the purpose of *Proceeds of Crime and Anti-Money Laundering Act*, is that, it is intended to provide for the offence of money laundering and to introduce measures for combating the offence, to provide for the identification, tracing, freezing, seizure and confiscation of the proceeds of crime, and for connected purposes. Auxiliary to the aforecaptioned Act of parliament is the CBK Prudential Guidelines, the was published to serve among other purpose to ensure the stability and soundness of the banking sector by setting a minimum standard for various aspects of banking operations, including risk management, corporate governance and consumer protection. It warrants mention that aside from the above, the Act and Guidelines serve the purpose of stemming run away corruption and illegal financial activity, in the guise of tendering within the public sector.
21. This Court gathers that the gist of the Respondent’s submission was that her business with the Ministry of Defence involving supply of goods and services was legitimate, to wit, upon request of requisite supporting documents in respect of the transaction by the Appellant, she availed all necessary documents in her possession. That the Appellant had no business reversing the transactions on either 12/03/2019 or 29/06/2019 without notification or communication despite having availed the necessary documentation to shore up the transaction. It would appear that the disputation arose when, upon the second remittance of the said funds to the Respondent’s account, the latter failed to avail the tender award and contract in respect of the said transaction, as requested by the Applicant.
22. By their respective evidence, it would seem that the request for documents was made both orally and via email as between the bank and its customer however neither party deemed it fit to evince and or avail the email conversation in respect of the issue. While the Court agrees with the Appellant’s submissions that it was duty bound by the *Proceeds of Crime and Anti-Money Laundering Act* and CBK Prudential Guidelines to know its customer, the same ought to have been carried out in good faith, so as not to breach its fiduciary duty and or duty of care to the Respondent. The trial Court was properly alive to the fact that the Appellant’s operations and procedures being in the banking industry were well guided by the forestated Act and Guidelines, in carrying out due diligence by way of Knowing Your Customer (KYC). It would appear and as rightly acknowledged by the trial Court, the second remittance was reversed on accord of the Respondent’s failure to avail the tender award and contract documents. At the risk of repetition, the Appellant failed to evince, the specific request for the said documents meanwhile by PW1’s evidence it would seem that what was sought for by the Appellant by way of the tender voucher and quotation were not in her possession, but with the Ministry of Defence.



23. The trial Court in its decision faulted the Appellant for failing to accord the Respondent the requisite time to avail the documents it had requested further no evidence that the requested documents were standard request documents for the nature of the said transaction. While in agreement with the trial Court's determination on the issue, I reasonable believe that the Appellant equally ought to have formally communicated the standard requisite documents to the nature of transaction in question and the consequence of the failure to adduce the same when called for. I equally agree with the Respondent's contestation that there ought to have been some form of notification and or communication from the bank that the Respondent's account would be debited and or funds reversed for failing to avail specific documents. The Appellant despite anchoring their case on their obligation under the Act and Guideline failed to evince the steps they took to inform the Respondent - Customer of the consequence of failure to avail the specific documents in actualizing their fiduciary duty and or duty of care to the Respondent.
24. The Appellant has purposefully, opted to selectively read the *Proceeds of Crime and Anti-Money Laundering Act* alongside the CBK Prudential Guidelines, to advance it case that no wrong was perpetuated as against the Respondent on accord of the transaction reversals. While CBK Prudential Guideline - CBK/PG/08 of the seeks to curb proceeds of crime and money laundering in financial services, CBK Prudential Guideline - CBK/PG/22 equally champions for consumer protection. To the latter end, it is incumbent upon a bank to consistently inform and or notify its customer of any requirements, specificities and consequences of failure to comply, if need be, in order to accord the customer opportunity to remedy an issue, if required. While it is true the Appellant enjoins statutory immunity by dint of Section 19 of the *Proceeds of Crime and Anti-Money Laundering Act*, which provides that-; A suit, prosecution or other legal proceedings shall not lie against any reporting institution or Government entity, or any officer, partner or employee thereof, or any other person in respect of anything done by or on behalf of that person with due diligence and in good faith, in the exercise of any power or the performance of any function or the exercise of any obligation under this Act, the key rider is that due diligence and good faith must be exhibited. Here, on account of the Appellant's failure to notify and dutifully communicated on specificities in respect of the transaction in question, the Appellant is deemed not to have acted diligently and in good faith. Had some form of communication from the Appellant indicating specific documentation required and the consequences of failure to avail the said documentation, the issue between the parties herein would have been avoided in earnest.
25. In any event, the Appellant was equally flippant on the documents it required from the Respondent (see KYC form DExh.3), in the first instance it was of the opinion that the documents availed by the Respondent were sufficient only to later turn around and state that the same were insufficient to shore up the transaction. By unilaterally reversing the funds, the Appellant was in breach of its fiduciary duty and or duty of care to the Respondent, who for all intents and purposes had the legitimate expectation that funds received from the Ministry of Defence would be available for utilization, when required whereas on the its part it had availed the document in its possession. See (PEXh.1 - 5). To the foregoing end, this Court agrees with the trial Court's finding that the Respondent discharged its burden of proof on a balance of probabilities, to wit, the Appellant failed to satisfactorily justify its action and motive behind the reversal in question.
26. Having arrived at the above determination, was the Respondent entitled to damages on account of the Appellant's breach of fiduciary duty and or duty of care on the premise of a banker – customer contractual relationship?



27. As a rule, general damages do not issue for breach of contract. The Court of Appeal in Kenya Tourist Development Corporation v Sundowner Lodge Limited [2018] eKLR held that:-

“As a general rule general damages are not recoverable in cases of alleged breach of contract and that has been the settled position of law in our jurisdiction, and with good reason. In DHARAMSHI vs. KARSAN [1974] EA 41, the former Court of Appeal held that general damages are not allowable in addition to quantified damages with Mustafa J.A expressing the view that such an award would amount to duplication”

28. Further, according to Anson’s Law of Contract, 28th Edition at Pg. 589 – 590- ;

“Every breach of a contract entitles the injured party to damages for the loss he or she has suffered. Damages for breach of contract are designed to compensate for the damage, loss or injury the claimant has suffered through that breach. A claimant who has not, in fact, suffered any loss by reason of that breach, is nevertheless entitled to a verdict but the damages recoverable will be purely nominal”.

29. Here, onus was on the Respondent to strictly plead and evince the loss it suffered on accord of the Appellant’s actions. By PW1’s testimony and evidence, no material was tendered in respect of loss occasioned either by way of loss of business or specific loss meted upon the Respondent. The Respondent made heavy weather of the fact that the trial Court’s award of Kshs. 1,033,340/- was justifiable and awardable. This Court notes with great exception that despite the trial Court being alive to the reliefs as sought by the Respondent, as duly captured at Paragraph 1 of its judgment, the trial Court went ahead and mutated its award at Paragraph 19. The specifics of the reliefs sought by the Respondent had earlier been captured in this judgment as such require not restatement. To the latter end, its trite that a judgment can only be rendered on issues specifically pleaded and sought, see Court of Appeal decision in North Kisii Central Farmers Limited v Jeremiah Mayaka Ombui & 4 others [2014] eKLR. This is because “the system of pleadings operates to define and delimit with clarity and precision the real matters in controversy between the parties upon which the parties can prepare and present their respective cases and upon which the court will be called upon to adjudicate between them” - Bullen and Leake (12th edition) Pg. 3 under the rubric Nature of Pleadings. Having failed to evince any specific loss, only nominal damages would be available to the Respondent for the inconvenience occasioned.

30. It must be remembered that the payment made in the Respondent’s account was in respect of works done in favour of Ministry of Defence, the Appellant was merely a conduit for the funds, to wit, they were to be received. It was neither a party or participant in the tendering process as between the Respondent and Ministry of Defence. In the end, the Appellant’s role as a financial institution was limited to acting fiducially and exercise utmost care with the Respondent funds, received on account. Therefore, no obligation could be placed upon it to make good on the funds even it was in breach of its breach of fiduciary duty and or duty of care on the premise of a banker – customer contractual relationship with Respondent. The funds merely reverted back to the payer, to wit, the Respondent can demand for payment for work done from the payer. Therefore, the order and award by the trial Court on the same must be faulted and set aside.

31. On the award for general and aggravated damages for defamation, the Court of Appeal in Selina Patani & Another vs Dhiranji V. Patani [2019] eKLR succinctly put it that the law of defamation is concerned with the protection of reputation of persons, that is, the estimation in which such persons are held by others. Therefore, onus was on the Respondent to demonstrate that the Appellant’s actions were defamatory in nature and occasioned him prejudice before right thinking members of society. By



PW1's evidence no material was evinced and or demonstrated that the Appellant's action occasioned the Respondent prejudice by way of defamation. Having failed to prove defamation it would be moot to address the award aggravated damages for defamation, to wit, the trial Court cannot be faulted for declining to award the same.

32. Consequently, the Appellant's appeal partially succeeds, to the extent that the decision of the trial Court is hereby set aside in its totality and substituted within an award of nominal damages in favour of the Respondent to the tune of Kshs. 50,000/- which award will attract interest at the Court rate from date of filing suit until payment in full. The Respondent's cross-appeal Nairobi Milimani HCCA No. E480 of 2023 is dismissed in its entirety. Given the partial success of the Appellant's appeal and lack of success of the Respondent's appeal, the Court will direct that each party bears their own costs of the appeal.
33. The Appellant is ordered to release the Respondent's money once it is deposited again to account without any other conditions or verification.

Orders Accordingly!

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 30TH DAY OF JUNE 2025

L. P. KASSAN

JUDGE

In the presence of

Onduso for Respondent

Wakiaga holding brief Atwori for Appellant

Ruth – Court Assistant

COURT

Stay for 30 days granted.

L. P. KASSAN

JUDGE

