



**Karanja v Family Bank Limited & another (Commercial Case E274 of 2020)
[2023] KEHC 2215 (KLR) (Commercial and Tax) (24 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 2215 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E274 OF 2020
A MABEYA, J
MARCH 24, 2023**

BETWEEN

DEBORAH NGUGI KARANJA PLAINTIFF

AND

FAMILY BANK LIMITED 1ST DEFENDANT

CENTRAL BANK OF KENYA 2ND DEFENDANT

JUDGMENT

1. The plaintiff moved this Court vide a plaint dated 3/8/2020. It was her case that she had a banker-customer relationship with the 1st defendant ('the bank') wherein she held Account No. xxxx at the defendant's KTDA Plaza Branch.
2. That vide contracts dated 6/3/2014, 8/4/2014 and 10/5/2014, she took various loans totaling Kshs.24,220,000/= from the bank which were repayable in monthly installments of Kshs.203,000/= . She utilized the same to develop residential apartments on her property LR No. Ruiru/East Block 5/118 which already had 21 pre-existing apartments with a monthly rental income of Kshs. 250,000/= . She sought to increase the same by a further 41 units.
3. She contended that the bank assigned her one of its officers, Mary Wamaitha Muriu ("Mary"), a Credit Analyst, as her point of call and reference in her engagement with the bank. That the said Mary had processed the aforementioned mortgage facility and worked closely with her.
4. In or about June 2014, Mary called her to the bank and pleaded with her to guarantee an LPO financing loan in favor of one Jackson Migwi Kirika T/A Quan Systems for Kshs. 3 million. It was represented to her that the proceeds therefrom would be applied towards settling the loan as it would be made through Jackson's account with the bank.



5. Upon disbursement of the loan and supply, KNEC made payment through the bank in two installments on 21/7/2014 and 4/8/2014 thereby discharging the plaintiff from the guarantee. However, the bank failed to recover the said sum but allowed the said Jackson to withdraw the entire sum. The bank then wrongfully demanded that the plaintiff do honor the guarantee.
6. It was therefore the plaintiff's case that there was a conspiracy by the bank and Jackson Migwi Kirika to defraud her. That the bank had a contractual, fiduciary and moral obligation to protect the plaintiff as a guarantor and discharge her from the guarantee immediately the KNEC payment was received.
7. Subsequently, the bank consolidated the guaranteed amount and arrears into the plaintiff's Mortgage Loan Account without notice causing the account to be in huge arrears increased interest of between 16% to 23% pa. The amount due became unserviceable as a result of which the plaintiff sought a facility from the Kenya Women Finance Trust (KWFT). The same being expensive, the plaintiff lost her property that had been given as security.
8. Despite lodging a complaint, the 2nd defendant remained an indolent by-stander despite its strict supervisory and regulatory mandate.
9. It was the plaintiff's case therefore that she lost her property valued at Kshs. 65 million as a direct consequence of the bank's breach of contractual obligation and CBK's breach of its regulatory and supervisory role.
10. The plaintiff therefore sought several prayers against the defendants.
11. The bank filed its defence dated 19/10/2020 wherein it admitted that the plaintiff held a current account with it and two other loan accounts. That she had a facility of Kshs. 24,220,000/= on the security of her security. It was a condition that default would make the facilities to be immediately repayable together with all expenses including legal charges of the bank's advocates, stamp duty, auctioneers' fees and all costs incurred by the bank in recovery of the plaintiff's indebtedness.
12. That there was a right to consolidate all the plaintiff's accounts without notice and set off or transfer amounts in those accounts to the satisfaction of any liabilities to the bank.
13. The bank contended that the plaintiff guaranteed the LPO loan for Kshs. 3 million as pleaded by the plaintiff. That there was however a clear warning before signing that the plaintiff was bound and liable to the bank and would pay on demand all money owing to the bank by the principal debtor.
14. The bank denied the allegations of assurances to sign the guarantee and indemnity as well as the third legal charge. That the plaintiff instructed an advocate to peruse the documents and received appropriate advice. The bank denied any fiduciary or moral relationship with the plaintiff stating that it was only contractual. The alleged conspiracy to defraud and any loss and damage by the plaintiff was denied.
15. That the default by the principal debtor made the entire amount under the charge due and payable immediately. It was further pleaded that there were no breaches or malpractices that required the intervention of the 2nd defendant. That the 2nd defendant was a stranger in the said contract and that CBK's supervisory and regulatory role did not extend to managing the bank's operations or officers.
16. The CBK filed a defense dated 4/3/2021. It admitted that the 1st defendant was a commercial bank licensed and supervised by CBK. CBK however denied that the supervision extended to the regulating contractual terms and conditions between the bank and its customers. That loan agreements were contractual and governed by the law of contract and other applicable laws. That CBK's mandate was



- to ensure that the bank complied with the *Banking Act* and the CBK Prudential Guidelines which did not extend to contractual terms entered into by the bank and its customers.
17. That upon receipt of the plaintiff's complaint, CBK consulted and established that the matter was contractual in nature. That the complaint was made long after the plaintiff had ceased dealings with the bank thus CBK could not have intervened when the facts were not within its knowledge.
 18. At the hearing, the plaintiff testified on her behalf. She was an auditor in the Auditor General's office. She adopted her witness statement dated 3/8/2020 which was similar to the plaint as her evidence in chief, and produce her bundle of documents as PEXB 1.
 19. In cross examination, she was firm that she did not know Jackson and that it was Mary who pleaded with her to guarantee the LPO loan. That Mary assured her that an account would be opened for the guaranteed amount. That the bank's option to resort to other means in case of default was not applicable because the total amount was paid to the bank. That she admitted liability in the letter dated 25/11/2015 because she wanted interest waiver and for the loan to be taken over by KWFT. That she was coerced to write the letter because her property was at a risk of been auctioned.
 20. In re-examination, she told the Court that Mary was a representative of the bank who had made her guarantee the LPO. That there was evidence that the bank received payment from KNEC but failed to recover its entitlement. That it's the bank that had the Offer Letter for the LPO loan. That it breached its contractual obligation on the LPO loan.
 21. The bank called one witness, Serah Kirigo Kibare, the Bank Manager at Kangema Branch. She adopted her witness statement dated 19/10/2020 as her evidence in chief, and produced the bank's bundle of documents as D1Exh1.
 22. She testified that Mary was a Credit Analyst and her role was to determine whether a customer was eligible for a loan or not. That the plaintiff had 2 mortgage facilities and a guarantee and there was a charge against her property for Kshs. 27.2 million. That by the time the plaintiff signed the guarantee dated 20/6/2014 the loan was well paid.
 23. That Jackson brought the application form and original LPO to the bank and the credit committee analysed the documents. Mary received the documents from Jackson, confirmed authenticity of the LPO from KNEC. That the case was then sent to the head office for approval, and Jackson was issued with an offer letter. That the letter was not part of D1Exh1.
 24. She further testified that for LPO's, when payment came in, the bank would recover the loaned amount as a lumpsum. That the procurement entity must give an undertaking that their payment shall be through the bank. That it was a term of the offer letter that upon the LPO amount being received, the bank was to recover the amount immediately as a lumpsum. That the bank usually opened an escrow account to be operated by the customer and a bank official such that the customer could not operate the account alone. That Jackson had agreed to those terms as well as the plaintiff.
 25. That in this case however, the escrow account was not opened and the money was channelled to the customer's account. That that there was a collusion between Jackson, Mary and the plaintiff. That the branch manager and credit analyst ought to have ensured that the conditions of the offer letter were met. That the plaintiff ought to have ensured that the escrow account was opened because it was one of the conditions in her offer letter. That after signing the offer letter, the plaintiff was not expected to sign any other documents towards opening of the account as the same was to be opened by the borrower and bank official.



26. She revealed that KNEC made payments on 21/7/2014 of Kshs. 1,337,000/= and on 4/8/2014 for Kshs. 2,163,000/= to the account whereby the loan was disbursed. That the bank was supposed to give the procuring entity the escrow account for purposes of remitting the funds. That she was not sure whether the undertaking was given and the same was not part of D1Exh1. That although the plaintiff had guaranteed Kshs. 3 million, the bank had received in excess of that amount.
27. D1W1 further testified that Mary was charged with defrauding the bank. That when the bank was unable to recover the loan, it compounded it and when KWFT took over the loan, the proceeds thereof were applied on the outstanding loan. She admitted that there was an offer from Jackson to turn the LPO loan into a term loan but the bank rejected it.
28. The CBK called Edwin Kipsitet as its only witness. He adopted his witness statement dated 4/3/2021 and produced the 2nd defendant's bundle of documents as D2Exh1.
29. He testified that upon the bank giving a summary of what had transpired, CBK concluded that the issue was contractual and it did not find any violation of the Laws or CBK Guidelines thus advised the plaintiff to pursue a court case. That there was no outright malpractice on the part of the bank. That CBK does not order for compensation and only penalizes banks by way of penalty payable to CBK.
30. The parties filed their respective submissions which are on record and which the Court has considered.
31. The issues for determination and can be summarized as hereunder: -
 - a. Whether there was any fiduciary and contractual relationship between the plaintiff and the 1st defendant bank, and if so, whether the bank was in breach thereof?
 - b. Whether the events leading to the eventual loss of the plaintiff's property LR No. Ruiru/East Block 5/118 was as a result of the bank's actions, and if so, whether the prayer for restitution and damages is justified.
 - c. Whether the 2nd defendant breached its supervisory and regulatory to the detriment of the plaintiff.
32. On the 1st issue, there are several undisputed facts which need to be stated. These are that; the plaintiff and the bank had a customer/bank relationship. The plaintiff operated one current account and two loan accounts with the plaintiff being xxxx, xxxx and xxxx. The plaintiff enjoyed loan facilities of Kshs. 24,200,000/= on the security of her property LR No. Ruiru/East Block 5/118.
33. It was also not disputed that the plaintiff signed a Guarantee & Indemnity dated 4/7/2014 wherein she guaranteed the payment of Kshs. 3 million by Jackson Migwi Kirika T/A Quan Systems inclusive of interest and applicable charges and costs.
34. However, it was the plaintiff's case that she did not know Jackson. That she only signed the guarantee after the bank's official, Mary made assurances to her. That she would not be exposed as LPO money would be directly paid to the bank by KNEC and the bank would immediately recover the loan and interest as a lumpsum.
35. It was her further case that the bank failed to honor the contractual terms in the guarantee thereby breaking both the fiduciary duty owed to her and the contractual terms of the guarantee. That the said breach led to events which eventually caused her property to be sold.
36. The defendant bank on the other hand denied that it owed the plaintiff any duty of care and that the relationship was purely contractual. That the bank followed legal processes to recover from the plaintiff upon the Jackson's failure to pay the LPO loan thus there was no contractual breach thereof.



37. In *Equity Bank of Kenya & Another v Robert Chesang* [2016] eKLR, the Court held that: -

“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 with its contracts with its customers. The duty to exercise reasonable care and skill extends over the whole range of banking business within the contract with the customer. Thus, the duty applies to interpreting, ascertaining and acting in accordance with the instructions of the customer ...

The bank/customer relationship is based on utmost good faith. The bank is also under a contractual duty to diligently handle accounts of a customer, to ensure that funds deposited on account are available when required by the customer. Any deviation from that understanding without justifiable reasons which should be communicated to the customer well in advance or immediately, the bank is in breach of a contract with the customer and is liable in damages.”

38. In *Co-operative Bank of Kenya Ltd v Biwott* (Civil Appeal 18 of 2019) [2022] KEHC 9946 (eKLR), the Court found that: -

“The bank-customer relationship is contractual in nature and imposes a duty on the bank to exercise reasonable care and skill in its dealings with the customer ... 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.”

39. Black’s Law Dictionary, 10th Ed. 2009 at pg 745 defines a fiduciary relationship as: -

“A relationship in which one person is under a duty to act for the benefit of another on matters within the scope of the relationship. ...

Fiduciary relationships usually arise in one of four situations; 1) when one person places trust in the faithful integrity of another, 2) when one person assumes control and responsibility over another, 3) when one person has a duty to act for or give advice to another on matters falling within the scope of the relationship, or 4) when there is specific relationship that has traditionally been recognized as involving fiduciary duties, as with a lawyer and client, ...”

40. From the foregoing, it is trite that a bank-customer relationship is contractual. However, to the extent that the bank has to exercise “reasonable care and skill” in carrying out its part of the contract on matters within the scope of that relationship with its customer and the customer depends on the bank’s advice on matters banking, the bank has a fiduciary duty of care. The bank cannot act recklessly on the basis that the relationship is contractual to the prejudice of the customer.

41. Therefore, in matters banking, the relationship between a bank and a customer is fiduciary to the extent that based on trust. It is on this trust that a customer will open a bank account and deposit own money with the trust that the bank will exercise care over the retention of that money. The bank in turn will rely on the same trust when loaning money to the customer, on the trust that the customer will not use the security in a manner prejudicial to the bank until the loan is repaid.



42. In the present case, the plaintiff maintained that she executed the Guarantee & Indemnity upon which the bank released the LPO loan to Jackson on the assurances of Mary. There were assurances that the proceeds from the LPO would be received by the bank directly and be applied to settle the loan given to Jackson. That evidence remained unshaken. I believed the plaintiff's testimony.
43. There was evidence by D1W1 that in LPO's transactions such as the one in the present case, the bank would open an escrow account which is operated by the bank and the debtor, to which the proceeds of the LPO is deposited. Once the proceeds are received in that account, the bank is able to control its utilization towards settling the loan.
44. In the present case, the bank acted to the contrary. It either acted recklessly or in connivance with the said Jackson, it failed to open an escrow account and permitted the proceeds to be deposited in Jackson's account who withdrew the entire sum. The bank therefore failed and refused to recover the loan from the proceeds of the LPO.
45. In light of the foregoing, I find that the bank made representations to the plaintiff which made the plaintiff to guarantee the LPO loan. That the proceeds of the LPO were paid to the bank but the bank failed to recover the loan therefrom. That since the entire sum of the LPO was received by the bank which was meant to clear the loan and it was the bank's obligation to recover the loan therefrom, the bank was in breach of its duty to the plaintiff to recover the said sum. That having received the entire sum of the loan for it to pay itself but failed to do so, the plaintiff was discharged from her guarantee and absolutely had no liability whatsoever to settle the same.
46. From the foregoing, this court finds that the bank owed the plaintiff a fiduciary and contractual duty and was in breach of those duties.
47. The second issue whether the events leading to the eventual loss of the plaintiff's property LR No. Ruiru/East Block 5/118 were as a result of the 1st defendant's breach, such that the prayer for restitution and damages is justified.
48. D1W1 admitted that, because of the circumstances leading to the utilization of the LPO proceeds by Jackson, the bank caused the arrest of its officer, Mary Wamaitha, who was charged with defrauding the bank. The bank also moved to demand the payment from the plaintiff and compounded the loan with the plaintiff's mortgage loan account and the account immediately went into arrears.
49. As at that time, the plaintiff had been serving her loan and her account was well paid up. It was the plaintiff's case that due to the sudden default, the attendant interest was raised from 16% to 23% per annum compounded daily. That the agreed upon installments could no longer service the loan and the same went into default, causing the bank to commence the process of realizing the security.
50. In a bid to rescue the property from sale by the bank, she KWFT to seek another loan to buy out the loan with the bank. Unfortunately, the latter loan had an even more expensive rate such that the rental income could not sustain it and KWFT eventually sold off the property.
51. This Court has already found that the bank was in breach of its customer-bank relationship which was fiduciary and contractual. The bank was responsible for the mistakes and negligence of its employees. The Court has found that the plaintiff's obligation under the guarantee was extinguished. The bank's action of consolidating the LPO loan and the plaintiff's mortgage was without basis and unlawful. It is what led to the skyrocketing of the interest and eventual inability to pay by the plaintiff.
52. Further, the menacing threats of the bank led the plaintiff to seek refuge in a more worse place, KWFT, where the property was finally lost. All that the plaintiff was doing was trying to run away from the



unlawful actions of the bank. If the bank had not breached its fiduciary and contractual obligations as already held, the plaintiff would not have found herself where she finally landed.

53. All these events were wrongfully caused by the bank. This Court sees no justification why the prayer for restitution should not issue.

54. In *Dharamshi v Karsan* [1974] EA 41, the Court of Appeal for East Africa held that general damages for breach of contract are not allowed in addition to quantified or special damages. It stated: -

“As a general principle, the purpose of damages for breach of contract is, subject to mitigation of loss, the claimant is to be put as far as possible in the same position he would have been if the breach complained of had not occurred. The measure of damages is in accordance with the rule established in the case of *Hadley v Baxendale* (1854) 9. Exch.341 that the measure of damages is such as may be fairly and reasonably be considered arising naturally from the breach itself or such as may be reasonably contemplated by the parties at the time the contract was made and a probable result of such breach. Such damages are not damages at large or general damages but are in the nature of special damages and they must be pleaded and proved.”

55. From the foregoing, it is clear that court will not award general damages for breach of contract, but will instead award special damages. However, the special damages must be pleaded and they ought to be fairly and reasonably considered as arising naturally from the breach itself, or be reasonably contemplated by the parties at the time the contract was made.

56. I have seen the plaint before me. The plaintiff sought refund of Kshs. 4,394,780/= being the LPO loan amount of Kshs. 3 million plus penalties and interest as at 11/11/2015 when the same was demanded at 23% per annum until payment in full.

57. The plaintiff also sought a refund of the amounts paid to the bank’s advocates and valuers before securing the discharge of the property for it to be charged to KWFT, and the amounts paid to KWFT’s advocate and the bank’s advocate in the transfer of the mortgage to KWFT and fresh charging of the property. All these totalled to Kshs. 2,332,165/=.

58. The final prayer was for general and exemplary damages. This prayer was badly pleaded. What the plaintiff sought was to be returned to the position that she would have been had the bank not acted recklessly and unlawfully. That she should not have lost her property valued at Kshs.65,000,000/-.

59. In this Court’s view, the plaintiff is entitled to the value of the property less the mortgage amount of Kshs.24,200,000/-. The valuation report by Light Valuers Limited dated 6/1/2020 placed the value of the said property at Kshs.65,000,000/-. The adequate compensation would therefore be Kshs.40,800,000/-.

60. The last issue was whether CBK breached its supervisory and regulatory duties to the detriment of the plaintiff. It was the plaintiff’s case that she reported a complaint to CBK, but not action was taken. That this amounted to breach of its supervisory and regulatory role over and it was therefore to blame for the plaintiff’s loss.

61. D2W1 testified that when the complaint was received, CBK engaged the bank and upon investigations, it determined that the matter was contractual and it did not find any violation of the Law or CBK Guidelines.

62. The Court has seen the 2nd defendant’s bundle dated 4/3/2021 produced as D2Eexh1. It incorporates numerous correspondences between CBK, the plaintiff and the bank. It shows that, contrary to the



plaintiff's assertions, CBK acted on her complaint. In any event, CBK found that the bank's infractions were contractual and an action for compensation was the appropriate route.

63. I reject the claim against the CBK. It acted within the purview of its mandate.
64. In the end, this Court finds that the plaintiff has proved her case against the 1st defendant to the required standard. Judgment is entered for the plaintiff against the 1st defendant as follows: -
- a. Prayers (i) and (ii) are granted.
 - b. Total sum of Kshs.47,526,945/- together with interest at court rate from the date of filing suit until payment in full.
 - c. The case against the 2nd defendant is dismissed with costs.
 - d. The plaintiff shall have the costs of the suit against the 1st defendant.

It is so decreed.

DATED AND DELIVERED AT NAIROBI THIS 24TH DAY OF MARCH, 2023.

A. MABEYA, FCIArb

JUDGE

