



**Co-operative Bank of Kenya Ltd v Mwaniki (Civil Appeal
17 of 2018) [2023] KEHC 3789 (KLR) (28 April 2023) (Judgment)**

Neutral citation: [2023] KEHC 3789 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERUGOYA
CIVIL APPEAL 17 OF 2018
RM MWONGO, J
APRIL 28, 2023**

BETWEEN

CO-OPERATIVE BANK OF KENYA LTD APPELLANT

AND

JAMES NJUGUNA MWANIKI RESPONDENT

*(Being an appeal against the judgment of Hon. E.O. Wambo (SRM) in
Kerugoya CMCC No. 117 of 2016 delivered on 8th February, 2018)*

JUDGMENT

1. James Njuguna Mwaniki sued the Co-operative Bank in the Lower Court for recovery of Ksh. 146,651/= which he alleged was fraudulently removed from his bank account. He itemised the particulars of negligence and eleven (11) particulars of fraud on the part of the bank.
2. The bank denied all the allegations, and alleged that the plaintiff's losses occurred due to his revealing his unique personal identification number to third parties.
3. The plaintiff/respondent testified on his own behalf and produced exhibits including his bank statement and letters to and from the bank. That banks evidence was adduced by one, W. Tongi, a fraud analyst with the bank.
4. After hearing the evidence of the two witnesses, the trial magistrate identified two issues for determination namely; whether the defendants were negligent and fraudulent; and whether or not the plaintiff exposed his PIN identification. The trial court found that the bank to have been negligent and entered judgement against the bank for the full amount claimed.
5. Dissatisfied the bank filed this appeal. The grounds are as follows:
 1. That the learned Magistrate erred in both law and in fact when he found that the Respondent had proved his case on a balance of probabilities against the Appellant.



2. That the Learned Magistrate erred in both law in holding that the Appellant was negligent while failing to appreciate the fact that it was the Respondents sole responsibility to keep his mobile banking PIN safe and not to disclose it to third parties.
3. That the Learned Magistrate erred in both law in holding the appellant liable for failing to act on the Respondent's complaints in good time while the transactions had already been carried out by the time the Respondent reported it.
4. That the Learned Magistrate erred in both law in holding that the Respondent's account had been linked for online transactions while the testimony of the witnesses and the evidence produced in court told otherwise.
5. That the Learned Magistrate erred in both law and fact while failing to appreciate the fact that all transactions carried out on the material date involved the use of the Respondent's mobile phone number.
6. That the Learned Magistrate erred in both law by failing to appreciate the fact that all transactions over the phone or through a computer system required the use of a PIN that only the Respondent held.
7. That the Learned Magistrate erred in fact and in law when he held that the Appellant had not testified as to the daily transactions limit that the respondent could transfer while it had been brought out during evidence that the limit was Kshs.200,000/=.
8. That the Learned Magistrate erred in both law and in fact in failing to consider or ever adequately adopt and appreciate the written submissions of the Appellant's record.
9. That the Learned Magistrate erred in both law and in fact in failing to find that the Respondent's pleading and evidence tendered thereof were incapable of sustaining any award of damages.
6. This court's duty is to re-evaluate all the evidence on record and to come to its own conclusions, noting that it did not hear the testimony of the witnesses or see their demeanour. (*Selle v Associated Motor Boat Co. Ltd* [1968] EA.)

Further, under section 78 of the CPA this court has:

“the same power and shall perform as nearly as may be the same duties as are conferred and imposed by this Act on courts of original jurisdiction.....”

7. . The plaintiff/respondent's evidence was that he operated his bank account No. 0110003750xxxx with the bank; that he was also registered for mobile banking No. 0722 - xxx - xxx in 2014. He produced his bank statement as PExb 1 for the period 19th - 24th December 2015.
8. He referred to the amounts, particularised on his plaint as having been withdrawn from his account. The monies withdrawn amounted to Kshs.146,651/=. The withdrawals were done between the hours of 1.00 am to 2.00 am on 26.12.2015. He produced Pexhibits 1 - 11 with his statement.
9. In cross-examination the plaintiff said that the PIN by which withdrawals were made was generated from the bank. Referred to Exhibit No. 5 he was able to identify the transactions that he made; and distinguished them from those that were made on the night of 26.12.2015 from 1.14am to 2.00am amounting to Kshs.146,651/=; that at the time the maximum transaction limit was Ksh.70,000/=; that the bank statement showed insufficient balances yet the debit transactions were still effected.
10. Further, he stated that on 29.12.2015 he wrote a formal complaint to the bank highlighting all the transactions done on 26.12.2015; that on 26.12.2015 he called the bank's customer care to complain about the midnight transactions and was told to report to the police; that he reported to the police vide



OB No. 33/26 December 2015; that he did not receive any terms and conditions when opening the mobile banking platform; and that he did not know the owners of the telephone numbers that were the recipients of the money transferred from his account.

11. In re-examination he stated that in mobile banking after doing a transaction, a message is sent to his phone, which is why he filed a complaint; that he cannot exceed the limit at the time of transfer unless it is done by someone within the bank; that he got a call from the bank's call centre who said they had rectified the failed transactions, yet he had never told them of any transactions done.
12. The defendant's case was made out by one witness W Tongi. The witness stated that he was a bank fraud analyst with the Co-operative Bank of Kenya. His witness statement was adopted. He said that at the time of registration for mobile service there is an input of the bank; that a PIN can be self-initiated over the phone; that after vetting the system sends a PIN verification to the customer by text message to the registered telephone number.
13. He further stated that no one has access to the PIN and only the customer can change it. He said that mobile banking can be accessed through the mobile phone or the mobile application. He pointed out that there are terms and conditions for the operation of the bank account which were in the Defendant's Exhibits at clause 9 (4) by which the customer is held responsible for safe keeping and use of his PIN.
14. In cross-examination he agreed that the plaintiff enrolled in mobile banking on 27.07.2004; the service he used was one of self-registration by which the system registers the customer. He admitted that there was no evidence that the customer accepted the exhibited terms and conditions; that in this case a mobile phone was used in all transactions save one.
15. Shown PExb 3, he confirmed that investigations were done and it was found that the correct PIN was used. He admitted that there is fraud in the bank, hence the terms and conditions clause 9 (5). He admitted that there are daily limits of the amount that can be transacted which is Ksh.200,000/= . He admitted that the investigation report that he prepared was submitted to the bank but not availed to the court.
16. DW1 admitted that in 2016 the bank recorded higher levels of fraud at the material time; that the customer received a call from a number 0711 013 200 which he was not sure was a call centre number.
17. In re-examination, he concluded that what was in issue in this case was the security of the customer's PIN number, which is the sole responsibility of the customer to secure.
18. The trial court in its determination relied on the cases of *Wilson Kaisongo Omamba v Esther Nyanchora Omabia & Another* [2007] eKLR and *Kenya Commercial Bank V Abdi Noor Aden Mohammed* [2017] eKLR.
19. The trial court noted that it was clear that the plaintiff had noticed failed attempts to his account, and that he informed or made inquiries to a bank official who informed him to check his balance. The trial court's view was that the bank official:

“ought to have been careful and inform his superiors of the plaintiff's concerns or queries [that]

The ought to have also inquired from the plaintiff if he was the one making withdrawal”



20. Although the appellant raised nine grounds of appeal, both parties took the common position that all the appeal grounds are crystalised in one issue for determination namely:

“Whether the Learned Magistrate erred in law and in fact when he found that the Respondent had proved his case on a balance of probabilities against the Appellant”.

Both parties’ submissions were focussed on this one issue.

21. I have carefully perused the proceedings, the record of appeal and the parties’ representations.
22. The starting point is what is the standard of proof which the plaintiff/respondent was required to prove and what evidence was available to that end?
23. The appellant argues that the respondent failed to prove a case against the appellant. It points out that section 107 of the *Evidence Act* places the burden of proof of a fact on the person who wishes the court to believe in its existence. They quoted the case of *Anne Wambui Ndiritu v Joseph Kiprono Ropkoi & Another* [2005] 1 EA 334 where the Court of Appeal stated that the legal burden of proof lies on the party who invoked the aid of the law, and that there is, however, the evidential burden that lies upon the party proving any particular fact which he desires the court to believe.
24. Further the appellant submitted in reliance on *Boniface Ndwiga Mbogo v Jamleck Mwaniki* [2016] eKLR in which it was held that:

“.....when the court is faced with two probabilities, it can only decide the case on a balance of probability, if there is no evidence to show that one probability was more possible than the other.”

25. The plaintiff/respondent’s evidence on record including his exhibits PExeb 1- 11, is simply as follows: The plaintiff had a bank account with the defendant since 2004; that he withdrew money from it using his mobile phone; that on the night of 26.12.2015 between 1.00a.m and 2.00a.m eleven (11) withdrawals were made from the account which he did not, himself, effect. That the withdrawals were at an unusual time, that they were unusual since there were numerous “transactions failed” notifications as evidenced by the exhibits provided by the plaintiff of the appellants computer screens.
26. Further, the plaintiff testified that he had made two transactions being withdrawals of 60,000/= and 67,500/=. As he failed in these transactions, he spoke to a bank official who told him to do an Mpesa transaction. He said the call came from the bank’s mobile centre No. 0711 013 200 and he was told of the line payment through which the bank made it possible to pay Kshs.67,500/=. To this end, he referred to PExb 4, a letter he later wrote to the bank asking whether his account was activated for online transactions. The bank responded with PExb 5 a letter from the bank, on which the bank confirmed that the plaintiff’s account is not activated for online payment.
27. In addition, the plaintiff exhibited the numerous messages he received on the material night showing numerous confirmations of failed transactions yet he was not the one who was effecting them. The plaintiff testified that he called an employee of the Defendant, Fred Wanjohi of Karatina on mobile No. 0722 661 856, who responded to him:

“he told me to check my account balance and if it was okay, it would mean a system failure on the bank. I did enquire on the balance on mobile banking showing Kshs. 147,934/=”.



28. In cross-examination he further stated that after he called the customer care number he was:
- “advised to lodge a complaint OB No. 33/26th December 2015 at Kerugoya Police.”
29. The following important pieces of evidence were thus availed by the plaintiff: the unusual timing of the bank withdrawals; the call with the mobile call centre No. 0711 013 200; the conversation held by the plaintiff with Fred Wanjohi, the bank’s employee who told him to check his balance and that there has been a system failure; The defendant was required to counter this evidence availed by the plaintiff.
30. The defendant’s sole witness was a trained communications expert employed in the Appellant’s Fraud Division. Despite being an alleged fraud expert, he was unable to confirm whether the telephone number 0711 013 200 belonged to the bank’s call centre although he could tell it was a call to the plaintiff; he did not check with the bank’s employee Fred Wanjohi who had suggested that there may have been a system failure; he did not explain how it came about that the plaintiff received many messages stating “failed transactions.”
31. In addition, the evidence given by the defendant’s witness was of a general character; how mobile banking operates; how it generates PIN numbers; that PIN number cannot be accessed; that nobody in the bank can know a person’s PIN unless the person releases it.
32. The defendant’s witness also admitted that although he conducted an investigation the report, although forwarded to the bank, was not availed to the court, and thus not available for testing verification through cross-examination. In short, it is unknown what was investigated and was the outcome.

Conclusion

33. The court was not told by the defendant that there was no call from a call centre; or that the transactions complained of could certainly not have been effected by a third person or by a failure in the bank’s system. The bank merely insisted that the plaintiff made the transactions; or that he allowed others to do them by disclosing his PIN.
34. On a balance, the evidence of the plaintiff appears to show that certain activities were occurring in his account which he had not initiated; that he got a call from the bank’s call centre, a bank employee later told him the bank may have had a system failure. The defendant/appellant was unable to muster evidence to respond to these facts.
35. As submitted by the respondent, the probabilities evinced by the plaintiff’s evidence having not been countered, stand as more probable in terms of the standards set out in the Samuel Ndegwa case, where it was stated:

“

- “12. In Civil cases such as this case, the standard of proof is on the balance of probabilities. This standard means that a court is satisfied an event occurred if the court considers that, on the evidence, the occurrence of the event was more likely than not. In *H (Minors)* [1966] AC 563 at pg 586, Lord Nicholls explained that the test on the balance of probabilities was flexible. Said he, “When assessing the probabilities the court will have in mind as a factor, to whatever extent is appropriate in the particular case, that the more serious the allegation, the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability. Fraud is usually less



likely than negligence. Deliberate physical injury is usually less likely than accidental physical injury.....

.....Built into the preponderance of the probability standard is generous degree of flexibility in respect of the seriousness of the allegation.

Although the result is much the same, this does not mean that where a serious allegation is in issue, the standard of proof required is higher. It means only that the inherent probability or improbability of an event is itself a matter to be taken into account when weighing the probabilities and deciding whether, on balance, the event occurred. The more improbable the event, the stronger must be the evidence that it did occur before, on the balance of probability, its occurrence will be established.”

36. In this case the court considered that the plaintiff/respondent satisfied the test in Samuel Ndegwa’s case that his case was more probable.
37. Ultimately, the material before me does not demonstrate to me that the appellant has made out a case sufficiently persuasive to require me to interfere in the eventual decision of the trial court holding that the plaintiff had succeeded in proving his case.
38. Accordingly, the appeal is dismissed, with costs to the respondent.

Orders accordingly.

DATED AT KERUGOYA THIS 28TH DAY OF APRIL ,2023

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RICHARD MWONGO

JUDGE

In the presence of:

1. Mrs. Muya for Appellant
2. Ms. Muturi for Respondent
3. Court Assistant, Murage

