



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KERICHO
COMMERCIAL & ADMIRALTY DIVISION
HIGH COURT CIVIL SUIT NO.3 OF 2020
NANCY CHEPKEMOI CHERUIYOT.....PLAINTIFF
VERSUS
FAMILY BANK LIMITED.....DEFENDANT
R U L I N G

1. The Plaintiff filed a Complaint herein on 7/2/2020 seeking the following orders against the Defendant.
 - i. That Immediate Closure of Family Bank Account Number 0220xxxxxxx domiciled in Kericho
 - ii. That the Defendant be ordered to delete and or destroy all the Plaintiff's personal information held;
 - iii. The Defendants be ordered to suspend all transactions on, and or freeze in its entirety, Family Bank Account Number 0220xxxxxxx domiciled in Kericho;
 - iv. Any further relief the Court may deem fit and just to grant; and
 - v. Costs of the suit.
2. The Defendant entered appearance on 20/2/2020 and filed a statement of Defence dated 27/2/2020 denying the Plaintiff's claim.
3. The Plaintiff who testified as PW1 adopted her statement filed in Court dated 7/2/2020 as her evidence in Chief.
4. It is stated in the said statement that the Plaintiff is the holder of Account Number 0220xxxxxxx held at the Defendant Bank.
5. The Plaintiff further stated in the statement that she sent the Defendant Bank two letters, one dated 5/11/2019 and the other 11/11/2019 instructing the Defendant to close the Account and she paid Kshs.1,200 for the closure.
6. The Plaintiff also said in her statement that the Defendant Bank failed to adhere to her instructions and deposited Kshs.196,020/= in the said Account without basis and without her authority and facilitated irregular transactions and further that the Defendant Bank is relying on KERICHO HIGH COURT Case No.4 of 2020 between the parties which was dismissed.
7. The Defendant called on witness (DW.1) MR. FREDRICK STEPHEN OCHIENG who also adopted his statement dated 1/11/2020 as his evidence in chief. In Cross-Examination, DW.1 said the Plaintiff has cases with the Defendant and there was need to preserve the account. He said he was not aware Kericho High Court Case No.4 of 2020 was dismissed.
8. The Parties filed Written Submissions in this case which I have duly considered. The Plaintiff submitted that she has every right to open an account with whichever bank she chooses and she therefore also has every right to close the same bank account which she opened voluntarily.
9. The plaintiff further submitted that the defendant infringed on her right to privacy when the defendant disobeyed her instructions to close her account and went ahead to operate and run the account using the plaintiff's personal information without her authority.

10. The defendant on the other hand submitted that the plaintiff did not adduce evidence that she had issued instructions either through letters or an account closure request form for the defendant to close her bank account.

11. The defendant also submitted that the plaintiff did not provide evidence of any fraudulent activities in her bank account by the defendant neither did she give any particulars of how the defendant utilized her personal information without her authority.

12. The issues for determination are whether:

i. Whether there was a fiduciary relationship between the plaintiff and the defendant;

ii. Whether the defendant breached its contractual obligation to the plaintiff, by failing to obey her instructions to close her bank account and by using her personal information without her approval;

iii. Who pays the costs of this suit?.

13. There is undisputed evidence that the Plaintiff held an account with the Defendant and therefore I find that the relationship between the Plaintiff and the Defendant is a fiduciary relationship based on trust.

14. The Defendant was under a duty to comply with the instructions of the Plaintiff.

15. In *Equity Bank of Kenya & another versus Robert Chesang (2016) eKLR*, the court while quoting the case of *Selangor United Rubber Estate Ltd V Cradock (No.3) [1968] 2 ALL ER 1073* stated 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 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.”

16. Further, the high court in *Eunice Wairimu Muturi & Another versus James Maina Thuku and another (2018) eKLR* stated as follows:

“The general principles of law are that, the relationship between the Bank and its customer is contractual. The main basis of this relationship is one of debtor and creditor. As held in the case of; *Foley vs Hill (1848)*, where the customer’s account is in credit, then the bank is in effect the customer’s debtor, that is to say that the bank owes the money to the customer. Where it is in debit, then the customer is the banker’s debtor. In this contractual relationship, the bank owes the customer several duties which includes but not limited to: a duty to comply with the customer’s mandate (*Joachson vs Swiss Bank Corporation (1921)*). It is important to realize that this duty not only refers to the original mandate completed when the customer opened the account but also various other documents which are interpreted as mandates, including standing orders, direct debits and cheques. Therefore, the Bank owes its customer an obligation to obey the customer’s instructions based on the mandate given.”

17. The defendant breached its contractual obligation to the plaintiff, by failing to obey her instructions to close her bank account.

18. However, there is no evidence that the Defendant was using the Plaintiff’s personal information without her approval to operate the account.

19. There is also no evidence that there were Court cases related to the Account held by the Plaintiff at the bank. The Defendant was therefore duty bound to obey the Plaintiff’s instructions to close the said account.

20. I find that the Defendant is in breach of the fiduciary relationship between themselves and the Plaintiff. I find that the Plaintiff has proved her case on a balance of probabilities.

21. I accordingly enter Judgment in favour of the Plaintiff against the Defendant in the following terms:-

i. THAT the Defendant be and is hereby directed to close the Plaintiff’s Account No. 0220xxxxxxx domiciled in Kericho within 30 days of this date.

ii. THAT the Defendant be and is hereby ordered to delete and or destroy all the Plaintiff’s Personal Information held at the Family Bank domiciled in Kericho in relation to the Family Bank Account No. 0220xxxxxxx domiciled in Kericho.

22. The Plaintiff is also awarded costs of this suit from the Defendant to be agreed upon by the parties or assessed.

DELIVERED, DATED AND SIGNED AT KERICHO THIS 19TH DAY OF NOVEMBER, 2021

A. N. ONGERI

JUDGE