



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CIVIL APPEAL NO. 32 OF 2019

EDINAH MATUNDURA RATEMO.....APPELLANT

VERSUS

KENYA COMMERCIAL BANK LIMITED.....RESPONDENT

(Being an appeal from the judgment and decree of Honorable Mr. S.K Onjoro (SRM) delivered on 27th July 2018 at Kisii Law Courts)

JUDGMENT

1. The appellant herein was the plaintiff before trial court and sued Kenya Commercial Bank Limited, the Respondent, seeking the following orders;

- a. General and punitive damages.
- b. Kshs 66,666 together with interest at commercial rates until payment in full.
- c. Cost and interest.
- d. Any other remedy the court may deem fit to grant.

2. It was the appellant's case that she held an account [*particulars withheld*] with the respondent for the benefit of her son and she exclusively operated the said account. She averred that the respondent allowed a third party to wrongfully and illegally subscribe the account to mobile banking and allowed withdrawal of Kshs 66,666/- from the plaintiff's account. She averred that as the account holder she never activated her mobile banking services nor had she used mobile banking services for the entire period she held the account. It was her case that the respondent was negligent and had breached its contractual and fiduciary duties by sharing her personal details with a third party.

3. In its statement of defence the respondent claimed that it operates a mobile banking service to which the appellant had subscribed to, subject to its terms and conditions. The respondent denied breach of contract and fiduciary duty owed to the appellant and averred that the appellant was the sole custodian of her Personal Identification Number (PIN) and security code to her account and thus aware of all the transactions in her account. It further averred that the appellant owed the respondent a duty to exercise reasonable care in executing bank instructions so as not to mislead the bank or to facilitate forgery and to keep the PIN number and security code to her bank account secret.

4. In dismissing the suit by the appellant the trial court held that the appellant failed to prove on a balance of probabilities that the respondent had acted negligently. Aggrieved by the judgment, the appellant has lodged the instant appeal citing the following grounds:

1. That the Learned Trial Magistrate erred in law and in fact by dismissing the Appellant's case.
2. That the Learned Trial Magistrate erred in law and fact by failing assess damages awardable to the Appellant even after dismissing the Appellant's case (sic).

5. The appeal was canvassed by way of written submissions. The appellant in its written submissions contend that the trial court only relied on the selective provisions of the contract between the appellant and the respondent and only the defence witness testimony in arriving at its decision. She argued that she made a prima facie case that money was withdrawn from her account without her knowledge and the burden therefore shifted to the Respondent to demonstrate that the withdrawal was authorized by the appellant which obligation was never discharged by the respondent.

6. It was also submitted that the trial court dismissed the plaintiff's suit without assessing damages. It was argued that the court has a duty to assess damages even after dismissing a suit (*Gladys Wanjiru Njaramba v Globe Pharmacy & Another (2014) eKLR and Lei Masaku v Kampala Builders Ltd (2014) eKLR*). The appellant proposed general damages of Kshs 1,500,000/= and relied on the cases of *Peter Mathenge Gitonga v Kenya Commercial Bank Limited (2017) eKLR and Equity Bank Limited & Another v Robert Chesang (2016) eKLR*.

7. The respondents filed its written submissions on 19th July 2019. They submitted that the appellant was on a fishing expedition as the grounds of appeal were poorly framed and not concise. The respondent cited several cases to support this assertion (*Kenya Power and Lighting Co Ltd v Livingstone Wechli Mukhwana [2019] eKLR and Law Society of Kenya v Center for Human Rights and Democracy & 13 Others [2019] eKLR*). It advanced that on 4th February 2017 the account statements revealed that there were transactions between two numbers being 07xxxxxx32 and 07xxxxxx87 and the appellant incurred Mobi banking charges of Kshs 58.05/-. They submitted that the transaction could not have been done without the appellant allowing a third party to access her personal information including her PIN number. They further submitted that the appellant had not proved her case on general and punitive damages. They argued that general damages ought to be specifically pleaded and supported in evidence.

8. I have considered the rival submissions by counsel and examined the record of appeal. As this is a first appeal, it is my duty to analyze and re-assess the evidence on record and reach my own conclusions in the matter. (*See Selle -vs- Associated Motor Boat Co. [1968] EA 123*)

9. At the hearing before the trial Court Edinah Matundura Ratemo testified as Pw1 while Wilson Ocharo testified for the respondent as Dw1.

10. Pw1 recalled that on 4th February 2017 her phone fell down and when she put it back together she received messages. One of the messages was that her PIN had been activated while another was that Kshs 66,666/- had been debited from her account. She went to a KCB agent and who gave her a number to contact so that her complaint could be resolved. She testified that on 6th February 2017 she visited the bank and on the advice of the Assistant Manager of the Respondent made a written statement to the bank explaining what transpired. She told court that she also reported the matter to the police. She testified that the money was withdrawn using the mobile number 07xxxxxx89.

11. Dw1 was the assistant manager at the respondent bank handling customer care issues. He adopted his written statement dated 22nd August 2017 as his evidence in chief.

DETERMINATION

12. The appeal raises two issues for determination, first, whether the plaintiff proved on a balance of probabilities that the respondent was negligent and in breach of its fiduciary duty and contractual terms. The second, what orders are available to the appellant, if any.

13. In this case it was the duty of the appellant to prove that the Respondent was negligent and breached terms of their contract. The appellant was required to prove that the transfer of money from her account using her phone number 07xxxxxx32 to the phone number 07xxxxxx87 was unauthorized. From the evidence it is clear that it was the plaintiff's mobile number (07xxxxxx32) and phone that was used during the transaction as notification of the transactions were sent to her phone. Though she immediately sought the help from the nearest agent of the Respondent, the respondent cannot be liable for the unauthorized transaction. Why do I find so? From the testimony of Pw1, the Appellant the mobile phone from which the transaction was carried out was at all times in her possession and no report of theft of the phone or mobile number was ever made. The respondent submitted that the transfer of the funds was initiated by the mobile number which the appellant had indicated as her number at the time she opened the account. All the transactions done using the appellant's number were therefore assumed to have originated from the appellant. The appellant did in fact immediately notify the respondent of the transaction that had transpired by calling the respondent through a telephone number shared by the respondent's agent. It was a term of their contract that the respondent may not be able to reverse or annul any transaction executed based on instructions or request received prior to any notice given to the respondent – clause 4.2 of the KCB Mobile Banking Service Terms and Conditions. The notice of the "unauthorized" transaction to the respondent was made after the transaction had been completed. Having established that the phone and mobile line was at all times in the possession of the appellant, the only plausible conclusion is that the appellant allowed a third party access her PIN and the third party thereafter made the transaction using her mobile number to transfer money from her account the number 07xxxxxx87. I must agree with the findings of the trial court that the appellant therefore failed to prove her case beyond the required standard, on a balance of probabilities.

14. I am also inclined to agree with the respondent that the first ground of appeal is not set in a concise and distinctive manner but I have nonetheless evaluated the evidence before the trial court and arrived at the finding that the appellant did not prove her case on a balance of probabilities.

15. It has been established that it is good practice for the trial court to always assess damages even if it finds that liability has not been established. In the case of *Lei Masaku (Supra)* the court held;

It has been held time and again by the Court of Appeal that the court of first instance must assess damages even if it finds that liability has not been established. To have casually dismissed the suit and fail to address that issue of damages in this case is a serious indictment on the part of the trial court. Both the trial court and this court must assess damages as they are not courts of last resort. Their decisions are appealable and the Appellate Court needs to know the view taken by the court of first instance on the issue of quantum. To the extent that the trial court failed to assess damages, its judgment was a serious flaw and cannot stand. [emphasis mine]

16. I shall therefore proceed to assess the damages as the same was omitted by the trial court. Though the appellant cited the case of *Peter Mathenge Gitonga v Kenya Commercial Bank Limited (2017) eKLR and Equity Bank Limited & Another v Robert Chesang (2016) eKLR* to guide the court on the issue of quantum, the two cases provide very little guidance to this court as the facts therein are quite apart from those of this case. In the *Peter Mathenge Gitonga case (supra)* the court found that the Defendant arm-twisted the Plaintiff into settling a loan amount by threatening the plaintiff with the unlawful exercise of statutory power and that the Defendant's action was

unlawful. In the case **Equity Bank Limited & Another (supra)** the court found that the appellant's failure to activate the respondent's accounts to enable him access money through the use of ATM card was gross recklessness and constituted malice, and upheld the an award of Kshs 1,500,000/-. I would have therefore made an award of Kshs 500,000/- on account of general damages. Had the appellant established negligence and a breach of fiduciary duty on the part of the respondent, I would in addition awarded Kshs 66,666/- with interest thereon at court rates from 2nd February 2017 until payment is made in full.

17. However from my above findings after re-evaluating the evidence on record, the appeal fails with costs to the respondent.

Dated, signed and delivered at Kisii this 24th day of October, 2019.

R. E. OUGO

JUDGE

In the presence of ;

Appellant Absent

Mr. Ochwangi h/b Eddinah Rweya For the Respondent

Rael Court clerk