



Equatorial Commercial Bank Limited v Jumbo Commodities Limited & 2 others (Civil Appeal E060 of 2024) [2025] KEHC 3350 (KLR) (Commercial and Tax) (20 March 2025) (Judgment)

Neutral citation: [2025] KEHC 3350 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL APPEAL E060 OF 2024
BK NJOROGE, J
MARCH 20, 2025**

BETWEEN

EQUATORIAL COMMERCIAL BANK LIMITED APPELLANT

AND

JUMBO COMMODITIES LIMITED 1ST RESPONDENT

VINCENT NG'ENO CHERUIYOT 2ND RESPONDENT

JACKSON KIMEU 3RD RESPONDENT

(This is a Judgement arising out of the decision of Honourable H.M. Ng'ang'a (PM) delivered on 15th February, 2024. The Trial Court entered Judgement in favour of the 1st Respondent against the Appellant)

JUDGMENT

1. This is a Judgement arising out of the decision of Honourable H.M. Ng'ang'a (PM) delivered on 15th February, 2024. The Trial Court entered Judgement in favour of the 1st Respondent against the Appellant and the 2nd and 3rd Respondents as follows;
 - a. The sum of Kshs.2,001,900.00 lost by the Plaintiff due to the Defendants' negligence, fraud and or acquiescence thereto.
 - b. Interest on (a) above at the rate of 18% PA being commercial rate of interest from 22nd December, 2014 until payment in full.
 - c. Costs of the suit and interest thereon at court rates from the date of filing the suit.



2. The Appellant was the 1st Defendant while the 1st Respondent was the Plaintiff before the Trial Court. The 2nd and 3rd Respondents were the 2nd and 3rd Defendants respectively.

Background facts

3. Jumbo Commodities Limited, a legally registered company since 2009, is engaged in the trade and distribution of agricultural commodities. Between November and December 2014, the company received cheques totaling Kshs.2,001,900 from customers, meant to be deposited into its I&M Bank account. However, discrepancies in financial records revealed that the cheques were fraudulently deposited into an account at Equatorial Commercial Bank, unlawfully opened by the 2nd and 3rd Respondents using a duplicate entity under the same name.
4. Further investigations confirmed that the 2nd and 3rd Respondents committed fraud by establishing a separate entity, Jumbo Commodities Ltd, and misappropriating funds, leading to their prosecution and conviction in Criminal Cause No. 1826 of 2014.
5. In response, Jumbo Commodities Limited filed a legal suit against both the fraudulent individuals and the bank (the Appellant), citing negligence in allowing the fraudulent account to be opened and operated. The company sought to recover the financial losses suffered due to these fraudulent activities. The Trial Court found the Appellant negligent.
6. The Appellant being dissatisfied with the Judgment of the Trial Magistrate Honourable H.M Ng'ang'a (PM)- Milimani Commercial Court delivered on 15th February, 2024 appealed to the High Court of Kenya at Nairobi against part of the said Judgment on the following grounds that; -
 - a. The Trial Magistrate erred in law and in fact by failing to determine that the Plaintiff's Witness lacks the requisite Authority to Act.
 - b. The Trial Magistrate erred in law and in fact by failing to determine whether the 1st Respondent had proven the alleged negligence to the required standard.
 - c. The Trial Magistrate erred in law and in fact by failing to determine whether the 1st Respondent had proven alleged loss or injury suffered.
 - d. The Trial Magistrate erred in law and in fact by failing to hold that the 1st Respondent had failed to prove the loss or injury suffered.
 - e. The Trial Magistrate erred in law and in fact in disregarding the principle that special damages must not only be pleaded but also proven.
7. The Appellant prayed for orders that: -
 - a. The appeal be allowed.
 - b. The Judgment of the Lower Court of 15th February 2024 be set aside.
 - c. Costs of the appeal and the Trial Court be awarded to the Appellant.
8. This Appeal was canvassed by way of written submissions which the court has carefully considered.

Issues for determination

9. The issues that arise for determination are;
 - a. Whether the Plaintiff's witness lacked the requisite authority to act



- b. Whether negligence was proved to the required standard.
- c. Whether the Plaintiff proved loss/injury suffered.
- d. Whether special damages were proven

Analysis and determination

10. This is a first appeal and the mandate of the Court was set out in *Selle -v- Associated Boat Co. of Kenya & Others* [1968] EA123 where it was stated;

“an appeal from the High Court is by way of retrial and the Court of Appeal is not bound to follow the trial judge’s findings of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression or the demeanor of witness is inconsistent with evidence generally.”

11. An appeal to this Court from the Trial Court is by way of a retrial. The principles upon which this Court acts in such an appeal are well settled. Briefly put, this Court must reconsider the evidence, evaluate it, and draw its own conclusion though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect.

12. The Court proceeds to analyse the issues framed in seriatim.

a) Whether the Plaintiff’s witness lacked the requisite authority to act

13. On the issue of whether the Trial Magistrate erred in law and fact by failing to determine that the Plaintiff’s Witness lacks the requisite Authority to Act; Courts have held time and again that the absence of a Resolution to institute a suit or authority to swear an affidavit was not fatal to a suit.
14. In *Arthi Highway Developers Limited v West End Butchery Limited & 6 others* [2015] eKLR, the Court of Appeal cited the case of *United Assurance co Ltd v Attorney General: SCCA no 1 of 1998* where the Supreme Court of Uganda held that:

“...it was now settled, as the law, that, it does not require a board of directors, or even the general meeting of members, to sit and resolve to instruct Counsel to file proceedings on behalf and in the names of the Company. Any director, who is authorized to act on behalf of the company, unless the contrary is shown, has the powers of the board to act on behalf of that Company.”

15. This ground fails because the defect is curable by application of Article 159(2) (d) of *the Constitution* which enjoins Courts to administer justice without undue regard to procedural technicalities.

b) The Trial Magistrate erred in law and in fact by failing to determine whether the 1st Respondent had proven the alleged negligence to the required standard.

16. Further, the Appellant contended that the learned trial Magistrate erred in law and fact by failing to determine whether the 1st Respondent had proven the alleged negligence to the required standard.
17. It was the Appellant’s submission that the Plaintiff was required to prove the existence of a duty of care, breach of the said duty, and that the injury suffered is as a result of the said breach. While this is the position in most negligence cases; when it comes to banks there is a duty of care owed to a third party who in most cases is not a customer to the bank as discussed below.



18. A bank must exercise reasonable diligence and take the necessary precautions by making proper inquiries to ensure that the holders of accounts are not imposters. In *Kenya Grange Vehicle Industries Ltd v Southern Credit Banking Corporation Limited* [2014] eKLR, the Court found the bank guilty of negligence for failing to take proper precautions, “so as to ensure that the holders (signatories) to the said account were legally who they said they were.”
19. Similarly, in *Beyond Kenya Limited and Another v Gulf African Bank Kenya Limited* ML HCCC No. 158 of 2009 [2019] eKLR, the Court held that the bank, “failed to comply with mandatory provisions, requiring a bank to verify the identity of a customer when establishing initial business relations”.
20. In such instances, the onus to show the absence of negligence falls on the bank as was stated by the Court of Appeal in *Standard Chartered Bank Kenya Ltd v Intercom Services Ltd & 4 others* NRB CA Civil Appeal No. 37 of 2003 [2004] eKLR that:

“The onus of establishing circumstances showing absence of negligence is on the banker. It is a matter of defence, and does not give a substantive cause of action. The extent of inquiry must be measured by what in the circumstances a fair minded banker paying due regard to the exigencies of banking business in relation to the person depositing the cheque would consider it prudent to do in order to protect the interest of the true owner and each case must depend on its own circumstances.”

21. Further to the above, as regards customer identification, the Prudential Guidelines by the Central Bank of Kenya, impose on the Bank a duty to know their customers. In particular Clause 5.6 provides, in part, as follows:

5.6 Customer Due Diligence

5.6.1 Know Your Customer Requirements

The need for institutions to know their customers is vital for the prevention of money laundering and underpins all other activities.

When a business relationship is being established, the nature of the business that the customer expects to conduct with the institution should be ascertained at the outset to show what might be expected as normal activity. In order to be able to judge whether a transaction is or is not suspicious, institutions need to have a clear understanding of the legitimate business of their customers.

5.6.2. Customer Identification and Verification

In all circumstances, any business entity operating within the financial sector requires basic information on its customers. The nature and extent of this information will vary according to the type of business. It shall also depend on whether the business is being introduced by a financial intermediary and the type of customer involved. An institution should establish to its satisfaction that it is dealing with a person that actually exists. It should identify those persons who are empowered to undertake the transactions, whether on their own behalf or on behalf of others.

When a business relationship is being established, the nature of business that the customer expects to conduct with the institution concerned should be ascertained, so as to determine what might be expected as the customer’s normal activity levels. In order to judge whether a transaction is or is not suspicious, an institution needs to have a clear understanding of the pattern of its customer’s business as its relationship.



5 6.3 When Identity Must Be Verified

An institution must identify its customer in the following circumstances:

- (a) When establishing initial business relations.
 - (b) When undertaking occasional or one-off transactions.
 - (c) When there is cause to be suspicious.
 - (d) When there is doubt about veracity or adequacy of previously obtained customer information.
22. While carrying out the above-mentioned functions, the Appellant it was incumbent upon the Appellant (the Bank) to perform an official search at the Registrar of Companies prior to opening the account for the subject entity. Such an official search would have enabled the Appellant to confirm the legitimacy, ownership, and governance details of Jumbo Commodities Limited, the entity presented by the 2nd and 3rd Respondents. In place of the official search, the Appellant relied on a letter from Gathaiya & Associates Advocates. It goes without saying that an official search is a critical component of the bank's compliance with regulatory requirements and industry best practices.
23. Having perused the Record of Appeal as well as the recorded testimonies of the witnesses; it is evident that there were glaring inconsistencies in the documents relied on the Appellant in opening of the account. For instance, and as pointed out by the Trial Court the Certificate of Incorporation showed certificate no. CPR/2009/14412 while the letter by Gathaiya & Associates Advocates showed no. CPR/2014/168128. Further the incorporation dates were two 25th November 2009 and 17th November 2014
24. Moreover, by its own admission the Appellant even admitted that it did not obtain the audited financial accounts, as the Certificate of Incorporation indicated that Jumbo Commodities Limited had been incorporated a few days before opening of the account. Yet it was alleged to have had financial dealings with the 2nd and 3rd Respondents spanning over 5 years. This was a clear red flag. The bank clearly did not exhaust its exercise of due diligence. Thus, had the Bank been diligent, it could have detected the anomalies early enough and not proceeded with opening the impugned bank accounts.

c. Whether the Plaintiff proved loss/injury suffered.

25. Was there loss occasioned to the 1st Respondent? From the transcript of the trial, the Appellant's own witness, Mr. Ojiambo admitted on record that before the Bank closed the account the 2nd and 3rd Respondents had managed to withdraw Kshs.2,001,900.
26. On the ground of negligence, the Court agrees with the Trial Court in finding the Appellant negligent since it breached its duty of care owed to the 1st Respondent. As a result of the breach of duty of care, the 1st Respondent did in fact suffer a loss.

d. Whether special damages were proven

27. On the issue of whether special damages were proven; the Court acknowledges that it is trite law that special damages must be both pleaded and proved before they can be awarded. In the case of Hahn v. Singh, Civil Appeal No. 42 Of 1983 [1985] KLR 716, the Court of Appeal held as follows:

“Special damages must not only be specifically claimed (pleaded) but also strictly proved for they are not the direct natural or probable consequence of the act complained of and



may not be inferred from the act. The degree of certainty and particularity of proof required depends on the circumstances and nature of the acts themselves.”

28. On this, the 1st Respondent’s customers provided copies of the cheques that were allegedly stolen by the 2nd and 3rd Respondents and deposited into an account held by the Appellant in its Supplementary Bundle of Documents. This corroborated the Appellant’s testimony that the 2nd and 3rd Respondents had managed to withdraw Kshs.2,001,900.
29. The upshot of the above is that the Appeal is dismissed and the decision of the Trial Court is hereby upheld.
30. On costs, the same ordinarily follow the event. The Court sees no reasons to depart from this principle. The 1st Respondent as the successful party is awarded the costs of this Appeal.

Determination

31. The Appeal is dismissed in its entirety.
32. The costs of the Appeal are awarded to the 1st Respondent.
33. It is so ordered.

SIGNED, DATED, AND DELIVERED IN VIRTUAL COURT THIS 20TH DAY OF MARCH 2025.

NJOROGE BENJAMIN K.

JUDGE

In the presence of:

.....for the Appellant
..... for the 1st Respondent
.....for 2nd Respondent
.....for 3rd Respondent
Court Assistant.....

