Mbogo v NCBA Bank Kenya & 2 others (Civil Appeal E106 of 2022)
[2025] KEHC 6065 (KLR) (12 May 2025) (Judgment)

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REPUBLIC OF KENYA

IN THE HIGH COURT AT NAKURU

CIVIL APPEAL E106 OF 2022

PN GICHOHI, J

MAY 12, 2025

BETWEEN

ELIZABETH MBOGO ..... APPELLANT

AND

NCBA BANK KENYA ..... 1ST RESPONDENT

CHRISTINE WANGARI ..... 2ND RESPONDENT

ANDREW N GEKE ..... 3RD RESPONDENT

(An Appeal from the Judgement and Decree of the Chief Magistrates' Court, Hon. B.B Limo(SRM) delivered on 13th July, 2022 in Nakuru Chief Magistrate's Court Civil Case No. E332 of 2021)

JUDGMENT

1. The background of this Appeal is that the Appellant herein sued the Respondents vide a Plaint dated 8th April, 2021 and Amended on 7th June, 2021, seeking judgement against them for:-

    1. A mandatory injunction compelling the 1st Defendant to unconditionally lift the freezing order placed by itself without any valid Court Order on account number 1200003410.

    2. An order compelling the 1st Defendant to return Kshs 5,700,000 transferred to Account number 1448460024 to the initial account number 1200003410 domiciled at the 1st Defendant Nakuru Branch.

    3. That the plaintiff be granted free access and use including transacting using and or dealing with bank account No. 1200003410 domiciled at the 1st Defendant's Nakuru Branch.

    4. General damages for breach of contract.

5. Costs of this Suit with interest.

6. Any other or further orders that the Court may deem just and fit to grant.

2. Her claim was that herself, the 2nd and 3rd Respondents are signatories to Account No. 1200003410 domiciled in the 1st Respondent and that the relationship between the parties and the 1st Respondent is a customer-banker relationship.

3. It was her case that acting on a letter drawn by the 2nd Respondent, the 1st Respondent froze the subject Account on the allegation that the signatories were in disagreement, which act she termed a breach of its fiduciary duty and the contract.

4. She claimed that it was only sometimes on 27th November, 2020 that she found out that the Account was frozen when she visited the bank and presented a cheque and it bounced. She stated that in the same period, the Respondents colluded and transferred the said money from Account No. 1200003410 to Account No. 1448460024 within the 1st Respondent without any notice to her.

5. The 1st Respondent did not file any defence.

6. The 2nd Respondent filed a Statement of Defence dated 19th August, 2021 denying the claim and stating that the signatories of the said Account are herself, the 3rd Respondent and Elizabeth Wanjira Evans, though the Account belongs to the 3rd Respondent who is their Advocate.

7. Her position was that they contributed monies deposited in the said Account and out of the Kshs. 31,800,000 contributed, Elizabeth Wanjira Evans contributed only Kshs. 6,000,000.That out of that money, she [Elizabeth Wanjira Evans] withdrew Kshs. 3,989,902 to settle her debt owed to Kiwaka Merchants Limited. She further withdrew a further sum of Kshs. 1,950,303 together with the 3rd Respondent, leaving a balance of Kshs. 60,795.

8. It was her case that a dispute arose between the signatories of the said Account when the said Elizabeth Wanjira Evans and 3rd Respondent attempted to withdraw more money than what she contributed, causing her [2nd Respondent] to notify the 1st Respondent of the issue and requested for freezing of the said Account to safeguard monies in the said Account which belong to third parties. Her position was that the 1st Respondent acted lawfully as it was not under any duty to honour a cheque which had been countermanded. She thus prayed for dismissal of suit with costs.

9. The 3rd Respondent filed a Statement of Defence dated 8th July, 2021 stating that the subject Account is his Client's Account and that sometimes back, he acted for the Appellant and the 2nd Respondent in various suits where they were paid some money and that said money was deposited in his Client's Account No. 1200003410.

10. He stated that both the Appellant and the 2nd Respondent had cordial relationship in operating the said Account but with time, the Appellant and the 2nd Respondent had disagreement and this caused the Client Account to be frozen without his knowledge thus inconveniencing his operations.

11. It was his position that out of the said money, he is owed Kshs. 550,000 being Advocates fees and which is to be recovered from the said Account. He contended that the Appellant and the 2nd Respondent failed to settle their difference causing him to transfer the subject sum of Kshs. 5,700,000 to another Account, where the three of them remain signatories. He claimed that this was to free his Client's Account for use. He therefore argued that there was no wrong doing on his part in requesting for the transfer of the disputed sum into another Account.

12. In his judgement delivered on 13th July, 2022, the learned trial Magistrate held:-

> " This court finds that the plaintiff has proved her case on a balance of probabilities . I shall enter judgment in favour of the plaintiff and against the defendant as per the amended plaint dated 7th June 2021 in terms of prayer 1 and 2 and for prayer 4 the plaintiff is awarded a sum of kshs 100,0000/= being nominal damages. For prayer 4 in the amended plaint, the plaintiff and the 2nd defendant are granted 60 days to agree on the modalities of sharing the money now credited back into Account No. 1200003410 [in terms of judgment Order No. 2] failure to which the money shall be shared [minus agreed or taxed advocates fees] on a 50:50 basis. For reasons stated above, the costs of the suit to the Plaintiff to be borne by 1st Defendant."

13. Dissatisfied with this decision, the Appellant herein filed a Memorandum of Appeal dated 10th August, 2020 based on the following Grounds: -

    1. That the learned trial Magistrate erred in law and in fact in holding that the Appellant and the 2nd Respondent ought to agree on the modalities of sharing the money credited into account no. 1200003410 domiciled at the 1st Respondent's Nakuru branch failure to which the money shall be shared [minus agreed or taxed advocates fees] on a 50: 50 basis whereas none of the parties had sought the said prayer in their pleadings and despite holding that the Appellant had proved her case on a balance of probabilities.

    2. That the learned trial Magistrate erred in law and in fact in making a further order in relation to prayer no 4 despite having made a determination under the same prayer where he awarded the Appellant a sum of Kshs. 100,000/= being nominal damages.

    3. That the learned trial Magistrate erred in law and in fact in failing to consider the pleadings and submissions filed by the Appellant thus arrived at that erroneous conclusion.

14. The Appellant therefore prayed that the "Appeal be allowed in so far as it states that for prayer 4 in the amended plaint, the Appellant and the 2nd Respondent are granted 60 days to agree on the modalities of sharing the money now credited back into account No. 1200003410 [in terms of judgment Order No. 2] failure to which the money shall be shared [minus agreed or taxed advocates fees] on a 50: 50 basis, be set aside and be substituted with orders awarding the Appellant free access and use of the entire amount of money credited back into Account No. 1200003410 domiciled at the 1st Respondent's Nakuru Branch and costs of this Appeal."

15. Also aggrieved by the learned Magistrate's decision, the 1st Respondent filed a Cross-Appeal dated 23rd August, 2023 on the following grounds: -

    1. The trial court erred by holding that the 1st Respondent breached its fiduciary duty by freezing account No. 120003410 without a court order.

    2. The trial court erred by holding that the 1st Respondent could only freeze the account by a court order only and that by this finding, the trial court failed to consider that the bank had a duty to protect the interest of all the account signatories and not just the Appellant.

    3. The trial court erred in law by ignoring the provisions of clause 3.5 of the Consumer Guide for Bankers in Kenya which allows the Bank to freeze an account under exceptional circumstances without prior notice to the account holders.

4. That the trial court erred in law and fact by holding that the Bank breached its duty to the Appellant by freezing the account yet there was a clear dispute between the account signatories. Indeed, the freezing of the account preserved the funds which is a lesser evil as compared to if the funds were withdrawn by the Appellant and the payment not being recoverable.

5. The trial magistrate erred in law and fact by elevating and giving undue weight to the Appellant's testimony over that of the 2nd and 3rd Respondents who were the joint signatories.

6. The trial court erred by ordering the Bank to pay the costs yet the bank neither had a stake in the proceedings nor instigated the dispute herein. The Bank was only a custodian of the money jointly held in the Bank.

16. The 1st Respondent therefore urged this Court to allow its Cross -Appeal, set aside in entirety the judgement of the trial court delivered 13th July, 2022 together with all consequential orders. It also prayed for costs of this Cross- Appeal and of the lower court case.

17. Likewise, the 2nd Respondent was aggrieved and therefore filed the Memorandum of Cross-Appeal dated 8th September, 2022 based on the following grounds: -

1. The learned magistrate erred in law and in fact in proceeding to issue judgement in the suit without hearing the 2nd Respondent testimony and without considering and appreciating the defence and evidence of the Appellant.

2. The learned magistrate erred in law and in fact in failing to subject the suit to the provisions of Order 11 of the Civil Procedure Rules which entails pre-trial processes before proceeding to the suit.

3. The learned magistrate erred in law and in fact in failing to deliver a ruling on the issue of stay of proceedings but instead proceeded to deliver its judgment without hearing the 2nd Respondent.

4. The Learned magistrate erred in law and in fact in failing to give due weight to the evidence on record.

18. She prayed that the Cross-Appeal to be allowed with costs, the judgement of 13/7/2022 be set aside and the proceedings and that judgement in the trial court be expunged from record and the matter be heard a fresh.

Appellant's Submissions

19. While emphasising on this Court's obligation as a first appellate court, he cited the case of Ramji Ratna & Company Limited v Wood Products [Kenya] Limited [2007] eKLR where Court of Appeal stated:- "This is a first appeal and so this Court is obliged to reconsider the evidence assess it and make appropriate conclusions on such evidence, but always remembering that we have neither seen nor heard the witnesses."

20. Regarding the Order granted without any party seeking for it, she cited the case of Lamba v*National Social Security Fund & another [Civil Appealb E168 of 2021*] [2023] KECA 124 [KLR] the Court of Appeal held that: -

> "...It is trite law that courts can only grant orders that have been prayed for in the pleadings, or make appropriate orders as it deems fit if need arises in the cause of a trial. Indeed, where a court has proceeded to grant a relief not contained in prayers in the pleading or not regularly sought by a party expressly or by implication, appellate courts have had no hesitation in

annulling or overturning orders granting such reliefs. The appellant chose to abandon her prayer for special damages and must therefore lie on her own bed..."

21. Similarly, she submitted that throughout the pleadings and during the proceedings, there was no prayer made for sharing the money on a 50:50 basis and therefore, the Court was not justified in granting a prayer that was not sought by the parties.

22. On the finding that the 1st Respondent breached its fiduciary duty, she argued that Courts have severally dealt with the issue of fiduciary duty as stated in the case of Family Bank Limited vPanda Co-operative Savings and Credit Society [2022] eKR that:-

> "...a fiduciary duty as in the instant case arises where the bank is entrusted wholly with the customer's money and transactions as instructed and that such instructions should be executed to the letter without breaching any of them. It is expected that, in carrying out whose instructions, the bank executes them with utmost confidence and honesty and in the best interests of the customer. It is a duty of fair dealing and loyalty. It is a duty of transmitting any necessary information and maintaining good records of all transactions on an account."

23. Further, reliance was also placed on the case of Viable Deco Solutions Limited vCo-operative Bank of Kenya Limited [2014] eKLR where F. Gikonyo J held as follows:

> "[20] Notice to the customer of important matters touching on the account held in a bank is almost an indispensable necessity. And although methods of communication are various and varied, most banks have adopted technology in communication of important matters to the customer; a method that is fast and almost instantaneous. The necessity of communication arises from the fiduciary nature of Customer-Bank relationship which is undergirded by absolute faith and trust. Ordinarily, full disclosure of any action taken by the Bank, especially those which are adverse to the Customer is imperative aspect of that relationship.

24. Accordingly, she argued that by failing to inform her that the Account had been frozen, the Bank breached its fiduciary duty and the trial court was justified in its finding that the Respondent should have obtained a Court Order before freezing the said Account.

25. Regarding costs, it was submitted that under Section 27 of the *Civil Procedure Act*, the trial court was right in finding the 1st Respondent liable to pay costs as it was the one that allowed the freezing of the Account and subsequent transfer of money from the said Account without informing her or obtaining her consent.

26. On whether the trial court failed to accord the 2nd Respondent audience in her defence, it was submitted that the matter before the trial court was filed and the parties served, they entered appearance, filed their responses and the Applications filed in the matter were heard and determined.

27. It was argued that the matter went for pretrial before it was fixed for hearing and that parties were given time to comply but the 2nd Respondent failed to do so and therefore, the trial court was justified in proceeding without their testimony.

28. It was her submissions that the 2nd Respondent's indolence should not be visited against the Appellant. On this position, reliance was placed on the case of Amina Karama v Njagi Gachangua & 3 others [2020] eKLR the Y.M. Angima J of the Environment and Land Court held:-

> " It has been held that equity aids the vigilant and not the indolent. It has also been held that delay defeats equity. In the case of Ibrahim Mungara Mwangi vFrancis Ndegwa Mwangi [2014] eKLR the court quoted the following passage from Snell's Equity by John MC Ghee Q.C. [31st Edition] at page 99: "The Court of equity has always refused its aid to stale demands where a party has slept upon his rights and acquiesced for a great length of time. Nothing can call forth this court into activity but conscience, good faith and reasonable diligence; where these want the court is passive, and does nothing."

29. Along that line, the Appellant submitted that the 2nd Respondent sought to reopen the defence case through her application dated 16th February 2022, which application was allowed on 8th March 2022 and she was given additional time to comply by filing its compliance documents but she failed even after being allowed to do so out of time.

30. It was her submissions that the case was reopened and set for hearing of the 2nd Respondent's case on 16th March 2022 and then on 30th March 2022. However, on both occasions, the 2nd Respondent was not ready and sought for adjournment, which was denied by the ruling of 31st March 2022.

31. In the circumstances, the Appellant submitted that if the 2nd Respondent was aggrieved by the said ruling, she ought to have appealed against it and not wait until judgment was delivered so as to Appeal.

32. On whether pre-trial was conducted, it was submitted that this issue was first raised by the 2nd Respondent herein on the 8th March 2022 at lower court and the issue was settled by the ruling of 31st March 2022 which ruling has never been appealed against or set aside.

33. In conclusion, she prayed for the award of costs of this Appeal and the Cross- Appeals.

1st Respondent's Submissions

34. On the onset, the 1st Respondent maintained that due process was followed in freezing Account No. 1200003410. It elaborated that this Account was opened in the year 2008 by Andrew Nyakundi Geke trading as A.G Geke & Company Advocates and he was the sole signatory and that sometime in 2020, the Appellant and the 2nd Respondent were added as signatories for the purposes of controlling a sum of Kshs. 31,800,000 which was transferred from High Court of Kenya at Nakuru to that Account.

35. It states that they operated the said Account smoothly until the Appellant and the 2nd Respondent could not agree on use of the balance of Kshs. 5,700,000. On 27th November, 2020, the 2nd Respondent wrote to the Bank informing it that the signatories had disagreed and requested that the Account be restricted until the issue is resolved.

36. It was submitted that the signatories of the said Account had agreed to be subjected to the terms and conditions of operation of the Bank, under Clause 15 of the Bank's General Terms and Condition which provided that:-

> " the bank may at any time move to freeze an account if there is a dispute or if the bank has doubt as to the person[s] entitled to operate the account."

37. The 1st Respondent submitted that Pursuant to the request of the 2nd Respondent, and with authority of Clause 15 above, it [Bank] froze the said Account until the dispute is resolved. It was emphasised

that in fact, the Appellant wrote to the Bank on 2nd February, 2021 confirming that there is a dispute between her and the 2nd Respondent. Moreover, that the 3rd Respondent wrote to the Bank requesting transfer of the disputed sum to another Account and maintaining the signatories, to enable him operate his Clients' Account when handling other Client's money.

38. Consequently, it was submitted that the 1st Respondent acted on the letter and transferred the sum of Kshs. 5,700,000 to Account No. 1448460024 within the same Branch and maintained the 3 signatories and therefore, the Bank followed due procedure in freezing the said Account and transferring the said money.

39. From the foregoing, it was submitted that it was not at any fault and the trial court should not have interfered with the agreement entered into between it and its customers. In support of this argument, reliance was placed on the case of National Bank of Kenya Ltd v Pipeplastic Samkolit [K] Ltd [1999] eKLR, where the Court of Appeal held that:-

> " A Court of law cannot re-write a contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved."

40. Further, the 1st Respondent cited the case of Kenya Commercial Finance Company Ltd v Ngeny & Another [2002] eKLR , where the Court of Appeal held that:-

> " As a general rule, courts will not interfere where parties have contracted on arm's length basis. However, by its equitable jurisdiction this Court has the power and will set aside any bargain which is found to be harsh, unconscionable and oppressive or where having agreed to certain terms and conditions thereafter imposes additional terms upon the other party then the course of equity can and may intervene to relieve the party upon which those additional obligations have been imposed by setting the same aside."

41. The 1st Respondent further relied on the case of Charles Onyango Anguka and Gerphas Obonyo T/ A Jopiju Electrical and General Works v Equity Bank Limited & another [2014] KEHC 722 [KLR], where G.L. Nzioka J held:-

> " 45. The bank can suspend an account; if there is a dispute about how an account is used or who owns the funds in it. For example, one of the account holders to a joint account may be in dispute with another account holder and ask the bank to suspend the account. Or, a bank may suspend a company account when one director tells the bank he or she is in dispute with another director. The bank may also suspend an account at its own discretion if it becomes aware of a dispute.
>
> 46. In such cases, it is not the bank's role to consider or resolve the dispute. The disputing sides must work it out themselves. The suspension will stay in place until that happens. However, a bank should take certain steps when there is a dispute about an account. It must:a] check whether there is a genuine dispute, and if so; b] suspend the account in accordance with the account terms and conditions; c] notify the disputing sides of the suspension and d] why it has been put in place; and e] what the disputing parties must do before the bank will lift the suspension [usually reach an agreement and complete a new mandate].

47. A bank may also advise the disputing sides that; they may have to take the matter to court, if they cannot reach an agreement. It does not have to tell account holders before suspending an account. This is mainly to protect the funds in the account. Telling an account holder in advance would give him or her the opportunity to withdraw money."

42. Similarly, that in this case, the Appellant was notified of the Account being frozen when she presented a cheque for cashing. Furthermore, that the Appellant confirmed that there is a dispute between the parties, affirming further the action taken by the 1st Respondent and therefore, in finding that a court Order was necessary before the Account could be frozen, the trial court misdirected itself.

43. On the award of nominal damages, the 1st Respondent maintained that it followed due procedure in freezing the said Account and even notified the Appellant in line with Clause 3.5 of the Consumer Guide for Bankers in Kenya, which requires a bank to give 14 days' notice to signatories, if it intends to suspend or close an account, provided that such an account may be suspended and a post notice given if the bank is required to comply with statutory requirements or legal obligation.

44. Therefore, 1st Respondent submitted that the nominal award of damages of Kshs. 100,000 and the costs of Kshs. 234,390 awarded to the Appellant were not warranted and it should thus be set aside.

45. The 1st Respondent concurred with the 2nd Respondent's Cross- Appeal and argued that the trial court entered judgement against the Respondents without according them, the right to be heard. Further, that the application pending stay of proceedings was not heard and instead, the trial court proceeded to deliver its judgement. On that note, it urged this court to remit the case back to the Chief Magistrate Court for hearing de novo.

46. Regarding costs, it was submitted that the 1st Respondent deserve to be awarded costs of both the trial court and this Appeal as it has demonstrated that it acted in good faith and did not breach either the contract or its fiduciary duty.

2nd Respondent's Submissions

47. She submitted that the trial court erred in declining to grant her leave to supply her evidence during trial thus denying her right to fair hearing which right is absolute and ought not to be taken away more so in judicial proceedings where a party is seeking justice.

48. To support this view, she relied on Mandeep Chauhan v Kenyatta National Hospital & 2 others [2013] eKLR where while dealing with the issue of right to fair administrative action, Lenaola J [as he then was] quoted the decision of the Supreme Court of Uganda in The Management Committee of Makondo Primary School and Another v Uganda National Examination Board, HC Civil Misc Application No.18 of 2010 thus:-

69. "It is a cardinal rule of natural justice that no one should be condemned unheard. Natural justice is not a creature of humankind. It was ordained by the divine hand of the Lord God hence the rules enjoy superiority over all laws made by humankind and that any law that contravenes or offends against any of the rules of natural justice, is null and void and of no effect. The rule as captured in the Latin Phrase 'audi alteram partem' literally translates into 'hear the parties in turn', and has been appropriately paraphrased as 'do not condemn anyone unheard'. This means a person against whom there is a complaint must be given a just and fair hearing."

49. On whether the main Appeal is merited, it was submitted that the money in the said Account is contributors' money, which was to be shared in the ratio of contribution mad and therefore, the Appellant is misleading the court in praying for exclusive use of the said money.

50. It is her submissions that in any event, one of the contributors of the subject money has also filed a suit at the Chief Magistrate Court Nakuru being MCCC No. E 761 of 2022- Lucy Muthoni Gachege vChristine Wangari Gachege & 3 Others, where she prays for similar Orders and therefore, if this Court upholds the Order of the trial court, the contributor's case will be rendered nugatory. She therefore urged this Court to issue orders that will protect the interest of all parties that contributed to the subject money.

51. On her cross Appeal, she submitted that it was in the interest of justice for the newly appointed advocate to request for leave to file his client's evidentiary documents out of time especially since this was not an omission of the client herself or her then newly appointed advocate, but of the former advocate for which reason the 2nd Respondent had changed her advocates.

52. To buttress this argument, she cited Article 159 [2] [a] of *the Constitution* which enjoins courts to render justice to all irrespective of status and Order 50 Rule 6 of the Civil Procedure Rules which allows courts to extend time for doing a particular thing the deadline for which had been fixed by the Rules.

53. Further, she placed reliance on the case of Ataka, Kimori and Okoth Advocates v urestep Systems and Solutions Ltd [2019] eKLR, where P. Nyamweya J [as she then was]held:-

> " ...It is therefore evident that the mandatory requirement is with respect to request for, and the granting of leave and extension of time before the filing of an appeal, where such leave or extension is required. This was the effect of the decisions in Northewood Agencies v Raj Devani & Another [2019] eKLR, and Raja Material Supplies v Lamech Mbaka Mutegi & Another [2018] eKLR that were relied on by the Advocate. In addition, courts are given powers under Order 50 Rule 6 of the Civil Procedure Rules to extend time for any matters for which time has been fixed under the Rules, therefore, a requirement that an application for leave to appeal be filed within fourteen days cannot be interpreted to be mandatory. It is notable in the present application that the Client has not yet filed its appeal, and the only oversight by the Client was the failure to include a prayer for extension of time in its application for leave to appeal. But for that oversight, the Client has properly moved this Court for leave before he can lodge its appeal, and has not lodged any appeal without such leave or extension of time. These circumstances therefore distinguish the present application, and the Client's oversight is one that this Court can cure in exercise of its duty under Article 159[2][b] of *the Constitution* and section 1A and 1B of the *Civil Procedure Act* to dispense substantive justice without undue regard to procedural technicalities, and to ensure the just, expeditious, proportionate and affordable resolution of the civil disputes. It is also notable that this Court has inherent powers under section 3A of the *Civil Procedure Act* to such orders as may be necessary for the ends of justice."

54. On costs, she emphasised Section 27 of the *Civil Procedure Act* that costs follow the events and urged this Court to exercise its discretion in her favour and proceed to dismiss the main Appeal and allow the Cross-Appeal with costs.

Analysis and determination.

55. Upon perusal of the Appeal and the two Cross-Appeals together with the grounds raised in each Appeal, the following issues fall for determination:-

1. Whether the failure to subject a suit to pre-trial Conference is fatal to the proceedings.
2. Whether the trial court failed to give the 2nd Respondent a chance to be heard.
3. Whether the 1st Respondent required to obtain a Court Order before freezing the subject Account.
4. Whether the trial court erred in granting an award that was not prayed for in the pleadings.
5. Who should bear costs of the Appeal and Cross-Appeals.

Whether the failure to subject a suit to pre-trial conference is fatal to the proceedings.

56. The 2nd Respondent argued that the case herein was not subjected to any pre-trial conference as required under Order 11 of the Civil Procedure Rules. This provision generally prescribe that there be a pre-trial conference before the case is set down for hearing and the purpose of the pre-trial conference is laid out in Rule 3, that is inter alia, to; promote the expeditious disposal of cases, afford the parties an opportunity to use alternative dispute resolution mechanisms to determine the case, afford the parties an opportunity to settle the case, determine any other matter relating to the management, hearing or disposal of the case, deal with pre-trial applications at first instance or formulate a timetable to deal with them as the court may deem fit and to identify the issues for determination.

57. Flowing from the above, a perusal of the proceedings before the trial court shows that indeed no pre-trial conference was conducted and therefore, the issue then would be whether failure to conduct pre-trial conference, being procedural law in its strict sense, vitiates the proceedings.

58. The import of Order 11 of the Civil Procedure Rules is to ensure that all parties are aware of the other party's position and this is discernible through the pleadings, witness statements and documentary evidence. In this case, the 1st Respondent did not enter appearance and did not participated in the trial and therefore, the allegation that it was not accorded hearing does not hold any water.

59. The 2nd and 3rd Respondents, filed their respective defence to the Amended Plaint and a reply to those defences were also filed. That in effect shows that the two parties were acquainted with each other's cases. In any event, none of the parties raised an issue that the matter was not subjected to pre-trial directions until the Appellant [Plaintiff in the trial court] and the 3rd Respondent cases were heard and closed.

60. This Court is satisfied that in the circumstances herein, failure to strictly comply with Order 11 of the Civil Procedure Rules was a technicality which is curable pursuant Article 159 [2] [d] of *the Constitution* of Kenya , 2010 hence not fatal to the proceedings as long as parties who had filed their pleadings and documentary evidence were allowed to participate in trial.

Whether the trial court failed to give the 2nd Respondent a chance to be heard.

61. The chronology of events leading to her being locked out of defending the suit reveals that there were three application filed before the trial court prior to hearing of the main suit. The application date 21/4/ 2021 was seeking to lift the freezing of the subject Account and for leave of the court to withdraw a sum of Kshs. 2,605,000 but this application was withdrawn on 28/5/2021.

62. The second application is dated 7/6/2021 seeking to restrain the Respondents from dealing with the subject Account and return the sum of Kshs. 5,700,000 back to the said Account and to be allowed either unconditional access to the subject Account or be allowed temporary access to withdraw the

sum of Kshs. 2,605,000. That application was allowed on 18/6/2021 only to the extent that the Respondents were restrained from dealing with the said Account.

63. The third application is dated 21/7/2021 and was seeking to enjoin the other two contributors of the subject sum of money, as interested parties. The application was dismissed on 24/9/2021

64. In the circumstances, the allegation that there was a pending application seeking stay of Proceedings is not factual. None of the parties has annexed the alleged application in their respective Appeals. That leads to the inevitable conclusion that such an application does not exist.

65. The trial court's record further reveals that upon hearing all the pending applications, the matter was subsequently, mentioned on 28/10/2021 in presence of only the Ms. Ogange [Appellant's Advocate] who took the hearing date of the main suit on 2/12/2021.

66. However, on the scheduled date, the trial court was away on annual leave and Hon. Arika[CM], being the duty court, directed that the matter be mentioned on 27/1/2022 for hearing of an application. None of the Respondents was present when those directions were given. However, they were all served with a hearing notice as seen in the Affidavit of Service sworn by Ogange Zowade on 6/12/2021.

67. Despite service, only the Appellant and the 3rd Respondent appeared during hearing on 27/1/2022 and their cases heard and closed. Directions were taken to file submissions with compliance date scheduled for 17/2/2022 and Judgement was reserved for 10/3/2022.

68. Before judgement was delivered, the 2nd Respondent changed his Advocates from the firm of Anyonka & Associates to the firm of Nzaku and Nzaku Advocates, and filed the Application dated 16th February, 2022, seeking to re-open the defence case on the grounds that the former Advocate failed to appear in court for hearing and that he did not inform the witness [2nd Respondent] of the hearing date. The Application was allowed by consent and hearing for the 2nd Respondent's case scheduled for 16th March, 2022.

69. On the said 16/3/2022, Mr. Biko Advocate holding brief for Mr. Mwangi for the 2nd Respondent sought for adjournment on the grounds that counsel was held up in another Court. Adjournment was allowed but marked as the last adjournment and the matter rescheduled to 30/3/ 2022.

70. On 30/3/2022, Mr. Nzaku appearing for the 2nd Respondent took time allocation for hearing of the 2nd Respondent's case at 12 noon but at the stated time, he told the court that he was not ready to proceed as the case had not been set down for pre-trial and that there was a pending application. The application for adjournment was opposed and a ruling rendered on 31/3/2022 declining it and the matter reserved for judgement, which was delivered on 13/7/2022.

71. As rightly submitted by parties herein, the right to be heard is a constitutional right, guaranteed under Article 50 [1] of *the Constitution* of Kenya, 2010. Indeed, the Court of Appeal in the case of Kiai Mbaki & 2 others v Gichuhi Macharia & another [2005] KECA 143 [KLR], held that;-

> " The right to be heard is a valued right. It would offend all notions of justice if the rights of a party were to be prejudiced or affected without the party being afforded an opportunity to be heard."

72. That right was qualified in the case Union Insurance Co. of Kenya Ltd v Ramzan Abdul Dhanji Civil Application No. Nai. 179 of 1998[Unreported] where the Court of Appeal held that:-

> " Whereas the right to be heard is a basic natural-justice concept and ought not to be taken away lightly, looking at the record before the court, the court is not impressed by the point

that the applicant was denied the right to defend itself. The applicants were notified on every step the respondents proposed to take in the litigation but on none of these occasions did their counsel attend. Clearly the applicant was given a chance to be heard and the court is not convinced that the issue of failure by the High Court to hear the applicant will be such an arguable point in the appeal. The law is not that a party must be heard in every litigation. The law is that parties must be given a reasonable opportunity of being heard and once that opportunity is given and is not utilised, then the only point on which the party not utilising the opportunity can be heard is why he did not utilise it."

73. From the chronology of events herein above, it is evident that the 2nd Respondent was granted ample opportunity to be heard, not once but twice. The claim that pre-trial was not conducted was a mere excuse that the 2nd Respondent used to seek further adjournment in the matter. Having, been given opportunity to be heard and failed to utilise it, the 2nd Respondent cannot claim to have been condemned unheard.

Whether the 1st Respondent required to obtain a Court Order before freezing the subject Account.

74. The trial court held that the Bank needed to obtain a court Order before acting on the said Account and thus the freezing was not done procedurally.

75. However, Clause 3.5 of the Consumer Guide for Bankers in Kenya provides that:-

> " Unless there are exceptional circumstances, a bank should not suspend or close an account without giving the account signatory at least a 14-day notice. However, if the Bank is required to freeze the account in compliance with statutory requirements or legal obligation, a post freeze notice should be given to the customer promptly.

76. From the above, it is clear that in the event circumstances require urgent freezing before notice is issued, the said Clause contemplate a post-freeze Notice. On the other hand, Clause 26. 1 of the General Terms and Conditions of the NCBA Bank provides that:-

> " The Bank may at any time, upon notice to the Customer, terminate or vary its business relationship with the Customer and in particular but without prejudice to the generality of the foregoing, the Bank may cancel credits which it has granted and require the repayment of outstanding debts resulting therefrom within such time as the Bank may determine. The Bank may at any time, terminate or freeze any account of the Customer without prior notice to the Customer in compliance with statutory requirements or in exceptional circumstances; or after receiving instructions to do so from any appropriate authority; or if and so long as there is any dispute or the Bank has doubt for any reason [whether or not well founded] as to the person or persons entitled to operate the same, without any obligation to institute interpleader proceedings or to take any step of its own initiative for the determination of such dispute or doubt." [Emphasis added]

77. Though the 1st Respondent argued that it gave the Appellant notice before freezing the subject Account, no such notice was exhibited before the court to ascertain that notice was indeed given. However, there is evidence that the 1st Respondent informed the Client that Account was frozen when she attempted to cash a cheque.

78. There is no doubt from the material presented before the court that indeed the Appellant together with the 2nd and 3rd Respondent were all customers of the 1st Respondent. They are bound by General Terms and Conditions of the Bank. including Clause 26.1 quoted herein which allows the 1st Respondent

to freeze a customer's Account without notice, when signatories were in dispute over the funds in the said Account.

79. Going by the provisions of Clause 26. 1 above of the General Terms and Conditions of the NCBA Bank, the 1st Respondent's Bank's argument that it proceeded to freeze the said Account so as to protect the interest of all parties and secured the funds in the said Account until the parties resolved their dispute is sound.

80. Further, regarding failure by the Bank to obtain a Court Order before freezing the Account, the Consumer Guide does not contemplate such an Order. Flowing from there, the trial court's award of Kshs.100,000/= for breach of contract was unjustified and in err.

81. There was a dispute in the money contributed by parties on Account No. 12000 3410. The 3rd Respondent justified transfer of the funds from the 3rd Respondent's Client No. 12000 3410 to Account No. 14484630024 where Appellant, 2nd and 3rd Respondents are all signatories. In its judgment, the trial court ordered that the money to be retransferred to the account as it was done without authority and notice to all signatories. The court went on to say:-

> " If I may revert back to prayers sought for in the amended plaint , I order that once the funds are re-credited , to a joint account, the funds belong to that initial account holders and shall be utilised once issues are resolved by themselves but within certain time frame to be given by the court."

82. The above would not have disposed of the dispute as to the moneys therein and therefore the orders for retransfer was not useful at that point.

Whether the trial court erred in granting an award that was not prayed for in the pleadings.

83. It is well settled that parties are bound by their pleadings and it is upon them that a Court makes determination. Indeed , the Court of Appeal in Independent Electoral and Boundaries Commission & another v Mule & 3 others [Civil Appeal 219 of 2013] [2014] KECA 890 [KLR] held:-

> " As the authorities do accord with our own way of thinking, we hold them to be representative of the proper legal position that parties are bound by their pleadings which in turn limits the issues upon which a trial court may pronounce. The learned Judge, no matter how well-intentioned, went well beyond the grounds raised by the petitioners and answered by the respondents before her and thereby determined the petition on the basis of matters not properly before her. To that extent, she committed a reversible error, and the appeal succeeds on that score."

84. From the material before the trial court, there was certainly no prayer for parties to go an agree on modalities of sharing the money and therefore, that order was in err.

Who should bear costs of the Appeal and Cross-Appeals.

85. Though costs follow the event as put by parties herein, there are also within the discretion of this Court and in conclusion:-

1. The trial court's judgment delivered on 13th July 2022 together with all consequential orders be and is hereby set aside.

2. The matter is remitted back to the Chief Magistrate's Court to be heard afresh by a different Magistrate

3. Cost of the appeal and cross appeals to abide outcome of the case before the trial court.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 12TH DAY OF MAY, 2025.

PATRICIA GICHOHI

JUDGE

Orina for Konosi for Appellant

Mr Raingo for 1st Respondent

N/A by 2nd and 3rd Respondent

Ruto, Court Assistant