Equity Bank Limited v Wells Fargo Limited (Civil Case E018 of 2022)
[2025] KEHC 8907 (KLR) (Commercial and Tax) (20 June 2025) (Judgment)

Neutral citation: [2025] KEHC 8907 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

CIVIL CASE E018 OF 2022

FG MUGAMBI, J

JUNE 20, 2025

BETWEEN

EQUITY BANK LIMITED ..... PLAINTIFF

AND

WELLS FARGO LIMITED ..... DEFENDANT

JUDGMENT

1. The suit before the Court is premised on a Plaint dated 14th June 2021. The plaintiff Bank seeks judgment against the defendant (Wells Fargo) for special damages amounting to Kshs. 23,400,000/=, together with interest and costs of the suit. The Bank's claim arises under the doctrine of subrogation, following an alleged loss of Kshs. 47,000,000/= during a cash-in-transit operation.

2. The Bank's case is that on or about 11th September 2019, it engaged Wells Fargo to airlift Kshs. 60,000,000/= from Nairobi to Odda Airstrip in Moyale, Marsabit County. Upon arrival at the airstrip at around 1:00 p.m., Kshs. 47,000,000/= was stolen from the aircraft, allegedly due to the negligent conduct of Wells Fargo's agents or employees. The Bank claims that Wells Fargo failed to exercise reasonable care and diligence, breached its duty to provide adequate security, and failed to ensure proper delivery of the funds.

3. The Bank also relies on the doctrine of res ipsa loquitur to assert that the loss occurred while the money was in Wells Fargo's custody. It acknowledges that its insurer, Britam General Insurance Company (Britam), indemnified it in the sum of Kshs. 22,500,000/= and incurred an additional Kshs. 900,000/= in assessment and storage fees, which forms the basis of the present claim.

4. In its defence dated 11th March 2022, Wells Fargo admits the existence of a service agreement for cash-in-transit services but contends that its liability was contractually limited. Wells Fargo asserts that the

Bank bore the responsibility for providing armed security at the destination and that the loss resulted solely from its failure to ensure its reception team was present at the airstrip.

5. Wells Fargo further asserts that its responsibility under the contract ended upon formal delivery at the destination, and thus, under the agreed operational procedure for remote areas like Moyale, liability did not lie with it. Wells Fargo denies negligence, the applicability of res ipsa loquitur, and the accuracy of the loss claimed.

6. During the trial, the Bank called three (3) witnesses. PW1 was John Gathua Kamau, the Head of Cash and Management; PW2 was Wangeshi Wambugu, the Manager of Legal Claims at Britam; and PW3 was Ali Muema Mutinda. Wells Fargo, called two witnesses: DW1 was Ismail M. Nzioka, and DW2 was Langat Nelson. I do not propose to recite their testimonies in detail, as they broadly correspond with the summary of the case as earlier outlined. I shall instead refer to the relevant portions of their evidence in the analysis that follows, together with the written submissions filed by the respective parties.

Analysis and Determination.

7. The Court is called upon to determine the following issues:

   i. Whether Wells Fargo was contractually and/or tortiously liable for the theft of Kshs. 47,000,000/=;

   ii. Whether the Bank is entitled to indemnity under subrogation for Kshs. 23,400,000/=;

   iii. Whether the doctrine of res ipsa loquitur applies in the circumstances.

8. Besides the existing contractual obligation, the claim by the Bank is premised on the tort of negligence. In order to succeed, the Bank must prove the well-established elements of negligence, namely the existence of a duty of care, a breach of that duty, a causal connection between the breach and the loss suffered and that the loss was a foreseeable consequence of the breach. These elements have been affirmed in judicial decisions, including Caparo Industries PLC V Dickman, [1990] 2 AC 605, Donoghue V Stevenson, [1932] AC 562 and Kenya Power & Lighting Co Ltd V Kimemia, [2018] eKLR.

9. In addition, the suit has been instituted under the doctrine of subrogation, whereby Britam, having indemnified the Bank for the insured loss, now seeks to recover the loss from Wells Fargo. Subrogation operates in equity and at common law, entitling an insurer who has paid a claim to pursue the rights of the insured against a third party responsible for the loss.

10. Accordingly, if the Court were to find that Wells Fargo owed and breached a duty of care to the Bank, and that the breach caused the loss in question, then the claim in negligence would succeed. As a consequence, the insurer, Britam, would be entitled to recover the amount paid under the policy by way of subrogation. Conversely, if no negligence is established on the part of Wells Fargo, then both the primary claim and the derivative subrogation claim must fail.

11. It is not in dispute that on 11th September 2019, Wells Fargo was contracted to transport a cash consignment amounting to Kshs. 60,000,000/= from Nairobi to Moyale, which was packed in three bags. It is further agreed that upon arrival at the destination, a theft occurred, resulting in the loss of Kshs. 47,000,000/=. The existence of a Service Agreement dated 1st February 2019, which governed the contractual relationship between the parties in respect of this transaction, is similarly not contested.

12. A review of the Service Agreement confirms that under Clause 4(d), Wells Fargo undertook to provide armed transport for the purpose of safeguarding the collection, loading, conveyance or transfer, and delivery of valuables. Clause 5(a) further provides that the Company shall indemnify the Client for any

and all loss or damage to valuables that may occur during the period of the Company's responsibility. Read together, these clauses make it evident that Wells Fargo's liability was contractually confined to losses occurring during the specific timeframe in which it retained actual custody and control of the consignment.

13. The scope of this responsibility commenced upon collection of the consignment and terminated upon formal handover or delivery to the client or its duly designated agents. Accordingly, any loss occurring outside this defined period would fall beyond the contractual liability of Wells Fargo unless otherwise expressly provided.

14. In Richard & Another V Okeyo, [2024] KEBPRT 382 (KLR), the Court cited with approval the earlier decision in Housing Finance Company of Kenya Limited V Gilbert Kibe Njuguna, Nairobi HCCC No. 1601 of 1999, reaffirming the principle that courts should not interfere with or rewrite contractual terms freely entered into by parties. These decisions, alongside the holding in National Bank of Kenya Ltd V Pipeplastic Samkolit (K) Ltd & Another, [2001] KLR 112, underscore the position that it is not the role of the Court to vary or renegotiate the terms upon which parties have agreed to conduct their commercial affairs.

15. Once parties have reduced their agreement into writing, the Court's mandate is to interpret and enforce those terms as they stand, unless vitiated by factors such as fraud, mistake, or illegality.

16. In the present case, while the written Service Agreement (Clause 4(d)) imposed a general obligation on Wells Fargo to provide armed transport, the uncontroverted testimony of PW1 and DW1 established a consistent and mutual operational practice that governed deliveries to remote destinations such as Moyale, where Wells Fargo had no branch presence. Both parties routinely operated on the understanding that for air deliveries, it was the responsibility of the Bank to ensure its personnel, together with armed security, were present at the airstrip 20 to 30 minutes before the aircraft's arrival.

17. This practice, repeatedly followed without objection and forming the basis of their dealings, had crystallized into a course of performance that supplemented the written agreement.

18. DW1 explained the standard procedure for cash movements under the agreement. He testified that when cash was collected from the Bank in Nairobi, Wells Fargo was responsible for security on that end, which included deployment of armed escorts. The money would be transported to the airport by the armed security team, accompanied by the cash officer, who would board the aircraft. The escort team would only leave after witnessing the aircraft take off.

19. Upon arrival in Moyale, the cash officer and pilot would be met by the Bank's security team before disembarking or handing over the consignment. This operational protocol clearly delineated responsibility: Wells Fargo's role ended with safe air delivery at the departure point, while the Bank assumed responsibility for reception at the destination airstrip.

20. It is trite law that under established contract law principles, parties may vary or qualify the terms of their written agreement by consistent conduct or mutual understanding over time. Where such a practice is clear, unequivocal, and relied upon by both parties, it becomes binding and enforceable. As held by the Court of Appeal in Ali Abdi Mohamed V Kenya Shell & Company Ltd, (2017) eKLR:

> "If one party to an agreement stands by and lets the other party incur expense or prejudice his position on the faith of the agreement being valid, he will not then be allowed to turn around and assert that the agreement is unenforceable."

21. Accordingly, in light of the authorities cited, and based on the evidence led, the Court finds that the parties' conduct amounted to an enforceable variation of the written terms of the Service Agreement.

The Bank, having accepted and acted upon the arrangement whereby it bore the responsibility for providing security at remote airstrips, cannot now disavow that practice and revert to the strict written terms in order to shift liability to Wells Fargo. To do so would offend the principle of consistency in commercial dealings and undermine the sanctity of mutually accepted business practice.

22. On the fateful day, it is not disputed that the cash consignment left Nairobi as scheduled but was stolen upon arrival in Moyale, while the aircraft remained on the tarmac awaiting reception. The evidence of PW1, DW1 and DW2 confirms that no reception team from the Bank was present at the airstrip at the time of landing. DW2, who was aboard the aircraft, testified that he was unarmed and that it was not within his mandate to provide security for the consignment. He remained in the aircraft upon landing and attempted to contact the Bank's security team, during which the armed robbery occurred.

23. PW1, under cross-examination, conceded that he could not confirm that Wells Fargo had failed to exercise reasonable care in the handling of the consignment. More significantly, he admitted that it was the Bank's responsibility to provide reception security upon arrival at Moyale. This evidence was corroborated by DW1, who further testified that the cash officer and pilots had complied with protocol by remaining in the aircraft pending the arrival of the Bank's security personnel.

24. In response to the submission that Wells Fargo's duty terminated upon delivery and acknowledgment of the consignment by the Bank in Moyale, the Court is satisfied, based on the evidence, that the theft did not occur due to a failure by Wells Fargo to perform its contractual obligations, but rather due to a breakdown in coordination on the part of the Bank. Specifically, the Bank failed to deploy its security team to the airstrip in good time, contrary to the established operational procedure between the parties.

25. It was an uncontested fact that Wells Fargo had no operational presence in Moyale and, therefore, could not provide on-ground security at the destination. While the theft occurred while the cash was still physically aboard the aircraft and technically in the custody of Wells Fargo, the surrounding circumstances reveal that the proximate cause of the loss was the Bank's own failure to deploy its security team to receive the consignment upon landing.

26. The Court finds that, had the Bank's security personnel been present at the airstrip upon landing, as was routinely required and expected, the robbery would in all likelihood have been prevented. The absence of a timely and armed reception team created an opportunity for the robbery to occur and interrupted the intended chain of custody. The loss, therefore, was not attributable to negligence on the part of Wells Fargo, but rather to the Bank's own omission in fulfilling its part of the agreed operational arrangement.

27. As to the doctrine of res ipsa loquitur, the Court of Appeal in the case of Rubangura Rose V Petrocom S.A. (Rwanda) [2015] KECA 220 (KLR) citing Charlesworth & Percy on Negligence 7th edition at page 350 outlined the pre requisites for invoking the maxim res ipsa loquitar . It stated thus:

> "(1) on proof of the happening of an unexplained occurrence;
>
> (2) when the occurrence is one which would not have happened in the ordinary course of things without negligence on the part of somebody other than the Bank; and
>
> (3) the circumstances point to the negligence in question being that of the Wells Fargo rather than any other person."

28. The Court went on to note that when the maxim res ipsa loquitar is aptly invoked, the burden of proof shifts to the Wells Fargo to show that the accident did not occur due to its negligence.

29. Against this background the Court finds the doctrine to be inapplicable. As stated, the principle only applies where the cause of harm is unknown and speaks of probable negligence. In this case, the cause of loss is known; an armed robbery that occurred in the absence of the Bank's security. The facts do not permit an inference of negligence against Wells Fargo. The burden lay on the Bank to prove, on a balance of probabilities, that Wells Fargo was negligent. That burden was not discharged.

30. Consequently, the derivative claim founded on the doctrine of subrogation equally fails as no primary liability has been established against Wells Fargo.

31. The claim for Kshs. 900,000/= on account of assessor's fees also lacks a legal and evidentiary foundation. More fundamentally, the Court has already found that the Bank has failed to establish negligence on the part of Wells Fargo. As a result, no legal basis exists upon which to hold Wells Fargo liable for any costs incurred by the insurer or the insured in investigating or assessing a loss that was not attributable to their fault. Accordingly, even if evidence had been tendered to support the amount claimed, liability would not attach to Wells Fargo in the absence of proven wrongdoing.

Disposition.

32. The upshot is that the plaintiff has failed to prove either negligence or entitlement to recover under subrogation. The suit is accordingly dismissed with costs to the defendant.

DATED, SIGNED AND DELIVERED IN NAIROBI THIS 20TH DAY OF JUNE 2025.

F. MUGAMBI

JUDGE