



**Equity Bank Kenya Limited v Kagai (Civil Appeal E094 of 2022)  
[2025] KEHC 7753 (KLR) (5 June 2025) (Judgment)**

Neutral citation: [2025] KEHC 7753 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KERUGOYA  
CIVIL APPEAL E094 OF 2022  
JK NG'ARNG'AR, J  
JUNE 5, 2025**

**BETWEEN**

**EQUITY BANK KENYA LIMITED ..... APPELLANT**

**AND**

**PETERSON KAMUNGE KAGAI ..... RESPONDENT**

*(Being an appeal from the judgment and decree of the Chief Magistrate's Court at Kerugoya  
(Hon. C.C. Kipkorir, PM.) delivered on 28th September 2022 in MCCC No. E024 of 2020)*

**JUDGMENT**

1. Vide his plaint amended on 24<sup>th</sup> May 2021, the respondent averred that he was in a bank – customer relationship with the appellant and account holder of an account with it under account number 0190xxxxxxxx. The account was opened in the appellant's Mwea Branch where he was issued with an ATM card. His further averment was that on the evening of 25<sup>th</sup> February 2019, he lost and/or was robbed off his wallet which had the ATM that he was issued with. As at 21<sup>st</sup> February 2019, his account balance was Kshs. 604,478.00.
2. The respondent reported this incident at Embu Police Station on 28<sup>th</sup> February 2019 and further at the appellant's Embu Branch and Mwea Branch later. He stated that on 28<sup>th</sup> February 2020, he was issued with a bank statement in respect to his account. It disclosed that his account had a balance of Kshs. 72.00. He observed that his account experienced unlawful, illegal and unprocedural debits on 26<sup>th</sup> February 2019. As a result, the appellant breached its duty of care and trust leading to the respondent's loss of money. The respondent maintained that he notified the appellant of the said activities who promised to carry out investigations and compensate him but had never actioned as promised. His claim was thus for a refund of Kshs. 604,226.00. He further sought interest, general damages, costs and interests.



3. The appellant entered appearance and filed its statement of defence dated 22<sup>nd</sup> January 2021 on 9<sup>th</sup> February 2021. It denied the averments set out in the plaint and accused the respondent of being negligent with his ATM and or security details of his account. It thus prayed that the suit be dismissed with costs.
4. In its judgment dated 28<sup>th</sup> September 2022, the learned magistrate found that the appellant was liable in negligence. Damages on that account were awarded in the sum of Kshs. 450,726.00. The claim for Kshs. 604,226.00 as well as general damages for breach of contract were dismissed. The court further awarded the respondent costs of the suit with interest from the date of filing suit.
5. The appellant is aggrieved by those findings. It filed its memorandum of appeal dated 10<sup>th</sup> October 2022 that raised five grounds disputing the findings of the learned magistrate. In summary, the learned magistrate's judgment went against the weight of the evidence since she disregarded that the respondent did not prove his case on a balance of probabilities; and the trial court did not consider its submissions and evidence fairly and thereby arrived at an erroneous finding. For those reasons, the appellant prayed that the appeal be allowed and the judgment of the trial court be set aside and substituted with an order dismissing the respondent's claim with costs.
6. Though the appeal was disposed of by way of written submissions, I was only impressed with the submissions of the respondent. The respondent's written submissions dated 29<sup>th</sup> July 2024 abridged the facts giving rise to the dispute to submit that he proved his case on a balance of probabilities. The trial court properly and correctly evaluated the evidence and arrived at a just decision. Finally, he dismissed the appellant's claim that its written submissions were not considered. He prayed that the appeal be dismissed with costs to him.
7. I have considered the respondent's written submissions, examined the record of appeal and analyzed the law. As a first appellate court, I am duty bound to re-assess, re-evaluate and re-analyze the evidence on record and make my own independent conclusions bearing in mind that I do not have the advantage of hearing or seeing the witnesses and make due allowance in that respect. [See Abok James Odera t/a Abou. J. Odera & Associates vs. John Patrick Machira T/A Machira & Co. Advocates (2013) eKLR.]
8. According to the facts and the evidence captured in the record before me, PW1, the respondent, testified that he opened an account with the appellant sometime in 2007 and was issued account number 0190xxxxxxx. On 26<sup>th</sup> February 2019 at 7:00 p.m., he lost a number of personal documents, inter alia his ATM card issued by the appellant. He reported the loss to Embu Equity Bank Branch on 27<sup>th</sup> February 2019 and was informed by the bank manager to report the loss to his branch office.
9. PW1 reported the loss at Embu Police Station vide O.B. No. 27/28/2/2019 on 28<sup>th</sup> February 2019 and thereafter to his branch located in Mwea. He was advised by the branch manager to first procure a bank statement of his account. He recalled that as at 26<sup>th</sup> February 2019, the funds left in his account totaled Kshs. 604,478.00. His last transaction was from his sister Grace Kabari Kagai who deposited Kshs. 5,000.000 on 21<sup>st</sup> February 2019.
10. PW1 applied for a bank statement on 28<sup>th</sup> February 2019. It was then that he shockingly discovered that his account had a balance of Kshs. 252.00. A total of 13 illegal transactions ranging from withdrawals of Kshs. 10,000.00 – 12,500.00 took place leading to a total debit of Kshs. 604,226.00. He was advised to file suit because the branch manager had no idea how the transactions occurred.
11. The respondent returned to the appellant offices accompanied by a police officer. CCTV footage revealed an unknown lady withdrawing Kshs. 30,000.00 at the appellant's ATM branch in Kenol – Makutano using the respondent's ATM card. He maintained that he had never disclosed his PIN to



anyone as at that time. The appellant was advised to investigate the matter as it was discovered that after that ATM withdrawal, all funds were channeled from his account via mobile banking which he had never registered since opening his account.

12. Come 1<sup>st</sup> March 2019, PW1 liaised with the Directorate of Criminal Investigations in Embu on 1<sup>st</sup> March 2019 and met with the DCI. He was promised that further investigations would be carried out. However, no arrests had been done to bring the culprits to book. On following up with the appellant, he testified that they were nonchalant and delayed in arresting the culprit(s). He would later be informed in October 2019 that a suspect had been arrested in connection with the transactions but was later released. On visiting the appellant's head office in Nairobi's Upperhill, accompanied by police officers in September 2020, PW1 was informed that no investigations had been done up to that date on their part.
13. PW2 Simon Maina CPA working at Maina Waithaka & Associates testified as an expert witness. His evidence was that on instructions from the respondent on 14<sup>th</sup> April 2021, their services were retained to conduct investigations on suspicion of fraudulent activities in his account number 0190xxxxxxx in Mwea branch. He looked at the respondent's bank statements between January 2019 and February 2019 where it was observed that a sum of Kshs. 604,406.00 was withdrawn during that period. He thereafter prepared a report.
14. The salient features of his report were that, on one date, sums were withdrawn by different people. There were also withdrawals made through Eazzy Funds Transfer. There were also transfers to mobile phones totaling Kshs. 140,000.00. It was also revealed that a sum of Kshs. 310,000.00 was withdrawn by Allan Wanderi, Michael Wachi and John Kanengeni on the same date. There was also a cash withdrawal of Kshs. 30,000.00 and bank charges of Kshs. 720.00. Pertinently, 13 transfers were made in one day. He observed that from those transactions; the appellant did not notify the respondent. In his opinion, since the frequency of the transactions were high, pertinently 13 transactions in one day, an alert ought to have been raised by the appellant and seek legal address. He formed the view that the transactions were fraudulent in their nature. He stated that he was not informed that the respondent's mobile phone was stolen.
15. The appellant on its part called DW1 Kirimi Martin, a security and investigation manager employed by the appellant, to the stand. His evidence was that on 8<sup>th</sup> November 2019, the resonant reported to the appellant, at is Mwea branch, that he had lost money from his account number 0190xxxxxxx totaling Kshs. 604,226.00 from his ATM card and the Eazzy App, an online mobile banking transaction conduit. The matter was forwarded to the security department.
16. On interrogating the respondent, it was revealed that on 25<sup>th</sup> February 2019, while in Kenol Makutano, a lady hugged the respondent and thereafter fell dizzy and unconscious. Upon regaining responsiveness, he realized that he had lost Kshs. 15,500.00 in cash, two phones and his equity ATM card. He would later discover that withdrawals totaling Kshs. 604,226.00 took place during that intervening period.
17. It was also revealed that the matter was reported at Wang'uru Police Station under OB No. 27/28/2/2019. One suspect had been detained while investigations were underway. It was also discovered that Kshs. 30,000.00 was withdrawn from his ATM card while other transfers took place from the Eazzy App transfer and pesalink. One of the recipients was Fabian, a student at Mount Kenya University. On liaising with the DCI, the student was arrested but did not refund the amount. He was also not charged on account of the COVID-19 pandemic protocols. In fact, none of the amounts had been recovered to date.



18. The appellant was a stranger to alleged fraudulent transactions since it blamed the respondent for compromising his security credentials. That is how the assailants accessed his account. As such, the appellant could not be held culpable. That being said, DW1 testified that the appellant was cooperating with the authorities to unravel the fraud and surrendered all useful information to the police and DCI.
19. Explaining how Eazzy App works, he stated that it is downloaded using a subscriber's Safaricom line. You are required to have a bank account and/or ATM card linked to the account. Upon downloading the app, a user receives a code through that line for future use. The registration of this App, in relation to the respondent, took place on the same day his phone was stolen; the gadget used to download the app. He confirmed that all transactions, other than the Kshs. 30,000.00, were done through that app. He was also not aware that he reported this matter to his branch on 28<sup>th</sup> February 2019. However, they investigated as soon as they were instructed to. He stated that suspicious transactions can be flagged when the customer notifies the bank. Since they didn't suspect fraudulent activities, it was superfluous to contact the respondent's next of kin.
20. It is not disputed that the appellant and the respondent were in a bank customer relationship. The respondent opened an account with the bank in their Mwea Branch on 25<sup>th</sup> February 2008 and was given account number 0190192694637. He was also issued with an ATM card. Amongst the bank's terms and conditions of service, if an ATM card was lost, the respondent was duty bound to immediately notify the appellant; otherwise, he would be liable for any losses incurred prior to the notification.
21. It is also not controverted that on 25<sup>th</sup> February 2019, the respondent lost his ATM card galvanizing the motion of activities complained of by the respondent. In fact, several withdrawals were made on 26<sup>th</sup> February 2019 in that account totaling Kshs. 604,226.00. From those debits, Kshs. 30,000.00 was withdrawn by a lady as was seen from the CCTV cameras using his ATM card while the rest was withdrawn from Eazzy App, an online mobile banking application that was downloaded in the respondent's mobile phone on 25<sup>th</sup> February 2019 as testified by DW1. The respondent reported to the police on 28<sup>th</sup> February 2019.
22. The respondent reported the incident to his branch on 28<sup>th</sup> February 2019. This is after the transactions had already taken place. As rightfully stated by the trial court, the appellant would not have known that the transactions were fraudulent absent flagged notifications from the respondent who was its customer.
23. Much as the appellant held a fiduciary duty of trust to protect the respondent's account, the respondent held an obligation to equally notify the bank immediately of any developments regarding his account; including the loss of his ATM card. Indeed, since the respondent did not immediately notify the appellant about the loss of his ATM card, the appellant would not have known that the transactions were fraudulent. This court is apprised of the fact that several transactions can occur in an account one day without suspicion as long as they are within the limits. Those findings are in the circumstances upheld.
24. The trial court then went ahead to establish whether the appellant acted negligently in investigating the respondent's case upon notification. It is on record that the respondent reported on 28<sup>th</sup> February 2019. However, investigations only commenced on 8<sup>th</sup> November 2019. The appellant did not explain why it took almost nine months to commence investigations. DW1 in fact stated that he was not aware



that the respondent complained on 28<sup>th</sup> February 2019. In finding them culpable, the trial court held in part:

“Considering the nature of the claim it was required of them, to avail in evidence a detailed report of the investigation the bank did within their capacity, outside the role of the DCI. As it is, it seems like the bank did not take active steps with the urgency needed, to recover any amounts they could from the trail left by the fraudsters. The evidence shows that the investigation began slightly over 8 months later. Even then, the details of the investigations done by the bank on it (sic) own accord in evidence is scant. My analysis in the foregoing paragraphs, show how the defendant owed the plaintiff a duty of care and how the (sic) breached it and (sic) a result he suffered damages. I find that the bank was negligent in this regard.”

25. This court wholly agrees with that finding. The bank gave no explanation why a delay of almost nine months took place in conducting its own internal investigations. And when it so did, the outcome left a lot to be desired. I therefore find that indeed the appellant was negligent to this extent and the respondent was entitled to damages.
26. In assessing the amount of damages sufficient, the trial court took into account the fact that the appellant did not make any efforts to trace and recover the several transactions that occurred on 26<sup>th</sup> February 2019 amounting to Kshs. 450,000.00 together with the costs of transactions totaling Kshs. 450,726.00. I find that this was a proper mode of assessment that adhered to the principles outlined and the law. She relied on the decision of Majanja, J. (as he then was) in *Eric Omuodo Ounga vs. Kenya Commercial Bank Limited* [2017] eKLR. which I find to be sound and applicable. It is also crucial to note that the said analysis was not challenged by the appellant. As stated above, as at the time of writing this judgment, the appellant did not impress me with its submissions. It therefore did not explain how the decision arrived at was erroneous.
27. Be that as it may, I find that the trial magistrate made a fair and just assessment of the damages that the respondent was unequivocally entitled too. In view of my foregoing analysis, I do not hesitate to find that the present appeal lacks merit. It is hereby dismissed with costs to the respondent.

It is so ordered.

**JUDGEMENT DATED, SIGNED AND DELIVERED VIRTUALLY THIS 5<sup>TH</sup> DAY OF JUNE 2025  
IN THE PRESENCE OF;**

Natocho holding brief for the Appellants

Maina for the Respondents

Siele /Mark (Court Assistants)

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**J. NG'ARNG'AR**

**JUDGE**

