African Banking Corporation v Burch & 2 others (Civil Appeal E1083 of 2024) [2025] KEHC 10375 (KLR) (Civ) (15 July 2025) (Judgment)

Neutral citation: [2025] KEHC 10375 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E1083 OF 2024

WM MUSYOKA, J

JULY 15, 2025

BETWEEN

AFRICAN BANKING CORPORATION ..... APPELLANT

AND

JAMES BURCH ..... 1ST RESPONDENT

BERNARD WAMALWA ..... 2ND RESPONDENT

DIAMOND TRUST BANK ..... 3RD RESPONDENT

(Appeal from judgement and decree, by Hon. DO Mbeja, Principal Magistrate, in Milimani CMCCC No. 4706 of 2019, of 19th August 2024)

JUDGMENT

1. The suit, at the primary court, was initiated by the 1st and 2nd respondents, against the 3rd respondent. The claim was that the 1st respondent had sent money, from the United States of America, USA, to the 2nd respondent, then the money was paid out to an imposter by the 3rd respondent. They sought to recover the amount of USD 1,732.00. The 3rd respondent resisted the claim. It denied all the allegations made in the plaint, arguing that the 1st and 2nd respondents brought the misfortune upon themselves, by their own negligence, particulars of which were itemized.

2. The plaint was subsequently amended, to add or join the appellant as a co-defendant, with the allegation that the appellant caused loss and damage to the 1st and 2nd respondents, by paying out the money, sent by the 1st respondent, to an imposter. Allegations of breach of the bank-customer relationship were made against both the appellant and the 3rd respondent.

3. Both the appellant and the 3rd respondent filed defences, to the amended plaint, entirely denying the allegations made therein.

4. A trial was conducted. All three parties testified, with each side calling a witness. Judgement was delivered, on 19th August 2024, in favour of the 1st and 2nd respondents, to the extent of refund of the sum of USD 1,732.00.

5. The appellant was aggrieved, hence the instant appeal. The grounds of appeal revolve around the trial court failing to determine whether the 2nd respondent visited the premises of the appellant at the time alleged; no evidence being adduced on disclosure of the MTCN number of the 2nd respondent to an agent of the appellant; the evidence of fraud on the part of the appellant not being proved to the required degree; determining the matter largely on balance of probability; failing to frame issues, and to evaluate the evidence and coming to wrong conclusions; and overlooking the evidence and submissions of the appellant.

6. Directions were given, on 6th February 2025, for disposal of the appeal by way of written submissions. All three sides to the dispute have filed their respective submissions.

7. The submissions by the appellant turn on three issues: burden of proof, implied fraud and costs.

8. It is submitted that the legal burden of proof was, throughout, on the 1st and 2nd respondents, to establish that the 2nd respondent visited the premises of the appellant, disclosed the MTCN number to an agent of the appellant and the agent of the appellant disclosed that number to the agent of the 3rd respondent. Sections 107 and 108 of the *Evidence Act*, Cap 80, Laws of Kenya; The Halsbury's Laws of England, 4th Edition, Volume 17, paragraph *13* and Gatirau Peter Munya v Dickson Mwenda Kithinji & 3 Others [2014] eKLR (Mutunga, CJ&P, Rawal, DCJ&VP, Tunoi, Ibrahim, Ojwang, Wanjala & Njoki, SCJJ), are cited in support.

9. On fraud, it is submitted that the same must not only be specifically pleaded, but it must also be specifically proved, to a standard above balance of probabilities. Vijay Morjaria v Nansingh Madhusingh Darbar & Another [2000] eKLR (Tonui, JA), Gichinga Kibutha v Caroline Nduku [2018] KEELC 3981 (KLR) (JG Kemei, J) and Koinange & 13 Others v Charles Karuga Koinange [1989] KLR 23 [1986] KEHC 3 (KLR) (SM Amin, J), are cited. On costs, it is submitted that they follow the event, and Republic v Rosemary Wairimu Munene (Ex parte Applicant) v Ihururu Dairy Farmers Cooperative Society Ltd JR Application No. 6 of 2004 (Mativo, J), is relied on.

10. The 1st and 2nd respondents submit that, as the appellant did not call evidence to support its defence, then their case, the 1st and 2nd respondents, was bound to be believed or accepted, and they cite North End Trading Company Limited (carrying on the business under the registered name of) Kenya Refuse Handlers Limited v City Council of Nairobi [2019] eKLR [2019] KEHC 10180 (KLR) (JA Makau, J). On fraud, they submit that, as the police conducted investigations of the fraud, on the part of the appellants, that was adequate proof that fraud was alleged, and they cite Ongera & 14 Others v Mwakwae [2025] KECA 535 (KLR) (Makhandia, Nyamweya & Kimaru, JJA). On issues for determination not being framed by the trial court, it is submitted that that is not fatal, and Ngugi Peter Ngumi Gichoho alias Peter Ngumi Gichoho Ngugi v Ambrose Wanjohi Migwi t/a Migan Hardware Store Nyeri HCCA No. 138 of 2003 (Sergon, J), Sher Agency Ltd v Felix Musumba [2008] eKLR (Koome, J), Kariuki Lydia & Another v AM [2018] eKLR (Odunga, J) and Ramjibhai v Rattan Singh s/o Nagina Singh [1953] 1 EACA 71 (Sir Barclay Nihill P, Sir Newnham Worley VP & de Lestang J), are cited.

11. The 3rd respondent submits that, in making payment to the imposter, it acted in good faith, having complied with all what was required of it. On the 2nd respondent not proving that he visited the premises of the appellant, it is submitted that the burden of proof was on the appellant, based on Regulation 33 of the Money Remittance Regulations, 2013. It is submitted that the appellant was vicariously liable for torts committed by its employee, and Beatrice William Muthoka & Another (both suing as the legal representatives of the Estate of the late William Muthoka Yumbia (Deceased) v Agility Logistics Limited [2020] eKLR (Nyakundi, J) is cited. It is further argued that the 3rd respondent was excluded from liability for amounts above USD 500.00, pursuant to the terms and conditions of Western Union, and National Bank of Kenya Ltd v Pipeplastic Sankolit (K) Limited [2001] eKLR (Tunoi, Shah & Keiwua, JJA) is cited. It is submitted that the 2nd respondent was guilty of contributory negligence, for sharing out the details of the MTCN and credentials, and Wayne Ann Holdings Limited (t/a Super Foods Stores) v Sandra Morgan [2011] JMCA Civ 44 (Harrison, Harris & Morrison, JJA) and Nance v British Columbia Electrical Rly [1951] AC 601 (Lord Simon) are cited.

12. It is common ground that a fraud was committed on the 1st and 2nd respondents, leading to loss of moneys, which the 1st respondent had sent to the 2nd respondent, via Western Union. It is also common ground that that money was paid by the 3rd respondent, an agent of Western Union, to an imposter. The 3rd respondent concedes the payment, and appears to admit a shortcoming on its part, although pleading that it did all what was expected of it, and it acted in good faith. It, however, blames the 2nd respondent also for disclosing the MTCN number and credentials, to whoever, which facilitated the fraud.

13. I note that the submissions by the 3rd respondent read like a cross-petition. It is argued that the 3rd respondent acted in accordance with the relevant regulation, Regulation 33 of the Money Remittance Regulations, 2013, suggested good faith on its part, and that it was the 2nd respondent who was to blame for sharing the credentials. It is also submitted that its liability did not exceed USD 500.00, going by the Regulations. However, the 3rd respondent did not cross-petition, and its arguments are, therefore, of little consequence at this stage.

14. What I pick out, from my reading of the pleadings, and especially the amended plaint, is that the suit was not founded on fraud. The appellant and the 3rd respondent were not accused of fraud. The claim was framed as founded on breach of a banker-customer relationship. The defences do not raise the issue of fraud, but negligence on the part of the 2nd respondent. The evidence, adduced by the parties, at trial, should have been geared towards proof of those cases, that is around breach of the banker-customer duty of care and negligence, and not fraud.

15. The matter of the appellant and the 3rd respondent being liable for fraud, was introduced by the trial court, in its judgement, to the effect that there was gross negligence and fraud on their part, in that their employees deliberately effected or allowed irregular and unauthorised transactions. The trial court went on to imply fraud on the part of the employees of the appellant and the 3rd respondent. The case was not founded on fraud as such, and I doubt that the trial court could venture to make findings of fact on fraud in the circumstances. Parties are bound by their pleadings, and a court ought not make findings on facts that are not pleaded. See Central Bank of Kenya Limited v Trust Bank Limited & 4 others [1996] eKLR [1996] KECA 197 (KLR) (Kwach, Tunoi & Pall, JJA) and Ongera & 14 Others v Mwakwae [2025] KECA 535 (KLR) (Makhandia, Nyamweya & Kimaru, JJA).

16. The 1st and 2nd respondents anchored their case on breach of duty and care, in the context of a banker-customer relationship. They were not raising an issue of fraud being practised on them by the appellant

and the 3rd respondent, but of the two breaching the banker-customer contractual relationship, by way of negligence, in the way they handled the money transfer, so that a loss was occasioned in the end.

17. The trial court should have been careful, about imputing fraud on the appellant and the 3rd respondent. Fraud has elements of criminality. It is on account of that, that where it is alleged in civil cases, the burden of proving or establishing it is higher than that expected in other civil claims, balance of probability or preponderance of the evidence. As it has elements of criminal conduct, the standard required for proving it is higher than that in an ordinary civil claim, tending towards the standard of proof required in criminal cases.

18. My understanding of the pleadings is that the 1st and 2nd respondents were not attributing fraud on the appellant and the 3rd respondent. They were not accusing them of defrauding them of the money in question. The complaint was that the handling of the money occasioned a loss to them, not on account of fraud by the appellant and the 3rd respondent, but because of a breach of a duty of care, owed to them on account of a bank-customer relationship between them.

19. The 1st and 2nd respondents were on the right track. The appellant and the 3rd respondents are not natural persons, but entities, or artificial persons, or corporations. That being the case, criminal or quasi-criminal conduct cannot be ascribed to them, except through the agency of the natural person. Whereas vicarious liability applies readily in civil matters, its application is restricted in criminal cases. When fraud is raised in a civil matter, the application of vicarious liability would be complicated, for attribution of fraud to civil conduct, would elevate the claim above an ordinary or plain civil matter, to a realm close to that of a criminal matter, where vicarious liability would only be attributed on a corporation through the sanction of Parliament. See R. v Huggins [1730] 2 Stra. 883, 93 ER 915 (Raymond, Lord CJ) and Mouse Brothers Limited v London and North-Western Railway Co. [1917] 2 KB 836 (Atkin, J).

20. The 1st and 2nd respondents were aware of the above position, hence they refrained from framing their suit on fraud, for doing so would have meant that the standard of proof of their case, if it was based on fraud, would have been higher. More importantly, it would have meant that the application of the principle of vicarious liability would have been restricted.

21. Related to that is the question of whether the liability of a corporation can be derived from the acts or conduct of an employee, as opposed to a director or another superior agent of the corporation. Corporate criminal liability is attributed to acts or omission of directors or other superior agents of the corporations, as directors, and other such senior officers, who are seen or treated as representing the will of the corporation, and, therefore, acting as the corporation itself rather than for it. That is those that control or manage the affairs of the corporation itself. The corporation would be held criminally liable for the acts of such officials, as opposed to being held liable for acts of employees or servants. The corporation has no mind of its own, and whatever it does, is at the impulse of those who control or manage it. See Essendon Engineering Co. Ltd v Maile [1982] RTR 260 [1982] Crimin. LR 510; R. v ICR Haulage Ltd [1994] 1 KB 551 [1994] All ER 691 and DPP v Kent and Sussex Contractors Ltd [1944] 1 All ER 119.

22. It would appear that, in view of the above, the 1st and 2nd respondents shied away from imputing fraud on the appellant and the 3rd respondents, given that the acts which exposed them to loss and damage, were not attributed to the directors or senior managers of the appellant and the 3rd respondent, but to employees at the level of tellers. As stated above, fraud has imputations of criminality, which, consequently, pushes the standard of proof up, from mere balance of probability to something much higher, and the 1st and 2nd respondents did not appear to have had intended to get into that.

23. The 1st and 2nd respondents did not ground their case on fraud, and, therefore, the standard of proof, to establish the case against the appellant and the 3rd respondent, remained that of mere balance of probability. There was no requirement to establish a case at a standard higher than that.

24. The conclusion above deals with the submission on the argument that the 1st and 2nd respondents did not establish that the 2nd respondent visited the premises of the appellant, and disclosed his credentials to the agents of the appellant there, as he did not provide video or CCTV footage to show that he visited the said premises or was attended to there.

25. The case by the 2nd respondent is that he never visited the premises of the 3rd respondent, and he was, therefore, not attended to there. He was clear that he visited the premises of the appellant, and he was attended to there. His details were inputted into the system, but he was advised that the system was down. He went away. He returned much later, and was informed that the money had since been withdrawn, through the 3rd respondent. He was clear that he visited the premises of the appellant and was attended to. He shared his credentials with them, but he was not paid, for he was informed that the system was down. What transpired, thereafter, is not clear, for what he put down, in his written witness statement, is inconsistent with his pleadings.

26. In the initial plaint, dated 26th June 2019, he had only sued the 3rd respondent. His written witness statement, of 8th May 2019, stated that he went to the premises of the 3rd respondent on 3rd December 2016, where he filled some paperwork but was advised that the system was down, and he chose to go away, and returned on a later date. He did return, 10 days later, and was advised that his MTCN number was invalid, and it was suggested that the money may have been wired back to the 1st respondent. He contacted the 1st respondent, who followed up with Western Union, who advised that the money was paid out by the 2nd respondent to an imposter.

27. The appellant was not named as a party in the plaint of 26th June 2019, but was added as a 2nd defendant, vide an amendment, in the amended plaint of 24th March 2021. Paragraph 14A, of the amended plaint, pleaded that the 2nd respondent had reported to the police, and investigations were conducted, which revealed that the CCTV recordings, at the premises of the appellant, when the 2nd respondent was allegedly attended there for the first time, did not capture his image or his presence. Two, that the documents that the 2nd respondent allegedly used, when he was served at the counter of the appellant, were unavailable. Three, that the appellant presented a payment record that had a forged signature of the 2nd respondent, with his first and last name, and his falsified residential address and national identification number.

28. Filed together with the amended plaint was a fresh written witness statement, dated 22nd March 2021. There is no record indicating that the other witness statement, of 8th May 2019, was expunged from the record. The new witness statement was about how the 2nd respondent visited the premises of the appellant, on 3rd December 2016, and his details were fed into a computer, then he was advised that the systems were down, and he was asked to return later. He returned after 10 days, and, after details were fed into the computer, he was advised that his MTCN number was invalid, and the money had possibly been wired back. He later established that the money was withdrawn on 3rd December 2016, through the 3rd respondent.

29. The 2nd respondent testified on 6th June 2022. He adopted his written witness statement. It was not made clear which one had been adopted, for there were 2 on record, one of 8th May 2019 and the other of 22nd March 2021. The oral statement that he made during trial, on oath, did not tally with his 2 written witness statements. He said that when he went back to the appellant, after the 10 days, he was

informed that the money had been paid through the 3rd respondent. That was not what was in his 2 written statements. He noted, in the written witness statements, that he was informed that his MTCN was invalid, and the money had probably been wired back to the 1st respondent, and it was only much later that he learnt about the 3rd respondent.

30. The inconsistency in his narrative to court, as against what was in his written witness statement was something that the trial court should have pointed out. It should have been taken together with what he averred in paragraph 14A of his amended plaint, that the CCTV footage of 3rd December 2016, at the premises of the appellant, did not capture his presence, and that the documentation recorded by the police, from the appellant, did not have his particulars.

31. The case by the 2nd respondent, as I understand it, was that his credentials were mined by employees of the appellant, and were then shared with some imposter, who used them to withdraw funds from the 3rd respondent. The appellant argues that the 2nd respondent did not prove that he was at its premises at all.

32. Was the material from the 2nd respondent sufficient to establish his presence at the premises of the appellant, to justify a case that it was employees of the appellant who had his credentials placed in the hands of crooks, who subsequently defrauded him? I am of the view that the trial court should have handled the material presented with some measure of caution. In the first place, the appellant had not been made a party in the initial plaint, and the allegation was that the 2nd respondent had visited the premises of the 3rd respondent, and it was there that he shared his credentials. That narrative later changed to the position that, he in fact did not visit the premises of the 3rd respondent at all, and that the premises he visited were those of the appellant. Then there is the variance in his written witness statement, that he was advised by agents of the appellant, on 13th December 2016, that his MTCN number was invalid, and then, on oath that he was told the money had been withdrawn at the premises of the 3rd respondent, contrary to the tale that that information came out much later. These discrepancies should have gone to credibility.

33. Related to that is the fact that the 2nd respondent engaged the police. The police visited the premises of the appellant and looked at the CCTV records for 3rd December 2016. The same did not capture the image or presence of the 2nd respondent, as proof to his having visited those premises on that day. That was pleaded in the amended plaint. The 1st and 2nd respondents did not rely on the material collected by the police, upon the report of the incident having been reported to them.

34. That was the only material that linked the appellant to the whole affair. The gaps in the story were too glaring for the narrative to be treated as credible. I doubt that the same was adequate, for a conclusion that the 2nd respondent visited the premises of the appellant, on 3rd December 2016 and 13th December 2016, and did what he alleged to have had done. The evidence was not adequate for the purposes of the appellant being held liable.

35. If there had been credible material, pointing to the 2nd respondent having visited the said premises, on both dates, and of having been attended to by agents of the appellant, there would be credence to the conclusion that the appellant owed a duty of care to the 2nd respondent, with respect to how his confidential information was handled. As it is, there were credibility gaps in his testimony, which should have been resolved in favour of the appellant.

36. Did the 2nd respondent adduce evidence which reached the threshold, for the evidential burden shifting to the appellant, to require the appellant to adduce counterevidence? I do not think so. Firstly, the 2nd respondent purported to adopt his written witness statement, yet he had 2, and he did not clarify which one of the 2 he was relying on. The 2 were mutually and materially inconsistent. Secondly, even

if he relied on his latter written witness statement, of 22nd March 2021, his oral statement on oath differed from it, in the sense that, in one he claimed that the bank told him his MTCN number was invalid, and suggested that the money had probably been wired back to USA, and in the other that he was told the money had already been paid through the 3rd respondent. Yet, other material stated that, after his MTCN was alleged to be invalid, he contacted the 1st respondent, who caused investigations to be done, which established that the money was paid to an imposter, through the 3rd respondent. Thirdly, police investigations indicated that the CCTV footage, at the premises of the appellant, did not place or locate the 2nd respondent at the said premises, on 3rd December 2016. The narratives were jumbled up. It should have been difficult to believe that they were of and by the person who was at those premises. Because of the inconsistencies, there was no coherent narrative that the appellant could be called upon to counter.

37. There is the issue of the banker-customer relationship. Both the appellant and the 3rd respondent pleaded that the 1st and 2nd respondents were not their customers, as they did not operate bank accounts with them. The nature of the banking business, the subject of the proceedings, was not the ordinary business of operating a bank account, but rather that of money transfer or transmission. The contractual relationship was between the 1st respondent and Western Union. The 1st respondent transacted with Western Union, by way of depositing money with that entity, to be paid to the 2nd respondent, through its agent in Kenya.

38. Both the appellant and the 3rd respondents were agents of Western Union. Any interaction, between the either of them and the 2nd respondent, would have established a bank-customer relationship between them and the 2nd respondent, in their respective capacities as agents of Western Union. The 2nd respondent did not deal with the 3rd respondent, at all, so there was no bank-customer relationship between them. The 2nd respondent alleged that he visited the premises of the appellant, and he was attended to, but no money was paid to him from Western Union by the appellant. That meant that there was no agency relationship between the two, if at all that interaction happened.

39. As evidence on the interaction between the 2nd respondent, on the one hand, and the appellant and the 3rd respondent, on the other, is tenuous, it should follow that any liability arising, if at all, would not be based on a contractual relationship, rather it would arise from a tortuous relationship, founded on negligence. A bank owes a duty of care to both customers and third parties, with the duty owed to third parties depending on the circumstances of each case. See Kenya Grange Vehicle Industries Limited v Southern Credit Banking Corporation Limited [2014] eKLR (Havelock, J) and Equity Bank (Kenya) Limited v Don Ogalloh Riaro & another [2019] KECA 317 (KLR) (Makhandia, Odek & Kiage, JJA).

40. On the matter of costs, should the appellant have not been found liable, at the trial court, it should follow that it should not have been condemned to pay costs. It also follows that, if the appeal succeeds, it should be entitled to costs of both the appeal, and at the trial court, for costs follow the event.

41. I find merit in the appeal herein. I hereby allow it. The consequence shall be that the finding by the trial court, that the appellant was liable, shall be set aside, and substituted with another to the effect that it was not liable and that the suit against it is dismissed. However, given the circumstances of the matter, I shall order that each party bear their own costs. Orders accordingly.

DELIVERED, VIA EMAIL, DATED AND SIGNED IN CHAMBERS, AT BUSIA, ON THIS 15TH DAY OF JULY 2025.

WM MUSYOKA

JUDGE

Mr. Arthur Etyang, Court Assistant, Busia.

Ms. Carolyne Oyuse, Court Assistant, Milimani, Nairobi.

Advocates

Ms. Omolo, instructed by Nyawira Milimo & Omollo, Advocates for the Appellant.

Ms. Namukuru, instructed by Bryan Khaemba Kamau Kamau & Company, Advocates for the 1st and 2nd respondents.

Mr. Ludenyo, instructed by Mohamed Madhani & Company, Advocates for the 3rd respondent.