



Sieley & 3 others (Suing as the Administrators of the Estate of the Late Nathaniel Kibitok Sieley) v Kenya Commercial Bank Limited & another; Kimutai & another (Third party) (Civil Suit 23 of 2019) [2025] KEHC 12889 (KLR) (19 September 2025) (Judgment)

Neutral citation: [2025] KEHC 12889 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CIVIL SUIT 23 OF 2019
JRA WANANDA, J
SEPTEMBER 19, 2025**

BETWEEN

**ELIZABETH CHELIMO SIELEY 1ST PLAINTIFF
ANDREW KIPROP BITOK SIELEY 2ND PLAINTIFF
JONATHAN KIBIWOT'T BITOK SIELEY 3RD PLAINTIFF
PETER KIPKORIR BITOK 4TH PLAINTIFF
SUING AS THE ADMINISTRATORS OF THE ESTATE OF THE LATE
NATHANIEL KIBITOK SIELEY**

AND

**KENYA COMMERCIAL BANK LIMITED 1ST DEFENDANT
THE BRANCH MANAGER KENYA COMMERCIAL BANK, NANDI HILLS
BRANCH 2ND DEFENDANT**

AND

**LUKE KIMUTAI THIRD PARTY
THE ATTORNEY GENERAL THIRD PARTY**

JUDGMENT

1. This suit was commenced by way of the Plaint dated 24/05/2019 and filed through Messrs Z.K. Yego Law Offices. The prayers sought by the Plaintiffs are premised as follows:



- a. An order that the Defendants do reinstate bank Account No. XXXXXXXXXXXX/XXXXXXXXXXXX and restore the sum of Kshs. 24,069.373.60/= illegally and fraudulently withdrawn from the said account on 14/02/2019.
 - b. Interest at Court rates on (a) above from 14/02/2019 until payment in full.
 - c. Costs of this suit.
 - d. Any other relief this Court may deem fit and just to grant.
2. In the Complaint, it was pleaded that the Plaintiffs are the administrators of the estate of the late Nathaniel Kibitok Sieley (deceased) who died on 19/03/2013, having obtained the Grant of Letters of Administration on 28/09/2018, that the deceased held the said bank account with the 1st Defendant at its Nandi Hills Branch, and that upon his death, the Plaintiffs filed Eldoret High Court Succession No. 8 of 2018 in which they obtained the said Grant. It was further pleaded that in a bid to discharge their duties as Administrators, the Plaintiffs requested for certified copies of the bank account statements vide the letter dated 22/02/2019, and the 2nd Defendant requested that the Plaintiffs do furnish a Court order for that purpose, upon which the Defendants obtained a Court order on 20/03/2019 directing the 2nd Defendant to furnish them with such statements, and that upon service thereof, the Defendants eventually furnished them with the statements for the period 1/01/2013 to 1/04/2019.
 3. It was further pleaded that the statements revealed that the account had a balance of Kshs 23,591,986.25 as at 19/03/2013 when the deceased died, subsequently there were additional credits until 14/02/2019 when the account balance stood at Kshs 24,069.373.60/-. It was also stated that on 14/02/2019, the account was closed online and the entire balance paid out to undisclosed persons, and that the closure of the bank account and payment of the balance to undisclosed persons is fraudulent and illegal. The particulars of the Defendants' fraud and illegality were then listed as intermeddling with the estate of the deceased, facilitating payment of the account balance to shadowy figures who did not hold a Certificate of Confirmation of Grant, stage-managing online closure of the account by undisclosed persons, facilitating illegal and fraudulent withdrawal of funds in the account, defrauding the estate of the deceased, facilitating payment of the said balance without a Certificate of Confirmation of Grant, making payment to strangers on the basis of a fake Grant, failing to verify the authenticity thereof and collaborating with fraudsters to withdraw funds from the Account.
 4. The Defendants, through Messrs Manani, Lilan, Mwetich & Co. Advocates filed the joint Statement of Defence dated 18/06/2019. The Defendants stated that before this action, they had been put on notice that the Administrators of the estate of the deceased was one Luke Kimutai, that if the Plaintiffs filed Eldoret High Court Succession No. 8 of 2018, then the same was filed after the 1st Defendant had already been served with a Grant of Letters of Administration over the same estate in earlier proceedings by the said Luke Kimutai, namely, Nakuru High Court Succession Cause No. 3 of 2013, which the Defendants had acted upon after the High Court of Kenya in Nakuru confirmed the authenticity thereof to the Defendants. It was stated further that if the funds were withdrawn from the bank account in question, then the same was withdrawn by a person holding himself out as holding a valid Grant of representation to the estate, which was authenticated by the Court, and that the Defendants are therefore not complicit to the fraud alleged. It was averred that in the circumstances, the Defendants could not reinstate the account, and that if the Grant is shown to have had any defect, then the Defendants are entitled to full indemnity from the said Luke Kimutai, whom they would be seeking leave to join as a third party to the suit.
 5. In the Plaintiffs' Reply to Defence dated 21/06/2019, it was averred that the Plaintiffs were the lawful Administrators of the estate of the deceased, and they had no knowledge of the Grant obtained by the



- alleged Luke Kimutai or of the proceedings in Nakuru High Court Succession Cause No. 3 of 2013. It was stated further that the Plaintiffs' family was well known to the 1st Defendant who, together with a number of staff members even attended the burial service of the deceased in March 2013.
6. Pursuant to the Defendants' Application, by the orders made on 10/02/2020 by H. Omondi J (as she then was), leave was granted to the Defendants to join the said Luke Kimutai as a third party in the suit. The said Luke Kimutai was then joined as aforesaid. Although it was said by the Defendants' Counsel that service upon the said Luke Mutai was, with leave of the Court, effected by way of substituted service, he never entered Appearance nor filed a Statement of Defence.
 7. When the matter came up for trial on 16/03/2021, it transpired that the Defendant had filed a second Application seeking leave to further join the Hon. Attorney General in the suit as a 2nd Third Party, but which Application the Defendant had delayed to prosecute. In the circumstances, the Application was held in abeyance and in the meantime, the Plaintiff's first witness was allowed to testify, which he did as PW1. The Application to join the Hon. Attorney General was however later revisited before PW2 testified, and was eventually allowed on 13/03/2021 by H. Omondi J (as she then was). Accordingly, the Hon. Attorney General was joined as the 2nd Third Party.
 8. The Hon. Attorney General, having been eventually served, entered appearance as the 2nd Third Party and filed the Statement of Defence dated 7/03/2022. He generally denied liability.
 9. When the matter came up 18/03/2024 for hearing of the testimony of PW2, by which time I had taken over hearing of the case, H. Omondi J (as she then was) having been since elevated to the Court of Appeal, it transpired that service upon the 1st Third Party, the alleged Luke Kimutai, may not have been satisfactorily done. Since PW2, the Deputy Registrar in the High Court of Kenya at Nakuru, was already in Court having been served with Witness Summons, after conferring with the parties, and to also save on further delays, I directed that, recognizing the witness' busy schedule as a Judicial Officer, her testimony would be taken nonetheless, and once service upon the 1st Third Party is established to have been satisfactorily served, and comes on record, he would then be granted liberty to apply to recall the witnesses for cross-examination. The testimony of PW2 was thus taken as aforesaid, on 18/03/2024.
 10. I will now recite the testimonies of the respective testimonies.
 11. PW1 was the 2nd Plaintiff, Andrew Kipkorir Bitok Sieley, who as aforesaid, testified before H. Omondi J (as she then was) on 16/03/2021. Led by his Counsel, Mr. Yego, he adopted his Statement and stated that his father, the deceased, who died in 2013 held the said account at the 1st Defendant which he had operated for over 40 years, and had a tea farm of about 70-80 acres in Nandi Hills. He stated that they were yet to finalize the proceedings in Eldoret High Court Succession Cause No. 8 of 2016 as their Lawyer passed on. He then reiterated matters stated in the Plaint, including their unsuccessful requests to the Defendants to supply them with bank statements for the account, the Defendants eventually supplying the same pursuant to a Court order, discovery that the account had been closed with a zero balance, and discovery that transactions had been made in the account after the death of the deceased and funds therein released to a stranger. He testified further that he had interacted with the 2nd Defendant, the Manager of the Nandi Hills Branch of the 1st Defendant, that Nandi Hills is a small town and as such everyone knew almost each other, and that the new Manager who came later was informed that the family of the deceased was one of the Branch's biggest clients. He denied any knowledge of the alleged Luke Kimutai, and then produced the documents contained in the Defendants' bundle. Under cross-examination by Mr. Maina, Counsel for the Defendants, he reiterated that no one in their family had any knowledge of the alleged Luke Kimutai. About the Bank Manager knowing him, he agreed that he did not have any evidence to support the allegation.



12. PW2 was Hon. Christine Menya, the Deputy Registrar at High Court of Kenya at Nakuru, who testified before me as aforesaid on 18/03/2024 having been served with Witness Summons. She produced two Court files, both bearing the similar description, Nakuru High Court Succession Cause No. 3 of 2013, the first one relating to the Estate of Ayub Wandundo Kimani, and in which the Petitioner is one Grace Wambui Kimani, and the second one relating to the Estate of Nathaniel Kibitok Sieley, allegedly the deceased herein, in which the Petitioner is not named. According to her, the one relating to the Estate of Ayub Wandundo Kimani, was the genuine one as it is backed by a Court Movement Register, and in which the Grant was confirmed on 27/07/2017 by Hon. Maureen Odero J. Regarding the file relating to the Estate of Nathaniel Kibitok Sieley, she stated that upon investigations, they discovered it to be a fake file and there is correspondence to that effect. She testified that it contains a purported Grant confirmed on 22/07/2017 which is fake as it does not exist as confirmed by the letter dated 9/03/2021, and that even the Form P&A 41 purportedly signed by Hon. Wendo J contained therein is also fake. Under cross-examination by Mr. Yego, she stated that to her knowledge, there has not been any forensic investigations on the matter. She stated that the fake Grant is dated 22/7/2017 and agreed that if the said date was a Saturday, then Courts do not work on Saturdays. She confirmed that it is not possible to have 2 files with the same case number but she could not explain how there came to be such 2 files. She agreed that according to the fake file, the beneficiaries of the KCB A/C was one Luke Kimutai.
13. When referred to the letter dated 27/11/2018 from the Defendants seeking for authentication of the Certificate of Confirmation of Grant issued in the fake file, she stated that the letter was responded to by the letter dated 3/12/2018 in which the Deputy Registrar stated that the bank details (account number) were erroneously captured and that the Administrator had been advised to apply for rectification thereof, and that the letter does not seem to have responded on whether the Grant was genuine. She stated further stated to her knowledge, there was no rectification of the Grant made. She added that the fake file has 2 separate Grants both bearing the date of 22/7/2017, and that the signature of Hon. Maureen Odero J is clearly fake. She stated further that the law firm of Ashitiva & Co. Advocates by its letter dated 2/05/2019, sought confirmation on whether what was issued through the Grant reflected the correct position, and that the Court responded by the letter dated 1/7/2021 and stated that the Grant was fake. She stated also that there was a response letter by the Attorney General dated 9/07/2021, and that the Attorney General had written a letter dated 22/04/2021 seeking for instructions on the Succession Cause No. 3 of 2013.
14. She also stated that the fake file does not contain a Petition or an Application for Confirmation of Grant. She denied that the Judiciary was complicit in any way, and also produced the two Court files bearing the same case number but relating to two separate estates. Under cross-examination by Ms. Jeruto, Counsel holding brief for Mr. Mwetich for the Defendants, she agreed that the Deputy Registrar, by the letter dated 27/11/2018 addressed to the Defendants, confirmed that the Grant presented was authentic and originated from the Court, and there is also the letter dated 14/01/2019, with a Court seal and also the letter dated 3/12/2018 correcting the wrong bank details captured in the fake Grant. She agreed that with the Court authenticating the fake Grant, the Defendants may not be blamed for believing and acting on it. Under cross-examination by Mr. Kwame, State Counsel appearing for the Hon. Attorney General, she stated that the fake file does not appear in the Court's Movement Register, nor does it contain a letter from the Chief or a Gazette Notice, and that under these circumstances, it is not possible to identify the person who filed it, and also that there is no indication that the file was ever placed before the Judge for any action. Regarding Rectification of a Grant, she stated that it is in practice, done by way of a formal Application, not a letter from the Court, and in the case of the fake file, there was no such Application. She agreed that the Court did not ask for a copy of the Petition or Gazette Notice and agreed further, that had it done so, the fraud may have



- been discovered, but she however denied that the Court was complicit. Under re-examination by Mr. Yego, she stated that the letters from the 1st Defendant, dated 27/11/2018 and 20/12/2018, were both from the Defendants' Nakuru Branch.
15. The Plaintiffs then closed their case, and at this point, Mr. Kwame, State Counsel informed the Court he, too, had intended to call a representative from the same High Court at Nakuru but since the Deputy Registrar of the same Court had already testified as PW2, he would not be calling his own separate witness. Upon his request therefore, the Court adopted the testimony of PW2 as representing also the 2nd Third Party's, the Hon. Attorney General. The Defence case then commenced on 16/07/2024.
 16. DW1, Hillary Kipkoech Sitienei testified before me on the said 16/07/2024 and on 22/10/2024. He stated that he used to be the Branch Manager of the 1st Defendant at its Nandi Hills Branch but had since proceeded on transfer to Kitale. He then adopted his Supplementary Statement dated 30/7/2021, and there being no objection raised, he also adopted the earlier Statement made by his predecessor, one Reuben Kirui, dated 1/2/2021, as he stated that the latter had already retired from the 1st Defendant's employment. He testified that regarding the bank account number XXXXXXXXXXXX, the 1st Defendant was made aware of the death of the account-holder and they restricted the account awaiting for an Administrator to be appointed, and that they later received a Grant from the High Court at Nakuru, dated 22/07/2017, indicating that one Luke Kimutai had been appointed as the Administrator and that the same person was listed as being the sole beneficiary. He testified further that as per their procedure, by a letter, they inquired from the Court through the 1st Defendant's Nakuru Branch for confirmation of the authenticity of the Grant, in response to which they received the letter dated 27/11/2018 from the Court confirming such authenticity. He testified that the letter bore the seal of the Deputy Registrar of the Court but they however noticed that in the account number indicated in the letter from the Court, one digit was missing and they again inquired from the Court, and the Court again gave confirmation, with the account number now corrected, and that they then, on the basis of the letter, disbursed the money.
 17. He further stated that the deceased account holder was Nathaniel Kibitok Sitienei, and that he came later to learn that apparently the High Court at Nakuru has 2 cases with the same number but relating to different/conflicting estates of deceased persons, namely, Estate of Nathaniel Kibitok Sieley and Estate of Ayub Wandundo Kimathi. He urged that the Defendants had no reason to doubt the contents of the letters from Court authenticating the Grant present in the Court file confirmed by the Deputy Registrar as the Defendants would not know whether one of the 2 files is fake, as confirmation of the authenticity thereof was the duty of the Court. He confirmed that the amount disbursed to the alleged Luke Kimutai was Kshs 24,068,093.06, and urged that the Defendants conducted due diligence and cannot be faulted. He then produced the documents contained in the Defendants' bundle.
 18. Under cross-examination by Mr. Yego, he stated that he worked at the 1st Defendant's Nandi Hills between 2015 and 2019, and agreed that the deceased and his family were the 1st Defendants' key clients as the deceased was a prominent tea farmer in the area. He however stated that he did not know whether the 1st Defendant's staff knew the deceased personally or whether the Defendants' staff delegation attended the burial. He testified that he did not personally know the family but stated that he knew one Andrew Sieley who used to come to the Branch, and whom he then identified as the 2nd Plaintiff seated in Court. He denied that the company known as Eastern & Produce Limited had at any time introduced him to the said Andrew Sieley (2nd Plaintiff) and stated that he only met him when he came to the office, and he agreed that other staff might also have known him. He denied knowing the 1st Plaintiff, Elizabeth Sieley, and reiterated that he only met the 2nd Plaintiff, who used to sometimes come to the office to inquire about the bank account, and who used to tell him that the family was pursuing Succession proceedings. He added that he did not know whether the family of the deceased had other



- properties in Nakuru, and agreed that it was strange that the Grant was issued from the Nakuru High Court, and not Nandi Hills. He then testified that he got the 2nd Plaintiff's phone number when he called him at some point when the Defendants were seeking for authentication the Grant, and agreed that this was before they disbursed the funds. He testified that when they received the Grant, he phoned the 2nd Plaintiff about it in late 2018, and that the 2nd Plaintiff's came with some family members, and they protested about the Grant claiming that they were not aware of it.
19. He stated that demand letters were received after the funds had already been disbursed on 14/2/2019, and the bank account closed on 2/04/2019,. He confirmed that they received a Court order compelling them to supply the bank statements and, on the basis thereof, they released the statements. He denied that their initial refusal to release the statements was a sign of complicity, and urged that they were only observing confidentiality as the family members of the deceased were not parties to the bank account. He agreed that on 17/11/2016, the 2nd Plaintiff deposited a dividend cheque, and again on 17/11/2016, deposited another cheque, and on 18/11/2016, a third payment was made, a salary payment was also made to the account, and that after the death of the deceased, the account was not used to make any payments, and only credits were allowed. He stated further that the alleged Luke Kimutai, the alleged Grantee did not have the surname "Sielei", and that they did not obtain a letter from the Chief to confirm that Luke Kimutai was indeed a son of deceased by another mother as he had alleged. He also confirmed that they did not obtain a Certificate of Birth to prove that Luke Kimutai was a son of the deceased, and also agreed that he did not have any "Know Your Customer" documents in Court although they had them in their records.
20. He also agreed that he did not have the alleged Luke Kimutai's phone number nor did he know his location or where he resides, and stated that he only knew him 2 weeks before the disbursement of the funds, but that they had a copy of his national identity card. He testified that "online closure" of a bank account means that the account has been closed by the system, but in this case, it was closed manually by a bank staff effecting the Court order. He confirmed that the bank statement he had produced does not show that any transfers were made to the alleged Luke Kimutai, but urged that this does not mean that no disbursement was made, as the bank records contain evidence thereof, and thus denied that the Statement shows an irregularity. He denied manufacturing the name "Luke Kimutai", but confirmed that he does not have any acknowledgment from him confirming that he received the money although the bank account used by the alleged Luke Kimutai was also at the 1st Defendant's branch in Nairobi. He agreed that even after learning of the fraud, they did not freeze the account in Nairobi where the funds were received although they are empowered to restrict or freeze suspicious accounts. He further confirmed his knowledge that the Court Register indicates that the deceased died on 13/03/2013, but that the Succession Cause No. 3 of 2013 was opened on 3/1/2013 when the deceased was still alive. He also agreed that the 1st Defendant's Nandi Hills branch did not by itself issue any letter inquiring about the authenticity of the Grant, but urged that at the Branch, they used to receive Grants from different Courts, including from the Eldoret Court and they would send letters seeking authenticity.
21. He conceded that the Nakuru High Court file does not indicate the existence of a Petitioner but contended that he could not have known this fact. He further confirmed seeing the letter dated 1/7/2019, from the Nakuru High Court addressed to their Advocates, Ashitiva & Co, wherein the Grant was disowned and described as fake and also that there were other letters to the Attorney General from the estate of the deceased, and that there was indication that the Succession Cause was not registered at that Court. He confirmed that 22/7/2017, the date which the Grant was confirmed was a Saturday, a date on which Courts do not work, and that in the Grant, one digit of the account number was missing, and that he did not have any Amended or Rectified Grant correcting the same nor a formal Application seeking Rectification. He stated that what he did when he noticed the missing digit was that he sent another letter to the Court but in which letter, he agreed, he did not explicitly mention the



- issue of the missing digit in the account number. He then however insisted that there was an Amended Grant although he had not produced any. He testified that the time when the transaction was made was about the same time that he was on transit or transfer to Kitale where he reported on 15/04/2019. He thus agreed that in February 2019, he could have still been at the Nandi Hills Branch.
22. He denied travelling to Nakuru around that time to collude with the staff at the Nakuru Branch, which is the Branch from which the letters addressed to the Court emanated from. Under cross-examination by State Counsel Mr. Kwame, he agreed that he is the one who received the instructions from the alleged Luke Kimutai. He agreed that the letter from the Nakuru Branch seeking authentication of the Grant was delivered to the Court by the 1st Defendants staff member by the name Anne Otieno, although the 1st Defendant had a panel of Law Firms, and also a Legal Department, that, at times, handled communication of such nature, and that he had nothing to show that he sought advice from the Lawyers. He however insisted that there was nothing wrong with the 1st Defendant's Nakuru Branch handling the matter, rather than the Nandi Hills Branch in which the Account was held, but conceded that he had nothing to show that the Nandi Hills Branch requested the Nakuru Branch to take up the matter. He stated that the alleged Luke Kimutai went personally to the Nandi Hills Branch and that they took down his particulars. He agreed that ordinarily, the Defendants would provide an Indemnity document to be signed by a customer before funds are released to him but in this case, there was no need for such Indemnity because they were simply acting on a Court order. He agreed that he did not ask for the name of the "another mother" alleged by Luke Kimutai to be his mother, and neither did he ask for a Certificate of Birth nor a letter from the Chief to confirm the claims made by the alleged Luke Kimutai. He then conceded that what he was referring to as the Amended Grant was in fact the fake Certificate of Confirmation, and that the same was delivered to them through G4S Courier although he conceded that he did have any waybill document to confirm the delivery by G4S.
23. He reiterated that when he received the Grant, he called family members of the deceased and informed them about it, and also had a meeting with them, and he conceded that this was before the funds were released. He agreed that to date, he has never taken any action on the matter, and agreed that there was nothing on record to show the account number which the alleged Luke Kimutai was operating. He conceded that he could not confirm that the alleged Luke Kimutai in fact exists. In re-examination, he stated that he did not know the deceased personally, that he joined the Nandi Hills Branch in 2016, and that he knew one member of the family, the said Andrew Sieli, who had told him that he was a son of the deceased, and he once again pointed out the 2nd Plaintiff sitting in Court as being the said Andrew Sieli, whom he reiterated knew about 6 months before the fraud occurred as he used to go to the Branch to inquire about the bank account, and who told him that they were pursuing the Succession proceedings. He testified that for amounts of less than Kshs 100,000/-, they would only require a letter from the County Commissioner, and not a Grant from the Court, to disburse funds in a bank account held by a deceased person.
24. He testified further that authentication of the Grant could be sought by any authorized officer of the bank and that in this case, he initiated an internal mail to one Patricia Odongo, an internal Legal Officer at their Headquarters at Nairobi, upon whose request or instructions, the Nakuru Branch issued the letter of inquiry to the Nakuru High Court. According to him, this was because of the proximity of the Nakuru Branch to the Nakuru High Court. He urged that he had no further obligation to make further inquiries from the family of the deceased, or to verify whether there was a Petition in the Court file once he received the letter from the Court authenticating the Grant. He thus denied that he was complicit in the fraud and denied that he has ever lived or worked in Nakuru, and stated that no action had been taken against him by his employer as there was no blame on his part. About the letter to the Court written upon realization of the missing digit in the account number mentioned in the Grant, thus "invalid" account number, he reiterated that the Defendants did not supply the correct



or full account number, and only raised the issue of the “invalidity” of the account number indicated. According to him therefore, it is not the Defendants who sought an amendment.

Written Submissions

25. At the close of the trial, the parties filed written submissions. The Plaintiffs filed the Submissions dated 14/11/2024, the Defendants filed the Submissions dated 17/12/2025, while the 2nd Third Party filed the Submissions dated 14/12/2024.

Plaintiffs’ Submissions

26. Counsel for the Plaintiffs, after recounting the witness testimonies, gave a list of what, in his view, constitute a raft of admissions made by the Defendants’ witness, DW1, proving particulars of negligence and/or liability against the Defendants. He submitted that the relationship between a bank and its customer is a fiduciary relationship in which the bank acts as a trustee of the customer’s funds in the bank account, that a bank therefore owes a duty of care to its customers at all times, and is under a duty to make all possible inquiries regarding a possible breach of trust regarding the operations of the account, and that this involves not allowing operations by third parties who are not signatories to the account in question. He cited Black’s Law Dictionary, 11th Edition, the case of Wolf v. Superior Court (2003)107 Cal. App. 4th 25, 29 [130 Cal. Rptr. 2d 860], and also Halsbury’s Laws of England, 4th Edition, Volume 3 at paragraph 125. He urged that in this case, the deceased entrusted his funds with the 1st Defendant, and was a loyal and long-standing customer, he was a prominent tea farmer and was well known to the staff of the 1st Defendant’s Nandi Hills Branch, that after he passed away on 19/03/2013 leaving his estate unadministered, the family continued to visit the bank wherein they banked cheques for dividends in the same account.
27. He added that PW1 was particularly known to DW1 who was the Branch Manager between the years 2016 and 2019, and that he (PW1) occasionally updated the bank of the pending Succession proceedings at the Eldoret High Court. In poetic style, Counsel submitted that on 14/02/2019, when the world was celebrating Valentine’s Day, “the day of lovers”, the Defendants were overcome with “lust of the eyes” and “fell in love” with the handsome sum of approximately Kshs. 24 million that was in the deceased’s account, they posted one strange entry marked “online account closure” that debited the entire amount of Kshs 24,069,373.60/- that was in the deceased’s bank account and in the twinkling of an eye, the account had zero balance. He observed that coincidentally, a week later on 22/02/2019, the Plaintiffs wrote a letter to the Defendants requesting to be supplied with a copy of a bank statement for the account to enable them apply for Confirmation of Grant, which request was not well received by the Defendants who demanded that the Plaintiffs obtain a Court order before they could access the bank statements. He submitted that the Plaintiffs rushed to Court, and obtained the Court order on 20/03/2019 and upon being served with the same, the Defendants complied and furnished the bank statement which shocked the Plaintiffs as it reflected that the account had 0.00 balance, the sum of Kshs. 24,068,093.60/- having been debited.
28. According to him, the fraudulent debit of the account leaves no doubt that the actor and conspirator of the fraudulent scheme were the Defendants who abused their fiduciary duty. He urged that DW1’s reliance on a fake Succession Grant is no defence as the bank ought to have carried out due diligence as part of its policy, and that it is absolutely clear that the 2nd Defendant did not carry out enough or reasonable inquiry. He cited Halsbury’s Laws of England Vol. 1 (2017) at Paragraph 165, and also the case of A & A Jewellers Limited v Royal Bank of Canada (2001). In conclusion, he submitted that the evidence clearly points out to a fraudulent scheme orchestrated by the Defendants that siphoned the



funds from the account of the deceased, and that the Defendants have been “caught with their hands dipped in the cookie jar” and ought to shoulder responsibility and reinstate the deceased's account.

Defendants' Submissions

29. Counsel for the Defendants, also after recounting the witness' testimonies, submitted that there was no illegality or fraud committed by the Defendants, that the Defendants employed all due diligence in handling the account, and that the same was closed upon all the processes being complied with. He submitted that the bank, knowing that the holder of the account was deceased, undertook its internal due diligence processes in ensuring that the monies will be released to the beneficiaries and decreed by a Court of competent jurisdiction, and that the same would require a confirmed Grant to be certified and authenticated by the issuing Court.
30. According to him, DW1 testified in detail as to what steps he took in ensuring that proper documentation was presented and authenticated before release of the funds to the lawful beneficiary, and Counsel then proceeded to list such steps taken by DW1. He contended that the monies were all disbursed to the alleged Luke Kimutai after submitting a Certificate of Confirmation of Grant issued under seal by the High Court wherein the Court decreed that the sole beneficiary to whole monies held in the account was the alleged Luke Kimutai, that the Defendants, in compliance with the decree went further to verify that the Confirmed Grant presented was indeed genuine by writing to the High Court at Nakuru, requesting for its confirmation that the Grant was genuine, and that the 1st Defendant's Nandi Hills branch, via the email dated 19/09/2018, forwarded to the Nakuru branch instructions to make the inquiry. He submitted that DW1 confirmed that although the account was at Nandi Hills branch, the branch at Nakuru was close to the Nakuru Court from which the Grant was issued, and as such would be the best suited to follow-up on authentication of the same due to its proximity to that Court. He reiterated that the Court in Nakuru responded and confirmed that the Grant was issued by itself but however the bank noticed that the Grant indicated an erroneous account. He urged that upon further inquiry, the Nakuru High Court confirmed that an error had occurred in the capturing of the account number and had advised the Administrator to initiate the process of amending the Court documents.
31. He contended that the Grant was authenticated by the Court on 3 different occasions. Regarding the argument that the bank ought to have talked to the family members or verified matters through a Chief's letter, he contended that the law does not require banks to go behind the confirmed Grant to confirm whether the processes therein were in order and that banks are not Lawyers and their reasonable duty of care was merely to confirm that the Confirmed Grant is genuine and emanated from the Court. He cited the case of *Eric Omuodo Ounga v Kenya Commercial Bank Limited* [2017] eKLR. Counsel pointed out that the existence of two identical Succession Causes in the same Court Registry is a very serious matter touching on the integrity of Court processes, that the Deputy Registrar herself testified that the Court maintained one genuine and one fake file bearing the same registration number, that this an admission of fraudulent dealing with the estate of the deceased, a fact that would not be possible for the bank to know. According to him, no amount of diligence or care on the part of the Defendants would have unearthed the fact that there existed the two files as both files were firmly in the control and custody of the Deputy Registrar, and it is the same Court which kept issuing letters repeatedly confirming that the orders were genuine. He thus maintained that the Court Registry was the author of the fraud or was complicit by creating and maintaining a fake file from which it issued the letters of authentication.
32. He added that it is the duty of the Plaintiffs to prove on a balance that is higher than the usual balance of probabilities, and that the Defendants were guilty of fraud. He cited the case of *Vijay Morjaria*



v Nansingh Madhusingh Darbar & another [2000] eKLR. He then contended that the Plaintiffs have not proven that the Defendants knowingly collaborated with fraudsters, in this case, the said Luke Kimutai, to withdraw the money. He submitted further that the fact that some of the family beneficiaries were known to the Defendants could not have been sufficient to raise suspicions as the Grant indicated the 2nd Plaintiff is also a beneficiary of the whole shares held at the National Bank which amount could not be ascertained and which could therefore have been equal to that held at the 1st Defendant. According to him therefore, the fact of the Defendants being acquaintances with the Plaintiffs should not, and must not, be a ground to allude to fraud on the part of the Defendants as the Defendants act on documents, not on informal information supplied by acquaintances.

33. He contended that the suggestion that the bank statement produced did not show the recipient is not a ground to attribute bad faith on the bank as the Plaintiffs are not professional bankers and no professional expert witness was called to testify as to the practice in the banking industry as to how credits and debits involving a closed account should be reflected in bank statements. He cited the case of Family Bank Limited v Pauda Co-operative Savings and Credit Society [2022] eKLR. Regarding the reliefs sought by the Plaintiffs, Counsel urged that if the Court is inclined to grant any, then the same should be borne by the 2nd Third party who was clearly complicit in the issuance of misleading orders and maintaining parallel files at its Court Registry. On the issue of costs, he submitted that award thereof ought to follow the principle enunciated in the Supreme Court case of Jasbir Singh Rai & 3 others Vs. Tarlochan Singh Rai & 4 others [2014] eKLR, and urged that the finding that presents itself is for the Court is to award costs to the Defendants as against the Plaintiff and the third parties.

2nd Third Party's Submissions

34. Senior State Counsel, Mr. Kwame Ramo, on his part, submitted that from the evidence, it was established that some very crucial documents were missing from the Nakuru Succession Court file, namely, Chief's letter, Petition for Letters of Administration, and Gazette Notices, and according to him, the bank should have conducted due diligence by calling for these documents to establish the genuineness of the Succession Cause. After recounting witness testimonies, he, too, listed matters supposedly admitted to by the Defendants' witness, DW1, and which, according to him, demonstrates lack of due diligence on the part of the Defendants.
35. After highlighting the omissions apparent in the Nakuru Court Succession file, he submitted that the whole process was tainted with illegality and the Grant was therefore null and void, and the bank should have conducted further due diligence considering the colossal amount of money involved. He observed that DW1, in cross-examination, indicated that the letter requesting for authentication was sent to the Court via courier though there was no waybill to confirm these assertions. and that the letter of authentication from the Court was also hand delivered to them. Counsel contended that the chain of custody of the letters leaves so much to be desired from the bank since, for starters, it was open for manipulation by any party who was in possession, that DW1 was at pains trying to justify why the bank chose to send the letter to the High Court through courier while they had Advocates both in-house and external who were competent to undertake the exercise as the issue fell within their mandate. Counsel maintained that it is not enough to just mention that the bank received a letter from the Court authenticating the Certificate of Confirmation, and urged there was need for the Defendants to examine the process leading to the issuance of the order and more so, to confirm the Confirmation proceedings, considering that the family of the deceased was well known to the 2nd Defendant. According to Counsel, had that exercise been conducted it would have been established that the purported Certificate was not genuine, and originated from a fraudulent scheme. He submitted that the transactions herein were all rooted on a fraudulent and illegal Certificate of Confirmation and the same should not be sanctioned by the Court as they were null and void ab initio,



and could not therefore bestow any rights to any party either directly or indirectly affected by same. He cited the case of *Wambui v Mwangi & 3 others* (Civil Appeal 465 of 2019) [2021] KECA 144 (KLR) (19 November 2021) (Judgment).

36. He then posed the question; in the unlikely event that the Court finds that the Certificate of Confirmation was valid, what then is the legal position of the amendments sought by the bank on the account number? He submitted that DW1 testified that upon receiving the Certificate of Confirmation of Grant, it was noticed that it contained an error with regard to the account number, and he indicated that they then received a letter addressed to "whom it may concern" purporting to amend the same. He averred that it is trite law that in case of any amendments to a Certificate of Confirmation of Grant, the law contemplates a formal application to be made which application would then be subjected to a hearing process after which an Amended Certificate would be issued. He observed that DW1 admitted that there was no Amended Certificate and acted on basis of the "to whom it may concern" letter, which was not an Amended Certificate. Counsel added that since the account details in the Certificate of Confirmation did not tally with what was in their records, the bank erred in transferring the funds.
37. Counsel also pointed out that although DWI was categorical that the funds were released to Luke Kimutai, there was no document to show that the said Luke Kimutai ever set foot into the Defendant's premises let alone being a customer, that there was no copy of an identity card, no photograph, and no address or telephone number captured by the bank under the "Know Your Customer" protocols. He pointed out that there is also no documentary evidence to show that indeed the funds were transferred to the said Luke Kimutai, and also that the statement of account produced only indicated an online account closure with no further details, and that therefore, the question which remains unanswered is whether the funds actually left the Defendants' bank. He urged that considering the amount involved, it is not expected that the bank would release Kshs 24,068,093.60/- in cash, and even if that was done, it is expected that the bank would have executed a formal document acknowledging receipt of the funds. He also maintained that if at all there was a bank transfer or a cheque, a paper trail would have been left behind to show the movement of the money, and that as it is, there is no a single document to show that Luke Kimutai exists, or that the money in question was released to him.

Determination

38. The broad issues that arise for determination in this matter can be summarized as follows:
- i. Whether the Defendants (a bank and its Branch Manager) breached their duty of care to the estate of the deceased by allegedly paying-out to a fraudster, funds held in the bank account held by the deceased at the Defendants' bank, and if so, whether the Defendants should compensate the estate for the loss.
 - ii. If the Defendants are liable to compensate the Plaintiff for the loss, whether the Third parties should indemnify the Defendants for the compensation to be made to the Plaintiffs.
39. The Black's Law Dictionary, 11th Edition, defines a "fiduciary duty" as follows:
- "a duty of utmost good faith, trust, confidence, and candor owed by a fiduciary (such as an agent or a trustee) to the beneficiary (such as the agent's principal or the beneficiaries of the trust ;... a duty to act with the highest degree of honesty and loyalty toward another person and in the best interest of the other person -.... Also termed as duty of loyalty, duty of fidelity; duty of faithful service; duty to avoid conflict of interest."



40. Fiduciary duty is therefore a relation existing between parties to a transaction wherein one of the parties is duty bound to act with the utmost good faith for the benefit of the other.
41. In the present case, the undisputed facts are that late Nathaniel Kibitok Sieley (the deceased), was a long-time customer of the 1st Defendant, and had an account with it at its Nandi Hills Branch. The Plaintiffs blame the Defendants for breach of their duty of care with regard to the handling of the deceased's bank account held at the 1st Defendants' Nandi Hills Branch, that led to the illegal and/or fraudulent loss of Kshs 24,068,093.60/- therefrom, which was paid out to a stranger.
42. The Court of Appeal in the case of Fidelity Commercial Bank Limited v Italian Market Kenya Limited [2017] KECA 370 (KLR) [2017] KECA 370 (KLR), CA Civil Appeal No, 248 of 2015 [2017] eKLR held that a reasonable and responsible banker is obliged to make such inquiries as might, in given circumstances, be appropriate and practical, and that a bank's duty of care to its customers includes protecting the customer from exposure to fraud by other third parties, and/or unauthorised persons.
- “The bank-customer relationship is contractual in nature and imposes a duty on the bank to exercise reasonable care and skill in its dealings with the customer ... A bank has a duty under its contract with its customer to exercise “reasonable care and skill” in carrying out its part with regard to operations within its contract with its customer. The standard of that reasonable care and skill is an objective standard applicable to bankers. Whether or not it has been attained in any particular case has to be decided in the light of all the relevant facts, which can vary almost infinitely.”
43. Similarly, in the case of Karak Brothers Company Ltd V Burden [1972] All ER 1210, which was followed in the case of Co-operative Bank of Kenya Ltd v Biwott (Civil Appeal 18 of 2019) [2022] KEHC 9946 (eKLR), the Court observed as follows:
- “[A] bank has a duty under its contract with its customer to exercise “reasonable care and skill” in carrying out its part with regard to operations within its contract with its customer. The standard of that reasonable care and skill is an objective standard applicable to bankers. Whether or not it has been attained in any particular case has to be decided in the light of all the relevant facts, which can vary almost infinitely.”
44. A bank-customer relationship is therefore contractual, and the bank's fiduciary duty of care extends to the degree that it must use “reasonable care and skill” in fulfilling its end of the bargain. The bank cannot therefore be allowed to act recklessly to the detriment of the client. That standard of reasonable care and skill is however, an objective standard, and each case must be determined on the basis of its own peculiar facts.
45. Further, as in all civil cases, the onus of proof lies on the Plaintiff, and the standard of proof is on a balance of probabilities. In other words, the legal burden of proof falls on the Plaintiff. Once he discharges that legal burden, the evidential burden, then shifts to the Defendant (see Section 112 of the *Evidence Act*).
46. In this case, the Defendants maintained that there was no breach of duty on their part in their releasing funds from the deceased's bank account to the alleged Luke Kimutai. This contention is anchored on the argument that the Defendants employed all due diligence since, having been served with the Certificate of Confirmation of Grant, upon their request, the same was authenticated by the High Court at Nakuru, from which the Certificate originated. The Defendants have, in the circumstances, deflected blame to the High Court at Nakuru.



47. During the hearing, PW2, the Deputy Registrar at the High Court at Nakuru (not the one who was in office at the time of the incident) testified that it transpired that there were two separate files in that Court's Registry but bearing the same case number, namely, Nakuru High Court Succession Cause No. 3 of 2013, one relating to the Estate of Ayub Wandundo Kimani and the second one, relating to the estate of Nathaniel Kibitok Sieley. According to PW2, upon examining the two files, it was noted that the one relating to the Estate of Ayub Wandundo was the authentic one as it was supported by the Court Register, while the one relating to the Estate of Nathaniel Kibitok Sieley was "fake" and did not exist in the Register. It also had no Petition or Petitioner, and no Application for Confirmation of Grant or any other pleading inside, but surprisingly, contained a fake Certificate of Grant purportedly dated 22/07/2017 falsely indicated to have been signed by Hon. Maureen Odero J. It also transpired that although the Cause was indicated to have been filed on 3/01/2013, the deceased died much later, on 19/03/2013. Again, the date of 22/07/2017 indicated as the date when the Certificate or Grant was signed was a Saturday, a non-Court working day. The alleged Grant was therefore clearly a forgery and the whole process leading to issuance by the Deputy Registrar of letters authenticating the same were based on fraud.
48. The Defendants have therefore placed heavy reliance on the apparent fraud which the Defendant urges, was perpetuated within the High Court at Nakuru, and contended that it is that Court that should be held liable. Taken in isolation and or on its own, the Defendants could indeed be exonerated on this sole ground. However, in this case, there are other serious circumstances that have arisen, and which require to be closely and carefully considered before a determination on liability is reached.
49. First, I have to say that no evidence has been tendered to suggest that the Deputy Registrar of the High Court at Nakuru (not PW2, the current one) who authored the letters authenticating the fake Grant knowingly did so, or was part of the fraudulent scheme.
50. It is not in dispute that the amount lost, the sum of Kshs 24,068,093.60/-, is a colossal sum by any means. The Defendants' witness, DW1, the former Branch Manager at the Nandi Hills Branch, agreed that the deceased was a prominent and well-known large-scale farmer within the Nandi Hills locality, a small town where "everyone knew everyone", and that the deceased was one of the Branch's biggest customers. He therefore agreed that the deceased and his family were well known to the staff at that branch of the bank. It is therefore curious that the emergence of a Certificate of Confirmation of Grant indicating a stranger as being both the Administrator and a beneficiary of the estate of the deceased did not at all raise any eyebrows within the bank calling for a little bit of further scrutiny, and the need to reach out to the family of the deceased, well-known to the bank staff.
51. I also note that DW1 conceded that he knew the deceased's son, Andrew Sielei (2nd Plaintiff) who used to visit the branch to inquire about his father's account and who would update him on the progress of the Succession proceedings that the family was pursuing. It was also pointed out that even after the death of the deceased, his family had been depositing cheques, and, as such, the bank was fully aware that the account was active. DW1 also stated that when he received the impugned Grant, he phoned the 2nd Plaintiff, who was well known to him, and asked him to go to the branch for a discussion thereon, that the 2nd Plaintiff obliged and went to the bank with other family members and protested about the alleged Grant informing DW1 that they were not aware of it. This was said to be in late 2018. Surprisingly, the Defendants still went ahead and acted on the Grant by disbursing the account funds to the alleged Luke Kimutai, a total stranger not known to the bank or the family, and without the family's consent or knowledge.
52. Further, DW1 testified that upon discovering that there was an error in the Certificate of Grant insofar as the bank account number indicated was incomplete, (missing one digit), and the Court having



- advised the alleged Luke Kimutai to move the Court for Rectification of the Grant, the Defendants still went ahead and paid out the funds on the basis of a letter addressed to “whom it may concern”, not supported by any Certificate of Rectification of the Grant. The Defendants thus released the funds to a stranger despite the Certificate of Confirmation of Grant presented to them indicating an incomplete account number, missing one digit, and without being served with any Amended or Rectified Grant correcting the same.
53. Although, as aforesaid, upon the Defendants’ further inquiry, the High Court at Nakuru subsequently issued a letter addressed to “whom it may concern” purporting to amend the Grant, by now indicating the complete account number, this subsequent letter should have raised eyebrows on the part of the Defendants’ staff since the Defendants, in their letter of inquiry, had not mentioned to the Court anything about the account number being incomplete
 54. Even assuming that the Defendants acted on the notion that the impugned Grant was legitimate, the most damning fact against the Defendants is that DW1 was not able to demonstrate that the alleged Luke Kimutai was an existing person in the first place, and not a mere fiction. In the ordinary course of business, banks would keep records of all transactions and details of the persons involved in a transaction. However, in this case, no such records have been produced. To date, the Defendants have not been able to produce any documentation or records whatsoever disclosing the identity of the alleged Luke Kimutia, the authenticity of the copy of the National Identity Card produced by the Defendants was not authenticated or verified, and there was no other nature of identification, or particulars of his residence, phone number, place of work, home area or any other such kind of details. Also being a high security facility, is it possible that the bank did not even have at least a CCTV installation to enable it replay footage of the said Luke Kimutai transacting at the Nandi Hills Branch, or is the bank hiding something? I also note that DW1 admitted that ordinarily, the bank would provide an Indemnity document to be signed by a payee but in this case, none was provided and no explanation for this omission was offered.
 55. For pay-out of such a colossal amount of money as the sum in issue herein, I find it too reckless for the Defendants to have effected such a huge transaction without at least demanding supply of any documentation or details of the payee, even if just for record purposes. It is, to say the least, incredible and just unbelievable.
 56. Further, and most damning, is the fact that DW1 was unable to prove that the alleged disbursement transaction was actually effected or took place. DW1, despite alleging that the funds were paid to an account held by the said Luke Kimutai at the same bank’s branch in Nairobi, nothing whatsoever was tendered to show that the funds actually left the bank account at Nandi Hills and was remitted to any other bank account elsewhere. The particulars of the account allegedly held by Luke Kimutai in its Nairobi branch in which the funds were allegedly transferred, also has never been disclosed, and no explanation whatsoever, has been given for this failure despite the alleged account being said to have also been also held at the same bank.
 57. The bank statement relied on by the Defendants also does not indicate the existence of any fund transfers made to the alleged Luke Kimutai on 14/02/2019 as alleged, on which date the sum of Kshs 24,068,093.60 was still in the account. The statement only reflects an entry christened “online closure” reading a “0.00” balance with no details whatsoever. The bank also never produced any acknowledgment of any kind from Luke Kimutai confirming that indeed, he received any money yet, as aforesaid, the bank account alleged to be in his name is also held at the same bank.
 58. DW1 also admitted that even after learning of the fraud, the Defendants still did not freeze the alleged bank account held and operated by Luke Kimutai within the same bank in Nairobi where the funds



- were allegedly remitted. This is despite DW1 admitting that the 1st Defendant was empowered by law to restrict or freeze suspicious accounts, and which power it routinely exercised in appropriate cases.
59. There is also no evidence whatsoever that the bank, even after discovering the fraud, has ever made a report to the police for the crime to be investigated and perpetrators prosecuted. Is this really normal practice for a bank such as the 1st Defendant, one of the biggest and oldest banks in Kenya? I do not think so, and the bank did not even allege any hindrance to taking any such step. This omission to lodge a complaint to the police, or to the well-known Bank Fraud Investigation Unit (BFIU) domiciled at the Central Bank, and specially formed and existing to handle such matters, compels me to “smell a rat”.
 60. There are other circumstances pointed out by the Plaintiffs, and also by the 1st Third Party, that equally raise serious questions over the conduct, apparent negligence and/or omissions of the Defendants. There was for instance, the observation that the Grant was issued from the far off Nakuru High Court, and not Eldoret High Court, which was, at that time, the High Court nearest to the Nandi Hills Branch.
 61. It was also contended that according to DW1, the letter from the 1st Defendant’s Nakuru Branch seeking authentication of the Grant was delivered to that Court by a staff member from the Nakuru Branch, yet the Defendants had a whole panel of Law Firms, and also a Legal Department, that should have handled matters of such nature, that DW1 had nothing to show that he sought advice from the Lawyers, and also, that DW1 had nothing to show that the Nandi Hills Branch indeed requested the Nakuru Branch to take up the matter. It was also argued that it was alleged that the letter from the Nakuru High Court was delivered to the 1st Defendant through G4S Courier, no waybill document was produced to confirm such delivery.
 62. According to the Defendants and the 1st Third Party therefore, the chain of custody of the letters leaves so much to be desired as it was clearly open for manipulation by any party who was in possession thereof.
 63. In view of the foregoing, the Plaintiffs’ and the 2nd Third Party’s contention that the alleged Luke Kimutai is a non-existent entity, and that the 1st Defendants’ staff may have colluded to “manufacture him” for purposes of defrauding the estate of the deceased, may, no doubt, sound credible, and may not be ignored or termed far-fetched.
 64. The Defendants have, on their part, argued that no amount of diligence or care on their part could have unearthed the fact that there existed two Succession files with the same case number at the Nakuru High Court, as both files were firmly in the control and custody of the Deputy Registrar of that Court. The Defendants also contended that they could not have known that the contents of the letters issued by the Deputy Registrar which authenticated the Grant were false. They also argued that the law does not require banks to go behind the confirmed Grant to verify whether the processes leading thereto were in order, and that banks are not Lawyers, and that their reasonable duty of care was merely to confirm that the Confirmed Grant was genuine and emanated from the Court. As aforesaid, if taken in isolation, the Defendants’ said arguments would easily carry the day. However, considering the aggregate facts and circumstances of this case, and the surrounding situations apparent, taken cumulatively and holistically, there is sufficient evidence that in this case, there were serious and obvious “red-flags” that required the bank to have gone further, and to have done more in conducting due diligence that in ordinary situations.
 65. This fraud seems to have been a well-orchestrated scheme, and a collusion involving unscrupulous persons in the two institutions involved, the 1st Defendant’s Nandi Hills Branch and the High Court at Nakuru. This was definitely an “inside job” within the two institutions, which unfortunately, and



for reasons not explained, does not even seem to have been reported, by either of the two, to the police for investigations. Thanks to the fraud, coupled with shocking negligence displayed (or perhaps vested interest?) by concerned officers, voila! a whopping Kshs 24,069,373.60/- vanished from the deceased's bank account "into thin air".

66. The Defendants clearly breached their duty of care to the estate of the deceased insofar as custody of the bank account was concerned. For the above reasons, I find that the Defendants failed to discharge that duty of care, and they cannot therefore run away from this liability.
67. When a customer opens an account with a bank and deposits his money therein, the bank is expected to apply its full skill, expertise and all safeguards within its capacity or capability to ensure that the customers' money remains safe and insulated from interference by 3rd parties, or any other unauthorized persons. In the circumstances of this case, the Defendants cannot be heard to shift blame to the 2nd Third Party yet it is the Defendants' own failure to take reasonable care or conduct due diligence that ultimately facilitated the loss of funds, even if the 2nd Third Party was also not blameless by issuing letters authenticating a fake Grant.
68. Regarding joinder and/or liability of a 3rd Party joined into a suit by a Defendant, Order 1 Rule 15 of the Civil Procedure Rules provide as follows:

“ 15. Notice to third and subsequent parties [Order 1, rule 15]

(1) Where a defendant claims as against any other person not already a party to the suit (hereinafter called the third party)—

- (a) that he is entitled to contribution or indemnity; or
- (b) that he is entitled to any relief or remedy relating to or connected with the original subject-matter of the suit and substantially the same as some relief or remedy claimed by the plaintiff; or
- (c) that any question or issue relating to or connected with the said subject-matter is substantially the same question or issue arising between the plaintiff and the defendant and should properly be determined not only as between the plaintiff and the defendant but as between the plaintiff and defendant and the third party or between any or either of them, he shall apply to the Court within fourteen days after the close of pleadings for leave of the Court to issue a notice (hereinafter called a third party notice) to that effect, and such leave shall be applied for by summons in chambers ex parte supported by affidavit.

.....”

69. In view of the above, and although I agree that there was indeed some level of inexcusable omission on the part of the 2nd Third Party, the High Court at Nakuru, which should obviously not be condoned or encouraged, the Defendants could only have successfully shifted liability to the 2nd Third Party if



they. in the first place, discharged their own duty of care to the Plaintiffs by demonstrating that they themselves were not guilty of failing to conduct due diligence.

70. In regard to the above, I share the sentiments expressed by F. Gikonyo J, in the case of Kenya Commercial Bank vs Suntra Investment Bank Ltd (2015) eKLR), in which he guided as follows, in respect to Third party proceedings:

“In law, a third party is enjoined in a suit at the instance of the defendant The way I understand the law on third parties, such issues of third parties are issues and triable only between the third party and the defendant and cannot be a bona fide issue triable between the defendant and the plaintiff. On the basis of those legal reasons, even if the third party had been joined, which he has not, it is not a triable issue at all for purposes of liability between the plaintiff and the defendant.”

71. As the Defendants’ active negligence, or perhaps, even participation by its staff, has been clearly demonstrated in the events leading to the fraudulent release of the bank account funds to a stranger, I find no reason to move to the further stage of holding the 2nd Third Party, the High Court at Nakuru, liable to indemnify the Defendants for the loss resulting from the fraud or to shift blame to the High Court at Nakuru, which in my assessment, was, just like the family of the deceased, a victim of fraud whose origin or execution appears to have been within the Defendants’ own rank.

72. There is also another issue relating to the joinder of the 2nd Third Party herein., The order allowing the joinder of the 1st Third Party, Luke Kimutai, into this suit was made on 10/02/2020, while the order allowing the joinder of the 2nd Third Party, Hon. Attorney General, was made on 13/05/2021. The 1st Third Party did not enter appearance. On the part of the 2nd Third Party however, he did enter Appearance and filed a Defence on 9/03/2022. The next step to be taken by the Defendants was to therefore apply for Third Party directions as stipulated under Order 1 Rule 22 of the Civil Procedure Rules as follows:

“ 22. Appearance of third party and directions [Order 1, rule 22]

If a third party enters an appearance pursuant to the third-party notice, the defendant giving the notice may apply to the court by summons in chambers for directions, and the court upon the hearing of such application may, if satisfied that there is a proper question to be tried as to the liability of the third party, order the question of such liability as between the third party and the defendant giving the notice, to be tried in such manner, at or after the trial of the suit, as the court may direct; and, if not so satisfied, may order such judgment as the nature of the case may require to be entered in favour of the defendant giving the notice against the third party.”

73. I have however carefully looked through the Court file but have not been able to trace any evidence that such directions were applied for or given. Taking of Third Party directions plays an important role in Third Party proceedings as it is at that stage that the Court for the first time gets the opportunity to hear the joined Third Party inter partes, and also the opportunity to make an informed determination on the manner in which the case shall be conducted, how the question of liability as between the Defendant and the Third Party is to be tried, whether it will be tried at, or after the trial of the suit and, may, in deserved cases, even straight-away enter Judgment against, or exonerate the Third Party at that stage, depending on the Court’s findings whether a basis has been laid for the joinder. This fact was well



captured in the case of *Sango Bay Estates Ltd & Others v. Dresdner Bank AG* [1971] E.A. 18, in which the East African Court of Appeal (Spry, V.P) held as follows:

“ 42. Mr. Wilkinson suggested that under Order I, r. 18 a judge has two courses open to him: he may give directions for the trial of the issue between the third party and the defendant or he may enter judgment in favour of the defendant. I would have not hesitation in rejecting that submission. On an application for directions, a judge may decide that there is an issue to be tried, when he gives directions; he may decide that the third party has no defence, when he gives judgment in favour of the defendant; but he may decide that the defendant has failed to show any claim to contribution or indemnity against the third party and in such a case he must be able to dismiss the application”.

74. There being no evidence of any Application for directions having been made by the Defendants as mandatorily required under the provisions of Order 1 Rule 22 aforesaid, under which the Court would have had the opportunity to direct whether the question of liability as between the Defendant and the 2nd Third Party would be tried at, or after the trial of the main suit. As such application has not been filed or directions sought or obtained, this Court has no foundation under which to determine the issue of liability as between the Defendant and the 2nd Third Party. In other words, the Court has been denied the opportunity to determine, before commencement of the trial, whether there was in the first place, a proper question to be tried as to the liability of the 2nd Third Party. The fact that the suit proceeded to full trial in which the 2nd Third Party fully participated, cannot by itself cure the Defendants’ unexplained omission to seek Third Party directions since Order 1 Rule 22, which provision was not enacted for mere cosmetic purposes. For these reasons, the issue whether the 2nd Third Party is liable to indemnify the Defendants cannot arise.

74. Further, as regards the 1st Third Party, Luke Kimutai’s failure to enter Appearance, although I gave the Defendants leave on 18/03/2024, to serve the 1st Third Party through substituted service by way of publishing of a Notice in a Newspaper, I have gone through the Court file and also the Judiciary Case Tracking System (CTS) online portal, and cannot find any Return of Service to that effect.

75. I therefore have no evidence before me demonstrating that the Third Party Notice allowed by H. Omondi J (as she then was) on 10/02/2020 to be served upon the 1st Third Party was so served. To this extent, I share the sentiments of Mbaluto J made in the case of *Official Receiver Continental Bank of Kenya Ltd vs. Mukunya* [2003] 1 EA 21, that:

“ An order obtained without serving a party affected by it as per the requirements of Order L, rule 2 of the Civil Procedure Rules, is a nullity and must therefore be set aside ex debito justitiae. *Graig v Kanseen* [1943] 1 ALL E.R. 108 adopted; *Khami v. Kirobe and others* [1956] 23 EACA 195 applied.”

76. For the reason of omission to demonstrate service of the Third Party Notice upon the 1st Third Party, it is clear that, like the 2nd Third Party, no adverse orders or Judgment can also be made in this suit against the 1st Third Party.

Final Orders

77. The upshot of the foregoing is that this Court finds and holds that the Plaintiffs have proved their claims against the 1st and 2nd Defendants to the required standard. As a consequence, I enter Judgment, against the 1st and 2nd Defendants, jointly and severally, as follows:



- i. An order hereby issues that the Defendants do reinstate the bank Account No. XXXXXXXXXXXX/XXXXXXXXXXXX, whether under the same account number or a new one, but on the same terms and conditions as before, and to restore the sum of Kshs 24,069,373.60/- illegally and fraudulently withdrawn therefrom on 14/02/2019.
- ii. The above sum shall also attract interest from the said 14/02/2019 at the same rate at which the funds were attracting interest before the same was fraudulently paid out to the 1st Third Party.
- iii. The Plaintiffs are also awarded costs of this suit to be borne by the Defendants.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 19TH DAY OF SEPTEMBER 2025

.....

WANANDA JOHN R. ANURO

JUDGE

Delivered in the presence of:

Ms. Chelimo h/b for Yego for the Plaintiffs

Ms. Jeruto h/b for Mr. Mwetich for the Defendants

Mr. Kwame for the 2nd Third Party

N/A for the 1st Third Party

Court Assistant: Brian Kimathi

