



**Absa Bank Kenya Plc (Formerly Barclays Bank Limited) & 2 others v Wanjiku & another  
(Civil Appeal 85 of 2018) [2024] KEHC 4209 (KLR) (11 April 2024) (Judgment)**

Neutral citation: [2024] KEHC 4209 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAKURU  
CIVIL APPEAL 85 OF 2018  
HI ONG'UDI, J  
APRIL 11, 2024**

**BETWEEN**

**ABSA BANK KENYA PLC (FORMERLY BARCLAYS BANK LIMITED) ..... 1<sup>ST</sup> APPELLANT  
JOSEPHINE NYOKABI WANJIKU ..... 2<sup>ND</sup> APPELLANT  
GUNNAR HALLSON ..... 3<sup>RD</sup> APPELLANT**

**AND**

**JOSEPHINE NYOKABI WANJIKU ..... 1<sup>ST</sup> RESPONDENT  
GUNNAR HALLSON ..... 2<sup>ND</sup> RESPONDENT**

*(Being an appeal from the Judgment and Decree of Honourable Oduor Chief Magistrate at Nakuru Law Courts, delivered on 6th June 2018 in CMCC No.226 of 2018)*

**JUDGMENT**

1. In the suit before the Magistrate's court, the respondents (being the plaintiffs therein) prayed for Judgment against the appellant for:
  - i. Payment of the whole sum of the money lost which is a sum of kshs. 6,300,000/= together with interest at commercial rates.
  - ii. Costs of the suit.
  - iii. Any other relief that this honourable court may deem fit to grant.
2. In the plaint it was pleaded that the 1<sup>st</sup> respondent (who was the 1<sup>st</sup> plaintiff) upon opening an account with the appellant (who was the defendant) gave the following details and documents to the



appellant's official namely; pin certificate, coloured passport, copy of identity card, address, residence email-xxxx.coth, mobile no. 0726xxxxx.

3. She informed the bank official that she expected some money to deposit from the 2<sup>nd</sup> respondent (who was the 2<sup>nd</sup> plaintiff) from Iceland. When she went to inquire about the account the bank official who assisted her, one Dennis continuously told her to come the following day until she got the letter of 16<sup>th</sup> April, 2013.
4. It was her case that the appellant's officers fraudulently used her email account to have the 2<sup>nd</sup> respondent send Ksh 6,300,000/= to an account other than hers and it was withdrawn. She therefore blamed the bank (appellant). The matter was then heard.
5. The lower court rendered a Judgment on 6<sup>th</sup> June, 2018 ordering the appellant to pay to the 1<sup>st</sup> respondent a sum of US dollars 10,600 at the applicable exchange rates. This was in addition to a refund of any bank charges levied and interests on the said amount at court rates from the date of filing of the suit.
6. Being aggrieved by the said Judgment the appellant lodged this appeal dated 2<sup>nd</sup> May,2018 on the following grounds:
  - i. The Learned Magistrate erred in law in failing to give reasons for his Judgment.
  - ii. The Honourable Magistrate erred in law and in fact in awarding general damages of the sum of US dollars 10,600 without any justification or basis for the same.
  - iii. The Honourable Magistrate erred in law and in fact in finding that the Appellant was negligent without giving reasons to justify the same.
  - iv. That the Learned Magistrate erred in law and in fact in failing to consider wholly the appellant's evidence in his Judgment.
  - v. That the Learned Magistrate erred in law and in fact in finding that the Plaintiffs proved their case to the required standard without establishing what the standard was.
  - vi. That the Learned Magistrate erred in law and in fact in failing to comprehend how money is transferred through the SWIFT system and that a Bank/financial Institution follows the instructions of a Remitter.
  - vii. That the Learned Magistrate erred in law and in fact in failing to comprehend how Bank practice is regulated in the remittance of funds.
  - viii. The Learned Magistrate erred in law and in fact in failing to understand the operation of the Prudential Guidelines set by Central Bank of Kenya and the value for Financial institutions/Banks to comply with the said regulations.
  - ix. The Learned Magistrate erred in law and in fact in finding fraud on the basis of the evidence adduced .and failing to identify the parties who committed the fraud, but nevertheless proceeding to assign liability on the Appellant without giving reasons for this conclusion.
  - x. That the Learned Magistrate erred in law and in fact in failing to consider any of the compelling evidence adduced by the appellant at the trial court.
  - xi. That the Learned Magistrate erred in law and in fact in awarding general damages of US dollars 10,600 to the respondents.



7. The respondents equally lodged a Cross Appeal through their memorandum of appeal dated 20<sup>th</sup> July 2018 setting out the following grounds of appeal: -
  - i. The learned trial magistrate erred both in law and in fact in dismissing part of the Appellants' now respondents' claim when there was sufficient evidence to find to the contrary.
  - ii. The learned trial magistrate erred both in law and in fact in disregarding the documents, clearly showed that the respondents now appellants had committed fraud.
  - iii. The learned trial magistrate erred both in law and in fact by failing to find that the documents exhibited by respondent now appellant showed that the money was being sent to an address in Nakuru belonging to the 1<sup>st</sup> appellant.
  - iv. The learned trial magistrate erred both in law and in fact in failing to consider submissions and authorities of the appellants now respondents.
  - v. The Learned trial Magistrate erred both in law and in fact in failing to consider the evidence of both witnesses which confirmed that the cash was intended for the 1<sup>st</sup> appellant now 1<sup>st</sup> respondent.
  - vi. The learned trial magistrate erred both in law and in fact by failing to find that the Respondents 'now appellants' employees committed a fraud by hacking into the 1<sup>st</sup> appellant's now 1<sup>st</sup> respondent's details and opened an account as the same name as that of the 1<sup>st</sup> appellant's now 1<sup>st</sup> respondent's and diverting the money meant for the 1<sup>st</sup> appellant now 1<sup>st</sup> respondent.
  - vii. The learned trial magistrate erred both in law and in fact by failing to observe that the delay in opening the account for the 1<sup>st</sup> appellant now 1<sup>st</sup> respondent was calculated at diverting the money that belonged to the 1<sup>st</sup> appellant now 1<sup>st</sup> respondent.
8. Both the appeal and cross-appeal were canvassed through written submissions.

### **Appellant's submissions**

9. The appellant's main appeal submissions were filed on 26<sup>th</sup> October 2023 by Oundo Muriuki Advocates. Counsel identified one issue for determination that is whether there was proof of negligence and/or fraud to the required standard on the part of the appellant before the trial court.
10. She submitted that the trial magistrate did not find any fault on the part of the appellant on the issue of opening dual accounts in the name of the 1<sup>st</sup> respondent. He added that it was impossible and illogical for the respondents to claim that the appellant and its servants in opening an account at Queensway on 5<sup>th</sup> April 2013, anticipated or had prior knowledge that she would open an account on 8<sup>th</sup> April 2013.
11. Counsel submitted further that the respondent did not produce the alleged email sent to the 2<sup>nd</sup> respondent by the appellant's staff giving him the Queensway branch account. That the respondents approached the trial court with mere speculations and conjecture. She placed reliance on the case of *Njuwanga Ltd v Langata KPA Nairobi & 5 Others* [2014] eKLR where held as follows;

“An allegation of fraud is a serious indictment against a party to whom it is made and though the standard of proof is not beyond a reasonable doubt as in criminal cases it is no doubt near there but is certainly higher than on a balance of probability and thus when a party in a civil matter makes an allegation of fraud against a party he should be prepared to tender and adduce evidence to prove allegation to the required standard.”



12. Counsel further submitted that the payment instructions carried out by the appellant on 11<sup>th</sup> April 2013 were in line with the Central Bank of Kenya prudential guidelines at page 227. Thus, the trial magistrate misdirected himself in finding that the appellant was negligent in honouring the payment instructions to Josphine Nyokabi Wansiky instead of the 1<sup>st</sup> respondent. He added that the appellant's systems were automated and payment would go through as long the two names were correct and the account number was correct.
13. Lastly, it was counsel's submission that the evidence provided by the 1<sup>st</sup> and 2<sup>nd</sup> respondents during trial was completely insufficient to show that there was any negligence and/or fraud on the part of the appellant. He placed reliance on Section 107 of the Evidence Act provides:

“Whoever desires any court to give judgment as to any legal right or liability depend on the existence of facts which he asserts must prove that those facts exist. When a person is required to prove the existence of any fact it is said that the burden of proof lies on that person.”
14. He urged the court to allow the appeal with costs to the appellant.

### **Respondent's submissions**

15. The said submissions were filed on 21<sup>st</sup> June 2023 by Mongeri and Company Advocates in respect of the Appeal and Cross-Appeal. Counsel submitted that the trial magistrate critically analysed the particulars of fraud as pleaded and by doing so he gave reasons for his judgment. He submitted further that the document produced as exhibit 3a found at page 22 of the record of appeal related to a transaction of USD 10, 600 made on 9<sup>th</sup> April 2013 to an account which had an error on the name. He added that the appellant failed to exercise due diligence on its part during the said transaction.
16. Counsel reiterated that the trial magistrate was right to find that there was negligence on the part of the appellant. Further that no evidence was adduced in court by the appellant of the transactions carried out in relation to account number 2027653661 to contravene the respondent's position. He added that the appellant failed to controvert the negligence allegations levelled against it.
17. On the cross appeal, counsel submitted that the trial magistrate erred on facts when upon finding that the total money sent into the wrong account was kshs. 6,300,000/= but ended up awarding the respondent only USD 10,600 instead of USD 67,000. Counsel submitted further that the appellant was required to exercise reasonable skill and care to make a more extensive inquiry beyond the minimum verification of name and account numbers.
18. He placed reliance on the case of Karak Brothers Company Limited versus Burden [1972] ALLER as cited in the case of Simba Commodities Ltd v Citibank N.A Civil Case No. 236 of 2003 [2013] eKLR regarding the duty of a paying bank where the court held inter alia:

“....the duty of skill and care applies to interpreting, ascertaining, and acting in accordance with the instructions of a customer, and that must mean his really intended instructions as contrasted with the instructions to act on signatories misused to defeat the customer's real intentions. Of course.....a bank should normally act in accordance with the mandate but not if reasonable skill and care indicate a different course”.

### **Analysis and Determination**

19. This being a first appellate court, I am guided by the dictum in the case of Selle vs. Associated Motor Boat Co. Ltd. [1965] E.A. 123, where it was held that the first appellate court has to re-consider and



re-evaluate the evidence that was tendered before the trial court, assess it and make its own conclusions in the circumstances.

20. I will first deal with the main Appeal and determine whether the same is merited. Counsel for the appellant argued in his submissions that the trial magistrate did not find any fault on the part of the appellant on the issue of opening dual accounts in the name of the 1<sup>st</sup> respondent. He argued further that the respondent did not produce the alleged email sent to the 2<sup>nd</sup> respondent by the appellant's staff giving him the Queensway branch account. He added that the payment instructions carried out by the appellant on 11<sup>th</sup> April 2013 were in line with the Central Bank of Kenya prudential guidelines.
21. The respondents on their part contend that the trial magistrate critically analysed the particulars of fraud as pleaded and by doing so gave reasons for his judgment. They argued further that no evidence was adduced in court by the appellant of the transactions carried out in relation to account number 2027653661 to contravene the respondent's position. That the appellant failed to controvert the negligence allegations levelled against it.
22. In the lower court judgment, the trial magistrate held that there was a probability that there was some collusion between the appellant's employees and whoever may have hacked into the 1<sup>st</sup> respondent's provided email and communicated the wrong account details to the 2<sup>nd</sup> respondent. That DW1 did not sufficiently explain the delay in opening the account at Nakuru West branch. The learned trial magistrate observed that the overall evidence suggested the commission of fraud on the part of some person(s) but did not point to a specific person(s) and the hacking of the 2<sup>nd</sup> respondent's email was only speculative.
23. In the end, the trial court found that there was negligence on the part of the appellant's employee(s) in remitting 10,600 US dollars to an account with the wrong name as captured in P. Exhibit 3 (a). The rest of the transactions that related to the 1<sup>st</sup> respondent's account were found to be in line with the Central Bank of Kenya's prudential guidelines.
24. Looking at the evidence adduced during the hearing before the trial court, PW1(who is the 2<sup>nd</sup> respondent herein) testified that he got an email from the 1<sup>st</sup> respondent and the same contained her name, account name and postal address. He confirmed sending money to the said account 6 times and said the money amounted to Kshs. 6,300,000/=. He also adduced proof of payments and the same were marked as P exhibit 3a,b,c,d,e and f respectively. In cross examination, the 1<sup>st</sup> respondent confirmed that he did have the particular email that directed him to send money to the fraudulent account.
25. The 1<sup>st</sup> respondent testified as PW2 stating that she opened an account with the appellant on 1<sup>st</sup> April 2013 with the assistance of one Dennis and she gave her personal details since the same was a requirement. She testified further that she sent an email containing her bank account details to the 2<sup>nd</sup> respondent but only realized later that there was another fraudulent account opened at the appellant's branch at Queensway in which the 2<sup>nd</sup> respondent had sent the money.
26. It was her evidence that there was delay by the appellant in opening her account and during that period the fraudulent money transfer was perpetrated. During cross examination she confirmed that the account document dated 5<sup>th</sup> April 2013 appeared to have been dealt with earlier than the one dated 8<sup>th</sup> April 2013 which belonged to her. She confirmed further that she gave 2<sup>nd</sup> respondent's email address and her password to one of the appellant's staff.



27. The burden of proof in a civil case is always cast upon the plaintiff. This is well illustrated under Section 107 (1) of the Evidence Act Cap 80 of the Laws of Kenya which provides:

“(1) Whoever desires any Court to give judgment as to any legal right or liability on the existence of facts which he asserts must prove those facts exist. (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”

28. The Court of Appeal in *Mumbi M’Nabea vs David M Wachira* [2016] eKLR stated as follows:

“In our jurisdiction, the standard of proof in civil liability claims is that of the balance of probabilities. This means that the court will assess the oral, documentary and real evidence advanced by each party and decide which case is more probable. To put it another way, on the evidence, which occurrence of the event was more likely to happen than not...The position was re-affirmed by the Court of Appeal in *Maria Ciabaitaru M’airanyi & Others v Blue Shield Insurance Company Limited -Civil Appeal No. 101 of 2000* [2005] 1 EA 280 where it was held that: “Whereas under section 107 of the Evidence Act, (which deals with the evidentiary burden of proof), the burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue, section 109 of the same act recognizes that the burden of proof as to any particular fact may be cast on the person who wishes the court to believe in its existence.”

29. Further, in *Karugi & Another V. Kabiya & 3 Others* [1987] KLR 347 the Court of Appeal stated that:

“The burden on a plaintiff to prove his case remains the same throughout the case even though that burden may become easier to discharge where the matter is not validly defended and that the burden of proof is in no way lessened because the case is heard by way of formal proof...The plaintiff must adduce evidence which, in the absence of rebuttal evidence by the defendant convinces the court that on a balance of probabilities it proves the claim.” (Emphasis added).

30. In the instant case, it is clear that the respondents did not avail any evidence showing negligence on the part of the appellant. It is not disputed that the 2<sup>nd</sup> respondent received the email containing bank account details from the 1<sup>st</sup> respondent and not the appellant. The trial magistrate in his judgment observed that the overall evidence suggested the commission of fraud on the part of some person(s) but did not point to a specific person(s) and the hacking of the 2<sup>nd</sup> respondent’s email was only speculative.

31. The observation made above by the trial magistrate clearly indicates that no evidence was adduced by the respondents implicating the appellant in the commission of fraud. The case was based on mere speculations. It is my opinion that the trial magistrate erred in fact and law in finding that there was negligence on the part of the appellant’s employee(s) in remitting 10,600 US dollars to an account with the wrong name as captured in P Exhibit 3 (a). The said P Exhibit 3a is a letter the 2<sup>nd</sup> respondent’s bank released on credit transfer to one Josephine Nyokabi Wansiky.

32. The said letter shows that the originator of the instructions was one GUNNAR HALLSSON who is the 2<sup>nd</sup> respondent who testified as PW1 in the lower court. It was the 2<sup>nd</sup> respondent’s evidence that he had received an email from the 1<sup>st</sup> respondent giving her name, account name and postal address. The account as reflected in P Exhibit 3a is 2027xxxxx Barclays Bank of Kenya Ltd now Absa in the



- names of Josephine Nyokabi Wansiky. Is this the account that was given to the 2<sup>nd</sup> respondent by the 1<sup>st</sup> respondent vide the email?
33. The court could only be in a position to know that if the 2<sup>nd</sup> respondent had availed the said email as part of his evidence. I raise this question because P EXB7 shows an account No. 2027xxxxxx in the 1<sup>st</sup> respondents names of Josephine Nyokabi Wanjiku. Secondly when did the respondents discover that the money was not reaching the 1<sup>st</sup> respondent? Being good friends, I am sure the 2<sup>nd</sup> respondent was updating his partner whenever he sent her money. He said they used to communicate via email. It was after sending her money six (6) times that she told him she never received the funds. I find this to be a bit strange.
34. The document produced as P EXB 3a has the mail address of P. O. BOX 17809 Nakuru. The documents PEXB 6, 7 also have the same mailing address. Did the 1<sup>st</sup> respondent get the mail P EXB 3a? If she did what action did she take since the 3<sup>rd</sup> name was Wansiky and not Wanjiku?
35. The respondents in their evidence talked of a fraudulent account and impersonation. The issues raised herein were serious issues requiring proper investigations for the court to know whether there was real fraud and who indeed was the beneficiary of the funds. There was no evidence adduced to show that the matter was reported to the Police or Anti-Fraud Unit for investigation. A police investigation would have unearthed whether the names Josephine Nyokabi Wanjiku and Josephine Nyokabi Wansiky belonged to one and the same person. Same for the two Absa account Nos. 2027xxxxxx and 2027xxxxxx. It is only the police or the Fraud unit who could have unraveled this.
36. From my above analysis I do find that the respondents did not prove their case on a balance of probabilities. The appeal is found to have merit and is allowed. In view of the above findings on the main appeal its my view that the cross-appeal lacks merit and is dismissed.
37. The above being my findings I hereby:
- i. Set aside the Judgment delivered on 6<sup>th</sup> June, 2018 by Hon G. H. Oduor Chief Magistrate, and substitute it with an order dismissing the plaintiffs' (Respondents) case in the lower court.
  - ii. Any money paid by the appellant to the respondents as a result of the said Judgment shall be refunded to the appellant.
  - iii. Costs of the appeal to the appellant.
38. Orders accordingly

**DELIVERED VIRTUALLY, THIS 11<sup>TH</sup> DAY OF APRIL, 2024 IN OPEN COURT AT NAIROBI.**

**H. I. ONG'UDI**

**JUDGE**

