



**Mate v Stanbic Bank of Kenya Limited (Civil Appeal E841 of 2021)
[2023] KEHC 49 (KLR) (Civ) (17 January 2023) (Judgment)**

Neutral citation: [2023] KEHC 49 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CIVIL
CIVIL APPEAL E841 OF 2021
DAS MAJANJA, J
JANUARY 17, 2023**

BETWEEN

AMY MATE APPELLANT

AND

STANBIC BANK OF KENYA LIMITED RESPONDENT

(Being an appeal from the Judgment and Decree of Hon. M. Mutua, Adjudicator/RM dated 19th November 2021 at the Small Claims Court at Nairobi in SCCC Claim No. 309 of 2021)

JUDGMENT

1. This appeal arises from a Judgment of the Small Claims Court dismissing the Appellant's claim for Kshs. 364,000.00 against the Respondent ("the Bank").
2. The Appellant's claim set out in her Statement of Claim dated 8th June 2021 is that she was an account holder with the Bank. On 15th March 2021, she visited the Bank's Garden City Mall Branch to inquire how to transfer money via the Pesalink platform. The Bank's customer service instructed her on how to use Pesalink. She states that the first attempt to transfer resulted in a message from Pesalink stating that the transaction had failed. She was then instructed to try again which she did successfully. She later learnt that the amount of Kshs. 364,000.00 had been debited twice whereupon she notified the Bank's agent of the error and requested immediate reversal of the second transfer. She states that the Bank refused and or neglected to reverse the error causing her to suffer a loss of the Kshs. 364,000.00.
3. In its Response to the Claim, the Bank admits the facts but denies that it is liable. It states that Pesalink is an independent and integrated money transfer service that allows customers of all local banks in Kenya to transfer money from one bank to another. As regards the issue of reversal, the Bank states that it initiated reversal of the Kshs. 364,000.00 with the recipient bank, Co-operative Bank of Kenya Limited but was advised that the request for reversal had been declined as the third party who received



the money had declined to issue Co-operative Bank of Kenya Limited with consent for the reversal. The Bank informed the Appellant of the communication and advised her to follow up with the third party to recover her money.

4. At the hearing, the Appellant (PW 1) testified while the Bank called its legal counsel, Simon Mwangi (DW 1) as its witness. In the judgment dated 19th November 2021 (“the Judgment”), the Adjudicator raised two issues for determination. First, whether the Bank was negligent and second, whether the Appellant had proved her case on the balance of probabilities. The Adjudicator concluded that based on the totality of the evidence, the Bank acted diligently after the Appellant notified it of the double debit and since Pesalink was not within the Bank’s control, it was not responsible for the failures of the third party platform.
5. It is the Judgment that has given rise to this appeal based on the Memorandum of Appeal dated 2nd December 2021. Although the Appellant has raised seven grounds of appeal, in her written submissions, she has condensed the grounds into two; Whether the Bank breached its fiduciary duty to her and whether the Appellant was entitled to compensation. Both parties filed written submissions in support of their respective positions.
6. In resolving this appeal, it is important to recall the appellate jurisdiction of this court in relation to appeals from the Small Claims Court is circumscribed by section 38(1) of the Small Claims Court Act, 2016 (“the SCCA”) which provides that ‘A person aggrieved by the decision or an order of the Court may appeal against that decision or order to the High Court on matters of law.’ A court limited to resolving matters of law is not permitted to substitute the Subordinate Court’s decision with its own conclusions based on its own analysis and appreciation of the facts unless the findings are so perverse that no reasonable tribunal would have arrived at them (see John Munuve Mati v Returning Officer Mwingi North Constituency & 2 others NRB CA EPA No. 5 of 2018 [2018] eKLR).
7. As I intimated earlier, the facts giving rise to this appeal are not in dispute. The Appellant went to the Bank. She was instructed how to use Pesalink to transfer money to another bank. She carried out the transaction which resulted in two debits in her account. She informed the Bank of the error. The Bank informed the third party bank of the error but the error could not be reversed.
8. Since there are no issues of fact to resolve, the only issue of law is whether, based on the undisputed facts, the Bank was negligent and liable to the Appellant. As the basis of her case, the Appellant cited Fidelity Commercial Bank Limited v Italian Market Kenya Limited NRB CA Civil Appeal No. 248 of 2015 [2017] eKLR where the Court of Appeal dealt with the fiduciary duty owed by a bank to its customers. It observed as follows:

We endorse the pronouncement of Brightman J in *Karak Brother Company Ltd vs Burden* [1972] 1 All ER 1210, which has been cited with approval in several of our local cases (e.g *Simba Commodities Limited vs Citibank N.A*, Civil Case No. 236 of 2003) where the learned Judge stated:-

“As between the company and the bank, the mandate, in my view, operates within the normal contractual relationships of customer and banker and does not exclude them. These relationships include the normal obligation of using reasonable skill and care; and that duty on the part of the bank, of using reasonable skill and care, is a duty owed to the other party to the contract, the customer, who in this case is the plaintiff company, and not to the authorized signatories...”



“... while carrying out the customer’s instruction a bank is under obligation to exercise reasonable skill and care. That skill and care applies to interpreting, ascertaining and acting in accordance with the instructions of the customer.”

The court further observed as follows:-

“In exercising its duty of care the paying bank was bound to make such enquiries as might, in given circumstances, be appropriate and practical, where it had, or a reasonable banker would have, grounds of believing that the authorised signatories were misusing their authority for purposes of defrauding their principal or otherwise defeating his true intentions.”

This authority is of persuasive value but it is spot on and good law.

9. To illustrate the general principle that money held in credit in a bank account belongs to the customer and the bank is under a fiduciary duty to act within and follow the customer’s instructions with respect to money held in the account, the Bank cited Eunice Wairimu Muturi and Another v James Maina Thuku and Another ML HC COMM. No. 343 of 2011 [2018] eKLR where the court explained that:

23. The general principles of law are that, the relationship between the Bank and its customer is contractual. The main basis of this relationship is one of debtor and creditor. As held in the case of; *Foley vs Hill* (1848), where the customer’s account is in credit, then the bank is in effect the customer’s debtor, that is to say that the bank owes the money to the customer. Where it is in debit, then the customer is the banker’s debtor. In this contractual relationship, the bank owes the customer several duties which includes but not limited to: a duty to comply with the customer’s mandate (*Joachson vs Swiss Bank Corporation* (1921)). It is important to realize that this duty not only refers to the original mandate completed when the customer opened the account but also various other documents which are interpreted as mandates, including standing orders, direct debits and cheques. Therefore, the Bank owes its customer an obligation to obey the customer’s instructions based on the mandate given.

10. The Appellant contends that the Bank encouraged her to use Pesalink and even guided her on how to use it and it is thus liable. Further, that the Pesalink platform is a system used to ease transmission of funds from one bank to another and does not in any way alter or reduce the Bank’s control over the customer’s funds. It submits the Bank ought to have exercised due care and caution not to authorize withdrawal of funds multiple times as it knew that the Appellant intended to transfer only Kshs. 364,000.00 and that it instructed her to try again after the initial attempts to transfer the money had failed.
11. On its part, the Bank submits that it acted in accordance with the Appellant’s instructions which she issued twice and once she realized that there was an error, it also acted on her instructions and requested the recipient bank to reverse the erroneous transaction. It however could not reverse the transaction as the funds had already been credited into a bank account outside its control. The Bank contends that Pesalink is independent and if there was a system error in the notification sent to the Appellant it could not be faulted.
12. While I agree that the Bank has a duty of care to its customer to safeguard the customer’s account and in particular to ensure that the account is operated in accordance with the instruction and mandate of the customer, I hold that in the circumstances of this case the Bank acted reasonably. Bearing in mind that Pesalink is an independent platform, the Bank acted in accordance with the Appellant’s instructions



to debit her account twice. This fact is not disputed. The fact that the Appellant was encouraged to use Pesalink does not, for that reason alone, render the Bank liable for the acts of a third party. The Pesalink platform is an independent platform which is not within the control of the Bank. Moreover, the Appellant's case as pleaded was that, "The respondent failed, refused and/or neglected to reverse the erroneously transferred amounts despite numerous requests....," and that, "The Respondent however, has to date persisted in breach of the duty of care owed to our client by failing to reverse the erroneous debt of her account for the amount of Kshs. 364,000.00."

13. Once the Appellant notified the Bank of the error, it acted accordingly and communicated with the receiving Bank in accordance with the Appellant's instructions but the receiving bank declined to reverse the transfer. The Bank could not reverse the erroneous debit once the money was in the control of the receiving bank. From the totality of the facts and evidence, I agree with the Adjudicator that the Bank acted reasonably and could not be liable in the circumstances.
14. The Appeal is dismissed. The Appellant shall bear the costs of this appeal assessed at Kshs. 30,000.00 only.

DATED AND DELIVERED AT NAIROBI THIS 17TH DAY OF JANUARY 2023.

D. S. MAJANJA

JUDGE

Mr Kofuna instructed by Kairu Mbuthia Law LLP Advocates for the Appellant.

Ms Muhia instructed by Wamae & Allen Advocates for the Respondent.

