



**Co-operative Bank of Kenya Limited v Kimunya (Civil Appeal
E059 of 2021) [2023] KEHC 4063 (KLR) (2 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 4063 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CIVIL APPEAL E059 OF 2021**

AN ONGERI, J

MAY 2, 2023

BETWEEN

CO-OPERATIVE BANK OF KENYA LIMITED APPELLANT

AND

JAMES MBUGUA KIMUNYA RESPONDENT

*(Being an appeal from the judgment and decree of Hon. D. W. MBURU
(SPM) in Milimani CMCC no. 6427 of 2013 delivered on 12/7/2019)*

JUDGMENT

1. The respondent sued the appellant in Milimani CMCC no. 6427 of 2013 seeking general damages for an illegal transaction effected on his account on 9/2/2013.
2. The respondent in the plaint dated 14/10/2013 also sought refund of ksh.60,000 withdrawn from his account and also costs of the suit and interest.
3. The appellant denied the respondent's claim and filed a defence dated 18/12/2013.
4. A brief summary of the case was that the respondent opened account no. [Particulars Withheld] with the appellant in the year 2009 which was active at the material time of this case.
5. The respondent received a notification on his mobile phone that kshs.60,000 had been withdrawn on 9/2/2013.
6. Prior to the withdraw, there was a signature change which the respondent disputed which was effected following a letter which was undated and handwritten requesting for change of signature.
7. The appellant did not deny that there was such a change effected. The person who effected the change was not called as a witness.



8. The trial court found that there was breach of duty of care by the appellant and ordered a refund of the amount of ksh.60,000 illegally withdrawn and also awarded general damages of ksh.500,000.
9. The appellant is aggrieved by the said judgment and has filed this appeal on the following grounds;
 - i. The learned trial magistrate erred in law in awarding general damages in the sum of ksh.500,000/= for a contractual dispute.
 - ii. The learned trial magistrate erred in fact and law in awarding general damages in the sum of ksh.500,000/= without proof of harm on the respondent.
 - iii. The learned trial magistrate erred in law and fact in misapprehending and or ignoring the respondent's evidence that the plaintiff changed his signature and withdrew his own funds from the account.
 - iv. The learned trial magistrate erred in law and fact in holding that the applicant was negligent despite elaborate evidence of due care and diligence.
10. The appeal was canvassed by way of written submissions as follows: the appellant in its submission argued that the transaction in question was a change of signature which was followed by withdrawal of Kes. 60, 000 from the Respondent's account. Evidence was adduced by the bank that to change signature, the customer had to make a written request and avail a copy of their original identity card and submit the new signature. It was its argument that the burden of proof laid on the customer to discount the handwriting and signature. That apart from denying that he did not write the letter the customer did not produce any evidence to prove that the documents that the bank relied on were not genuine.
11. The appellants argued further that the court made an adverse inference against the bank for failing to call the officer who effected the change in signature despite the fact being informed that the officer could not be called as he had already left the bank. The appellant further drew attention to the fact that despite closing of pleadings in 2014, the respondent did not take any action and in 2017, the bank filed an application seeking to dismiss the suit for want of prosecution. A lot of time passed before the matter could be heard and it was therefore prejudicial for the court to draw an adverse inference from the non-availability of a witness who had left the bank
12. The appellant submitted that the trial magistrate was wrong in awarding general damages in a contractual dispute just because the respondent allegedly suffered loss. That there was no justification in awarding kshs. 500,000 as general damages and the same should be rectified by this court.
13. The respondent in his submission argued on the contrary and submitted that matter herein is premised on the failure of the appellant to exercise reasonable care and skill when dealing with his account. He indicated that in his plaint he pleaded negligence and/or breach of duty of care on the part of the appellant and specifically in the particulars of negligence under paragraph 6 of the plaint. The trial court was therefore correct in awarding general damages as the respondent had suffered inconvenience as a result of the negligence of the appellant.
14. On evidence the respondent argued that it was undisputed that he had an account with the appellant bank and that kshs 60,000 was withdrawn from the account on 9/2/2013. That what was in contention was whether the withdrawal was done by the respondent or was an unauthorized withdrawal. The respondent learnt through a mobile phone notification that a withdrawal was made on his account without his consent to which he informed the bank vide a letter dated 11/3/2013.



15. The transactional receipt bared a signature that was not the respondent's and thus it was not him who visited the bank on the aforementioned date. That despite the appellant insisting that it was the respondent who withdrew the money, no CCTV footage was ever availed to support this position.
16. That additionally the appellant failed to avail Nabib Wakofula as a witness to corroborate their evidence as he was the one who allegedly attended to the respondent during the alleged change of signature.
17. Finally, the respondents submitted that the appellant did not exercise due care when dealing with the respondent's account and because of the negligence the respondent suffered loss and was not able to use or access his money for more than 7 years. That the appellant's witness David Wamuti testified the respondent requested for a change of signature and indicated that the customer care officer noticed that the serial number and the details and place of issue of the national identity card in possession of the respondent were different from the ones in the national identity card which was used to open the account. It was therefore apparent that due care was not undertaken by the appellant when handling the respondents account.
18. This being the first appellate court my duty is to re-evaluate the evidence adduced before the trial court and to arrive at my own conclusion whether to support the finds of the trial court. In *Selle –Vs- Associated Motor Boat Co.* [1968] EA 123 in the following terms: -

“An appeal from the High Court is by way of re-trial and the Court of Appeal is not bound to follow the trial judge's finding of fact if it appears either that he failed to take account of particular circumstances or probabilities, or if the impression of the demeanour of a witness is inconsistent with the evidence generally.

An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect.

In particular, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally.”

19. The issues for determination in this appeal are as follows;
 - i. Whether the respondent proved his case to the required standard.
 - ii. Whether the appeal should be allowed.
20. On the issue as to whether the respondent proved his case to the required standard, I find that there was evidence that the respondent's signature was changed through a handwritten undated letter and ksh.60,000 was withdrawn from his account held with the appellant bank. That the burden of proof then laid on the customer to discount the handwriting and signature in the letter dated 9/3/2013.
21. The appellant bank owed the respondent a fiduciary duty of care arising out of the banker-customer relationship existing between the parties. According to *Black's Law Dictionary*, 11th edition, a fiduciary duty is:

“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.”

22. *Equity Bank Limited & another v Nairobi Robert Chesang* [2016] eKLR quoted the *Encyclopedia of Banking Law C.21 Selangor United Rubber Estate Ltd V Cradock (No.3)* [1968] 2 ALL ER 1073) where it was stated:

“ 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 contracts with its customers. The duty to exercise reasonable care and skill extends over the whole range of banking business within the contract with the customer. Thus the duty applies to interpreting, ascertaining and acting in accordance with the instructions of the customer.”

23. I find that the bank failed to establish that it exercised due diligence in allowing the change of signature.
24. The person who effected the change was not called to testify and neither was the date of the handwritten letter ascertained.
25. I find that the trial court was right in its finding that there was breach of duty.
26. The elements of negligence that the respondent had to establish are as follows;
- i. That the bank owed him a duty of care.
 - ii. That there was breach of the said duty.
 - iii. That there was resultant damages.
27. The respondent established that he was a customer of the bank and further that the bank owed him a duty of care not to allow unauthorized transactions.
28. There was evidence that the appellant allowed a withdrawal which the respondent did not initiate.
29. There was also evidence that the respondent lost ksh.60,000 as a result of breach of the duty of care.
30. I find that the respondent proved his case on a balance of probabilities and the trial court was right in directing the appellant to refund the ksh.60,000 and to pay general damages of ksh.500,000.
31. I find no reason to tamper with the award of damages. The only time when an appellate court is allowed to interfere with an award of damages is when the trial court relied on wrong principles or failed to rely on correct ones and arrived at an erroneous decision.
32. This is the principle enunciated in *Butt v. Khan* [1981] KLR 349 when it held as per Law, J.A that:
‘An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the Judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low.’
33. I find that the appeal lacks in merit and the same is disallowed.
34. I uphold both the finding on liability and award of damages.
35. The appeal is accordingly dismissed with costs to the respondent.



**DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS
2ND DAY OF MAY, 2023.**

.....

A. N. ONGERI

JUDGE

In the presence of:

.....for the Appellant

.....for the Respondent

