



**Family Bank Limited v Njiru & another (Commercial Appeal E150 of 2022)
[2023] KEHC 22029 (KLR) (Commercial and Tax) (5 September 2023) (Judgment)**

Neutral citation: [2023] KEHC 22029 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL APPEAL E150 OF 2022
DAS MAJANJA, J
SEPTEMBER 5, 2023**

BETWEEN

FAMILY BANK LIMITED APPELLANT

AND

ANN WAWIRA NJIRU 1ST RESPONDENT

NELSON NYAGA NJIRU 2ND RESPONDENT

(Being an appeal from the Judgement and Decree of Hon. K. Gweno, SRM/Adjudicator dated 29th September 2022 at the Small Claims Court at Nairobi SCC Claim No. E3825 of 2022)

JUDGMENT

Introduction and Background

1. By a Statement of Claim dated 09.06.2022, the 1st Respondent filed suit in the subordinate court against the Appellant (“the Bank”) seeking judgment of Kshs. 686,000.00 which she claimed the Bank fraudulently debited from her account 012****871 held at the Bank’s Kenyatta Avenue Branch on diverse dates in 2018.
2. In its response, the Bank denied the 1st Respondent’s claim and averred that the 1st Respondent’s account was debited to the account of the 2nd Respondent 014****616 also held by the Bank, the 1st Respondent’s brother, using credentials exclusively held by the 1st Respondent. That the same credentials had been used to transfer funds amounting to Kshs. 2,404,900.00 between 05.11.2015 and 03.11.2017 without contention to the 2nd Respondent. The Bank therefore denied any wrongdoing and if anything blamed the 2nd Respondent and urged that if the subordinate court finds in favour of the 1st Respondent, then the court should enter judgment against the 2nd Respondent for the claimed amount.



3. In his response, the 2nd Respondent joined the 1st Respondent in accusing the Bank of fraudulently causing the transfer of money from the 1st Respondent's account into his account and then subsequently and fraudulently debiting his account with Kshs. 609,080.00 in a scheme intended to defraud the Respondents of funds.
4. The matter was set down for hearing. The 1st Respondent testified on her own behalf (PW 1) and the Bank called three witnesses; its security officer, Moses Kipkorir Kosgey (DW 1), its Operations Supervisor at Kasarani Branch, Phoebe Anyango Oduor (DW 2) and its Relationship Officer at JKIA branch, Anthony Waweru (DW 3). The 2nd Respondent testified on his own behalf as DW 4. The court rendered its judgment on 29.09.2022 after considering the parties' submissions.
5. The Subordinate Court found that the Bank failed to prove that the signatures in the withdrawal slips belonged to or matched that of the 2nd Respondent and that there was nothing to prove that the transactions done over the counter on the various dates in 2018 were done by the 2nd Respondent. The court concluded that funds were transferred from the 1st Respondent's account to the 2nd Respondent's account and then withdrawn not by the 2nd Respondent but by an unknown person resulting in the 1st Respondent losing Kshs. 655,680.00. On the ATM withdrawals, the Subordinate Court found that the 2nd Respondent did not allege that his ATM card was stolen or compromised hence he may have withdrawn the money over the ATM and that there was nothing to prove that the Bank compromised his ATM.
6. Based on its findings, the Subordinate Court concluded that the Bank breached its duty of care to the 1st Respondent when it allowed unauthorized transactions to be carried on her account and that it failed to protect the 1st Respondent's money when it allowed third parties to transfer funds from the 1st Respondent's account and deposit the same to the 2nd Respondent's account and the money withdrawn over the counter.
7. The Bank has filed this appeal through its Memorandum of Appeal dated 13.10.2022. The appeal was canvassed by way of written submissions. I do not propose to rehash the submissions but make relevant references to them in my analysis and determination below.

Analysis and Determination

8. The parties are agreed that this appeal ought to be determined in line with the appellate jurisdiction of this court in relation to appeals from the Small Claims Court as provided by section 38(1) of the [*Small Claims Court Act*, 2016](#) 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 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 ([*John Munuve Mati v Returning Officer Mwingi North Constituency & 2 others*](#) [2018] eKLR). Therefore, the court will only limit itself to establishing whether the subordinate court's conclusions were reflective and supported by facts and evidence on record.
9. The Bank raises 8 grounds in its Memorandum of Appeal however, in its submissions, it has condensed the same to three issues; whether the Appellant was liable for the transfer of Kshs. 686,000.00 from the 1st Respondent's account to the 2nd Respondent's account, whether the Appellant was liable for the over-the-counter withdrawals of Kshs. 655,680.00 from the 2nd Respondent's account and whether the Appellant is entitled to the orders sought. I shall therefore deal with the same accordingly and ultimately determine if the subordinate court came to a decision supported by the facts and evidence.



10. It was common ground that the Respondents each held individual accounts with the Bank and that on various dates in 2018, the 1st Respondent's account was debited with the sum of Kshs. 686,000.00 which sum was credited into the account of the 2nd Respondent. It was also not disputed that a sum of Kshs. 655,680.00 of the sum credited into the 2nd Respondent's account was withdrawn over the counter from the Bank. In these transactions, the Respondents averred that they neither authorized nor participated in them and thus implicated the Bank for facilitating the unauthorized transactions.
11. That a bank owes a duty of care to its customers which duty subsumes the responsibility to safeguard and protect the customers' money is not in dispute. As submitted by the Bank, the Court of Appeal in *Fidelity Commercial Bank Limited v Italian Market Kenya Limited* NRB CA Civil Appeal No, 248 of 2015 [2017] eKLR accepted as reasonable proposition that a customer owed to a bank an implied contractual duty to report fraud of which the customer did not know, but which a putative reasonable person possessing the same information as the customer, would have discovered. However, what the Bank does not say is that the Appellate Court stated that blame should never shift to the customer when the bank was privy to all the ongoings of the customer's account. 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 among others third parties and unauthorised persons.
12. This case boiled down to how the Bank dealt with the subject transactions. In a letter dated 31.01.2022, the 1st Respondent wrote to the Bank reporting the illegal debiting of her account stating that she could not have made those transactions as she was overseas. In its response, the Bank, in a letter of 08.02.2022 stated that it was investigating the matter and would revert upon completion of the investigations. The record also indicates that the 2nd Respondent also wrote to the Bank on 21.12.2021 raising concerns of the credits to his account from the 1st Respondent and the subsequent withdrawals and a follow up letter of 31.01.2022 was responded to by the Bank in a similar manner to that of the 1st Respondent, that the Bank was investigating the matter. There was no response on the outcome of these investigations until when the 1st Respondent filed the suit and the Bank's witnesses stated that they had been engaging the 2nd Respondent but there was no breakthrough.
13. The Respondents were accusing the Bank of among others breach of duty of care and diligence and such allegations require evidence in rebuttal (See *Kenya Commercial Bank Limited v Shalimar Flowers Self Help Group* NYR CA Civil Appeal No. 84 "A" of 2016 [2018] eKLR). From the record, I agree with the subordinate court that no evidence was adduced by the Bank controverting the Respondents' position that they never authorized the subject transactions and yet the Bank had all the evidence in its possession to prove otherwise. The Bank had all the withdrawal slips for the cash withdrawal transactions from the 2nd Respondent's account together with the 2nd Respondent's specimen signature but the Bank still could not produce the latter to enable the trial court examine, even on face value, whether the signatures in the slips matched with that of the specimen. The Bank also could not explain how the 1st Respondent made transfers to the 2nd Respondent and yet she was overseas. It did not produce evidence to rebut the 1st Respondent's contention that she was not the one who authorized the said debits to the 2nd Respondent and the Bank also did not produce evidence of any diligence or enquiries it conducted prior to or during the transfers from the 1st Respondent's account to that of the 2nd Respondent. It must be recalled that these facts are within the knowledge of the Bank hence it bears the burden and without disclosing what in the ordinary cause of business it would be required to prove, the court is entitled to make an adverse inference.
14. In the absence of evidence challenging the Respondents' position, the Subordinate Court was right to find that the 1st Respondent did not authorize the debits and transfers to the 2nd Respondent and



the 2nd Respondent did not withdraw the sum of Kshs. 655,680.00 over the counter at the Bank. The Adjudicator's conclusions were in line with the facts and evidence on record.

Conclusion and Disposition

15. I dismiss the appeal with costs to the Respondents. The costs are assessed at Kshs. 30,000.00.

DATED AND DELIVERED AT NAIROBI THIS 5TH DAY OF SEPTEMBER 2023.

D. S. MAJANJA

JUDGE

