



**Stanbic Bank Kenya Limited v Simba (Civil Appeal E114 of 2022)  
[2023] KEHC 22277 (KLR) (Commercial and Tax) (19 September 2023) (Judgment)**

Neutral citation: [2023] KEHC 22277 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
CIVIL APPEAL E114 OF 2022  
JWW MONG'ARE, J  
SEPTEMBER 19, 2023**

**BETWEEN**

**STANBIC BANK KENYA LIMITED ..... APPELLANT**

**AND**

**ANTHONY MWAMISI SIMBA ..... RESPONDENT**

*(Being an appeal against the judgement of Hon. C. A. Okumu (RM/  
Adjudicator), delivered on 29/7/2022 in SCCOMM Case No. E1511 of 2022)*

**JUDGMENT**

1. The Respondent was the Appellant's customer operating account number 010xxxxxxx at the Appellant's Industrial Area branch.
2. By a Statement of Claim dated 16/3/2022, the Respondent instituted SCCOMM No E1511 of 2022 claiming *inter alia* a refund of Kshs 257,900/- from the Appellant. The Respondent's claim was premised on the allegation that on 8/1/2022, a total sum of Kshs 257,900/- was fraudulently withdrawn from his account held with the Appellant without his authorization. The Respondent claimed that the bank acted in breach of its fiduciary duty to diligently handle the Respondent's account and to ensure funds deposited are available whenever they are required. In its defence, the Appellant argued that the instructions for the disputed transactions were issued to the bank from the Respondent's registered phone number through the USSD platform and that a transaction can only be successful when the Respondent input's his PIN to authorise the same.
3. The lower court entered judgement in favour of the Respondent and ordered the Appellant to refund him a sum of Kshs 257,900/- with interest until payment in full.



4. Vide a Memorandum of Appeal dated 28/8/2022, the Appellant appealed against the said judgement on the following grounds:

- “ 1. The learned Magistrate erred in law and fact by failing to take into account the evidence placed before the Honourable Court;
  - a. That a PIN is only known to the customer and is required to authorise mobile banking transactions.
  - b. That when a transaction is initiated, a customer is prompted to enter his PIN, which is only known to the customer.
  - c. That transactions can only be initiated from the registered phone number and that the transactions were initiated from the Respondent’s registered mobile number through the USSD channel.
  - d. That the Respondent was in control of his mobile phone on 8th January, 2022, the day he alleges to have discovered the fraudulent transfers, based on his mobile transaction of Kshs 900/-
  - e. That since the Respondent admitted that he never lost his mobile phone or shared his PIN, the Appellant was right to deem the Respondent as the origin of the instructions.
  - f. That exculpatory evidence was submitted by the Appellant, which evidence duly noted that the Appellant had not breach any of its fiduciary duties, or contractual duties arising from the Bank-client relationship.
2. The learned Magistrate erred in law and in fact by failing to appreciate that the Respondent’s allegations of fraud had not been specifically pleaded and proved, and that the burden of proof in respect of fraud is to a higher legal threshold.
3. The learned Magistrate erred in law and fact by holding that the Appellant was negligent in the manner it dealt with the Respondent’s account.
4. The learned Magistrate erred in law and in fact by failing to evaluate the evidence on record, thus, arriving at an erroneous finding.
5. The learned Magistrate erred in law and fact in not adhering to the legal threshold on burden of proof placed on a Plaintiff in a suit, thus, arriving at an erroneous finding.
6. The learned Magistrate erred in law and fact by making a finding that the Respondent herein was entitled to a refund and costs, together with an award of interest.
7. The learned Magistrate erred in law and fact by holding that the Respondent was entitled to interest and cost of the suit.”



5. Based on these grounds, the Appellant prayed to have the appeal allowed and for orders to have the judgment of the lower court set aside and to have it substituted with a finding that the Respondent's suit be dismissed with costs.
6. Both parties herein filed their respective submissions which I have considered. I have also analysed the record of appeal.
7. Upon considering the grounds of Appeal as set out in the Memorandum of Appeal as filed only one issue emerges for determination, to wit, whether the Appellant breached the duty of care it owed to the Respondent.
8. It is not in dispute that on 8/1/2022, a total sum of Kshs 257,900/- was withdrawn from the Respondent's bank account held at the Appellant's branch in Industrial area in four batches. The Respondent averred that he did not carry out the said transactions. It is the Appellant's position that Mobile banking transactions are initiated by the customer through his/her mobile phone and before any transaction is carried out a personalised PIN number is entered by the customer. The Respondent further avers that the bank can only carry out transactions based on the instructions of the customer and that the Bank has the primary duty to honour the customer's instructions and make payment in accordance with the mandate of the customer.
9. From the Record of Appeal, I note that the lower court in the judgment of 29/7/2022 did not consider the fact that the transactions of 8/1/2022 were initiated by the Respondent's mobile number which he admitted, during the hearing, that he had always used to carry out mobile banking and, that he further confirmed that the sim card and/or phone had not been reported as stolen at the time of the said transaction. Further, I note that the lower court did not consider the fact that a PIN which is expected to be only known by the customer was required to authorize and complete any mobile transactions.
10. I am persuaded that, as averred by the Appellant, once it received a request to transfer funds from the Respondent's phone number via mobile banking and proceeded to transfer the same to the recipients' phone numbers, the Appellant did not breach its statutory duty of care as envisioned by the [Banking Act](#). I also note from a careful consideration of the record; the allegation of fraud has not been proved as no material was placed before the court to support the allegations. If there was fraud involved, the Appellant bank did not know as it was simply carrying out the instructions of its customer, in the usual manner.
11. I note that the Adjudicator's judgement found that the Appellant owed the Respondent a duty of care and that the Appellant did not send an SMS alert to the Respondent when the said sums were withdrawn thus violating clause 1.5 of the Mobile Banking Agreement. However, on cross examination the Appellant's witness testified that she was not able to confirm receipts of alerts to specific client's phone's as Safaricom ensures delivery of the same and not the bank.
12. While it may be true that the Respondent did not receive a notification of money withdrawal from his account, I find that the Appellant had diligently carried out its duty of care as stipulated in the Mobile Banking Agreement and that it did not act negligently when it transferred the sums of money pursuant to the instructions issued through mobile banking.
13. I find and hold that the Appellant has satisfactorily proved that the transactions in question were initiated through the USSD Code Channel and the bank acted within its fiduciary duty in honouring the transactions as they were initiated through the registered mobile number
14. I therefore find that the appeal has merit and allow the same as prayed with costs awarded to the Appellant.



**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 19<sup>TH</sup> DAY OF SEPTEMBER 2023.**

**J. W. W. MONG'ARE**

**JUDGE**

In the presence of:-

1. Mr. Otieno holding brief for Githinji for the Appellant.
2. Ms. Mukobi holding brief Mr. Wachira for the Respondent.
3. Amos - Court Assistant

