



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 86 OF 2020

THE COOPERATIVE BANK OF KENYA LTD.....APPELLANT

VERSUS

MICHAEL OCHILA AMINGA.....1ST RESPONDENT

ARDELLINE MASINDE.....2ND RESPONDENT

BOTH TRADING AS LINMAS ENTERPRISES

(Being an appeal from judgement of Hon. A. N. Makau,

PM delivered at Nairobi on 12th June 2019 in CMCC no. 4445 of 2016.)

JUDGEMENT

1) The respondents herein filed an action against the appellant before the Chief Magistrate's Court vide the plaint dated 8th July 2016 claiming for inter alia pay of ksh.95,000/= plus interest and costs in respect of unauthorized bank withdrawals. Hon. A. N. Makau learned Principal Magistrate heard the suit and in the end entered judgment in favour of the respondents.

2) The appellant being aggrieved preferred this appeal and put forward the following grounds;

i. THAT the learned magistrate erred in law and in fact in finding against the appellant without any evidence that the respondents' bank account was accessed by other means other than the bank account's authorized mobile money PIN, which PIN was at all times in the custody of the respondents.

ii. THAT the learned magistrate erred in law and in fact by disregarding the appellant's testimony that though the respondents' bank account was accessible using wireless application protocol (WAP), the access was only possible using the correct login credentials, the registered mobile phone number and the correct mobile money PIN, which PIN was at all times in the custody of the respondents.

iii. THAT the learned magistrate erred in law and in fact in finding and attributing liability to the appellant merely because the respondents' bank account was accessed and the respondents complained, without the learned magistrate making a finding on whether the appellant demonstrably authorized, condoned or allowed the said allegedly wrongful access.

iv. THAT the learned magistrate misapprehended the operation of the subject mobile money facility, Mco-op cash in finding that the amounts the subject of the suit in the subordinate court were withdraw from the respondents' bank account using mobile phone numbers other than the mobile phone number registered for the facility.

v. THAT the learned magistrate erred in law and in fact by disregarding the appellant's evidence that the transactions the subject of the suit in the subordinate court were made before the respondents reported the occurrence of the transactions to the appellant.

vi. THAT the learned magistrate erred in law and in fact in finding that the appellant allowed transactions on the respondent's bank account after the appellant had blocked the 1st respondent's money wallet.

vii. THAT the learned magistrate erred in law and in fact in finding that the appellant transferred or reversed the monies

allegedly withdrawn from the respondents' bank account back to the said account upon the respondents reporting the same to the appellant.

viii. THAT the learned magistrate erred in law and in fact in finding that the action taken by the appellant to block the 1st respondent's money wallet was not a sufficient measure to safeguard the respondents' funds held by the appellant.

ix. THAT the learned magistrate erred in law and in fact in disregarding the indemnity accorded to the appellant under the terms and conditions for the operation of the respondents' subject bank account using mobile money PIN.

x. THAT the learned magistrate erred in law and in fact in holding the appellant liable for breach of contractual duty to the respondents.

xi. THAT the learned magistrate erred in law and in fact in allowing the respondents' claim in the subordinate court suit and awarding costs thereon.

3) The advocates appearing in this appeal recorded a consent order to have the appeal disposed of by written submissions. I have re-evaluated the evidence that were presented before the trial court. I have also considered the rival written submissions. Though the appellant put forward a total of 11 grounds of appeal, those grounds may be disposed of by three main grounds vizly”

4) **First**, whether the trial magistrate erred in holding that the respondents bank account was accessed by strange mobile numbers other than the number linked to the account.

5) **Two**, whether the appellant was negligent and or in breach of its contractual obligation to the respondents.

6) **Three** whether the respondents are entitled to indemnity and to the claim.

7) On the first ground, it is the submission of the appellant that without any evidence before it, in support of the finding that strange numbers were used to access the respondents' account, the finding must be overturned. The appellant further argued that it tendered evidence showing the contrary. The appellant stated that its expert witness one Wycliffe Tongi (DW1) stated that it was not possible to access the respondents' account using a different number other than the one linked to the account.

8) The appellant stated that the evidence of DW1 were not controverted. The trial magistrate was accused of disregarding the uncontroverted evidence of DW1. It is the submission of the respondents that they proved their case that the disputed withdrawals were fraudulent and were not effected by the respondents or through the 1st respondent's phone number.

9) The respondents also argued that the withdrawals took place due to the appellant's negligence and breach of contract. In the judgment, the learned Principal Magistrate stated the respondents' bank account was interfered with and money withdrawn from it using different mobile numbers which did not belong to the respondent.

10) It was also stated by the trial court that when the issue was reported to the appellant it transferred back some of the money and blocked the M wallet of the 1st respondent. The trial magistrate further stated that the appellant did not make a follow up to trace and or take action on the owners of the phone numbers that benefited or withdrew the money.

11) After a careful re-evaluation of the evidence, it is clear that the evidence of DW1, an expert seem to suggest that the respondents' account could only be accessed through the 1st respondent's phone number which was linked to the account using the PIN. DW1 failed to give details of the phone numbers which accessed the respondents' account. He also failed to expressly state that the 1st respondent's phone number was used.

12) With respect, I am satisfied that in the circumstances of this case and on the basis of the evidence tendered before the trial court, that the learned Principal Magistrate came to the correct conclusion which cannot be faulted on appeal.

13) The second ground is whether the appellant was negligent and in breach of the contractual obligations to the respondents.

14) It is the appellant's submission that there was no evidence tendered to show that the appellant condoned or authorized access to the respondents' bank account through unauthorized means.

15) The appellant argued that DW1 demonstrated that the respondents' account could only be accessed through the 1st respondent's authorized phone number and PIN.

16) The respondents are of the submission that the appellant did not undertake any serious steps to discover the fraudsters. The documents in form of bank statements which were produced show that a sum of kshs.155,000/= was withdrawn from the respondent's bank account in a single day and thereafter a sum of ksh.60,044.= was refunded. The appellant categorised the repayment as a reversal.

17) I have already stated that the trial magistrate noted that the appellant acted in a casual manner in dealing with the complaint. It is said the appellant simply did not make a follow up to trace the culprits but it instead made a partial refund and blocked the plaintiffs' M wallet

18) The evidence and the conduct of the appellant lead to the conclusion that it was negligent and in the process breached the customer-bank contract. The trial magistrate therefore came to the correct conclusion in the matter.

19) The final ground is whether the respondents are entitled to indemnity and the claim. Having established that the appellant was negligent by failing to safeguard its interest as the bank customer, the respondents are entitled to the claim. The trial court properly arrived at its conclusion.

20) In the end, this appeal is found to be without merit. It is dismissed with costs to the respondents.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 8TH DAY OF OCTOBER, 2021.

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J. K. SERGON

JUDGE

In the presence of:

..... for the Respondent

..... for the Appellant