REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

CIVIL APPEAL NO. E069 OF 2024

EQUITY BANK (KENYA) LIMITED…….. APPELLANT

VERSUS

CALEB GITHAIGA WACHIRA…….. …….RESPONDENT

JUDGMENT

1. The appeal arises from the ruling delivered on 2.10.2024 by the Honourabe N.W. Wanja (Resident Magistrate) in Othaya MCCC No. E002 of 2021. The court made the following orders:
    a) The Plaintiff/Applicant's application dated 11.6.2024 seeking to cite the Defendant/Respondent for contempt of court dated 25.5.2023 is hereby allowed and the Defendant/Respondent is found to be in contempt of court for disobeying the said court orders.
    b) I hereby allow prayer 1 and 4 of the application dated 11.6.2024, but reserve sentence until the contemnor is heard on mitigation unless the contemnor purge themselves of the contempt.
    c) Prayer 2 and 3 of the application are disallowed.

2. The Appellant being aggrieved by the ruling lodged the Memorandum of Appeal dated 25.10.2024 and raised the following material grounds:

    a) The leaned magistrate erred in not properly appraising the evidence and the law that the branch manager for the Defendant/Respondent herein be cited for contempt of court and be punished accordingly with jail term for a period of six months or any other punishment the court may deem fit for having deliberately disobeyed the orders of the court granted on 25.5.2023.
    b) The learned magistrate erred in law and fact in holding that the Respondent's application dated 11.6.2024 was not *res judicata*.
    c) The learned magistrate erred in law and fact in failing to appreciate the evidence that the Appellant had availed data that could be retrieved.
    d) The learned magistrate erred in law and fact in shifting the burden of proof to the Appellant.

3. Hitherto the court had made the following orders in respect to an earlier application dated 17.10.2023:

    a) The application filed on 17.10.2023 is hereby dismissed.
    b) Costs shall be in the cause.

c) The Defendant's operation manager is hereby directed to personally appear in court at the next mention date.

d) It is so ordered.

4. The Respondent filed a subsequent application and sought the following orders:

a) That the branch manager for the Defendant/Respondent herein be cited for contempt of court and be punished accordingly with jail term for a period of six months or any other punishment the court may deem fit for having deliberately disobeyed the orders of the court granted on 25.5.2023.

b) That the Defendant/Respondent, its agents, servants and employees or proxies be ordered to produce the closed circuit (CCTV) footage as indicated in the order.

c) That in the alternative, the Defendant be ordered to deposit the amount of Kshs 340,000 which is unaccounted for into the plaintiff's bank account number 0080101533292.

d) That any other or further orders be granted geared towards protecting the dignity and authority of this honourable court.

e) That costs be provided for.

5. Upon hearing the parties the court made the following orders:

    a) That a mandatory injunction order be and is hereby issued compelling the Defendant, its agents, servants, employees, proxies or otherwise howsoever to produce the closed-circuit television (CCTV) footages in relation to the specific dates the withdrawals were made.

    b) That costs of the suit and interest be awarded to the plaintiff to be borne by the defendant herein.

Submissions

6. The Appellant filed submissions dated 4.6.2025. It was submitted that the court erred in not finding that the Respondent's application dated 11.6.2024 was not *res judicata*. They cited section 7 of the Civil Procedure Act. Reliance was also placed on HCCC Misc. Appl. No. 241 of 2019 - **Nyandoro & Co. Advocates v Nairobi Water Conservation and Pipeline Corporation** based on which it was submitted that the issue of contempt of court had been raised in the previous application of 16.10.2023 and determined. It was further submitted that in that regard, the court was *funtus officio*.

7. The Appellant also submitted that the Appellant was not in contempt of the court order. Reliance was heavily placed *inter alia* on **Republic v Kenyatta University ex parte Losem Naomi Chepkemoi** (2017) eKLR. On this, it was submitted

that the procedure for personal service of the contempt order was not followed.

8. On their part, the Respondents filed submissions dated 30.6.2025 by which it was submitted that the application dated 11.6.2024 was not *res judicata*. The Respondent relied *inter alia* on **John Florence Maritime Services Limited & Another v Cabinet Secretary Transport and Infrastructure & Another** (2021) eKLR.

9. On contempt, the Respondents submitted that the Appellant was clearly in contempt of the order dated 25.5.2023. Reliance was placed on Order 40 Rule 3 of the Civil Procedure Act and among others the case of **Sheila Cassatt Issenberg & Attorney General v Antony Machatha Kinyanjui** (2021) eKLR. Based on this, it was submitted that the elements of contempt which were clear terms of order, knowledge of order, breach of order and deliberate conduct were proved.

Analysis

10. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand.

11. In the case of *Mbogo and Another vs. Shah [1968] EA 93* the Court stated:

> *"...that this Court will not interfere with the exercise of judicial discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which is should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion."*

12. The duty of the first appellate court was settled long ago by Clement De Lestang, VP, Duffus and Law JJA, in the locus classicus case of **Selle and another Vs Associated Motor Board Company and Others [1968]EA 123**, where the Judges in their usual gusto, held as follows;-

> ".. this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of re-trial and the Court of Appeal is not bound to follow the trial Court's finding of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression of demeanour of a witness is inconsistent with the evidence generally."

13. The Court is to bear in mind that it had neither seen nor heard the witnesses. It is the trial court that has observed the

demeanor and truthfulness of those witnesses. However, documents still speak for themselves. The observation of documents is the same as the lower court as parties cannot read into those documents matters extrinsic to them.

14. In the case of **Peters vs Sunday Post Limited [1958] EA 424**, the court therein rendered itself as follows:

> **It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses…But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion…"**

15. It must be remembered that the matter proceeded by way of affidavit evidence. In a scenario where only documents are used, the court must defer to what is written as opposed to oral evidence. In **Fidelity & Commercial Bank Ltd V Kenya Grange Vehicle Industries Ltd (2017) eKLR**, the Court of Appeal, Ouko, Kiage and Murgor JJA held as doth;-

> "Courts adopt the objective theory of contract interpretation and profess to have overriding view sometimes called Four Corners of an Instrument, which insists that a documents meaning should be derived from the document itself, without reference to anything outside of the document, extrinsic reversed…"

16. There is, however wider latitude when it comes to affidavit evidence or where the court did not hear witnesses. In the case of **Sugut v Jemutai & 3 others (Civil Appeal 110 of 2018) [2023] KECA 202 (KLR) (17 February 2023) (Judgment) Neutral citation: [2023] KECA 202 (KLR)** Kiage JA stated as doth: -

> **"I have carefully considered those rival submissions by counsel in light of the record and the bundles of authorities placed before us. I have done so mindful of our role as a first appellate court to proceed by way of re-hearing and to subject the entire evidence to a fresh and exhaustive re-evaluation so as to arrive at our own independent conclusions. See Rule 29(1) of the Court of Appeal Rules 2010; Selle Vs Associated Motor Boat Co [1968] EA 123). I do accord due respect to the factual findings of the trial court out of an appreciation that it had the advantage, which we do not, of having seen and heard the witnesses as they testified. I am, however, not bound to accept any such findings if it appears that the judge failed to take any particular circumstance into account or they were based on no evidence or were otherwise plainly wrong. I note from the record before us that the learned Judge may not have been in a fully advantageous position in that regard having taken up the case when it was already half-way heard. Her conclusions on the evidence and findings of fact were**

therefore from a reading of what was recorded by the previous judge."

17. It is clear from a cursory perusal of the judgment of court dated 25.5.2023 that the court compelled the Appellant to produce CCTV footage in relation to the specific dates the withdrawals were made.

18. From the said judgment, the specific dates were not decreed. The plaint too did not state the specific dates. However, subsequent to the judgment, on the request by the Appellant, the Respondent furnished the dates as 17.12.2019, 2.1.2020, 2.8.2020, 2.12.2020. This was a span of about 12 months.

19. The response by the Appellant was that the CCTV coverage would be deleted within 3 months of coverage and so was irretrievable and unavailable. It was however the position of the Appellant that there were stored resultant images available since images could be stored for longer duration than the CCTV footage. Some of the said images were indeed availed to the Respondent.

20. The explanation given by the Appellant was plausible. The Respondent as customer of the Appellant had duty to immediately report any suspicious tampering or fraud on his account and there was no evidence that the Respondent reported specific dates when the incident of unauthorized withdrawal of funds from his account was done.

21. These were matters that ought to have been clearly pleaded in the plaint. Whereas the Appellant's position was that the bank could delete data to accommodate more fresh records, the lower court doubted this factual position despite the fact that the Respondent had only pleaded in his plaint that the amount was withdrawn on occasions in 2019 without specifying any date.

22. Coupled with the common position of the parties that the Appellant availed some images that were available, I find no basis upon which the court found the Appellant to be in contempt. The case of the Appellant was of a party who did the best that was in its ability to assist the Respondent, its customer.

23. Further, the issue before the lower court was not as to whether the bank was responsible for the loss of the Respondent's amount stated as Ksh. 340,000/=. Parties are bound by their pleadings and the Respondent was duty bound to plead if he so found basis that the Appellant had a hand in the alleged loss of Ksh. 340,000/=. This was not done and I find no basis upon which the Appellant could be directed to deposit the said money in the Respondent's account as was sought in the application.

24. The Respondent was bound to plead his case fully from inception. In the case of **Daniel Otieno Migore v South**

Nyanza Sugar Co. Ltd [2018] eKLR, Justice A C Mrima stated as doth: -

> **"11. It is by now well settled by precedent that parties are bound by their pleadings and that evidence which tends to be at variance with the pleadings is for rejection. Pleadings are the bedrock upon which all the proceedings derive from. It hence follows that any evidence adduced in a matter must be in consonance with the pleadings. Any evidence, however strong, that tends to be at variance with the pleadings must be disregarded. That settled position was re-affirmed by the Court of Appeal in the case of Independent Electoral and Boundaries Commission & Ano. vs. Stephen Mutinda Mule & 3 others (2014) eKLR which cited with approval the decision of the Supreme Court of Nigeria in Adetoun Oladeji (NIG) vs. Nigeria Breweries PLC SC 91/2002 where Adereji, JSC expressed himself thus on the importance and place of pleadings: -**
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> *".....it is now trite principle in law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded……*
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> *...In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid any surprises*

by which no opportunity is given to the other party to meet the new situation."

25. In the case of **Malawi Railways Ltd vs Nyasulu [1998] MWSC 3**, Malawi Supreme Court of Appeal stated as doth when the learned judges cited with approval an article by Sir Jack Jacob entitled *"The Present Importance of Pleadings"* published in [1960] Current Legal Problems at p. 174 whereof the learned author posited that: -

> As the parties are adversaries, it is left to each one of them to formulate his case in his own way subject to the basic rules of pleadings …….for the sake of certainty and finality; each party is bound by his own pleadings and cannot be allowed to raise a different fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover in such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice….

> In the adversarial system of litigation therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called "Any Other Business" in the sense that points other than those specific may be raised without notice."

26. In respect to the essence of pleadings, the Supreme Court of Kenya in its ruling on *inter alia* scrutiny in the case of **Raila Amolo Odinga & Another vs. IEBC & 2 others (2017) eKLR** found and held as follows in an election petition: -

> *"In absence of pleadings, evidence if any, produced by the parties, cannot be considered. It is also a settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the court for its consideration. The issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other party. Therefore, it is neither desirable nor permissible for a court to frame an issue not arising on the pleadings……'"*

27. The court cannot act on evidence, even where it is established, in the absence of pleadings. In the recent presidential Election Petition, the Court of Appeal of Nigeria sitting as the election court, in **Peter Gregory Obi & another versus Senator Bola Ahmed Tinubu &INEC & 3 others consolidated with petitions no. 4 and 5 both of 2023,** stated as doth: -

> **"In Belgore Versus Ahmed(2013) 8 Nwlr (Pt.1355) 60 the complaint against averments in the petition that were unspecific, generic, speculative, vague, unreferable (sic), omnibus and general in terms. The Apex court specifically held as follows: -**
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> > **"Pleadings in an action are written statements of the parties wherein they set forth the summary of material facts on which they rely on in proof of this claim or his defence as the case may be, and by means of which real matters [in] controversy between the parties are to be adjudicated are pleaded in a summary form. They must nevertheless be sufficiently specific and comprehensive to elicit the necessary answers from the opponent.**

28. Whereas the Appellant had the duty to maintain records relating to the operation of its ATM slots and ensure that the ATM, its hardware and software as well as all customer

records were secured and coverage well kept as to the influx of accessing customers, the bank was not under duty to ensure that the Respondent's ATM card was well kept and its PIN secured from unwarranted third parties. The Respondent's case was also not that the Appellant reneged on its duty. The case for the supply of the CCTV footage for no specific dates and the response by the Appellant that as the request had been made long after the dates, data could not be traced, and that like other data, was deleted after 3 months of storage, was reasonable. The Respondent specified the dates after the judgment of the court.

29. Having found that the Appellant was not in contempt, I have no difficulty finding that as the data was irretrievable, the order for its retrieval could only be an order of court granted in vain and the same was unwarranted. Court orders cannot be issued in vain. In **B vs. Attorney General [2004] 1 KLR 431,** the court stated as follows:

> **The Court does not, and ought not to be seen to make orders in vain; otherwise the Court would be exposed to ridicule, and no agency of the constitutional order would then be left in place to serve as a guarantee for legality, and for the rights of all people.**

30. It is the finding of this court that the burden remained with the Respondent to prove the allegations that he lost Ksh. 340,000/=. The Appellant on the other hand had a duty to

provide banking records to the Respondent. From the evidence, the Appellant provided the records that were available. Therefore, the burden remained with the Respondent to prove that there were further records that the bank had declined to provide and this was rebutted by the evidence of the Appellant that the information had since been archived and the data deleted.

31. This position was not challenged and I do not agree with the learned magistrate that the Appellant needed to prove that the data was archived or deleted. In **Raghbir Singh Chatte v National Bank of Kenya Limited [1996] eKLR** the Court of Appeal stated thus:

> "When a party in any pleading denied an allegation of fact in the previous pleading of the opposite party, he must not do so evasively, but answer the point of substance. Thus, if it be alleged that he received a certain sum of money, it shall not be sufficient to deny that he received that particular amount, but he must deny that he received that sum, or any part thereof, or else set out how much he received. And so, when a matter of fact is alleged with divers circumstances, it shall not be sufficient to deny it as alleged along those circumstances, but fair and substantial answer must be given."…
> …First of all a mere denial is not a sufficient defence in this type of case there must be some reason why the defendant does not owe the money. Either there was no contract or it was not carried out and failed. It could also be that

> payment had been made and could be proved. It is not sufficient therefore simply to deny liability without some reason given.

32. I have said enough to demonstrate that this appeal is merited and is for allowing. I allow it.

33. Before departing, I note that the learned magistrate gave a blanket order for release of a CCTV footage. The footage contained its customers who may have accessed the ATM. The appellant is under duty not to disclose such sensitive data to persons outside the law enforcement. What an unscrupulous person can do with the footages is without doubt enormous and may result in breach of data.

34. The order ought not to have issued in the first place in view of the fact that the access was through the ATM interface for which only the Respondent had access. Any breach of the ATM card interface must have been due to utter negligence of the Respondent. Releasing video footage cannot solve the puzzle on who withdrew the money from the Respondent's account. He could only have access through the criminal process (ADD ATM interface).

35. The Appellant is under no obligation to release any ATM data to the Respondent.

36. The issue of costs is governed by Section 27 of the Civil Procedure Act, which provides as follows:

> **(1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers: Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.**
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> **(2) The court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such.**

37. Costs are generally discretionary. However, the discretion is not arbitrary. The Court of Appeal in the case of **Farah Awad Gullet v CMC Motors Group Limited [2018] KECA 158 (KLR)** had this to say:

> **It is our finding that the position in law is that costs are at the discretion of the court seized up of the matter with the usual caveat being that such discretion should be exercised judiciously meaning without caprice or whim and on sound reasoning secondly that a court can only withhold costs**

either partially or wholly from a successful party for good cause to be shown.

38. The Supreme Court set forth guiding principles applicable in the exercise of that discretion in the case of **Jasbir Singh Rai & 3 others v. Tarlochan Singh Rai & 4 others, SC Petition No. 4 of 2012; [2014] eKLR**, as follows:

> **18.It emerges that the award of costs would normally be guided by the principle that "costs follow the event": the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However, the vital factor in setting the preference, is the judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, prior-to, during, and subsequent-to the actual process of litigation.**
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> **22. Although there is eminent good sense in the basic rule of costs - that costs follow the event- it is not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is the judicial discretion. It follows, therefore, that costs do not, in law, constitute an unchanging consequence of**

legal proceedings - a position well illustrated by the considered opinions of this Court in other cases. The relevant question in this particular matter must be, whether or not the circumstances merit an award of costs to the Applicant.

39. Costs follow the event. The event is the success by the appellant. The Respondent shall in the circumstances bear the appellant's costs of Ksh. 85,000/=.

Determination

40. In the upshot, I make the following orders: -

(a) The Ruling of the lower court dated 2.10.2024 is set aside and substituted thereof with an order dismissing the Respondent's application dated 11.6.2024.

(b) The Appellant shall have costs of this appeal of Ksh. 85,000/=.

DELIVERED, DATED and **SIGNED** at **NYERI** on this **11th** day of **November, 2025**. Judgment delivered through Microsoft Teams Online Platform.

KIZITO MAGARE

JUDGE

In the presence of: -

Mr. Mwaniki for the Appellant

Ms. Wairimu for the Respondent

Court Assistant – Michael