



Mugambi v Equity Bank, Kenyatta University Branch & another (Civil Appeal 114 of 2023) [2025] KEHC 15898 (KLR) (3 November 2025) (Judgment)

Neutral citation: [2025] KEHC 15898 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT THIKA
CIVIL APPEAL 114 OF 2023
RC RUTTO, J
NOVEMBER 3, 2025**

BETWEEN

ALEXANDER MIRITI MUGAMBI APPELLANT

AND

EQUITY BANK, KENYATTA UNIVERSITY BRANCH 1ST RESPONDENT

VIACOM OIL LIMITED 2ND RESPONDENT

(Being an appeal from the Judgment of Honourable Senior Resident Magistrate C. A Otieno in Ruiru Civil Suit No. 354 of 2020, delivered on 9th December, 2022)

JUDGMENT

1. The Appellant challenges the decision of in Ruiru Civil Suit No. 354 of 2020, delivered on 9th December 2022. The trial court dismissed the Appellant’s case with costs citing lack of evidence to prove that the Appellant’s account was overdrawn.
2. Before the trial court, the Appellant sued the 1st Respondent seeking, inter alia, orders for the removal of the alleged overdraw on his account, restoration of the account to a credit balance, annulment of the overdraw, general damages, and costs. In the Complaint, the Appellant alleged that on or about 8th September 2020, he made a withdrawal request from his account number 0260190745959 at the Kenyatta University Branch. However, the bank declined the transaction, returning the withdrawal document marked “Cash Withdrawal Declined, Do Not Pay.” Upon reviewing his bank statement, both electronically and physically, the Appellant discovered that his account had been overdrawn by Kshs. 3,000,000/= instead of reflecting the expected credit balance of Kshs.500,000/=. He contended that he had neither applied for nor received a loan, nor had he withdrawn the said amount, and that the 1st Respondent’s action caused him financial embarrassment, loss, and damage.
3. In its defence, the 1st Respondent, denied the Appellant’s claim asserting that the account had a balance of Kshs.500,000/= at the time it was flagged due to suspected fraudulent transactions. This action



followed a complaint lodged by the director of a company with which the Appellant was in dispute. The 1st Respondent further stated that the Appellant declined to provide documentation detailing the nature and purpose of the transactions or proof thereof. It maintained that the account was flagged pursuant to a lawful court order authorising investigations suspected fraudulent dealings. The 1st Respondent argued that it was statutorily obligated to verify the source of funds and the identity of the ultimate beneficiary in compliance with regulatory requirements.

4. The 2nd Respondent was subsequently enjoined in the suit, and filed a defence and counterclaim seeking judgment against the Appellant for rescission of contract, recovery of Kshs. 3,100,000/=, interest thereon, general damages for fraud and fraudulent misrepresentation, and costs. The counterclaim was based on allegations that the Appellant had falsely represented that he would sell seeds intended for scientific research on cancer treatment in Japan. The 2nd Respondent later discover that the seeds were counterfeit, lacked any medicinal value, and that the purported scientific research was non-existent.
5. After hearing parties, the trial court dismissed the appellant's case finding no evidence to support the claim that the account was overdrawn. The court also held that the 2nd Respondent's counterclaim was not validly before it.
6. Aggrieved by the Judgment delivered on 9th December 2022, the Appellant filed this appeal on the grounds that the Learned Magistrate erred in fact and in law in failing to substantively and appropriately consider the pleadings and evidence adduced by the parties as relates to the Appellant's account balance as at the time the observatory lien was placed; ignoring the fact that both the 1st Respondent and the 2nd Respondent had conceded that the account balance prior to the lien was Kshs.500,000/=, making it a non-contentious issue; misapplying the principle that parties are bound by their pleadings, despite the Respondents' admissions regarding the account balance; erroneously concluding that the Appellant failed to prove the account had a credit balance of Kshs.500,000/=, contrary to the evidence and admissions on record; failing to consider the material facts and evidence that the 1st Respondent had no legal basis for placing an observatory lien and allowing the 2nd Respondent to actively participate and file substantive pleadings as an interested party, despite the Appellant's objection.
7. The appeal was canvassed by way of written submissions. The Appellant's submissions are dated 15th May 2024 while those of the Respondent are dated 24th June 2024.

Appellants' Submissions

8. Counsel for the Appellant began the submissions by outlining the background of the matter and the grounds of appeal, before proceeding to address each ground substantively.
9. On ground 1, it was submitted that the trial court erred in law and in fact by failing to consider the purport of the pleadings filed by the parties and the evidence adduced, particularly regarding the Appellant's account balance at the time it was placed under observatory lien. The Appellant testified on 17th August 2022 and adopted the contents of his witness statements filed on record. He submitted that the 1st Respondent, in its statement of defence, did not dispute that account number 0260190745595 belonged to him and reflected a credit balance of Kshs.500,000/= at the time of flagging. The Appellant contended that this fact was expressly admitted in the pleadings and therefore ceased to be an issue for determination.
10. To support this assertion, the Appellant referred to DExh3, the account statement produced by the 1st Respondent, which showed the account balance as at 8th September 2020 when the account was



allegedly flagged. He submitted that had the trial court properly considered the pleadings and the evidence on record regarding the account balance at the time his withdrawal transaction was declined and the account subsequently flagged or placed under lien, it would have concluded that the account belonged to him and had a credit balance exceeding Kshs.500,000/=. The Appellant therefore urged this Court to allow Grounds 1 and 2 of the appeal.

11. On ground 3, which concerns whether the learned trial magistrate erred in fact and in law by failing to appropriately consider the pleadings, written submissions, and the material issues of law and fact, the Appellant submitted that the question of his account balance was not in dispute. He noted that the trial court identified four issues for determination, namely: whether the Plaintiff's account was overdrawn; whether the Plaintiff was entitled to the orders sought as against the Defendant; whether the Interested Party's counterclaim was validly before the court; and whether the Interested Party was entitled to the orders sought against the Plaintiff.
12. The Appellant argued that despite framing these issues, the trial court erred in disallowing the prayer for removal of the overdrawing from his account, despite clear evidence on record showing that his account had been overdrawn by Kshs.3,000,000/=. He pointed out the court itself acknowledged that DExh3, indicated a credit balance of Kshs.510,828.56/= and that PExh2, the cash withdrawal slip, showed he had attempted to withdraw only Kshs.20,000/=. He submitted that was unreasonable for a withdrawal of Kshs.20,000/= declined from an account with a credit balance exceeding kshs.500,000/=.
13. The Appellant further submitted that the 1st Respondent's pleadings confirmed that his account had a balance of Kshs.500,000/= when it was flagged. The Respondent also pleaded that the account was flagged on suspicion of fraudulent transactions following a complaint by the Director of the 2nd Respondent and pursuant to a lawful court order authorising investigation. The Appellant argued that this admission shifted the evidentiary burden to the bank to explain why the account was overdrawn despite acknowledging a positive balance. He maintained that this evidentiary burden formed the basis of his plea for removal of the overdrawing and restoration of the account to credit. He added that the 1st Respondent's evidence, both in examination in chief and under cross-examination, revealed that an account is placed under lien when funds exceeding one million shillings are received and supporting documents are required, or when there is a dispute over the funds. In this case, the account was frozen pursuant to an order emanating from the Othaya Magistrate's Court.
14. The Appellant maintained that one of his proposed issues for determination before the trial court was "whether the Defendant's act of freezing, declining withdrawal from, or marking the Plaintiff's account as overdrawn was proper." He argued that this issue was clearly drawn from the pleadings and evidence, and was therefore germane to the determination of the suit. He submitted that the trial court erred by framing and determining the matter solely on the question of whether the account was overdrawn, instead of addressing the substantive issues raised in the pleadings and evidence. He therefore prayed that Grounds 3, 4, and 5 of the appeal be allowed.
15. On grounds 6 and 7, the Appellant submitted that the issues before the trial court were whether his account was overdrawn and whether the 1st Respondent had any legal basis for placing an observatory lien over the account. He argued that the second issue flowed directly from the pleadings and the evidence. He further submitted that the 1st Respondent had no lawful basis to overdraw or place a lien on his account without an express order issued by a court of competent jurisdiction. He stated that on 8th September 2020, he attempted to withdraw funds from an ATM, but the transaction was declined due to an alleged overdraft. Upon inquiry, he was informed that the overdrawing originated from Equity Bank, Othaya Branch, yet no freezing order was shown to him. He later learnt that the amount



in question had been deposited by one Milton Gitahi, a director of the 2nd Respondent, prompting him to retrieve documents proving the source of his funds.

16. The Appellant added that he had previously transacted with Mr. Gitahi who testified and confirmed having deposited Kshs.3,100,000/= into the Appellant's account. Mr. Gitahi said he personally completed the deposit forms and indicated the purpose of the payment. The Appellant further submitted that the 1st Respondent's witness expressly confirmed that neither the court order nor the Notice of Motion application relied upon by the bank authorised the freezing of his account. The Appellant contended that the absence of an express court order directing the freezing of his account rendered the 1st Respondent's actions unlawful and unjustification. He argued that, at the very least, the bank ought to have sought clarification or initiated further investigations into the account before pursuing appropriate legal proceedings should there have been any legitimate suspicion of fraud.
17. While referring to Section 44 of the *Proceeds of Crime and Anti-Money Laundering Act* (POCAML) and its attendant Regulations, the Appellant submitted that the Act imposes an obligation on every reporting institution to monitor and report all complex, unusual, suspicious, large, or other specified transactions whether completed or not within seven days. These institutions are required to submit a report of their findings to the Financial Reporting Centre (FRC). The Appellant argued that neither the Act nor its Regulations confer upon a reporting institution the power to freeze or place an observatory lien on a customer's account, as the 1st Respondent purported to do. He added that the 1st Respondent failed to adduce any evidence showing that it had reported any suspicious activity concerning his account to the FRC, as required by law. He therefore maintained that the 1st Respondent's actions in freezing his account were ultra vires and unsupported by any valid court order or warrant.
18. Counsel urged the court to allow the appeal as prayed.

Respondents' Submissions

19. The Respondents identified three issues for determination that is;
 - a) whether the trial court appropriately considered the pleadings, written submissions and the material issues of law and fact in arriving at the issues for determination;
 - b) whether the trial court erred in fact and in law in finding that the 1st Respondent had legal basis to place an observatory lien over the Appellant's account; and
 - c) whether the trial court took into consideration the purport of the pleadings filed by the parties and the evidence adduced as relates to the Appellant's account balance.
20. On the first issue, the Respondents submitted that the trial court after careful consideration of the pleadings, submissions, and the relevant issues of law and fact, correctly identified the issue for determination as whether the Plaintiff's account was overdrawn and whether he was entitled to the orders sought. They argued that the trial court rightly found no evidence from the Appellant to prove that his account with the 1st Respondent bank was overdrawn. The Respondent maintained that the account had been frozen pursuant to an order issued by the Othaya Court in Miscellaneous Application No. 32 of 2020, obtained by the Directorate of Criminal Investigations (DCI) Othaya during fraud investigation.
21. While making reference to Section 44(2) of the *Proceeds of Crime and Anti-Money Laundering Act* (POCAML), the Respondents submitted that the 1st Respondent was legally empowered to monitor client accounts and verify the source of funds. They argued that the bank acted within the law when it requested the Appellant to provide documents verifying the source of funds in his



- account. They noted that the Appellant, both in examination-in-chief and under cross-examination, did not mention of having provided such documentation. The Operations Manager's testified that the Appellant walked out of the bank in protest when asked to provide the required information.
22. Citing the case of *Erastus Kibiti Stephen v Euro Bank & Commissioner of Police Criminal Application No. 9 of 2003*, the Respondents submitted that the bank's suspicion was necessitated by a complaint lodged by a director of the Interested Party, *Viacom Kenya Limited*, and was further reinforced by warrants issued by a court of competent jurisdiction authorising investigations into the Appellant's account. They argued that the controversy is ripe for determination before the criminal court which issued the impugned orders. They urged this Court to take judicial notice of those orders, arguing that they are matters of public notoriety.
 23. The Respondents further submitted that the trial court correctly observed that the Appellant had not sought any declaratory relief challenging the legality of the 1st Respondent's action in freezing his account. Since that issue was not pleaded, the trial court, had no jurisdiction to determine it. In support of that position, the Respondents cited the decision in *Galaxy Paints Company Ltd v Falcon Guards Ltd [2000] eKLR*, where the Court held that a court cannot pronounce itself on issues that do not flow from the parties' pleadings. The Respondents maintained that the trial court properly framed the issues after a thorough consideration of the pleadings, submissions, and the material facts and law presented before it.
 24. On the second issue, the Appellant, asserted in his witness statement, that the 1st Respondent's decision to freeze his account was without merit and violated his rights as an account holder. In contrast, the Respondents maintained that the Appellant's account was frozen pursuant to a valid court order issued by the Othaya Court in *Miscellaneous Application No. 32 of 2020*, obtained by the Directorate of Criminal Investigations (DCI) Othaya, during a fraud investigating. The order was produced in evidence as DExh2. They argued that a bank is entitled to freeze a customer's account upon receipt of a valid court order, and may place a lien where there is a dispute over the funds.
 25. The Respondents noted that, the Appellant did not challenge the freezing order during trial nor seek relief in his *Plaint* regarding its legality. They contended that this amounts to acquiescence and reiterated that parties are bound by their pleadings and cannot, introduce new issues at the appellate stage.
 26. On the third issue, the Respondents submitted that the trial court considered the pleadings and evidence regarding the Appellant's account balance. They argued that the Appellant's *plaint* sought removal of the alleged overdrawn, restoration of the account to credit, and annulment of the overdrawn. Therefore, the burden of proof lay with the Appellant which they claimed he failed to discharge.
 27. The Respondents further submitted that the Appellant did not produce any bank statement to demonstrate that his account with the 1st Respondent had been overdrawn by Kshs. 3,000,000/=, as alleged. Citing the decisions in *Gachinga Kibutha v Caroline Nduku [2018] eKLR* and *Trust Bank Limited v Paramount Universal Bank Limited & 2 Others [2009] eKLR*, they reiterated that the burden of proof lies with the party who alleges, and in this instance, the Appellant failed to substantiate his claims through credible evidence.
 28. In conclusion, the Respondent urged the court to dismiss the appeal with costs.



Analysis and Determination

29. 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 demeanor of the witnesses and hearing their evidence first hand. The foregoing duty was succinctly stated by the Court of Appeal in the case of *Selle v Associated Motor Boat Company Ltd* (1968) EA 123 and *Peters v Sunday Post Limited* [1985] EA 424).
30. I have carefully considered the entirety of the evidence presented before the trial court, the grounds of appeal; the judgment of the learned trial magistrate and the written submissions filed by both the Appellant and the Respondent together with the authorities cited. The issues for determination are;
 - a. Whether the Appellant proved his case to the required standard of proof in civil cases.
 - b. Whether the 1st Respondent acted lawfully in placing a lien or freezing the Appellant's account.

Whether the Appellant proved his case to the required standard of proof in civil cases.

31. The Appellant's case before the trial court was that on 8th September 2020, he attempted to withdraw Kshs.20,000/= from his Account No. 0260190745959 at the 1st Respondent's Kenyatta University Branch. However, the transaction was declined with the message "Cash Withdrawal Declined, Do Not Pay." He claimed that upon checking his account statement, he discovered that his account had been overdrawn by Kshs.3,000,000/=, instead of reflecting a credit balance of Kshs.500,000/=. Consequently, he sought an order directing the 1st Respondent to reverse the alleged overdrawn, restore his account to credit and compensate him for the embarrassment and loss allegedly suffered.
32. From the record, there was no evidence adduced by the Appellant to substantiate the alleged overdrawn. The only documents presented in support of his case were the demand letter to the 1st Respondent dated 14th September 2020 and a cash withdrawal slip of the same date. He did not produce any bank statements or documentation to demonstrate that his account had indeed been overdrawn. It is trite law that he who alleges must prove. Section 107 (1) of the *Evidence Act*, Cap 80 Laws of Kenya, provides that:-

"Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist."
33. In *Anne Wambui Ndiritu vs Joseph Kiprono Ropkoi & Another* [2005] 1 EA 334, the Court of Appeal held that:-

"As a general proposition under Section 107 (1) of the *Evidence Act*, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is case upon any party the burden of proving any particular fact which he desires the court to believe in its existence which is captured in Sections 109 and 112 of the Act."
34. It is, therefore, settled law that in civil cases, a party seeking judgment or declaration of legal rights based on specific facts bears the legal obligation to present evidence that best facilitates proof of the existence of those facts. Such a party must place before the court all reasonably available evidence relevant to the contested factual issue.
35. The burden of proof remained with the Appellant throughout. The Appellant argued that the Respondent admitted in its pleadings that the account had a balance of Kshs.500,000/= and therefore



the overdrawing was justified. However, the existence of a credit balance prior to the account being flagged does not, in itself prove that the account was subsequently overdrawn or that the bank unlawfully debited it. The Appellant failed to produce a bank statement showing a debit entry or to call any corroborative evidence to support his claim.

36. The learned trial magistrate correctly observed that “I therefore find no evidence from which I can find that the Plaintiff’s account with the Defendant’s bank was overdrawn.” Upon re-evaluation, I find that this conclusion was well founded in both law and fact. The Appellant did not discharge the burden of proof to the standard required in civil cases, that is, on a balance of probabilities.

Whether the 1st Respondent acted lawfully in placing a lien or freezing the Appellant’s account

37. The 1st Respondent explained that the Appellant’s account was flagged following a complaint from the director of the 2nd Respondent alleging fraudulent activity. Subsequently, the Directorate of Criminal Investigations (DCI) in Othaya obtained an order in Othaya Miscellaneous Application No. 32 of 2020 to investigate the account. The Operations Manager testified that the account was frozen pursuant to that order, which was produced as DExh2.

38. Upon examining DExh2, this court notes that the order does not expressly direct the freezing of the Appellant’s account. In fact, the 1st Respondent’s witness conceded in cross-examination that the order did not instruct the bank to freeze the account. While Section 44(2) of the *Proceeds of Crime and Anti-Money Laundering Act* (POCAML) empowers reporting institutions such as banks to monitor and report suspicious transactions to the Financial Reporting Centre (FRC), it does not authorize them to unilaterally freeze or restrict a customer’s account absent a specific court order. The statutory duty is to report suspicious activity within two days of arising and await lawful directions. Section 44(2) provides that;

“(2) Upon suspicion that any of the transactions or activities described in subsection (1) or any other transaction or activity could constitute or be related to money laundering, terrorism financing, proliferation financing or to the proceeds of crime, a reporting institution shall report the suspicious or unusual transaction or activity to the Centre in the specified manner within two days after the suspicion arose.”

39. Therefore, while the 1st Respondent may have been justified in flagging the account for scrutiny, the act of restricting withdrawals or treating the account as frozen was beyond the scope of DExh2 and contravened the lawful procedure envisaged under *Proceeds of Crime and Anti-Money Laundering Act* (POCAML). Banks must act strictly within the terms of lawful authority when dealing with customer accounts under investigation.

40. However, despite this finding, the Appellant did not plead or seek declaratory relief challenging the legality of the freeze. His prayers were limited to the removal of the alleged overdrawing and restoration of his account credit balance. In the case of *Gichinga Kubutha v Caroline Nduku* [2018] KEELC 3981 KLR the court stated with authority that

“.....It goes without saying that a party is bound by their own pleadings and the evidence they adduce in court. The purpose of pleadings is to ascertain with clarity the matters on which parties disagree and points of agreement so as to ascertain matters for determination.”

41. Consequently, the trial court could not determine an unpleaded issue, and this appellate court likewise cannot expand the scope of the dispute beyond what was presented at trial.



- 42. In light of the totality of the evidence, this court finds that the Appellant failed to produce evidence proof that his account was overdrawn or that he suffered quantifiable loss. Although the 1st Respondent’s reliance on an order that did not expressly authorise the freezing of the account was irregular, the Appellant did not properly challenge that action in his pleadings. The trial court correctly held that the Appellant did not discharge his evidentiary burden.
- 43. Accordingly, this court finds no reason to interfere with the decision of the trial court. The appeal is therefore dismissed each party will bear its own costs.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT MACHAKOS THIS 3RD DAY OF NOVEMBER, 2025.

RHODA RUTTO

JUDGE

In the presence of;

.....for Appellant

.....for Respondent

Selina Court Assistant:

