

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT BUSIA
CIVIL APPEAL NO. E043 OF 2025

FAMILY BANK LIMITED.....APPELLANT
VERSUS
NEMWEL MAKOYO.....1ST RESPONDENT
HON. ATTORNEY GENERAL.....2ND
RESPONDENT

**(Appeal from the judgement and decree, of Hon. PA Olengo,
Senior Principal Magistrate, SPM, in Busia CMCCC No. 3466 of
2016, of 24th August 2024)**

JUDGEMENT

1. The suit, at the primary court, had been filed by the 1st respondent, against the appellant and the 2nd respondent. He was claiming Kshs. 2,448,000.00, from the appellant, being funds that he had deposited there, with accrued interest, but the same was fraudulently or negligently paid out to the third parties by the appellant. He also claimed damages, for malicious prosecution and false imprisonment, following his arrest and prosecution, after he wrote to the Central Bank of Kenya, on the matter of the Kshs. 2,448,000.00.
2. The respondent resisted the claim, denying the allegations in the plaint, stating that it was not aware of any money lost from the account of the 1st respondent. The appellant counterclaimed for dismissal of the claim, general damages for the false allegations and costs.
3. A trial was conducted. The respondent testified, and did not call a witness. The appellant called 1 witness. Judgement was delivered, on 29th August 2024. The claim for Kshs.

2,448,000.00 was allowed, while that for malicious prosecution was dismissed.

4. The appellant was aggrieved, hence the instant appeal. The grounds are that the judgment was against the weight of the evidence, expert evidence was not summoned to shed light on the withdrawals and signatures; the withdrawals were made by the 1st respondent in person; among others
5. Directions were taken on 17th December 2025, for disposal of the appeal, by way of written submissions. Both sides have filed written submissions, which I have read and noted the arguments made.
6. The only issue should be whether the claim was established to the required standard.
7. There was evidence that a sum of Kshs. 2,448,000.00 was withdrawn from the account of the 1st respondent. The response to that, by the appellant, was that the withdrawals were made by the 1st respondent himself. There were materials, collected by the Central Bank of Kenya, used at the criminal trial, where document examiners concluded that there were no forgeries, and that the thumbprints, on the documents, belonged to the 1st respondent, and the signatures were by his hand.
8. Before the trial civil court, it was the 1st respondent claiming Kshs. 2,448,000.00 had been negligently withdrawn from his account, by tricks, forgery, collusion of bank employees, failing to install the CCTV cameras to keep away dishonest bank employees and others. The burden was on the 1st respondent, to prove the negligence that he alleged, that tricks and forgery were used to cause the loss of his money; there was collusion of bank employees; dishonesty by bank employees; among others. Standard of proof, in civil cases, is

preponderance of the evidence or proof on a balance of probability. He was required to establish his case, in that respect, on a balance of probability. The evidential burden, that was on him, was to shift to the appellant, only upon evidence being adduced, on a balance, that there were tricks, forgery and dishonesty of employees.

9. The 1st respondent did not lead any evidence of forgery of the documents that were used to withdraw the money. The forgery would have related to his signatories on the withdrawal slips. He did not present material, to demonstrate that the signatures, on the withdrawal slips, were not his. That could only be done through forensic evidence. by way of the comparing his known signatures to those on the impugned slips. That was crucial, given that the Central Bank of Kenya had generated forensic evidence, which pointed to those same signatures being genuine, together with the fingerprints. The only way, to counter that evidence, would have been to subject the same signatures to comparison by a different handwriting expert, and to have the 2 handwriting experts or document examiners subjected to cross-examination; to provide basis for the trial court to determine the reliability of the opinions. That was not done, and the trial court could not properly conclude there was use of forged signatures, to have the funds withdrawn, without that evidence. The evidential burden had not shifted to the appellant, to demonstrate that the signatures and fingerprints, on the impugned documents, were in fact those of the 1st respondent. He who alleges must prove. The other side should provide counterevidence only upon the alleger providing proof of what he alleges. That was not done.
10. The 1st respondent alleged tricks by the appellant or the individuals who allegedly withdraw the funds. No evidence was adduced of such tricks. The 1st respondent did not identify the alleged tricks. He did not identify the

individuals who employed those alleged tricks. He pleaded collusion by employees of the bank, and alleged that they were dishonest. Yet, he led no evidence of the alleged collusion and dishonesty. He did not identify any of the allegedly dishonest employees, who were involved in the alleged collusion.

11. The case, built by the 1st respondent, before trial court, was founded only on his acquittal, in the criminal proceedings. He was acquitted of the offence of giving false information to a police officer. However, that acquittal was not proof that money from his account was, in fact lost, and that loss, if at all, had anything to do with negligence, on the part of the appellant, or its employees, or collusion and dishonesty on their part. The conclusion, of the trial criminal court, was that the report, which formed the basis for those criminal proceedings, was made in good faith, and the 2nd respondent believed it to be genuine. However, whether there was basis for it, or truth in substance, was another matter. That could only be established by evidence. However, that evidence was not adduced, before the decree, for Kshs. 2,448,000.00, was made.
12. The trial court did not properly address its mind to the burden of proof in civil matters, and it ended up shifting the burden of proof to the appellant, before negligence had been established by the 1st respondent.
13. It was stated as follows, at page 3 of the judgment:
“I find that the 1st defendant owed a duty of care to the plaintiff the moment he sought their services as a customer. However, the 1st defendant breached that duty when they acted negligently by failing to keep the plaintiff’s account safe and ensure his account was properly managed. The defendant failed the moment a complaint was raised by the

plaintiff on monies that were lost. The basis of the disputed amount is that the same was withdrawn through a fraudulent scheme and no evidence has been produced to the court by the 1st defendant to dispute the same ... No expert witness has been called or report made to court to shed light on the disputed withdrawals, no specimen of the plaintiff's signatures was submitted to compare with the disputed ones."

14. Based on what I have discussed above, I do find and hold that the appeal herein has merit. I hereby allow it. The decision of the trial court, to award Kshs. 2,448,000.00, with costs and interests, is hereby set aside. The same is substituted with an order, dismissing that suit, with costs. Orders accordingly.

**DELIVERED, VIA EMAIL, DATED AND SIGNED IN
CHAMBERS, AT BUSIA ON THIS 10TH DAY OF FEBRUARY
2026.**

**WM MUSYOKA
JUDGE**

Mr. Arthur Etyang, Court Assistant, Busia.

Advocates

**Ms. Ndengi, instructed by Lilian Amere Machio & Company,
Advocates for the appellant.**

**Mr. Bogonko, instructed by Bogonko Otanga & Company,
Advocates for the 1st respondent.**