



NCBA Bank Kenya PLC v Mwangi & 2 others (Commercial Appeal E004 of 2025) [2026] KEHC 4378 (KLR) (5 March 2026) (Judgment)

Neutral citation: [2026] KEHC 4378 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
COMMERCIAL APPEAL E004 OF 2025**

F WANGARI, J

MARCH 5, 2026

BETWEEN

NCBA BANK KENYA PLC APPELLANT

AND

VIRGINIA WANGUI MWANGI 1ST RESPONDENT

PRANA GROUP LIMITED 2ND RESPONDENT

CHRISTOPHER KIMEU 3RD RESPONDENT

(Being an appeal against the Judgment and decree of Hon. G. Sogomo (PM) delivered on 31st January 2025 in Mombasa Chief Magistrate's Court Case No. 378 of 2020, Virginia Wangui Mwangi v NCBA Bank Kenya PLC, Prana Group Limited 7 Christopher Kimeu)

JUDGMENT

1. The background of the appeal is a Further Amended Plaintiff dated 8th December 2020 where the 1st Plaintiff/ Respondent, sued the 1st Defendant/ Appellant and 2 others for damages and a mandatory injunction compelling the 1st Defendant to credit to account number 1003684314 the sum of Kshs. 2,225,000 together with interest accrued thereon at prevailing interest rates from the date of fund withdrawals to the date of crediting the said account and to further debit from the said account the amount so credited and transmit the same to the Plaintiff by way of a banker's cheque issued in the Plaintiff's name, damages for breach of contract and fiduciary trust.
2. In the alternative to the mandatory injunction, an order compelling the Defendants jointly and severally to refund to the Plaintiff the total sum of Kshs. 2,225,000 together with interest at court rates accrued thereon from the respective dates of funds withdrawals to the date of payment in full, and costs of the suit.



3. The Plaintiff averred that she was a creditor and investor in Prana Group Limited, 2nd Defendant, and that she invested in the company as an unsecured creditor. That her investment consisted of injecting capital into the company to finance construction projects whose contracts the Plaintiff had secured and that she was to be repaid through the profits that would be obtained from the projects. That on the advice of the Defendant, the company opened a 'B' account with NIC Bank Kenya PLC where she was the mandatory signatory and from which account she was to recover her investment. That the sole purpose of making her a mandatory signatory was to safeguard her interest as an unsecured creditor and to ensure her ability to control the funds channeled through the account.
4. The Plaintiff averred that the account opening forms clearly indicated that she was the account's mandatory signatory, with any transaction carried out by the 2 directors of the company, Christopher Kimeu (3rd Defendant) and Faith Wanjiku, being accompanied by the Plaintiff's signature. That she supplied the Defendant with specimens of her signature for comparison and verification purposes, and that there was an implied contract between the defendant company and her in addition to the fiduciary relationship.
5. The Plaintiff stated that on diverse dates in the months of September 2016 and October 2016, the 1st Defendant allowed a total of Kshs. 2,225,000 to be withdrawn by 3rd Defendant through cheques not signed by the Plaintiff. That the 3rd Defendant fraudulently withdrew the said amount with the knowledge and approval of and in connivance with the 1st Defendant's employees thereby breaching the contract terms between the Defendants and the Plaintiff as well as the fiduciary duty bestowed upon the Defendant.
6. The 1st Defendant filed Statement its Statement of Defence dated 28th October 2021 where save for what was admitted, it denied each and every allegation in the Plaint and prayed for dismissal of the Plaintiff's suit with costs. The 2nd and 3rd Defendants having been duly served and having failed to enter appearance within the stipulated period of time, the trial court entered interlocutory judgment as prayed.
7. The suit was heard in the trial court where three witnesses for the Plaintiff tendered their evidence, they were cross examined and they closed their case. The 1st Defendant did not tender any evidence and they closed their case. Judgment was delivered on 31st January 2025 in favour of the Plaintiff as prayed in the Plaint.
8. Being dissatisfied, the 1st Defendant/ Appellant appealed against the judgment and decree through the Memorandum of Appeal dated 27th February 2025 on grounds that the learned magistrate erred in law in failing to consider and find that the 1st Respondent lacked locus standi, yet it was an issue that had been isolated for determination. That the learned magistrate erred in law and in fact in finding that the 1st Respondent had proved a case of negligence against the Appellant, when in fact, the evidence did not warrant that conclusion. That the learned magistrate erred in law in granting both the main and alternative reliefs.
9. The Appellant prayed for orders that the appeal be allowed, and that judgment and decree made on 31st January 2025 be set aside and be substituted with an order dismissing the 1st Respondent's suit against the Appellant with costs to the Appellant.

Submissions

10. The court herein made orders that the appeal be disposed of by way of written submissions. The Appellant in their submissions dated 6th November 2025 argued that when a party lacks locus standi, the court cannot consider the merits of the case. That the trial court was bound to consider the issue



as a preliminary one, however, given the age of the matter it is neither necessary nor just for the issue to go back to trial. The Appellant therefore invited the court to render itself on the issue.

11. The Appellant reiterated the holding in *Sultan Hasham Lalji & 2 others v Ahmed Hasham Lalji & 4 others* [2014] KECA 440 (KLR) that the company itself is the proper plaintiff, and the only proper plaintiff, in an action arising out of a dispute within the company. That while the rule has exceptions, a party who brings themselves within those exceptions must obtain leave to bring a derivative claim in the name of the company, not against the company.
12. The Appellant stated that the principles were settled in the case of *Patrick Kang'ethe Njuguna & 2 others v co-operative Bank of Kenya Limited & 4 others* [2018] KEHC 7966 (KLR). That in almost all private companies, shareholders would often be the mandatory signatories to protect their investment but that would not bestow upon them an independent right to sue for money unlawfully withdrawn.
13. The Appellant submitted that even undefended cases must be dismissed if the evidence does not meet the standard of proof as held in the case of *Mburu Gitimu v Daniel Kamau Muiruri* [2018] KEELC 3102 (KLR). That failure of the Appellant to call a witness did not entitle the 1st Respondent to succeed and that succeeding on review of the evidence required proving the pleaded negligence against the Appellant, failure of which her claim had to be dismissed without calling on the Appellant to present any evidence.
14. The Appellant stated that the judgment does not tell which act or omission was considered by the trial court to constitute connivance and/or negligence. That there was no evidence showing the Appellant knowingly allowed the 3rd Respondent to withdraw funds from the 2nd Respondent's account through cheques which the Appellant knew were not signed by the 1st Respondent.
15. On the document examiner's report which concluded that the 6 signatures on the cheques were not the 1st Respondent's, the Appellant submitted that the trial court held that the evidence could only be impeached through another expert report when the court in the case of *Kagina v Kagina & 2 others* [2021] KECA 242 (KLR) rejected an expert report even though no other evidence was called and that without proof and submission of the witnesses' credentials to the court, there was nothing to demonstrate the said witness was indeed a forensic expert.
16. The Appellant stated that the expert admitted he had not presented evidence of his qualification and that he relied on photocopies in preparing the report when in *Samson Tela Akute v Republic* [2006] KEHC 3513 (KLR) held that a photocopy of a document greatly reduces the accuracy of the report. The Appellant further submitted that the standard of care of a bank is not as burdensome as to require it to possess the skills of a forensic document examiner as held in *David Josef Motion v Barclays Bank of Kenya Limited & another* [2021] KEHC 4423 (KLR).
17. The Appellant stated that the 1st Respondent sought a mandatory injunction compelling the Appellant to refund Kshs. 2,225,000 plus interest at the prevailing rate from the date of withdrawal, and in the alternative, she sought that the Appellant and the 2nd and 3rd Respondent do pay Kshs. 2,225,000 plus interest at court rates from the dates of withdrawal. That the trial court granted both reliefs which was wrong in law as held in *National Bank of Kenya v Anthony Njue John* [2019] KECA 445 (KLR). According to the Appellant, justification would be required to award interest from the date prior to filing of the suit. That there is no indication that the trial court appreciated and weighed the factors when granting both reliefs.
18. The Respondents despite having been served failed to file their submissions. This court will therefore proceed and make a determination of the appeal on merit.



Submissions

19. The role of the first appellate court to reexamine and to reevaluate evidence to come up with its own findings was set out in *Selle v Associated Motor Boat Co.* (1968) E.A 123 as follows: -
- “ ... Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect ...”
20. I have considered the Record of Appeal dated 11th March 2025, the Supplementary Record of Appeal dated 6th November 2025, and submissions by the Appellant. The issues for determination are: -
- a. Whether the 1st Respondent had locus standi
 - b. Whether negligence and/or breach of duty was proved against the Appellant
 - c. Whether the trial court erred in granting both principal and alternative reliefs
 - d. Whether the award of interest was properly made
 - e. What are the orders on costs
21. On whether the 1st Respondent had locus standi, the Appellant submitted that the proper plaintiff was the company and that any claim relating to withdrawal of company funds lay with the company where a wrong done to a company must be remedied by the company itself.
22. However, the evidence on record shows that the 1st Respondent was expressly designated as a mandatory signatory to the ‘B’ account with NIC Bank Kenya PLC, and that no transaction was to be effected without her signature. The account mandate expressly conferred upon her a personal and direct right in the operation of the account.
23. This was not a derivative action on behalf of the company. Rather, it was a personal claim grounded on breach of the bank’s contractual mandate and fiduciary duty owed directly to her as a mandatory signatory. A bank-customer relationship is contractual in nature. Lord Atkin in *Joachimson v Swiss Bank Corporation* (1921) VOL.3 A B 110 held that: -
- “The question turns upon the terms of the contract made between the Banker and the Customer in ordinary course of business when a current account is opened by the bank. It is said on the one hand that it is a simple contract of loan; it is admitted that there is added, or super added, an obligation of the Bank to honour the customer’s drafts to any amount not exceeding the credit balance at any material time; but it is contended that this added obligation does not affect the main contract. The Bank has borrowed the money and is under the ordinary obligation of a borrower to repay. The lender could sue for his debt whenever he pleases.”
24. Where a bank acts contrary to a customer’s mandate, it breaches that contract. The 1st Respondent’s claim arose from the breach of a specific signing mandate in which she had a defined and protected interest. Accordingly, she possessed sufficient locus standi to sue for breach of that mandate. This ground of appeal therefore fails.



25. On whether negligence and/or breach of duty was proved against the Appellant, the standard of proof in civil cases is on a balance of probabilities, as stated in *Kirugi & another v Kabiya & 3 Others* [1983] KECA 38 (KLR) as follows: -

“... The burden on the plaintiff to prove his case remains the same, though it is true that, where the matter is not defended, or, as here, validly defended that burden may become easier to discharge ... The plaintiff has therefore to prove his case. To do so he calls evidence, such evidence before the court, the court may consider it unchallenged and proceed upon it, unless it is clear that it is intrinsically unreliable. No court will believe that the noon is actually the sun however unchallenged that statement may be.”

26. The uncontroverted evidence before the trial court was that the account mandate required the 1st Respondent’s signature, six cheques were honoured without her signature, a document examiner opined that the signatures were not hers, and the Appellant called no evidence in rebuttal. While the Appellant challenges the qualifications of the document examiner, no contrary expert evidence was tendered. Further, a bank’s duty when paying cheques is to verify that the instrument conforms to the mandate. In *Shalimar Flowers Self Help Group v Kenya Commercial Bank* [2016] KEHC 6238 (KLR), the court held that: -

“... it is reasonable to expect the Defendant to act with due care and in the interest of its customer. This duty calls upon the banker to exercise skill while dealing with transactions on the customer’s account. This sense of duty in my view informs the “further step” taken by the DW1 to call one of the signatories, despite there being no such instructions, to confirm the payments on the five instruction letters.”

27. The Appellant argued that the standard of care does not require forensic expertise. That may be so. However, the obligation remains that payment must strictly comply with the mandate. Where a mandatory signatory’s signature is absent, the bank pays at its own risk. I have perused through the documents relied on by the document examiner. The questioned signature and the known signatures of the Plaintiff, through the naked eye looks strikingly similar.

28. The document examiner confirmed that the signatures were a forgery. It had to take the expertise of a document examiner to find the alleged signatures of the Plaintiff forged. The report on methodology used stated as follows;

“In my exam, I subjected the handwritings and signatures into image enhancement and magnification procedures using Video Spectra Comparator (VSC6000) and magnifying lens for better visibility and inspection of individual characteristic for absolute identification.”

29. I do agree with the submissions by the Appellant that the bank is not equipped with the knowledge and skills of a forensic document examiner to establish the signatures on the cheques were forged. I find that the Plaintiff failed to establish negligence on the part of the bank and that the Appellant did not act negligently. The banks have since taken precautions in taking further steps as indicated in the case of *Shalimar Flowers Selfhelp Group* (supra) in calling the signatories to ensure that they have drawn the checks as presented.

30. On whether the trial court erred in granting both principal and alternative reliefs, the law is settled that a court cannot grant both a primary and an alternative remedy simultaneously. An alternative prayer



only arises where the primary relief is declined. Based on the finding herein above, that negligence was not proved on the part of the 1st Defendant/ Appellant, the primary prayer in the Plaint fails.

31. On costs, the Respondent having not filed their written submissions, I exercise the discretion of this court and direct that each party bear its own costs.
32. Determination
33. In the upshot, this court makes the following orders –
 - a. The appeal has merits and is allowed on the following terms;
 - i. The judgment of the lower court against the 1st Defendant/ Appellant is hereby set aside and substituted with judgment of this court dismissing the suit against the 1st Defendant/ Appellant.
 - ii. The Judgment against the 2nd and 3rd Defendants/ Respondents is upheld.
 - b. Each party to bear its own costs

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 5TH DAY OF MARCH, 2026

HON. F. WANGARI

JUDGE OF THE HIGH COURT

In the presence of: -

Mr. Odero Advocate h/b for Mr. Kongere Advocate for the Appellant

Mr. Origi Advocate for the Respondent

Ms. Salwa, Court Assistant

