

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND TAX DIVISION
COMMERCIAL APPEAL NO. E296 OF 2024

LEVIS MASAMBU LIDWAJI.....1ST
APPELLANT

WILFRED ABINCHA ONONO.....2ND
APPELLANT

HILDAH MARAGA.....3RD
APPELLANT

VERSUS

COOPERATIVE BANK OF KENYA.....1ST
RESPONDENT

JOSEPH KANYUIRA MUKUNA.....2ND
RESPONDENT

JUDGEMENT

1. This Appeal emanates from the decision of the **Small Claims Court**. There is already an established **High Court Civil Appellate Division** of this Court, handling Appeals from the **Small Claims Court**. Nevertheless, this Court is vested with jurisdiction to hear the Appeal and having taken the oral highlights proceeds to render its decision. This lends to the Court's primary duty to expedite the resolution of

disputes before it. A transfer of this suit to the **High Court Civil Appellate Division** at this stage, may not assist in achieving that objective.

Background Facts

2. The Appellants were dissatisfied and aggrieved by a portion of the Judgment and consequential orders/decrees of the **Hon. Wamae E.M. Muindi** delivered on 05/10/2024 in **Milimani SCC COMM NO. E3631 of 2024; Levi Masambu Lidwaji and 2 Others V Cooperative Bank and Another.** They appeal to the High Court at Nairobi against a portion of the Judgment.
3. Consequently, the Appellants filed the Memorandum of Appeal dated 5th October 2024 raising the following grounds;
 - a) *The Learned Magistrate erred by not holding the 1st Respondent, the Cooperative Bank of Kenya, vicariously liable for the actions and omissions of the 2nd Respondent. The Court found that the 1st Respondent had duly appointed the 2nd Respondent as its agent to*

procure banking services on its behalf (as noted in paragraph 5 of the Judgment). Furthermore, since the 2nd Respondent was found liable for the Kshs. 450,000 received in this capacity, the Magistrate's failure to attribute liability to the 1st Respondent was a significant oversight;

b) The Magistrate also erred by neglecting to apply the agency agreement between the 1st and 2nd Respondents. This agreement contemplates that the 2nd Respondent is liable to third parties for actions or omissions of the 1st Respondent that may fall outside the contract's scope. Under Clause 6 of the agency agreement, the 1st Respondent is obligated to indemnify the 2nd Respondent for any losses arising from such misconduct; and

c) Additionally, the Learned Magistrate misdirected himself by failing to hold the 1st Respondent accountable for the actions and omissions of its agent, the 2nd Respondent.

4. The Appellants prayed for orders that;

- a) *The Appeal be allowed with costs awarded to the Appellant.*
- b) *The Judgment of Hon. Wamae E.M. Muindi, delivered on 05/10/2024 in Milimani SCC COMM NO. E3631 of 2024; Levi Masambu Lidwaji and 2 Others v. Cooperative Bank and Another, be varied to hold the 1st and 2nd Respondents jointly and severally liable;*
- c) *Alternatively, or in addition to prayer B, that a declaration be issued holding the 1st Respondent vicariously liable for the actions of the 2nd Respondent, as determined in the Judgment of Hon. Wamae E.M. Muindi delivered on 05/10/2024 in Milimani SCCCOMM NO. E3631 of 2024; Levi Masambu Lidwaji and 2 Others v. Cooperative Bank and Another;*
- d) *The Court grants any other appropriate relief as it deems fit.*
5. The Appeal is opposed by the 1st Respondent being the Cooperative Bank of Kenya. The 2nd Respondent did not participate in this Appeal.

Issues for determination

6. The Court has carefully considered the Appeal and the written submissions and frames the following issues for determination;

a) Whether the Trial Court erred by not holding the 1st Respondent, the Cooperative Bank of Kenya, vicariously liable for the actions and omissions of the 2nd Respondent.

Analysis

7. This being an appeal from the **Small Claims Court**, **Section 38 of the Small Claims Court Act** under which the appeal has been preferred applies. It provides as follows;

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“(1)A person aggrieved by the decision or an order of the Court may appeal against that decision or order to the High Court on matters of law.

(2) An appeal from any decision or order referred to in subsection (1) shall be final.”

8. It therefore follows that appeals originating from the **Small Claims Court** to this Court can only on the points of law.

Consequently, this Court cannot, in appeals emanating from the **Small Claims Court**, entertain an invitation to interfere with the factual findings of the Trial Court. The duty of this Court when dealing with such appeals is therefore equivalent to that of the Court of Appeal in its capacity as a second Appellate Court.

(a) Whether the Trial Court erred by not holding the 1st Respondent, the Cooperative Bank of Kenya, vicariously liable for the actions and omissions of the 2nd Respondent.

9. This Appeal was brought forth to challenge the Trial Court's judgment because it failed to hold that the 1st Respondent was vicariously liable for the acts of the 2nd Respondent. That it should therefore be severally and jointly held liable to refund the sum of kshs.450,000.

10. It was the Appellants' case that where a principal publicly authorizes and holds out another as its agent to transact on its behalf, it is estopped from later denying that agency against innocent third parties who reasonably relied

on that representation. The 1st Respondent licensed, publicized, and enabled the 2nd Respondent to operate under Agent Number POSAG058000 to receive deposits, thereby creating a clear representation of authority upon which the Appellants reasonably and foreseeably relied; consequently, it would be inequitable to allow the 1st Respondent to avoid liability by disowning its own agent.

11. According to the Appellants, the 2nd Respondent was tasked with receiving customer deposits as part of his authorized duties under the 1st Respondent's Coop Mtaani agency program. The wrongful act — namely, failing to properly account for the full deposit — was directly connected with the performance of those authorized banking functions.

12. In response, the 1st Respondent argued that the Trial Court did not fail to apply the agency agreement between the Respondents; it noted that even though there was an agency relationship between the Respondents herein, the 1st Respondent could only be held vicariously liable for the acts of the 2nd Respondent where such acts were conducted

within the 2nd Respondent's scope of employment. This was not the case in this suit since the acts were conducted by the 2nd Respondent using a different account number from the one designated for use by the 1st Respondent. Hence qualifying the said transactions to have been conducted outside the scope of employment of the 2nd Respondent. That not all the acts of the agent bind the principal simply because the public assumes the actions to the agent conducts all its business on behalf of the principal.

13. There is no doubt that the 1st Respondent was the principal and the 2nd Respondent the agent for the 1st Respondent. The 1st Respondent duly appointed an agent (The 2nd Respondent) to procure banking services on its behalf. The principal agency relationship entailed the 2nd Respondent agent or their customers depositing money into the 1st Respondent's designated bank account.

14. Agency is defined in **BOWSTEAD & REYNOLD on AGENCY, 17th edition, page 1** as;

“Agency is the fiduciary relationship which exists between two persons, one of whom expressly or

impliedly consents that the other should act on his behalf so as to affect his relations with third parties and the other of whom similarly consents so to act or so acts. The one on whose behalf the act or acts are to be done is called the principal. The one who is to act is called the agent. Any person other than the principal and the agent may be referred to as third party."

15. The 1st Respondent submitted that even though the 2nd Respondent was its agent; the money transaction in issue was not conducted within the scope of employment. This is because he failed to conduct the transaction using the bank account number designated for the transactions involving the 1st Respondent.
16. However, according to the Appellants, it is immaterial that the 2nd Respondent may have acted fraudulently or outside internal procedural instructions; what matters is that he was purporting to carry out an assigned task.
17. Regarding the general liability of an agent for a wrongful act, **Halsbury's Laws of England Vol. 1 (2017)** at **Paragraph 165** guides as follows:

“Any agent, including a public agent, who commits a wrongful act in the course of his employment, is personally liable to any third person who suffers loss or damage thereby, notwithstanding that the act was expressly authorized or ratified by the principal, unless it was deprived of its wrongful character. It is immaterial that the agent did the act innocently and without knowledge that it was wrongful except in case where actual malice is essential to constitute the wrong.”

18. Further to the above, the Court in **National Social Security Fund Board of Trustees v Ankhan Holdings Limited & 2 Others [2006] eKLR** cited with approval the decision of the **House of Lords in Williams and another v Natural Life Health Foods Ltd and another [1998] 2 All ER 577 at 582** which held that:

“Whether the principal is a company or a natural person, someone acting on his behalf may incur personal liability in tort as well as imposing vicarious or attributed liability upon his principal.”

19. It is notable that the Appellants themselves acknowledged that the 2nd Respondent directed the deposits

to be channeled through a 3rd party account instead of a direct opposite deposit into the 1st Respondent's account. As pointed out by the 1st Respondent, this transaction by the 2nd Respondent was outside the scope of his employment because the account number used was not that of the bank. The Appellants averred as follows in their Statement on oath in support of the claim;

“THAT On December 21st, 2023, at the Coop Mtaani Point of Sale, we instructed the 2nd Respondent (agent for the 1st Respondent) to deposit Kshs. 1,000,000 into our designated account. However, the 2nd Respondent directed the funds to a different account belonging to Stephen Mbithi despite our confirmation.”

20. In light of the above, the Court agrees with the 1st Respondent that the 2nd Respondent's scope of employment was strictly limited to the transactions carried out using the 1st Respondent's designated account number (the bank account entrusted with the 2nd Respondent for conducting transactions on behalf of the 1st Respondent). The Bank cannot be held liable for transactions made to **Stephen**

Mbithi. Therefore, one can only conclude that this was a fraudulent transaction for which the 2nd Respondent is personally liable to the Appellants.

21. The Court is minded to draw the following two analogies to explain the question that has vexed it in this Appeal.
22. Firstly, what if a party with a dispute in Court comes to pay Court fees or a fine or even a deposit. He then allows himself to be directed by a Court clerk outside the Court premises to pay the fees or fine through an Mpesa Agent or a Bank Teller, to an account that is totally unknown to the Court. The funds go to enrich a Third party and never reach the Court. All this while the party has left the designated Bank or Mtaani Agent that is housed within the Milimani Law Courts. For the time being the designated Bank Is Kenya Commercial Bank and it has a designated space within Milimani Law Courts. The party has ignored the Mpesa Paybill Numbers prominently displayed within the Court house. Would the Judiciary be held vicariously liable for the

acts of its Clerk or to account for funds that the Judiciary never received?

23. While making payments for goods purchased at a Supermarket online, the customer blindly follows the instructions of the Supermarket's employee and makes payment to an Mpesa number of a third party. This is all the while ignoring the specific instructions to pay to the designated Supermarket's paybill number. Would the Supermarket be held liable for refusing to deliver goods as it did not receive any payment? Can an employee or agent who acts outside the scope of his employment by derailing or channeling payments to a Third party, still be said to bind the principal or the employer?
24. Drawing from the two illustrations above and from the facts of this case, the Court's answer would be a resounding NO!.
25. The Court finds that the Trial Court did not err in any way by holding that the 1st Respondent is not liable for the acts and omissions of the 2nd Respondent. The Appeal is hereby dismissed.

26. As to costs, the same lie at the discretion of this Court. Ordinarily costs follow the event. This Court has a duty to save on costs in situations it finds fitting and just. The Appellants did lose money in the transaction and it appears just and fit to save them from further pain by way of the costs of this Appeal.

Determination

27. The Appellants' Appeal is dismissed with costs for lacking in merits.
28. Each Party do bear their own costs of this Appeal.
29. It is so ordered.
30. This file is marked as closed.

**DATED, SIGNED AND DELIVERED AT MILIMANI
THIS 22ND DAY OF APRIL, 2026.**

**NJOROGE BENJAMIN K.
JUDGE**

In the presence of;

Mr. Sore for the Appellants.

Miss Obiri for the 1st Respondent

N/A for the 2nd Respondent

Mr. Peter Wabwire - Court Assistant

