



REPUBLIC OF KENYA



**KENYA LAW**

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**Mutua & 2 others (t/a Mutua Nyongesa Muthoka) v Family Bank Limited (Commercial Appeal E202 of 2023) [2025] KEHC 658 (KLR) (Commercial and Tax) (30 January 2025) (Judgment)**

Neutral citation: [2025] KEHC 658 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
COMMERCIAL AND TAX  
COMMERCIAL APPEAL E202 OF 2023  
AM MUTETI, J  
JANUARY 30, 2025**

**BETWEEN**

**FELIX MUTUA ..... 1<sup>ST</sup> APPELLANT  
BENJAMIN MUTHOKA ..... 2<sup>ND</sup> APPELLANT  
CHRISTINE MUTHOKA ..... 3<sup>RD</sup> APPELLANT  
T/A MUTUA NYONGESA MUTHOKA**

**AND**

**FAMILY BANK LIMITED ..... RESPONDENT**

*(Being an appeal from the Judgment of the Honorable V.M Machoché delivered on 10th August in Small Claims Commercial Suit No. E1866 of 2023 at the Small Claims Court, Milimani)*

**JUDGMENT**

**Introduction**

**Facts**

1. The claimant issued a cheque No.000/013 on the 30<sup>th</sup> September 2022. The cheque was for the sum of Ksh. 750,000.
2. The respondent was the drawee and when the cheque was presented to the Bank the same was returned by the Bank unpaid for reasons that the amount in words did not tally with the amount in figures.
3. According to the appellant upon return of the cheque he withdrew cash Ksh. 750,000 which he paid the payee in the cheque who was his client.



4. The appellant alleges that he did not rebank the cheque but the Bank on the 3<sup>rd</sup> October 2022 mysteriously went ahead and cleared the cheque.
5. According to the respondent the cheque was indeed returned unpaid since the amount in figures read 780,000 whereas in words it read “ seven hundred and fifty thousand .”
6. The bank maintains that the cheque was returned in 30<sup>th</sup> September 2022 and rebanked the same day with the correct amount indicated on the face of the cheque being Ksh. 750,000.
7. Further, the respondent states that the cheque was presented on 3<sup>rd</sup> October 2022 and paid.
8. The contested fact is that the cheque was rebanked by the drawer or the payee prompting the bank to pay the same.

### **Analysis**

9. The court sitting as a first appellate court is called upon to examine the evidence presented before the Lower Court, re-evaluate the same and draw its own conclusions.
10. In *Gitobu Imanyara & 2 Others vs Attorney General* [2016] eKLR the Court of Appeal stated that:-

“ An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. 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.”
11. The dispute between the appellant and the respondent revolves around the cheque No. 000103 which was drawn by the appellant and cleared by the respondent.
12. The appellant maintains that the clearance by the bank was erroneous since when the cheque was returned to them by the client uncleared, they did not rebank the same.
13. The respondent on his part however submits that they returned the cheque unpaid in first instance and that it was rebanked prompting the clearance on 3<sup>rd</sup> October 2022.
14. The appellant relied on the statement of Christine Muthoka advocate dated 26<sup>th</sup> April 2023 who maintained that they did not rebank the cheque as alleged by the respondent.
15. According to the appellant the learned Honorable Magistrate shifted the duty of care to the appellant thereby occasioning a failure of justice.
16. The appellant therefore urges this court to find that decision of the learned Honorable magistrate was against the weight of evidence and occasioned a failure of justice.
17. The respondents on their part relied on the statement of Lawrence Gitonga Gathenya in which he maintained that the cheque was returned because of the amount in words conflicting the figures but later the claimant rebanked the same.
18. The respondent maintained that they were not aware that the claimant had proceeded to withdraw money and paid the client in cash.
19. The respondent argued that the appellants were negligent in drawing the cheque in the first place and indicating differing amounts in figures and in words.



20. The respondent's position is therefore that the recourse open to the appellant is to sue the client who benefited twice from payment.

### Issues

21. The submissions by the parties bring out two issues :-
- i. Whether the bank breached its duty of care to the appellant by clearing the cheque after it had been returned to the appellants.
  - ii. Whether the appellants were negligent in drawing the cheque with figures that were in conflict.
  - iii. Whether the cheque was actually rebanked as alleged by the respondent.
21. The appellant testified on 11/7/2023 and produced EX1-3.
22. In her evidence MS. CHRISTINE MWIKALI MUTHOKA stated in cross-examination that the bank returned a cheque of Ksh. 750,000 and that she was not aware that her representative rebanked another cheque in the Bank of Baroda.
23. She admitted that it was her partner who banked the cheque. She never received a cheque for correction.
24. The witness also admitted that the cheque was returned to them because there was an error in figures and words.
25. The witness gave the reason for suing the bank as being that the client was impecunious and that the bank was negligent in clearing the cheque.
26. She denied knowledge of the fact that her partner submitted a cheque on 30<sup>th</sup> September 2022 with the correct figures.
27. The respondent through Lawrence Gitonga Gathenya the operations manager Family Bank gave evidence that they returned a cheque NO. 103 because the figures differed with the amount in words.
28. He however maintained that they received the same cheque with the correct figure and words countersigned by both signatories.
29. The cheque according to the witness was presented for clearance after it was rebanked.
30. The cheque was rebanked after amendment.
31. The witness did not however produce the cheque in its amended form.
32. He similarly did not file any documents to support his claim in response to the evidence presented by the appellants.
33. The witness upon cross examination admitted that there was a withdrawal vide cheque number 105 across the counter.
34. The two parties have filed written submissions in support of their respective position on the matter.
35. The bank has a general duty of care owed to its customers in the handling of their finances. In *Equity Bank of Kenya & Another Vs. Robert Chesang* [2016] eKLR the court held:- "A bank has a duty under its contract with its customer to exercise reasonable care and skill in carrying out its part with regard to operations with its contracts with its customers. The duty to exercise reasonable care and skill extends over the whole range of banking business within the contract with the customer. Thus, the duty applies to interpreting, ascertaining and acting in accordance with the instructions of the customer ...The



bank/customer relationship is based on utmost good faith. The bank is also under a contractual duty to diligently handle accounts of a customer, to ensure that funds deposited on account are available when required by the customer. Any deviation from that understanding without justifiable reasons which should be communicated to the customer well in advance or immediately, the bank is in breach of a contract with the customer and is liable in damages.”

36. A customer equally, has a duty to ensure that instructions issued to a bank in connection with the handling of funds in his account are clear and specific. The instructions should guard against placing the bank in a situation that exposes it to the risk of loss of funds held in the customers account.
37. The customer retains the sole mandate of issuing instructions and recalling those instructions promptly should the need arise. Where a customer fails to do so, any funds leaving his account on the basis of instructions issued by him to the bank would certainly not be blamed on the bank.
38. The appellants did not deny issuing the cheque in question.
39. All that the appellant says is that she does not recall her representative re-banking the cheque.
40. The most interesting thing about the appellant is that they have tried to pursue their client and they confirm the client is impecunious.
41. It is the appellants position that they are pursuing the bank for negligence.
42. The appellant does not however through out her evidence indicate whether they counter manded the cheque after its return.
43. The law expects of any person issuing a cheque, once that person desires that it should not be honored, they should countermand it.
44. Section 75 of the *Bills of Exchange Act* provides:-
  - a. Countermand payment.
  - b. Notice of customers death.
43. It therefore follows that once a cheque is issued unless the customer countermands it is the duty of Bank to honour it continues.
44. The respondent Bank therefore would not be in breach of any Law if a cheque was returned to a client for whatever reason and the same is later rebanked.
45. The duty is upon the drawer of the cheque to inform the bank that it does not wish to have the bank honor the cheque.
46. The position of the respondent is that it was presented with a corrected cheque after it had returned the same to the appellants.
47. The appellant through the witness simply says that she does not know whether their representative rebanked the cheque.
48. It is the duty of the drawer to ensure that all their cheque leaves are properly utilized otherwise where a cheque is properly signed by the signatories to a bank cannot dishonor the same without exposing themselves to the risk of being sued by the client.



49. It is the finding of the court that the appellant did not discharge the burden upon them to show that once the cheque was returned to them they did not rebank it.
50. The appellant was desirous to have the Court believe that they did not rebank the cheque.
51. The cheque having been returned to them for correction the appellants should have persuaded the court that they did not correct the error on the face of the cheque and rebank it.
52. Under Section 107 (1) of the *Evidence Act* the Appellant was under duty to prove that they had countermanded the cheque. It was not enough to simply say that they had withdrawn money in cash and paid to the client directly. See *Anne Wambui Ndiritu Vs Joseph Kiprono Ropkoi & Another* 2005 1 EA 334 on the duty of the party seeking to be believed by a court as to the existence of certain state of affairs.
53. The failure to discharge that burden was enough for the magistrate to find that there was no negligence on the part of the Bank in honoring the cheque.
54. The appeal by the appellant therefore fails and it is hereby dismissed with costs.
55. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 30<sup>TH</sup> DAY OF JANUARY 2025.**

**A.M. MUTETI**

**JUDGE**

In the presence of:

Kiptoo: Court Assistant

Karanu Kanai C. Advocate absent for Appellants

Karimi for the Respondent

