



**Co-operative Bank of Kenya Ltd v Mutuku (Civil Appeal
183 of 2024) [2025] KEHC 4324 (KLR) (27 March 2025) (Judgment)**

Neutral citation: [2025] KEHC 4324 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CIVIL APPEAL 183 OF 2024
EN MAINA, J
MARCH 27, 2025**

BETWEEN

THE CO-OPERATIVE BANK OF KENYA LTD APPELLANT

AND

BEATRICE MUKII MUTUKU RESPONDENT

*(Being an appeal from the judgment of the Chief Magistrate Ole Keiwua delivered on
26th June 2024 in the Chief Magistrate Court at Kangundo Civil Case No. E57 of 2023)*

JUDGMENT

1. By Plaintiff dated 26th May, 2023 the Respondent herein successfully sued the Appellant for damages in regard to a sum of Kshs.140,125/- which she alleged was unlawfully debited from her account held in the Appellant's bank. She also prayed for the costs of the suit and interest. She attributed the loss of her life long savings to breach of banking roles and operating procedures on the on the part of the Appellant. She averred that the loss of her funds occurred due to collusion between the Defendants staff and/or employees and other parties.
2. In its statement of defence dated 27th June, 2023 the Appellant vehemently denied the claim and averred that it was the Respondent who made the withdrawals at the Automatic Teller Machine (ATM) using her debit card and password (PIN) which is only known to her and as a result of the withdrawals, her bank account balance reduced to Kshs 275.50/-. The Appellant averred that for each withdrawal the Respondent received an alert through her mobile phone and hence should have notified the bank in accordance with the Terms & Conditions.
3. The Appellant averred that the Respondent did not raise a concern or complaint about the withdrawals until 1st November, 2022 when a lawyer wrote to the Defendant and her claim is but an afterthought intended to unjustly enrich herself and ought to be dismissed with costs to the Appellant.



4. After hearing and evaluating the evidence adduced by the parties, the learned magistrate found in favour of the Respondent and awarded her a sum of Kshs.139,500/-, costs of the suit and interest but declined to award her general damages.
5. Being aggrieved, the Appellant preferred this appeal. The appeal is premised on the following grounds:-
 - a. That the learned Trial Magistrate erred in law by failing to consider or analyze any law or authority in arriving at the decision.
 - b. That the learned Trial Magistrate erred in law by failing to interpret and or apply any legal provision and precedent in arriving at the decision.
 - c. That the learned Trial Magistrate erred in law and in fact by failing to consider the contractual terms and conditions between the plaintiff and the defendant.
 - d. That the learned Trial Magistrate erred in law and in fact in holding the defendant liable for negligence whilst it was not a pleaded cause of action in the plaint.
 - e. That the learned Trial Magistrate erred in law by going beyond the pleadings when it found the defendant liable for negligence.
 - f. That the learned Trial Magistrate erred in law and misapprehended and misapplied the principle of adverse interference.
 - g. That the learned Trial Magistrate erred in law and in fact by holding the defendant liable despite the plaintiff failing to discharge its legal and evidentiary burden to prove her claim.
 - h. That the learned Trial Magistrate erred in law and in fact by failing to appreciate or consider the legal and factual submissions by the defendant.
 - i. That the learned Trial Magistrate erred in law and in fact by failing to consider the issues for determination.”
6. The Counsel for the parties consented to canvassing the appeal by way of written submissions.

Submissions

7. In submissions dated 18th November 2024, Learned Counsel for the Appellant stated that the Respondent served the bank with a written complaint five months after the disputed withdrawals and that failure to lodge the complaint in time absolves the bank from any liability as provided in clause 1.16 of the bank’s General Terms and Conditions (T&Cs).
8. Counsel submitted that investigations done by the Appellant revealed that the withdrawals were done in the same manner as the Respondent’s previous withdrawals and with the use of her debit card and PIN. Counsel argued that parties are bound by the terms of their contracts and the courts cannot rewrite such contracts. To support this submissions reliance was placed on the case of Centurion Engineers & Builders Limited vs Kenya Bureau of Standards [2023] KECA 1289 (KLR) and also on the case of Brogden vs Metropolitan Rly Co [1876-77]LR 2 APP CAS 66.
9. Counsel submitted that adherence to the mutually agreed terms and conditions of operating a bank account by the bank and the customer is paramount. Counsel cited the case of Philipp vs Barclays Bank UK PLC [2023] UKSC 25 and submitted that the bank’s duty is simply to execute orders by making the requisite payment but duty of care does not apply.



10. Counsel also contended that the trial Magistrate did not consider the issue of whether the Appellant unlawfully accessed the Respondent's account and stole her money and the issue of whether the DCI was yet to conclude investigations on the matter which was an important issue as stated in the case of *Republic vs Mtumba Mumba & Another* [2015] eKLR.
11. Counsel also faulted the trial Magistrate for finding the Appellant liable for negligence whilst it was not a pleaded cause of action in the plaint and submitted that the court was bound to stick to the pleadings as provided in Order 2, Rule 10(1) of the Civil Procedure Rules. For this, reliance was placed on the case of *James K. Kamau vs Nairobi City Council* [2018] KECA 625 KLR, the case of *Galaxy Paints Co. Ltd v Falcon Guards Ltd* (2000) EA 885, *Josephat Kamau Gatimu vs Peter Gatimu Kanyonyo* [2015], *Independent Electoral & Boundaries Commission & Another vs Stephen Mutinda Mule & 3 Others* [2014] eKLR and *Okoth v Nyaberi & another* [2024] KECA 427.
12. Counsel for the Appellant further submitted that the court erred by drawing an adverse inference of negligence against the Appellant for failure to produce CCTV footage of the ATM machine, where the disputed withdrawals were made, without thoroughly examining the respondent's compliance with the General Terms and Conditions of their contract.
13. Relying on Section 22 of the *Civil Procedure Act*, Counsel argued that an adverse inference ought only to be drawn in the event a Notice to Produce was issued and the adverse party failed to comply with it. To support this argument, Counsel cited the case of *Chase Bank (Kenya) Limited v Cannon Assurance Limited* [2019] KECA 313.
14. Counsel further argued that the Respondent did not discharge the burden of proof as required under Sections 107,108 and 109 of the *evidence Act* and in the case of *Samson Gwer & 5 Others v Kenya Medical Research Institute & 3 Others* [2020] eKLR where it was held that for burden of proof to shift the Respondent had first to discharge the legal burden of proof. Counsel also relied on the case of *Alice Wanjiru Ruhiu v Messiac Assembly of Yahweh* [2021] eKLR and also the case of *Muriungi Kanoru Jeremiah vs Stephen Ungu M'mwarabua* [2015] eKLR. Counsel urged this court to allow the appeal.
15. Counsel for the Respondent began his submissions by pointing out that the Respondent has a constitutional right to property. Counsel then submitted that the Terms and Conditions produced by the Appellant cannot be interpreted as a contract between the parties; that the Appellant breached its duty and money was unlawfully withdrawn from the sites over which the Appellant or its agent had absolute control and command. Counsel cited the case of *Fidelity Commercial Bank v Italian Market Kenya Limited* [2017] on the issue of duty of care and stated that the Appellant owed a duty of care to the Respondent to ensure that her account was safe and protected from fraud and other losses and should have used reasonable skill and care when processing customer payments. To buttress this submission Counsel cited the case of *Co-operative Bank of Kenya Ltd v Biwott (Civil Appeal 18 of 2019)* [2022] KEHC 9946 (eKLR). Counsel averred that the theft was planned and executed by the Appellant's agents, servants or employees and that the Respondent proved her case as required under the law and hence this appeal should be dismissed with costs.

Determination and Analysis

16. As the first appellate court and as aptly stated in the case of *Selle & Another vs. Associated Motor Boat Co Ltd & Others* [1968] EA 123, I have considered and re-evaluated the evidence adduced in the lower court so as to arrive at my own independent decision while bearing in mind that I did not see or hear the witnesses as did the trial court. I have also considered the rival submissions and cases cited by Learned Counsel for the parties.



17. There is no dispute that at all material times there was a banker/customer relationship between the Appellant and the Respondent. It is also not disputed that during the period in issue money was withdrawn from the Respondent's account leaving only Kshs.275/50. The issue for determination therefore is:-

Whether this sum was withdrawn or stolen from the account and if so whether there was a fiduciary duty between the Appellant and the Respondent and if so whether the Appellant breached that fiduciary duty.

18. The onus of proof always lies on the Plaintiff, in this case the Respondent, and the standard of proof is on a balance of probabilities. In other words, the legal burden of proof in this case fell on the Respondent. Be that as it may, once the Respondent has discharged that legal burden the evidential burden may depending on the circumstances shift to the Defendant in our case the Appellant – (see Section 112 of the Evidence Act).

19. The Court of Appeal dealt with the question of the onus of proof in the case of *Mbuthia Macharia v Annah Mutua Ndwiga & another* [2017] eKLR and stated;

“The legal burden is discharged by way of evidence, with the opposing party having a corresponding duty of adducing evidence in rebuttal. This constitutes evidential burden. Therefore, while both the legal and evidential burdens initially rested upon the Appellant, the evidential burden may shift in the course of trial, depending on the evidence adduced. As the weight of evidence given by either side during the trial varies, so will the evidential burden shift” to the party who would fail without further evidence?”

20. On the issue of whether or not the Respondent's account was unlawfully debited to the tune of Kshs.139,500/- it is my finding that she adduced evidence which proved on a balance of probabilities that the money was withdrawn without her consent. This court believed her when she stated that the money was withdrawn at places she had not been to and despite that she had her debit card safely with her. She also maintained that she had never disclosed her secret PIN or password to anybody. She did not therefore breach any of the General Terms and Conditions that attached to her account. Her evidence that she never withdrew that money was not rebutted, as indeed the Appellant did not produce the CCTV footage which it alleged would have proved that she was the one who withdrew the money. Counsel for the Appellant's arguments that the learned magistrate shifted the burden of proof is not correct given that this was a fact within the especial knowledge of the Appellant as it was the one in custody of the CCTV footage and hence the onus to produce it fell upon it. This was not a case of discovery but one of the evidential burden of proof as provided under Section 112 of the Evidence Act which states:-

“ 112] Proof of special knowledge in civil proceedings.

In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.”

21. In the absence of the CCTV footage to prove that the Respondent withdrew the cash, the Respondent's evidence that she did not withdraw the money and that it was withdrawn without her consent hence stolen, was not rebutted and hence stands.

22. As to whether the Appellant owed a duty of care to the Respondent, my finding is that it did. I am persuaded by the finding in the case of *Encyclopedia of Banking Law C.21 Selangor United Rubber*



Estate Ltd -v- Cradock (No.3) [1968] 2 ALL ER 1073 cited with approval in the case of Equity Bank of Kenya & Another v Robert Chesang [2016] eKLR, where the court stated:-

“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.”

23. My holding also finds support in the case of Co-operative Bank of Kenya Ltd v Biwott (Civil Appeal 18 of 2019) [2022] KEHC 9946 (eKLR), where the court stated:-

“The bank-customer relationship is contractual in nature and imposes a duty on the bank to exercise reasonable care and skill in its dealings with the customer ... 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 within its contract with its customer. The standard of that reasonable care and skill is an objective standard applicable to bankers. Whether or not it has been attained in any particular case has to be decided in the light of all the relevant facts, which can vary almost infinitely.”

24. From the foregoing, it is clear that in matters banking, the relationship between a bank and a customer is fiduciary. It is based on trust. It is upon that trust that the Respondent opened a bank account and deposited her money in the bank in trust that the bank would exercise due care over the same. The Appellant breached its fiduciary duty. The Appellant cannot therefore run away from its responsibility simply because negligence was not pleaded or investigations were yet to be concluded. If indeed it had evidence that the money was withdrawn by the Respondent then it ought to have tendered that evidence. In the absence of that evidence, I am persuaded that the debits were without the approval and consent and even knowledge of the Respondent. It behoves the Appellant to investigate who the culprit is and bring them to book so as to indemnify itself.

25. For the Respondent she has proved her case on a balance of probabilities. Her money was stolen while in the care and custody of the Appellant and the Terms and Conditions do not, in my view, absolve the Appellant from the duty of care bestowed upon it by the law. It must therefore, indemnify the Respondent for the loss suffered as a result of breaching its side of the contract.

26. In the premises, I find no merit in this appeal and it is dismissed with costs to the Respondent. The Judgment of the lower court is hereby affirmed and upheld.

Orders accordingly.

JUDGMENT SIGNED, DATED AND DELIVERED VIRTUALLY ON THIS 27TH DAY OF MARCH, 2025.

E. N. MAINA

JUDGE

In the presence of:

Mr. Njeru for Guandaru for the Respondent

Mr. Ned Chemwoiwa for the Appellant

C/A: Wambua

