



**Standard Chartered Bank v Masinde (Civil Appeal 139 of 2023)
[2025] KEHC 7181 (KLR) (30 May 2025) (Judgment)**

Neutral citation: [2025] KEHC 7181 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CIVIL APPEAL 139 OF 2023**

E OMINDE, J

MAY 30, 2025

BETWEEN

STANDARD CHARTERED BANK APPELLANT

AND

VICTORIA MASINDE RESPONDENT

JUDGMENT

1. This appeal arises from the ruling of Hon. R. Otieno Resident Magistrate/Adjudicator in Eldoret Small Claims Court Claim No. E419 of 2023.
2. By a Statement of Claim filed on 16/03/2023, the Respondent sued the Appellant for breach of contract for failing to protect her bank account XXXXXX thus leading to the loss of approximately Kshs.800,000/= and failing to protect her credit card facility thus leading to the loss of approximately Kshs.150,000/=. The Respondent sought judgment in the sum of Kshs.950,000/=. a declaration that she is not a loan defaulter and her name be immediately removed from the Credit Reference Bureau, compensation for breach of contract, costs of the claim and any other appropriate relief.
3. The Appellant filed a Response to the Statement of Claim, in which it denied the Respondent claim stating that the loss of funds emanated out of the Respondent's own negligence that cannot be attributed to it for reasons: that the Respondent received a phone call from a strange number that is not registered with the Appellant or in the Appellant's name; that the Respondent received the said phone call from a person purporting to be an employee of the Appellant and the Respondent was then prompted by a strange caller to share personal details of her account; that the Respondent inadvertently shares one-time password OTP for system access and beneficiary creation; that the Respondent's actions gave a third party access to her online banking platform; that the third party validated the one time password OTP sent to the Respondent's personal number sent by the bank to allow the use of a new device and to facilitate addition of a new beneficiary to the Respondent's online banking profile and in view of the above, the Respondent's personal account were exposed to a third party



who proceeded to transfer funds from her personal account to a third party account and from the Respondent's credit card to their Kenya Shillings account which was thereafter remitted to a third party account in another local bank which amounts were withdrawn immediately.

4. The Appellant stated that it was aware that a sum of Kshs.179,000/= was transferred from Respondent's Credit Card to their current account in three transactions of Kshs.150,000/=, Kshs.15,000/= and Kshs.14,000/= and that a further sum of Kshs.563,000/= was transferred from the Respondent's current account to a third party account. The Appellant maintained that the Respondent received debit notification of the above transfers on 30/10/2020, however she only reported to it on 1/11/2020. The Appellant stated that it made several efforts to reclaim the transferred funds subject to the Respondent's complaint to no avail as the funds were utilized by the third party.
5. The Appellant stated that in good faith it decided to refund the Respondent the total sum of Kshs.742,000/= being funds transferred from her accounts from which a sum of Kshs.226,603.30 was applied to pay of the Respondent's credit card. The Appellant further denied forwarding the Respondent's name to the Credit Reference Bureau in view of the incident that occurred to the Respondent. The Appellant however noted that that the Respondent had two non-performing accounts being overdraft and a credit card; that for the overdraft, the facility hit 90 days in arrears on 28/02/2023 and was listed adversely at the CRB on 10/03/2021 as a result, a prelisting notice was sent to the Respondent postal address and that currently the facility is settled and this was duly updated upon full settlement and for the credit, the facility hit 90 days in arrears on 28/02/2021 and was listed adversely at the CRB on 10/03/2021 as a result, a prelisting notice was sent to the Respondent postal address and that currently the facility is settled and this was duly updated upon full settlement.
6. After trial Judgment was delivered on 26/07/2023 and the trial Court awarded the Respondent Kshs.226,603.30/= plus costs and interest of the suit.
7. Dissatisfied with the court's decision, the Appellant lodged this appeal citing 11 grounds of appeal that:
 1. The learned Magistrate/Adjudicator erred in law by failing to exercise his discretion judiciously, hence he erred by awarding the Respondent KSh.226,603.30/=.
 2. The learned Magistrate/Adjudicator erred in law by finding that the Appellant was entitled to pay the Respondent Kshs.226,603.30/=.
 3. The learned Magistrate/Adjudicator misapplied and/or misinterpreted the law to the Respondent's Claim in a way it was not intended to be applied
 4. The learned Magistrate/Adjudicator erred in law by basing his decision of awarding Kshs.226,603,30/= on an issue not pleaded by the Respondent
 5. The learned Magistrate/Adjudicator erred in law by considering incorrect factual evidence and/or improper admission of evidence by going beyond the grounds raised by the parties in their pleadings, hence his finding on the award for Kshs.226,603.30/= is erroneous.
 6. The learned Magistrate/Adjudicator erred in law when he awarded Kshs.226,603.30/= as refund for monies that were fraudulently withdrawn from the Respondent accounts, which award was not sought nor prayed for by the Respondent in her statement of Claim hence determining matters not properly before him.
 7. The learned Magistrate/Adjudicator erred in law by failing to take into account the pleadings filed by the parties herein, and most especially by the Respondent, and as a result he arrived at an erroneous award for refund of Kshs.226,603.30/= in favour of the Respondent which resulted in a denial of justice.



8. The learned Magistrate/Adjudicator erred in law by awarding Kshs.226,603.30/=not pleaded and thus infringed on the Appellant's right to fair hearing.
9. The learned Magistrate/Adjudicator was wrong in law in its approach to the conditions under which an action for breach of contract will fall, hence arrived at an erroneous decision.
10. The learned Magistrate/Adjudicator was wrong in law in failing to find that the Respondent had a legal burden to prove that she did not owe Kshs.226,603.30/=on her credit card account, which legal burden she did not discharge ,hence it reached an erroneous verdict.
11. The Judgement of the learned Magistrate/Adjudicator is in the circumstance unfair and unjust.

Submissions

8. The court directed the parties to file written submissions. The Appellant filed her submissions on 29/01/2025 while the Respondent did not file any despite being given an opportunity to do so.

The Appellant's Submissions

9. In regard to the refund of Kshs.226,603/= not pleaded by the Respondent, Counsel for the Appellant submitted that issue before this Court is whether the refund of Kshs.226,603.30/= granted by the trial Court in favour of the Respondent despite the same not forming part of the prayers in the Respondent's Statement of Claim was erroneous in law. Counsel relied on the proviso of Order 4 Rule 2 and Order 4 Rule 6 of the Civil Procedure Rules, 2010. Counsel further submitted that it trite law that parties are bound by their pleadings. He relied on the decision in Kenya Agricultural and Livestock Research Organisation V Okoko & Another (Civil Appeal 36A of 2021) [2022] KEHC 3302 (KLR), citing the cases of Galaxy Paints Co. Ltd. V Falcon Guards Ltd /20001 2 EA 385 and Standard Chartered Bank Kenya Limited V Intercom Services Limited & 4 Others Civil Appeal No. 37 of 2003|2004] 2 KLR 183 with approval at paragraph 22, stated that:

“...courts should determine a case on the issues that flow from the pleadings and therefore a Court may only pronounce judgement on the issues arising from the pleadings...”

10. Counsel urged that it is the duty of the court to adjudicate upon the specific matters in dispute, which the parties themselves have raised by their pleadings. Counsel submitted that a perusal of the Respondent's statement of Claim, the basis of the claim is was that the Appellant was in breach of the contract between the parties that the Respondent specifically pleaded breach of contract on the following circumstances; Failing to protect the claimant's bank account 1500121585700 (Swiss Franc Account),0100321634800 (Hifadhi Current Account) & 8751221585700 (USD Account)this leading to the loss of approximately Kshs. 800,000/=therein and failing to protect the claimant's credit card facility thus leading to the loss of approximately Kshs.150,000/=”. Counsel maintained that the Respondent sought judgment for the sum of Kshs.950,000/=being the cumulative claim of Kshs.950,000/=for the various accounts. Counsel relied on the Court's decision in University of Nairobi v Otundo [2022]KEELRC 12893 (KLR) where while dealing with a similar issue, the Court relied on the decision in Caltex Oil (Kenya) Limited v Rono Limited [2016] eKLR where the court had these to say on pleadings:

“The pleadings are a precursor for a party to lead evidence in satisfaction of the prayers he seeks to be granted in his favour. Where no such prayer is pleaded in a specific and somewhat



particularized manner, the party is not entitled to benefit and the court has no jurisdiction to whimsically grant those orders."

11. He submitted that the Court in the court in (University of Nairobi vs Otundo (supra) additionally relied on *Chaticha Farmers Co-operative Society Limited v George Odhiambo & 9 others* (1987] KECA 70 (KLR) where it was stated that:

"The object of pleadings is, of course, to secure that both parties shall know what are the points in issue between them; so that each may have full information of the case he has to meet and prepare his evidence to support his own case or meet that of his opponent. As a rule, relief not founded on the pleadings will not be given"

12. Counsel faulted the trial Court for pronouncing itself on a claim that has not been made by the parties as the same would amount to plunging into the realm of speculation. Counsel observed that the court in *David Sironga Ole Tukai v Francis Arap Muge, Kiprotich Arap Kirui & Johannah Kiprono Arap Mosonik* (Sued as Chairman, Secretary & Treasurer of Kapkween Farmers' Co-operative Society Ltd) [2014]KECA 155 (KLR) noted that;

"A decision given on a claim or defence not pleaded amounts to a determination made without hearing the parties and leads to denial of justice."

13. Counsel urged the Court to be persuaded by the above case law and find the Trial Court therefore erred in law by determining and awarding the sum of Kshs.226,603.30/=when the same was never sought nor pleaded.

14. On whether the trial Court failed to exercise its discretion judiciously, Counsel relied on the Black's Law Dictionary (Tenth Edition) definition of judicial discretion. Counsel pointed out that the Appellant appreciates that the trial court is clothed with the jurisdiction under section 3A of the *Civil Procedure Act* to facilitate just, expeditious and affordable resolution of civil disputes. Counsel also highlighted Section 1 A of the *Civil Procedure Act* and he submitted that Madan JA (as he then was), stated as follows regarding judicial discretion in the case of *United India Insurance Company Limited V East African Underwriters(Kenya)Limited /1985 E.A.:*

"The Court of Appeal will not interfere with a discretionary decision of the Judge appealed from simply on the ground that its members, if sitting at first instance, would or might have given a different weight to that given by the Judge to the various factors of the case. The Court of Appeal is only entitled to interfere if one or more of the following matters are established: first, that the Judge misdirected himself in law; secondly, that he misapprehended the facts; thirdly, that he took account of considerations of which he should not have taken account; fourthly, that he failed to take account of considerations of which he should have taken account; or fifthly, that his decision, albeit a discretionary one, is plainly wrong."

15. Counsel submitted that a perusal of the proceedings reveals that the Appellant refunded the Respondent Kshs. 742,000/=being sums transferred from her various account as a sign of good faith considering the relationship between the parties. Counsel faulted the trial Court for failing to consider that the sum of Kshs.226,603.30/=was deducted by the Appellant from the Respondent's account as her credit card had fallen into arrears. Counsel contended that the burden was on the Respondent to prove that she did not have credit facilities capable of being deducted. Counsel further contended that the trial court failed to consider that the Appellant refunded the Respondent all sums that was



transferred from her account amounting to Kshs.742,000/= as a demonstration of good faith. Counsel maintained that the trial Court misdirected itself as to the law by considering matters not pleaded in the Respondent's Statement of Claim and arriving at its decision to award the Respondent a refund of Kshs.226,603.30/=. He relied on the decision in the case of George Kimotho llewe V Joseph Mathuku Neewa /2022/ eKLR, where the Court stated that:

“This being an exercise of judicial discretion, like any other judicial discretion, must be on fixed principles and not on private opinions, sentiments and sympathy or benevolence but deservedly and not arbitrarily, whimsically or capriciously. The Court's discretion being judicial must therefore be exercised on the basis of evidence and sound legal principles, with the burden of disclosing the material falling squarely on the supplicant for such orders.” (emphasis added)

16. Additionally, Counsel observed that in *Mbogo & Another Vs. Shah* (1968) E.A, it was stated;

“An appellate court will interfere if the exercise of the discretion is clearly wrong because the Judge has misdirected himself or acted on matters which he should not have acted upon or failed to take into consideration and in so doing arrived at a wrong conclusion. It is trite law that an appellate court should not interfere with the exercise of the discretion of a judge unless it is satisfied that the Judge in exercising his discretion has misdirected himself and has been clearly wrong in the exercise of the discretion and that as a result, there has been injustice.”

17. Counsel urged that the Trial Court, erred in law by failing to exercise its discretion judiciously by basing the award of a refund of Kshs. 226,603.30/= to the Respondent on private opinions, sentiments and sympathy since the same was not pleaded or prayed for.

18. On whether the Appellant's right to fair hearing was impeded, Counsel submitted that the Applicant's right to fair hearing is entrenched in Article 50 of the Constitution of Kenya, 2010, while Article 23 of the Constitution empowers this Honourable Court to hear and determine applications for redress of a denial, violation, or infringement or threat to, a right or fundamental freedom in the Bill of Rights. Counsel maintained that the Appellant's right to fair hearing was infringed when the Trial Court made a determination and granted an award in favour of the Respondent by considering matters that were not pleaded, that the Respondent in her Statement of Claim never prayed for a refund of Kshs.226,603/= from the Applicant on the grounds that the Respondent did not owe the Applicant credit card debts in arrears. Counsel relied on the decision in *China Wu Vi Limited & Another V Trene Leals Musan* (2022) eKLR, where the Court observed that the point of pleadings is to secure that both parties are aware of the points in issue between them so that they can each prepare their evidence in support of their case and that a relief not founded in the pleadings will not be given.

19. Counsel further submitted that at the time of hearing the Respondent has the burden of proving that she did not have any credit facilities, that the Appellant at the time of hearing produced bank statements indicating that the sum of Kshs.226,603/=was deducted to facilitate credit card payment. Counsel maintained that the Respondent, additionally bears the burden of proving that that she did not have any overdue credit card payments arising from the phishing incident. The Appellant did indicate during re-examination that the deduction of Kshs.226,603/=was unrelated to what was initially transferred from the Respondent's accounts. Counsel cited Section 107 and 108 with regard to



the burden of proof and also he relied on the decision in CMC Aviation Limited -vs-Cruisair Limited (No. 1) [1976-8011 KLR 835, Madan J (as he then was) expressed himself thus:-

“Pleadings contain the averments of the parties concerned or anything until they are proved or disapproved or there is an admission of them or any of them by the parties they are not evidence and no decision could be founded upon them.

Proof is the foundation of evidence. Evidence denotes the means by which and alleged matter of fact the truth of which is submitted for investigation until the truth has been established or otherwise they remain unproven. Averments in no way satisfy for example, the definition of “evidence” as anything That makes clear or obvious: ground for knowledge indication or testimony in That which makes truth evident or renders evidence to mind That it is truth.”

20. Counsel contended that by making determination and granting an award in favour of the Respondent based on matters not pleaded, the Trial court erred in law by depriving the Applicant an opportunity to be defend themselves, as well as denying them the opportunity to challenge and adduce evidence. Counsel also cited the Halsbury's Laws of England, 4 Edition, Volume 17, at paras 13 and 14 with regard to the burden of proof. Counsel urged that the learned Magistrate erred by not taking into consideration and appreciating the evidence by the Appellant that the deduction of Kshs.226,603.30/= was as a result of arrears in the Respondent's account and unrelated to the phishing incident, that despite the mare allegation that she did not have outstanding sum in her credit card account, no evidence was adduced by the respondent to support for the same. Counsel relied on the case of Gandy V. Caspair Air Charters Ltd. (1956) 23 EACA 139 where Sir Sinclair, V-P, said:-

“The object of pleadings is, of course, to secure That both parties shall know what are the points in issue between them, so That each may have full information on the case he has to meet and prepare his evidence to support his own case or to meet That of his opponent. As a rule, relief not founded on the pleadings will not be given.”

21. Counsel maintained that this is a serious miscarriage of justice and that the Applicant prays the judgement and award of the Trial Court of Kshs.226,603.30/=in favour of the Respondent be quashed.
22. Regarding costs, Counsel submitted that the general rule under Section 27 of the *Civil Procedure Act*, Cap 21 of the Laws of Kenya, is that costs follow events. Counsel observed that the Supreme Court, in the case of Narok County Government V Livingstone Kunini & 2 Others (2018) eKLR, stated that costs always follow the event, but at the Honourable Court's discretion.

Determination

23. This being the first appellate court, the guiding principle for the first appellate court was set out in the case of *Selle v Associated Motor Boat Co.* [1968] EA 123 where the court stated as follows:-

The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal from a trial by the High Court is by way of a retrial and the principles upon which the Court of Appeal acts are that the 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. In particular, the court is not bound necessarily to follow the trial Judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular



circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.”

24. I have addressed my mind to the pleadings and submissions as well as the pleadings before the Lower Court, the proceedings and the impugned judgement and it is my considered opinion is that the issue for determination is;

whether the Trial Magistrate misdirected himself in his award in favour of the Appellant

25. In its case before the trial court, the Respondents claim was for a refund of Ks. 950,000/- fraudulently siphoned from various accounts held by herself with the Appellant Bank. The Learned Magistrate in his judgement awarded the Respondent Ks. 226, 603.30 for reasons that the said amount was wrongly deducted by the Appellants by the Respondents from the total amount of Ks. 742,000/- that the Appellants agreed to refund the Respondent which amount the Respondent pleaded had been wrongfully withdrawn by the Appellants from the Respondents accounts including from her credit card account following a hacking incidence. That the Appellants had stated that the retained this amount to cater for the amounts withdrawn from the Appellant’s credit card account. The Learned magistrate in entering judgement in favour of the Respondent as against the Appellant for this amount termed this act by the Appellants to be unfair.
26. Having carefully addressed my mind to the issue herein, it is my very well considered opinion that the long and short of the award by the Learned Magistrate is that the established legal position is that it is law trite that parties are bound by their pleadings. The court being a neutral arbiter can only grant that which is sought by a party in their pleadings. Anything outside of the pleadings is untenable. This is because must not just be done, but must also be seen to be done. The court must not be seen to seem to be litigating a case on behalf of a litigant. If subsequent to the filing of the suit the Appellant’s claim became partially compromised by the Appellants in conceding to pay a certain amount of the Appellant’s claim, the Appellant then ought to have amended their claim to reflect the remaining disputed balance so as to justify the judgement of the Learned Magistrate.
27. The same not having been done, then the Learned Magistrate in awarding the amount deducted by the Appellant for the reasons given in the impugned judgement misdirected himself and I now hereby so find. In this regard, it is my finding that the Appellant’s Appeal has merit, the same is allowed in its entirety and as a consequence, the judgement delivered in favour of the Respondent and against the Appellants for the sum of Ks. 226, 603.30 and all the consequential orders thereto is now hereby set aside in its entirety with costs to the Appellants

READ DATED AND SIGNED AT ELDORET ON 30TH MAY 2025

E. OMINDE

JUDGE

