



**Co-operative Bank of Kenya Limited v Obure (Civil Appeal 61 of 2019)
[2024] KEHC 5275 (KLR) (Civ) (26 April 2024) (Judgment)**

Neutral citation: [2024] KEHC 5275 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL 61 OF 2019

CW MEOLI, J

APRIL 26, 2024

BETWEEN

CO-OPERATIVE BANK OF KENYA LIMITED APPELLANT

AND

JERIM O OBURE RESPONDENT

*(Being an appeal from the judgment of Murage, M.W., SRM delivered
on 11th January, 2019 in Milimani CMCC No. 3466 of 2016)*

JUDGMENT

1. The subject of this appeal is the judgment delivered on 11th January, 2019 in Milimani CMCC No. 3466 of 2016 arising from the suit instituted by Jerim O. Obure, the plaintiff in the lower court (hereafter the Respondent) against Co-operative Bank of Kenya Limited, the defendant in the lower court (hereafter the Appellant). The claim was for the sum of Kshs. 154,128/- and was founded on alleged negligence and/or breach of fiduciary duty.
2. It was pleaded in the plaint that at all material times, the Appellant and the Respondent enjoyed a bank-customer relationship, respectively pursuant to which the latter held credit card numbers 4797404058476642 and 47974030-0049-0214 (the first and second credit cards). It was further pleaded that sometime in the month of December 2014 the Respondent upon receipt of his e-statements in respect of the said credit cards, noted that certain withdrawal transactions had been undertaken on the said credit cards without his consent or authorization. The Respondent pleaded that he proceeded to verbally inform the Appellant of the strange transactions and vide a letter dated 18th December, 2014 and in response, the Appellant's agent advised him to complete a claim form in order to receive a refund on the irregularly withdrawn funds.



3. However, the Appellant subsequently wrote to the Respondent informing him that upon conducting investigations, it was not liable for the (allegedly) fraudulently withdrawn funds, and upon the Respondent's persistence, the Appellant agreed to conduct further investigations into the matter. Which revealed that the transactions had been undertaken by people unknown to the Respondent. That despite the Respondent's instructions for the Appellant to stop the credit cards, further irregular transactions were made on the said cards, to the tune of Kshs. 17,982/- between the months of May 2015 and July, 2015.
4. The Respondent pleaded that whereas the Appellant later refunded the said sum of Kshs. 17,982/- it declined to refund further sums withdrawn in the sum of Kshs. 138,750/- whilst simultaneously continuing to levy penalties and bank charges totaling a sum of Kshs. 33,360/- thereon. The Respondent therefore sought a refund of the outstanding sums.
5. The Appellant filed the statement of defence dated 13th July, 2016 denying the key averments in the plaint and liability. The Respondent equally denied the particulars of negligence/breach of fiduciary duty and averred that all the transactions complained of in the plaint were carried out using the credits cards and the Respondent's personal identification number (PIN), both of which were in his exclusive custody and hence the Appellant could not be held liable for any loss arising therefrom.
6. The Respondent rejoined with a reply to the defence essentially joining issue with the defence.
7. The suit proceeded to hearing with the Respondent testifying as the sole plaintiff witness. The Appellant on its part summoned (1) witness. The trial court by the judgment delivered on 11th January, 2019 granted the reliefs sought in the plaint, save to award interest on the amount sought from the date of filing suit until payment in full.
8. Aggrieved with the judgment, the Appellant preferred this appeal which is based on the following grounds:
 1. That the Learned Magistrate erred in law and in fact in holding that the Bank ought to have installed CCTV cameras at the ATM Booths yet there is no legal requirement either in the [Banking Act](#) or in any directive issued by the Central Bank of Kenya to require the same. In any event the Learned Magistrate failed to appreciate evidence on record that the ATM Booths in question were operated by other Banks independent of the Applicant.
 2. That the Learned Magistrate erred in holding that the Bank was negligent in failing to report the matter to the authorities yet evidence tabled even by the Respondent shows that it actually did refer the matter to the authorities.
 3. That the Learned Magistrate erred in holding that the refund by the Bank to the Respondent of some Kshs. 17,860/= was an admission of liability yet the circumstances, under which the same was done was fully explained by the Applicant's witness.
 4. That the Learned Magistrate erred in law and in fact by applying the principle of Judicial Notice on circumstances not envisaged by the provisions of Section 60 of the [Evidence Act](#).
 5. That the Learned Magistrate erred in law and in fact by holding that the Respondent has proved his case on a balance of probabilities yet such a finding was not supported by any evidence adduced by the Respondent contrary to the Provisions of Section 107, 108 and 109 of the [Evidence Act](#).



6. That the Learned Magistrate erred in law and in fact in failing to hold that the sole responsibility of ensuring that all ATM transactions were to be borne by the Respondent and further erred in shifting the said responsibility to the Appellant.
7. That the Learned Magistrate erred in law by failing to consider and give weight to the evidence tabled by the Appellant's witness, the Appellant's submissions and the authorities attached thereto." (sic)
9. The appeal was canvassed by way of written submissions. Counsel for the Appellant submitted that the trial court erred in making a finding that by refunding the sum particularized in the plaint, the Appellant admitted liability. Counsel asserting that the refund that was made on the sum of Kshs. 17,982/- was merely prompted by the Appellant's failure to stop and suspend use of the credit cards belonging to the Respondent pursuant to the instructions given to it on 17th June, 2015.
10. On the subject of the CCTV cameras, counsel faulted the trial court's findings stating that it was unclear how the absence of a CCTV in the ATM situated at Caltex contributed to the alleged theft in respect of the credit cards. Especially because it was a matter of fact that the ATM used in the alleged transactions was used by various banking institutions and not just the Appellant. Counsel further faulted the trial court for finding that by not installing a CCTV camera in the relevant ATM station, the Appellant acted negligently.
11. It was counsel's submission that contrary to the finding of the trial court, investigations were carried out by the Appellant following the alarm raised by the Respondent. In summary therefore, it was counsel's contention that the trial court erred in both its analysis of the pleadings and evidence, and in its finding on the matter. On those grounds, the court was urged to allow the appeal accordingly.
12. Counsel for the Respondent submitted that the appeal ought to have been summarily dismissed by dint of Section 79B of the Civil Procedure Act (CPA), since the Appellant included irrelevant documents in the record. On the merits of the appeal, counsel supported the decision by the trial court by arguing inter alia, that evidence was tendered at the trial to support the Respondent's case for negligence and breach of fiduciary duty against the Appellant; and which evidence the Appellant did not object to. Counsel further argued that despite the irregular transactions being reported by the Respondent, the Appellant took no steps leading to further loss on the part of the Respondent. That in the premises, the trial court upon considering the pleadings and evidence which had been placed before it, acted correctly by finding the Appellant negligent and by granting the reliefs sought in the plaint. Consequently, counsel urged the court to either strike out or dismiss the appeal, with costs.
13. The court has considered the record of appeal, the pleadings and original record of the proceedings as well as the submissions by the respective parties. Counsel for the Respondent in his opening submissions urged the court to summarily dismiss the appeal on the basis that irrelevant documents had been incorporated into the record of appeal. Citing the provisions of Section 79B of the CPA, which states:

“ Before an appeal from a subordinate court to the High Court is heard, a judge of the High Court shall peruse it, and if he considers that there is no sufficient ground for interfering with the decree, part of a decree or order appealed against he may, notwithstanding section 79C, reject the appeal summarily.”
14. The appeal was already admitted. Any defect in the record of appeal ought ideally to be addressed during directions. The appeal is now at the stage of determination. In the court's view, the question



whether or not the appeal ought to be summarily dismissed under the cited section has been overtaken by events.

15. Now to the merits of the appeal. This is a first appeal. The Court of Appeal for East Africa set out the duty of the first appellate court in *Selle v Associated Motor Boat Co.* [1968] EA 123 in the following terms:

“An appeal from the High Court is by way of re-trial and the Court of Appeal is not bound to follow the trial judge’s finding of fact if it appears either that he failed to take account of circumstances or probabilities, or if the impression of the demeanour of a witness is inconsistent with the evidence generally.

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.

In particular this 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 demeanor of a witness is inconsistent with the evidence in the case generally.”

16. An appellate court will not ordinarily interfere with a finding of fact made by a trial court unless such finding was unfounded, or it is demonstrated that the court below acted on wrong principles in arriving at the finding it did. See *Ephantus Mwangi & Another v Duncan Mwangi Wambugu* [1982 – 1988] IKAR 278.
17. Upon review of the memorandum of appeal and submissions by the respective parties before this court it is evident that the appeal is essentially challenging the decision by the trial court in finding liability against the Appellant and consequently awarding the reliefs sought.
18. The gist of the parties’ respective pleadings are as follows. The Respondent upon pleading that he noticed certain irregular transactions on the credit cards, averred that the irregular withdrawals were the result of negligence on the part of the Appellant, in the following manner set out in paragraphs 6 and 7 of the plaint:

6. The Plaintiff thereafter asked the Defendant to stop the Credit Card immediately but surprisingly further transactions/withdrawals totaling to Kshs. 17,982/= took place between May 2015 and July 2015 prompting further complaints and protests from the Plaintiff thereafter.

7. The Defendant later paid Kshs. 17,982/= to the Plaintiff but adamantly failed to pay the sum of Kshs. 138,750/= which had similarly been irregularly/fraudulently withdrawn by third parties due to the breach of fiduciary duty and negligence of the Defendant who, even after the Plaintiff had requested the Credit Card be stopped/disabled, still left the same running hence exposed to the fraudsters who continued to withdraw money from the Plaintiff’s Credit Card Account as the Defendant continued to irregularly levy penalties, bank charges and interest on the account which totaled Kshs. 33, 360/=.

Particulars of Negligence/Breach of fiduciary duty on the part of the Defendant



- a. Failure/neglecting to ensure that the Plaintiff's money was secure.
- b. Failure/neglecting to put/install impregnable systems that would ensure safety of the Plaintiff's money/account.
- c. Failing to stop the card account even after being informed that there were fraudsters doing the illegal/irregular transactions thereon.
- d. Refunding only part of the money the Plaintiff lost but refusing to pay the rest which clearly got lost under similar circumstances.
- e. Continuing to levy irregular/unjustifiable bank charges, interest and penalties on the account." sic

19. In its statement of defence denying the averments in the plaint and liability, the Appellant averred as follows under paragraphs 4 and 5:

“ 4. In further defence, the Defendant avers that all the transactions complained of by the Plaintiff were made from the Plaintiff's cards and the said card and P.I.N. were in the exclusive custody of the Plaintiff. The Terms and Conditions of Use of the aforesaid cards placed the duty to care for the safety of both the cards and their P.I.Ns squarely on the Plaintiff's shoulders and any loss ensuing therefrom can only be fully blamed on the Plaintiff.

5. The Defendant further avers that all its systems and control for the use of the 2 credit cards were fully operational and hence the Defendant fully discharged its duties and responsibilities in all the above transactions and therefore vehemently denies any or the particulars of negligence and/or breach of fiduciary duty as alleged by the Plaintiff.” sic

20. At the trial stage, the Respondent being PW1, adopted his executed witness statement dated 24th May, 2016 as his evidence-in-chief and produced his list and bundle of documents of like date as exhibits (though unmarked). He went on to state under cross-examination that the irregular transactions were done through the ATM although he had no way of confirming this position. The Respondent then stated that the total number of transactions complained of were seven (7), namely, a withdrawal of Kshs. 20,000/- on 6th December, 2014; a withdrawal of Kshs. 20,000/- on 13th December, 2014; two withdrawals of Kshs. 10,000/- each on 17th November, 2014; and another alleged withdrawal in the sum of Kshs. 20,000/- on 28th November, 2014. The Respondent further stated that the first and second credit cards were never in use simultaneously and that he had the PINs to both cards, but that the transactions were seemingly made on the said cards.

21. It was his further evidence that upon realizing the irregular transactions, he instructed the Appellant to stop the credit cards on 15th June, 2015 but that they did not act on his instructions, causing him to lose a further sum of Kshs. 17,982/- arising from similarly irregular transactions undertaken on 1st and 4th July, 2015 respectively. That he held the Appellant liable for failing to protect his funds. That subsequently, he wrote to Central Bank of Kenya (CBK) who sent a response he did not consider positive, by their letter dated 22nd October, 2015 and which letter formed part of his exhibits.



22. The Appellant in turn called its employee, Julius Ngure Ng'ang'a, as DW1. His evidence-in-chief consisted of the adoption of his signed witness statement. The witness proceeded to state that the Appellant ordinarily issued its customers with a card together with a sealed PIN, which the customers are at liberty to change. He testified that all ATM transactions require insertion of both the card in question and the PIN. That in the present instance, it is possible that the Respondent may have left his credit cards in the custody of other persons; that this was the position taken by the Appellant as well as CBK and other institutions. The witness further testified that interest was routinely charged on credit cards.
23. He confirmed that upon receiving instructions from the Respondent to stop the credit cards, the Appellant did not immediately act on the instructions, and that in the process, two (2) additional transactions were undertaken. That nonetheless, the Appellant eventually stopped the credit cards and refunded the sums lost as a result of delayed stoppage. It was also his testimony that the CCTV footage which was reviewed at the Umoja ATM showed an unidentifiable person transacting, but that it was not possible for the Appellant's agents to confirm whether the Respondent's card was in use at the time. He added that in the material periods, the Respondent did not surrender the credit cards but remained with them.
24. During cross-examination, the witness reiterated his earlier testimony that it was not possible to identify the person seen in the CCTV footage from the Umoja ATM on one of the material dates. He then testified that the Appellant could not stop the credit cards without first undertaking its investigations. That it was confirmed that both the Respondent's card and PIN were used at the ATMs situated at both Caltex and Umoja ATMs, the former which did not have CCTV cameras. He stated that ultimately, the responsibility rested with the Respondent to ensure both his cards and PIN were kept safe.
25. On being re-examined, the witness stated that the Respondent had never taken issue with the Appellant's terms and conditions regarding the use and safety of the credit cards.
26. Upon close of final submissions, the trial court after restating and analyzing the evidence concluded as follows in respect of the suit:

“It is common ground that the plaintiff had two accounts with the defendant and was issued with cards and pins.

It is also common ground that the plaintiff reported the alleged illegal transactions to the bank and also to the Central Bank of Kenya.

Although it is true that the pin and the cards were in the custody of the plaintiff, it is clear that the plaintiff after writing to the bank to stop any other transactions with the cards, the bank ignored. The bank did not stop the transactions and had to refund the plaintiff the money withdrawn from his accounts.

Had the bank not owned up to its mistake, the amount of Kshs. 17,982/= would not have been refunded to the plaintiff.

The bank through its witness admitted that there was no CCTV footages as the CCTV cameras had not been installed. The bank was negligent by not installing the cameras to monitor who came into the lobby.

The plaintiff kept on complaining but there was no evidence that the bank investigated the claim either by reporting to the police or otherwise.



I find that the plaintiff lost money through the negligence of the defendant. He reported to the bank. The bank refunded only Kshs. 17,982/= but ignored the plaintiff's complaint alleging that he was the sole custodian of the cards and the Pin.

I take judicial notice of the fact that many cases of this nature were reported and have been reported. It is therefore the responsibility of all banks and financial institutions to ensure that their customers hard earned cash is safely guarded.

It reiterate that the bank (defendant herein) failed causing the plaintiff to lose the amount claimed to fraudsters. It is my view that the plaintiff has proved his case on a balance of probability. I allow the claim save that interest shall be at court rates from the date of filing suit till payment in full. It is so ordered.” (sic)

27. The burden of proof in civil cases rests with the plaintiff at all material times, while the standard of proof is held on a balance of probabilities. In [*Wareham t/a A.F. Wareham & 2 Others v Kenya Post Office Savings Bank*](#) [2004] 2 KLR 91, the Court of Appeal stated in this regard that:

“We have carefully considered the judgment of the superior court, the grounds of appeal raised against it and the submissions before us on those matters. Having done so we are impelled to state unequivocally that in our adversarial system of litigation, cases are tried and determined on the basis of the pleadings made and the issues of fact or law framed by the parties or Court on the basis of those pleadings pursuant to the provisions of Order XIV of the *Civil Procedure Rules*. And the burden of proof is on the Plaintiff and the degree thereof is on a balance of probabilities. In discharging that burden, the only evidence to be adduced is evidence of existence or non-existence of the facts in issue or facts relevant to the issue. It follows from those principles that only evidence of facts pleaded is to be admitted and if the evidence does not support the facts pleaded, the party with the burden of proof should fail.” (Emphasis added)

28. The applicable law as to the burden of proof is set out under Sections 107, 108 and 109 of the [*Evidence Act*](#). The Court of Appeal in [*Mumbi M'Nabea v David M. Wachira*](#) [2016] eKLR while discussing the standard of proof in civil liability claims in our jurisdiction had this to say:

“In our jurisdiction, the standard of proof in civil liability claims is that of the balance of probabilities. This means that the Court will assess the oral, documentary and real evidence advanced by each party and decide which case is more probable. To put it another way, on the evidence, which occurrence of the event was more likely to happen than not. Section 107(1) of the [*Evidence Act*](#), Cap 80 Laws of Kenya provides as follows:

“Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.” The above provision provides for the legal burden of proof.

However, Section 109 of the same [*Act*](#) provides for the evidentiary burden of proof and states as follows:

“The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”



The position was re-affirmed by the Court of Appeal in *Maria Ciabaitaru M'mairanyi & Others v. Blue Shield Insurance Company Limited* -Civil Appeal No. 101 of 2000 [2005] 1 EA 280 where it was held that:

“Whereas under section 107 of the *Evidence Act*, (which deals with the legal evidentiary burden of proof), the burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue, section 109 of the same Act recognizes that the burden of proof as to any particular fact may be cast on the person who wishes the Court to believe in its existence.”

29. The latter statement alludes to the position that the legal burden of proof, unlike the evidentiary burden of proof, does not shift. In reiterating the standard of proof, the Court of Appeal in *Palace Investment Ltd v Geoffrey Kariuki Mwenda & Another* [2015] eKLR held that:

“Denning J, in *Miller – v- Minister of Pensions* [1947] 2 All ER 372 discussing the burden of proof had this to say;-

“That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that a tribunal can say: we think it more probable than not; the burden is discharged, but, if the probabilities are equal it is not.

This, burden on a balance or preponderance of probabilities means a win however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept where both parties... are equally (un) convincing, the party bearing the burden of proof will lose because the requisite standard will not have been attained.”

30. From the foregoing guiding authorities, the duty of proving the averments contained in the plaint lay squarely with the Respondent. In *Karugi & Another v Kabiya & 3 Others* (1987) KLR 347 the Court of Appeal stated that:

“[T]he burden on a plaintiff to prove his case remains the same throughout the case even though that burden may become easier to discharge where the matter is not validly defended and that the burden of proof is in no way lessened because the case is heard by way of formal proof. We would therefore venture to suggest that before the trial court can conclude that the plaintiff's case is not controverted or is proved on a balance of probabilities by reason of the defendants' failure to call evidence, the court must be satisfied that the plaintiff has adduced some credible and believable evidence, which can stand in the absence of rebuttal evidence by the defendant...-. The plaintiff must adduce evidence which, in the absence of rebuttal evidence by the defendant convinces the court that on a balance of probabilities it proves the claim.” (Emphasis added)

31. In the court's view, the appeal turns on the question whether the trial court was correct in both its analysis and finding that the Respondent had proved his case as against the Appellant. The court will thus address the seven (7) grounds of appeal contemporaneously, as hereunder.



32. The Respondent's case against the Appellant was founded on negligence and/or breach of fiduciary duty. The term 'fiduciary duty' was defined by the Black's Law Dictionary, 11th edition, as follows:

“a duty of utmost good faith, trust, confidence, and candor owed by a fiduciary (such as an agent or a trustee) to the beneficiary (such as the agent's principal or the beneficiaries of the trust;... a duty to act with the highest degree of honesty and loyalty toward another person and in the best interest of the other person-....Also termed as duty of loyalty, duty of fidelity; duty of faithful service; duty to avoid conflict of interest.”

33. The principle of fiduciary duty arising out of a bank-customer relationship was spelt out by the Court of Appeal in the case of *Fidelity Commercial Bank Limited v Italian Market Kenya Limited* [2017] eKLR when it held thus:

“We endorse the pronouncement of Brightman J in *Karak Brother Company Ltd v Burden* [1972] 1 All ER 1210, which has been cited with approval in several of our local cases (e.g *Simba Commodities Limited v Citibank N.A*, Civil Case No. 236 of 2003) where the learned Judge stated:-

“As between the company and the bank, the mandate, in my view, operates within the normal contractual relationships of customer and banker and does not exclude them. These relationships include the normal obligation of using reasonable skill and care; and that duty on the part of the bank, of using reasonable skill and care, is a duty owed to the other party to the contract, the customer, who in this case is the plaintiff company, and not to the authorized signatories...”

“... while carrying out the customer's instruction a bank is under obligation to exercise reasonable skill and care. That skill and care applies to interpreting, ascertaining and acting in accordance with the instructions of the customer.”

34. Among the fiduciary duties owed by a bank to its customer is the duty to safeguard the customer's account and to ensure that the account in question is operated in accordance with the instructions and mandate of the customer. It is not in dispute that a bank-customer relationship existed between the parties herein, at all material times. It is also not in issue that the Respondent held the first and second credit cards with the Appellant at all material times, giving rise to a fiduciary duty of care on the part of the Appellant, as the bank. That said, the onus was on the Respondent to prove the particulars of breach of fiduciary duty/negligence on the part of the Appellant in order for his claim to succeed.

35. The Respondent on the one part averred and argued that the Appellant was in breach of its fiduciary duty and acted negligently by essentially failing to set up CCTV cameras at the designated ATM stations and by failing to comply with his instructions to stop the credit cards upon being notified of the alleged fraudulent/irregular transactions being undertaken thereon. On the other part, the Appellant denied the particulars of breach/negligence made against it, taking the position that it fully discharged its duties and responsibilities, since all the transactions complained of were undertaken using the Respondent's PIN and credit cards, and hence the Appellant could not be held responsible for any loss arising therefrom. The Appellant, however, admitted to the delay in stopping the credit cards, and further admitted to making a refund on the sums transacting because of the delayed stoppage.



36. From the pleadings and material tendered at the trial, it is apparent that at the point of issuance of the credit cards and at all material times for that matter, both the said cards and their PIN details in the possession, custody and knowledge of the Respondent. There is nothing to indicate that the Appellant had knowledge of or access to the Respondent's PIN and other confidential information in respect thereof. The Respondent himself confirmed that the credit cards were at all material times with him.
37. It is also apparent from the pleadings and related material that the Respondent admitted to having come to the realization of the alleged irregular transactions upon receipt of his e-statements sometime in December, 2014. That subsequently, he alerted the Appellant of the said transactions, as evidenced in the letter dated 18th December, 2014 found in his bundle of documents dated 24th May, 2016. Thereafter, the Respondent completed and submitted transaction claim forms with the Appellant on the same day, copies of which are also contained in his bundle of documents.
38. It appears that the Appellant was prompted to undertake investigations on the alleged irregular transactions, hence the email to the Respondent dated 7th January, 2015 communicating the determination by the Appellant's agents that the transactions in question had taken place in an ATM and with the use of the Respondent's card and PIN details. The said email prompted a response from the Respondent on 8th January, 2015 where he expressed dissatisfaction with the outcome of the investigations. Soon thereafter, further investigations were carried out and CCTV footage was retrieved, showing a person(s) present at the ATM situated in Umoja on the material date(s). However, the said person was unidentifiable, although the Respondent claimed that he was a stranger to him.
39. Suffice it to say that the Respondent tendered an email dated 15th June, 2015 to support his testimony that he instructed the Appellant to terminate the credit cards in question. Admittedly, these instructions were not promptly acted upon by the Appellant and resulted in alleged further irregular transactions to be undertaken on the credit cards, to the tune of Kshs. 17,982/- which the Appellant later refunded to the Respondent in addition to stopping the credit card(s), a position which was confirmed by both the Respondent and DW1.
40. Taking all factors and material on record into account, the court is persuaded by the disclaimer of liability by the Appellant based on the fact that the credit cards and PIN were at all material times in the possession/custody and knowledge of the Respondent. Curiously, even after the initial alleged losses, the Respondent was content to write to the Appellant but retained the cards, and not returning them to the Appellant, as a reasonable person would have done. In any event, the Respondent did not tender any credible evidence to show that the Appellant and/or its agents had or would have had access to his PIN or cards.
41. Nor show how the negligence of the Appellant resulted in the losses that occurred prior to the stoppage instructions. The instructions and delay in effecting instructions pleaded in the particulars of negligence came several months after the earlier losses and are therefore irrelevant. Inasmuch as the Appellant owed a duty of care to safeguard the Respondent's accounts, it was not enough for the Respondent to so to speak, assert that because he did not withdraw the claimed monies himself, the Appellant must have been somehow negligent, in part for failing to install CCTV cameras. The absence of CCTV cameras, without more in the circumstances was not enough reason for the trial court to enter a finding of negligence against the Appellant.
42. Moreover, the court respectfully disagrees with the finding by the trial court that the Appellant acted negligently by not undertaking investigations. The evidence tendered at the trial supports the assertions that investigations had been carried out by the Appellant, only that the Respondent was dissatisfied with the outcome and elected to escalate the dispute to the CBK.



43. Concerning the refund of the sum of Kshs. 17,982/- the court similarly disagrees with the trial court's reasoning inferring that this constituted an admission on full liability/mistake. The Appellant explained that the refund was made on the basis that the said funds were withdrawn on the Respondent's account following the Appellant's delay in stopping the credit card(s). The stoppage instructions came several months after the December 2014 alleged losses, while withdrawal of the sum of Kshs. 17,982/- came after stoppage instructions. Thus, the Appellant's action of making a refund of the latter sum could not be taken to constitute an admission of the claim involving earlier withdrawals made before the stoppage instructions.
44. Reviewing the entire evidence, the court is not persuaded that the Respondent tendered credible evidence to demonstrate that, save for the funds refunded following the delay in stopping the credit cards, any sums allegedly lost and/or charged resulted from fraud or irregular transactions on his accounts due to negligence and/or breach of fiduciary duty on the part of the Appellant. The trial court's finding to the contrary was based on surmises upon evidence that was clearly weak.
45. Consequently, there is a reasonable basis here for interfering with the decision by the trial court. The appeal must be allowed. The judgment delivered by the trial court on 11th January, 2019 in Milimani CMCC No. 3466 of 2016 is hereby set aside and is substituted with an order dismissing the Respondent's suit in the lower court with costs. In the circumstances, the Appellant shall also have the costs of the appeal.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 26TH DAY OF APRIL 2024.

C.MEOLI

JUDGE

In the presence of:

For the Appellant: N/A

For the Respondent: Mr. Isindu

For the 2nd Defendant: Ms. Magara

C/A: Erick

