



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
COMMERCIAL & TAX DIVISION
CIVIL SUIT NO. 564 OF 2009

DILESH SOMCHAND BID.....PLAINTIFF

VERSUS

AFRIKA INVESTMENT BANK LIMITED.....DEFENDANT

JUDGMENT

[1] The Plaintiff, **Dilesh Somchand Bid**, is a businessman in Nairobi. He filed this suit on **5 August 2009** against the Defendant, **Africa Investment Bank (AIB)**, a Broker and a duly registered Investment Bank, licensed under the **Capital Markets Authority Act, Chapter 485A** of the **Laws of Kenya**. The Plaintiff's cause of action is that on or about **March, 2008**, **Safaricom Limited** issued a prospectus in respect of the sale to the public of ordinary shares in the company by way of an Initial Public Offering (IPO). The shares were offered at the rate of **Kshs. 5/=**; and the Defendant was the Lead Sponsoring Broker authorized by **Safaricom Ltd** to sell the shares.

[2] The Plaintiff, being interested in the offering, made a written application in the prescribed form dated **22 April 2008** which he duly delivered to the Defendant on **23 April 2008**. According to the Plaintiff, the Defendant acknowledged receipt of his application and, in consideration of a commission, agreed to secure allocation of up to a maximum of 32,500,000 shares for him, worth **Kshs. 162,500,000**. He added that the application was accompanied by:

[a] A letter dated **23 April 2008** by **M/s Prime Bank Limited** to the Central Depository & Settlement Corporation requesting pledging of shares;

[b] **Cheque No. 014834** dated **23 April 2008** drawn upon **M/s Prime Bank Ltd**, Riverside Drive Branch, Nairobi in the sum of **Kshs. 1000/=** payable to the Central Depository & Settlement Corporation Ltd, being the pledging fee for the shares applied for;

[c] The prescribed CDS5 Pledge Form duly signed and stamped by the Plaintiff and the Bank;

[d] **Cheque No. 0148333** dated **23 April 2008** drawn upon **M/s Prime Bank Ltd**, Riverside Branch, Nairobi, in the sum of **Kshs.162,500,000/=** payable to **Safaricom Ltd**, being the value of the 32,500,000 shares applied for by the Plaintiff;

[3] It was the contention of the Plaintiff that his application set out therein, his CDS Account Number to which the allotted shares would be credited; the details of the bank account to which the sum of **Kshs.**

162,500,000/=, or any part thereof, would be refunded, if need be. Thus, since the Plaintiff was, in due course, advised that he had been allotted only 6,906,300 shares valued at **Kshs. 34,531,500/=**; it was therefore his legitimate expectation that the Defendant would ensure that the balance of the sum of **Kshs. 127,968,500/=** being the difference between what he paid and the value of the allotted shares, would be refunded to his financiers, **Prime Bank Limited**, by way of Electronic Funds Transfer as per his intimation in the share application form. The Plaintiff added that, this intimation was on account of the fact that he had obtained a loan from **Prime Bank Ltd** at the compounded rate of 14% per annum to enable him purchase the shares.

[4] The Plaintiff further averred that, as at **23 June 2008**, the value of the shares, as published by the Nairobi Stock Exchange, had risen to **Kshs. 7.85** per share. He accordingly instructed the Defendant to sell the allotted 6,906,300 shares on **23 June 2008** at the aforementioned rate; but that in breach of the said agreement and its obligation to the Plaintiff, the Defendant failed to do so. Thus, it was not until **23 July 2008** that the Plaintiff's CDS account was credited with the allotted shares; and it was not until **27 June 2008** that the refund of the balance of the share purchase price paid by him. Thus, the shares were later sold on **4 and 5 August 2008**, by which time the price had dropped to **Kshs. 5/85** per share. Consequently, he earned only **Kshs. 39,315,320/85** from the transaction instead of **Kshs. 54,214,455/=** that he would have earned had the shares been sold at **Kshs. 7/85**.

[5] Given the foregoing scenario, the parties negotiated a Memorandum of Understanding dated **15 September 2008**; whereby the Defendant agreed to pay and did pay the Plaintiff the sum of **Kshs. 7,937,501.91** being 50% of the loss and damage suffered by the Plaintiff as of **14 September 2008**. The value of the shares was worked at **Kshs. 7/85** per share and the rate of interest applied was 14% per annum, compounded. The Defendant was to pay the Plaintiff the balance of the monies together with interest at the agreed rate, but failed to do so, thereby necessitating the filing of this suit. Hence, what the Plaintiff seeks herein is simply the balance of the agreed sum constituting his loss of **Kshs. 8,968,133.34** together with interest at the rate of 14% per annum compounded until payment in full; as well as costs of the suit with interest thereon; and, although the Plaintiff was amended twice, vide the Amended Plaintiff filed herein on **3 March 2010**, and the Further Amended Plaintiff which was filed herein on **8 April 2010**, the Plaintiff's prayers and the substance of his claim remain largely unaltered.

[6] In support of the Plaintiff's case, evidence was adduced from the Plaintiff, **Dilesh Somchand Bid (PW2)** and the Managing Director of **Bid Securities Ltd, Mr. Kunal Kamlesh Bid (PW1)**. The Plaintiff adopted his Witness Statement filed herein on **1 February 2016** in replacement of his initial Witness Statement. His evidence was that, upon learning of the **Safaricom IPO** through the daily newspapers, he contacted his stock-broking agents, **Bid Securities Limited**, and was provided with a copy of the Prospectus. The shares were being offered at **Kshs. 5/=** per share and, as he was interested in purchasing a large number of shares, he approached several banks for financing options. He ultimately settled on **Prime Bank Ltd** as they offered him **Kshs. 4/=** for every **Kshs. 1/=** that he put in. **PW2** further stated that he accordingly completed the application form in respect of 32,500,000 shares and forwarded the same to the Defendant together with the supporting documents, including bankers cheques numbers 014833 and 014834 for **Kshs. 162,500,000/=** and **Kshs. 1000/=** respectively (copies at page 182 of the Plaintiff's Bundle of Documents).

[7] It was the evidence of **PW2** that on **30 May 2008** when the result of the allocations was published in the press, he got to learn that he had been allocated only **6,906,300** shares valued at **Kshs. 34,531,500/=**, being 21.25% of the total number of shares he had applied for. The difference of the purchase price, of **Kshs. 127,968,500/=**, was thus to be refunded to his account on **9 June 2008** through Electronic Fund Transfer as specified in the Safaricom IPO Prospectus. He stated that, on his instructions, **Bid Securities Ltd** wrote to the Chief Executive Officer of the Defendant enquiring on the allocation and the refund. Thereafter on **23 June 2008**, he got to learn from his agents, **Bid Securities Ltd**, that the price of the shares had reached **Kshs. 7.85**; and thereupon, he immediately instructed his agents to sell all his shares on the same day.

[8] It was the testimony of **PW2** that he was disappointed to learn from his agent, **PW1**, that his CDS account had not been credited with his shares until **23 July 2008**; and that it was therefore not possible to

sell the shares at **Kshs. 7.85** as per his instructions. The shares were later sold on **4 August 2008** and **5 August 2008** at prices between **Kshs. 5.75** and **Kshs. 5.85** thereby realizing the total sum of **Kshs. 39,315,320.85**, instead of **Kshs. 54,314,455/=** as had been anticipated had the shares been sold at **Kshs. 7.85** on **23 June 2008**. He was paid by a cheque dated **13 August 2008**, but was soon advised by his bankers that the cheque had been returned unpaid. Thereafter they had various meetings with the Defendant and their lawyers with a view of resolving the matter, that culminated in the signing of the Memorandum of Understanding dated **15 September 2008** (at page 212-218 of the Plaintiff's Bundle of Documents), pursuant to which the sum of **Kshs. 10,175,459.22** being 50% of the Plaintiff's claim together with interest was placed in an escrow account for 90 days pending the resolution of the Defendant's claim against **Citibank**. The parties further agreed that the monies would be released to the Plaintiff should there be no agreement between the Defendant and Citibank within the period aforementioned.

[9] According to the Plaintiff no progress was thereafter made in connection with the Memorandum of Understanding; and that after 90 days had lapsed, the sum of **Kshs. 7,937,502.15** was released to him being 50% of his claim against the Defendant, thus leaving a balance of **Kshs. 8,968,133.60** being the balance of his claim plus the accrued interest of **Kshs. 1,030,631.43**.

[10] The Plaintiff's testimony was supported by the evidence of **Kunal Kamlesh Bid (PW1)**, who confirmed that **PW2** was their client, and that he had expressed interest in investing in the Safaricom IPO, in respect of which he submitted an application form for 32,500,000 shares worth **Kshs. 162,500,000/=**; and that the application was financed by **Prime Bank Ltd**. **PW1** confirmed having forwarded the Plaintiff's application to the Defendant vide the letter dated **23 April 2008** (at page 177 of the Plaintiff's Bundle of Documents) and enclosed all the supporting documents, including two cheques for the value of the shares, **Kshs. 162,500,000/=** and **Kshs. 1,000/=**, respectively, for the processing fee, as required by the Prospectus. **PW1** further confirmed that the allotted shares ought to have been credited into the Plaintiff's CDS account by **4 June 2008**, but that this was not to be.

[11] **PW1** further confirmed that the Plaintiff ended up receiving only a fraction of the shares he had applied for and that the refund, of **Kshs. 127,968,500/=**, which was to be paid to the Plaintiff's account with **Prime Bank Ltd** by **9 June 2008**, was not timeously made by the Defendant. He added that it was not until **26 June 2008** that he received the refund cheque drawn by the Defendant and had it forwarded to **Prime Bank Ltd**. Copies of the forwarding letter and cheque were exhibited at pages 189 and 190 of the Plaintiff's Bundle of Documents. **PW1** further testified that the Plaintiff's instructions to have all his allotted shares on **23 June 2008** at the prevailing market price of **Kshs. 7.85** could not be complied with because the Defendant had failed to have the shares uploaded and credited in the Plaintiff's CDS account within the timelines stated in the Prospectus; and that when the shares were finally sold on **4 and 5 August 2008**, the cheque issued by the Defendant to the Plaintiff for **Kshs. 39,315,320.85** was thereafter returned unpaid, hence the discussions and the ensuing Memorandum of Understanding. Both **PW1** and **PW2** referred to the documents comprising the Plaintiff's Bundle of Documents, which were produced herein by the Plaintiff and marked as the Plaintiff's **Exhibit. No. 1**.

[12] In the Defendant's Statement of Defence, filed herein on its behalf on **7 September 2009** by the firm of **M/s Ochieng Onyango Kibet and Ohaga Advocates**, it was conceded that, indeed the Defendant, **Afrika Investment Bank Limited**, was an Authorized Selling Agent in respect of the **Safaricom Ltd** IPO; and that, as such Authorized Selling Agent, it was required to co-ordinate its services with the Transaction Advisor, the Application Processing Agent and the Lead Receiving Bank to ensure the success of the transaction. The Defendant further averred that it was specifically mandated to do the following:

[a] Act as selling agent for the IPO by selling the shares to potential investors;

[b] Assist investors in understanding the business of Safaricom Limited as set out in the Prospectus;

[c] Assist investors in completing the application forms;

[d] Forward all applications received and processed to the Application Processing Agent within the time provided in the Transaction Timetable;

[e] Ensure that all information in the application forms was accurate and adequate and that all supporting documentation had been provided.

[13] The Defendant further conceded that it received from the Plaintiff a written application together with the accompanying documents for the purchase of 32,500,000 shares at the value of **Kshs. 5/=** each, but denied that it had agreed to secure the allocation of any number of shares to the Plaintiff; or that it received a commission from the Plaintiff as consideration as alleged, or at all. It then forwarded the Plaintiff's application with all the accompanying documents to **Citibank NA** as the Lead Receiving Bank and Application Processing Agent whose responsibility it was to collect, collate and process all applications and thereafter provide the data to the Registrar for allocation.

[14] The Defendant also admitted that it received instructions from the Plaintiff on **23 June 2008** to sell all the shares that had been allotted to him, and that the shares were then going for **Kshs. 7/85** at the Nairobi Stock Exchange. It however contended that its inability to comply with the Plaintiff's instructions arose from the failure by **Citibank**, the Lead Receiving Bank and the Third Party herein, to credit the Plaintiff's CDS Account with the allotted shares. The Defendant further blamed **Citibank** for the failure to refund the Plaintiff the balance of **Kshs. 127,968,500/=**, and added that it was obliged to make separate arrangements for the refund of the Plaintiff's funds in order to safeguard the good business relationship that it enjoyed with the Plaintiff, and to mitigate the pressure that the Plaintiff was placing it under with respect to the refund of the monies.

[15] Lastly, the Defendant acknowledged that it entered into the Memorandum of Understanding as pleaded in paragraph 13 of the Plaint, but added that it was understood by the parties that the purpose of the Memorandum of Understanding was to accord the Defendant time to take up and resolve the matter with **Citibank**; and that since **Citibank** thereafter denied responsibility, it was constrained to take out Third Party proceedings against **Citibank** for the purpose of claiming contribution and/or indemnity.

[16] In support of the Defence Case, evidence was called from **Nina Goswami (DW1)**, the Defendant's Operations Manager. She confirmed that the Defendant is an Investment Bank licensed by the Capital Markets Authority and that it offers various products and services, including stock brokerage, fixed income dealing and collective investment schemes. **DW1**, who adopted her Witness Statement dated **12 April 2013**, further confirmed that the Defendant was appointed as one of the Lead Sponsoring Stockbrokers for the Safaricom IPO, which was an offer by the Government of Kenya to sell 10,000,000,000 ordinary shares of **Safaricom Ltd**. **DW1** confirmed that he Defendant was also appointed an Authorized Selling Agent, while the Third Party was one of the Receiving Banks alongside **National Bank of Kenya, Equity Bank Ltd** and **Post Bank**; and that to effectively undertake its obligations the Defendant set up a team which was trained to deal with all issues relating to the IPO. She added that the Government issued a detailed Prospectus, setting out the procedures and other pertinent details, such as the timetable for the IPO. In addition, to attract the greatest possible interest in the shares, the IPO was divided into five pools, namely: Domestic Retail, Qualified Institutional Investors, Safaricom Dealers, Employees of Safaricom and the International Pool.

[17] It was further the testimony of **DW1** that the Prospectus was explicit that applicants were at liberty to approach licensed commercial banks, at their own risk, for loan facilities to facilitate participation and payment of the full amount due in respect of the shares applied for; and that applicants were free to elect to receive allotment of shares by way of share certificate or in immobilized form by way of crediting their CDS accounts with the allocated number of shares. In respect of refunds, it was the evidence of **DW1** that applicants were at liberty to elect whether to receive any refunds by cheque or by electronic funds transfer into their designated bank account.

[18] **DW1** confirmed in her evidence that the Plaintiff was one of the investors who applied for the Safaricom shares; and that his application for 32,500,000 shares was allocated Serial Number 1553855. She further confirmed that the said application was submitted along with all the requisite documents

including a Bankers Cheque No. 14833 drawn on **Prime Bank Ltd**, Riverside Drive Branch, Nairobi; and that it was indicated in the application that the purchase had been financed by **Prime Bank Ltd** in respect of which a Pledge Form was also provided. It was also confirmed by **DW1** that the Plaintiff had expressly indicated that the shares allotted to him be allocated directly into his CDS account; and that any refund be remitted to him by EFT to **Account Number 008LNTMLB23161** at **Prime Bank Ltd**, Riverside Drive Branch.

[19] It was the evidence of **DW1** that, upon receipt of the Plaintiff's application, it was duly processed, batched with other applications in accordance with the requirements set out in the Agents' Manual and remitted to **Citibank**, as the Application Processing Agent; and that **Citibank** acknowledged receipt thereof on **26 April 2008**. According to her, the role of the Defendant ended at that point, as it had no role either in the allocation of shares or refund of any monies to the Plaintiff. She added that the Safaricom IPO was grossly oversubscribed and that all applicants received only a proportion of the shares for which they had applied. She confirmed therefore that they got to learn, at the close of the IPO, that the Plaintiff had been allocated only 6,906,300 shares and was therefore entitled to a refund of **Kshs. 127,968,500/=**; which they assumed would be promptly done by **Citibank**.

[20] It was the evidence of **DW1** that the Defendant was taken aback when the Plaintiff began to make inquiries from it regarding his shares and the refund; and upon following up they were able to establish that arising from certain difficulties at **Citibank**, certain applications were not processed. She added that, as the Plaintiff was an important customer and had become aggressive in his demands including reporting the issue to the **CMA**, a decision was taken by the Defendant to refund the Plaintiff to safeguard its reputation and commercial interests; and that it was for the same reason that the Defendant entered into the Memorandum of Understanding dated **15 September 2008**, in terms of which the Plaintiff was to grant the Defendant time to pursue the matter with Citibank. Thus, the Defendant denied any liability whatsoever for the Plaintiff's claim and prayed for the dismissal of this suit with costs.

[21] The court record confirms that, at the instance of the Defendant, a Third Party Notice was consequently issued on **2 November 2009** pursuant to directions given by the Court on **30 October 2009**; and that the Third Party, **Citibank NA**, thereafter filed its Memorandum of Appearance and Defence through the law firm of **M/s Njoroje Regeru and Company Advocates**. The Third Party confirmed thereby that on or about **14 March 2008**, the Government of Kenya and **Safaricom Limited** published a Prospectus in respect of an offer by the Government of Kenya for the sale of 10 billion ordinary shares with a par value of **Kshs. 5/=** per share; and that it was appointed as the Lead Receiving Bank and the Application Processing Agent by the Government of Kenya, while the Defendant was appointed the Lead Sponsoring Broker and Authorized Selling Agent in respect of the IPO. It was however the contention of the Third Party that it was the Defendant's obligation as an Authorized Placing Agent to, inter alia, perform its services as enumerated in Schedule A of the Agency Agreement; provide the said services diligently and in accordance with the Timetable of Key Events as set out in Schedule B of the Agency Agreement; and reconcile with the Third Party, within the deadline as stipulated in the timetable, failing which the Third Party would finalize the allocation/allotment based on the Third Party's records and issue shares and refunds accordingly.

[22] With regard to the Plaintiff's application, it was the contention of the Third Party that it was the responsibility of the Defendant as the Authorized Selling Agent to procure from the Plaintiff all the necessary data and to upload the same onto the e-IPO Online website/system; and that the Plaintiff's application for 32,500,000 shares valued at **Kshs. 162,500,000/=** was one of the applications in respect of which no data had been received or uploaded by the Defendant; and in respect of which the Defendant opted to make two global applications on or about **28 May 2008** vide applications **Serial No. 572507** and **572508**. The Third Party added that upon completion of the Safaricom IPO, it issued the Defendant with two refund cheques dated **9 June 2008** for **Kshs. 50,625,000/=** and **Kshs. 154,194,000/=**, respectively; and that the cheques were presented for payment and were duly paid on **10 June 2008** through **Stanbic Bank Kenya Limited**, in accordance with the Safaricom IPO Timetable. The Third Party accordingly denied that it is liable to indemnify the Defendant herein, and added that at all material times, it was acting as an agent for a known principal, a fact to which the Defendant was privy; and that the Defendant ought therefore to have pursued his claim, if any, from the right party.

[23] The Third Party relied on the evidence of **Stanley Mbatia Mbogo (TPW1)**, the Witness Statement dated **5 October 2015** and the List and Bundle of Documents filed on **23 February 2013**. **TPW1** asserted that the Third Party processed all applications and cheques received from the Defendant in respect of the Safaricom IPO and duly forwarded daily reports of applications and payment status to the Defendant; and that at the close of the exercise, the Third Party duly submitted to the Defendant the status report for all the applications and payments which the Third Party had received from the Defendant as follows:

[a] The total number of shares applied for by all the applicants who had gone through the Defendant was 960,888,100;

[b] The value of the said shares applied for was **Kshs. 4,804,440,500/=**;

[c] The total amount forwarded by the Defendant to the Third Party on account of the said shares was **Kshs. 3,583,116,880/=**; and that the outstanding payment or shortfall stood at **Kshs. 426,620/=** in respect of the retail investors who had submitted their applications through the Plaintiff.

[24] **TPW1** further stated that there were certain applications, whose total value came to **Kshs. 564,732,220/=**, that had been submitted to it by the Defendant with discrepancies and in respect of which it sent an exception report to the Defendant on or about **26 May 2008**. According to the Third Party, it was the duty of the Defendant to ensure the applications were verified for compliance and to not only procure from their client all the necessary data, but to also upload the same onto the e-IPO Online website/system. **TPW1** testified that the Plaintiff's application was one of the applications in respect of which no data was uploaded onto the e-IPO system and that in response to the queries by the Third Party, the Defendant opted, on or about **28 May 2008** to make two global applications valued at **Kshs. 260,092,000/=** vide **Application Serial No. 572507** for 12,857,400 shares valued at **Kshs. 64,287,000/=** and **Application Serial No. 572508** for 39,161,000 shares valued at **Kshs. 195,805,000/=**, respectively. That upon completion of the Safaricom IPO, the Third Party issued the Defendant with two refund cheques dated **9 June 2008** for **Kshs. 50,625,000/=** and **Kshs. 154,194,000/=**, respectively, in respect of the global application; which cheques were presented for payment and were duly paid in the ordinary course of banking business on **10 June 2008** through **Stanbic Bank Kenya Limited**, Nairobi Branch. The Third Party also mentioned that the Defendant executed a Reconciliation Certificate on **2 October 2008** which stated, inter alia, that they agreed, acknowledged and confirmed that the reconciliation data was correct and accurate in every respect; and that by duly executing the certificate they indemnified **Citibank** for any future liability or claims that may arise related to the Safaricom IPO. Thus, the Third party denied any default in carrying out its duties and obligations as Lead Receiving Bank and Application Processing Agent.

[25] In the light of the foregoing summary of evidence, there is no disputation that on or about the month of **March 2008**, **Safaricom Ltd** issued a Prospectus in respect of an offer for sale by the Government of Kenya of 10,000,000,000 of its ordinary shares at **Kshs. 5/=** per share. The Defendant was appointed the Lead Sponsoring Broker and Authorized Selling Agent, while the Third Party was appointed as the Lead Receiving Bank as well as the Application Processing Agent. There is consensus that, in addition to the detailed information provided in the Prospectus, all the key players were trained and supplied with Manuals pertinent to their specific roles. Copies of the Prospectus are to be found at pages 1 to 175 of the Plaintiff's Bundle of Documents and pages 1 to 177 of the Defendant's List and Bundle of Documents; and at page 11 of the Prospectus (see page 11 of the Plaintiff's Bundle of Documents and page 13 of the Defendant's Bundle) the timelines were clearly set out, indicating when the sale would commence in respect of the Domestic Pool, when the IPO would close, date of payment of refunds and when NSE trading would commence.

[26] There was no disputation that the Plaintiff, through his stockbroker, **Bid Securities Ltd**, lodged an application with the Defendant for 32,500,000 ordinary shares worth **Kshs. 162,500,000/=**. A copy of the letter dated **23 April 2008** by which **Kunal Bid (PW1)** submitted the Plaintiff's application to the Defendant, was exhibited at page 176 of the Plaintiff's Bundle of Documents; while the Application Form that was duly filled by the Plaintiff was exhibited at pages 179 to 180 of the Plaintiff's Bundle of

Documents. In the Application Form, the Plaintiff indicated his preference that the shares be credited to his CDS account and that refunds, if any, be made to **Prime Bank Ltd**, Riverside Drive Branch, by way of EFT. The application was accompanied by two Bankers Cheques issued by **Prime Bank Ltd** whose copies were exhibited at page 182 of the Plaintiff's Bundle of Documents. The Plaintiff's application was allocated **Serial Number 1553855** and was accompanied by all the requisite documents, including a Pledge Form in favour of Prime Bank Ltd for which the requisite fee of **Kshs. 1000/=** was paid by **Prime Bank Ltd**.

[27] There is no dispute that the Plaintiff's application was duly received and stamped by the Defendant; and that the Pledge Form was accordingly forwarded to **CDSC** for notification. At page 183 of the Plaintiff's Bundle of Documents was the Defendant's letter forwarding the Pledge Form to **CDSC**. According to the timelines set out in the Prospectus, the IPO was to close on Wednesday, **23 April 2008** at 3.00 p.m. and the Allocation Results were to be announced on Friday, **30 May 2008**. The parties were in agreement that the announcement was indeed made as scheduled and the outcome, for the Plaintiff, was that only 6,906,300 was allotted to him. It turned out that the IPO was grossly over-subscribed and a decision had been taken to allocate all applicants shares on a pro rata basis of 21.25% of the total number of shares applied for. This, to the Plaintiff, was sufficient proof that his application was valid and had been processed along with others; and therefore it was the Plaintiff's legitimate expectation that his allotted shares would be credited to his CDS account by **4 June 2008** in readiness for trading as indicated in the Prospectus. It was further the Plaintiff's legitimate expectation that the refund due to him, in the sum of **Kshs. 127,968,500/=**, would be transmitted promptly by way of EFT to **Prime Bank Ltd**.

[28] There is further no dispute that, on learning from **PW1** that the Safaricom shares were trading at **Kshs. 7/85**, the Plaintiff issued instructions to his stockbroker, **Bid Securities Ltd**, to have all his allotted shares sold on **23 June 2008** at the prevailing rate aforementioned. Again, there is no dispute that **PW1** notified the Defendant accordingly as per the email at **page 188** of the Plaintiff's Bundle of Documents; or that **PW1** was unable to carry out these instructions for the reason that the Plaintiff's shares had not been uploaded or credited to his CDS account by then. It is further not in dispute that the shares were not credited to the Plaintiff's CDS account until the **25 July 2008**, over 50 days after the prescribed date; or that the refund was not made until **26 June 2008**. Copies of the Plaintiff's Statement of Account, the refund cheque and forwarding letter were exhibited by the Plaintiff at pages **189, 190, and 203 to 206** of the Plaintiff's Bundle of Documents. Thus, doing the best they could, and as confirmed by the correspondence exhibited at pages 199 to 201 of the Plaintiff's Bundle of Documents, **PW1** facilitated the sale of the shares on the **4 and 5 August 2008**, and ended up fetching only **Kshs. 39,315,320.85** therefor, at the prices of between **Kshs. 5.75** and **Kshs. 5.85**, which were then the prevailing best prices.

[29] It is instructive that the Defendant's cheque for the sale was not issued to the Plaintiff until **13 August 2008** (a copy thereof was exhibited at page 207 of the Plaintiff's Bundle of Documents), but also that the said cheque was returned unpaid on presentation with the remarks "Refer to Drawer" thereby causing the Plaintiff to incur additional expenses for the reversal. The Plaintiff produced as an exhibit a letter dated **18 August 2008** from **Fina Bank** (at page 208 of the Plaintiff's Bundle of Documents) to authenticate his evidence in this connection. All this while, the Plaintiff as well as **PW1** had, in various letters and email communication, expressed the Plaintiff's disappointment to the Defendant and notified it of his loss and damage and his intention of seeking legal redress. Copies of some of the letters and emails were exhibited at pages 185, 186, 191, 192, 193, 194, 200 and 202 of the Plaintiff's Bundle of Documents.

[30] It was in the light of the foregoing background that the parties held discussions and crafted for themselves the Memorandum of Understanding dated **15 September 2008**, exhibited at pages 212 to 218 of the Plaintiff's Bundle of Documents, and at pages 184 to 189 of the Defendant's Bundle of Documents. The MOU, which was signed by the Plaintiff and **Best Investment Decisions Limited** on the one part and the Defendant on the other, makes it clear that, although it was limited to the grant of time and accommodation to the Defendant to sort out the dispute with **Citibank** (the Third Party herein), it was acknowledged that the investors (the Plaintiff and **Best Investment Decisions Ltd**) had suffered loss and damage as a result of certain acts and omissions on the part of the Defendant in handling the investment. Accordingly, the Defendant was agreeable to making a deposit of 50% of the Plaintiff's claim, to the tune

of **Kshs. 10,175,459.22** in an escrow account in the joint names of the advocates for the parties for 90 days, pending the outcome of its engagement with **Citibank** over the matter. The Defendant's position was that the matters complained of by the investors and which culminated in the claim were the responsibility of the Third Party. Nevertheless, the MOU was explicit and the parties were in agreement that, in the event of failure by the Broker to pursue or otherwise settle with **Citibank** as proposed, the funds in the escrow account would be released to the investors unconditionally and the investors were to be at liberty to pursue the Broker by way of court action, or otherwise as they would deem expedient, for the recovery of the balance.

[31] Whereas the Defendant did take up the matter with **Citibank**, no amicable settlement was reached; and therefore the funds in the escrow account were duly released to the Plaintiff. In the same vein, this suit filed for the balance of the Plaintiff's claim, in the sum of **Kshs. 8,968,133.60** together with interest and costs. Thus, in the light of the foregoing, the only issues remaining for determination are:

[a] Whether the Plaintiff has made out a good case for the payment of the sum claimed by him together with attendant interest and costs; and if so;

[b] Who between the Defendant and the Third Party is liable for the payment.

[a] On whether the Plaintiff has a good case:

[32] As has been pointed out herein above, the Plaintiff has presented uncontroverted evidence that, with funding from **Prime Bank Ltd**, he submitted his application for a total of 32,500,000 shares in respect of the Safaricom IPO worth **Kshs. 162,500,000/=**; and that he ended up receiving only 6,906,300 shares valued at **Kshs. 34,531,500/=**. He was therefore entitled to a refund of **Kshs. 127,968,500/=** by **9 June 2008**; and that the refund was not made until **26 June 2008**, per the Defendant's cheque at page 190 of the Plaintiff's Bundle of Documents. The Plaintiff has also shown that, granted that he was financed by **Prime Bank Ltd**, it was imperative that the unutilized funds be promptly refunded to the said Bank; and for this reason he had provided his account particulars and made it clear in his Application Form that he had taken for EFT option, as shown on page 180 of the Plaintiff's Bundle of Documents. The letter at pages 186 and 187 of the Plaintiff's Bundle of Documents further confirms that **Prime Bank Ltd** did weigh in on the situation and made it clear that:

"We had forwarded to you the following applications of our clients who were financed by us for allotment of shares under Safaricom IPO along with relative Bankers' cheques for the value of the application money for onward transmission to Citibank together with the relative CDS 6 Pledge forms under cover of our Letters No. PBL/HO-ADV/08/635 dated 23rd April, 2008 and PBL/Ho-ADV/08/652 dated 23rd April, 2008. The applicants had instructed for receipt of the refund if any to be made by EFT... We are extremely concerned to note that refunds for the full value of the shares unallotted have not be received till this date..."

[33] The letter is dated **19 June 2008**, and therefore was written ten days after the deadline for refunds as set out in the Prospectus. It was the undisputed evidence of the Plaintiff that he incurred bank charges by way of interest of **Kshs. 883,508.55** for the late refund, calculated at the rate of 14% per annum. The Plaintiff further showed that his allotted shares were not credited in time to his CDS account and therefore that he was denied the opportunity to sell them on **23 June 2008** at the then prevailing rate of **Kshs. 7.85** per share. The Plaintiff calculated his loss as set out at paragraph 14 of his Further Amended Plaint thus:

[a] **Kshs. 883,508/=** being interest accrued from the Bank on late refund of **Kshs. 127,968,500/=** @ 14% per annum from **9 June 2008 to 27 June 2008**;

[b] **Kshs. 13,788,877.36** being the difference between the sum of **Kshs. 53,104,198** that he would have earned had his shares been sold on **23 June 2008** at **Kshs. 7.85** and **Kshs. 39,315,320.85** that he received;

[c] **Kshs. 1,202,618.46** being interest accrued on [a] and [b] above upto the date of the MOU.

[34] The Plaintiff then reduced from the total of **Kshs. 15,875,003.82** the sum of **Kshs. 7,937,501.91**, being 50% of his claim, that was paid by the Defendant pursuant to the MOU, to arrive at the sum of **Kshs. 7,937,501.91**; to which he added interest for the period **15 September 2008 to 31 July 2009**; **July 2009** being the month immediately preceding the filing of this suit. The same justification was provided by way of the document annexed at page 217 of the Plaintiff's Bundle of Documents. The Plaintiff has therefore made a good and an unrebutted account for the sum claimed of **Kshs. 8,968,133.34**; and it is therefore my finding that he is entitled to that sum together with interest at 14% per annum from **1 August 2009** till payment in full, bearing in mind that the Plaintiff obtained a loan for the specific purposes of the investment which he had to pay back with interest. In this regard, I am persuaded by the expressions of the Court in **Sempra Metals Ltd vs. Inland Revenue Commissioners and Another [2007] 3 WLR 354** in which it was held that:

"In the nature of things the proof required to establish a claimed interest loss will depend upon the nature of the loss and the circumstances of the case. The loss may be the cost of borrowing money. That cost may include an element of compound interest. Or the loss may be loss of an opportunity to invest the promised money. Here again, where the circumstances require, the investment loss may need to include a compound element if it is to be a fair measure of what the plaintiff lost by the late payment. Or the loss flowing from the late payment may take some other form. Whatever form the loss takes the court will here, as elsewhere, draw from the proved or admitted facts such inferences as are appropriate. That is a matter for the trial judge."

[b] Who between the Defendant and the Third Party is liable for the payment.

[35] As has been shown herein above, the Plaintiff blames the Defendant for his loss and had given indication in this connection well before the filing of the instant suit. It was however the contention of the Defendant that, having batched and submitted the Plaintiff's application, along with others, to the Third Party, it was *functus officio*. It is instructive then to restate the role of the Defendant as a Selling Agent, vis-a-vis the role of the Third Party as a Receiving Bank. Clause 1.3 of the Agents' Manual issued for the specific purpose of the Safaricom IPO, lists the tasks that the Defendant was expected to undertake as follows (at page 237 to 238 of the Third Party's Bundle of Documents):

- [a] Act as selling Agents to Safaricom and the Vendors by marketing and placing the Offer Shares to potential investors;
- [b] Assist investors in understanding the business of Safaricom;
- [c] Assist investors in completing the application forms;
- [d] Ensure that an IPO receipt is issued for all monies received from applicants;
- [e] Ensure adequate general security measures have been put in place in the Authorized Selling Agent's offices;
- [f] Ensure secure and reliable cash management systems have been put in place;
- [g] Provide services honestly and professionally;
- [h] Forward all applications received and processed to the Receiving Bank within the time provided for in the Event Timetable outlined in the Agency Agreement and in this manual;
- [i] Act diligently to ensure that the number of rejections is kept as low as possible or eliminated altogether;
- [j] Explain the rejections and refunds policy to investors;

[k] Ensure that reconciliation between investor and Agent, and Agent and Receiving Bank will be done accurately in the shortest time possible and within the time provided in the Timetable;

[l] Batch all application forms to the Receiving Bank in a correct and efficient manner;

[m] Ensure that any refund that is paid to the Authorized Selling Agent or via the Authorized Selling Agent for the benefit of the investor ultimately reaches the bona fide investor in the shortest time possible;

[n] Do all that is necessary and provide such additional services that will ensure the transaction is conducted to acceptable professional standards;

[o] Confirm the completeness and adequacy of the information provided in support of the application (ensure that the supporting documentations matches the category they tick);

[p] Timely submission of information on international investor application to the Data Receiving Bank Processing centre.

[36] At page 246 of the Third Party's Bundle of Documents is a flow-chart illustrating the respective functions of the key players; and the parties were in no disputation in connection therewith. That flow-chart also gives a summary of the role of the Third Party as the Receiving Bank, and they included: daily processing of applications and sending rejections to the Authorized Selling Agents; preparing global applications statistics; announcement of Final Results and reports; release of refund details; dispatch of Allotment Letters; issuance of Clearance Certificates to Authorized Selling Agents and payment of refunds, among others. Thus, it was explained by **TPW1** that, whereas the Defendant forwarded to the Third Party the batch containing the Plaintiff's application along with some attachments, the said application (at page 179 of the Plaintiff's Bundle of Documents) could not be uploaded into the system for further processing because it lacked vital data; and that this information was promptly relayed to the Defendant, as confirmed by the documents at pages 284 to 292 of the Third Party's Bundle of Documents.

[37] There is credible evidence herein from **TPW1** that, in response to the aforementioned communication, the Defendant submitted two global applications which were accepted by the Third Party; and that the global applications included the Plaintiff's application. Copies of the two applications are to be found at pages 296 and 297 of the Third Party's Bundle of Documents. **TPW1** confirmed that the two applications were successfully processed, but that, given the over-subscription, they were not fully serviced. Hence, a sum of **Kshs. 50,625,000/=** was refunded for the first application and **Kshs. 154,194,000/=** for the second application. There is no disputation therefore that that is how the Plaintiff obtained his partial allotment of 6,906,300 shares. There is also uncontroverted evidence from the Third Party, that daily reconciliations would be done and reports submitted by it to the Defendant; and that at the close of the processing of the numerous applications it submitted to the Defendant the status of all applications received from the Defendant. That summary was provided in the witness statement of **TPW1** thus:

[a] The total number of shares applied for by all the applicants who had gone through the Defendant was 960,888,100;

[b] The value of the said shares applied for was **Kshs. 4,804,440,500/=**;

[c] The total amount forwarded by the Defendant to the Third Party on account of the said shares was **Kshs. 3,583,116,880/=**; and that the outstanding payment or shortfall stood at **Kshs. 426,620/=**.

[38] There is further credible evidence to show that the Third Party issued refund cheques to the Defendant dated **9 June 2008** for **Kshs. 50,625,000/=** and **Kshs. 154,194,000/=** in respect of the two global applications aforementioned; and that the cheques (see pages 306 and 307 of the Third Party's Bundle of Documents) were duly paid within the timeframes set out in the Prospectus. No explanation or

justification was given by the Defendant as to why it did not refund the Plaintiff's monies to Prime Bank Ltd between **9 June 2008** and **26 June 2008**, when the refund was ultimately made.

[39] Hence, having submitted a global application that included the Plaintiff's, it was obviously the Defendant's duty to ensure that it followed up not only on the uploading of the shares in readiness for trading, but to also ensure that the refund, which was timeously remitted to it by the Third Party, was promptly paid to **Prime Bank Ltd** as per the instructions of the Plaintiff. This it failed to do. It was therefore a clear manifestation of dereliction of its duties as set out in the Agents' Manual, for **DW1** to state, as she did, that:

"At the close of the IPO we learnt that the Plaintiff had been allocated only 6,906,300 shares and was entitled to a refund of Kshs. 127,968,500. We assumed that the shares would be allocated directly into the Plaintiff's CDS account and the refund would be credited by EFT. We were therefore taken aback when the Plaintiff began to make inquiries from AIB regarding his shares and refund."

[40] In my finding therefore, the Defendant, and not the Third Party, is to blame for the Plaintiff's loss. Indeed the Defendant released the Third Party via a Reconciliation Certificate dated **2 October 2008** in which it acknowledged that:

"...By duly executing this certificate, we indemnify Citibank, N.A. (acting through its Kenya Branch), in its capacity as the Receiving Bank of the Safaricom IPO 2008, for any future liability or claims that may arise related to this specific transaction."

[41] In the result, Judgment is hereby entered for the Plaintiff against the Defendant as follows:

[a] For the sum of **Kshs. 8,969,133.34** claimed in the Further Amended Plaint.

[b] Interest on the aforesaid sum at the rate of 14% per annum compounded from **1 August 2009** till payment in full;

[c] Costs of the suit;

In the same vein, the Defendant's claim for indemnity against the Third Party is hereby dismissed with costs.

Orders accordingly.

DATED SIGNED AND DELIVERED AT NAIROBI THIS 24TH DAY OF JANUARY 2018

OLGA SEWE

JUDGE