



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL COURTS
COMMERCIAL & TAX DIVISION
CIVIL SUIT NO 522 OF 2014

FARAJ ABDALLA IDHA T/A SAFIF TRADING.....PLAINTIFF

VERSUS

GULF AFRICAN BANK LIMITED.....DEFENDANT

JUDGMENT

[1] The Plaintiff, **Faraj Abdalla Idha** filed this suit on **12 November 2014** praying for judgment against the Defendant, **Gulf African Bank Limited**, for the sum of **British Pounds (GBP) 63,004.06** or its equivalent of **Kenya Shillings 8,924,207** at the rate of 141.64, together with interest at 14% per annum from **10 April 2014** till payment in full. The Plaintiff's cause of action is that he was a customer of the Defendant as the holder of **Account Number 1600006502** at the Defendant's Nine West Branch, Nairobi. In that capacity, he issued instructions to the Defendant on **10 April 2014** to transfer **GBP 183,000** from his aforementioned account to the account of **Road Range Limited** vide Real Time Gross Settlement (RTGS) System. When, on **14 April 2014**, the Plaintiff was informed by the Director of **Road Range Limited** that they had not received the funds, the Plaintiff forwarded to him a copy of the Swift Transfer Notification as proof of the transfer of funds. It was the Plaintiff's case that on receipt thereof, the Director of **Road Range Limited** informed the Plaintiff that their Bankers were **Barclays Bank, Liverpool City Branch** and not **Halifax Bank** as had been indicated in the Notification.

[2] Upon realizing this mistake, the Plaintiff directed the Defendant by way of a letter dated **15 April 2014** to immediately stop the payment of the sum of **GBP 183,000**. He averred that he was thereupon assured that the money would be recalled and credited to his account within 72 hours. It was the Plaintiff's case that this was not to be, and that it was not until **2 July 2014** that he was notified by the Defendant that it had recalled the payment, but was only successful in recovering **GBP 119,995.94**. On inquiring from the Defendant about the remaining sum of **GBP 63,004.06**, the Plaintiff was told it was unrecoverable for the reason that he provided incorrect bank details. It was thus on account of the foregoing that the Plaintiff filed this suit, contending that the Defendant acted negligently and recklessly in transferring the funds to the wrong account, and that it owed him a duty of care to verify the bank particulars of the Beneficiary before effecting the transfer.

[3] The Defendant denied the Plaintiff's claim and allegations. It filed its Statement of Defence herein on **9 December 2016** in which it admitted that the Plaintiff was its customer, and that he had given instructions for transfer of funds to the account of **Road Range Limited** as contended by the Plaintiff, but denied that it was reckless. According to the Defendant, the funds were transmitted in accordance with the Plaintiff's instructions; and that, although it received an email purportedly sent on behalf of the

Plaintiff advising the Bank to reverse the transaction on account of incorrect Beneficiary particulars, the Bank could not immediately act on the email communication. This was because the Plaintiff had issued written instructions to the Bank dated **17 February 2014**, not to act on any instructions communicated by way of email. According to the Defendant, the written instructions for the recall of funds was not given until **15 April, 2014**, whereupon the Bank managed to have **GBP 119,995.94** remitted back to the Plaintiff's account.

[4] It was thus the contention of the Defendant that it merely acted in accordance with the Plaintiff's instructions, and that, since the Plaintiff has admitted that he had provided the Bank with incorrect Bank details of the Beneficiary, it cannot be held liable for the resultant loss to the Plaintiff. The Defendant further contended that the Plaintiff was the author of his own misfortune, and that the suit is therefore frivolous, vexatious and intended only to embarrass it. In the premises, the Defendant urged for the dismissal of this suit with costs.

[5] In his **Reply to Defence**, filed herein on **22 December 2014**, the Plaintiff pointed out that the loss that is the subject of this suit occurred, not because of incorrect Beneficiary bank details, but because the Defendant acted on unauthorized email instructions dated **11 April 2014** after it had received strict instructions on **17 February 2014** not to act on any email instructions. He further stated in the **Reply to Defence** that his email address for purposes of the subject account was **safiftrading@gmail.com** and not **info@nahdytravel.com** that was used in the email dated **11 April 2014**. He thus reiterated his contention that the Defendant acted in breach of its duty of care, given the manner in which it handled the subject transaction.

[6] At the hearing, the Plaintiff adopted the amended written statement he made on **4 May 2015** which was filed in replacement of the initial statement dated **11 November 2014**. His evidence was that sometime in **March 2014**, he visited the United Kingdom with a view of purchasing heavy duty trailer trucks for his business. He identified six such heavy duty trucks. He produced as exhibits invoices issued in respect of the trucks by **Road Range Limited**. Thus, on the basis of those invoices, he gave instructions to the Defendant on **10 April 2014** to transfer the sum of **GBP 183,000** from his **Account Number 1600006502** to the following recipient:

Account Name : Road Range Limited

Bank : Halifax Bank

Branch : Halifax Commercial Street Branch

Account Number : 4564086

[7] The Plaintiff further stated that on **11 April 2014**, he received a call from one of the Defendant's employees one **Mayyan**, who enquired if he had sent the Defendant an email altering the recipient's particulars on the Swift/RTGS Application Form, and that he advised her that he had not sent any such email. He added that he had, on **17 February 2014**, advised the Defendant in writing that he had withdrawn previous instructions authorizing communication by way of email as well as all indemnities in respect thereof. He further stated that he later learn that the Defendant had received unauthorized instructions via email from an unknown person directing the Bank to alter the payment instructions he had issued on **10 April 2014** by replacing the name of the beneficiary from **Road Range Limited** to **Deborah Jaiyesemi**, contrary to his instructions of **17 February 2014**. That as a result, the subject funds were paid to the account of **Deborah Jaiyesemi** and not **Road Range Limited**. He denied having given the aforesaid email instructions, contending that he knew nobody by the name of **Deborah Jaiyesemi**.

[8] It was further the evidence of the Plaintiff that when he got to learn from the Director of **Road Range Limited**, on **14 April 2014**, that the funds had not been received by **Road Range Limited**, he forwarded to **Road Range Limited** a copy of the Swift Transfer Notification. It then became evident that he had given the Bank incorrect particulars, and that the correct details in respect of **Road Range Limited** were:

Account Name : Road Range Limited

Bank : Barclays Bank

Branch : Liverpool City Branch

Account Number : 20790427

[9] With the foregoing clarification, the Plaintiff stated that he immediately notified the Bank and requested it to recall the funds. This he did in writing by a letter dated **15 April 2014**. In response thereto, the Defendant, through one of its officers, **Patrick Luvai**, assured him that the funds would be recalled and credited into his account within 72 hours. However, it was not until **2 July 2014** that he was notified by the Defendant that it had managed to recover a sum of **GBP 119,995.94** only, and that upon enquiring about the balance of the funds, the Defendant told him that by reason of having provided incorrect bank details the balance of the funds was not recoverable.

[10] According to the Plaintiff, it was the duty of the Defendant and its Correspondent Bank, namely, the **Bank of Beirut** to receive the SWIFT/RTGS Application Form, verify the details of the sender and recipient, and confirm that the recipient's name and account number as provided indeed corresponded with the name and account number of the recipient. It was thus the evidence of the Plaintiff that it was incumbent upon the Defendant and its Correspondent Bank to halt any payment and revert to the Plaintiff in the event of any discrepancy. He reiterated his contention that the Defendant acted negligently and recklessly in transferring the aforesaid sum of **GBP 183,000** to the account of **Deborah Jaiyesemi**; and that the Bank's conduct was a gross breach of the duty of care that it owed to him in the management of the account. In support of his evidence he produced as exhibits the following documents:

[a] The letters dated **17 February 2014, 15 April 2014, 28 April 2014** and **2 July 2014**;

[b] The Swift/RTGS Application form;

[c] A copy of the email dated **11 April 2014**;

[d] The Swift Transfer Notification;

[11] On behalf of the Defendant, evidence was called from two witnesses, namely, **Abdalla Twahir Nassor (DW1)** and **Patrick Luvai (DW2)**. **Mr. Nassor** works in the Customer Service Department of the Defendant's Nkrumah Branch in Mombasa. According to him, the Plaintiff, a customer well known to him, visited their Defendant Bank on **10 April 2014** to send a Telegraphic Funds Transfer to the United Kingdom. That the transfer request was duly processed in accordance with the Plaintiff's instructions. The sum of **GBP 183,000** was payable to the Bank Account of **Road Range Limited Number 4564086 at Halifax Bank**. It was the evidence of **Mr. Nassor** that he personally verified the forms to ensure that the particulars given tallied with the details provided in the invoices supplied by the Plaintiff. He thereafter processed the transaction by uploading the details in the system. He then sent an alert to the approvers for their input, and that after the transaction was approved, he scanned the documents and forwarded them to their Nairobi Headquarters.

[12] **Mr. Nassor** further stated that, thereafter on the **11 April 2014**, he received an email from the Plaintiff seeking amendment of the beneficiary details. He consequently caused a colleague, **Mayyan**, to contact the Plaintiff to confirm the instructions, but that the Plaintiff denied having given such instructions. He stated that further to the telephone conversation, he personally responded to the email communication and advised the Plaintiff to visit the Bank and personally authorize the suggested changes, given his earlier instructions discontinuing email instructions.

[13] It was further the evidence of **Mr. Nassor** that he met the Plaintiff on **14 April 2014** after working hours and learnt from him that his supplier in the United Kingdom had not received the funds. Their conversation was followed by a visit to the Bank on **15 April 2014** by the Plaintiff. Upon written

instructions, the Bank initiated a recall of the funds, after it was communicated that the Plaintiff had given incorrect details of the Beneficiary Bank. According to **Mr. Nassor**, the Plaintiff was not being truthful when he asserted that the Bank had changed the beneficiary details in the Swift Form. His evidence was, in effect, that the Bank acted strictly in accordance with the instructions issued by the Plaintiff.

[14] The Defendant's second witness was **Patrick Luvai (DW2)**, a Manager in the Defendants Central Operations Department, which handles SWIFT operations. He stated that he came to know the Plaintiff as a customer of the Bank on **10 April 2014** after his matter was referred to the Headquarters by **Mr. Nassor (DW1)** for further processing. It was his evidence that the information was duly cross-checked, whereupon the Bank proceeded to release the SWIFT instructions on the live network; and copies of the transaction that were automatically generated were forwarded to their Mombasa Branch with a copy to the Plaintiff. He further testified that he was later notified that the Plaintiff had visited their Mombasa office on **15 April 2014** and instructed the Bank to recall the funds because he had received a message from London that the Beneficiary details were incorrect; and that the Bank immediately took steps on **15 April 2014** to recall the funds, but the their correspondent Bank, the **Bank of Beirut**, insisted on an Indemnity from the Defendant for any loss resulting from the recall of funds. He further stated that the process commenced on **15 April 2014** and was only finalized on **27 June 2014**, whereupon the Bank credited the Plaintiff's account with the recalled funds and notified the Plaintiff accordingly.

[15] It was further the testimony of **DW2** that, from the time the Plaintiff disclosed that he had sent the money to the wrong account, the Bank provided him with all the support towards the recall of the funds. According to him, chances of recovery of funds remitted to the wrong account had been low, and that the Plaintiff was fortunate to recover a large portion of the money. He thus urged that the Plaintiff should not be allowed to benefit from his own mistake, and in support of his testimony, he made reference to the Plaintiff's SWIFT application form and the invoices attached thereto, the SWIFT confirmation, the Indemnity and correspondence exchanged between the Plaintiff and the Bank, all of which are in the Defendant's Bundle of Documents.

[16] At the close of the hearing, the parties filed their respective written submissions. The Plaintiff's written submissions were filed on **7 June 2016**, while the Defendant filed their written submissions on **25 August 2016**. Thus, having perused and considered the same in the light of the pleadings filed herein and the evidence adduced by the parties, the agreed issues for determination can be summarized as hereunder:

- [a] Whether the Plaintiff properly completed the RTGS/SWIFT Application Form; and if so,
- [b] Whether the Defendant owed the Plaintiff a duty of care to counter-check and verify the details of the RTGS/SWIFT Application Form against the particulars of the intended recipient, and whether such verification was done;
- [c] Whether the Defendant received instructions from the Plaintiff not to act on email instructions; and if so, whether the Defendant was obliged to exercise caution as part of its duty of care when it received instructions via email purporting to be from the Plaintiff;
- [d] What are the appropriate orders in this matter?

[a] On whether the Plaintiff properly completed the RTGS/SWIFT Application Form:

[17] There is no dispute herein that the Plaintiff was desirous of purchasing trucks from **Road Range Limited**, a company based in the United Kingdom; and that to that end it approached the Defendant Bank to facilitate the electronic transfer of funds to his said suppliers. To this end, the Plaintiff was required to, and he did fill a SWIFT/RTGS Application Form which was supported by the Plaintiff's cheque for the amount as well as invoices issued by **Road Range Limited**. The Application Form was exhibited herein at page 12 of the Plaintiff's Bundle of Documents and page 2 of the Defendant's initial Bundle of Documents filed on **9 December 2014**. The documents confirm that the Plaintiff thereby instructed the Defendant to transfer **GBP 183,000** to the account of **Road Range Limited No. 4564086** at **Halifax Bank**, Halifax Commercial Street Branch.

[18] It is further not in dispute that it later turned out that the correct account of the Beneficiary was held at **Barclays Bank Limited**, Liverpool City Branch, being **Account No. 20790427**. Indeed, the Plaintiff conceded that the details he provided to the Bank in the SWIFT/RTGS Application form aforementioned were incorrect. It is therefore plain that the Plaintiff was responsible for the incorrect information that was provided to the Defendant for action via the SWIFT/RTGS Application Form dated **10 April 2014**.

[b] On whether the Defendant owed the Plaintiff a duty of care to counter-check and verify the details of the RTGS/SWIFT Application Form against the particulars of the intended recipient, and whether such verification was done:

[19] The Plaintiff's contention in this regard was that he was a well-known customer of the Defendant Bank and that it had, since **13 June 2013**, operated two accounts with the Bank, being **Account No. 1600006501** and **Account No. 1600006502**. For this reason, the Plaintiff posited that there existed a fiduciary relationship between him and the Bank that obligated the Bank to exercise due care and attention including the duty to verify the information he had provided in SWIFT/RTGS Application Form for correctness. He particularly took issue with the fact that the document evidencing the recall of the funds as shown on Defendant's Bundle at pages 9 and 10 did not indicate that the funds were recovered from the account of **Road Range Limited**, but that the funds were obtained from different accounts. The Court was thus urged to conclude from the foregoing that the Defendant did not send the entire sum of **GBP 183,000** to the intended beneficiary.

[20] The Plaintiff relied on the cases of **Selangor United Rubber vs. Cradock and others [1968] ALLER 1073; Halsbury's Laws of England 4th Edition, Volume 3; Simba Commodities Limited vs. Citibank NA [2003] eKLR and Davies vs. Swan Motor Co. [1949] 2 KB 1** in support of its contention that the Defendant, in the exercise of its fiduciary duty ought to have exercised reasonable care and skill in handling the instant transaction. In this regard, the Plaintiff posited that the transaction was akin to cheque transactions, and that he did not owe any wider duty of care in the operation of his account with the Defendant to prevent misdirection of the funds, much in the same way a customer would have no particular duty to prevent the presentation of forged cheques in respect of his account; his argument being that it would be the responsibility of the bank to prevent such fraud from occurring.

[21] The Defendant, on the other hand, was of the posturing that it had received specific instructions from the Plaintiff as set out in the SWIFT/RTGS Application Form, and its duty was limited to ensuring that those details tallied with the invoices attached thereto, which it did. In support of its position, the Defendant cited **Ellinger's Modern Banking Law, 4th Edition**, particularly the paragraph at page 130 which states thus:

"The core banking activities of deposit taking and lending are not fiduciary in character. The courts have continually stressed that "on the face of it, the relationship between the bank and its customer is not a fiduciary relationship...A bank may find itself subject to fiduciary obligations when giving investment advice to its customer. However, fiduciary obligations will be imposed where a bank can reasonably be considered to have undertaken to act in the best interests of its customer in giving advice."

[22] It was thus the Defendant's argument that its main duty, as the bank originating the money transfer transaction, was to adhere to the instructions given to it by the Plaintiff; ensuring that the amount was transferred on time, and engaging a reliable correspondent in the beneficiary country to perfect the transaction. The Defendant further referred the Court to a report issued by the **Financial Services Authority** of the UK in **July 2011** on the obligations of the paying bank and the intermediary bank; and an article published in the Cornell International Law Journal entitled: **Liability for Lost or Stolen Funds in Cases of Name and Number Discrepancies in Wire Transfers: Analysis of the Approaches Taken in United States and Internationally, by Koh, Howard (1989)** to support the proposition that it is only the receiving bank that is capable of determining whether the account name and number are inconsistent.

[23] As to the general applicable principles, the Defendant relied on **Paget's Law of Banking, 12th Edition**, for the proposition that instructions to countermand a transfer can only be effected before

transfer and therefore cannot be honoured after the bank incurs a commitment to a third party. It was thus submitted by the Defence Counsel that the Defendant could not possibly have acted in any other manner in the circumstances of this case. The question that then arises is whether the bank was under duty to go outside the what was stated in the SWIFT/RTGS Application Form and its attachments by way of verification with a view of confirming the account particulars of the intended beneficiary of the funds before wiring the funds.

[22] Thus, it was incumbent upon the Plaintiff to demonstrate that, in respect of the instant transaction, the Defendant's role included the giving of advice, or that the Defendant had undertaken to carry out the additional verification outside jurisdiction. There is evidence herein that the Bank, through **DW1** and **DW2** verified the information provided in the SWIFT Application form and the invoices, including the availability of funds to cater for the application; but there is no evidence to show that the Defendant had given any prior advice in respect of the transaction or that it undertook to carry out further verification outside jurisdiction. Indeed, there is no indication that the Plaintiff was uncertain about the particulars of the beneficiary or that it placed a request with the Bank to ensure verification outside jurisdiction before releasing the funds.

[23] In **the Law of Bank Payments, 4th Edition** at page 134, the duties of the paying bank is stated summarized as hereunder:

"The relationship between the payer and the paying bank to which he delivers the money transfer order is that of principal and agent, the paying bank making payment on behalf of its principal"

The authors therefore posited that the duty of the bank is limited to the strict instructions given in the order form. This is the same posturing adopted in **Ellinger's Modern Banking Law** (supra). Accordingly, there being no dispute that the Defendant carried out the Plaintiff's instructions as expressed in the SWIFT/RTGS Application Form dated **10 April 2014** promptly, it would follow, and it is my finding, that the Defendant owed the Plaintiff no further duty to counter-check and verify the details of the RTGS/SWIFT Application Form to ascertain that they tallied with the particulars of the intended recipient; and further that indeed no such verification was done by the Defendant.

[24] As to whether, the Defendant's correspondent bank, **the Bank of Beirut**, was under obligation to undertake this verification prior to payment, the Defendant referred the Court to a report by the **Financial Services Authority** of the United Kingdom, issued pursuant to their **Financial Services and Markets Act, 2000** at paragraph 5.2 in which it was stated thus with regard to the financial obligations of the paying bank and the intermediary/corresponding bank:

"...the paying bank is unable to validate the accuracy of the beneficiary date given by the ordering customer. The bank's system may be able to check that the given IBAN is the correct length and furthermore, may check that the bank part of the IBAN matches the "account with" institution given by the ordering customer. If not, the payment institution goes through the repair process, which may be done manually or by referring back to the client. There is thus a limit to what any paying bank can do to validate the accuracy of the beneficiary information given by the customer. Given the highly automated, high volume, straight-through-processing (STP) environment major banks can do little to enrich or improve SWIFT message information."

I find the foregoing exposition not only logical but also persuasive.

[25] The foregoing posturing by the Defendant was not controverted by the Plaintiff. Accordingly, I would agree with the Defence contention that neither the Defendant, nor its intermediary bank were in a position to verify the correctness of the information supplied by the Plaintiff in the SWIFT Application form. In this respect I am similarly persuaded by the article by **Koh, Howard (1989)** on **Liability for Lost or Stolen Funds in Cases of Name and Number Discrepancies in Wire Transfers: Analysis of the Approaches Taken in the United States and Internationally, Vol. 22** at page 112, in which the

author opined thus:

"Considering the potential vulnerabilities of the wire transfer system, it would not be unduly burdensome for the last bank in the chain of messages to make a final check to ensure nothing has gone awry during the transaction. The receiving bank is the only bank which is capable of determining whether the account name and number are inconsistent."

This is only logical, granted that it is the receiving bank that has, or is supposed to have, the account details of the beneficiary of the funds. It is not clear whether this verification was done by **Halifax Bank**, but the fact that a substantial portion of the funds was available for recall confirms some level of due diligence on the part of the receiving bank. In the premises, I would agree with the Defendant that liability for failure in the verification process, if any, would only lie as against **Halifax Bank** and not the Defendant; and that even then, it was upon the Plaintiff to demonstrate that there was a lapse on the part of Halifax Bank, which has not been done herein.

[c] On whether the Defendant received instructions from the Plaintiff not to act on email instructions; and if so, whether the Defendant was obliged to exercise caution as part of its duty of care when it received instructions via email purporting to be from the Plaintiff:

[26] The Plaintiff's evidence that on the **17 February 2014**, he wrote to the Defendant instructing it not to act on any instructions received by email. The letter was produced herein at page 10 of the Plaintiff's Bundle of Documents and at page 1 of the Defendant's Bundle of Documents. Both **DW1** and **DW2** admitted that the aforesaid instructions were indeed given by the Plaintiff, and that it was for that reason that the Defendant declined to act on emails purporting to be from the Plaintiff, notably the email dated **11 April 2014**.

[27] Although the Plaintiff contended that the funds were lost because of misdirection to the account of **Deborah Jaiyesemi** no evidence was adduced by the Plaintiff in proof thereof. To the contrary, **DW1** discounted this supposition by his evidence to the effect that the funds were returned from **Halifax Bank** and deposited in their account whose statement the Plaintiff relied on to support this contention. He added that that particular account entailed transactions from its various customers as can be seen at pages 9 and 10 of the Defendant's Bundle of Documents filed on **9 December 2014**. Besides, there is indubitable evidence that the funds were transferred in accordance with the instructions of the Plaintiff as per the SWIFT/RTGS Application Form and not on the basis of any email communication. Moreover, by the time the Defendant received the email dated **11 April 2014**, the funds had already been transferred, as confirmed by the Defendant and the documents at pages 2 to 4 of the Defendant's Bundle of Documents filed on 9 December 2014.

[28] Further to the foregoing, there is evidence herein, which evidence was conceded to by the Plaintiff, that he was contacted by the Defendant upon receipt of the email dated **11 April 2014** with a view of confirming whether indeed he had sent that email, and that the Plaintiff disowned that email; for which reason, no action was taken by the Defendant on that email. In any event, the email at page 5 of the Defendant's Bundle of Documents confirms that the Defendant alerted the Plaintiff on the same date that they could not act on instructions sent via email and required him to visit the branch to provide written instructions instead; and that pursuant thereto the Plaintiff visited the bank and gave written instructions as per his letter dated **15 April 2014** (see page 7 of the Defendant's Bundle of Documents filed on **9 December 2014**). Thus, there is no nexus between the impugned email dated **11 April 2014** and the transfer of the funds to **Halifax Bank**, granted that the funds had been wired before the receipt by the Bank of that email.

[29] The letter of **15 April 2014** further shows that when the Plaintiff did not provide the written instructions for the recall of the funds, the Bank promptly respondent to the request is manifest in the SWIFT message at page 8 of the Defendant's Bundle of Documents, which is also dated **15 April 2014**. The Court is accordingly satisfied that, whereas the Defendant did receive instructions from the Plaintiff not to act on email instructions, and whereas the Defendant was obliged to exercise caution as part of its duty of care when it received instructions via email purporting to be from the Plaintiff, it cannot

be said that the Defendant deviated from those instructions. What the evidence adduced points to is that the Defendant did act in accordance with the mandate given by the Plaintiff by not issuing instructions for re-routing of the funds to the account of **Deborah Jayaisemi**, or recalling the funds without authorization from the Plaintiff.

[30] Even after written instructions were given in the nature of the letter aforementioned, both the Plaintiff and the Defendant were in concurrence that the correspondent bank, namely **the Bank of Beirut**, declined to act until the Plaintiff and the Defendant provided an Indemnity. The Indemnity that the Plaintiff signed is reproduced at page 19 of the Defendant's Bundle of Documents filed on **22 April 2015**. It reads as follows in part:

"In consideration of your releasing the total sum GBP 183,000.00 or less (Great British Pounds one hundred and Eighty Three Thousand only) date of transaction 11 April 2014 held in the account of Road Range Ltd held under Bank Code and Account Number 11-00-01 04564086. I/We hereby indemnify you and hold you harmless against all actions proceedings, claims, demands, charges, costs, damages, expenses, and losses which you may suffer, incur or sustain by reason of such release being made without the authority of your customer..."
(emphasis added)

[31] It is noteworthy that in cross-examination, **DW2** explained that it was on account of the aforementioned Indemnity and the costs entailed by the reversal that the recalled funds were reduced. Given the wording of the Indemnity, it is patent that the Plaintiff recognized the possibility of not receiving back the entire sum of **GBP 183,000** that had been remitted to **Road Range Limited**. In any event, by reason of the Indemnity, the Plaintiff was estopped from making any claim for losses attributable to his own mistake. In **Maynard Lusambili vs. Sarova Hotels Limited [1996] eKLR**, while explaining the import of **section 120 of the Evidence Act, Chapter 80 of the Laws of Kenya**, the Court observed thus:

"S. 120 of the Evidence Act Cap 80 provides:-

'When one person has by his declaration, act or omissions, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed in any suit or proceedings to deny the truth of such thing.' ... The plaintiff by promising that he will not sue the defendant and that receiving money in full and final payment made a representation which the other party acted on and had him paid. These circumstances estop the plaintiff from denying that the payment he received was in final and complete settlement. He signed for and accepted these terms out of his own volition without any coercion, indeed he admitted to understanding the terms. In my judgment the plaintiff is estopped from denying that disclaimer and therefore cannot be heard to say now that he has further claims against the defendants."

[32] I would come to the same conclusion and find that the aforesaid provision of the law is applicable to the facts of this case. The Indemnity was given by the Plaintiff to the Defendant, and on the basis thereof, the Defendant in turn issued an Indemnity in terms to its correspondent bank. By that Indemnity the Plaintiff undertook to keep the Defendant "harmless" in respect of "all actions, proceedings, claims, demands, charges, costs, damages, expenses, and losses" which would ensue in connection with the recall. It is my finding therefore that the Plaintiff is estopped from going back on that undertaking.

[33] In my consideration, the Plaintiff's argument that there ought to have been evidence that the funds were returned from the account of **Road Range Limited** at **Halifax Bank** would be illogical, granted the admission that **Road Range Limited** had no account at **Halifax Bank**; but that its account was at **Barclays Bank Limited**, Liverpool City Branch. Clearly therefore, the Plaintiff was the author of his own misfortune.

[d] What are the appropriate orders in this matter?

[31] On account of all the matters aforesated, it is my resultant finding that the Plaintiff has failed to prove on a balance of probabilities that the Defendant was to blame for the misdirection of the funds. It is further my finding that the Indemnity provided by the Plaintiff to facilitate the recall of the funds took into account the possibility that the funds could be less. In the premises, it cannot be said that the Plaintiff has made out a case against the Defendant for the refund of **GBP 63,004.06** together with interest and costs as claimed herein. I would therefore dismiss the Plaintiff's suit with costs.

It is so ordered.

DATED SIGNED AND DELIVERED AT NAIROBI THIS 28TH DAY OF OCTOBER 2016

OLGA SEWE

JUDGE