



Faraj Abdalla Idha t/a Safif Trading v Gulf African Bank Limited (Civil Appeal 417 of 2017) [2021] KECA 187 (KLR) (5 November 2021) (Judgment)

Neutral citation: [2021] KECA 187 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL 417 OF 2017
RN NAMBUYE, HM OKWENGU & KI LAIBUTA, JJA
NOVEMBER 5, 2021**

BETWEEN

FARAJ ABDALLA IDHA T/A SAFIF TRADING APPELLANT

AND

GULF AFRICAN BANK LIMITED RESPONDENT

(Being an Appeal from a Judgment and Decree of the High Court at Nairobi, Hon. Lady Justice O. Sewe dated and delivered on the 28th October 2016 at Nairobi in High Court Commercial Case No. 522 of 2014)

JUDGMENT

Background

1. This appeal arises from the judgment and decree of Hon. Lady Justice O. Sewe delivered on 28th October 2016 in Nairobi High Court (Commercial & Tax Division) Civil Case No. 522 of 2014 in which the appellant, Faraj Abdalla Idah t/a Safif Trading, had sued the respondent, Gulf African Bank Limited, seeking judgment for –
 - a. the sum of GBP 63,004.6 or its equivalent of KShs. 8,924,207 at the exchange rate of 141.64;
 - b. costs of the suit; and
 - c. interest on (a) at the rate of 14% per annum from 10th April 2014, being the date of the withdrawal until payment in full.
2. The respondent filed its defence and denied the appellant’s claim praying that the appellant’s suit be dismissed with costs on a full indemnity basis.



3. The suit proceeded to hearing at the conclusion of which the Hon. Lady Justice O. Sewe delivered her judgment on 28th October 2016 dismissing the appellant's suit with costs to the respondent. A decree was issued accordingly on 7th December 2017. Aggrieved by the decision of the learned Judge, the Appellant filed this appeal.

The Parties

4. The Appellant is a businessman who carries on business under the name and style of Saff Trading registered in accordance with the provisions of the *Registration of Business Names Act*, Chapter 499 of the Laws of Kenya while the respondent is a limited liability company duly incorporated in accordance with the provisions of the *Companies Act*, Chapter 486 of the Laws of Kenya (now repealed) and is licenced to carry out the business of banking in Kenya.
5. The appellant was at all material times a customer of the respondent. He held Account No. 160xxxxxxx at the respondent's [Particulars Withheld] Branch, Nairobi.

Dispute and Judgment of the Superior Court

6. On or about 10th April 2014, the appellant executed a SWIFT/RTGS Application Form (Form MT103) instructing the respondent to transfer a sum of GBP183,000 from his account to Road Range Ltd's Account No. 456xxxx in [Particulars Withheld] Bank, Halifax Commercial Street, W.Yorks for the purpose of purchasing trucks. The transfer was executed through Fed Wire Number/Sort Code 11-00-01, which identifies the beneficiary's bank and branch.

According to the application form, the foreign bank charges were to be shared, presumably between the appellant and the beneficiary.

7. On 14th April 2014, the appellant was informed by the Director of Road Range Limited (the beneficiary) that they had not received the funds. In response, the appellant forwarded a copy of the SWIFT Transfer Notification as proof of transfer of the funds in issue. On receipt of the notification, the Director of the beneficiary informed the appellant that their bankers were Barclays Bank, Liverpool City Branch and not Halifax Bank as had been indicated in the SWIFT Transfer Notification.
8. On becoming aware of his mistake, the appellant wrote to the respondent vide a letter dated 15th April 2014 directing them to recall with immediate effect the sum of GBP183,000 that was intended to be transferred to Road Range Ltd on 10th April 2014. On 2nd July 2014 the respondent notified the appellant that it had recalled the payment, but only succeeded in recovering GBP119,995.94 resulting in the loss of GBP63,004.06, the amount claimed in the suit leading to the judgment from which this appeal arises.
9. In his claim in the suit aforesaid, the appellant alleged that the respondent acted negligently and recklessly in transferring the funds in issue to the wrong account. He contended that the respondent owed him a duty of care to verify the banking particulars of the beneficiary before effecting the transfer. The respondent denied the appellant's claim that it was negligent. In its defence, the respondent contended that the funds were transmitted in accordance with the appellant's instructions and explained that, although they received an email purportedly sent on the appellant's behalf advising the respondent to reverse the transaction on account of incorrect particulars of the beneficiary, the bank could not act immediately on the email communication.
10. Having heard the appellant and the respondent, the learned Judge dismissed the appellant's suit with costs to the respondent. Aggrieved by the decision of the Hon. Lady Justice O. Sewe, the appellant instituted this appeal from the whole of her judgment and decree on 5 grounds, which we need not



reproduce in full here. However, we take the liberty to summarise and reframe them. In our considered view, the salient grounds of the appeal before us are that the learned Judge –

- a. erred in finding that the appellant was the author of his own misfortune;
- b. failed to appreciate and consider the level of reasonable care exercised by the appellant towards rectification of the error in the transaction details relating to the beneficiary;
- c. failed to consider the legal authorities relied on by the appellant; and
- d. failed to determine the appellant’s claim on its merits, and to find that the respondent was contributory to the loss complained of.

11. On these grounds, the appellant requests this Court to –

- a. allow this appeal and set aside the judgment and decree of the Hon. Lady Justice O. Sewe; and
- b. the appellant be awarded costs of this appeal.

It is noteworthy that, apart from the foregoing prayers, the appellant does not seek any pecuniary relief.

Appeal, Submissions by Counsel and Findings

12. Having examined the record of appeal and the grounds on which it is founded, we are of the considered view that the appeal stands or falls on our findings on the following issues of law and fact in respect of which learned counsel filed written submissions:

- a. What was the nature of the relationship between the appellant and the respondent, and what duties attached to that relationship at law?
- b. Was the appellant the sole author of his misfortunes?
- c. Was the respondent in any way or to any extent contributory to the loss complained of and, if the answer is in the affirmative, what relief is available to the appellant?
- d. Who bears the costs of this appeal?

12. We need to point out at the onset that this being a first appeal, it is also our duty, in addition to considering submissions by learned counsel, to analyze and re-assess the evidence on record and reach our own conclusions in the matter. This approach was adopted by this Court in *Arthi Highway Developers Limited v West End Butchery Limited and 6 others* [2015] eKLR citing the case of *Selle v Associated Motor Boat Co.* [1968] EA p.123.

14. In *Selle’s* case (ibid), the Court held:

“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.”

Nature of the Relationship between Appellant and Respondent and the Appurtenant Duties

15. Counsel for the appellant submitted that the relationship between the appellant and the respondent is one of banker/customer, which he argues is

“essentially a fiduciary relationship”. We do not agree that that relationship is primarily a fiduciary relationship, such as exists between a trustee and a beneficiary. Granted, a bank has a duty under its contract with its customer to exercise “reasonable care and skill” in carrying out its part with regard to operations within its contract with its customer. As was held in *Selangor United Rubber v Cradock and others* [1968] All ER p.1073 at p.1075, a bank is under obligation to exercise reasonable care and skill which applies to interpreting, ascertaining and acting in accordance with instructions of the customer while carrying out its client’s instructions.
16. That the banker/customer relationship is in the nature of that between a debtor and his creditor was enunciated in *Edward Thomas Foley v Thomas Hill and Others* (1848) 2 HLC p.28, where Lord Brougham observed that: “this trade of a banker is to receive money, and use it as if it were his own, he becoming debtor to the person who has lent or deposited with him the money to use as his own, and for which money he is accountable as a debtor. That being the trade of a banker, and that being the nature of the relation in which he stands to his customer I cannot at all confound the situation of a banker with, that of a trustee, and conclude that the banker is a debtor with a fiduciary character.” That settles the first issue.
17. Though not its customer’s fiduciary, it is indisputable that the respondent was at all material times under a contractual duty to exercise reasonable care and skill in carrying out its part with regard to operations within its contract with the appellant. The only question that calls for an answer in that regard is whether the respondent exercised reasonable care and skill in carrying out the appellant’s instructions to transfer the sum of GBP183,000 to Road Range Ltd.
18. To answer this question, one must ascertain the nature and details of the express instructions given by the appellant to the respondent in relation to the name of the beneficiary, the particulars of the beneficiary’s bank account and name of the bank through which the transfer was directed to be made. The record before us is unequivocal. The appellant’s written instructions given in the SWIFT/RTGS Application Form were clear and unmistakable in so far as they contained express directions to the respondent to –
 - a. Transfer to Road Range Ltd (the beneficiary a sum of GBP183,000;
 - b. effect the transfer by way of SWIFT/RTGS;
 - c. pay the sums in issue through Account No. 4564086 Halifax Bank, Halifax Commercial Street Branch; and
 - d. effect the transfer through Fed Wire Number/Sort Code 11-00-01.
19. Did the respondent act against the grain of those express instructions? We find no evidence on the record to suggest that the respondent acted negligently or, otherwise, contrary to the appellant’s instructions. We find as a fact that the respondent carried out those instructions to the letter and



transferred the sums in issue to the specified bank and account. As it turned out, the beneficiary had no account with Halifax Bank, but with Barclays Bank, Liverpool City Branch.

Liability for the Loss Complained Of

20. Questions were raised as to why the lapse of two-and-a-half months before the sums in issue were successfully recalled. Secondly, was the respondent in any way negligent or contributory to the loss of the sums claimed, or was the loss complained of wholly attributable to the appellant’s own mistake? According to the respondent, the appellant had previously issued written instructions to them on 17th February 2014 prohibiting them from acting on any instructions communicated by way of email. It was not until receipt by the respondent of the written instructions vide the appellant’s letter of 15th April 2014 that the respondent acted albeit too late in the day. A substantial amount of the moneys had already been withdrawn and appropriated by one Deborah Jaiyesemi, who was not joined as party to the appellant’s suit to which this appeal relates.
21. We have no doubt in our minds that the respondent cannot be faulted for the loss complained of. The bank has no share in the appellant’s grave error in directing payment to a beneficiary through a bank in which the company had no account. The misfortune of money falling into wrong hands cannot be blamed on the respondent. Indeed, it is more true to say that the appellant was the author of his own misfortune. Neither was the respondent contributory to the erroneous details supplied by the appellant. It did not complete the SWIFT/RTGS Application Form on the Appellant’s behalf. Neither have we been told what the respondent could have done to avert the misfortune or discover and rectify the error relating to information that only the appellant had knowledge of. If anything, it was incumbent upon the appellant to guarantee the accuracy of his instructions.
22. The duty to ensure clear and accurate instructions on the part of a customer *vis a vis* his bank was underscored in *Joachimson v Swiss Bank Corporation* [1921] 3 KB p.110 at p.127 where Atkin, LJ observed that “... the customer on his part undertakes to exercise reasonable care in executing his written orders so as not to mislead the bank or facilitate forgery.” Accordingly, liability for the loss complained of rests squarely on the appellant’s shoulders. We find nothing to fault the respondent or to justify interference with the decision of Sewe, J. That settles the second and third issues that fall to be determined in this appeal.
23. In conclusion, we uphold the judgment of the High Court dated 28th October 2016. Consequently, we dismiss the appellant’s appeal in its entirety with costs to the respondent.

DATED AND DELIVERED AT NAIROBI THIS 5TH DAY OF NOVEMBER, 2021

R. N. NAMBUYE

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JUDGE OF APPEAL

HANNAH M. OKWENGU

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JUDGE OF APPEAL

DR. K. I. LAIBUTA

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JUDGE OF APPEAL

I certify that this is a true copy of the original.



Signed

DEPUTY REGISTRAR

