THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

(DAR-ES-SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

CIVIL APPEAL NO. 226 OF 2019

(Originating from Civil Case No. 188 of 2016 before Hon. Obasi S.J. RM in the District Court of Ilala at Kinyerezi)

PRUDENCE ALIBALIO KATANGWA................................ APPELANT

Versus

EQUITY BANK TANZANIA LTD.................................. RESPONDENT

JUDGEMENT

LALTAIKA, J.

Date of last order: 20/8/2021
Date of Judgement: 17/12/2021

Prudence Alibalio Katangwa (herein after the "appellant") is dissatisfied with the judgement and decree of Ilala District Court in **Civil Case No. 188 of 2016.** A brief historical backdrop leading to this appeal is imperative. The appellant, a Dar-es-Salaam, Kigogo area-based businessman dealing in transportation, was in a process of buying a vehicle make MAN TGA

TRACTOR UNIT from a car dealer in the United Kingdom. On the 14th of March 2016, he ordered his banker, the respondent, to debit from his account a total of **7,000 Sterling Pounds** and transfer the same to one **Walker Movement Ltd, Tamworth Road, Sawley-Nottingham NG 10 3 AF, United Kingdom** (referred to in this judgement interchangeably as "beneficiary" and the "intended recipient) an account holder with HBC City Bank, United Kingdom (hereafter the" beneficiary Bank") as down payment for the vehicle he had wanted to buy. The responded did indeed debit the account of the appellant to deduct the amount stated meant to be sent to the beneficiary. However, for reasons that will become apparent in this judgement, the money, allegedly, never reached the intended recipient.

Upon learning that the money had not been received by the intended recipient and after conducting several inquiries, the appellant instituted a suit at the Ilala District Court claiming that the respondent pays back his money. On finalization of the matter at the District Court, it turns out, the learned magistrate in her **judgement delivered on 28/11/2017,** decided the matter contrary to the issues jointly framed and agreed upon by the parties. Consequently, the appellant (now respondent) was dissatisfied and appealed to this court. **His Lordship Mugeta J.**; having been convinced

that the learned magistrate had indeed decided the matter out of the issues that the parties had framed, quashed the judgement of the trial court and any orders emanating therefrom. His Lordship further ordered the trial court, through a different magistrate, to prepare a fresh judgement based on strength of evidence and final submissions of parties on court records. The current appellant partly lost to the current respondent in the case **delivered on the 26th August 2019** hence this appeal. In his memorandum of appeal, the appellant has fronted ten (10) grounds of appeal. For clarity and ease of reference, I reproduce them as follows:

1. *That the learned Trial Magistrate erred both in law and in fact for believing that the Respondent is not liable to pay back the money transferred from the account of the Appellant which, in fact did not serve the intended goal*

2. *The learned Trial Magistrate erred both in law and in fact for believing that the Respondent had discharged its duty under the banker customer relationship while the Respondent did not send the money to the intended beneficiary*

3. *That the learned Trial Magistrate erred both in law and fact in for believing that the Appellant's money is still held by the beneficiary bank at the time he was writing the judgement without any justification to that effect*

4. *That the learned Trial Magistrate erred both in law and fact for believing that the Respondent had discharged its duty under the banker customer relationship while the respondent did not send the money to the intended beneficiary*

5. *That the learned Trial Magistrate erred both in law and in fact for believing that the Respondent is not bound to pay some costs having admitted that the Appellant incurred costs in due course of fighting for his rights*

6. *That the learned Trial Magistrate erred in both law and fact for believing that the appellant did not suffer any loss as a result of the dispute that was in court against the respondent*

7. *That the learned Trial Magistrate erred both in law and in fact for believing that the appellant had another duty to perform after the Appellant had instructed the Respondent to sent the money to the Beneficiary bank*

8. *That the Trial Magistrate erred in fact and in law for not making proper analysis of both documentary and oral evidence that were adduced during trial*

9. *That the learned Trial Magistrate erred in fact and in law for providing judgement which is not executable on part of the Appellant despite that the Appellant had proved his case on the balance of probabilities*

10. *That the learned Trial Magistrate erred in fact and in law for not observing Rules of Procedure during trial and in composing judgement.*

When the matter was called for hearing, the appellant was represented by Mr. Ludovick Nickson, learned Advocate whereas the respondent enjoyed services of Ms. Irene Swai, learned Advocate. The learned counsels opted to

make oral submissions. In the next paragraphs I document a summarized version of their submissions before moving on to points raised ***Suo motu*** by this court, my analysis and this court's decision.

In his submission in chief, Mr. Nickson announced that he had initially fronted a total of 10 grounds of appeal. Nevertheless, for reasons that he found not worthy of disclosure, he chose to abandon the 4th and 8th grounds and argue the rest in four groups. He started off with a submission on the first group made up of grounds number 1,2 and 3 argued jointly. The learned counsel for the appellant averred that the trial magistrate had erred in law and fact because although he admitted in his judgement that the respondent had deducted a total of seven thousand (7,000) Sterling Pounds from the account of the appellant, he went ahead to hold that the respondent was not supposed to pay back the money withdrawn from the account of his client, the appellant.

Mr. Nickson asserted further that at page 2 and 3 of the judgement of the District Court, the trial magistrate admits that the money was being held by the beneficiary bank namely HBC City Bank. He averred further that the learned magistrate had no any evidence for such a claim since the disputed

transaction took place in 2016 whereas the judgement against which this appeal is pursued was delivered in 2019.

Moving on to the second group of grounds, abandoning ground of appeal number 4 (four), the learned counsel announced that he was going to argue grounds 5 and 6 collectively. It is Mr. Nickson's submission that the trial magistrate erred in law and fact in concluding that the appellant had not incurred costs or any other loss. The learned counsel asserted further that at page 4 of his judgement the magistrate observes that the appellant had incurred costs due to delayed transmission of funds and the transaction itself. Mr. Nickson firmly believes that the appellant had suffered loss and inconvenience thus entitled to general damages as he prayed in the plaint.

Coming to the third group made of ground number 7, the learned counsel vehemently brushed off any attempts to blame his client. Mr. Nickson averred that it was not right to blame the appellant in the pretext that he did not cooperate in facilitating the money to reach Walker Movement Ltd. The learned counsel averred that his client had no access to communication with the respondent and the beneficiary bank. Arguing passionately on this ground, the learned counsel asserted that the trial magistrate had erred in arriving to a conclusion that the appellant had

another task to do after instructing the appellant to debit his account and send the amount so instructed to the beneficiary namely Walker Movement Ltd.

Mr. Nickson insists that it is the respondent who had sent the money abroad and therefore, naturally, it was upon his shoulders as a duty to make a follow up to know if the money had reached the intended recipient or not. Mr. Nickson opines that the respondent had the responsibility of reversing the transaction.

Having exhausted ground number seven, Mr. Nickson moved to the fourth and last group where he chose to abandon ground number 8 and argue grounds 9 and 10 collectively. The learned counsel believes that the trial magistrate erred by making a judgement which was incapable of being executed. Mr. Nickson is of a firm opinion that the judgement of the trial court was dependent on the will of the parties since its holding provided in part that the defendant was "to help" the plaintiff in communicating with the beneficiary bank so that the funds could be transferred to the intended recipient. It is Mr. Nickson's opinion that principles of judgement writing he was aware of were to the effect that a court judgement had to be decisive. He averred that the trial court's judgement lacked autonomy and that both

the judgement and the decree were difficult to implement. The learned counsel concluded his submission in chief by reiterating prayers of the appellant.

It was Ms. Irene Swai's turn. The learned counsel for the respondent took the podium and announced that she was going to confine herself to the grounds argued by counsel for the appellant. In that regard she took off with the group of the 1st, 2nd and 3rd grounds argued collectively. Ms. Swai submitted that she was in total agreement with the trial court's holding that the respondent was not liable to pay anything and that the respondent had fulfilled her duty of sending the money to Walker Movement Ltd as instructed by the appellant.

Ms. Swai submitted further that it was not in dispute that the respondent had deducted the stated amount from the appellant's account. However, the learned counsel chose to focus on what an expert in banking had told the trial court about the procedure for international transfer of funds. Ms. Swai explained that the transfer in the instant matter **was based on SWIFT (Society for Worldwide Interbank Financial Telecommunications)** transaction whereupon the respondent had the

duty to play as a sending bank but there was also an intermediary bank and a beneficiary bank.

Ms. Swai submitted that as far as SWIFT transfers was concerned, when money left the account of the appellant, **it went to an intermediary bank, and then to the beneficiary bank.** Ms. Swai submitted further that at that point the money was out of control of the respondent and, the learned counsel averred further, the same could not simply be automatically reversed as asserted by counsel for the appellant.

It is Ms. Swai's submission that Exhibit D4 was produced at the trial court to show that the money was swifted as instructed. She emphasized that DW1 who had tendered the exhibit was a senior operating officer of the respondent and an experienced banker specialized in making such international transactions. It is Ms. Swai's conviction that the respondent had fulfilled her duty adding that the appellant was consulted at every stage and was always being informed of what was going on through electronic mail "email" services.

The learned counsel for the respondent submitted further that it was erroneous to read the trial court's judgement and conclude that the

magistrate had no any proof to say that the money was with the beneficiary bank. Ms. Swai added that common sense dictated that if the money left his client's bank and the intended recipient hadn't received the same, it was obvious that the same was [still] with the beneficiary bank. The learned counsel concluded that the trial court's analysis was free of any mistakes and called upon this court to disregard the appellant's argument as baseless.

Moving on to ground number seven, Ms. Swai was in agreement with the trial court's judgement that the duty to communicate did not lie directly with the appellant because those were bank to bank transactions. She was also in agreement that the appellant was not in the know as far as interbank communications was concerned. Nevertheless, Ms. Swai was quick to point out that the appellant was supposed to provide some [additional] information that only him could do so and that he was supposed to cooperate with the bank.

The learned counsel submitted further that, upon inquiring as to why his [the appellant's] money was yet to reach the intended recipient, he was told that his money did not reach the intended recipient because there was investigation going on about the account he intended to send to. Ms. Swai pointed out that the additional questions that the appellant was asked were

based on international monetary policies particularly those related to prevention of terrorist financing.

Ms. Swai moved on to ground 9 and 10 focusing particularly on Mr. Nickson's assertion that the trial court's judgement was inexecutable. Ms. Swai is of a firm view that had the court held that the money be refunded by the respondent, that would have meant that the respondent had used the money. Ms. Swai insisted that the respondent had fulfilled her duty. Wondering aloud, the learned counsel exclaimed that she had no idea if the respondent were to refund the appellant, where the funds for doing so would come from. Probably to show emphasis, Ms. Swai chose to use a Kiswahili term, in which "Kifungu" would the money for refund come from? In the context used here, the word Kifungu means some money set aside for a particular purpose also referred to in government accounting as "vote".

Ms. Swai asserted that the appellant did not produce any proof to show that the money was never withdrawn by the beneficiary. Ms. Swai concluded by opining that this court could not order general damages in the absence of evidence since there was no any negligence on the part of the defendant. She prayed that the entire appeal be dismissed with cost.

Mr. Nickson took to the stage for a brief rejoinder. He insisted that the respondent never fulfilled her duty as she was supposed to ensure that the money, seven thousand pounds she had debited from the appellant's account reached the intended recipient and that the same never happened. The learned counsel for the appellant averred further that the duty of the respondent was not only to deduct the money and send it abroad but also to ensure the same reached the intended destination.

Mr. Nickson took advantage of the opportunity for rejoinder to strongly oppose Ms. Swai's assertion that the money was being held due to "internal policies" of the beneficiary bank. The learned counsel averred that his client had no any access to communication between the two banks and that, before sending the money, the respondent was supposed to know such policies in order to avoid inconveniences on the part of the appellant. With regards to the assertions by counsel for the respondent that the money was being held for terrorism related investigation, Mr. Nickson opined that the argument was baseless because there was no any evidence to that effect.

Mr. Nickson was equally dissatisfied with Ms. Swai's assertion that common sense dictated that the money was with the beneficiary bank. The

learned counsel opined that common sense could not replace the need for evidence in the legal parlance.

With regards to evidence produced at the trial court and admitted as Exhibit D1 and D2, Mr. Nickson submitted that the documents came to the attention of the appellant after the appellant had sued the bank in the district court. Mr. Nickson emphatically submitted that the appellant had never seen the documents before going to court.

Commenting on the assertion by counsel for the respondent that there was no evidence that Walker Movement had not received the money, Mr. Nickson thought that was rather a confusion on the part of the learned counsel for the respondent. Mr. Nickson emphasized that all the evidence tendered in the trial court were to the effect that the money never reached the intended recipient's account.

With regards to assessment of damages, Mr. Nickson was in agreement with counsel for the respondent that general damages could not be ascertained in the absence of specific damages. However, the learned counsel was quick to point out that the specific damages of the appellant

were the seven thousand Pounds. Mr. Nickson concluded his rejoinder by a prayer that the appeal be allowed.

Upon finalization of submissions and the rejoinder, it was obvious that none of the learned counsels had brought to the attention of the court any case law or even a legal provision to back up his or her arguments. Nevertheless, this court firmly believes that as officers of the court, the learned counsels are dutybound to conduct research and advise the court on the current position of the law. To that end, I took the liberty, in the spirit of the Overriding Objective principle and inherent powers of this court, to task the learned counsels to address this court on specific areas that would assist me in reaching a just decision. It was jointly agreed that the learned counsels address the court on the following points:

(i) *the rights and responsibilities of clients and banks in international money transfer*
(ii) *privity of contract in banker customer relationship*
(iii) *consumer protection schemes (if any) in money transfer*
(iv) *the middle ground in a situation where the money in dispute is allegedly abroad while the customer and the bank are in Tanzania:*

I now turn to the responses of the learned counsels, which responses, admittedly, have added great value to this judgement.

On the first point, Mr. Nickson brought to the attention of this court **Section 24(1)(d) of The Banking and Financial Institutions Act Number 5 of 2006.** The learned counsel averred that according to the section cited, the duty to do money transmission is given to banks. He averred further that under the cited law, a bank is obliged to protect the money that belongs to its customers to make sure any money transferred from their accounts served the intended purpose.

Mr. Nickson also cited article **7(c) of the Uniform Customs and Practice for Documentary Credits (UCP) of July 2007** asserting that the same imposes a duty to follow up on payment in international purchase to the issuing bank and nominated bank.

On the second point namely privity of contract in banker-customer relationship, Mr. Nickson was of the view that it was not any different from privity of contract in normal contracts. It is Mr. Nickson's submission that a third party could not sue in a contract that he or she was not a party to. To buttress his argument Mr. Nickson cited the case of **Tanzania Sugar Producers Association *versus* Minister of Finance** CIVIL APPEAL NO. 91 OF 2003 as well as **Section 37(1)** of **The Law of Contract Act Cap 345 RE 2019**

On the third point as to whether there was a scheme for protecting clients, the learned counsel respondent to the affirmative. He submitted that **Section 39(1) of Act No 5 of 2006** (supra) imposes a duty to a Bank to protect money of its customers.

On the fourth point, Mr. Nickson submitted that a number of Financial Laws in the country protect customers in banking transactions. He cited the **Bank of Tanzania (Financial Consumer Protection) Regulation 2019 particularly Regulations 19(3) and 36 and 37.** The learned counsel asserted that under Regulation 36(a) banks are required to put in place security measures to protect consumer financials. Mr. Nickson went on to expound that Regulation 58 provides that when [a financial] transaction involves more than one financial service provider, the responsibility to resolve matters resulting in the transaction shall be solely on the service provider who initiated the financial product service.

On her part, Ms. Swai submitted on the first point that she had not come across any local law that provided for rights and duties in international financial transfer. To this end she reverted to the International **UNCITRAL** [**United Nation's Commission on International Trade Law's] Model Law on International Money Transfer** hereinafter the "Model Law". The

learned counsel submitted that she was convinced of its applicability from the definitions (Article 1 and 2). She went on to submit that Articles 5, 8, and 10 of the Model Law have analyzed the responsibilities of parties to international transfers including issuing of instructions and ensuring the order so issued had all the necessary particulars.

On the second point namely privity of contract between the bank and the client Ms. Swai was of a firm view that in the instant matter at hand, there was a customer-banker relationship that had many faces. She went on to opine that in this particular matter the relationship was that of an **agent and a principal.** Ms. Swai emphasized that in this situation, the bank was executing the transaction on behalf of the customer. To support her argument, Ms. Swai cited **Section 134 The Law of Contract Act** (supra). She averred that **Section 163 of the Act** analyzes the rights and duties of agents and principals. It is Ms. Swai's submission that the agent-principal relationship was an exception to the privity of contract rule.

On the third point, Ms. Swai obtained inspiration from **Article 14 of the Model Law.** The learned counsel averred that the article provided for completion of transactions defined by Article 19 as when the beneficiary bank

accepts the order, the receiving bank receives the credit message then the receiving bank is considered to have received the transfer.

Ms. Swai is in agreement with learned counsel for appellant that there were various local laws that protected financial consumers in the country but opined that they were more inclined towards the **Tanzania Interbank Settlement System (TISS) and not the SWIFT.**

Having dispassionately considered submissions by counsels for both parties, it is now upon me to decide on the merits or demerits of the appeal. It should be recalled that this is the second time that this matter comes to this court. In the first instance, the appellant asserted that the trial court had decided the matter based on issues that were not raised by the parties.

For record keeping purposes, the issues originally framed by the parties are as follows:

(i) *Whether the defendant has any liability in respect of the plaintiff's money sent to Walker Movement and which is said not to be delivered (sic!) to him*

(ii) *Whether the plaintiff has suffered any loss/ damage as a result of the said failure to deliver the money to Walker Movement*

(iii) *What reliefs are the parties entitled to*

Needless to emphasize that the grounds of appeal hitherto argued for and against, are going to guide my discussion and analysis. It is my intention to stay on track as closely as possible to prevent any slight drift towards an anomaly that my brother in the bench His Lordship Mugeta J. had cured as earlier on recounted. This is on the issues that parties had all along wanted the court to decide upon.

Premised on the first to the third grounds of appeal argued collectively by counsel for the applicant and respondent accordingly by counsel for the respondent, the ball is upon me to determine whether or not **the respondent is liable for Electronic Fund Transfer (herein after EFT)** against the account of the applicant. This is the crux of the matter and one that needs to be confronted head-on. I understand that the law related to Financial Technology **(commonly referred to by its shorthand, FinTech)** in general and EFT in particular is at its earliest stages of development in many jurisdictions including our own. The relevant technologies that fall under the FinTech legal parlance are point-of-sale terminals (POS), automated teller machines (ATM), telephone banking systems, automated clearing houses (ACH), and wire transfer operations. As

a result, I leave my mind open to possibilities to borrow a leaf or two from other common law jurisdictions with whom we share the legal ancestry.

To begin with, I considered it vital to first and foremost, go to the legal semantics to find out what exactly EFT means. At this juncture, I am inclined to borrow from one of the earliest statutes in the world to define the term namely the **Electronic Fund Transfer Act (EFTA) of 1978** a federal statute of the United States of America (USA). EFT is defined as;

> ***"...any transfer of funds other than a transaction originated by a check, draft, or similar paper instrument, which is initiated through an electronic terminal, telephonic instrument or computer or magnetic tape so as to order, instruct, or authorize a financial institution to debit or credit an account..."***

It is not disputed that the parties are in a banker-client relationship. It is not disputed further that the respondent had debited a total of seven thousand pound from the account of the appellant. Parties are in agreement that the respondent had used SWIFT to transmit funds debited from the account of the applicant. SWIFT is an international organization established

in 1973 to effect international fund transfers more efficiently. It should be noted that SWIFT, a game changer in the financial sector is not settlement system such as the Tanzania Interbank Settlement System (TISS) but merely a communications or message switching network.

As we travel down the road of legal reasoning, our next question is how is EFT conducted? Without going into too many details, the law in the banking industry provides that fund transmission in general and EFT in particular, is ignited by and implemented upon **receipt of instructions from a client**. In our case, the respondent is legally justified to undertake an EFT against the appellant's account only upon being instructed by the appellant expressly to do so. Case law informs that in the absence of a specific format, instructions must be coached in an imperative language. In the case of; **Little v. Slackford (1878) 173 E.R. 1120** the sentence "please let the bearer have £ 7 and place to my account and you will oblige your humble servant" was considered not an imperative language.

Client instructions are known to be a form of order. That means, even if the wording is politely framed with such pleasant words as *"please"*, *"kindly"* *"your obedient servant"* that does not mean the instructions are not an order. This was the discussion in the case of **Provost of Airdrie v.**

French (1915) 31 Sh. Ct. Rep. 189 where the court held that the word "please" does not necessarily mean that the instructions are not an order. It goes without saying in our present case that the respondent acted upon instructions dully issued by the applicant. That means the respondent was acting in the safest of legal parameters as far as the EFT she implemented was concerned.

Our next question would be; if the respondent acted lawfully in accordance with instructions of the client, is she still liable for the EFT undertaken against the account of her client, the appellant? At this juncture it is imperative to point out in the outset that EFT is "banking business" and one of the income generating activities of the respondent. I am inspired by the landmark case of **United Dominion Trust v. Kirkwood [1966] 2 Q.B. 431, 447** where Lord Denning M.R. described what constitutes "banking business". EFT is not some charity or a favour done to clients who happen to have accounts in some banking institutions. In fact, there is usually a fee charged for every transaction done.

Still in the question of liability, it is trite law that there cannot be liability without duty. Duty arises in the course of a relationship-be it legal or otherwise. As correctly submitted by Ms. Swai, counsel for the respondent,

the relationship between the appellant and the respondent **is that of a Principal and Agent**. I like this formulation because it provides me with the much needed "entry point" to the vast area of the law of agency. It is instructive to note however that the transaction in the matter at hand involves more than just the "principal" in this case the appellant and the "agent" in this case the respondent. Apparently, there is a third (and probably a fourth) entity referred to by the learned counsels in their submissions as the "beneficiary bank" and, at times the "intermediary bank".

As I will explain later, I am really not interested in proper identification of these so called "beneficiary" and "intermediary" banks. I am only interested in their legal position and this what prompted me to task the learned counsels to address me on the relevant legal doctrine. Having said so, what is the position of a third party in our matter at hand? The next paragraphs dig deeper in an attempt to shed some light.

In his submission, counsel for the appellant opined that the **doctrine of privity of contract** barred the appellant from instituting any case against the intermediary bank because she was not privy to the contract. That is the correct legal position and one that is supported by a myriad of case law

including those that are binding and those that are merely persuasive to this court.

Although both counsels are in agreement on the agency-principal relationship as well as limitation occasioned by the doctrine of privity of contract, counsel for the respondent Ms. Swai strongly denies any liability on the side of the respondent for the EFT transaction. As it can be gathered from records at the lower court, the respondent had brought witnesses specialized in financial matters. The witnesses "DW1" and "DW2" testified and produced documentary evidence to the effect that the respondent had transferred the money as required and that was all she could do. No more no less.

Borrowing heavily from the testimonies of DW1 and DW2 to buttress her submission, Ms. Swai insisted that the respondent had performed her duty as a banker with uttermost diligence and that her hands were clean. The learned counsel emphasized that there was absolutely nothing else the respondent could do.

As if going by the Kiswahili erudition ***"Kiendacho kwa Mganga Hakirudi"*** **(**loosely translated "What goes to a magician never comes

back"), Ms. Swai brushed off any possibility for liability on the side of the respondent. As we shall see later, this kind of thinking is unnecessarily dismissive and, by and large, unhelpful.

Towards the end of her submission, counsel for the respondent averred that there was no proof that the money of the appellant was not delivered to the intended recipient. Mr. Nickson on his part, is of a considered view that such assertion is tantamount to bringing about a confusion in the courtroom on the part of the learned counsel for the respondent. Mr. Nickson averred that all the evidence tendered in the trial court were to the effect that the money never reached Walker Movement's account. I can not agree more with Mr. Nickson. Unless this court confines itself to matters actually appealed against, it risks taking a dangerous path down the plateau of unending litigation paved by limitless assertions. Besides, who is in the better position to prove delivery of the money between the direct sender (the respondent) and an indirect sender (the appellant)?

Although I don't want to go to the complex issues of "telecommunication engineering aspects" of FinTech I must say in passing that transfer banks on one side and beneficiary banks, on the other have a way of notifying each other when a transaction is successful or not.

Based on ground of appeal number three, my next question for this analysis is **where, as we speak, are the funds (£7000) debited from the appellant's account?** The trial court's finding is that the money is with the beneficiary bank. In his submission Mr. Nickson averred that the learned magistrate erred in law and fact in reaching to this conclusion in the absence of any evidence. Responding, Ms. Swai reverted to common sense. She is of the opinion that common sense dictates that if the money is neither with the applicant nor the respondent, it would appear obvious that it was with the beneficiary bank. Needless to say, Ms. Swai's submission sounds brilliantly convincing to me. Although Mr. Nickson is opposed to resorting to common sense as a halfway house to thinking through established legal principles, it is my considered opinion that these two are not mutually exclusive.

On a balance of probabilities, I agree with the trial court and counsel for the respondent that the disputed amount is with the beneficiary bank. With due respect to the learned counsel for the appellant, he had wasted so much time trying to argue on this point. Who else can be trusted on the whereabouts of the money than the respondent who not only wired it out but also communicated with both the intermediary and the beneficiary banks on the same?

As I exercise the power of imagination in my mind, this brings me to a very interesting scenario. The appellant and the respondent are a natural and an artificial person respectively situated in Tanzania. Assuming that both of them are unable to ensure that the £7000 debited from a local account is returned to the sender, the debited amount rests in the coffers of a large foreign bank in some country. What does that amount to? Contract law theorists would say it amounts to unjust enrichment. It does not take much thought to realize that the £7000 is not just lying there in some drawer of the beneficiary bank. The same is being used to run the wheels of the beneficiary bank's day to day business and, as little as it counts, contribute in the maintenance of financial stability. Until that time when the client gets back the money, it is at the total control of the bank and they can do anything with it. The case of **Foley v. Hill (1848) 2 H.L.C. 28; 9 E.R. 1002, 1005** is illustrative:

> "Money, when paid into a bank, ceases altogether to be the money of the principal; it is the money of the banker, **who is bound to return an equivalent by paying a similar sum to that deposited with him when he is asked for it.** The money paid into the banker's is money known by the principal to be placed there for the purpose of being under the control of the banker; it is then the banker's money; he is known to deal with it as his own; **he makes what profits of it he can, which profit he retains to himself,** paying back only the principal, according to the custom of bankers in some places, or the

> principal and a small rate of interest, according to the custom of bankers in other places. **The money placed in the custody of a banker is, to all intents and purposes, the money of the banker,** to do with it as he pleases…" (emphasis mine)

As I come to the second part of my analysis, I must put it clear that, with all due respect, the learned counsels appeared to have very little if any information about who they referred to as "intermediary" and at times "beneficiary" banks. In the EFT parlance, these are often but not always different entities each with a different role. Nevertheless, I decided not to task the learned counsels to address me on this area. The reason is simple; they are all strangers in this matter. I have deliberately avoided any detailed description of their business and addresses. I can not allow them to be used as a hideout for any entity within the jurisdiction of this court to avoid liability or any how delay implementation of the orders of this court.

Let me go back to the whereabouts of the money. Assuming we all agree that the £7000 lies with the "beneficiary bank" in some part of this planet, why is the money not delivered to the intended recipient? Or, in the alternative, why is it difficult to wire it back to the sender?

This takes me to yet another contour; having established that **one**: the money belongs to the applicant **two:** it was debited from his account by the

respondent upon receiving instructions from the applicant and **three:** that **such money is neither with the appellant nor the respondent** but a third party, my question is **who bears liability?**

Submitting on this aspect, counsel for the appellant Mr. Nickson opines that the respondent is liable for negligence. He asserts that the respondent had been negligent in handling the EFT that led to failure to ensure that the funds reached the intended recipient. Counsel for the respondent on her part, strongly denies any negligence. She is of a strong view that her client had acted professionally and no any evidence on negligence had been adduced. I agree with Ms. Swai. Nevertheless, and with all due respect to both counsels, I am not prepared to take the path of negligence for this analysis. It is trite law that liability in tort can only be resorted to in the absence of liability in contract. Since we have already chosen the path of contract law in the form of the relationship between principal and agent, I think it would be illogical to jump into another wagon. The case of **Tai Hing Cotton Mill Ltd v. Liu Chong Hing Bank [1986] A.C. 80, [1985] 2 AU ER. 947** is illustrative:

> "Their lordships do not believe that there is anything to the advantage of the law's development in searching for a liability in tort where the parties are in a contractual

> relationship. This is particularly so in a commercial relationship. Though it is possible as a matter of legal semantics to conduct an analysis of the rights and duties inherent in some contractual relationships including that of a banker and customer either as a matter of contract law when the question will be what, if any, terms are to be implied or as a matter of tort law when the task will be to identify a duty arising from the proximity and character of the relationship between the parties, their Lordships believe it to be correct in principle and necessary for the avoidance of confusion in the law to adhere to the contractual analysis: on principle because it is a relationship in which the parties have, subject to a few exceptions, the right to determine their obligations to each other, and for the avoidance of confusion because different consequences do follow according to whether liability arises from contract, e.g. in the limitation of action."

Coming back to the matter at hand, does it really matter to the client whether the intermediary or correspondent or call it beneficiary bank has acted negligently or not? Can an average financial consumer be expected to prove negligence in the complex EFT transactions? I choose not to take that path. Instead, I choose to be pragmatic. The respondent had delegated a part of her functions to another bank. It does not take much thought to conclude that the latter was acting as a sub-agent. The respondent is therefore responsible for actions and omissions, contractual or otherwise of the intermediary bank and all other banks in the transmission chain. The

landmark case of **Royal Products v. Midland Bank Ltd [1981] 2 Lloyd's Rep. 194** is illustrative:

> "As between the customer and his banker, however, the latter is liable for the acts of his correspondent in exactly the same way and within the same limit as for those of his managers and servants, for it is immaterial to the customer whether the banker operates through a branch or through a correspondent..."

The above quoted case law though merely persuasive due to the reception date underlying stare decisis in our jurisdiction, fits in like a jigsaw puzzle with the current position of the law on EFT in Tanzania. **The Bank of Tanzania (Financial Consumer Protection) Regulations** provide at Regulation 58 as follows:

> ***58. Where a complaint from the consumer involves more than one financial service provider, the responsibility to resolve the matter shall solely be on the service provider who initiated the financial product or service.***

Premised on the above discussion, I allow grounds of appeal No 1 and 2. I hold that failure of both the "intermediary" bank and the "beneficiary" bank or any of them, as the case may be, whether due to negligence or any other cause, to transfer the funds into the accounts of the intended recipient either

directly or though another bank, falls squarely on the shoulders of the transfer bank namely the respondent. Ground number three fails. The trial magistrate correctly on a balance of probability, expounded on the whereabouts of the disputed money.

This brings me to grounds of appeal Number 5 and 6 which are centered on costs and damages respectively. With regards to cots, the appellant averred that the trial magistrate had erred both in law and in fact for believing that the respondent is not bound to pay some costs having admitted that the appellant incurred costs in due course of fighting for his rights. Both counsels did not have much to say on this. I do not intend to spend much time here either. It is a settled position of the law in our jurisdiction that costs are awarded at the discretion of the court but such discretion must be exercised judiciously. The Court of Appeal of Tanzania proffered on this in the authoritative case of **Mohamed Salmini *v.* Jumanne Omary Mapesa** Civil Appeal No 4 of 2014 CAT Dodoma (unreported) thus:

> "As a general rule, costs are awarded at the discretion of the court but the discretion is judicial and has to be exercised upon established principles, and not arbitrarily or capriciously. One of the established principles, is that, costs would usually follow the event unless there are reasonable

> grounds for not depriving a successful party of this cost. A successful party could lose his costs if the said costs were incurred improperly or without reasonable cause or by the conduct of the party or his advocate. The list is not exhaustive. Each case would be dictated by its own set of circumstances."

It is clear from the judgement of trial court that no order as to cost was made. I don't believe that the above position of the law escaped the attention of the learned magistrate. He might have had a more constructive reason. Unfortunately, he didn't pen it down. For this reason, I uphold the fifth ground. The solid rock of our jurisdiction remains unshaken, costs follow the event.

Ground number 6 is on damages. According to the ***Halsbury's Laws of England,*** 4th ed., par. 1, 102 damages "are the pecuniary recompense given by process of law to a person for the actionable wrong that another has done him". In some jurisdictions particularly the United States of America, damages recoverable from EFT are statutorily regulated. (See 15 U.S. Code Subchapter VI - ELECTRONIC FUND TRANSFERS). In the absence of a specific legislation on EFT related damages, I am guided by the holding of the apex court of this country in **Tanzania Saruji Cooperation vs. African Marble Company Ltd**, [2004] TLR 96 thus:

> "General damages are such as the law will presume to be direct natural or probable consequences of the act complained of, of the plaintiff wrong doing, therefore have been a cause if not the sole or a particular significant cause of damages."

The appellant contends that the learned Trial Magistrate erred in both law and fact for believing that the appellant did not suffer any loss as a result of the dispute that was in court against the respondent. On her part, counsel for the respondent strongly resisted the award of damages. Her reasoning is to the effect that there cannot be general damages in the absence of specific damages. Responding at a rejoinder, Counsel for the appellant submitted that specific damages are the seven thousand Sterling Pounds debited from his client's account. I have already ruled on the seven thousand pounds. What I am concerned with now is the segment on general damages. In the next paragraph I explain why I think the appellant should be awarded general damages at the amount that I will state in the end of my judgement.

The appellant is a business man, member of the private sector, often referred to as the engine of the economy of this country. The private sector has been praised for the role it plays in employment creation and diffusion of technology, innovation and entrepreneurship in our country. Members of

the private sector such as the appellant struggle a big deal to keep their business (often small to medium sized) running. In so doing, they provide employment to our young people while paying taxes. I am not an economist but I believe that inability to protect our small and medium sized businesses and the private sector in general is tantamount to shooting oneself in the leg.

Zooming in to the appellant, he had entrusted the respondent the processes of transmitting his hard-earned money to a car dealer in the United Kingdom. From 2016 to the present neither the money nor the car is anywhere to be seen. He has been in the court corridors all along crying out loud for help. In the meanwhile, his business kept dwindling. One doesn't need to be a clinical psychologist to realize that the past seven years have been extremely stressful on the side of the appellant. Likewise, one doesn't need to be trained in business administration to realize that the appellant's business had suffered greatly in the absence of the money that has been in the hands of the "beneficiary" bank all this year. I uphold the sixth ground of appeal but defer mentioning the amount to the end of this judgement. I move on to ground number 7.

On the seventh ground of appeal, the appellant avers that the trial court had erred in law and in fact in believing that the appellant had another duty to perform after he had instructed the respondent to transfer the money to the beneficiary bank. Mr. Nickson believes that the transaction was done between two banks and that there was no way the appellant could be a party to their communication.

The learned counsel for the respondent Ms. Swai on her part, is of the view that the beneficiary bank is holding the funds because it suspects the same could be connected with terrorism financing. Ms. Swai submitted that the intermediary bank sent additional questions to the appellant which were meant to find out issues related to financing of terrorism.

In response, Mr. Nickson submitted that such unsupported allegations were a distraction that would prevent the court from discussing the main issued before it. I agree with Mr. Nickson. This court has not been called upon to decide on involvement or otherwise of the appellant on terrorism financing. I cannot demand any evidence from any of the learned counsels on this as that would be too much and way beyond the duty of counsels to a civil suit. To this end, I dismiss this assertion. It is not a justifiable cause

for the beneficiary bank or intermediary bank or whatever other third party may be, to keep the money belonging to the applicant.

Mr. Nickson has also argued that the appellant couldn't possibly be a part of the interbank communications. Ms. Swai agreed on this. It goes without saying that in the banking business, as soon as a client issues an order for EFT or any other transfer in that matter, he/she is out of the picture. The engineering, "mercantile rituals" and protocols among banks and other financial institutions does not concern an average client. The clients are like farmers. They simply wait for the seeds they have planted to germinate. They do not need to know what exactly happens beneath the soil surface that makes the miracle happen. That is better left to crop scientists.

Before I part ways with ground of appeal number seven, here is an example to cement my argument that what happens between banks during cash transfer is way beyond what an average client would be able to grapple with. There is a practice among many if not most banks to **maintain NOSTRO and VOSTRO accounts** to settle financial transfers between them. A nostro account is the account that a transferring bank maintains with another bank such as an intermediary bank. A Vostro account, on the other hand, is an account maintained by "another bank" such as an

intermediary bank for the transferring bank. With all fairness, these "Financial Engineering" matters are not only too cumbersome for an average consumer to grapple with as hinted above, but also by and large unnecessary. To this end, I find Ms. Swai's submission that the appellant had been involved at all stages of the transaction quite unconvincing. I uphold the seventh ground of appeal.

This brings me to the last group of grounds made up of grounds 9 and 10. These are on the form and content of the judgement of the trial court. Learned counsel for the appellant strongly believes that the judgement falls short of judgement writing principles he had come across with. Mr. Nickson is of the considered view that the trial court's judgement is inexecutable. Ms. Swai on her part doesn't see any fault with the judgement. In her view, any order of the court that the respondent should pay back the appellant could mean that the responded had indeed used the appellant's money. The learned counsel for the respondent is also concerned on where the money for refund would come from.

Let me address this last part of the learned counsel's submission and come back to the judgement of the district court. The illustration I gave on NOSTRO and VOSTRO accounts partly addresses Ms. Swai's concern raised

on where the money for refund would come from. The learned counsel is advised to check with her client to find out whether they are of the nostro-vostro type or some other scheme. I strongly believe that the regulator in this area namely **The Bank of Tanzania (BoT)** in her mightiest of wisdoms has put in place mechanisms for financial institutions to draw from a part of their accrued profit to address genuine consumer concerns like this one. The ***Kiendacho kwa mganga hakirudi*** approach to problem solving would be too simplistic and a cause of unending litigation.

Let me go back to the judgement of the lower court that has been faulted by counsel for the appellant. I have read the judgement. With all due respect to the learned Magistrate, the judgement lacks brevity. Directing parties to "help" each other is tantamount to postponing the problem. It must be borne in mind that one of the most important characteristics of law is normativity. Normative orders must be free from ambiguity. Instead of empowering one party to take the lead in the bargaining, a court judgement should provide clear orders that can be executed. See the Court of Appeal of Tanzania's recent proffered directive in **Allan Duller versus The Republic** Criminal Appeal No 367 of 2019 thus:

> "...judges and magistrates [need] to ensure that the final orders they give are free from any ambiguity lest they may create a confusion in the execution process. We need not overemphasize on the need to be careful on that."

All said and done, I allow the appeal. I quash and set aside the judgement and decree of the trial court. The respondent is ordered to return **the seven thousand Sterling Pounds (£ 7,000)** debited from the account of the appellant. The respondent is ordered further to pay the respondent general damages to the tune of **100,000 (One hundred thousand Tanzanian Shillings)** and the cost of this suit.

The right to appeal to the Court of Appeal of Tanzania fully explained.

E.I. LALTAIKA

JUDGE

17.12.2021

PROCEEDINGS

Date:	**17/12/2021**
Coram:	Hon. Dr. E.I. LALTAIKA, J
For the Appellant:	Adv. Happyness Carol
For the Respondent:	Adv. Happyness Carol
CC-	Zawadi

Ms. Carol

My lord the matter is coming up for judgement. I hold brief for both Adv. Ludovick Swai and Adv. Irene Swai, counsels for the appellant and respondent respectively.

Court: Judgement delivered in the Court Chambers today on 17/12/2021 in the presence of Adv. Happyness Carol holding brief for both counsels for the applicant and for respondent. The right to appeal to the Court of Appeal of Tanzania fully explained

E.I. LATAIKA

JUDGE

17/12/2021