IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MKUYE, J.A., WAMBALI, J.A. And GALEBA, J.A.)

CIVIL APPEAL NO. 82 OF 2019

ECOBANK TANZANIA LIMITED .....APPELLANT

VERSUS

FUTURE TRADING COMPANY LIMITED..... RESPONDENT

[Appeal from the Decision of the High Court of Tanzania (Commercial Division) at Dar es salaam]

(Sehel, J.)

dated the 21st day of May, 2018
in
Commercial Case No. 68 of 2014

.....

JUDGMENT OF THE COURT

8th June & 13th August, 2021

GALEBA, J.A.:

Ecobank Tanzania Limited, the appellant and Future Trading Company Limited, the respondent, had a good banker and customer relationship since 29th April 2010 when the respondent opened bank account number 0010 1354 0001 9801 with the appellant at its Uhuru branch in Dar es salaam.

The relation however, turned sour from 10th March 2014 when the appellant debited TZS. 66,240,000.00 from the said bank account and

allegedly paid it to **Bashir K General Dealers CC** (the overseas supplier) based in South Africa. It therefore turned out that, whereas the appellant alleged to have been duly instructed by the respondent to debit its account and pay the money to the overseas supplier, the latter disputed not only having issued the alleged instructions to debit its account or pay any third party, but also it denied to have any knowledge of the said overseas supplier. The respondent further, disputed to have ever requested the appellant for activation of its account for utilization of internet banking services.

As the appellant maintained its position that the money was debited following the respondent's instructions to do so, the latter filed Commercial Case No. 68 of 2014 in the Commercial Division of the High Court for orders of:

(i) refund of the said TZS. 66,240,000.00;

(ii) payment of TZS. 50,000,000.00 for loss of earnings resulting from the respondent's failure to meet various financial commitments;

(iii) payment of TZS. 50,000,000.00 being compensation for breach of contract and tortious injuries it suffered on account of the appellant's unlawful and negligent acts;

(iv) payment of general damages to be quantified by the court; and

(v) costs of the suit.

As hinted above, at paragraph 3 (j) and (o) of the written statement of defence the appellant reiterated its position that it debited the missing money and paid it to the overseas supplier on instructions of the respondent, and moved the trial Court to dismiss the suit.

Based on the pleadings, the evidence tendered and the submissions made, the trial court held that the appellant did not have instructions or mandate to debit the respondent's account and transfer its money to any beneficiary account abroad. Consequently, the trial court made the following orders:

(i) that the appellant should refund the respondent with the said TZS. 66,240,000.00, which had been unlawfully debited from the respondent's bank account;

(ii) the appellant should pay TZS. 25,000,000.00 as general damages for unauthorized withdrawal and keeping the money out of the respondent's use;

(iii) the appellant should pay interest at the rate of 7% per annum on the above decretal amounts from the date of judgment to the date of final settlement; and

(iv) costs of the suit.

The appellant was aggrieved with the above orders, hence the present appeal, in which it raised four (4) grounds of appeal although on 2nd June 2021 it filed an additional ground of appeal. The first four (4) grounds of appeal are:

> *"1. That the Hounourable Judge of the High Court grossly erred both in law and in fact in holding that the respondent had not applied for internet banking services/facilities.*
>
> *2. That the Hounourable Judge of the High Court grossly erred both in law and fact in failing to consider and decide on the effect of the uncontroverted fact that the 1st respondent's managing director one Mr. Abubakar Suwed had received through his registered mobile phone*

number +255 754 444 292 several sms alert messages in respect of the transactions which took place in the respondent's account from the time of activating internet banking service up until the transaction complained of took place.

3. *That the Hounourable Judge of the High Court grossly erred both in law and fact in holding that the transaction complained of was done without the respondent's instructions.*

4. *That the Hounourable Judge of the High Court grossly erred both in law and fact in deciding the case against the overwhelming evidence in the case."*

Moreover, the additional ground of appeal was to the effect that:

"The trial Judge B. M. A. Sehel J. (as she then was) erred in law in taking over the trial of the case (i.e. Commercial Case No. 68 of 2014) from a predecessor trial Judge Hon. Justice Mwambegele J. (as he then was) without recording reasons for such take over contrary to Order XVIII Rule 10(1) of the Civil Procedure Code [Cap 33 RE 2019]".

At the hearing of the appeal, the appellant was represented by Mr. Mpaya Kamara leaned advocate and for the respondent was Mr. Joseph Rutabingwa assisted by Ms. Idda Rugakingira both learned advocates.

In arguing the appeal, after having adopted the submissions lodged on behalf of the appellant earlier on, Mr. Kamara opted to make a few additional points on the first and third grounds of appeal and then submitted substantively on the additional ground of appeal as no written submissions were lodged in relation to it. He did not make any oral submissions in respect of the second and fourth grounds.

We propose to start our determination of the appeal with the additional ground of appeal.

In support of that ground, Mr. Kamara submitted that the basis of his complaint is traceable at pages 544 and 545 of the record of appeal where, Hon. Mwambegele J. (as he then was) (the predecessor judge), on 30th November 2016 adopted issues agreed by parties and as at that time witness statements had been filed, hearing had started before him. Mr. Kamara's point was that when Hon. Sehel J. (as she then was) (the successor judge) took over the proceedings on 23rd February 2017 she was duty bound to record reasons why she had to take over a trial she did not

start. He submitted that the omission to give reasons offended Order XVIII Rule 10(1) of the Civil Procedure Code [Cap 33 R.E. 2019] (the CPC).

He submitted that according to rule 49(1) of the of the High Court (Commercial Division) Procedure Rules 2012, GN. No. 250 of 2012, (the Commercial Division Rules of Procedure), evidence in chief in the Commercial Division is adduced by filing witness statements. So according to him, evidence in chief had been adduced in respect of all witnesses at the time the successor judge took over the proceedings. Thus, relying on commentaries on the case of **Vidyabai v. Padmalatha**, AIR 2009 SC 1433, he invited us to hold that hearing commenced before the predecessor judge as witness statements had been filed at the time when the successor judge took over proceedings. Further, relying on this Court's decisions in **Mariam Samburo (as the Legal Personal Representative of the Late Ramadhan Abas) v. Masoud Mohamed Joshi and Two Others**, Civil Appeal No. 109 of 2016; **Charles Chama and Two Others v. The Regional Manager TRA and Three Others**, Civil Appeal No. 224 of 2018 and **VIP Engineering and Marketing Ltd v. Mechma Corporation (Malaysia) Berhad of Malaysia**, Civil Application No. 163 of 2004 (all unreported), he implored us to nullify the proceedings which

were handled by the successor judge up to the judgment for failure to give reasons for her taking over the proceedings.

In reply to the above arguments, Mr. Rutabingwa submitted that Mr. Kamara's interpretation of the law was incorrect. He contended that in this case no one was prejudiced by the omission of the learned successor judge to assign reasons when she took over the proceedings. Relying on the case of **Salma Mohamed Abdallah v. Joyce Hume,** Civil Appeal No. 149 of 2015 (unreported), he submitted that at the time the successor judge took over proceedings, hearing had not started because, the alleged witness statements were tendered before the successor judge much later after she took over the proceedings. Mr. Rutabingwa's point being that mere filing of the witness statements cannot have marked commencement of hearing because the statements still needed adoption and admission at the actual trial.

In a brief but focused rejoinder, Mr. Kamara submitted that the decision in **Salma Mohamed Abdallah (supra)** is proper in the circumstances of that case but not in the context of rule 49 of the Commercial Division Rules of Procedure. He argued that the issue of tendering the witness statements for admission when a witness is called for

cross examination, is irrelevant because even if the witness does not appear to tender it, the same must be considered although it may be accorded less weight, as provided under rule 52(4) of the Commercial Division Rules of Procedure.

On whether his client was in any way prejudiced by the allege omission of the successor judge to record, Mr. Kamara forcefully contended that Order XVIII Rule 10(1) of the CPC is there to ensure that the High Court can assess the credibility of all witnesses who testify before it, to protect judicial integrity and to promote transparency in justice administration. He concluded that, by failure to record reasons for the takeover of proceedings, the above principles of justice administration were undermined.

To appreciate our deliberation on this ground we need to make reference to Order XVIII Rule 10(1) of the CPC, which provides that: -

> *"10: -(1) Where a judge or magistrate is prevented by death, transfer or other cause from concluding the trial of a suit, his successor may deal with any evidence or memorandum taken down or made under the foregoing rules as if such evidence or memorandum has been taken down or made by him or under his direction under the said rules and may*

proceed with the suit from the stage at which his predecessor left it."

The above provision has been interpreted by this Court as requiring a successor judge who takes over trial of a case in which one or more witnesses have testified before a predecessor judge, to record reasons for him or her to take over the trial. The rationale for such disclosure of reasons was propounded in **Charles Chama and Two Others** (supra) as being two-fold, **one**, the one who sees and hears a witness testifying is in the best position to assess the credibility of the witness and **two** because judicial integrity of court proceedings hinges on transparency.

The issue for determination in this ground is whether on 23rd February 2017 when the successor judge took over the trial, hearing in Commercial Case No. 68 of 2014 had commenced. This will be the epicentre of our focus in addressing the additional ground, and without being lengthy, the two narrower issues we need to determine in this respect are **one**, whether once a witness statement is filed it becomes automatically admitted without any additional requirement of having to formerly be tendered and admitted by the trial court and **two**, whether before 23rd February 2017 hearing had started because issues had been framed and recorded before the predecessor judge.

We propose to start with the issue of witness statements. As regards rule 49(2) of the of the Commercial Division Rules of Procedure which has since been amended by rule 24 of the High Court (Commercial Division) Procedure (Amendment) Rules 2019, GN. No. 107 of 2019, provided as follows prior to its amendment: -

> *"The statement shall be filed within seven (7) days of the completion of mediation and served as directed by the court."*

In this case, the respondent and the appellant filed their witness statements on 9th October 2014 and on 10th October 2014 respectively. That means when the case came up for hearing before the successor judge on 23rd February 2017, the witness statements had been filed. Mr. Kamara was of the position that according to rule 52(4) of the Commercial Division Rules of Procedure, once the statements are filed, they are deemed admitted and that if a witness does not appear to be cross examined on his statement, the court is called upon to accord it less weight. That rule provides:

> *"52(4). Where the court admits an affidavit of a person who failed to appear for cross examination, lesser weight shall be attached to such affidavit."*

We must hasten to state at this point, that our close reading of the whole of rule 52 of the Commercial Division Rules of Procedure leads us to the finding that it relates to matters commenced by way of an originating summons, where instead of filing witness statements, the appropriate documents to file are affidavits as opposed to witness statements which are applicable where suits are initiated by way of plaints under rule 49(1) of the Commercial Division Rules of Procedure. That is to say, respectfully, that rule 52(4) was not relevant to the matter at hand, rather the applicable rules were rules 53 and 56(3) which provide that:

> *"53. During the hearing of the suit and upon an oral application by a party or suo motu, the Court may order that* ***any inadmissible, scandalous, irrelevant or otherwise oppressive matter be struck out of any witness statement****.*
>
> *56(3).* ***Where the court admits a witness statement*** *of a person who failed to appear for cross examination, lesser weight shall be attached to such statement."*
>
> [Emphasis added]

In this regard, a further careful examination of the above rules especially rule 53 reproduced above, reveals that witness statements must

be admitted at the time the suit is called for hearing and at that time, the court on its own motion (*suo motu*) or upon being moved by a party, it may strike out part of the witness statement which is inadmissible, scandalous, irrelevant or otherwise oppressive. That is to say although, the witness statement is deemed to be evidence in chief, the document must pass the test of admissibility in evidence so that inadmissible parts of the statement, may be struck out.

Rule 56(3) goes on to provide that where a witness statement is admitted under rule 53 in the absence of a witness who swore it, then the court admitting it must accord it lesser weight.

In any event, admissibility of documents is never automatic at filing them. In **Total Tanzania Ltd v. Samwel Mgonja**, Civil Appeal No. 70 of 2018 (unreported), the High Court Commercial Division automatically adopted documents which were attached to the witness statements without subjecting them to normal rules of admissibility as detailed at Part III of the Evidence Act. In retrospect this Court observed:

> *"53. ...if the witness wants to tender a particular document, pleaded and attached to his witness statement, he ought to make a prayer for tendering it as exhibit. And the adverse party should be given*

a chance to object or concede to its admission. If it is admitted, the trial court ought to comply with the endorsement of such document pursuant to Order XIII Rule 4 of the CPC and such admitted document pursuant to Rule 7 (1) of Order XIII of the CPC forms part of the record of the trial court proceedings."

Admittedly, in that case, the matter was not on admission of witness statements but admission of documents attached to the statements.

It is notable that in the instant case, the predecessor judge had not heard evidence of any witnesses and no witness statement of any witness had been admitted in court as indicated above, although the statements had been filed. Seeking to have the statements admitted, both parties prayed for admission of their witness statements and they were formerly allowed by the successor judge. It is our position that filing of witness statements did not *per se* entail commencement of hearing since no witness had tendered his statement and no assessment was made by the court *suo motu* or on application of any party to see whether the statements contained any inadmissible, scandalous, irrelevant or oppressive matters. For evidence to be treated as evidence, it must be

trimmed of the above inadmissible materials, which at the time the successor judge was taking over, that had not happened. We must stress that, in this case the predecessor judge did not see or hear any witness; all witnesses adduced their evidence before the successor judge including adopting and admitting the witness statements. In this regard, for instance at page 277 of the record of appeal, the witness statement of DW1 was admitted by the successor judge as follows:

> *"COURT: The witness statement of Stella Malekia is* ***hereby admitted to form part of DW1 testimony in chief*** *and part of the proceedings in this case."*

In our opinion, the court was complying to what is provided for under rule 53 of the Commercial Division Rules of Procedure, to admit a witness statement.

As for the cases cited by the parties, we need to observe that none was interpreting rule 53 of the Commercial Division Rules of Procedure reproduced above. We were also invited to apply the Indian decision in **Vidyabai v. Padmalatha (supra)**. However, we are unable to follow the authority, not even at the level of being persuaded, because **firstly**, it relates to filing of affidavits, while in this case we are dealing with witness

statements. In other words, it could be a little better if we had issues with a matter commenced by way of an originating summons under rule 52, where the relevant witness documents are affidavits. **Secondly,** we do not know, and Mr. Kamara did not submit to us that at the time the case was being decided in India, the procedural statute in that jurisdiction had *pari materia* provisions to rules 53 and 56(3) of our Commercial Division Rules of Procedure.

It is significant as well, to note that at page 545 of the record of appeal, counsel for the respondent prayed before the successor judge to file a supplementary witness statement and also to consolidate witness statements of two witnesses. He also prayed for extension of the case's life span. Although the prayers relating the statements of witnesses were refused and that relating to extension of the life span granted at page 547 of the record of appeal, what it all implies is that the case was still at inception with preliminary matters to sort out before hearing could officially take off.

To conclude the first limb of the additional ground of appeal we hold that at the time that the predecessor judge took over, hearing had not commenced because at that time no witness statement had been admitted

for purposes of being relied upon as evidence in terms of the Commercial Division Rules of Procedure.

We now move to the second limb of the additional ground of appeal, *viz*, whether the fact that issues had been framed and recorded at the time the successor judge took over proceedings, trial had commenced. This issue can be answered by revisiting the record of the proceedings dated 30th November 2016 and those of 18th May 2017.

According to the above record, original issues were recorded by the predecessor judge on 30th November 2016, but the scenario changed as the issues were amended on 18th May 2017, before the successor judge. This is what transpired on the latter date as reflected at page 548 of the record of appeal:

> *"Date: 18/05/2017*
>
> *Coram: Hon. B. M. A. Sehel, Judge*
>
> *For the Plaintiff: Mr. Lyimo and Mr. Rwegasira, Advocates*
>
> *For the Defendant: Mr. Matunda, Advocate*
>
> *Cc: Maurice*
>
> ***Lyimo Adocate**: Madam Judge, we have one witness today and before we proceed, we pray to make a small*

amendment on the issues framed on the account number.

Court: *The account number reads 001034500019801.*

Lyimo Adocate*: Madam Judge, before number 3 there should be number (1).*

Matunda Adocate*: Madam Judge, I cannot object to that.*

Order*: The* ***prayer for amendment is granted. Thus, the account number in both issues no. 1 and 2 shall now read 001013450019801.***

B. A. M. Sehel
Judge
18/05/2017'

(Emphasis is added)

A closer examination of the above record reveals that although the predecessor judge found on record framed issues, the respondent appeared before her and prayed to amend the issues and the appellant consented to the amendment. We are, therefore, of a firm position that since the issues earlier framed were amended by the successor judge on 18th May 2017 at the instance of the parties, that was a clear indication that hearing had not started at the time the successor judge took over

proceedings. It would be erroneous to take it that the successor judge resolved issues that were recorded by the predecessor judge.

Consequently, having found that filing the witness statements did not mark the commencement of hearing, and having resolved that the issues that were resolved by the successor judge were issues which were amended before her, we find the additional ground of appeal to have no merit and we dismiss it.

We will now proceed to the substantive grounds contained in the memorandum of appeal. Although Mr. Kamara argued the first and third grounds together, the grounds raise completely different issues. The first is on a complaint that the trial judge was wrong to hold that the respondent did not apply to join internet banking services whereas the third is based on the complaint that the trial court was wrong to hold that the missing amount of TZS. 66,240,000.00 was debited by the appellant without instructions of the respondent. We will therefore not be able to discuss the first and third grounds together but separately as they entail completely different considerations with distinct outcomes. On the contrary, we propose to consider the first and second grounds together because Mr. Kamara submitted that the evidence that the respondent applied for and its

bank account activated to use internet banking, is that it received SMS alerts, which is a complaint in the second ground.

In respect of the first ground, Mr. Kamara submitted that according to Exhibit D1, which are many email messages including the Internet Banking Set Up Form, the respondent applied and its bank account was connected and activated to utilize internet banking services. He submitted further that the respondent's managing director admitted to have received SMS alerts on his telephone line number 0754 444 292 informing him that the respondent's account had been debited with the sum of TZS. 66,240,000.00. Supplementing the substance of his written submission on that ground orally, before us, he contended that Exhibit D4 which is an indemnity document shows that the respondent agreed to use internet in his banking operations with the appellant. He therefore faulted the trial judge for not considering the document which was not challenged by the other party at the hearing. He specifically relied on clause two of that document and urged us to allow the first ground of appeal.

In reply to the submissions of the appellant, Mr. Rutabingwa, like his counterpart, adopted the respondent's earlier lodged written submissions and added that according to the record of appeal, instructions to activate

internet services came from Anita Moshi, but she was not called to testify as from whom did she receive the alleged instructions. He submitted that the SMS alerts if any were being sent to telephone number +255 574 444 292 whereas according to the appellant the telephone number filled in the Internet Banking Set Up Form at the time of applying for joining internet banking service was 078 207 4511. He added that in any event, if at all the alert was sent, the same was meant to inform the appellant of the unlawful debiting of his money and not whether the appellant should debit its account or not.

We have considered the contending arguments of parties and considered the basis of the judgment of the trial court on both grounds, one and two. The trial judge was convinced that the evidence by the appellant supporting the position that the respondent applied for joining internet banking was weak because; Anita Moshi from whom the initial communication on the subject came, was not called as a witness. Similarly, the appellant did not rule out the possibility of the respondent's cyber security concerns where the respondent's email account could be hacked in which case, the bank could be communicating all along with cyber criminals.

The trial judge also indicated that, when the respondent was opening the bank account initially in 2010, he marked on the form that it would not want to use online operations with its account. But that is not all, two more points, throw light on this aspect of the case. ***Firstly,*** the relationship manager Mr. Toy Aloyce Ruvumbagu (DW3) stated that he forgot to verify the genuineness of an email he received from Anita Moshi, which email he forwarded to other departments to process activation of internet banking. ***Secondly,*** Mr. Abubakari Swedi Sadiq (PW1) testified during cross examination that emails allegedly from him, *prima facie* had issues of genuineness. For instance, a careful study of the email communications in exhibit D1 reveals that an email sent by Stela Malekia (DW1) to Mr. Sadiq on 10th March 2014 at 8:55 AM, has Ms. Malekia's signature showing that she is an E-Channel Corporate Banking official and it has the respondent's standard disclaimer clause immediately below the message. However, all other emails from the said DW1 do not have any such signature or the appellant's standard disclaimer. A further scrutiny of an email which is part of exhibit D1 allegedly sent to the appellant by the respondent's managing director on 10th March 2014 at 12:07 PM, has the respondent's standard

disclaimer, which means, whoever sent the email was using the appellant's internet infrastructure.

No wonder all this happened because the initial email from Anita Moshi was not verified by DW3, and she was not called to testify although she was the only person in a position to explain the original source. We must emphasize that, in the circumstances where a key witness, like Ms. Moshi in this case, is not called to testify on a material aspect of the case, the court is entitled to draw an adverse inference against a party who ought to have called the witness.

It is our considered view that the said Anita Moshi was a material witness who could have explained the missing links in the appellant's allegations of the instruction from the respondent, and thus drawing an adverse inference against the appellant by the trial court was an appropriate stance to take.

On the other hand, Mr. Kamara, challenged the trial judge for not considering exhibit D4, the document titled, *"Indemnity for Faxes and Electronic Instructions, Corporate".* That document is one of a series of documents that new bank account applicants need to execute, before they can be assigned a relevant bank account number. He contended that had

the trial court considered the exhibit, it would have reached to a conclusion that the respondent had approved the appellant to register him with internet banking operations in respect of its account. Mr. Kamara specifically referred us to the second recital of that indemnity which provides:-

> *"2. The customer hereby requests and the bank hereby agrees to act upon fax, internet, electronic and scanned copies of documentation for banking facilities/transactions with the Bank and for any instruction in respect of the account(s) and its operations as if the same were originals and/or hard copies provided that the documentation and instruction are issued in line with the customers with mandate to the Bank."*

We have critically reviewed the document, particularly the above clause and we think what the recital is all about is that the bank is defining to its new customer, the whole range of communication modalities that may be used in the course of their relationship. It states that the two can correspond by way of fax and other online modalities and it puts a *proviso* at the foot of that clause that; *"provided that such documents and instructions are issued in line with the customer's mandate to the bank".*

We therefore think that such a clause does not automatically mean that by signing it, a customer approves the bank to connect him or his bank account to use internet banking. Something more has to be done and that is why, in our view, although the above quoted document was signed on 29th April 2010, the appellant is arguing that the respondent approached it on 5th March 2014 applying for registration as a user of internet banking services. Had the indemnity form been enough, the respondent would have been a user of the services, since 29th April 2010 when it signed the document. We are settled in our mind that the trial judge, did not deal with the document because it was not a material document that was alleged to have been used for applying to join internet banking services. It also, as stated above, directs the bank that whatever to be done on the customer's account, it must be done with the latter's mandate or instructions.

That said, in brief we agree that the trail judge was right to hold that the appellant failed to prove to the required standard, that the respondent company applied for utilization of internet banking services.

In respect of the second ground, Mr. Kamara's contention at page 10 of his written submissions was that monies were sent to South Africa and after that transaction PW1 received the SMS alert message or messages

upon completion of the transfer on 10th March 2014. Mr. Rutabingwa's response was straight forward that the alert was of no use because, even if the same was to be admitted as having been received, the same was informing the respondent's Managing Director that his company's money has already been debited from its bank account.

According to the trial judge, which the appellant is challenging, the appellant did not produce a print out from Vodacom, a mobile operator through whose telecommunication system the SMS alert was sent to the respondent. In our view, like Mr. Rutabingwa argued, the fact that the alert was sent to the respondent's Managing Director after the money was debited and sent to a destination known to the appellant, diminishes the significance of a debate and arguments on the usefulness of the alert in the context of the missing money. In any case, the alert was for purposes of positively establishing that indeed money was debited by the appellant.

As we have held a while ago in respect of the first ground of appeal that the appellant failed to prove to the required standard, that the respondent company applied for utilization of internet banking services and based on what we have just discussed in respect of the second ground of

appeal on the SMS alerts, we find that both the first and the second grounds have no merit and we dismiss them.

Finally, are the third and fourth grounds. The import of both grounds is that the appellant adduced sufficient evidence to prove that it debited the contested TZS. 66.240,000.00 and paid it to a beneficiary in South Africa with instructions of the respondent company. In respect of these grounds, Mr. Kamara contended at page 10 of the appellant's submissions that the evidence for transfer of the money to South Africa is contained in the email communication, Exh. D1, the invoice, Exh. D2 and the oral testimony of DW1, DW2 and DW3. He moved the Court to consider that evidence and allow the appeal.

In reply Mr. Rutabingwa submitted that there was no evidence to prove that the appellant was instructed by the respondent to debit its account with any money and pay it to any third party overseas. He moved the Court to dismiss the appeal with costs.

Before we get to the discussion on the merits and demerits of the parties' arguments on these grounds, let us make one position clear: in banking the relationship of a banker and its customer, is a fiduciary one. The banker is a trustee and the customer, a beneficiary. This is because of

the massive control that a banker has over the depositor's funds and the unfettered prerogative it has to use the money without consulting its owner *vis a vis* almost no powers that a customer remains with. The latter position into which a customer is placed by the relationship, attracts in its favour immense protection of both the law and the courts. The upper hand that the bank enjoys with the money brings it within the grip of section 115 of the Evidence Act in circumstances where there is a state of uncertainty as to the money's security or availability. That section provides that:

> *"In civil proceedings when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him".*

The point we want driven home is that, it was upon the appellant bank to prove that it was not at fault in the disappearance of the respondent's funds, because it was the sole custodian of the money.

That clarified, we will start with the evidence as contained in the submission of counsel and also on record. As we have already made our position clear on the evidential value of the emails which are part of exhibit D1 when resolving the first and second grounds, we will proceed to discuss exhibit D2 which is an invoice that was allegedly settled by the amount debited from the respondent's bank account. That invoice misses essential

details of a valid document that can enable anybody to settle it. For instance, the alleged invoice does not have payment details, like the account number, branch name, bank name and country in respect of the payee. The document also does not show anywhere on its face that it is for settlement. Moreover, although the amount missing in the account of the respondent company was TZS. 66,240,000.00 the invoice that the appellant alleged to have settled quotes $40,000. It is significant to note that, in the absence of any evidence that the respondent authorized conversion of his money from Tanzania Shillings on his account to some other foreign currency, it is impossible to link or relate the missing money which is in Tanzania Shillings and the invoice quoted in Dollars.

According to the appellant in its submissions, the other evidence was oral evidence of DW1, DW2 and DW3, without elaborating. So, we will examine the evidence of DW1 and then determine whether the evidence of DW2 and DW3 will be of any relevance. DW1 at page 304 of the record of appeal to be particular, her evidence was that it was PW1 who used his mobile phone via internet banking to transfer the funds to the overseas supplier. Whereas that was her evidence, the appellant in its pleadings, at clause 3(j) and (o) of the written statement of defence, it is pleaded that

the money was debited by the appellant on instructions of the respondent and it was wired or transferred by the appellant to the Republic of South Africa. The evidence of DW1, on this aspect was at logger heads with the appellant's own pleading, which act waters down the credibility of the witness. It means the witness failed to prove what is contained in the appellant's pleadings. It is emphasized here that, the principle of law in **James Funke Gwagilo v. The Attorney General** [2004] TLR 161 and **Peter Karant and 48 Others v. The Attorney General,** Civil Appeal No 3 of 1994 (unreported) is that parties are bound by their pleadings. That was not all, DW1 later changed course and testified that the funds were paid by the appellant to a recipient in South Africa by way of TT (telegraphic transfer), but she produced no document to substantiate that allegation. Other than admission by the appellant's witnesses that the respondent's bank account was debited, throughout the appellant's case, there was no evidence showing that the money was sent to any destination outside.

At clause 12 of DW1's witness statement, she testified that the respondent's managing director demanded evidence of payment abroad but she did not avail the document to him. In our considered view, the

absence or failure to avail the remittance advice (evidence of remitting money to an overseas bank account) to the respondent and to the Court, the inability by any witness from the appellant's side to mention the bank account or even the bank name to which the money transfer transaction terminated, means nothing else except a single logical inference, that the money claimed by respondent did not leave the appellant's bank house to any overseas destination.

Further submissions of the appellant was that the other evidence to prove instructions to transfer the money was that of DW2 and DW3. However, according to the record of appeal DW2 was head of operational risk and DW3 a customer relationship manager. Their witness statements do not state that they had a hand in processing any money transfer to any destination. That is to say we do not see how their evidence would have been of assistance to make any better that of DW1, the witness who was central to the transaction.

By way of winding up, we must state that we have not been able to trace any evidence suggesting that the appellant transferred any money to any bank account in South Africa as alleged. In the circumstances, the third and fourth grounds of appeal fail and we dismiss them.

In light of the foregoing, the judgment of the trial court is upheld and this appeal is dismissed in its entirety with costs.

DATED at **DAR ES SALAAM**, this 3rd day of August, 2021.

R. K. MKUYE
JUSTICE OF APPEAL

F. L. K. WAMBALI
JUSTICE OF APPEAL

Z. N. GALEBA
JUSTICE OF APPEAL

The Judgment delivered this 13th day of August, 2021 in the presence of Mr. Othiambo Kobas holding brief for Mr. Mpaya Kamara, learned counsel for the Appellant and Mr. Evodius Rutabingwa, learned counsel for the Respondent, is hereby certified as a true copy of the original.

THE COURT OF APPEAL OF TANZANIA

E. G. MRANGU
DEPUTY REGISTRAR
COURT OF APPEAL