



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**COMMERCIAL & TAX DIVISION**

**MILIMANI LAW COURTS**

**HCCC NO. 228 OF 2016**

**SAFARICOM LIMITED.....PLAINTIFF**

**VERSUS**

**TRANSCEND MEDIA GROUP.....DEFENDANT**

**JUDGMENT**

1. The opening words in a Ruling of this Court made on 4<sup>th</sup> October 2016 in this matter were;

**“1. The Tender process and outcome, and implementation of what is now popularly known as The Blaze Brand Promotion has led to a fall out between Safaricom Limited (Safaricom) and Transcend Media Group Limited (Transcend).”**

2. Safaricom’s claim against Transcend is three pronged; malicious falsehood, the tort of occasioning loss by unlawful means; and copyright infringement.

3. Safaricom pleads, and it is a matter in the public domain in Kenya, that it is the leading mobile phone operator in Kenya. So as to entrench its leadership further, it developed a youth segment strategy targeting subscribers in the age bracket of 18 to 24 years with various products. Safaricom anticipated that the targeted subscriber base would bring in considerable market growth.

4. Towards actualizing the strategy, Safaricom, on 25<sup>th</sup> January 2016, forwarded a Request for Quotation (**RFQ**) to 8 prequalified advertising agencies, Transcend being one of them. It is common ground that Transcend participated in the bid. Safaricom asserts that upon evaluation of the bids, Saracen Media Limited (**Saracen**) emerged as the successful bidder and a two year contract was subsequently entered between Safaricom and Saracen. The contract was the framework for implementation of the Blaze Brand.

5. Safaricom complains that on or about 18<sup>th</sup> April 2016, Transcend wrote and published a letter to Vodafone Group Service Limited (**Vodafone**) concerning the business of Safaricom and in particular, the implementation of the partnership between Saracen and Safaricom.

The letter is produced later this decision as the Court will be evaluating the evidence.

6. Something else done by Transcend irks Safaricom. On or about 27<sup>th</sup> May 2016, Transcend wrote and caused to be published in the “Daily Nation” an advertiser’s announcement which Safaricom alleges was in regard to the implementation of the partnership between Saracen Media Limited and Safaricom in respect to the Blaze Brand promotion. Again the Court chooses to reproduce the entire announcement later in this decision.

7. It is the case of Safaricom that the words in the letter and announcement were false and published maliciously. Safaricom sets out the particulars of falsity and malice:-

**PARTICULARS OF FALSITY**

*a) The Defendant did not win the tender for the BLAZE brand promotion;*

*b) The Plaintiff did not procure the departure of the Defendant’s staff and their recruitment by Saracen Media Limited for purposes of implementing the BLAZE brand promotion;*

c) *The KPMG Audit report relied upon by the Defendant as evidence of having won the BLAZE brand promotion tender has not been finalized and submitted to the Plaintiff;*

d) *The Plaintiff has not engaged in any corporate espionage and sabotage;*

e) *The Plaintiff has not engaged in any illegal or corrupt activities in the tender for the BLAZE brand promotion; and,*

f) *The Plaintiff is not illegally implementing the Defendant's intellectual property;*

g) *The Defendant and Saracen Media Limited are competitors;*

h) *The Defendant was disgruntled when it lost the BLAZE brand promotion tender to Saracen Media Limited; and,*

i) *The Defendant published or caused to be published the said words knowing they were false or recklessly, not caring whether they were true or false, in order to induce or procure the Plaintiff to terminate the partnership with Saracen Media Limited and transfer the BLAZE brand promotion contract to the Defendant.*

8. Safaricom contends that the words were calculated to cause it pecuniary damage in the implementation of the Blaze Brand promotion and it claims damages and an injunction in that respect.

9. Regarding the tort of occasioning loss by unlawful means, Safaricom relies on the same set of facts which ground its case for malicious falsehood and in addition asserts that having lost the tender for the implementation of the Blaze Brand, Transcend commenced a public smear campaign to malign its directors and employees. The particulars of the smear campaign include the letter of 18<sup>th</sup> April 2016 and the paid up advertisement of 27<sup>th</sup> May 2016. Safaricom also cites another letter of 15<sup>th</sup> May 2016 written by Transcend to Vodafone in which it is alleged that Transcend accused Safaricom's Chief Executive Officer of complicity in the alleged corruption claims. Further that on 6<sup>th</sup> June 2016, Transcend filed CMCC No. 3644 of 2016, sought and obtained orders against Saracen, to impound documents and materials used in the implementation of the Blaze Brand promotion, the effect of which was to injure Safaricom in business.

10. Turning to the infringement of copyright, Safaricom states that it is the author of the works contained in the Agency brief which is a document that formed part of the RFQ. It asserts authorship of the confidential material in respect thereof which is said to include developed works for the implementation of the Blaze Brand promotion. Safaricom complains that in breach of trust and confidence reposed by it, Transcend has used the confidential information to register 4 copyrights which it has used to extort Safaricom and to interfere in the implementation of the Blaze Brand promotion. The copyrights are:-

(i) *Kenya Speaks Safaricom*

(ii) *Communication Strategy*

(iii) *Youth Assets*

(iv) *Digital Tribe and Shangwe Sato.*

11. Safaricom's case is that Transcend does not engage in any business in which it can put to use the aforesaid copyrights and the same were registered for the sole purpose of the extortion and interference referred to in the preceding paragraph.

12. In the end the Plaintiff seeks Judgment against the Defendant for the following orders:-

a) *The Defendant whether acting by its directors, officers, servants, agents or otherwise howsoever be and is hereby restrained from further publishing or causing to be published any words attributing corruption and illegality on the part of the Plaintiff in respect to its tender processes, and in particular, the tender for the contract for the implementation of the BLAZE brand promotion.*

b) *The Defendant whether acting by its directors, officers, servants, agents or otherwise howsoever be and is hereby restrained from interfering with the implementation of the contract between Saracen Media Limited and the Plaintiff in respect to the BLAZE brand promotion.*

c) *General damages.*

d) *Such further or other relief as this Honourable Court may deem fit.*

e) *Costs of the suit.*

13. The claim by Safaricom is refuted. Transcend questions the integrity of the process of selecting Saracen as the winning bid and states that it was riddled with irregularities and unfair trade practices. It also contends that the implementation of the Blaze campaign was through theft of the copyright owned by it in contravention with the provisions of the Copyright Act (2001). The particulars of the alleged irregularities and illegal conduct on the part of Safaricom are set out as follows:-

a) *Breach of trust by substantially making adaption to the Defendant's copyrighted works and as submitted to the*

Plaintiff in the pitching of the tender referred to as “Request for Proposal for 2<sup>nd</sup> Agency for the Safaricom ATL/BTL Creature and Digital Agency”.

b) *Inducing and conniving with the Defendant’s erstwhile staff, Thomas Omanga, Timla Tieng (Senior Art Manager) and Brian Oyugi (Creative Designer) to work with Saracen Media Limited in the implementation of the Blaze Campaign whereas they were actively involved in the Safaricom pitch and were the Defendant’s key staff.*

c) *Saracen Media Limited pitched for the tender as a consortium with 5ive Limited and Bean Limited but their winning bid excluded the said partners whereas Saracen Media Limited bid along with them because it is a media agency and not creative agency.*

d) *Saracen Media Limited was commissioned by the Plaintiff to work with Fieldstone Helms Limited whose directors included the Defendant’s lead Creative Director, Thomas Omanga.*

e) *Saracen Media Limited were expected to roll out their winning pitched dubbed as “Y-Generation” but what is being implemented as Blaze campaign is remotely similar to what they pitched.*

f) *In the tendering process, it was expected that the results would be sent to the tendering entities along with reasons for selecting the winning bid and the scores but the same was never done.*

g) *Infringing and putting to use copyrighted work owned by the Defendant and brazenly passing-off as Saracen Media’s Creativity.*

14. Regarding the letter of 18<sup>th</sup> April 2016 to Vodafone, Transcend argues that the letter was a communication to a company affiliated to Safaricom and cannot amount to publication. That in any case, and this is pleaded as an alternative, the letter was a complaint lodged to the Plaintiff on the tendering process and was not in any way malicious. Malice and falsehood are denied.

15. There is the publication of 27<sup>th</sup> May 2016. It is the defence of Transcend that it exercised its right of expression as contemplated in Article 33 of the Constitution and that it was a fair and true comment, right of reply and justification. Further that it was made in good faith, without malice and that the matters are of a great public interest and are in the public domain.

16. It is contended by Transcend that if Safaricom was aggrieved by the publication then it should have exercised its right of reply or sought a demand of retraction. That the failure to do either implied waiver of right and is an estoppel against Safaricom.

17. Transcend states that Blaze Brand is a substantial adoption and direct copying of its registered copyrights and that in exercise of its rights as a copyright owner commenced CMCC No. 3644 of 2016 against Saracen, Fieldstone Helms Limited and Thomas Omanga for copyright infringement and damages arising out of their implementation of the Blaze campaign.

18. Regarding the Non-Disclosure Agreement in the RFQ, Transcend avers that it provided that all information disclosed by it was deemed as its intellectual property and Safaricom’s assertion to the contrary borders on fraudulent misrepresentation.

19. Two witnesses testified in the matter; Daniel Ndaba who is a Senior Manager litigation of Safaricom and Lai Muthoka, an Operations Director of Transcend. Curved out from the pleadings, the following are the issues for determination:-

a) Did the letter of 18<sup>th</sup> April 2016 to Vodafone amount to a publication to a third party?

b) Are the contents of that letter false and malicious?

c) Is the Defence of privilege available to Transcend in respect to the letter?

d) Are the contents notice dated 27<sup>th</sup> May 2016 published by Transcend false and actuated by malice?

e) If liability upon Transcend arises from both or one of the above what quantum of damages is appropriate?

f) Was Transcend engaged in a public smear campaign to malign the Plaintiff, its directors and employees?

g) If so, was the intention to cause pecuniary damage to the Plaintiff in the implementation of the Blaze Brand promotion?

h) If the answer to (f) and (g) are in the affirmative, what pecuniary loss if any has the Plaintiff suffered?

i) Is Safaricom the author of the works contained in the Agency brief?

j) If so, did Transcend infringe upon the proprietary rights of Safaricom?

k) Is Safaricom entitled to an order for taking of accounts?

i) What is the appropriate order on costs?

**Of malicious falsehood:**

20. As a preface to discussing the evidence in this regard, the Court sets out ingredients of the tort of malicious falsehood. They are well known, Njuguna J in **Kings Wear Limited -vs- Registered Trustees of the Sisters of Mercy [2019] eKLR** stated:-

**“The cause of action is closely related to that of defamation and in many respects the similarities between the two torts are striking.**

**Indeed it will commonly be the case that the same set of facts will give rise to the cause of action in both defamation and malicious falsehoods.**

**At common law, in order to succeed in an action for malicious falsehood, the claimant must prove that;**

**a) The defendant published false words of the claimant whether orally, or in writing, to third parties.**

**b) That the publication was malicious.**

**c) That damage was caused which was the natural and reasonable result of the publication.**

**In the case of *Radcliffe vs. Evans (1892) 2OB 254*, the court of Appeal distinguished the tort of malicious falsehood from the very specific requirements of defamation and decided that the tort could result in liability in respect of any malicious statement that resulted in damage even where defamation could not be shown.**

**The tort has its origins in action formerly referred to as slander of title. This was a very specific action based on the false questioning of a person’s title to land with the result that it became less saleable or even unsaleable. In the 19th Century, the tort extended to include slander of goods, based on similar principles. More recently, the tort has developed in a more general sense as a protection of people’s economic and commercial interests.**

**The test of remoteness of damage is based on reasonable foreseeability. In certain circumstances, there is no requirement for the claimant to prove special damage where the statement is in a written or permanent form and was calculated to cause a pecuniary loss or where the statement was calculated to cause a pecuniary loss to the claimant in respect of any office or profession, calling, trade, or business he is in, at the time of its publication.”**

21. In respect to the burden of proof this Court had in its Ruling of its 4<sup>th</sup> October 2016 observed:-

**“[28] The burden of proof of each of the three elements of the Action in Malicious Falsehood lies with the Plaintiff. This is unlike Defamation where, for instance, Falsity is presumed. In *PETER CRUDDAS VS. JONATHAN CALVERT***

**(2) *HEIDI BLAKE (3) TIMES NEWSPAPERS LTD [2013] EWHC 2298 (QB) Tugendhat J. held;-***

**“I recall that in libel the burden of proving the truth lies on the Defendant, whereas in Malicious Falsehood the burden of proving falsity lies on the Claimant”.**

**This burden of proof will turn out to be critical on assessing whether or not Safaricom has demonstrated a clear case of Malicious Falsehood.”**

22. Safaricom pleads that the malicious falsehood was published in the letter of 18<sup>th</sup> April 2016 and again in the paid up advertisement of 27<sup>th</sup> May 2016. The two are reproduced at length:-

*Nick Vidovich*

*Group Legal Director – Litigation*

*Vodafone Group Services Limited*

*Dear Sir,*

*RE: COMPLAINTS AGAINST SAFARICOM TENDER PROCEDURES*

*We, Transcend Group (TMG) received an email on 25th January 2016 from Safaricom inviting us to participate in a tender for provision of 2nd ATL-BTL Creative and Digital Agency. We responded by submitting our bid via the provided online portal on 12th February.*

*In addition to the above we were separately also invited to submit bids for Experimental marketing, Out of Home and Digital agency work.*

The brief for the creative and digital agency focused on the high potential category of youth between 18-24 years. On 16th February we were called in to pitch to the evaluation Committee and did well enough to proceed to the next round. On 2nd March we presented to the Executive committee and were told to await the results outcome after being in competition with 2 other finalist bidders namely:

1. Brainwave Communications
2. Saracen Media in collaboration with 5ive limited and Bean interactive.

Saracen Media are purely a specialized media buying firma and have no creative or digital capacity which then required them to get partners in these areas in order to qualify to bid for this tender of integrated Creative and digital agency. Anyway after a month of waiting we were later to learn that Saracen won the contract but were shocked to find that they had been FORCED by senior Safaricom staff to work with staff from TMG who had participated in the bid while under employment, namely:

1. Thomas Omanga – Client Service Director & Lead for Safaricom pitch.
2. TimlaTieng – Senior Art Director
3. Brian Oyugi – Designer
4. Christine Muchendu – Account Director

The above personnel quickly set up a company named Fieldstone Helms and tasked with handling all the creative aspects of the newly awarded contract. First off, Saracen did NOT bid on joint venture with Fieldstone Helms, they bided with 5ive Ltd as their creative partner but what Safaricom did was to insist that they work with our staff namely the lead, Thomas who subsequently resigned on 4th April 2016 to go and handle the Safaricom account.

Safaricom called us Friday, 15th April, 3.45pm to inform us of the outcome of the pitch after they realized that the industry was conversing about the manner in which they mismanaged the entire procurement process.

Saracen confessed they had been forced to work with Fieldstone Helmsa Company that is a startup and that never bided whatsoever for the lucrative tender. They do not have bona fide offices neither have they even been prequalified by Safaricom as was the case with all invited bidders including TMG.

Our suspicion is that the User department colluded with our staff to leave TMG and obtain the work through the back door through this dubious scheme. The personnel involved in this are Ms. Sylvia Mulinge – Head of Consumer and a Mr. Nicholas Mulila – head of risk. The later even approached us to try and obtain a bride during the bidding process, we flatly refused and he punished us by ensuring we did not get the job. He was working in partnership with Ms. Mulinge. The monies he requested from us through our Chairman Mr. Michael Njeru was Ksh.50 million. He has evidence in form of text messages through a proxy contact Mr. Mulira was using as a conduct to solicit the said bride, he tells his friend in a local dialect the reason he did not approve TMG was because Mike Njeru was broke and could not afford to pay him what he wanted.

Safaricom has come out publicly through the CEO as a company that has zero tolerance on corruption. In fact only recently Mr. Bob Collymore was enlisted by the President of the Republic of Kenya to help fight corruption in the private sector. It is unfortunate that he is fully aware of what was going on with his staff as they colluded to tamper with the procurement procedures. He is known to favour a close friend of his of many years one Bharat Thakrar, CEO of WPP Scan group who has held a monopoly on all marketing and communications business from Safaricom for the last 10 years exclusively.

Two years ago TMG bided against Scangroup and won but we were denied the job following what they termed as not having capacity. Then and even now Bharat has repeatedly tried to poach our employees to weaken us and gain advantage but has failed, this time we suspect he is behind this latest scheme together with senior safaricom employees to have then set up an alternative agency which we suspect he is behind in order to deny us the work. Bob Collymore and Bharat are best of friends to an extent they meet every Tuesday evening socially in a group they dabble in the Whiskey club together with others.

What is even more sad is the fact that we are confident and sure we won this business fair and square and would like to be shown the scoring results of the evaluation committee and also for the Executive committee in order to prove we scored the highest or not. The Procurement staff called us last Friday 15th April but did not divulge reasons for us losing the bid they were extremely cagey with details insisting they are not authorized to divulge details.

We are appealing to you to investigate this scam that is brewing and that is getting the industry talking to protect the reputation of your esteemed organization globally before it gets out of hand.

We also fear that Safaricom will use our intellectual property without paying any form of compensation for it through our former employees even after signing an NDA with TMG.

We present 4 concepts, which we will provide for your reference. Please note we have since proceeded to protect them under the Kenya Copyright Board. The ideas presented were:

1. NEXT NATION
2. HACT IT
3. TRIBE DIGITAL
4. SAFCOM 2.0 – Coded free

Transcend Media consulted our legal team and want to seek legal redress but have held that process in order to engage with you as Principle shareholders of Safaricom to come in to do a thorough audit and investigation and bring the culprits to book and award the rightful Agency that won the tender fairly the contract. Sive Ltd agency were kicked out at the last minute and are also very distraught and have not been contacted by Saracen nor Safaricom since the award was given out. The M.D Mr. John Otieno has expressed his willingness to testify in this matter in solidarity with us and verify sequence of events from the beginning of this bidding process together with Saracen up until they went silent on the outcome after being awarded. The question begs why would an agency that is purely a Media buying outfit win a job that is for provisions of Creative services?"

As TMG were are aggrieved because our employees at the time of the tender were induced by the senior Safaricom personnel to form an agency and use our work to win the tender only for them to leave without anyform of notice and be awarded the job illegally. It has caused us irreparable damage and cost us a lot of time, money and resources to put together work that has now been stolen. We commissioned research that informed our successful Strategy and incurred costs of production to produce ready to run material for TV, newspaper and radio. The second question begs, if Transcend Medial were unsuccessful in the bid why then did they have to steal our employees who worked on this bid in order to use the ideas we generated at TMG?"

Please intervene expeditiously on this matter. I am available at any instance to testify under oath to help you with this investigation. I have also enclosed crucial documents and email correspondences to support the above allegations.

Kind Regards.

Signed

Tony Gacheca

Chief Executive Officer

cc: Michael Njeru – Chairman, Transcend Media Group

"TRANSCEND MEDIA GROUP

ADVERTISER'S ANNOUNCEMENT

Our attention has been drawn to numerous print, electronic and social media reports with regard to Transcend Media Group(TMG) and wish to clarify as follows:-

1. TMG is a wholly owned Kenyan company specializing in advertising, media and communication services.
2. The Group employs more than 80 young Kenyan Professionals directly; and offers opportunities to thousands of others indirectly through third party suppliers whom it constantly engages. These include producers, artistes, creatives, activators, printers, event organizers, IT and emerging Media practitioners, among others.
3. The Group espouses patriotism and has a Kenyan bias with regard to employment and sourcing of services.
4. At the same time, the Group is affiliated internationally to one of the largest Advertising networks in the world; that is, Inter Public Group of Companies (IPG), namely McCann World group and Mullen Lowe. This partnership has enabled the Group to tap into the best in class strategic tools to provide topnotch communications solutions to clients. Further, the Group has invested in a robust operating system to support the work flow processes and efficiencies.
5. The Company has experienced organic growth over the years, to become a major player in the media, communications an advertising industry by attracting the best talent, applying best industry and corporate governance practice. The company is a signatory to the Code of Ethics of Business in Kenya, through its membership in the Kenya Private Sector Alliance (KEPSA).
6. Over the years, TMG has competitively won major blue chip company accounts, as well as Multinationals, Kenyan Corporates, NGO's and government agencies. The Group has satisfactorily carried out major assignments to the full satisfaction of its clients leading to recognition awards from the Marketing Society of Kenya (MSK) and International Quality Crown Awards (IQCA) and

African Sun Advertising Awards (ASAF).

7. With regard to the foregoing, we wish to state as follows:-

On 19th December 2013, Safaricom Kenya (Safaricom) sent out an RFP (Request on Proposal) for a creative and digital agency pitch to eight out of hundreds of potential media, advertising and communication agencies in the country. The pitch included the following:

- a) Ability to deliver both ATL & BTL (Above the line and Below the line);
- b) Strong financial capability due to Safaricom's huge spends;
- c) Working relations with an of Safaricom's competitors;
- d) Strong worldwide partnership and international network; and
- e) A clear strategy proposal

The Selection of the eight companies was based on an intense market research by Safaricom to identify the country's top agencies that satisfy the RFP requirements.

Notably, four of the eight agencies that bid were interestingly WPP/Scan group affiliated companies. It has now emerged that Scanad were awarded the contract as detailed in a KPMG report which noted that "although Transcend Media was ranked first during the technical and commercial analysis, we observed that they were not selected". Notably the award was for a period of one year, yet two years down the line, Scanad continues to offer services without being subjected to a rigorous procurement process.

8. Fast forward to January 2016, with Scanad as its agency, Safaricom sought to procure a second agency to handle the youth segment brand communication. Once again, TMG was identified and shortlisted by Safaricom among the leading Kenyan agencies to bid for this specialized communication.

9. TMG was further identified to bid for four other categories owing to the fact that the company is a full service integrated marketing and communication agency. The events that unfolded were thus;

a) The company went through three stages of the rigorous bid process

b) Before officially communicating the results of the tender to the participating agencies, Safaricom awarded the business to Saracen Media Limited (Saracen), an excessively medial buying agency.

c) Details have emerged that Saracen had initially bid with a creative agency known as 5ive Ltd, which was dropped at the behest of Senior Safaricom management staff.

d) In short, Safaricom, awarded the business to Saracen and a company owned by former TMG staff who were involved in our bid including the team leader. The said company is now illegally implanting TMG's intellectual property.

e) TMG has already instituted a legal process with regard to the staff departure, corporate espionage and sabotage; as well as infringement of its intellectual property and proprietary tools. Further, TMG has severally demanded for return of its submitted strategy and creative body of works from Safaricom but to no avail.

## CONCLUSION

The ongoing malicious and defamatory media campaign against TMG and its directors is a diversionary tactic aimed at intimidating them from pursuing justice and fairness with regard to compromise of our intellectual property rights.

Indeed, it is a concerted affront on an indigenous company by multinational entities which are privileged to carry out lucrative business in the country, and which are enjoying the patronage, goodwill and profits on account of the very Kenyans that they are illegally denying business through lack of corporate probity.

Every Kenyan or Kenyan company has a constitutional right to seek justice and to seek answers from public corporations in regard to the conduct of their affairs.

We wish to underscore the importance of fostering creativity through respect and protection of intellectual property rights of others. A nation cannot be built on disregard for originality and promotion of copycats".

23. Admittedly, the letter is written and addressed to Vodafone which is an affiliate of Safaricom. Indeed in the letter itself, Transcend expressly acknowledges that Vodafone is a principal shareholder of Safaricom. In paragraphs 10 and 11 of the statement of defence, Transcend pleads:-

**“[10] The Defendant denies the averments in Paragraph 17 of Defence. In particular the Defendant denies publishing a letter to Vodafone Group Service Limited and avers that the letter dated 18<sup>th</sup> April 2016 was a communication to the Defendant’s affiliated company and the same cannot amount to publication whereof any contrary assertion is put to strict proof.**

**[11] In the ALTERNATIVE and WITHOUT PREJUDICE to the foregoing, the Defendant avers that the said letter was in effect a complaint lodged to the Plaintiff on the tendering process and was not in any way malicious.”**

24. Even before considering whether the letter contains falsehoods that are malicious, two issues arise. Is that communication a publication to a third party and is it a privileged occasion as suggested by Transcend.

25. On the law in this regard, I draw from the South African decision in the matter of **Mark Steyn and Alexandra Security (Pty) Limited, Andre Dominic Cheminai Case No. A530/2008** in which Owen Rogers AJ states;

**“[35] In English law, to which our courts have frequently referred on this topic, it has often been held that shareholders of a company have a common interest in the affairs of the company and that communications between them on that topic enjoy qualified privilege (see *Gatley on Libel and Slander* 9<sup>th</sup> Edition para 14.44 and cases their cited).”**

26. Although the decision is in regard to the tort of defamation, it also holds true for the tort of malicious falsehood. Shareholders of a company would each have an interest in the affairs of the company individually but also in common with other shareholders. Transcend asserts that it was bringing to the attention of Vodafone infractions in a tender process in Safaricom in which it holds shares. That would not technically be communication to a 3<sup>rd</sup> party but a privileged occasion.

27. Yet what is privileged is the occasion in which the communication is made and not the communication itself. In this regard Rogers AJ in **Mark Steyn** (supra) observes:-

**“[27] It has been observed that strictly speaking it is not the defamatory communication that is privileged in these circumstances but rather the occasion on which the communication is made. The circumstances of the communication and the relationship between the parties rebut the presumption of wrongfulness, and it is then for the plaintiff to prove actual malice by the defendant (hence the description of the defence as qualified rather than absolute). Although in former days the defence was said to rebut animus iniuriandi (see *De Waal v Ziervogel* 1938 AD 112 at 122) it is now recognized as going rather to the issue of wrongfulness (see *Jansen van Vuuren and Another NNO v Kruger* 1993 (4) SA 842 (A) at 851D). The “malice” which defeats the justification is not limited to spite or ill-will but covers improper motives in general (see *Basner v Trigger* 1946 AD 83 at 95).**

**[28] Even if the occasion is privileged, the defamatory communication will only be protected in regard to such statements as are relevant or germane to the occasion.**

Relevance in this context has been said to be essentially “*a matter of reason and commonsense, having its foundation in the facts, circumstances and principles governing each particular case*”, a “*blend of logic and experience lying outside the law*” (*Van Der Berg v Coopers & Lybrand Trust (Pty) Ltd and Others* 2001 (2) SA 242 (SCA) para 26).”

28. Should the Court find that the communication was false and malicious then Transcend cannot hide behind the defence of privilege. So as to focus more closely, the Court reproduces the particular parts of the communication which are said to be false and malicious. Of course they will not be considered in isolation but within the context of the entire communication:-

**“Anyway after a month of waiting we were later to learn that Saracen won the contract but were shocked to find that they had been FORCED by senior Safaricom staff to work with staff from TMG who had participated in the bid while under employment, namely:**

- 1. Thomas Omanga – Client Service Director & Lead for Safaricom pitch.**
- 2. TimlaTieng – Senior Art Director**
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was the case with all invited bidders including TMG.

Our suspicion is that the User department colluded with our staff to leave TMG and obtain the work through the back door through this dubious scheme. The personnel involved in this are Ms. Sylvia Mulinge – Head of Consumer and a Mr. Nicholas Mulila – head of risk. The later even approached us to try and obtain a bride during the bidding process, we flatly refused and he punished us by ensuring we did not get the job. He was working in partnership with Ms. Mulinge. The monies he requested from us through our Chairman Mr. Michael Njeru was Ksh.50 million. He has evidence in form of text messages through a proxy contact Mr. Mulira was using as a conduct to solicit the said bride, he tells his friend in a local dialect the reason he did not approve TMG was because Mike Njeru was broke and could not afford to pay him what he wanted.

Safaricom has come out publicly through the CEO as a company that has zero tolerance on corruption. In fact only recently Mr. Bob Collymore was enlisted by the President of the Republic of Kenya to help fight corruption in the private sector. It is unfortunate that he is fully aware of what was going on with his staff as they colluded to tamper with the procurement procedures. He is known to favour a close friend of his of many years one Bharat Thakrar, CEO of WPP Scan group who has held a monopoly on all marketing and communications business from Safaricom for the last 10 years exclusively.

Two years ago TMG bided against Scangroup and won but we were denied the job following what they termed as not having capacity. Then and even now Bharat has repeatedly tried to poach our employees to weaken us and gain advantage but has failed, this time we suspect he is behind this latest scheme together with senior safaricom employees to have then set up an alternative agency which we suspect he is behind in order to deny us the work. Bob Collymore and Bharat are best of friends to an extent they meet every Tuesday evening socially in a group they dabble in the Whiskey club together with others.

What is even more sad is the fact that we are confident and sure we won this business fair and square and would like to be shown the scoring results of the evaluation committee and also for the Executive committee in order to prove we scored the highest or not. The Procurement staff called us last Friday 15th April but did not divulge reasons for us losing the bid they were extremely cagey with details insisting they are not authorized to divulge details.

We are appealing to you to investigate this scam that is brewing and that is getting the industry talking to protect the reputation of your esteemed organization globally before it gets out of hand.

We also fear that Safaricom will use our intellectual property without paying any form of compensation for it through our former employees even after signing an NDA with TMG.

We present 4 concepts, which we will provide for your reference. Please note we have since proceeded to protect them under the Kenya Copyright Board. The ideas presented were:

1. NEXT NATION
2. HACT IT
3. TRIBE DIGITAL
4. SAFCOM 2.0 – Coded free

Transcend Media consulted our legal team and want to seek legal redress but have held that process in order to engage with you as Principle shareholders of Safaricom to come in to do a thorough audit and investigation and bring the culprits to book and award the rightful Agency that won the tender fairly the contract. Sive Ltd agency were kicked out at the last minute and are also very distraught and have not been contacted by Saracen nor Safaricom since the award was given out. The M.D Mr. John Otieno has expressed his willingness to testify in this matter in solidarity with us and verify sequence of events from the beginning of this bidding process together with Saracen up until they went silent on the outcome after being awarded. The question begs why would an agency that is purely a Media buying outfit win a job that is for provisions of Creative services?"

As TMG were are aggrieved because our employees at the time of the tender were induced by the senior Safaricom personnel to form an agency and use our work to win the tender only for them to leave without anyform of notice and be awarded the job illegally. It has caused us irreparable damage and cost us a lot of time, money and resources to put together work that has now been stolen. We commissioned research that informed our successful Strategy and incurred costs of production to produce ready to run material for TV, newspaper and radio. The second question begs, if Transcend Medial were unsuccessful in the bid why then did they have to steal our employees who worked on this bid in order to use the ideas we generated at TMG?"

*Please intervene expeditiously on this matter. I am available at any instance to testify under oath to help you with this investigation. I have also enclosed crucial documents and email correspondences to support the above allegations."*

29. Is the statement that Saracen was forced by senior Safaricom staff to work with staff from Transcend who had participated in the bid while under employment true? Mr. Daniel Ndaba testified as follows:-

“[Page 405.D] We never had anything to do with those appointments. We had no part in the employment of employees to Saracen.”

30. There is sufficient evidence that Thomas Omanga, Timla Tieng, Brian Oyugi and Christine Muchendu who were former employees of

Transcend left employment in the period when the tender was being processed. The resignation letter of Thomas Omanga is dated 7<sup>th</sup> April 2016 (**D. Exhibit Page 47**), Timla Tieng dated 5<sup>th</sup> April 2016 (**D. Exhibit Page 48**), Brian Oyugi dated 14<sup>th</sup> April 2016 (**D. Exhibit Page 49**) and of Christine Muchendu dated 13<sup>th</sup> April 2016 (**D. Exhibit page 50**).

31. The allegation was that Saracen were forced by senior Safaricom staff to work with these four who had participated in the bid while in the employment of Transcend. Another allegation was that:-

**“Our suspicion is that the user department colluded with one staff to leave TMG and obtain the work through the back door through this dubious scheme”.**

32. One allegation is an assertion, a positive assertion that senior Safaricom staff forced the four to work with Saracen. In fact the word FORCED is capitalized for emphasis. This assertion is underscored by a further statement that:-

**“Saracen confessed they had been forced to work with Fieldstone Helms .....”**

33. In the Ruling of Court of 4<sup>th</sup> October 2016 the Court had observed:-

**“[40] On the allegation of illegality and corrupt activities in the Tender process, none of the members of staff of Safaricom who participated in the process swore an Affidavit in response to the allegations by Transcend. For example there was a pointed allegation that Mr. Mulila requested for a 50 million bribe. Surely, if the falsity of this allegation was to be established, Mr. Mulila would have to say something about it.”**

34. Even at main hearing Sylvia Mulinge and Nicholas Mulila did not testify. Was the falsity of the statements established even without their evidence?

35. Ndaba who testified for Safaricom was categorical that Safaricom was not involved in that scheme. On the part of Transcend the testimony of Muthoka was that:-

**“Safaricom reached out to Thomas Omanga who was an employee of Transcend and lead person in the project .....**

**Our employees were directed to work with Saracen by Safaricom. I was told this by Lenny Nganga who is a friend of mine .... a director of Saracen. I raised this in my letter....”**

36. He was later to add that:-

**“Saracen has not protested and we have been vindicated by the foresaid report (filed in Court Case No. 460 of 2017 Transcend –vs- Safaricom, Saracen & Others) which stated that there was communication between our members of staff, Safaricom and Saracen which started immediately after we presented to Safaricom”.**

37. Although Mulinge and Mulila did not testify, the evidence of the Ndaba that Safaricom did not force Saracen to work with the four former employees was not shaken in cross-examination. And Transcend had opportunity to prove it to be true by either getting the corroboration from Lenny Nganga or producing the foresaid report which they found necessary to produce in Civil Suit No. 466 before this Court.

38. While that part of the letter in which Transcend states that they were suspicious of collusion between Safaricom and its former employees to leave Transcend may have been justified because of the timing of the exit, and that the four were incorporated in Saracen’s team working in the Blaze project, the more aggressive statement and positive assertion that Saracen was forced by senior Safaricom staff to work with the four is a false statement. At least on the evidence before Court.

39. The falsity becomes even more apparent because in its defence, Transcend pleads as follows:-

**(b) Inducing and conniving with the Defendant’s erstwhile staff, Thomas Omanga, Timla Tieng (Senior Art Manager) and Brian Oyig Creative Designer) to work with Saracen Media Limited in the implementation of the Blaze Campaign whereas they were actively involved in the Safaricom pitch and were the Defendants’ Key staff.**

That is a step down from what it asserted in the letter that Saracen had been forced to work with the four.

40. While counsel for Transcend criticized Safaricom for not calling Sammy Thuo, a director of Saracen to discount or clarify the contested facts when it had listed him as one of his witness, the totality of the evidence, which this Court has just discussed, established the falsity of the allegations.

41. Another untruth that was established by the Plaintiff was that the four staff members quickly set up a company named Fieldstone Helms because the evidence is that only Omanga amongst the four is a shareholder of Fieldstone Helms. Muthoka testified that:-

**“If I had seen the CR 12 at the time of writing the letter then I would have only listed Thomas Omanga as owner and not the**

**other 3. From my understanding of “set up” is that they were critical in rolling out Fieldstone”.**

42. Muthoka was however unable to provide evidence that the other three were critical in rolling out Fieldstone. He did not explain why he did not carry out a search of Fieldstone before making the statement and this Court finds that he was reckless in stating what has turned out to be false.

43. Was the allegation that Mulila approached Transcend for a 50 Million bribe during the bidding process proved to be false? On the letter it is said that the chairman of Transcend;

**“Has evidence in form of text message through a proxy contact Mr. Mulila was using a contact to solicit the said bribe...”**

While the text message was not produced before this Court, the responsibility of disproving the falsity of the statement would only have shifted to the defence if Mulila had testified and denied that he solicited for a bribe. This Court is not told why Mulila did not testify and the falsity of that statement has not been sufficiently proved.

44. For some reason neither party paid much attention to the other allegations that the bidding process was riddled with corruption. For example, it is expected that Safaricom would have led evidence on the probity of the tendering process so that the accusation that Transcend was wrongfully bumped out could be debunked. So, other than what I have specifically held as proved the Plaintiff has not established that the other contents of the letter are false.

45. The Court agrees with Safaricom that one purpose of the letter by Transcend was to have the partnership between Saracen and Safaricom terminated and they be contracted instead. This the Safaricom argues is evidence of malice. Halsbury Laws of England 4<sup>th</sup> Edition, Volume 28 at Paragraph 282 says as follows about the essential element of malicious in an action for malicious falsehood:-

**“ In actions for slander of goods or other malicious falsehood, malice is an essential element’. malice’ in this connection, bears the same meaning as ‘express malice’ in the tort of defamation, namely a dominant improper motive of causing injury to the Plaintiff. Such a motive is generally to be interred from knowledge that the words were false, the absence of an honest belief that they were true, or recklessness, not caring whether they were true or false. Several inaccuracies may constitute evidence of malice. There is no evidence of malice if all that is shown is that the Defendant wrote or spoke honestly, even though wrongly, in defence of a real or supposed right or title to the property or carelessly, believing the words to be true, or merely for the purpose of advancing the sale of his own good or in pursuance of duty. A mistake of law is no evidence of malice, but it is clearly malicious in this context to publish the words knowing them to be true”.**

46. Can it be said that Transcend wrote honestly, even though wrongly in the instances this Court has set out and believing the words to be true so as to be excused of malice. In other words were the false statements made in good faith? In its submissions to Court, Transcend refers the Court to a passage from Gately on Libel and Slander 11<sup>th</sup> Edition in which the authors posit as follows of malice:

**“There is no liability in malicious falsehood of a statement published in good faith..... mere negligence is not malice (though in certain circumstances it may amount to a separate basis for liability). A statement false in fact and calculated to produce actual damage will therefore not support such an action if it was in the belief, even a careless belief, that it was true. The Defendant may have acted stupidly in asserting a right yet if he bonafide believed such right to exist, no action lies... Again, “the mere absence of just cause or excuse is not itself malice. Malice in its proper and accurate sense is a question of motive, intention or state of mind.”**

47. Whether recklessness, not caring to be true, amounts to malice will depend on the circumstances of each case. The communication to Vodafone had the potential of leading to the termination of the contract between Safaricom and Saracen. Saracen and Transcend were competitors. The letter put the reputation of members of staff of Safaricom on the line and their jobs at stake. Vodafone was a principal shareholder of Safaricom and had it believed the contents of the communication then it may have led to dire consequences for Safaricom. In circumstances such as these, Transcend was duty-bound to verify the truthfulness of the allegations it made. Transcend has not provided evidence of the effort it put to verify the following statements:-

(i) That Saracen was forced by senior Safaricom staff to work with Thomas Omanga, Timla Tieng, Brian Oyugi and Christine Muchendu.

(ii) That the four (other than Thomas Omanga) quickly set up a company named Fieldstone Helms.

48. The fact that Transcend carried out a search just days after the letter and was able to establish the ownership of Fieldstone Helms shows that making a more accurate complaint did not require much effort.

49. Given the possible consequences of the communication and what the communication was expressly bespeaking, I reach a conclusion that the essential of malice has been proved.

50. I now turn to examine the Advertiser’s announcement of 27<sup>th</sup> May 2016. The specific words complained of are reproduced:-

**“It has now emerged that Scanad were awarded the contract as detailed in a KPMG report which noted that “although Transcend Media was ranked first during the technical and commercial analysis, we observed that they were not selected”. Notably the award was for a period of one year, yet two years down the line, Scanad continues to offer services without being subjected to a rigorous procurement process.**

**8. Fast forward to January 2016, with Scanad as its agency, Safaricom sought to procure a second agency to handle the youth segment brand communication. Once again, TMG was identified and shortlisted by Safaricom among the leading Kenyan agencies to bid for this specialized communication.**

**9. TMG was further identified to bid for four other categories owing to the fact that the company is a full service integrated marketing and communication agency. The events that unfolded were thus:**

**a) The company went through three stages of the rigorous bid process**

**b) Before officially communicating the results of the tender to the participating agencies, Safaricom awarded the business to Saracen Media Limited (Saracen), an excessively medial buying agency.**

**c) Details have emerged that Saracen had initially bid with a creative agency known as 5ive Ltd, which was dropped at the behest of Senior Safaricom management staff.**

**d) In short, Safaricom, awarded the business to Saracen and a company owned by former TMG staff who were involved in our bid including the team leader. The said company is now illegally implanting TMG's intellectual property.**

**e) TMG has already instituted a legal process with regard to the staff departure, corporate espionage and sabotage; as well as infringement of its intellectual property and proprietary tools. Further, TMG has severally demanded for return of its submitted strategy and creative body of works from Safaricom but to no avail.**

### **CONCLUSION**

**The ongoing malicious and defamatory media campaign against TMG and its directors is a diversionary tactic aimed at intimidating them from pursuing justice and fairness with regard to compromise of our intellectual property rights.**

**Indeed, it is a concerted affront on an indigenous company by multinational entities which are privileged to carry out lucrative business in the country, and which are enjoying the patronage, goodwill and profits on account of the very Kenyans that they are illegally denying business through lack of corporate probity.**

**Every Kenyan or Kenyan company has a constitutional right to seek justice and to seek answers from public corporations in regard to the conduct of their affairs.**

**We wish to underscore the importance of fostering creativity through respect and protection of intellectual property rights of others. A nation cannot be built on disregard for originality and promotion of copycats”.**

51. Again the onus was on Safaricom to prove that those statements were not only false but made maliciously. The attack on Safaricom was essentially that its tendering process was opaque and biased. As stated earlier there was no attempt by Safaricom to prove the probity, fairness and integrity of the process. In particular in respect to the advertisement no evidence was put forward by either Safaricom or Transcend to demonstrate that it is not true that:-

(a) The KPMG report relied on by Transcend was not the final report.

(b) That although the award was for a period of one year, Saracen continues to offer the services without being subjected to a rigorous procurement process.

(c) That Saracen had initially bid with creative agency known as 5ive Limited but was dropped at the behest of senior Safaricom management staff.

(d) That Saracen is owned by former TMG staff.

52. The Plaintiff having failed to get past the first hurdle, then it is not necessary to examine whether there was malice.

### **Occasioning loss by unlawful means:**

53. The elements of the tort of occasioning loss by unlawful means are set out in the Canadian decision of **Ontario Ltd. v. Sagaz Industries Canada Inc., 1998 CanLII 14850** as:-

**(i) The existence of a valid business relationship or business expectancy between the plaintiff and another party;**

**(ii) Knowledge by the defendant of that business relationship or expectancy;**

**(iii) Intentional interference which induces or causes a termination of that relationship or expectancy;**

**(iv) The interference is by way of unlawful means;**

**(v) The interference by the defendant must be the proximate cause of the termination of the business relationship or expectancy; and**

**(vi) There is a resulting loss to the plaintiff.**

54. This sits well with what the Court had laid down in its Ruling of 4<sup>th</sup>

55. Even from the name of the tort, loss or damage to the Plaintiff is a central element. It is common ground that the contract between Saracen and Transcend was not terminated and run its full course. Further that the Blaze Brand promotion was a resounding success. It is for this reason that the Court agrees with counsel for Transcend that as there was no damage caused to the Plaintiff, the tort of occasioning loss by unlawful means was not proved.

56. Part of the RFQ documents passed to Transcend was an Agency Brief detailing 15 deliverables expected of the advertising agencies in the implementation of the Blaze Brand. It is the case for Safaricom the Agency Brief contained confidential material in respect too, including the developed works for the implementation of the Blaze Brand promotion. That these were released solely for the purpose of enabling Transcend participate in the tender for the promotion.

57. Speaking for Safaricom, Mr. Ndaba asserted that in breach of trust and confidence reposed to it by Safaricom, Transcend used the confidential material including the developed works for implementation of the Blaze Brand promotion to register copyrights namely Kenya Speaks Safaricom No. LT 13131, Communication Strategy No. RT-00358, Youth Assets No. AT00361, Digital Tribe and Shangwe Sato No. 000359 (P. Exhibit Pages 492 to 495).

58. Safaricom emphasizes that Transcend does not engage in any business in which it can put to use the copyrights and contends that they were registered for the sole purpose of extorting from it and interfering in the implementation of the Blaze Brand promotions. Safaricom thinks that it is particularly curious that the Copyright “Kenya Speaks Safaricom No. LT 13131” bears the name Safaricom which had not been adequately addressed by the Transcend.

59. The law is that a work need not be registered under Copyright Act to be a protected work under Copyright Law. As I understand it, the case for Safaricom is that Transcend has infringed on some of its copyrights works, which although unregistered, are nevertheless protectable under the copyright law.

60. Part IV of the Act makes provision regarding infringement. Section 35(1) provides as follows:-

### **35. Infringement**

**(1) Copyright or related rights shall be infringed by a person who, without the license of the owner of the copyright or related rights**

**(a) does, or causes to be done, an act the doing of which is controlled by the copyright or related rights; or**

**(b) imports, or causes to be imported, otherwise than for his private and domestic use, an article which he knows to be an infringing copy.**

61. Subsection 8 then reads:-

**(8) In an action under this section—**

**(a) copyright shall be presumed to subsist in the work or other subject matter to which the action relates, if the defendant does not put in issue the subsistence of copyright therein; and**

**(b) where the subsistence of copyright is proved, admitted or presumed under paragraph (a), the plaintiff shall be presumed to be the owner of the copyright if he makes a claim thereto and the defendant does not dispute that claim.**

62. In paragraph 20 of the Defence, Transcend denies that Safaricom owns copyright to the Blaze Brand promotion and avers that the Blaze Brand is a substantial adoption and direct copying of its copyrights. The subsistence of Safaricom’s copyright is challenged and the first order of business for Safaricom would be to establish that it is the holder of the alleged copyrights.

63. On 27<sup>th</sup> January 2016, Safaricom and Transcend entered a Non-disclosure Agreement. Clauses 3 and 4 of the Agreement are relevant:-

#### **“[3] OWNERSHIP**

**All confidential information, including that which is contained in files, letters, memoranda, reports, records, data, sketches, drawings, notebooks, program listings, or other written, photographic, or other tangible, intangible, or other materials, or which shall come into a Receiving Party’s custody or possession, is and at all times shall be the exclusive property of the Disclosing Party, to be used by the Receiving Party only for the purposes expressly contemplated by this Agreement”.**

#### **[4] NO RIGHTS OR LICENSES GRANTED**

**The Receiving Party shall not acquire hereunder any right whatsoever to any Confidential information, including without limitation any right or license or any patent, trademark, copyright, trade secret, moral right or any other right now or later recognized by any law or regulation of any jurisdiction throughout the universe (collectively, “Intellectual Property Rights”) as a result of or in connection with any disclosure hereunder. Accordingly, nothing in this Agreement is intended or shall be construed as a transfer, grant, license, release or waiver of any Intellectual Property Rights in any Confidential Information.”**

64. One important effect of those provisions is that the ownership of intellectual property remains with the disclosing party and so any disclosure is not intended, and will not be construed as a transfer, grant, license, release or waiver of any intellectual property rights in any confidential information. In terms of the Agency Brief the disclosing party is Safaricom and so that would be an assumption that any intellectual property rights in works contained in the Agency Brief will belong to Safaricom.

65. Safaricom was however very short of evidence as to what those exact works were. And this becomes a source of difficulty in proving the claim. While Transcend would have had access to the original works through the Tender process and there was opportunity for copying, Safaricom need to prove that the works in the four copyrights registered by Transcend were substantially similar to the works in the Agency Brief. Safaricom has failed to prove this crucial element and cannot succeed in its claim for infringement.

66. Parties disclosed that there is a suit being Milimani CMCC 3644 of 2016 Transcend –vs- Saracen Media & 2 Others for infringement of copyright and I must wonder whether those proceedings will not resolve the issue of ownership of the copyright asserted by Safaricom.

67. The Court has concluded that Safaricom has failed in its action in the tort of occasioning loss by unlawful means and infringement of copyright. Regarding the tort of malicious falsehood, Safaricom has proved that only a very small portion of the letter of 18<sup>th</sup> April 2016 contained malicious falsehood. The duty of the Court is to now determine the appropriate quantum in respect to that liability. Safaricom submits that, because of its stature, an award of Kshs.50,000,000/= would suffice. It cites that it is the leading mobile phone operator in Kenya with over 25,200,000 subscribers. Transcend does not propose any figures. Instead, it submits that as the Blaze campaign was successful, the claim for damages be dismissed.

68. In **Kings Wear Limited (supra)** Njuguna J made an award of Kshs.1,000,000/= in respect to a similar tort where there was no specific proof of loss. In the matter before me, there is no evidence that Safaricom suffered any monetary or pecuniary loss in respect to the malicious falsehood. If the intention of Transcend, as it seemed to be, was to scuttle the partnership between Saracen and Safaricom then it failed to do so. The partnership was successfully implemented and in the words of Ndaba:-

**“The Blaze Brand has been launched with considerable excellent reception from the youth subscriber base.”**

69. Another consideration which leans towards moderation of the quantum is that the offending statements was in a communication to an affiliate company or shareholder. There is no evidence that the shareholder believed in the truthfulness of the statements or acted on them to the detriment of Safaricom.

70. On the other hand, the likely consequences for Safaricom may have been dire if its major shareholder had put value to the statements. So the potential damage the offending statements would have caused to Safaricom cannot be altogether ignored.

71. Doing the best I can in the circumstances, the Court finds an award of Kshs.2,000,000/= to be reasonable. As each side has won and lost to some measure, each side shall bear its own costs.

**Dated, Signed and Delivered in Court at Nairobi this 15<sup>th</sup> Day of June 2020**

**F. TUIYOTT**

**JUDGE**

**ORDER**

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 17<sup>th</sup> April 2020, this Judgment has been delivered to the parties through virtual platform

**F. TUIYOTT**

**JUDGE**

**PRESENT:**

Havi for Plaintiff

Maingi for Defendant

Corrections made to this Judgment pursuant to the provisions of Section 99 of the Civil Procedure Rules this 6<sup>th</sup> day of July 2020.

**F. TUIYOTT**

**JUDGE**