



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI COMMERCIAL COURTS

CIVIL CASE NO. 204 OF 2004

CENTRAL BANK OF KENYA.....PLAINTIFF

VERSUS

GIRO COMMERCIAL BANK LIMITED.....1ST DEFENDANT

JIGNESH DESAI.....2ND DEFENDANT

ALEX REBIRO NGUGI (alias Aba Mpesha T/A Mpesha Enterprises)...3rd DEFENDANT

JOHMAT DISTRIBUTORS LIMITED.....4TH DEFENDANT

JUDGEMENT

The Parties

1. The Plaintiff herein is described as a body corporate created and established under the *Central Bank of Kenya Act* Cap 491 Laws of Kenya while the first defendant against whom the suit was withdrawn is described as a banking institution incorporated and registered in Kenya under *the Companies Act* Cap 486 Laws of Kenya and licenced as a bank pursuant to the provisions of the *Banking Act*. The second defendant was at all material times employed by the 1st Defendant as its Branch Manager, Westlands hence was the 1st Defendant's agent and/or servant. The 3rd Defendant is also a male adult trading as **Mpesha Enterprises** and is otherwise known as **Alex Rebiro Ngugi alias Aba Mpesha** and was at all material times the 1st Defendant's customer. The 4th Defendant is described as a limited liability company under the provisions of the said *Companies Act*.

The Pleadings

The Plaintiff

2. According to the Plaintiff, pursuant to the provisions of the *Internal Loans Act* Cap 420 Laws of Kenya, the government may from time to time borrow in Kenya Currency sums of money in such amounts and on such terms and conditions as to interest, repayment or otherwise as the Minister from the time being responsible for finance may determine, by issue of bills, bonds or stocks or otherwise.

3. In this regard, the Plaintiff is the appointed agent of the Government of Kenya to administer the said public debt. In discharge of its said functions, the Plaintiff has established an electronic system for the administration of Public Debt both for issuance and secondary trading, known as the Central Depository System (CDS), through which, members of the public can purchase and trade in Government securities, conducted through electronic book entries.

4. It was pleaded that sometimes on or about 29th July, 2002, the 1st Defendant through its Westlands Branch opened an account for the 3rd Defendant, in its alleged business, Mpesha Enterprises, a process which was exclusively being handled under the supervision of the 2nd Defendant, then the Branch Manager. According to the plaintiff, the said account was opened in the most casual manner without due consideration and or taking account of such matters as a Bank is bound in the normal course of business to take into consideration and or due compliance with the CBK Prudential Regulations and Guidelines and in particular: -

a. The account was opened on the same date as the registration of the business name under the *Registration of Business Names Act* and without the financial statement of the business for the preceding 12 months or at all.

- b. There was no verification as to whether the proprietor – the 3rd Defendant was a registered taxpayer.
- c. There were no details of the permanent address of the business.
- d. No evidence of reference from the introducing party.
- e. Customer verification was sought from Barclays Bank of Kenya Limited six (6) months after the account was opened instead of immediately the proprietor approached the Bank. In any event, the 3rd Defendant in his unchallenged evidence denied being the author of the letter which purported to authorise Barclay Bank of Kenya Limited to verify the information requested.
- f. There was no verification of the horticultural business allegedly undertaken by the 3rd Defendant.

5. It was further pleaded that the said account was thereafter haltingly and in a haphazard manner by the 3rd Defendant which ought to have placed the 1st Defendant on inquiry. Notwithstanding that, the 1st defendant endorsed on the CDS Account Opening Card that the information given by the 3rd Defendant was correct and additionally added the words “confirmed by Desai” and part of the said information was on disposal instructions to the 1st Defendant. Thereafter, the 3rd Defendant falsely and fraudulently procured Treasury Bonds Issue Nos. FXT 2/2002/2 and FXD 1/2002/4 in the names of CBA Capital and Mumbu Holdings Limited respectively to be transferred gratuitously through the CDS Account to the name of the 3rd Defendant. The particulars of these transactions were that on 28th January 2003, Treasury Bond for CBA Capital Limited valued at Kshs. 175 million was transferred from their account CDS account number 09-30-005-1 to the 3rd Defendant’s account while on 3rd April 2003, Treasury Bond for Mumbu Holdings Limited valued at Kshs. 30 million was transferred from their CDS account number 09-30-194819 to the 3rd Defendant’s account.

6. Following the receipts of the proceeds of the sale of the said Treasury Bonds, the 1st Defendant assisted the 3rd Defendant to operate his account in a manner which left no doubt that the said Defendant through the 2nd Defendant, its servants and/or agents were involved in fraudulent assistance of the 3rd Defendant, with a view to defraud the Plaintiff of the proceeds of the sale of the said Treasury Bonds and to fraudulently and without colour of right transfer the said proceeds to various accounts and persons.

7. The particulars of these transactions were that on 7th February 2003, the 1st Defendant received a credit of Kshs. 95,420,160/- by way of transfer by order of Dyer & Blair Investment Bank through Stanbic Bank in favour of the 3rd Defendant and upon inquiry by the 1st Defendant, it was claimed, the 1st Defendant was advised that the amount was proceeds from the sale of Treasury Bonds. The 1st Defendant then proceeded to permit the 3rd Defendant to operate his account by cash withdrawal of Kshs. 16.5 million; payment of Kshs. 41,539 million by five separate bankers’ cheques to Fina Bank Limited; payment of Kshs. 8 million by bankers’ cheque to Paramount Universal Bank Limited; payment of Kshs. 1.848 million by two bankers’ cheques to Blue Sea Forex Bureau; and payment of Kshs. 924,000/- by bankers’ cheques to Travellers Forex Bureau. As a result, within 7 days the balance on the account had been reduced to Kshs. 755,174/-.

8. It was further pleaded that on 24th February 2003, the 3rd Defendant’s the account of was credited with Kshs. 90,140,460/- being a transfer by Dyer & Blair on behalf of the 3rd Defendant in respect of the sale of Treasury Bonds through Stanbic Bank Limited. From the said amount Kshs. 6,540,000/- was withdrawn in cash; Kshs. 50 million was paid to Fina Bank Limited by bankers’ cheque; Kshs. 1,540,000/- was paid by bankers’ cheque to Travellers Forex Bureau; Kshs. 13,537,000 was paid by a series of bankers’ cheques to Paramount Universal Bank Limited; and Kshs. 15 million was paid into a fixed deposit account in the name of the 4th Defendant in an account domiciled in Giro Commercial Bank, Westlands Branch.

9. In addition, on 16th April 2003, a sum of Kshs. 30,631,680/ was credited into the 3rd Defendant’s account on instructions by Dyer & Blair through Credit Agricole Indosuez which account was similarly withdrawn between 16th to 29th April 2003.

10. It was the Plaintiff’s case that the 1st Defendant knowingly received the payment in respect of the Treasury Bonds and dishonestly assisted the 3rd Defendant and subsequently the 4th Defendant to defraud the Plaintiff. The Plaintiff contended that manner in which the funds were received and dealt with by the 1st Defendant through its Westlands Branch headed by the 2nd Defendant left no doubt that the 1st Defendant through its servants and/or agents and more particularly the 2nd Defendant were involved in fraudulent assistance of the 3rd Defendant (whose true name later turned out to be Alex Rebiro Ngugi) and subsequently the 4th Defendant and 2nd Defendant was involved in fraudulent assistance of the 3rd Defendant. To achieve this, it was pleaded that the 2nd Defendant acting as the servant and/or agent of the 1st Defendant assisted the 3rd and 4th Defendants to open an account with the 1st Defendant in breach of the prudential guidelines issued by the Plaintiff in its capacity as a regulator pursuant to the provisions of the **Central Bank of Kenya Act**. Further the 2nd defendant together with **Shah Manish**, a servant or agent of the 1st Defendant certified on behalf of the 3rd Defendant that the information provided in the application to open a CDC account, including the disposal instructions in favour of the 1st Defendant were accurate and independently confirmed by the 2nd Defendant. In addition, the 1st Defendant wilfully and recklessly failed to make any or sufficient inquiry as an honest and reasonable man or a prudent banker would have made in the circumstances on receipt of the amounts specified above. It was reiterated that the 2nd Defendant acting in his capacity as servant and/or agent of the 1st Defendant dishonestly assisted the 3rd Defendant in paying out the money received by the 3rd Defendant from the Plaintiff to amongst other parties the 4th Defendant through its bankers’ cheques and substantial and irregular withdrawals in cash. Additionally, the 2nd Defendant acting in his capacity of as Manager of the 1st Defendant introduced the 4th Defendant as a customer and proceeded as Manager to open the account.

11. The Plaintiff therefore claimed the said sum of Kshs. 205 million plus interest thereon from the 1st Defendant as constructive trustee of the Plaintiff having through its agents and/or servants including the 2nd Defendant knowingly received the said amount for and on behalf of the 3rd Defendant without making the necessary inquiries and dishonestly assisted the 3rd Defendant to dispose of the said amount. In the

alternative the plaintiff claimed against the 1st, 2nd, 3rd and 4th Defendants jointly and severally a total amount of Kshs. 205 million plus interest thereon for their separate involvement in the fraudulent acquisition and transfer of the Treasury Bonds rightfully belonging to the Plaintiff.

12. Accordingly, the Plaintiff prayed for the following orders:

a. A declaration that the Defendants are liable for the loss suffered by the Plaintiff.

b. The sum of Kshs. 205 million be paid by the first Defendant as a constructive trustee of the Plaintiff.

c. FURTHER OR IN THE ALTERNATIVE judgment be entered jointly and severally against the first, second, third and fourth Defendants in the sum of Kshs. 205 million for their separate involvement in the fraudulent acquisition and transfer of the proceeds from Treasury Bonds rightfully belonging to the Plaintiff, being money had and received by the said Defendants to the Plaintiff.

d. Interest at bank rates from the date of payment of the said amount until payment in full.

e. Costs of this suit.

f. Such other or further relief as this Honourable Court may deem fit.

2nd Defendant's Defence

13. In his defence, the 2nd Defendant averred that all precautions required for operating a new account were taken; that forms were filled in 2nd Defendant's presence; that the original identity card, PIN Card and Business Registration were seen and photocopies taken; that introduction letter was signed by existing customer in the second Defendant's presence; that cash money was taken to open the account; and that photographs were taken. According to the 2nd Defendant the words "confirmed by Desai" were inserted by the Plaintiff's servant or agent and not the 2nd Defendant. He therefore denied that the said account was being operated haltingly or in a haphazard way as alleged or at all.

14. The defendant denied the allegations made against him in the plaint particularly those relating to fraudulent assistance or dealings with the 3rd Defendant. According to him, all receipts of the funds were verified with the 1st Defendant's Head Office and the 1st Defendant officers confirmed the credit with Stanbic Bank and that Indosuez Bank also confirmed the transfer by Swift Message. He also denied that the Plaintiff lost Kshs 205 million as alleged.

15. On his part, the 2nd Defendant counterclaimed as against the Plaintiff US \$ 420,000 plus interests which was unlawfully and illegally seized and was in possession and custody of the Plaintiff and which was the subject of Nairobi Chief Magistrate's Court Criminal Case No. 1699 of 2003 which monies the Plaintiff failed to give account of.

3rd Defendant's Defence

16. On behalf of the 3rd Defendant it was pleaded, while denying the contents of the plaint, that if the allegations made by the plaintiff are to be sustained, then the plaintiff acted in breach of its fiduciary duty of care owed to the said CBA Capital Limited and Mumbu Holdings Limited (hereinafter referred to as "the two entities") in that it failed to operate the accounts of the said two entities in a prudent business manner; that it failed to give adequate or full details of credit disbursed through the CDS accounts of the said entities; failing, ignoring and/or refusing to verify the purported transfer of funds from the said entities to that of the 3rd Defendant; failing to verify the tax status of the 3rd Defendant; failing to obtain audited financial statements pertaining to the 3rd Defendant; and acting on documents for transfer, which were not properly executed by the Treasury Bond designates.

17. The 3rd Defendant denied that he transferred funds from the CDS accounts of the said two entities to that of Mpesha Enterprises and according to him since the said transfer was null and void, it cannot form the basis of any liability in fact or in law. It was however averred that if there were any valid transfers, then the proper plaintiffs ought to have been the said two entities being the corporate entities affected by the alleged acts of fraud and not the plaintiff herein.

18. The 3rd Defendant denied operating an account with the 1st Defendant and averred that the documents linking him to the transaction are forgeries with the sole intention of identifying him as the owner of the account, which conspiracy he insists was hatched by senior officers of the Plaintiff.

4th Defendant's Defence

19. While denying the allegations made against it in the plaint, the 4th Defendant averred that not being privy to the alleged transactions, it opened, operated and maintained accounts with the 1st Defendant in ordinary banker/customer relationship and none of its resources were obtained from any party in this suit and that all its funds were obtained lawfully from the 4th Defendant's business operations.

20. The 4th Defendant therefore accused the Plaintiff of seizing and converting its monies lying with the 1st Defendant without any

reasonable cause and claimed general damages, aggravated damages and loss of interests on deposit from 22nd July, 2003.

Plaintiff's rejoinder

21. By way of rejoinders the Plaintiff filed defences to the counterclaims made by the 2nd and 4th Defendant in which it denied owing them the sums claimed.

The Plaintiff's Case

22. In support of its case, the Plaintiff called as PW1, **Mwendwa Marete**, the Plaintiff's manager heading Debt Issuance Section who in 2003 was an Assistant Manager in the Department. According to him, after the budget speech, there is a borrowing programme that has to be determined by the Treasury and through Government bonds the Plaintiff invites the general public to participate in the process. To do so any interested investor must open a free numbered CDS account with the Plaintiff after which the Plaintiff advertises the tender showing the security being offered whether a bond or a bill as well as the features. According to the witness the Plaintiff has prescribed forms which are filled in and sent to the tender box. It was his evidence that every last Thursday of the month, there is an auction for treasury bonds.

23. After listing of the bids according to their value, the auction committee determines the outcome of the auction and generates a list of successful bidders. Payments to the said accounts is by bankers' cheques or by electronic transfers and upon payments, the account is credited and a statement generated. It was however explained that the CDS system came into effect from 1996.

24. Apart from that system, treasury bonds can also be purchased by the CDS holders through the Nairobi Stock Exchange or by way of a transfer by a bond holder.

25. Therefore, there are two ways of trading in the said government securities, the first one known as "primary market" while the second one is known as "secondary market".

26. As regards the disposal of the bonds one can do so through the stock exchange or by discounting the same and selling the bonds back to the Plaintiff at a reduced rate.

27. It was stated that Mungu Holdings Ltd was dealing with the Treasury bonds in the equivalent of Kshs 30 million. In May 2003 the said account was brought to his notice account when the said bonds were being offered for sale. However, it turned out that what was being sold had already been transferred early in the year. The investor however denied having sold the said bonds. Upon generation of a statement, it was found that around April, 2003 there was a transfer of the securities to Mpesha Enterprises, the 3rd Defendant herein whose CDS account was credited with Kshs 30 million. Before that there had been a transfer of Kshs 175 million through a secondary market a transaction which was denied by CBA Capital.

28. In cross-examination, PW1 stated that the transactions in this case took place in 2003 the first transaction involving Kshs 175 million occurring in January while the second one in respect of Kshs 30 million taking place in May of the said year. The witness was however unable, in the absence of the documents, to confirm whether he processed the first transaction. Though he was aware of the second transaction, he was similarly unable to confirm in the absence of documents since a Mrs Onyango was the one in charge of the department. He however insisted that due diligence was carried out.

29. PW2, **Peter Kamau Ngángá**, a security manager with Barclays Bank of Kenya and a former police officer having arisen to the rank of Inspector in the CID Banking Fraud Investigations. According to him during his tenure, he investigated a case involving the four defendants in 2005. One of the cases involved Mumbu Holdings Ltd that held a treasury bond account with the Plaintiff and which he intended to sale. Upon verification of the existence of the account no. 119384 whose face value was Kshs 30 million, it was found that the same had already been sold, though the customer through a **Mr John Mbuu**, denied that it was aware of such transaction. According to the documentations, the seller was indicated as Mumbu Holdings Ltd while the buyer was indicated as Mpesha Enterprises. From the information, Mpesha Enterprises was a business name registered by Aba Mpesha, the 3rd Defendant though the investigations revealed that his real name was **Alex Rebiro Ngugi**, information which was obtained from the 3rd Defendant himself. From the investigations, the witness found out that in order to trade one did not have to have the physical bond with him but one was supposed to hold a CDS (Central Depository System) account at the Plaintiff and upon buying a bond the account is credited and when the bond is sold the same account is debited.

30. The witness confirmed that Mumbu Holdings Ltd had a CDS account with the Plaintiff and that Kshs 30 million had been debited on that account. He also discovered that there was a CDS account in the name of Mpesha Enterprises into which the said amount was credited the same day. Though the 3rd Defendant admitted that he had transacted the bond, he did not give any evidence of the settlement of the purchase price. Apart from that transaction there was another purchase of a bond worth Kshs 175 million and the seller was shown as CBA Capital Ltd while the buyer was Mpesha Enterprises whose reference was 119863. By then no complaint had been lodged by the said CBA Capital Ltd. However, since the first bond had been denied, the witness stated that they suspected the second one as well. In respect of the second transaction, the selling dealer was indicated as Ramprakad while the transaction on behalf of the buyer was dealt by Aba. Upon inquiry from Mr Ramprakad of CBA Capital Ltd, he denied that CBA Capital Ltd had sold the said bond. However, the 3rd Defendant, upon his arrest stated that he had purchased the said second bond but never produced any documents to prove that he settled the transaction. Upon the completion of the investigations, **Aba Mpesha** was charged with the offence of stealing contrary to section 275 of the Penal Code based on the said two transactions and he was convicted.

31. According to the witness, the funds were credited in Mpesha Enterprises Account at Giro Commercial Bank, an account which had been in existence for less than one year. However, prior to the transactions the subject of this case, there were small transactions in the said account. According to the documents availed, the account was opened by the 1st Defendant's Bank Manager, **Mr Jignesh Desai**, the 2nd Defendant herein. According to the bank statements, the true credit was for Kshs 95,420,610.00 which was transferred on 7th February, 2003

from Stanbic Bank being proceeds of sale of Treasury Bills. There was another credit of Kshs 20,553,580.60 dated 19th February, 2003 and another one for Kshs 11,550,000.00 dated 21st March, 2003 and a credit of Kshs 19,140,460/= dated 21st February, 2003. In respect of the Kshs 95 million the same was from Stanbic Bank and the Kshs 20 million was a deposit while 11 million was a cancelled bankers cheque. The said Kshs 19 million was a transfer by Dyer and Blair in respect of sale of Treasury Bills. Other credits were made being Kshs 10,000,000.00 was made on 5th March, 2003 and other credits of Kshs 7,517,841.95 and Kshs 30,631,680/= made on 10th March, 2003 and 15th April, 2003 respectively.

32. According to the witness when they placed an advert in the papers seeking for the proprietor of Mpesha Enterprises, **Aba Mpesha**, the person presented himself and identified himself as **Alex Kibiro Ngugi**.

33. The witness also identified various cashed cheques amounting to Kshs 50,045,000.00 drawn on Mpesha Account payable to self between 24th January, 2003 and 12th March, 2003 and a further cheque payable to African Banking Corporation Ltd for the sum of Kshs 5,000,000.00 dated 10th February, 2003. Another cheque dated 7th February, 2003 was drawn on Mpesha Account payable to self in the sum of Kshs 10,000,000.00 and another one for the same date in the sum of Kshs 1,500,000.00. On 8th February 2003 and 21st February, 2003 two other cheques payable to self were drawn on the same Account in the sums of Kshs 5,420,610.000 and 6,848,000.00 respectively. Another cheque was identified payable to the 1st Defendant for Kshs 6,000,000.00 dated 5th March, 2003 and another one dated 7th February, 2003 for Kshs 5,000,000.00 both drawn on the same account.

34. The witness also testified that there was a request by the 2nd Defendant dated 10th February, 2003 addressed to ABC Bank for payment of cash of Kshs 5,000,000.00 which was reflected in the Mpesha Account. Again there was a request addressed to FIDA (K) Westlands dated 11th February 2003 requesting the 1st Defendant to make payments on behalf of Aba Mpesha a sum of Kshs 10,000,000.00 and the request was signed by the 2nd Defendant which payment was credited to Mpesha Account on 11th February, 2003. On 25th February, 2003 a letter was addressed to Fina Bank, Westlands Branch requesting for payment of Kshs 50,000,000.00 against a banker's cheque payable to Aba Mpesha, a payment which was debited into the account of Mpesha Enterprises. According to the witness there were other transactions of that nature for the sum of Kshs 31,000,500.00.

35. According to the witness there was no evidence of any accounts held by Mpesha Enterprises in ABC and Fina Bank yet requests were made by the 1st Defendant for payments to the said banks to Aba Mpesha. The explanation given for this was, according to the witness, that at the time of the said payments, the 1st Defendant, the paying bank did not hold enough cash.

36. It was the witnesses' testimony that arising from the investigations, the proprietor of the 4th Defendant herein, **John Mathara Mwangi**, was adversely mentioned and as a result he was charged in the said criminal case but was acquitted.

37. In cross-examination PW2 stated that he was not present when the 2nd defendant was arrested at his home. He however interacted with the 2nd defendant a day or two after his arrest at Marshalls House though he admitted that one is supposed to have been charged within 24 hours. He admitted that it was not right to put pressure on the Defendants or to force the 2nd defendant to sign the swift transfer money from Dubai to Kenya though he was not aware of the day they signed the same. It was his evidence that there was \$ 400,000 which was brought back though he did not investigate how the money was deposited there. Though the 2nd Defendant was acquitted of the criminal charge, he was not aware that there was an order for the release of the said \$ 400,000 and whether it was released to the 2nd Defendant.

38. PW2 confirmed that there were instructions to the 1st Defendant requesting for payments and that in 2003 there was no limitation for the withdrawable amount. According to him, as a result of lack of funds arising from withdrawals the account was closed. He confirmed that there was nothing wrong or illegal in drawing a cheque in the name of the bank in order for a banker's cheque to be issued. He confirmed that from their investigations the 2nd defendant did not receive any money. He confirmed that the subject account was opened in the year 2002 and the statement for the year 2002/2003 showed the balance as Kshs 780,426.55.

39. He confirmed that he did not interview the 3rd Defendant. It was his evidence the total sum lost by the Plaintiff was Kshs 205 million and that the value traced in Aba Mpesha Account was Kshs 204 million. He however denied that the Plaintiff was involved and confirmed that those who were suspended were later reinstated.

40. According to the witness **John Mwangi Mathara** was arrested past 10.00 at night and was kept for 5 days before being charged in court which according to him was not illegal. He however explained that the fixed deposits were collected from the bank and not from his house. It was his evidence that he had no evidence that Jomat was receiving money from Mpesha Account though he insisted that there was enough evidence to charge him in court.

41. In re-examination he reiterated that there was a statement from Ashok and the 2nd Defendant that implicated the 4th Defendant.

42. PW4, **Joseph Kiplangat Yegon**, who was at the material time a Chief Inspector of Police officer stationed at the Plaintiff's Anti-fraud Unit. According to him the department received a query regarding a transfer of Kshs 30 million worth of treasury bonds by a company called Mumbo Holdings. On 8th May, 2003, Dyer and Blair raised a document with the Plaintiff inquiring about the said bond produced by Mumbo Holdings but was informed that the same had been transferred but the said client denied knowledge of the said transfer to Aba Mpesha. Accordingly, the matter was treated as fraud and was referred to the witness for further investigations.

43. In the course of his investigations, the witness called for account opening forms for the CDS Account at the Plaintiff and the documents produced showed a CDS Account had been opened by Aba Mpesha on 17th January, 2003. From the statements it was learnt that there were two transfers for Kshs 175 million in February and Kshs 30 million in April 2003. It was his evidence that for one to open such account one needs to be introduced by a banker and the said Aba Mpesha was introduced by the 1st Defendant. Accordingly, the witness obtained account

opening documents in respect of the account operated by Aba Mpesha at the 1st Defendant as well as the statements therefrom which confirmed that the proceeds from the income sent through the Nairobi Stock Exchange had been credited for the sum of Kshs 175 million which credits were subsequently withdrawn in cash leaving a balance of Kshs 780,000.00.

44. After an advert was placed for Aba Mpesha, in the print media, he appeared and his identity was authenticated as **Alex Ribero Ngugi** and not **Aba Mpesha**.

45. According to the witness further investigations revealed that the account at the 1st Defendant was opened in 2002 and the introduction was by **Ashok Patel** who it was learnt was outside the country. Upon his return he disclosed that Aba Mpesha was introduced to him by the Branch Manager of the 1st Defendant, Jignesh Desai, though he himself did not know the account holder. He however denied any knowledge of the fraud.

46. The witness further testified that from the information gathered from the investigations, the 2nd Defendant and **John Mathara Mwangi** were active players in the fraud hence their arrest and charge with the criminal offence of obtaining Kshs 5 million from Ashok Patel deposited in KCB Westlands Branch. There was a further recovery after the 2nd Defendant offered to recall the proceeds he received from Dubai, the money which was wired to the Plaintiff but the witness was not sure of the figure. According to him, the money was invested in Dubai, information which the investigators would not have known. The investigators also gathered that **John Mathara Mwangi** who was sent to him was also involved in the fraud also had some Kshs 5 million in fixed deposit with the 1st Defendant in the name of Jomat Distributors. However, the said **John Mathara Mwangi** denied that the sum of Kshs 15 million was part of the fraud but declined to divulge the source of the said funds.

47. It was stated that the withdrawal from Mpesha account was done in rapid succession in cash withdrawal from the 1st Defendant but occasionally there was a request from Fina Bank or the head office.

48. Following the institution of the criminal charges, **Aba Mpesha Alex Rebero** was convicted and jailed while the others were acquitted.

49. According to him, though they searched the 2nd Defendant's house, there was no evidence found that could implicate him in the fraud. It was his evidence that he was unable to remember the number of days the 2nd Defendant was in custody though he never raised the issue during the prosecution. According to him a person who is not charged within minutes can be held up to 48 hours and they did not take him to court immediately.

50. It was his testimony that other than the information presented, there was nothing linking **Mathara** to the fraud and that there was no direct credit to Jomat Account.

51. PW4, **Josephat Bwonya Fedha**, was at the material time similarly an officer attached to the Plaintiff's Banking Anti-Fraud Unit. According to him, he recorded the 2nd Defendant's statement under inquiry in connection with the case which occurred at the 1st Defendant Bank. He identified that the said statement in bundle and stated that he gave the 2nd Defendant the warning before doing so and proceeded to produce the same as exhibit.

52. In cross-examination he stated that in 2003 there were no police cells with the building where they were housed, Marshalls Building though there was a room which did not qualify as a cell where suspects were held. However, they could not be held there overnight though he was not sure how long the 2nd defendant was held there before giving his statement which he confirmed was given on 5th July, 2003. According to him, he was not bonded to testify in the criminal case and so he did not give evidence therein. It was his testimony that he recorded the 2nd Defendant's statement during the day at about 2.30 pm and not 3.00 am though this was not reflected in the statement. According to him all the original statements are given to the investigators immediately after they are recorded. He however compared the one he exhibited with the original one though he was aware of its contents from his memory. While admitting that there was an obligation to indicate the time and place of recording the statement, these were not indicated.

53. He stated that at that time though a police post ought to be gazetted, Marshalls House was by then not gazetted. By the time he left the place in 2004 he was not sure whether it had been gazetted as he was not aware of when it was gazetted. He however clarified that it was not him who arrested the 2nd Defendant.

54. In re-examination he clarified that both the date and the place were indicated in the statement.

2nd Defendant's Case

55. **Jignesh Ghelabhai Desai**, the 2nd Defendant wholly relied on his witness statement sworn on 11th July, 2016 and filed the same date as well as the documents annexed in his defence and counterclaim.

56. In cross-examination he stated that **John Mathara Mwangi** was one of his customers at the 1st Defendant Bank, Westlands Branch having a current account in the name of Jomat Distributors Ltd. According to him the said person never went to the bank with or introduced Alex Ribero as a customer and no money was paid from the 3rd Defendant to his account. According to the 2nd Defendant the said **John Mathara Mwangi** was holding large sums of money though this was the first time he was holding a sum of Kshs 14,000,000/= in his account in the name of Jomat Distributors Ltd.

57. The 2nd Defendant admitted that he was not a banker and that he joined the 1st Defendant bank in 1993 as a computer manager. He had a BCom. and post graduate in IT before joining the 1st Defendant. Before then he was working for a Software Technologies having just come

to Kenya though he had worked before in Mumbai, India for Apple Industries for three years. Before then he had not worked anywhere. At Apple, he was teaching computerised accounting and was earning 4500 Indian Rupees, equivalent of Kshs 9,000/-. When he joined the Kenyan Company he was earning Kshs 25,000.00 net of taxes plus benefits amounting to Kshs 30,000/= which was paid off the payroll. He could not tell whether tax was paid on the allowance since he was getting the credit in his account. He however asserted that since his coming to Kenya, he had been paying his taxes which should be reflected in his records. According to him he had four children and his siblings were in the United States and Mumbai, India.

58. According to the 2nd defendant when Credit and Commerce Bank converted to Giro Bank he was promoted and became a branch manager with the primary duties of generating business, getting new customers and managing day to day affairs of the Branch. He was to open new accounts. According to him, he played the role in opening some new accounts while others were transferred from other branches. He however stated that he did not undergo any formal training but he was acquainted with the Plaintiff's Prudential Guidelines given from time to time. According to him, he was not aware of any suspicious transactions and though he went through the guidelines, it was not detailed.

59. According to him he set out the various documents to collect from the customers when opening the account. With respect to the 3rd Defendant, he assisted in opening the account which was a sole proprietorship account. The 3rd Defendant was introduced by **Mr Ashok Patel** a customer of the Bank who had a Trading Account called Fullhouse Entertainment Company. Mpesha was indicated to be horticultural exporters as its business. According to him, by the time the 3rd defendant went to the bank in June, 2002 it had traded in the business of horticultural for some time. The 2nd Defendant stated that he took the business registration certificate issued on 14th November, 2002 which was the only certificate surrendered to the bank. The third defendant did not however furnish any evidence of horticulture and did not provide any financial statements or expected cash flow. The said account was opened in July, 2002. Referred to the account opening forms, he confirmed that they did not indicate the customer's physical address either in the letter or in the form though there was a field for it. Referred to a letter dated 12th February, 2003, he stated that it was by himself to the Manager, Barclays Bank Queensway Branch requesting for verification of the customer's identity for Mpesha Enterprises Current Account No. 0985625304 which was the account provided by Mpesha as a reference. It was however his evidence that by this time Mpesha had been introduced to the 1st Defendant by Ashok 6 months earlier and there were already certain amounts in the account. For example, as at 7th February, 2003 an amount of Kshs 10 million was withdrawn an implication that there must have been that amount in the account. On 12th February, 2003 is when he sought verification of the customer's particulars from Barclays Bank. The 2nd Defendant confirmed that there was a letter from Mpesha referring to the account and requesting that the Bank makes reference to the account provided and the particulars be given to the 1st Defendant. He however insisted that it was not necessary to ask for reference at the inception and he was not sure whether that was a requirement under the Prudential Guidelines. According to him upon receiving the particulars they became satisfied that they were dealing with a genuine customer though he still insisted that it was not necessary to seek reference from the previous bankers.

60. Referred to the Prudential Guidelines the 2nd defendant confirmed that it talks of customer identification and that they provide for the minimum. He confirmed that with respect to personal accounts there is a requirement for previous reference while corporate and sole proprietorship requires reference where applicable. According to the 2nd defendant if the bank is satisfied with the documents provided it does not have to go through each and every point. It was his evidence that in 2002 they were satisfied with the documents provided hence they went ahead to open the account. However, six months later they realised that they needed reference and they sought for it. However, the bank gave varied details regarding the identity, the period, address, signatures and recommendations of the customer.

61. It was his evidence that for the first six months after the opening of the account, there was hardly any activity on the account and on 21st January, 2003 an amount of Kshs 50,000/= was deposited. From then the credits started coming in millions from Stanbic through the Plaintiff. The explanation was that the money was coming from Dyer and Blair stockbrokers. He however stated that not all withdrawals were in cash since the first withdrawal was by cheque in the sum of Kshs 45,000/=. On 12th March, 2003 there was a cash withdrawal of Kshs 500,000/=. On 7th February, 2003 there was a cheque for Kshs 10,000,000/= and cash of 1.5 million, on 21st March, 2003 there was cash withdrawal of Kshs 6,000,000/=. On 8th February, 2003 there was another cash withdrawal. It was his evidence that when banks do not have cash they have an arrangement with other banks to draw bankers cheque and pay in cash.

62. It was his evidence that the customer informed him that he had a CDS Account with the Plaintiff and that he had bonds which he was interested in trading in open market. According to him, though they were also interested in buying the bonds, they got better deals from Dyer and Blair and the customer decided to sell his. However, since the amounts being deposited were large, he required the customer to produce a statement of his CDS Account with the Plaintiff which statements were to be filed as part of the 1st Defendant's records. However, the customer did not furnish the said records. He testified that the Treasury Bonds were in the names of Mpesha Enterprises.

63. The 2nd defendant stated that the \$ 420,000 were his funds and his wife's savings from her parents in a Savings Account at Citibank Account which he opened in 1998. Though he was not operating the account frequently, the bank would furnish him with periodic statements. Those statements, it was his evidence were taken away by the plaintiff during the search of his house. However, referred to his statement, he stated that nothing was found. He also stated that he had not requested in writing for his statements of the joint account between him and his wife.

64. It was his testimony that he was arrested and taken to court but was acquitted based on no case to answer. He however clarified that he was placed on his defence. According to him he objected to the production of his statement before the trial court since he did not record the same but just signed them without reading the same.

65. Later on he came to learn that some Treasury Bonds were stolen and the proceeds therefrom channelled through the 1st Defendant Bank where he was the manager. He disclosed that Johmat Distributors were trading in some commodities and had Current and Fixed Deposit Accounts in the total sum of 14 million. He acknowledged knowing **Ashok Patel** as the 1st defendant's customer and was operating a club. He however denied that he opened a prodigy email account for communicating with the people who were involved in the scheme that saw the plaintiff lose Kshs 205 million. According to his evidence, he had three sources of income, his savings, his wife's savings and her

inheritance though he did not disclose their respective amounts. It was his evidence that he claimed the money after his release but the court stopped the same.

66. In re-examination, he reiterated that Mpesha was introduced by **Ashok Patel** who was the 1st Defendant's customer and that they were under no responsibility to seek further reference. According to him, they did due diligence before opening the account which was being operated by the 3rd defendant. According to him the first credit is required to be in cash and he opened the account using Kshs 5,000/= in July, 2002 and that there were other transactions in between up to January, 2003. He reiterated that they received verification from Barclays Bank upon receipt of a credit of Kshs 95 million and it was confirmed that it was in order. He admitted that on 7th February, 2003 huge amounts came into the account from Stanbic Kenya in respect of the CDS Account originating from the Plaintiff and that the signatories were verified. On 20th February, 2003 there was another credit of Kshs 90 million which was an interbank transfer with two signatories. Thereafter there were disbursements to third parties as well as an FDR of Kshs 5,000,000/=.

67. He confirmed that they had an internal audit system. He stated that the money was transferred by the 1st Plaintiff to the 1st Defendant's head office and was advised to his branch to credit the customer's account via a letter dated 6th February, 2003 and the account was credited on 7th February, 2003 since there was a need for verification by the head office. According to him, by that time there were no restrictions on withdrawal or receipt of over 1 million shillings. According to him while the directors were aware of the payments which were being made, no issue was raised by the auditors.

68. While aware that the Plaintiff filed a suit against the 1st Defendant, he said that he was unaware if the same was settled. He however denied the allegation that he defrauded the plaintiff since he was not a beneficiary of the fraud as the cheques were made to third parties and the money in his Dubai Account was his and not part of the fraudulent sum. He stated that he transferred the said sum while in incarceration and his employment was termination when he was in custody. To his knowledge the account of Johmat Distributors was regular and no issue was raised in respect thereof. He reiterated that there was a court order prohibiting him from accessing his money from the plaintiff hence the orders sought in his defence and counterclaim.

The 3rd Defendant's Case

69. The 3rd Defendant wholly relied on the statement filed herein on 4th April, 2019 the contents of which he wholly adopted.

70. In cross-examination he confirmed having opened the account in question. He however denied that he had an account with Barclays Bank. According to him the opening of the account with the 1st Defendant was the initiative of a third party. He disclosed that he worked with Barclays Bank from 3rd November, 1987 to Mid-1997 as a cashier having undergone training with the said Bank. He however never worked in the accounts opening department. After leaving the said Bank he went into *Jua Kali* jobs (hustling). When he went to open the account he walked into the Bank with introductory documents which were given to him by Khimji Patel who informed him to go to the inquiries where he was directed to the Branch Manager, the 2nd Defendant herein, and he presented his case of opening a bank account by presenting the said forms after disclosing to him the person who gave him the forms. The 2nd Defendant handed over the forms to another person. According to him in the forms it indicated by the said Khimji that he was involved in Agricultural Export though he was not involved in the said business. It was his evidence that he never had any trading account at Barclays Bank and that he was just given the documents of Mpesha Company who registration he never applied for. Referred to the letterhead of the company, he stated that he has never stepped in Occidental Plaza and that the signature on the said letterhead was not his and it was different from his signature in his witness. According to him, though he did not mention the proceeds from Treasury Bonds, he explained everything. He however admitted that it was him who withdrew the cash from the account despite the fact that he has never owned any treasury bonds and never sold any. It was his evidence that it was Khimji who instructed him to withdraw the amounts across the counter after which he would take the same to Khimji wherever they agreed to meet. The said arrangement, according to him stopped in May, 2003 and he never saw any statement.

The 4th Defendant's Case.

71. **John Mathaara Mwangi**, DW3 testified that he was running a micro-finance company called nationwide Microfinance. He was also a director of Multiple Traders and was running Johmat Distributors, which was involved in transport and other general businesses. He was also a farmer owning Double M Farm in Nyandarua. In his defence he adopted his statement dated 27th November, 2018 as well as his list of documents filed on 9th November, 2008.

72. He disclosed that he was charged in Criminal Case No. 1343 of 2003 as a third accused as a director of Johmat Distributors and he tendered his evidence therein and was acquitted on all the counts on 4th May, 2006 after 3 years and 5 months. According to him no appeal was lodged against the said decision and he obtained an order that all his account documents be returned to him which order was partially honoured by him being given only the account opening forms and the certificates but not his money. According to him the cash was produced in court. He was however unaware of the orders that were issued in this case freezing the funds held in the 1st Defendant's Bank since they were not served on him and he only saw them when he came to court. It was his evidence that the order was made one month after the orders in the criminal case were issued.

73. It was his case that the case was proceedings concurrently with the criminal case though he was not a party to this case and only applied to be joined after the orders were issued against him.

74. In his evidence there was no evidence that the money came from the subject transaction and no witness testified to that effect. Therefore, there was no evidence linking him with Mpesha and that he had a hand in the opening of the account by Mpesha. He stated that the said sum of Kshs 140 million which was frozen was On Call Deposit for three months each. He stated that at the expiry of the maturity period he only withdrew the interest and rolled it over for another three months though he broke it into several denominations hence the several certificates. Because the Plaintiff is claiming Kshs 205 million with interest, it was his case that at the current rate of 14% he would be required to pay

1.6 Billion which money he does not have. According to him, there was no evidence to support this claim and the court ought to discharge him since nobody has proved that the certificates are not genuine and nobody has doubted the source of his income. According to him the said deposits are earning interest.

75. He claimed that he was arrested at 3.00 am from his house and taken to Banking Fraud Investigations Department and in the morning taken to Kankunji Police Station for three days after which he was transferred to Central Police Station for another three days. He was thereafter transferred to Kangemi Police Station. He was therefore in custody for 10 days. He revealed that a search was conducted in his house in the presence of his family members at which his house was turned upside down. He was also taken to his Kinangop home for another search that also yielded nothing. As a result, he failed to capture parliamentary seat in 2002, 2007 and 2013 since he was taken there in handcuffs. He also claimed that the incident disrupted his business. He therefore sought the orders in his counterclaim.

76. In cross-examination he confirmed that the total amounts in the counts before the trial court added up to 205 million which is the same amount claimed in this suit and that he was acquitted of all the charges. He confirmed that he dealt with the 2nd defendant but was never involved in fraud with him.

77. According to him, before starting his business he worked in 1985 for Jimba Credit and its sister company, Union Bank. The two deposits he made on 3rd March, 2003 in the sums of 5.5 million and 8.5 million on 3rd March, 2003 and 25th February, 2003 respectively in respect of Johmat Distributors. The deposit was however for Multiple Traders and they were made in cash. According to him Multiple Traders is a sole proprietorship while Johmat is a Limited liability company but they are both owned by the same directors with Multiple Traders being involved in shylock business. According to him the money was part of its operational funds. He stated that Johmat did not have a current account with the 1st Defendant but had an account in Equity Bank and that the funds went straight into the fixed deposit. According to him, he knew the 2nd Defendant before he made the deposit and that that was the first account he had with the 1st Defendant but had account with Commerce Bank in one of his company's name. According to him, by the time he opened the fixed deposit account, he had closed his account with Commerce Bank where he had a current account. He withdrew the funds in order to finance his two companies though he could not recall the date of doing so. He however did not close the said account. After the merger he transferred his counts to the 1st Defendant, Westlands Branch in form of Deposit Certificate in the name of Multiple Traders in the safe and deposit.

78. According to his evidence the cash was not removed from Commerce Bank but the funds were in Multiple Traders. By the time of the merger of the two banks, his current account in Commerce Bank was not active though he had not closed it. In his evidence, the transfer of the accounts would depend on the status of the account from the former bank. When he went to invest in the 1st Defendant, the 2nd Defendant was one of the officers there though they did not discuss the other accounts when he opened the fixed deposit account. According to him he did not have to disclose where the funds came from. He stated that he did not appeal against the order made in this case. While he filed Civil Appeal No. 66 of 2007, he stated that the same was abandoned.

79. He lamented that as a result of this case, his opponents have always used the same against him. According to him, **John Mathaara** is the 4th Defendant in this case and he is a director of Johmat and that his name does not appear as a defendant.

80. In re-examination he stated that he has stopped operating the account in Commerce Bank. He stated that he learnt about the merger in the newspapers and that the said account was a sole proprietorship. According to him, by that time there were no regulations regulating withdrawal and deposits and no questions were asked.

Plaintiff Submissions

81. It was submitted on behalf of the Plaintiff that Pursuant to the provisions of the **Internal Loans Act** Cap 420 of the Laws of Kenya, the Government may from time to time borrow in Kenyan currency sums of money in such amounts and on such terms and conditions as to interest, repayment or otherwise as the Minister from the time being responsible for finance may determine, by issue of bills, bonds or stocks or otherwise and that the Plaintiff is the appointed agent of the Government of Kenya to administer the public debt aforesaid. In discharge of its functions above, the Plaintiff has established an electronic system for the administration of Public Debt both for issuance and secondary trading, known as the Central Depository System (CDS). Through the said system, members of the publican purchase and trade in Government securities, conducted through electronic book entries.

82. On 29th April 2002, the Government of Kenya floated a two year coupon rate Treasury Bond through issue number FXT 2/2002/2 which were for a fixed coupon rate of 13% to mature on 26th April 2004. Among the successful bidders was CBA Capital Limited for Treasury Bonds worth Kshs. 175,000,000/- being the holder of CDS Account No. 09-30-00595-1. On 29th July 2002, the Government of Kenya floated a four-year coupon rate Treasury Bonds through issue no. FXD 1/2002/4 which Bonds were purchased at an average discounted rate of 13.75% and were due on 24th July 2006. Among the successful bidders for this issue was Mumbu Holdings Limited for bonds worth Kshs. 30,000,000/- being the holder of CDS Account No. 09-30-19086.

83. On or about 29th July 2002, the 2nd Defendant opened an account for the 3rd Defendant in his alleged business name known as Mpesha Enterprises in Giro Commercial Bank, Westlands Branch which process was exclusively handled under the supervision of the 2nd Defendant who was then the Branch Manager. The 3rd Defendant in his statement filed in court on 4th April 2019 narrated the manner in which the account was opened in the most casual manner without due consideration and or taking account of such matters as a Bank is bound in the normal of business to take into consideration and or due compliance with the CBK Prudential Regulations and Guidelines. It was submitted that in particular the account was opened on the same date as the registration of the business name under the **Registration of Business Names Act** and without the financial statement of the business for the preceding 12 months or at all; there was no verification as to whether the proprietor – the 3rd Defendant was a registered taxpayer; there were no details of the permanent address of the business; there was no evidence of reference from the introducing party; the customer verification was sought from Barclays Bank of Kenya Limited six (6) months after the account was opened instead of immediately the proprietor approached the Bank and the 3rd Defendant in his unchallenged evidence denied being the author of the letter which purported to authorise Barclay Bank of Kenya Limited to verify the information requested; and

there was no verification of the horticultural business allegedly undertaken by the 3rd Defendant.

84. It was submitted that there is not in dispute that on 28th January 2003, Treasury Bond for CBA Capital Limited valued at Kshs. 175 million was fraudulently and without knowledge or consent of CBA Capital Limited transferred from its CDS account to the 3rd Defendant's CDS account number 09-30-194819 and that on 3rd April 2003, Treasury Bond for Mumbu Holdings Limited valued at Kshs. 30 million was fraudulently transferred from their CDS account number 09-30-19086-8 to the 3rd Defendant's CDS account number 09-30-19086-8 without the knowledge of the said Mumbu Holdings Limited and without any consideration. The 3rd Defendant thereafter instructed Dyer and Blair Investment Bank to sell the fraudulently acquired Treasury Bonds which Bonds were subsequently disposed of without the knowledge of the true owners and an amount totalling to Kshs. 216,191,750/- paid into the account of the 3rd Defendant held in Giro Commercial Bank Westlands Branch being the proceeds from the sale of the Treasury Bonds.

85. According to the Plaintiff, following the receipts of the proceeds of the sale of the Treasury Bonds aforesaid, the 3rd Defendant proceeded to operate his account in a manner that could only be deemed as suspicious. The manner in which the account was operated left no doubt that the 2nd Defendant was involved in the fraudulent assistance of the 3rd Defendant, with a view to defraud the Plaintiff of the proceeds of the sale of the said Treasury Bonds and to fraudulently transfer the said proceeds to various accounts and persons. Particulars of the said fraud, it was submitted were that on 7th February 2003, Giro Commercial Bank received a credit of Kshs. 95,420,160/- by way of transfer by order of Dyer & Blair Investment Bank through Stanbic Bank in favour of the 3rd Defendant purportedly being proceeds from the sale of Treasury Bonds, an amount which was inconsistent with the history of the account as two (2) foreign currency cheques had previously been dishonoured; the 3rd Defendant thereafter proceeded to withdraw Kshs. 16.5 million in cash, pay Kshs. 41,539 million by five separate bankers' cheques to Fina Bank Limited, pay Kshs. 8 million by bankers' cheque to Paramount Universal Bank Limited, pay Kshs. 1.848 million by two bankers' cheques to Blue Sea Forex Bureau and pay Kshs. 924,000/- by bankers' cheques to Travellers Forex Bureau. All these bankers' cheques were drawn in favour of the respective banks and were meant to facilitate cash withdrawals and within 7 days the balance on the account had been reduced to Kshs. 755,174/-; On 24th February 2003, the account of the 3rd Defendant was credited with Kshs. 90,140,460/- being a transfer by Dyer & Blair on behalf of the 3rd Defendant in respect of the sale of Treasury Bonds through Stanbic Bank Limited from which sum Kshs. 6,540,000/- was withdrawn in cash, Kshs. 50 million was paid to Fina Bank Limited by bankers' cheque, Kshs. 1,540,000/- was paid by bankers' cheque to Travellers Forex Bureau, Kshs. 13,537,000 was paid by a series of bankers' cheques to Paramount Universal Bank Limited and Kshs. 15 million was paid into a fixed deposit account in the name of the 4th Defendant in an account domiciled in Giro Commercial Bank, Westlands Branch. Again, all these bankers' cheques were drawn in favour of the respective banks and were meant to facilitate cash withdrawals; On 16th April 2003, a sum of Kshs. 30,631,680/ was credited into the 3rd Defendant's account on instructions by Dyer & Blair through Credit Agricole Indosuez and the said account was similarly withdrawn between 16th to 29th April 2003.

86. The Plaintiff contended that the manner in which the funds were received and dealt with by Giro Commercial Bank through its Westlands Branch which was managed by the 2nd Defendant left no doubt that the 2nd Defendant was involved in fraudulent assistance of the 3rd Defendant since the 2nd Defendant assisted the 3rd to open an account with Giro Commercial Bank in breach of the prudential guidelines issued by the Plaintiff in its capacity as a regulator pursuant to the provisions of the *Central Bank of Kenya Act*; in opening the account, the 3rd Defendant was described as being in horticulture business and for vast amounts of money to dock into the account from a stockbroker, the 2nd Defendant should have become suspicious but he did not as he was part of the fraudulent scheme as is evidenced from the inception of the account and the statement he gave to the police; the 2nd Defendant together with Shah Manish, an employee of Giro Bank certified on behalf of the 3rd Defendant that the information provided in the application to open a CDC account were accurate and independently confirmed by the 2nd Defendant; the 2nd Defendant acting in his capacity as the Manager of the Westlands branch of Giro Bank dishonestly assisted the 3rd Defendant in paying out the money received by the 3rd Defendant from the proceeds of the sale of the fraudulently acquired Treasury Bonds to amongst other parties the 4th Defendant through its bankers' cheques drawn in favour of other banks and meant to facilitate cash withdrawals. and substantial and irregular withdrawals in cash; the 2nd Defendant acting in his capacity of as Manager of Giro Bank introduced the 4th Defendant as a customer and proceeded as Manager to receive huge amounts of case which he issued a fixed deposit receipt yet the 4th Defendant at the time of making the fixed deposits did not have an account with Giro Bank through which the cash would be deposited and out of which the money would be placed in a fixed deposit account.

87. The Plaintiff therefore claims against the 2nd, 3rd and 4th Defendants jointly and severally a total amount of Kshs. 205 million plus interest thereon for their separate involvement in the fraudulent acquisition and transfer of the Treasury Bonds rightfully belonging to the Plaintiff.

88. The Plaintiff identified the following issues for determination:

- a. Whether the 2nd, 3rd and 4th Defendants jointly and severally fraudulently acquired Treasury Bonds in the names of CBA Capital Limited and Mumbu Holdings Limited and transferred the same to the CDS account in the name of the 3rd Defendant.

89. Whether the 2nd Defendant was involved in fraudulent assistance of the 3rd Defendant and subsequently the 4th Defendant whose account was credited with part of the proceeds from the sale of the fraudulently acquired Treasury Bonds.

90. In support of its case the Plaintiff relied *Black's Law Dictionary, 8th Ed.* at page 685, *R.G. Patel vs. Lalji Makanji [1957] EA 314*, *Denis Noel Mukhulo Ochwada & Another vs. Elizabeth Murungari Njoroge & Another [2018] eKLR* and *Kuria Kiarie & 2 Others vs. Sammy Magera [2018] eKLR*.

91. Regarding the liability of the 2nd Defendant, it was submitted that he was the Manager of the Westlands branch of Giro Commercial Bank and he assisted the 3rd Defendant to open an account with Giro Commercial Bank in breach of the prudential guidelines issued by the

Plaintiff in its capacity as a regulator pursuant to the provisions of the *Central Bank of Kenya Act*. Regulation 2 CBK Prudential Regulations for Banking Institutions 2000, it was submitted, provides for the minimum information required for customer identification. For corporate, partnership, sole trader accounts or transactions, Regulation 2.2 provides as:

- a. **Certified copy of Certificate of Registration, Certificate of Incorporation, Partnership Deed, Memorandum and Articles of Association or other similar documentation evidencing legal status;**
- b. **Certified copy of Board Resolution stating authority to open accounts, transaction business, and borrow funds, and designating persons having signatory authority thereof;**
- c. **Verified identity and address of the chairman of the board of directors, the managing director, and all principal shareholders for a corporation, or the general partner and at least one limited partner for partnerships, or the principal owner for sole traders, etc.;**
- d. **Audited financial statements (last full year at minimum although, last three years preferred) for corporation; for partnerships, sole traders, unaudited statements may be substituted upon prior written approval of a senior management official of bank; formation statement and PIN registration;**
- e. **Where applicable, written confirmation from the customer's prior bank attesting to customer's identity and history of account relationship.**

92. The 2nd Defendant further received a huge amount of cash from the 4th Defendant when the 4th Defendant did not have an account in Giro Bank through which the cash would have been deposited and out of which the cash would be invested in a fixed deposit. The 2nd Defendant testified that he did not ask for a written confirmation from the 3rd Defendant's prior bank until 6 months after the account was opened. The 2nd Defendant also testified that they did not have any financial statements from the 3rd Defendant to verify consistency of deposits and withdrawals. The 3rd Defendant in evidence denied that the letter authorizing the 2nd Defendant to verify information from Barclay Bank of Kenya came from him. The 2nd Defendant together with one Mr. Shah Manish the Assistant Manager of Giro Commercial Bank certified on behalf of the 3rd Defendant that the information provided in the application to open a CDS account were accurate and independently confirmed by the 2nd Defendant. Further, the 2nd Defendant acting in his capacity as the Manager of the Westlands Branch of Giro Bank dishonestly assisted the 3rd Defendant in paying out the money received by the 3rd Defendant from the proceeds of the sale of the fraudulently acquired Treasury Bonds to amongst other parties the 4th Defendant through its bankers' cheques and substantial and irregular withdrawals in cash. The 2nd Defendant did not raise any suspicious activity report despite the irregular withdrawal of substantial sums of money by the 3rd Defendant in contravention of the *Prudential Regulations 2000*.

93. According to the Plaintiff, Regulation 4.1 provides as follows with regards to suspicious activities:

“Account activity (e.g. large, frequent or unusual deposits, withdrawals, payments or exchanges of cash, foreign currency or negotiable instruments) which is not consistent with or reasonably related to the customer's normal business activities or financial standing;”

94. Regulation 5 of the *Prudential Regulations* provides that such suspicious activities or transactions should be reported. Therefore, taking into account that the 3rd Defendant had declared while opening the account that he was in horticultural business, huge funds from a stockbroker should have raised a red flag. Further taking into account the history of the account, such a huge transfer should have been raised suspicion. Despite this, the 2nd Defendant as the manager who was in control of the account did not flag or raise any report on the suspicious activity on the 3rd Defendant's account and email correspondence between the 2nd Defendant and one **Mr. Ashok Patel** found at page 119 - 132 of the Plaintiff's Bundle of Documents shows that the 2nd Defendant was indeed involved in the fraudulent scheme and it is the Plaintiff's submission that the 2nd Defendant should be found liable for fraudulent assistance.

95. In his statement under inquiry recorded on 5th July 2003 which this court ruled as admissible, the 2nd Defendant admits that he was involved in the fraudulent scheme that was orchestrated by the 3rd Defendant and on **Mr. John Mathara Mwangi**, the director of the 4th Defendant. According to the said statement, sometime in July 2002, he met **John Mathara Mwangi** at Exotica Hotel who introduced him to the 3rd Defendant. **John Mathara Mwangi** told him that the 3rd Defendant would open an account at the Westlands Branch of Giro Bank and on 30th July 2002, the 3rd Defendant accompanied by one **Mr. Ashok Patel** went to the branch and opened an account in the name of Mpesha Enterprises. He together with the assistant manager of Giro Bank Westlands branch signed the account opening forms for Mpesha Enterprises CDS account. On or about January 2003, he met **John Mathara Mwangi** at the bank that John told him that he was able to work out treasury bonds worth Kshs. 175 million and transferred the same to the name of Mpesha Enterprises while assuring the 2nd defendant that he would be paid 15% of the money going through the Mpesha Enterprises account. The proceeds from the sale of the fraudulently acquired treasury bonds were credited to the 3rd Defendant's account who would withdraw the money from the account and would pay back to him his share and that of Ashok Patel in US dollar. That he received a total of 490,000 USD from the fraudulent transactions out of which 350,000 USD was his share which he transferred through *Hauuala* through Starling Forex Bureau to his account in City Bank Dubai which he had opened when he visited Dubai at the end of March 2003. That **John Mathara Mwangi** opened a fixed deposit account in the name of **Johmat Distributors Ltd** (the 4th Defendant) and deposited cash totaling to about Kshs. 15 million which is still in the account.

96. It was submitted that though the 2nd Defendant in his evidence stated that the deposit in Citibank, Dubai was from his savings and his wife's inheritance, nothing would have been easier than for him to supply statements and evidence of the origin of the money which he did not. The only evidence we have is what he told the police. Reliance was placed on *ABN Amro Bank N.V vs. Le Monde Foods Limited Civil Application No. Nai 15 of 2002 (UR 11/02) on adverse inference*.

97. It was submitted that the only way the police knew about the money in Citibank, Dubai is because the 2nd Defendant revealed to them the information. According to the Plaintiff, the manner in which the funds were received and dealt with by Giro Commercial Bank through its Westlands Branch which was headed by the 2nd Defendant left no doubt that the 2nd Defendant was involved in fraudulent assistance of the 3rd Defendant.

98. As regards the 3rd Defendant's liability, it was submitted that he *orchestrated a fraud sometime in 2003 whereby he* falsely and fraudulently procured Treasury Bonds Issue No. FXT 2/2002/2 valued at Kshs. 175 million and FXD 1/2-02/4 valued at Kshs. 30 million in the names of CBA Capital Limited and Mumbu Holdings Limited respectively and transferred the same to his CDS account. Thereafter, he instructed Dyer and Blair Investment Bank to sell the said treasury bonds and the funds received from the sale of the Treasury Bonds were paid through an account opened by the 3rd Defendant at Giro Commercial Bank. Following the receipts of the proceeds of the sale of the Treasury Bonds aforesaid, the 2nd Defendant assisted the 3rd Defendant to operate his account in a manner which left no doubt that the 2nd Defendant was involved in fraudulent assistance of the 3rd Defendant, with a view to defraud the Plaintiff of the proceeds of the sale of the Treasury Bonds and to fraudulently transfer the said proceeds to various accounts and persons and the 3rd Defendant withdrew the monies on various occasions at Giro Commercial Bank and sometimes the Bank would instruct Fina Bank, Paramount Universal Bank, Blue Sea Forex Bureau or Travellers Forex Bureau to pay the 3rd Defendant on its behalf.

99. In his statement dated 4th April 2019 and filed in court on even date, the 3rd Defendant does not deny the existence of a fraudulent scheme as claimed by the Plaintiff. Rather he claims that the fraud was orchestrated by one Mr. Kimji Patel and that he was just a pawn in the whole scheme. He admits that the identity card of Aba Mpesha was fraudulently acquired and that it is the details of Aba Mpesha that were used to open the account in Giro Commercial Bank. He admits that he used to withdraw large sums of money from the Mpesha account at Giro Bank and give the money to one Mr. Kimji Patel who would then give him his cut of either Kshs. 100,000/- or Kshs. 200,000/-.

100. It was submitted that the 3rd Defendant was charged alongside the 2nd Defendant and **John Mwangi** (the 4th Defendant's director) in Criminal Case No. 1343 of 2003 with the offence of forgery contrary to section 349 of the **Penal Code** and stealing contrary to section 349 of the **Penal Code** and he was found guilty on all counts and sentenced to a jail term of 3 years.

101. It was therefore submitted that since the 3rd Defendant was found guilty on all charges in the criminal case, the finding of guilt by the criminal court of the 3rd Defendant is *ipso facto* evidence that the 3rd Defendant is liable for the fraudulent acts which led to the loss of Kshs. 205 million by the Plaintiff. The court was urged to take cognizance of the fact that the standard of proof in a criminal trial is one beyond reasonable doubt whereas in a civil case it is one on a balance of probabilities.

102. Regarding the 4th Defendant's liability, it was submitted that the 4th Defendant with the help of the 2nd Defendant opened a fixed deposit account with Giro Commercial Bank and thereafter made 2 cash deposits into the fixed deposit account; Kshs. 8.5 million on 25th February 2003 and Kshs. 5.5 million on 3rd March 2003 at the period when the fraudulent sale of the Treasury Bonds was credited and withdrawn from the 3rd Defendant's account.

103. In cross-examination, the director of the 4th Defendant conceded that the 4th Defendant did not have a current account in Giro Commercial Bank at the time he opened a fixed deposit account. It was submitted that the dates when the funds were deposited in the fixed deposit account by the 4th Defendant coincide with the dates when payment was made into the 3rd Defendant's account from the sale of the fraudulently acquired Treasury Bonds. To the plaintiff, this cannot be a mere coincidence especially when the statement of the 2nd Defendant is taken into account. The said funds that were credited to the account of the 4th Defendant must have been part of the proceeds from the sale of the fraudulently acquired Treasury Bonds. The fact that the 2nd Defendant and the director of the 4th Defendant were not found guilty in the criminal case does not mean that they cannot be found liable in this case since the evidentiary burden in a criminal case is that of 'beyond reasonable doubt' which is much higher standard than that required in this case. It was urged that this court in exercising its civil jurisdiction is under a legal obligation to review and consider the evidence tendered before it.

104. It was submitted that the Plaintiff was able to show that the 2nd Defendant was involved in the fraudulent scheme. This is evidenced by amongst others the email correspondent between the 2nd Defendant and **Mr. Ashok Patel**.

105. It was therefore the Plaintiff's case that the 2nd, 3rd and 4th Defendants were jointly and severally involved in the fraudulent scheme that led to the loss of Kshs. 205 million by the Plaintiff and as such should be found liable for the loss.

106. In view of the foregoing, it was the Plaintiff's prayer that this Honourable Court allows the Plaintiff's suit and orders that:

- a. A declaration that the Defendants are liable for the loss suffered by the Plaintiff.
- b. Judgment be entered jointly and severally against the 2nd, 3rd and 4th Defendants in the sum of Kshs. 205 million for their separate involvement in the fraudulent acquisition and transfer of the proceeds from Treasury Bonds rightfully belonging to the Plaintiff.
- c. Interest at bank rates from the date of payment of the said amount until payment in full.
- d. Costs of the suit.
- e. Such other or further relief as this Honourable Court may deem fit.

2nd Defendant's Submissions

107. It was submitted on behalf of the 2nd Defendant that the evidence relied upon by the Plaintiff was mostly hearsay and therefore could not be relied upon by the Court. Regarding the Inquiry Statement relied upon by the Plaintiff, it was submitted that it was coerced and made under duress, and prolonged illegal incarceration of the 2nd Defendant by the Banking Fraud Officers attached to the Plaintiff's Banking Fraud Unit. It was therefore inadmissible and could not amount to a confession. Similarly, the uplifting of the amount in the 2nd Defendant's Citi Bank Dubai account was as a result of that threat.

108. According to the 2nd Defendant, three basic principles of civil law are advanced. First, the Court is required to act on the evidence adduced before it and on nothing else. Second, the Court must decide any contested issue on the more probable evidence adduced. The evidence of a witness ought generally to be confined to matters within his personal knowledge. The last reflects the quality of evidence and the weight attached to it.

109. According to the 2nd Defendant, the following issues fall for determination:

1. Whether the Plaintiff proved its case as against the 2nd Defendant on a balance of probabilities taking into consideration the totality of the evidence relied upon?
2. Whether the 1st, 2nd, 3rd and 4th Defendants jointly and severally fraudulently acquired Treasury Bonds in the names of CBA Capital Limited and Mumbu Holdings Limited and transferred the same to the CDS account in the name of the 3rd Defendant?
3. Whether the 2nd Defendant given the circumstances of the process involved in the Account Opening of the 3rd Defendant exercised due diligence and reasonable care, skill and responsibility as expected of the person of the Branch Manager?.
4. What is the purport and effect of the Judgement delivered in Criminal Case No. 1343 of 2003: Republic vs Alex Rebero Ngugi, P.O. Kuntoyi, J.M. Mwangi & J. G. Desai. on 4th May 2006 by the Hon A.O. Muchelule (as he then was) (Chief Magistrate) at Pages 13 to 27 of the 2nd Defendant's Documents.
5. Can a civil court rely upon a judgement given in a criminal case based on the same facts?
6. What is the legal implication in civil cases when a defendant has been acquitted in a criminal case?
7. What is the standard of proof in civil cases for acts of fraud?
8. How is banking fraud established in civil cases?
9. Does the principle of double jeopardy in civil cases?
10. What is the consequence on the 2nd, 3rd and 4th Defendant in the legal proceedings when the Plaintiff and 1st Defendant on 26th April 2006 by Consent marked the suit against the 1st Defendant (Giro Commercial Bank Limited) as settled with no Order as to Costs!
11. What is the legal implication, if any in the Plaintiff having has taken no steps as required by law to delete the name of the 1st Defendant Bank from the Pleadings in the current legal proceedings?
12. Is the 2nd Defendant entitled to an Order unconditionally to release to the 2nd Defendant the sum of Kshs 31,000,000.00 or the equivalent of US \$420,000.00 unlawfully withheld by the Plaintiff and/or its Agents/Employees forthwith together with Interest claimed at commercial rates from 15th September 2003 until date of payment?
13. Is the 2nd Defendant entitled from this Honourable Court to Award in damages for Breach of the 2nd Defendant's Constitutional rights and due to wrongful imprisonment and malicious prosecution?
14. Is the 2nd Defendant entitled to an award in his favour as against the Plaintiff for Costs, Interest on all sums found due and payable at the Commercial Bank lending rates or alternatively at Court rates as from the Year 2003 to date of payment?

110. It was submitted that from the evidence of the 2nd Defendant, he joined Credit & Commerce Finance which was later converted to Giro Commercial Bank Ltd from May 1993 as Computer Manager. He was given the duty as an Employee of the 1st Defendant to open and manage Westlands Branch in Bhandari Plaza in February 2000 as Branch Manager with one Assistant Manager and other clerical staff in the branch. During opening of said account of Mpesha Enterprises in June 2002, the 2nd Defendant took all the necessary steps for collecting the required documents as prescribed by Banking Act and these included the ID, business registration, Introduction by existing client, Bank's reference letter. The account opening forms also passed through the First Defendant's (Giro Bank's) internal audit department and no query was raised, at the time the Account was opened, during its operations or at anytime thereafter, or at all. By his letter dated 12th February 2003, the 3rd defendant (Mpesha Enterprises) discloses the physical address, Box Number and Telephone Number Contact of Mpesha Enterprises while the letter dated 22nd February 2003 to the 2nd Defendant from Barclays Bank Ltd clearly confirms the particulars and

authenticity of the 3rd Defendant (Mpesha Enterprises). The letter further confirms the existence of the 3rd Defendant (Mpesha Enterprises) as a Sole Proprietorship registered on 14th November 2000, and that the disclosed physical address, Box Number and Telephone Number Contact of Mpesha Enterprises as being correct.

111. It was submitted that the record discloses the 3rd Defendant's (Mpesha Enterprises) Aba Mpesha's ID Card copies, the 1st Defendant (Giro Commercial Bank)'s Account Opening Form, the Certificate of Registration of the Business Name of the 3rd Defendant's (Mpesha Enterprises), the Specimen Signature Card confirming the 3rd Defendant's (Mpesha Enterprises) Business Particulars and Signature of the Sole Signatory, the 3rd Defendant's (Mpesha Enterprises) letter dated 12th February 2003 to the 2nd Defendant, clearly discloses the physical address, Box Number and Telephone Number Contact of Mpesha Enterprises and the document proving that Mpesha Enterprises also held a CDS account with Central Bank of Kenya.

112. It was therefore submitted that given the circumstances of the process involved in the Account Opening, the 2nd Defendant exercised due diligence and reasonable care, skill and responsibility as expected of the person of the Branch Manager. The 2nd Defendant submitted that he was not trained by the 1st Defendant in the skills of being a detective nor of a police officer to investigate and detect forgeries or fraudulent documentation, and that he discharged his duties and obligations as required under the **Banking Act** and under **The Prudential Regulations for Banking Institutions (September 2000)**. In support of his submissions the 2nd defendant relied on **Ellinger's Modern Banking Law, 4th Edition at page 639**.

113. It was contended that during Operation of Mpesha Enterprises account all the transactions were authorised by the 2nd Defendant, Assistant Manager Manish Shah and Clerk of the Bank following due procedures of the Bank. Further to that, the Bank's senior Manager including Directors were aware of these transactions as there was a procedure to send daily report with all transactions above Kenya Shillings One Million (Kshs. 1,000,000.00) to the Directors. No query was raised by internal auditor or Directors, who were all experienced Bankers with over 25 years in banking industry, regarding any of the transactions of Mpesha Enterprises. Similarly, all the funds received in Mpesha Enterprises were channelled through legal channel and through Central Bank of Kenya and that the 1st Defendant bank took re-confirmation of validity of the funds after receiving and all was confirmed. It was therefore the 2nd Defendant's position that as a Branch Manager, he was discharging his duties with full knowledge of assistant manager, clerical staff and also Directors of the bank and that he had no connection with the 3rd Defendant -Mpesha Enterprises.

114. It was averred that on 4th July 2003, the BFID (Banking Fraud Investigations Department) officers went to the 2nd Defendant's residence and did a house search but did not find anything. At 12:30 p.m., they took the 2nd Defendant to Marshall's house for questioning and the 2nd Defendant was incarcerated and kept there till 3:00 a.m., in the morning. The 2nd Defendant was then taken to Kileleshwa Police station and kept in custody for 5 days – everyday being taken to BFID and back and was not allowed to meet his family or his advocate.

115. Regarding the 2nd Defendant's funds in Citibank, Dubai, it was submitted that the 2nd Defendant has been a customer of Citibank, Dubai for many years and as a non-Kenyan, he had full right to hold an off-shore account. He submitted that the funds at Citibank, Dubai were partly his and his wife's regular savings and also part of funds the wife inherited from her parents. During the 5 day period that the BFID used all the legitimate and also the illegitimate ways to torture the 2nd Defendant physically and mentally in order to coerce and pressurise the 2nd Defendant and also used the 2nd Defendant's family member names to force the 2nd Defendant to sign letter to Citibank to transfer the funds to Kenya.

116. It was submitted that from the evidence, the funds were invested in long term investment and there was no proof that these funds were part of any money he received in Kenya and there is no proof that funds were transferred from Kenyan Bank to Dubai or anywhere else for that matter.

117. It was noted that the 2nd Defendant was arrested and charged in **Criminal Case No. 1343 of 2003: Republic vs Alex Rebiro Ngugi, P.O. Kuntoyi, J.M. Mwangi & J. G. Desai** which took about 3 years to be concluded. From the said proceedings what comes out are that there was absolutely no evidence given or adduced (either oral or documentary) that implicated the 2nd Defendant for any fraud or criminal wrongdoing; there was absolutely no witness either from the Bank (i.e the 1st Defendant herein), or the Central Bank – DFIB Department nor any witness including the 3rd and 4th Defendants herein who gave any adverse or incriminating evidence against the 2nd Defendant relating to the alleged fraud/criminal charges; and the Court in the Judgement given on 4th May 2006 clearly and unequivocally absolved the 2nd Defendant and acquitted him from the alleged criminal charges that had been maliciously and unlawfully proffered by the Plaintiff (and being the Complainant through the Republic in the Criminal case) against him.

118. The 2nd Defendant invited the Court to take judicial notice and take into account that the Criminal case against the 2nd Defendant was a prosecution instigated by the Plaintiff, and which case after a full-blown hearing resulted in the unconditional acquittal of the 2nd Accused for *inter alia* lack of evidence. By unrelentingly pursuing these proceedings based entirely on the same facts and the same identical evidence adduced in the Criminal case, it was the 2nd Defendant's submission that the conduct of the Plaintiff is nothing but *mala fides* in that the 2nd Defendant is now being persecuted in the Civil case hence it is a classic example of the 2nd Defendant now being subjected to "Double Jeopardy".

119. The 2nd Defendant also submitted that as a direct consequence of the mental and physical torture the 2nd Defendant had endured for almost 5 years due to the harassment, intimidation, arrest and charging the 2nd Defendant with the alleged criminal offences, and then being subjected to a criminal trial for 3 years, and now the Civil Case herein which has been in Court for more than 15 years, the 2nd Defendant has suffered loss and damages, and which loss and damages the 2nd Defendant hereby requests this Honourable Court to award the 2nd Defendant. According to him, the 2nd Defendant has suffered severe financial loss over the funds wrongfully withheld due to the Orders given in the Civil proceedings herein. The 2nd Defendant therefore requests the Court to release unconditionally the sum of U.S.\$ 420,000

together with interest at commercial rates of borrowing thereon to-date until date of payment, and costs of the suit and further interest thereon. He further seeks that the court awards him damages for Breach of the 2nd Defendant's Constitutional rights and due to wrongful imprisonment and malicious prosecution.

120. He therefore prayed that the Plaintiff's Amended Plaintiff be dismissed with costs on the Higher Scale, and that his Amended Defence and Amended Counterclaim, and to refund the 2nd Defendant's money held in CBK with interest from 2003 be allowed with costs.

121. After responding to the Plaintiff's submissions the 1st Defendant prayed for Judgement against the Plaintiff for:

- a. Interest at commercial rates on the monies held by the Plaintiff as fund by holding Number 3 of Lady Justice M. Kasango's Ruling delivered on 15th February 2007.
- b. Refund and release of US\$ 420,000/= due to him forthwith plus interest from rom 15th September 2003 until payment in full.
- c. Dismissal of the Plaintiff's suit with costs

4th Defendant's Submissions

122. On behalf of the 4th Defendant it was submitted that this matter emanates from a Criminal Case Number 1343 of 2003 where the 4th defendant was charged alongside **Jignesh Desai** and **Alex Rebiro Ngugi (alias Aba Mpesa)**. They were arraigned in court and criminal proceedings against them started in 2003. They were put on their defence and after a trial that lasted almost four (4) years the 2nd and 4th defendants were acquitted but the 3rd defendant was convicted. In acquitting the 4th defendant the learned Chief Magistrate Muchelule (as he then was), stated as follows: -

“3rd accused (4th defendant in this case) is a director of Johmat Distributors Limited. The Investigating Officer found that on the 25th February 2003 the company opened a savings account with Giro Bank Westlands and on the same day placed Kshs 8.5 million in a fixed deposit and on the 4th March 2003 placed Kshs 5.5 million in another fixed deposit account. There was no evidence called to connect 3rd accused (4th defendant in this case) or his company with the Kshs 175,000,000/- or Kshs 30,000,000/- transactions and it was not alleged or proved that the money the 3rd accused (4th defendant in this case) has in the account are proceeds of the transaction”

123. It was submitted that the plaintiff never appealed this judgment and the findings of the Chief Magistrate Muchelule still stands. It was noted that no claim, whatsoever was made by the plaintiff against the 4th defendant in the initial pleadings and it was not until after four (4) years that the plaintiff amended its plaint and included the 4th defendant. It is further noted that the inclusion of the 4th defendant was not done at the behest of the plaintiff but at the behest of the 4th defendant who applied to be joined as an interested party in an application that had been filed by the plaintiff seeking an injunction to restrain the defendants Giro Commercial Bank Limited, the 1st defendant and/or their agents from drawing or otherwise dealing with funds held by the 1st defendant on account of the 4th defendant. The 4th defendant upon realizing that an adverse order was being sought against it in contravention of its constitutional right of being heard before being condemned with any order, moved the court seeking to be joined. As a result of the ruling joining the 4th Defendant, the plaintiff was compelled to amend the plaint to include the 4th defendant which was done on the 27th February 2007 and the 4th defendant filed its defence dated 9th September 2008 together with a counterclaim in which it averred that the plaintiff acted unlawfully and obtained orders by its actions has caused loss to the 4th defendant which he particularised as follows:

- a. Seizing deposits without adequate or any lawful cause: - The plaintiff's actions was prompted and based on speculations and indirect or careless investigations on which no reason existed for the seizure of 4th defendant's funds.
- b. Causing loss of interest on the deposits for FD 5001525/FD/1/2797 Kshs 8,500,000.00 and FD 5001525/FD/1/2820 – Kshs 5,500,000/- and other monies held by the 1st defendant.
- c. Acting unlawfully and inducing other persons to allege that the 4th defendant resources were unlawfully obtained.
- d. Causing loss of business and general damages due to seizure of 4th defendant's financial resources.

124. The 4th defendant therefore counterclaimed for general damages aggravated damages and loss of interest on the deposits from 22nd July 2003.

125. To this counterclaim, it was submitted there was no reply by the plaintiff hence it remains unchallenged. Before the matter could commence for hearing, the plaintiff entered into a consent order with the 1st defendant M/s Giro Commercial Bank wherein the plaintiff compromised its claim against the 1st defendant. Earlier on before the matter had proceeded for hearing, the plaintiff had moved the court exparte and obtained an order dated 14th June 2006 issued by **Justice Hatari Waweru** freezing the accounts of the 2nd, 3rd and 4th defendants. This was a followed by another order issued on the 12th June 2006 and it is on the basis of this order that the plaintiff took hold of the 4th defendant's sum of Kshs **14,000,000/-** held in the 4th defendant's account with M/s Giro Commercial Bank under an FDR 5001525/FD/1/2797. However, the plaintiff in its pleadings lays no stake against this money FDR 5001525/FD/1/2820. It does not state that this money was the proceeds of its allegation against the 4th defendant nor does it adduce any evidence that will give a nexus of this money

with its allegation.

126. The 4th Defendant then proceeded to set out the Plaintiff's evidence. According to the 4th Defendant the gravamen of his case are:

1. Is there a judgment of a competent court in respect of this matter, and if so, was the same appealed? Is the plaintiff entitled to challenge this judgment directly? And if so, was it ever set aside?
2. Was there an order freezing the 4th defendant's accounts?
3. Did the plaintiff comply with the court order? If not is the plaintiff culpable of contempt of court and underserving of the court's audience?
4. Was there inordinate delay in enjoining the 4th defendant and if so does it have any legal impact?
5. Has the plaintiff proved its case on a balance of probability?
6. Was the plaintiff justified in seizing the 4th defendant's deposit with the 1st defendant?
7. Is the 4th defendant entitled to have the sum of Kshs 14,000,000/- refunded to it together with interest from the date of seizure at commercial rates as prayed for in the counterclaim?
8. Did the plaintiff file a reply to the 4th defendant's counterclaim, if not what is the legal implication?
9. Is the 4th defendant's directors entitled to general damages, and if so how much?
10. Is the 4th defendant entitled to the cost of the suit and cost of the counterclaim?

127. It was submitted that it is not in dispute that there is a valid judgment by a competent court arising out of the same facts delivered in Criminal Case number 1343 of 2003 by Chief Magistrate Muchelule as he then was. These issues at hand in that case were that the 4th defendant in concert with the 1st, 2nd and 3rd defendant stole the sum of Kshs 205,000,000/- from the plaintiff who was the complainant. Evidence was adduced and the 2nd, 3rd and 4th defendants placed on their defence. The court after analysing the evidence acquitted the 4th defendant on the grounds that the plaintiff as the complainant had not connected the 4th defendant with the alleged offence. No appeal was filed by the complainant against the acquittal of the 4th defendant hence the judgment still stands to date. In this respect the 4th Defendant cited sections 43 and 44 of the **Evidence Act** Chapter 80 Laws of Kenya and according to the 4th Defendant since the operative word in section 43 is "**any judgment**" it is immaterial whether the judgment is from a civil division or criminal division of the lower court and he relied on **Eagle Star and British Dominions Insurance Co. vs. Heuer 1927**, **Hollington vs. Hewthorn (943) King's Bench 587 -596-7** and a peer-referenced Journal by **J.A Coutts** titled the **Modern Law Review** at page 232 at number 9.

128. It was submitted that it is only in instances where the Civil Litigation does not emanate directly from the criminal proceedings that the resultant judgment in the said criminal case is inadmissible. This proposition is based on the principle of "**inter alios acta nocere non debet**" which meant that the affected person by the judgment should not be victimized in the civil proceedings as if they were different. Reference was also made to **Captain Moses Kariuki Wachira vs. Joseph Mureithi Kanyita & 3 Others Civil Case No. 423 of 2009** and **Trans vs. Alberts (Edmonton Remand Centre) 2002 ABQB658** and it was contended that it is manifestly clear that the issue of culpability of the 4th defendant was directly in issue in the criminal case in which the plaintiff was the sole complainant and a judgment on all the issues raised in this matter delivered by competent court which resulted in an acquittal. The plaintiff is estopped from re-litigating. The general principal of the law is that they should be a finality in litigation. The plaintiff is attempting to re-litigate matters that have been settled by a court of competent jurisdiction. On this ground alone, the Court was urged to dismiss the suit by upholding our submissions that the criminal case judgment dated 4th May 2006 determined the issues herein.

129. It was submitted that from the onset that the plaintiff did not and has never applied to join the 4th defendant in this suit. In the plaint filed on the 20th April 2004, there was no mention of the 4th defendant. It was submitted that by seeking and obtaining orders against the 4th Defendant the Plaintiff violated Article 50(1) of the Constitution and continues to do so to date.

130. According to the 4th Defendant, on the 9th June 2006, **Chief Magistrate Muchelule** (as he then was) had issued an order for the release of the 4th defendant's money. This order was made prior to the plaintiff's obtaining the order dated 14th June 2006. The plaintiff refused to comply with the said order despite being served with the same. The court had ordered the release of the monies belonging to the 4th defendant together with his passport and bank documents. The bank chose to partially comply with the court order and released the passport and the company documents to wit the FDR slips to wit FDR/500525/FB/1/2880, FDR/500/FD/1/2797. For six (6) days from the date of the order by the Chief Magistrate to 14th June 2006 when an exparte order was issued in favour of the plaintiff freezing the 4th defendant's account with M/s Giro Commercial Bank. The plaintiff actively resisted compliance with the court order. It was submitted that a party who shows contempt to court order should not be a beneficiary of the court process until they purge or show reason enough as to why they never complied. The plaintiff has chosen to sweep the issue under the carpet with and hope that it will go away. Accordingly, the plaintiff must be held to account for its blatant disobedience of a court order and this can only be done by refusal to grant them audience and the benefit of a judgment in this matter. They have not cared to give any reason as to why they declined to obey the court order fully.

131. According to the 4th Defendant, being a tort, the suit against the 4th defendant ought to have been brought with the bracket of limitations

which is three (3) years. This was not done yet the original suit was filed in 2004. In this regard reliance was made to the case of **Joseph Nyariki Oguri (Claimant) vs. Kipkebe Estate Limited (Respondent) ELRC No. 111/14 Kisumu**, where **Mbaru J.** had this to say: -

“the law on limitation is intended to protect the defendants against unreasonable delay in bringing of suits against them. The statute expects the intending plaintiff to exercise reasonable diligence and to take reasonable steps in his own interest”

132. To the 4th Defendant, the plaintiff clearly slept on its rights and the court ought to dismiss the claim on this ground alone.

133. It was reiterated that the 4th defendant filed its reply and a counterclaim to the plaintiff's claim and no reply to the 4th defendant's counterclaim which goes further to show that he plaintiff's claim is a mere afterthought not backed by any evidence and ought to be dismissed as it does not establish any justifiable cause of action against the 4th defendant.

134. It was submitted that the Plaintiff has not proven its case against the 4th Defendant on a balance of probability since the plaintiff has continued to rely on unsubstantiated statements against the 4th defendant. According to the 4th Defendant the Plaintiff has failed to prove that there was nexus between the 3rd and 4th defendants; that the 4th defendant did help directly or indirectly the 3rd defendant to open an account with the Giro Commercial Bank; that the 4th defendant was paid monies by the 3rd defendant either by bank transfer or cheque; that the 3rd defendant has implicated the 4th defendant; and that there was a link between the 4th defendant's money and the alleged sum from the Central Bank.

135. It was contended that the Plaintiff's submission that the dates the funds were deposited in the fixed deposit account by the 4th defendant coincided with the dates when payment was made into the 3rd defendant's account from the sale of fraudulently acquired treasury bonds is not only erroneous but also misleading. The sums in issue herein were allegedly paid on 28th January 2003 and the deposits were made on the 25th February 2003 almost a month from the alleged date the money was paid out. The investigating officer Inspector Yegon clearly indicated that during the investigation, they found no links of the deposits of the 4th defendant to the alleged money taken from Central Bank. He also confirmed that the 4th defendant dealt in real estate, was a commission agent and also dealt in Shylock business. It was therefore, not unusual for the 4th defendant to hold such kind of money. It is not enough for the plaintiff to make allegations and expect the court to make a finding on them without proof. In support of this submission the 4th Defendant relied on section 107(1) of the *Evidence Act* as well as the decision of the Court of Appeal at Nairobi in Civil Appeal number 297/2015 between **Mbuthia Macharia vs. Anna Mutua Ndwiga** that:

“the legal burden is the burden of proof which remains constant throughout a trial, it is the burden of establishing the facts and contentions which will support a party's case. If at the conclusion of the trial he has failed to establish these to the approved standard, he will lose. The legal burden of proof normally rests upon the party desiring the court to take action thus a claimant must satisfy the court or tribunal that the conditions which entitle him to an award have been satisfied. In respect of a particular allegation, the burden lies upon the party for whom substantiation of that particular allegation is an essential of his case. There may therefore be separate burdens in a case with separate issues.

136. It was submitted that the plaintiff did not rise to the occasion as required by the law and bring its case within the balance of probability to enable this court to find by its favour. In light of the above submissions, the court was urged to dismiss the plaintiff's claim with costs to the 4th defendant.

137. As regards the counterclaim, it was submitted that upon perusal of the plaintiff's submissions filed herein there has been no mention or submission in respect of the 4th defendant's counterclaim which is for the following: -

- i. Seizing deposits without adequate or any lawful cause. The plaintiff's actions were prompted and based on speculations and indifferent or careless investigations on which no reason existed for seizure of the 4th defendant's funds.
- ii. Causing loss of interest on the deposit FD5001525/FD/1/2797 and other monies held by the 1st defendant.
- iii. Acting unlawfully and inducing other persons to allege that the 4th defendant's resources were unlawfully obtained.
- iv. Causing loss of business and general damages due to seizure of 4th defendant's financial resources.

AND the 4th defendant prays for general damages, aggregated damages and loss of interest on the deposits from 22nd July 2003 up-to payment of the same.

138. It was reiterated that there is no record of a reply to the counter-claim. There is no submissions made in respect of the counterclaim in the plaintiff's submissions and reference was made to Order 7 rule 11 of the *Civil Procedure Rules* which states that:

Any person named in a defence as party to a counterclaim thereby made may unless other or further order is made by the court, deliver a reply within fifteen (15) days after service upon him of the counterclaim and shall serve a copy thereof on all parties to the suit.

139. According to the 4th Defendant, there has been an admission by the plaintiff that he sum of Kshs 14,000,000/- had been seized by the plaintiff. That the said sums were deposited in an interest earning fixed deposit account. According to the 4th Defendant, if the 4th defendant was earning interest at commercial rates todate the 4th defendant would have earned the sum of Kshs 68,531,297.38 in interest from the year

2003 to date. The 4th defendant's funds were then held at the behest of the plaintiff who gave the undertaking. Since the plaintiff has failed to prove the allegations against the 4th defendant, it must be called upon to honour the undertaking and compensate the 4th defendant for the lost interest and for the suffering it caused the 4th defendant which to date would be Kshs 82,531,297.90 calculated as hereunder: -

On the basis of $CF = PV(1+ R)^{No. of years} = 14,000,000.00(1.11)^{17} = 82,531,297.90$

140. As for the interest the 4th Defendant computed it as follows: -

11% = $(1.11)^{17} = 205,000,000.00 \times 5.8950 = 1,208,494,005.20$

141. As for the general damages, the 4th Defendant prayed that this Court awards the sum of Kshs 10,000,000/- and the cost of the counterclaim.

Determinations

142. Having considered the pleadings, the evidence adduced, the issues and the submissions made as well as the authorities relied upon by the parties herein, this is the view I form of the matter.

143. From the evidence placed before this court, it is not in dispute that on 28th January 2003, Treasury Bond for CBA Capital Limited valued at Kshs. 175 million was fraudulently and without knowledge or consent of CBA Capital Limited transferred from its CDS account to the 3rd Defendant's CDS account number 09-30-194819 and that on 3rd April 2003, Treasury Bond for Mumbu Holdings Limited valued at Kshs. 30 million was fraudulently transferred from their CDS account number 09-30-19086-8 to the 3rd Defendant's CDS account number 09-30-19086-8 without the knowledge of the said Mumbu Holdings Limited and without any consideration. Based on the same evidence the 3rd Defendant thereafter instructed Dyer and Blair Investment Bank to sell the said Treasury Bonds and the proceeds therefrom totalling to Kshs. 216,191,750/- was paid into the account of the 3rd Defendant held in Giro Commercial Bank, the 1st Defendant herein, at its Westlands Branch, which was being managed by the 2nd Defendant.

144. It is clear from the evidence that the manner in which the said 3rd Defendant's account was opened was not in compliance with the law in particular the prudential guidelines issued by the Plaintiff in its capacity as a regulator pursuant to the provisions of the **Central Bank of Kenya Act**. Regulation 2 CBK Prudential Regulations for Banking Institutions 2000, provides for the minimum information required for customer identification. For corporate, partnership, sole trader accounts or transactions, Regulation 2.2 requires the following:

a. Certified copy of Certificate of Registration, Certificate of Incorporation, Partnership Deed, Memorandum and Articles of Association or other similar documentation evidencing legal status;

b. Certified copy of Board Resolution stating authority to open accounts, transaction business, and borrow funds, and designating persons having signatory authority thereof;

c. Verified identity and address of the chairman of the board of directors, the managing director, and all principal shareholders for a corporation, or the general partner and at least one limited partner for partnerships, or the principal owner for sole traders, etc.;

d. Audited financial statements (last full year at minimum although, last three years preferred) for corporation; for partnerships, sole traders, unaudited statements may be substituted upon prior written approval of a senior management official of bank; formation statement and PIN registration;

e. Where applicable, written confirmation from the customer's prior bank attesting to customer's identity and history of account relationship.

145. In this case the 2nd Defendant testified that he did not ask for a written confirmation from the 3rd Defendant's prior bank until 6 months after the account was opened. Why did he decide to seek for that information after receiving huge deposit in the 3rd Defendant's account if that information was not necessary for the purposes of opening the account? It is the failure to answer this question that put the 2nd Defendant in a position where he must be deemed to have been aware of the said Regulations but decided to ignore the same. He also testified that they did not have any financial statements from the 3rd Defendant to verify consistency of deposits and withdrawals. On his part, the 3rd Defendant in evidence denied that the letter authorizing the 2nd Defendant to verify information from Barclay Bank of Kenya came from him. Despite these discrepancies, the 2nd Defendant together with one **Mr. Shah Manish** the Assistant Manager of Giro Commercial Bank certified on behalf of the 3rd Defendant that the information provided in the application to open a CDS account were accurate and independently confirmed by the 2nd Defendant.

146. Apart from the discrepancies in the procedure for opening the account, following the receipts of the proceeds of the sale of the said Treasury Bonds, the 3rd Defendant proceeded to operate his account in a rather unusual and suspicious manner. That the 2nd Defendant's eyebrows were never raised leaves a lot to be desired unless the 2nd Defendant deliberately decided to turn a blind eye to patently unusual manner of operating the account. Contrary to the history of the account, Giro Commercial Bank, the 1st Defendant herein, on 7th February 2003 received a credit of Kshs. 95,420,160/- by way of transfer by order of Dyer & Blair Investment Bank through Stanbic Bank in favour of the 3rd Defendant purportedly being proceeds from the sale of Treasury Bonds; the 3rd Defendant thereafter proceeded to withdraw Kshs. 16.5 million in cash, pay Kshs. 41,539 million by five separate bankers' cheques to Fina Bank Limited, pay Kshs. 8 million by bankers'

cheque to Paramount Universal Bank Limited, pay Kshs. 1.848 million by two bankers' cheques to Blue Sea Forex Bureau and pay Kshs. 924,000/- by bankers' cheques to Travellers Forex Bureau. As a result of these transactions, within 7 days the balance on the account had been reduced to Kshs. 755,174/-. Again on 24th February 2003, the account of the 3rd Defendant was credited with Kshs. 90,140,460/- being a transfer by Dyer & Blair on behalf of the 3rd Defendant in respect of the sale of Treasury Bonds through Stanbic Bank Limited from which sum Kshs. 6,540,000/- was withdrawn in cash, Kshs. 50 million was paid to Fina Bank Limited by bankers' cheque, Kshs. 1,540,000/- was paid by bankers' cheque to Travellers Forex Bureau, Kshs. 13,537,000 was paid by a series of bankers' cheques to Paramount Universal Bank Limited and Kshs. 15 million was paid into a fixed deposit account in the name of the 4th Defendant in an account domiciled in Giro Commercial Bank, Westlands Branch. On 16th April 2003, a sum of Kshs. 30,631,680/ was credited into the 3rd Defendant's account on instructions by Dyer & Blair through Credit Agricole Indosuez and the said account was similarly withdrawn between 16th to 29th April 2003.

147. I agree with the Plaintiff that the manner in which the funds were received and dealt with by Giro Commercial Bank through its Westlands Branch under the management of the 2nd Defendant left no doubt that there was a conspiracy between the 2nd Defendant and the 3rd Defendant following the irregular opening of an account by the 3rd Defendant at the 1st Defendant's Westlands Branch, which was under the management of the 2nd Defendant.

148. In opening the account, the 3rd Defendant was described as being in horticulture business. However, the monies being credited into the account were not coming from the said horticultural business but were from stockbroking. While there is nothing unlawful about one being in business and also trading in stocks, the manner in which the subject account was being operated ought to have raised a red flag on the part of the 2nd Defendant who, if prudent, ought to have made inquiries as to whether the said credits were genuine. By failing to do so, one can only conclude that the 2nd Defendant was part of the conspiracy to launder the said fraudulently obtained sums of money and facilitate their being paid out to various avenues. In **Katende vs. Haridas and Company Limited [2008] 2 EA 173**, it was held that:

“Fraud can be participatory which means the party participates in fraudulent dealings. However, fraud can be imputed on a person, that is when he or she was aware of the fraud and condoned it, or benefited from it or used it to deprive another person of his rights. In short all those who actually participate in the fraudulent transaction and who had knowledge of it are privy and have notice of fraud.”

149. In **Silayo vs. CRDB (1966) Ltd [2002] 1 EA 288**, it was held that:

“In civil action where fraud or other matter is or may be a crime is alleged against a party or against persons to the action, the standard to be applied is that applicable in civil actions generally, namely, proof on the balance of probability, and not the higher proof of beyond all reasonable doubt required in criminal matters...The elements of gravity of an issue are part of the range of circumstances which have to be weighed when deciding as to the balance of probabilities.”

150. In this case the circumstances were such that an ordinary banker would have had his antenna raised considering the manner in which the said account was being operated and as was held in **Standard Chartered Bank Kenya Limited vs. Intercom Services Limited & 4 Others [2004] 2 KLR 183**:

“The standard of care required is that to be derived from ordinary practice of bankers not individuals.”

151. Although the principle of confidentiality applies between a banker and his customer, as was held in **Standard Chartered Bank Kenya Limited vs. Intercom Services Limited & 4 Others** (ibid):

Whereas the bank has an implied legal duty arising from the contract between it and its customer to abstain from disclosing information as to the customer's affairs without his consent, there is no privilege from disclosure and the bank may disclose the customers account and affairs to an extent reasonable and proper for its own protection, as in collecting or suing for an overdraft; or to an extent reasonable and proper for carrying on business of the account as in giving a reason for declining to honour the cheques drawn on bills accepted by the customer, where there are insufficient assets; or when ordered to answer questions in the law courts or to prevent frauds or crimes...The onus of establishing circumstances showing absence of negligence is on the banker and it is a matter of defence, and does not give a substantive cause of action and the extent of inquiry must be measured by what in the circumstances a fair minded banker paying due regard to the exigencies of banking business in relation to the person depositing the cheque would consider it prudent to do in order to protect the interest of the true owner and each case must depend on its own circumstances”

152. Not only was the 2nd Defendant expected as a matter of prudence to raise a red flag on the manner in which the account was being operated, but the said ***Prudential Regulations*** required him to be on notice in such circumstances since, under Regulation 4.1, one of the occurrence of a suspicious activity is where:

“Account activity (e.g. large, frequent or unusual deposits, withdrawals, payments or exchanges of cash, foreign currency or negotiable instruments) which is not consistent with or reasonably related to the customer's normal business activities or financial standing;”

153. This account was clearly one such account. Regulation 5 of the ***Prudential Regulations*** provides that such suspicious activities or transactions should be reported. Therefore, I agree taking into account that the 3rd Defendant had declared while opening the account that he was in horticultural business, huge funds from a stockbroker should have raised a red flag. Further taking into account the history of the account, such a huge transfer should have raised suspicion. Despite this, the 2nd Defendant as the manager who was in control of the account

did not raise a red flag or make any report on the suspicious activity on the 3rd Defendant's account. A perusal of the email correspondence between the 2nd Defendant and one **Mr. Ashok Patel** shows that the 2nd Defendant was indeed involved in the fraudulent scheme. In his statement under inquiry recorded on 5th July 2003 which the criminal court ruled as admissible, the 2nd Defendant admits that he was involved in the fraudulent scheme that was orchestrated by the 3rd Defendant. While he was acquitted therein, that does not necessarily mean that he cannot be found liable in civil proceedings arising from the same transaction since the burden of proof in criminal proceedings is necessarily higher than in civil proceedings. While that statement may not necessarily be used against the 4th Defendant herein, it is my view that it is certainly admissible as against the 2nd Defendant. As was held in **R.G Patel v. Lalji Makani, [1957] E.A 314:**

“All allegations of fraud must be strictly proved, although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required.”

154. Regarding the 3rd Defendant's liability, it is clear that he *orchestrated, whether on his own or through the influence of others, a fraud sometime in 2003 whereby he* falsely and fraudulently procured Treasury Bonds Issue No. FXT 2/2002/2 valued at Kshs. 175 million and FXD 1/2-02/4 valued at Kshs. 30 million in the names of CBA Capital Limited and Mumbu Holdings Limited respectively and transferred the same to a CDS account opened by himself. Thereafter, instructions were issued on his behalf to Dyer and Blair Investment Bank to sell the said treasury bonds and the funds received from the sale of the Treasury Bonds were paid through an account opened by him at the 1st Defendant Bank. Following the receipts of the proceeds of the sale of the Treasury Bonds aforesaid, in collusion with the 2nd Defendant, the 3rd Defendant to operate his account in a manner which left no doubt that the 2nd Defendant fraudulently assisted him, in defrauding the Plaintiff of the proceeds of the sale of the Treasury Bonds and eventual transfer of the said the said proceeds to various accounts and persons including himself.

155. The 3rd Defendant was charged alongside the 2nd Defendant and **John Mwangi** (the 4th Defendant's director) in Criminal Case No. 1343 of 2003 with the offence of forgery contrary to section 349 of the **Penal Code** and stealing contrary to section 349 of the **Penal Code** and he was found guilty on all counts and sentenced to a jail term of 3 years. Accordingly, the finding of guilt by the criminal court of the 3rd Defendant is *ipso facto* evidence that the 3rd Defendant is liable for the fraudulent acts which led to the loss of Kshs. 205 million by the Plaintiff.

156. As for the case against the 4th Defendant apart from mere suspicion and the 2nd Defendant's inadmissible evidence against the 4th defendant in these proceedings, none of the witnesses called in this case has testified as to the evidence directly linking him to the loss of the proceeds of the said Treasury Bonds. He has explained the sources of his money deposited with the 1st Defendant and based thereon, I am satisfied that on a balance of probability the Plaintiff's case against him does not meet the threshold required to prove a case in civil proceedings. As was held by **Kimaru, J** in **William Kabogo Gitau vs. George Thuo & 2 Others** [2010] 1 KLR 526 stated that:

“In ordinary civil cases, a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely than not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred.”

157. Similarly, in **Palace Investment Ltd vs. Geoffrey Kariuki Mwenda & Another (2015) eKLR**, the Court of Appeal expressed itself as hereunder:

“Denning J. in Miller Vs Minister of Pensions (1947) 2 ALL ER 372 discussing the burden of proof had this to say;-

“That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say; we think it more probable than not; the burden is discharged, but if the probability are equal it is not. This burden on a balance of preponderance of probabilities means a win, however narrow. A draw is not enough. So in any case in which a tribunal cannot decide one way or the other which evidence to accept, where both parties...are equally (un)convincing, the party bearing the burden of proof will loose, because the requisite standard will not have been attained.”

158. In **Evans Nyakwana vs. Cleophas Bwana Ongaro (2015) eKLR** it was similarly held that:

“As a general proposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of Section 107(i) of the Evidence Act, Chapter 80 Laws of Kenya. Furthermore the evidential burden ... is cast upon any party, the burden of proving any particular fact which he desires the court to believe in its existence. That is captured in Section 109 and 112 of law that proof of that fact shall lie on any particular person...The appellant did not discharge that burden and as Section 108 of the Evidence Act provides the burden lies in that person who would fail if no evidence at all were given as either side.”

159. **Ringera, J** (as he then was) in **Gandhi Brothers vs. H K Njage T/A H K Enterprises Nairobi (Milimani) HCCC No. 1330 of 2001**, cited section 3 of the **Evidence Act** Cap. 80 Laws of Kenya that a fact is not proved if it is neither proved nor disproved. It is therefore not proved.

160. It would seem that the case against the 4th Defendant is based merely on suspicion but as was held in **Mususa vs. Dhanani [2001] 2 EA 471:**

“Mere suspicion is not enough, there must be circumstances incompatible with honest dealing and fraudulent conduct must be distinctly alleged and distinctly proved and it is not allowable to leave fraud to be inferred from facts.”

161. Having considered the material placed before me in this case, whereas I find that the Plaintiff has failed to prove its case against the 4th Defendant, it has proved its claim against the 2nd and 3rd Defendants. Accordingly, I make the following orders:

a. I declare that the 2nd and 3rd Defendants are liable for the loss suffered by the Plaintiff.

b. I enter judgement jointly and severally against the 2nd and 3rd Defendants in the sum of Kshs. 205 million for their separate involvement in the fraudulent acquisition and transfer of the proceeds from Treasury Bonds rightfully belonging to the Plaintiff. It follows that the 2nd Defendant’s counterclaim fails and is dismissed.

c. I award the plaintiff interest at bank rates from the date of payment of the said amount until payment in full.

d. I also award the Plaintiff the costs of the suit.

162. As regards the suit against the 4th Defendant, the same is hereby dismissed. In its counterclaim, the 4th Defendant only claimed general damages, aggravated damage and loss of interest on the deposit from 22nd July, 2003. In **Obongo and Another vs.. Municipal Council of Kisumu [1971] EA 91**, it was held that:

“It is well established that when damages are at large and a court is making a general award, it may take into account factors such as malice or arrogance on the part of the defendant and this is regarded as increasing the injury suffered by the plaintiff, as, for example, by causing him humiliation or distress. Damages enhanced on account of such aggravation are regarded as still being essentially compensatory in nature.”

163. In this case no evidence was led to prove that the Plaintiff’s action was malicious or was arrogant. The Plaintiff seems to have acted on the statement made by the 2nd Defendant which implicated the 4th Defendant. It therefore acted reasonably though erroneously in the circumstances. As for general damages, the Court of Appeal in **Jimi Masege vs. Kenya Airways Limited [2010] 1 KLR 27** held that in law there can be no general damages for breach of contract. See also **Dharamshi vs. Karsan [1974] EA 41**. As for the claim for loss of interest on the deposit, apart from a bare claim, no basis was set in the pleading for seeking the same. Apart from that, no evidence was led in evidence to support the claim that any interests was due, the applicable rate of such interest and how much it was. That was the position adopted by **Makhandia, J** (as he then was) in **Mununga Tea Factory Ltd vs. Ephantus Munyi Gichimu Nyeri HCCA No. 82 of 2004**, in which he held that:

“Even if the respondent had been entitled to damages, the amount awarded was arbitrary. It seems like the learned Magistrate merely plucked a figure from the air and planted it on the appellant. There was no factual basis or evidence adduced by the respondents upon which appropriate damages awardable in the circumstances would have been considered.”

164. Loss of interest in my view is a species of loss of income and as was held by the Court of Appeal in **Mumias Sugar Company Limited vs. Francis Wanalo [2007] 2 KLR 74**, this type of claim (loss of future earnings) could be a claim on its own and the figure need not be plucked from the air because the plaintiff would be expected to furnish the material on which a reasonable figure would be based.

165. Accordingly, that claim being unsupported by both pleadings and evidence cannot succeed. In the premises the 4th Defendant’s counterclaim fails and is dismissed.

166. Those shall be the orders of this court.

167. It is so ordered.

Judgement read, signed and delivered in open Court at Machakos this 18th day of December, 2019.

G. V. ODUNGA

JUDGE

In the presence of:

Mr Rabut for Mr Chacha Odera for the Plaintiff

Ms Wafula for Mr Billing for the 2nd Defendant

Mr Alex Rebiro the 3rd Defendant in person

Miss Bitok for Mr Maina for the 4th Defendant

