



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL AND TAX DIVISION

CIVIL SUIT NO. 543 OF 2003

EUROCRAFT AGENCIES LIMITED.....PLAINTIFF

VERSUS

TRADEWINDS EXPRESS LIMITED.....1ST DEFENDANT

BARRY MICHAEL TOMLINSON.....2ND DEFENDANT

JUDGMENT

1. The Plaintiff EUROCRAFT AGENCIES LIMITED was incorporated on 6th October 1993, with the principal objective of carrying on the business of provision of Aircraft Ground Handling Services.
2. The 1st Defendant, TRADEWINDS EXPRESS LIMITED held 7,500 shares, whilst the 2nd Defendant, BARRY MICHAEL TOMLINSON held 2,500 shares, in the Plaintiff.
3. By an Agreement dated 1st March 1995 the Plaintiff entered into a Contract with KENYA AIRPORTS AUTHORITY, pursuant to which the Plaintiff was granted a concession which enable it to conduct Ground Handling Services including Portage and Baggage Handling.
4. It is common ground that as at 1st March 1995, the 1st Defendant, (**hereinafter “Tradewinds”**) were already serving several airlines as their agent for Ground Handling Services.
5. Therefore, as the Plaintiff stated in paragraph 11 of the Complaint, it approached Tradewinds which had the necessary resources and equipment to fully and effectually undertake the Plaintiff’s obligations under the Concession Agreement.
6. On the other hand, Tradewinds had the resources and equipment, but did not have a Ground Handling Licence.
7. Therefore, the Plaintiff and the 1st Defendant entered into an agreement which would be mutually beneficial to them.
8. As stated in paragraph 11 of the Complaint, Tradewinds did agree to hire their equipment to the Plaintiff (**EUROCRAFT**).
9. It was the Plaintiff’s case that the parties were to agree from time to time, on the costs at which Eurocraft was to hire the equipment from Tradewinds.
10. It was the Plaintiff’s further case that on 3rd November 1995, BARRY MICHAEL TOMLINSON (**Barry**) informed the Board of Directors of Eurocraft that Tradewinds was charging Kshs 800,000/= monthly for the equipment it was hiring to Eurocraft. Eurocraft Board of Directors approved that rate.
11. However, at a meeting held on 11th March 1996, Barry is said to have offered to reduce the hire charges for the equipment, to a maximum of Kshs 400,000/= with effect from the end of February 1996.
12. As far as the Plaintiff was concerned, the minutes of the Meeting held on 11th March 1996, formed a written Contract in relation to the rate at which Tradewinds was to charge Eurocraft, in respect to the hire of equipment.
13. But the Defendants’ position was that the minutes which allegedly constituted an Agreement between Eurocraft and Tradewinds, cannot

have been an agreement between those two Companies, as Tradewinds did not attend the meeting in question.

14. It is common ground that the meeting held on 11th March 1996 was a meeting of the Board of Directors of Eurocraft Agencies Limited. The meeting did not bring together the Directors of 2 separate Companies.

15. Therefore, in a strict sense, Tradewinds was not a party to the discussions or the resolutions which were passed at that Board meeting.

16. But it is also common ground that Barry Tomlinson was the Managing Director of both Tradewinds and Eurocraft as at 11th March 1996.

17. On the issue of equipment, and in particular on the question of the hire charges, the minute No. 3 reads as follows:-

“Mr. Tomlinson did, however, offer to reduce the hire charges of the equipment from TEL from Kshs. 800,000/= to a maximum of Kshs. 400,000/= with effect from the end of February 1996 and subject to fluctuations in the volume of business. In addition, Mr. Tomlinson offered EAL the use of any of the other equipment belonging to TEL that it may require. The Board welcomed this timely and attractive offer on reduce hire charges and thanked Mr. Tomlinson”.

18. Earlier, within the same minutes “EAL” was clearly stated to be the abbreviation for Eurocraft Agencies Limited, whilst “TEL” was the abbreviation for Tradewinds Express Limited.

19. It therefore follows that Barry was offering to reduce the hire charges which Tradewinds was charging Eurocraft.

20. Nonetheless, Tradewinds submitted that Barry did not represent it at the Board meeting of Eurocraft.

21. On the other hand, Eurocraft insists that at its Board Meeting on 11th March 1996, Barry acted as the agent of Tradewinds.

22. I find that in the minutes of that meeting there is absolutely no mention of the alleged agency.

23. But it also cannot be overlooked that, in fact, Barry was the Managing Director of Tradewinds at the material time.

24. I understand the Plaintiff to be saying that because Barry made an offer to Eurocraft, and because Eurocraft accepted the offer, that constituted a Contract.

25. If the Managing Director of Tradewinds could make an informal verbal offer on behalf of his Company, it would follow that the Managing Director of Eurocraft could similarly make informal verbal offers to Tradewinds.

26. Quoting from Halsbury’s Laws of England, 4th Edition, at paragraph 674, the Plaintiff urged me to note the following,

“Although the Courts will not make a Contract for the parties where none exists, they will seek to uphold bargains made between businessmen wherever possible, recognizing that they often record the most important agreement in crude and summary fashion, and will seek to construe any documents fairly and broadly, without being too astute or subtle in finding defects. If satisfied that there was an ascertainable and determinable intention to contract, the Courts will strive to give effect to the intention looking at the substance and not at the mere form,,,,, This is particularly the case where there is evidence that the parties acted in good faith that certain terms constitute a Contract between them”.

27. In so far as the Plaintiff was concerned, the terms of minutes of the meeting held on 11th March 1996 contain an ascertainable and determinable intention to contract.

28. Whilst I appreciate the fact that Eurocraft expressed the view that the offer to reduce the hire charges was attractive, and was therefore welcome, I did not find any express acceptance of the said offer.

29. It is to be noted that during the meeting in issue, the Board of Directors passed a **Resolution** to shelve its earlier decision to obtain a loan, which was for use to purchase equipment.

30. The Board also **agreed** with the recommendation to maintain flexibility on the issue of the salary to be paid to the full-time Accountant.

31. In relation to the discussion regarding **Equipment**, the only Board Resolution was;

“.....to authorize the Management to spend up to Kshs 3.3 Million AND THAT a further Kshs 5 million be authorized in principle for a hiloader and pushback if and when these funds are available”.

32. The Board also passed a specific resolution in relation to the preparation of audited Accounts.

33. It is therefore arguable that in the absence of a specific Board Resolution, to accept the offer for the reduction of the Hire Charges, the offer was not accepted.

34. But when again, if Barry did make the offer, and if the Board welcomed it, would that not imply that the offer was accepted? There is no easy and straightforward answer to that question.

35. Whilst it is correct that when minutes of Board Meetings have been dully signed by the Chairman of that meeting, the minutes constitute evidence of what transpired at that meeting, I do not share the Plaintiff's contention that the minutes in issue, show that;-

“...the 2nd Defendant played a dual role...”

36. Nowhere in the minutes is it stated that the 2nd Defendant played a dual role at that Board meeting.

37. I reiterate that the meeting was of the Board of Directors of Eurocraft, and that therefore Tradewinds was not a party to the decisions made by Eurocraft.

38. Even in the minutes of the 3rd November 1995, which the Plaintiff Credits with the resolution or deliberations which gave rise to the agreement that Tradewinds would charge Eurocraft Kshs. 800,000/= as hire charges, there was an express Resolution.

39. All the more reasons why I find that on 11th March 1996, there was no resolution to have the hire charges reduced from Kshs. 800,000/= to a sum not exceeding Kshs. 400,000/= monthly.

40. The plaintiff had asserted that Barry was in a position to make or to influence decisions in Eurocraft without any reference, regard or consultation with the other Directors of Eurocraft.

41. The said position is said to have arisen from the fact that Barry was the Managing Director of both Eurocraft and Tradewinds.

42. Barry is said to have manipulated or caused to be manipulated, the Plaintiff's financial position, thus enabling Tradewinds to earn money for the alleged hire of equipment and also for services which were allegedly rendered to Eurocraft by Tradewinds.

43. Tradewinds are said to have raised various arbitrary and fictitious invoices, as a result of the manipulation of the accounting position between Tradewinds and Eurocraft.

44. Whereas the Managing Director of both Eurocraft and Tradewinds may have been in a position to influence the decisions made by both Companies, it has not been demonstrated that Barry did so, without any reference, regard or consultation with the other Directors of Eurocraft. If anything, Barry has consistently said that either he or Mark Tomlinson always held discussions and consultations with Clement Kusinyi.

45. The allegation that Barry had manipulated or caused to be manipulated the financial position of Eurocraft, is a very serious matter. I say so because the acts complained about constitute fraud. I so find because a person who fiddles around with accounts, so that his Company receives money for services which the Company had not rendered, would be defrauding the person or company which made such payments.

46. I have found no evidence of the alleged manipulation by Barry. And the Plaintiff did not specify the alleged **“fictitious invoices”** or **“arbitrary invoices”** which had been raised by Tradewinds, as a result of manipulation of Eurocraft's accounting position.

47. **PW1, MRS JANE NJERI MAINA**, testified that she is the person who conceptualized the incorporation of the Plaintiff, and that she did so when the Ground Handling business was being liberalized in Kenya.

48. **PW1** had known from the beginning that Barry was a Director and a Shareholder in Tradewinds.

49. Indeed, it was because the 1st Defendant was already carrying on the kind of business which the Plaintiff was venturing into, that it was deemed prudent to engage Tradewinds, as that Company was in a position to actualize the intentions of Eurocraft.

50. This is how Jane (**PW1**) described Barry;-

“He was one of the most organized and meticulous Ground Handling Services. I respected him”.

According to Jane, Barry;

“....looked organized and efficient. He was meticulous in sorting out bills. He was punctual in settling bills. He would come to my office to pay. We never followed him up”.

Those are the attributes which persuaded Jane to seek out Barry.

51. Jane could not become either a Subscriber or a Director of Eurocraft at the initial stages because she was working for Kenya Aerotech Limited, which was then the only Ground Handling Agency in Kenya. As she stated, if she had openly joined Eurocraft at its inception, there would have been a conflict of interest as her employer was engaged in the same business as Eurocraft.

52. That is why she only became a Shareholder on 30th May 1996. Later, in 1998 she became a Director of Eurocraft.

53. It was the testimony of Jane that the 2 Directors who handled the day to day matters of Eurocraft were Kusinyi and Barry Tomlinson.

Thereafter, those 2 Directors gave Reports to the Directors, from time to time.

54. But Jane also made it clear that at the meetings of the Board of Directors of Eurocraft, Barry had only one vote.

55. In the circumstances, as Barry and Kusinyi handled the day to day matters for Eurocraft, and then reported to the other Directors, I find that Kusinyi was in a position to know the happenings in Eurocraft.

56. That is even more so when it is considered that, by the evaluation of Jane, Mr. Kusinyi had considerable experience in Ground Handling.

57. PW2, CLEMENT WANDERA KUSINYI testified that from the date when Eurocraft started operations, he was the Director in-charge of operations. He served in that capacity until he was appointed as the Managing Director in July 2002.

58. He explained that Barry always worked from the offices of Tradewinds; and never worked at the offices of Eurocraft. Therefore, in a literal sense, Barry could not interfere with the work being carried out at the offices of Eurocraft.

59. Mr. Kusinyi confirmed that he is the person who presented Eurocraft's Management Reports to the Board of Directors. However, he explained that he did not understand the contents of the said Reports.

60. It is common ground that the Board of Directors passed Resolutions adopting the Company's Audited Accounts.

61. There is no evidence that Barry or Tradewinds either prepared the Management Reports and the Audited Reports, or that any of the Defendants had manipulated the said Reports.

62. When Mr. Kusinyi was asked about the nature of the problems or errors which were allegedly in the Reports, he said that it was only Mr. Anthony Ndungu, who was able to provide the said explanations. Mr. Ndungu was an Accountant at Eurocraft.

63. Apparently, the anomalies about which Eurocraft was complaining, only came to light after an Independent Audit which had been conducted by the firm of **KAMAU & AWUONDO CERTIFIED PUBLIC ACCOUNTANTS**.

64. Prior to that, Ms. Elizabeth Nyaga had found some shortcomings, which she then placed before the Board of Directors of Eurocraft. Presumably, it is then that the Board engaged Kamau & Awuondo Certified Public Accountants to conduct an independent audit.

65. Regrettably, however, Elizabeth Nyaga declined to give evidence, allegedly because of her religious beliefs.

66. And when Mr. Kusinyi was asked if the Report of Kamau & Awuondo Certified Public Accountants supported the Plaintiff's claim for Kshs. 76 Million, his answer was in the negative. He said that the firm of Auditors had made the point that they were unable to get the documents which they needed.

67. It therefore follows that the Independent Auditors who had been hired by the Plaintiff did not provide evidence which could advance the Plaintiff's case.

68. At a meeting of the Plaintiff's Board of Directors, on 25th October 2001, KPMG PEAT MARWICK were in attendance, and they presented the Audited Accounts as at 31st October 2000.

69. Mr. Kusinyi testified that the Directors had an opportunity to question the Accounts, and that the Directors were not compelled to approve the Accounts. Nonetheless, the Directors approved the Audited Reports.

70. However, at a later date, the Plaintiff allegedly became aware that there were problems with the Audited Reports which they had approved.

71. But the Plaintiff did not lodge any complaints directed against KPMG PEAT MARWICK.

72. I am unable to understand why the Plaintiff made a decision to challenge Barry, instead of the professionals whom they had hired, and whom they later found to have been preparing inaccurate Reports.

73. I find no evidence that the Defendants manipulated or caused to be manipulated the Plaintiff's accounting position.

74. PW3 ANTONEY NDUNGU, was the Plaintiff's FINANCE MANAGER. He joined the Plaintiff in January 2010, which is almost 10 years after the suit was filed in Court.

75. PW3 was a Certified Public Accountant. He testified that the Board of Directors of Eurocraft had given him instructions to confirm the computation and justification for the Plaintiff's claim of Kshs. 76,509,743/55, against the Defendants.

76. He delved into the Plaintiff's Books of Accounts; Invoices and the supporting documents. Ultimately, he came to the conclusion that the Plaintiff was justified to claim Kshs 67,209,743/7.

77. In the circumstances, when the Plaintiff reached the conclusion that it had made out a case for the recovery of Kshs 76,509,743.55, the said conclusion is at variance with the evidence of PW3.

78. PW3 STATED, IN HIS Witness Statement that from the end of February 1996, there was an agreement that Tradewinds would charge no more than Kshs. 400,000/= per month, for the equipment which they were hiring to Eurocraft.

79. Therefore, he listed 8 invoices, dating from October 1999 up to May 2000, in which the sums exceeded Kshs. 400,000/=.

80. After adding up all the amounts which were in excess Kshs 400,000/= monthly, PW3 arrived at a total of Kshs 10,163,282/86. To that sum he added Kshs 13,850,730/= which were in relation to invoices for October 1997 and September 1998. The total added up to Kshs 24,014,012.86.

81. As I have already held herein, there is no evidence that Tradewinds and Eurocraft had an agreement pursuant to which the hire charges would be reduced from Kshs. 800,000/= to a maximum of Kshs. 400,000/= monthly.

82. In any event, PW3 explained that the Board of Directors had approved the Audited Accounts of Tradewinds. The said accounts had been prepared by KPMG PEAT MARWICK, who the witness described as being reputable.

83. In his experience, PW3 said that he had never come across situations in which audited accounts were challenged. But he was aware that queries could arise post audit.

84. In this case, PW3 testified that it was the Plaintiff who believed that there were some matters which needed to be corrected. The said corrections were to be effected for the period between 1994 and 2000.

85. According to PW3, the Financial Statements of Eurocraft had been reviewed by the Finance Manager, Elizabeth Hinga.

86. It was the said Ms. Hinga who had found questionable entries in the books, and she prepared a Report. Although PW3 had seen the Report, the same was not made available to the Court.

87. As Elizabeth Hinga was the person who was thereafter involved in the preparation of the Plaintiff's Bundle of Documents, I hold the view that her testimony would have been of great importance to the Court, in understanding how the Plaintiff's case was put together.

88. I say so because whilst the Plaintiff's claim is said to be in relation to the period between 1994 and 2000, PW3 testified that he had not seen any invoices pre-dating the year 1997. Therefore, the witness would be unable to speak authoritatively about matters pre-dating 1997.

89. I also note that according to PW3, the claim for Kshs 13,850,730/= (arising from the invoices dated 31/10/97 and 30/9/98) had been referred to the Board, after a dispute arose. However, the Board of Directors failed to resolve the said dispute.

90. Considering that that claim arose from an unresolved dispute, I hold the view that it cannot therefore be deemed as having been proved by the Plaintiff.

91. The reasoning of PW3 was that Tradewinds had fabricated the claims for Kshs 13,850,730/=. It was said that Tradewinds had been paid Kshs 400,000/= monthly, in accordance with the agreement on Hire Charges. But PW3 expressed the view that Tradewinds later raised further invoices at the end of the year.

92. When PW3 was asked to indicate the documents which reflected the monthly payments of Kshs 400,000/=: he said that the documents do not show proof of the sum of Kshs 400,000/= monthly.

93. In the circumstances, the explanation given by the witness does not hold water, as it lacks a demonstrable foundation.

94. I also note that PW3 only interviewed Ms. Elizabeth Hinga of Eurocraft, when he wanted to obtain information that would enable him formulate an independent opinion.

95. PW3 did not interview KPMG, who had been the Plaintiff's Auditors for several years. Nonetheless, PW3 expressed the view that the audited records prepared by KPMG did not reflect the correct position.

96. In my considered opinion, when the witness made a choice to interview a person who had formed an opinion favourable to the Plaintiff, but he failed to interview the Auditors who had prepared Audit Reports that had been approved by the Plaintiff's Board of Directors, PW3 was unable to arrive at an objective and balanced opinion.

97. It is also noteworthy that the Plaintiff had three different sets of figures. The first one was in the Report prepared by KAMAU & AWUONDO CERTIFIED PUBLIC ACCOUNTANT OF KENYA, which concluded that the Accountants were unable to form an opinion on whether Tradewinds was unjustly enriched from its transaction with Eurocraft.

98. The second set of figures was put together by Elizabeth Hinga, and they formed the basis of the claims in the Plaintiff. The third set of figures was put together by Antony Ndungu (PW3).

99. In the light of the 3 different sets of figures which were prepared by the Plaintiff, it is not possible for the Court to make a reasoned ascertainment as to which is accurate. The figures have kept on varying, and reasons have been given by the Plaintiff, for the said variations.

100. As the last such variation was made long after the suit was filed, and because the said variation cast shadows of doubt on the 2 earlier Reports, the Court finds that the Plaintiff has not proved the claims in the Plaintiff.

101. Both Mr. Kusinyi and Barry were involved in the actual preparations of the invoices which Tradewinds raised. Kusinyi testified that Tradewinds operated from the Oserian Building whilst Eurocraft operated at the air-side i.e. the area where planes were parked. He added that Barry never worked at the offices of Eurocraft.

102. Meanwhile, Mr. Kusinyi was practically in charge of operations. Therefore, he was best placed to know the services which were rendered by Tradewinds to Eurocraft. He was also well-placed to know the equipment which Tradewinds hired out to Eurocraft; as well as the identity of persons employed by either Tradewinds or by Eurocraft.

103. He should therefore have been the right witness to give particulars of such things as invoices that were raised in respect of no services. Curiously, however, Mr. Kusinyi said that the person who would provide those particulars was Antony Ndungu, a person who joined Eurocraft many years after the matters in issue had allegedly taken place.

104. By a letter dated 15th April, 2002 Eurocraft told Barry that he should not have been asking Eurocraft why the Plaintiff's Directors had not raised any issues concerning Kshs 13.8 million. The letter went on to say;-

“It is for the Auditors to explain why they never raised any Management Letters since the inception of the Company”.

Notwithstanding the said view, Eurocraft failed to take action against the Auditors.

105. Surely, if Barry and Tradewinds were manipulating the Accounts of Eurocraft, that is something which the Auditors ought to have picked up. Yet, the Auditors do not seem to have picked up any such misdeeds.

106. The Board of Directors of Eurocraft also adopted the Audited Accounts, without picking up the alleged misdeeds. Instead, the Board approved the Accounts.

107. If I were to find the Defendants liable, it would be akin to condemning the Auditors who had prepared the Reports, as such Reports would have to be discarded. That is all the more reasons why the Plaintiff should have, at least, engaged the Auditors at the stage when the Plaintiff was reviewing its financial records. By failing to engage the Auditors, whose audited Reports they were disputing, the Plaintiff cannot now fault the said Auditors.

108. CHRISPINE OMOGA OKOTH (DW2) testified that he was an employee of Eurocraft, at the material time. Although the Plaintiff had alluded to the fact that DW2 was actually not its employee, that issue was not taken up when the witness was being cross-examined.

109. Mr. Kusinyi had, earlier, also testified that Okoth was an Accountant, employed by Eurocraft. According to DW2, Eurocraft had Clement Kusinyi as a compulsory signatory to all the Company's cheques. It is Okoth who told a meeting of a sub-committee of Eurocraft (at a meeting held on 1st November 2001) that:-

“.....the charges of Kshs 12,107,682/= and 13,850,730/= were included in the Eurocraft Accounts without any approval. After some lengthy discussions, it was resolved that this matter be referred to the Board”.

110. However, Okoth also explained that in 2002, Kusinyi told him that the Board wanted the invoices for Kshs. 13 million reversed. His evidence was that the invoices relating to the Hire of equipment had been signed by Mr. Kusinyi, thus signifying Eurocraft's approval for maintenance.

111. When Okoth declined to reverse the invoices for Kshs 13 million, his services at Eurocraft was terminated. If, as Okoth said, the relevant invoices bore the signature of Mr. Kusinyi, that would constitute the approval by the said Mr. Kusinyi.

112. The Plaintiff has emphasized the distinction between the respective legal personalities, rights and liabilities of a company and those of its shareholders. To back up its submission on that aspect, the Plaintiff cited the following words of Lord Halsbury LC in the case of **SALOMON vs SALOMON AND COMPANY LIMITED** (1859-59) ALL ER E.R 30;-

“It seems to me impossible to dispute that once the Company is legally incorporated it must be treated like any independent person with its rights and liabilities appropriate to itself, and that the motives of those who took part in the promotion of the Company are absolutely irrelevant in discussing what those rights and liabilities are”.

For that reason, the Plaintiff reasoned that Barry was precluded from charging any management fees against the Plaintiff.

113. The Defendants' answer was that Tradewinds was right to have charged Management fees because it offered actual services to Eurocraft. It was the 1st Defendant's case that it provided the Plaintiff with a functional office, with all complimentary facilities.

114. However, it appears that it is Barry who claimed the Management fees. It is for that reasons that the Plaintiff sought to emphasize the distinction between Tradewinds and Barry.

115. In the minutes of the Board Meeting held by Eurocraft on 3rd November 1995, it was resolved that Barry be paid Management fees. Therefore, although in practical terms it may have been that Tradewinds is the one who provided Eurocraft with a **"functional office, complete with facilities"**, the agreement to pay fees did not relate to Tradewinds.

116. In the result, the sum of Kshs. 5,190,000/= which was received by Tradewinds, ought not to have been paid to the Company. It ought to have been paid to Barry.

117. I pause there to compare and contrast the distinction between Barry and Tradewinds in relation to the Management fees, on the one hand; to the situation in which Barry is alleged to have committed Tradewinds to charge a reduced Hire Charge, whereas the alleged commitment was made at a Meeting of the Plaintiff's Board of Directors.

118. Just like the Company cannot claim a right which is attributable to its Shareholder or its Directors, I find that a shareholder or a Director cannot impose a liability on the Company unless he is duly authorized by the said Company.

119. As far as the staff Secondment is concerned, the evidence provided shows that both JAMES MUTUKU and FREDRICK OKOTH were employees of Eurocraft. They were not seconded by Tradewinds to Eurocraft. Therefore, the salaries which they earned were payable by Eurocraft.

120. In the circumstances, there was no basis for the Plaintiff's contention that whilst it had employed those two persons, they were not working for the Plaintiff, but were working for Tradewinds.

121. At any rate, the Plaintiff did not provide proof that Mutuku and Okoth were or either of them was working for Tradewinds, whilst they were employed by Eurocraft.

122. On the question of maintenance, the Court has found no express contractual terms between the Plaintiff and the 1st Defendant. On the one hand Tradewinds asserted that there was an oral Contract which was entered into through Mark Tomlinson and Clement Kusinyi, who were representing Tradewinds and Eurocraft, respectively.

123. On the other hand, Eurocraft pointed out that the issue of maintenance was so key that it could not have been entered into in the manner suggested by Tradewinds.

124. It is common ground that Barry had owned up about the fact that the equipment which Tradewinds was hiring out to Eurocraft were old and were thus expensive to fuel and to maintain.

125. In the circumstances, I share the Plaintiff's view that a matter which was so serious that it had been the subject matter of deliberations at the Board meeting, would most probably have been resolved in a formal manner. An oral agreement, whose terms were not captured in a manner that was verifiable, leaves vulnerable the party who asserts that the Contract existed.

126. In this case, the Defendants did not prove that there was an oral Contract pursuant to which Tradewinds would continue to provide maintenance for the equipment which it hired out to the Plaintiff.

127. According to Eurocraft it was common practice that a person who hires equipment does not pay for its maintenance. Whereas that might be the common practice, what transpired in this case was that Tradewinds raised invoices in respect to Maintenance charges. The said charges were raised over a period of time, and were paid for. That means that between the 2 Companies in this case, the practice was different from what Eurocraft has described as the common practice.

128. The Auditors, KPMG Peat Marwick reached the conclusion that there was no Contract between the 2 Companies, on the issue of maintenance charges. I share that view. That means that there was no agreed basis upon which the computation of the maintenance charges could be founded.

129. However, if maintenance was done, the person who carried it out would be entitled to compensation for the services rendered. If that were the position, the Court could order that Tradewinds be paid a reasonable amount for the maintenance work it had done.

130. But matters are not that simple in this case. I say so because the Plaintiff insists that the maintenance costs must have been taken into account when Tradewinds was setting the rate for the Hire Charges.

131. Of course, there is nowhere in the evidence where it can be discerned that the Hire Charges incorporated the maintenance charges.

132. In the circumstances, I find that Tradewinds has failed to prove that it was entitled to raise separate invoices for Maintenance charges. Therefore the Plaintiff is entitled to the sum of Kshs 15,168,542/=, from Tradewinds.

133. It would also follow that the Counter-claim by Tradewinds, for Kshs. 10,611,988/40, in respect of maintenance is not sustainable.

134. Secondly, in so far as the claim by the Plaintiff, for Maintenance charges is successful, it follows that the sum of Kshs 15,168,542/= ought to be deducted from the turnover, of Eurocraft, before calculating the 7% Concession Charge payable to the Kenya Airports Authority.

135. On the question of Miscellaneous Charges, the Plaintiff has failed to prove its Claim. The fact that the Claim comprises of entries in the Accounts Payable Journal and in the Suspense Account, does not constitute proof that the Plaintiff paid out the said sums, or that the 1st Defendant received such payments.

136. As regards the Fiduciary Duty which the 2nd Defendant owed to the Plaintiff, there is no doubt that, in law, a Director is under an obligation to discharge his duties in such a manner as shall not give rise to a conflict of interest between his personal interests and the interests of the Company. The Plaintiff has said that Barry placed himself in a position in which his duties to Eurocraft, and his personal interests may conflict.

137. I find that it is the Plaintiff's founder, MS. JANE NJERI MAINA (PW1) who invited Barry to become a part of the Plaintiff. At that time, PW1 was well aware that Tradewinds was carrying on the kind of business which Eurocraft wished to do.

138. PW1 and her friends were not in a position to openly become subscribers in the Plaintiff because they were still working with either Kenya Aerotech or Kenya Airports Authority.

139. By inviting Barry to become the Managing Director of Eurocraft, whilst knowing that Barry was a Director in Tradewinds, it is the Plaintiff which placed Barry in a situation in which a conflict of interest could possible arise.

140. I have found no evidence that proves that Barry failed to make any full disclosure to the Plaintiff concerning any situation in which he was conflicted with the Plaintiff.

141. Mark Tomlinson became a signatory to the Bank Account of Eurocraft, at the request of Clement Kusinyi. Mark counter-signed cheques alongside Kusinyi. The reason why Mark was made a signatory was to ensure that operations of Eurocraft did not grind to a halt when Barry was out of the Country. It was for the benefit and convenience of Eurocraft.

142. The decision was neither intended to be harmful to the Plaintiff nor has it been shown to have prejudiced the Plaintiff in any manner. At no time did Barry counter-sign any cheque with Mark, to the exclusion of Kusinyi.

143. Even when Barry put forward proposals for purchase of equipment, he did so through a detailed written proposal. That conduct is inconsistent with the Plaintiff's assertion, that Barry was either being secretive or was seeking to profiteer at the expense of Eurocraft.

144. I also find no proof that Barry derived any profit in an irregular manner, from Eurocraft. If he had done so, he could have been held to account.

145. In conclusion the Plaintiff's Claims fail save for:-

a. Management fees.....Kshs 5,190,000/=

b. Maintenance charges.....Kshs. 15,168,542/=

146. Secondly, the Counterclaim fails in its totality.

147. Accordingly, I now enter judgment in favour of the Plaintiff, against the 1st Defendant for Kshs 20,358,542/=. The said sum will attract interest at Court rates from the date of judgment, until payment in full.

148. The 1st Defendant will pay to the Plaintiff, the costs of the suit.

149. Meanwhile, the Plaintiff's Claim against the 2nd Defendant is dismissed with costs.

150. Finally, the 1st Defendant will pay to the Plaintiff the costs of the Counter-claim.

DATED, SIGNED and DELIVERED at NAIROBI this 21st day of September 2018.

FRED A. OCHIENG

JUDGE