**REPUBLIC OF KENYA**

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

**HIGH COURT CIVIL CASE NO. 68 OF 2005**

**AFRICAN BANK LIMITED……...……..…..APPLICANT**

**VERSUS**

**CRESENT CONSTRUCTION CO. LTD. ……..…...……. RESPONDENT**

**JUDGMENT**

1. By a Plaint dated 30th October 1992, the Plaintiff sued the Defendant for recovery of a sum of Ksh. 19,406,648.80 alleged to be an amount lent and advanced to the Defendant by the Plaintiff together with interest thereon calculated upto 30th September, 1992. The Plaintiff therefore claimed the said sum together with interest at 23% per annum from 1st October 1992 compounded monthly until payment in full.
2. At the trial, the Plaintiff called two witnesses. Hannington Taabu (PW1), an employee of the Deposit Protection Fund (DPF) of the Central Bank of Kenya (CBK) who told the court that; the Defendant was a customer of the Plaintiff. He produced the Plaintiff's Bundle of documents as Bundle "A" and identified several documents therein as the basis of the Defendant's indebtedness to the Plaintiff. He identified, *inter alia*, the Defendants application for loan, Letter of Introduction, Director's guarantees, Letter of Installment a document dated 24th October, 1989 showing the advancement of Ksh.5 million, Promissory Note for Ksh. 10 million, an undated request for advancement of Ksh. 10 million (Pg. 28 Bundle "A"), other correspondence between the Plaintiff and the Defendant and the Statement of Account No. 02-2-1240 held by the Defendant with the Plaintiff for the period October, 1989 and November, 1992.
3. PW 1 was emphatic that the Statement of Accounts were being supplied to the Defendant on a monthly basis; that there was no agreement between the Plaintiff and the Defendant to run Kwetu Coffee Estate. He told the court that the rate of interest charged on the advanced facility was 23% P.A. He denied that the Plaintiff owed the Defendant the sum of Ksh. 29 Million on management fees either as claimed by the Defendant in the Counterclaim or at all. He however admittted that there was correspondence between the parties calling for meetings to sort out the issue of the Defendant's management fees.
4. On her part, Leah Ida Wambete (PW2) told the court that she was the liquidating agent of the Plaintiff. That she did not know what work was done by the Defendant to warrant a claim for Ksh. 29 million in the counterclaim; that the Plaintiff had settled the claims between itself and the 3rd party in **HCCC. No. 634 of 1998**. That in that settlement, the 3rd party agreed to indemnify the Plaintiff against any claims and all liability, lost damages caused by any party by reason of discharging the security No. LR. 11317. That the claim for management fees by the Defendant should be directed at the 3rd party.
5. In its Defence and Counterclaim dated 7th December, 1992, the Defendant denied the Plaintiff's

claim in its entirety. It denied having been an agreement to pay interest at the rate of 23% per annum as claimed by the Plaintiff. The Defendant alleged that the Plaintiff had failed to supply the particulars of its claim or give an account of all the Defendants deposits placed with itself or the interest earned thereon. The Defendant counterclaimed a sum of Ksh. 29,000,000/- being reasonable management fees, charges and costs for the rehabilitation and management of Kilimambogo Coffee Estate and for other services rendered on behalf of the Plaintiff from October 1989 to December, 1991. The Defendant also prayed for an account to be taken for the amounts due from 31/12/1991 together with interest and costs.

6. At the trial, the Defendant called only one witness; Mohamed Ashraf (DW 1). He told the Court that in October 1989, the Chairman, director and principal shareholder of the Plaintiff, one Mohamed Aslam (deceased) requested the Defendant to help in rehabilitating a farm at Kilimambogo near Thika. A sum of Ksh. 5 million was advanced by the Plaintiff to the Defendant for this purpose. That agreement was not in writing in view of the relationship DW1 and the deceased had. In rehabilitating the farm, the Defendant had the squatters evicted, constructed roads and dams amongst other things. The agreement was to the effect that the Defendant was to rehabilitate the said farm to acceptable standards meanwhile the Plaintiff was looking for a buyer. That although a buyer was found in 1990, the deceased asked the Defendant to continue holding to the farm. He maintained that the Defendant was invited to the farm by the Plaintiff and remained therein at the Plaintiff instance.
7. DW1 produced the Defendants bundle of documents marked "Bundle B". He identified the correspondence between the parties showing the improvement the Defendant had carried on the farm; the meetings held at various times between the representatives of the Plaintiff and the Defendant and 3rd party with a view to settle the Defendant's management fees. He testified that the value of the farm had improved from a meager Ksh. 23 million to Ksh. 300 million in 1999. That at one time the parties had agreed that the Defendant's management fees be reduced to Ksh. 220 million from a staggering sum of about Kshs. 500million.
8. DW 1 insisted that even after the 3rd party purchased the farm, the Defendant continued to manage the farm on behalf of the Plaintiff. He denied the existence of any relationship between the 3rd party and the Defendant. That the Defendant only left the farm upon receiving instructions to do so from the Plaintiff in 1999 through the Deposit Protection Fund. He indicated that as at the time he was giving his testimony, the Defendants claim on management fess was Ksh. 525,538,823/- as set out at page 172 of Bundle "B". He clarified that the sum of Ksh. 29 million claimed in the Plaint was for the period between October 1989 and 1992 when the suit was filed.
9. Although the 3rd party was served with the 3rd party notice and it appeared throughout the proceedings, no defence was filed on its behalf. Vide an order made on 17th July, 2014, the 3rd party was allowed to call evidence which was tendered by way of an affidavit of Esther Ngunya Kwinga sworn on 22nd October 2014. She testified that she was a director of the 3rd party; that the 3rd party purchased LR. Nos .11317 and 11485 from Kilimambogo Coffee Estate Limited; that the sale was conducted by the Plaintiff; that the transfer was done in 1990 and a charge created over the properties; that it found the Defendant on those properties and that after the said purchase by the 3rd party, the Defendant continued to manage a portion thereof engaging in horticulture and other farming on the Defendants own behalf and on behalf of the Plaintiff.
10. Mrs. Kwinga confirmed that the differences between the 3rd party and the Plaintiff were settled in **HCCC. No. 634 of 1998**; that the 3rd party was enjoined in these proceedings after a meeting of 08/05/1997 when there was no Kilimambogo Coffee Estate in existence. That for that reason the 3rd party could not take the responsibility of the management of the aforesaid farm retrospectively. She denied that the presence of the Defendant in the farm was at the instance or benefit of the 3rd party but insisted it to have been that of the Plaintiff. That to prove that the Defendant was at the farm at the Plaintiff's instance, once the 3rd party repaid the purchase price and settled with the Plaintiff, the Plaintiff handed over possession of the entire property to the 3rd party. She insisted that all issues and liability in relation to LR. Nos. 11317 and 11485 as between the Plaintiff and the 3rd party was settled in **HCCC. No. 634 of 1998**. She maintained in cross-examination that it is the Plaintiff and no one else that was responsible for the Defendant's management fees.

11. The Plaintiff's and the Defendant's Advocates field written submissions which I have carefully examined. The suit was heard by Ransely J. and then Warsame J. (as he was). I only heard two (2) of the four witnesses who testified in this suit. The parties produced both Bundles A and B by consent. They however did not file any issues for determination. It therefore behooves this court to formulate the issues for determination. Having examined the pleadings, the evidence, the exhibits produced and submissions made on behalf of the respective parties, I consider the following issues to be the ones necessary for determination.

a. ***Was there a contract for credit facilities between the Plaintiff and the Defendant?***
b. ***If so, was the amount advanced repaid? If not, how much is due to the Plaintiff on the said facilities?***
c. ***What was the rate of interest agreed upon on the advances made by the Plaintiff to the Defendant, if any? Was it 23% per annum compounded monthly as allege? If not, what is the rate applicable?***
d. ***Was there any agreement between the Plaintiff and Defendant for management of Kilimambogo Coffee Estate farm?***
e. ***Is the Plaintiff liable to the Defendant in the sum of Ksh. 29,000,000/- as claimed or at all?***
f. ***Is the Defendant entitled to the prayers sought in the counterclaim or at all?***
g. ***What orders as between the Plaintiff and 3rd party.***
h. ***What orders should be made on costs?***

12. PW 1 Hannington Taabu testified that the Defendant was a customer of the Plaintiff. That the Defendant applied for credit facilities from the Plaintiff in October 1989. He produce various documents in the Plaintiff's bundle "A" which showed that on 23rd October, 1989 the Defendant introduced itself to the Plaintiff. Two days later, on 25th October, 1989, it applied for a credit facility of Ksh. 5 million from the Plaintiff for which the Defendant's directors gave personal guarantees for Ksh. 20 million (Pg. 8 Bundle "A"). PW 1 also produced other documents which showed that on 2nd March 1990, the Defendant applied for an additional facility of Ksh. 10 million and another sum of Ksh.12 million on 14th March, 1990.
13. DW 1 admitted that a sum of Ksh. 5 million was advanced to the Defendant by the Plaintiff in October, 1989. According to him, the said sum was meant for the rehabilitation and management of the Kilimambogo Coffee Estate farm for the Plaintiff. That the said farm belonged to the former President Daniel Moi and General Mulinge who had disagreed on its management and the bank had, through its chairman the late Mr. Aslam, stepped in. DW 1 testified that before 1989, the Defendant and the Plaintiff had had no dealings with each other; that the Defendant had not operated any account with the Plaintiff before then.
14. It was submitted on behalf of the Plaintiff that on the evidence on record and the documents produced, the Plaintiff had proved its case on a balance of probability; that the Defendant's witness had admitted borrowing of the monies and the validity of the Plaintiffs claim. On behalf of the Defendant it was submitted that the sum of Ksh. 5,000,000/- was advanced in circumstance that did not warrant a repayment that the political climate of the time should be taken into consideration and that the Plaintiff's suit should be dismissed.
15. I have recapitulated above what the respective parties witnesses told the court. It is not disputed that the Defendant was advanced by the Plaintiff a sum of Ksh. 5,000,000/- on or about 25th October, 1989. Although the Plaintiff produced documents to show that the Defendants made further requests for advancement of Ksh. 10 million and 12 million, respectively in or about March, 1990, there was no evidence that that sum was ever advanced.
16. I have on my part seen the statement of accounts produced in Bundle"A" in respect of account number 02-2-1240 held by the Defendant with the Plaintiff. It is clear from he said account that on 20/10/09 a sum of Ksh. 5 million was credited in the said account. That was the credit facility by the Plaintiff to the Defendant. The conditions for the said facility would be found in the documents produced by the Plaintiff as Bundle "A" at pages 1-7 and 12 to 18. Neither the said documents nor the entries in the statement of accounts appearing at pages 80 to 154 of Exhibit bundle "A" were seriously challenged nor denied by the Defendant. Indeed DW 1, Mohamed Ashraf the managing Director of the Defendant admitted that the Defendant was advanced the said

sum of Ksh. 5 million by the Plaintiff. His defence was that the said sum was advanced for the rehabilitation of the farm (Kilimambogo Coffee Estates) for the Plaintiff in an arrangement agreed between him and the late Aslam for the Plaintiff. That it is for this reason that the said sum was never demanded by the Plaintiff but only until after Mr. Aslam passed on.

17. In my mind, I am satisfied from the evidence on record that the Defendant did apply and was granted credit facilities for the sum of Ksh. 5 million by the Plaintiff; that the said sum was disbursed on or about 25th October 1989 to the Defendant's account No. 02-2-1240 with the Plaintiff; that the Defendant continued to operate the said account until after the filing of this suit.
18. I am also satisfied that the entries made into the statement of account Number 02-2-1240 held by the Defendant with the Plaintiff and produced at pages 80 to 1544 of the Plaintiff's exhibit bundle "A" were neither disputed nor challenged by the Defendant. At page 154 of the exhibit bundle "A", the amount shown to be due as at 30/09/92 is Ksh. 19,406,648/80. It does not matter for what purpose the said sum of Ksh. 5 million was originally advanced. The evidence clearly shows that it was advanced to the Defendant. The Defendant operated the account to which the said sum was deposited/transferred by the Plaintiff. The amount was utilized by the Defendant. The transaction seems to have been a simple normal commercial engagement between the parties. There was no evidence of any political connotation in the advancement and ultimate utilization of the said facility as suggested by the Defendant. I therefore reject the submission that the court should take notice of the political circumstances of the time.
19. In the circumstances, I find that the Plaintiff did offer the Defendant credit facilities on or about 25th October, 1989; that the amount due on the said facilities from the Defendant to the Plaintiff as at 30/09/92 was Ksh. 19,406,646/80. I am satisfied that the Defendant's allegation that the Plaintiff had failed to supply the particulars of its claim to be hollow. I also find the allegation by the Defendant that the Plaintiff had failed to give an account of all deposits placed with itself by the Defendant including the interest earned thereon not to have been proved.
20. Accordingly, I find that the Plaintiff has proved its case on a balance of probability and I enter judgment for the sum of Ksh. 19,406,648/80 for the Plaintiff against the Defendant in terms of Prayer (a) of the Plaint.
21. The next issue to be considered is the rate of interest applicable to the facilities. According to the Plaintiff, the rate of interest applicable was 23% per annum. That is the rate claimed in the statement of claim. According to the Defendant, that was not the rate of interest agreed between the parties. To the Defendant, the amount was advanced for the purposes of carrying out the management and rehabilitation of the Kilimambogo Farm. That is why no interest was agreed upon or charged.
22. PW 1 produced bundle "A" without any objection. He identified all documents forming the contract between the Plaintiff and the Defendant in respect of the credit facilities. He stated that the rate of interest applicable was 23%. He referred the court to a letter dated 4/1/93 at page 61 of Exhibit "A" as the basis of his claim that the rate of interest was 23% per annum.
23. I have on my part carefully scrutinized the contract documents produced by the Plaintiff. These include; the application for credit facilities dated 23/10/89, Letter of continuity dated 25/10/89; Letter of installment dated 25/10/89; Guarantee dated 25/10/89; Letter of disbursement dated 22/3/90; amongst many other documents. In none of the said documents or the documents signed by the Defendant was any rate of interest applicable to the facilities disclosed.
24. However, at page 4, of exhibit "A" there is a document signed by the Plaintiff's manager. It is undated and part of it reads:-

***"The above mentioned company has opened an account with us on 24/10/89 and requested for Ksh. 5,000,000/- overdraft limit for six months against the Debenture of four Loaders/Bulldozers approximately valued at ksh.6,400,000/-.The company and the Directors are having good reputation in the market. We recommend for your approval."***

25. The document then sets out the security documents executed or given by the Defendant, then concludes with the remarks; **"Rate of interest is 15% P.A."**

That document seems to have been an internal communication between the Plaintiff's manager and his seniors seeking their approval for the facility. The document did not state whether the

rates of interest was variable or not. The same was not signed by the Defendant nor was there any evidence to show what rate of interest was agreed between the Plaintiff and the Defendant. As I had earlier stated, all the contract documents that contained the advances and the mode of payment thereof were silent on the payment of interest thereon or the rate thereof.

26. The first time the rate of interest of 23% P. A was raised was in the demand letter dated 29th January, 1992 by D. V. Kapila & Co. Advocates. The only other documents referring to the rate of interest of 23% P.A is the letter dated 4th January, 1993. That letter indicated that the rate of interest was being increased from 19% per annum to 23% per annum from 1st January 1993. Of course that letter was being written three months after the current suit had been filed. Parties are bound to their bargains. None can be allowed to change the terms of the contract unilaterally.
27. In my view, the rate of interest of 23% per annum that was being increased on 4/1/93 could not apply retrospectively. Parties are bound by the contracts they enter into. There was no evidence as to what rate of interest was agreed between the parties on the subject facility. There was no evidence that the rate of interest applicable, if any, was adjustable. At least not from the contract documents produced in court. There was no evidence that was produced to show that the rate of the 23% P.A claimed by the Plaintiff was agreed or applicable rate of interest. Accordingly, I reject the Plaintiff's claim for interest at the rate of 23% P.A as claimed in the Plaint. As regards the rate of interest of 15% P.A appearing at page 4 of Bundle "A", that document as I said was an internal communication between the officials of the Plaintiff. It was never signed by the Defendant. There was no evidence to show that the contents thereof or a copy of the same was communicated or sent to the Defendant. The Defendant insisted that no rate of interest was agreed as the facility had been advanced on a friendly basis between the Executive Chairman of the Plaintiff and DW1. Indeed the monies advanced were for rehabilitation of the Kilimambogo Farm for and on behalf of the Plaintiff. That is why there is no proper trial of documentation on the subject facility. At best, the entries were being made for purposes of accounting. There being no acceptable evidence on the rate of 23% P.A claimed. However, since it would seem the rate of 15% P.A at page 4 of Bundle "A" was the interest originally applied and not challenged by the respondent, this court will uphold it.
28. The next issue is the claim by the Defendant against the Plaintiff for Ksh. 29 million for management fees amongst other items. It was the Plaintiff's contention that there was no evidence to show that there existed an agreement between the Plaintiff and the Defendant for the management of the property known as Kilimambogo Coffee Estates for which the Defendant's claim arises.
29. On its part, the Defendant through DW 1 told the court that the property known as Kilimambogo Coffee Estates belonged to former President Daniel Moi and General Mulinge. The two seem not to have agreed on its management as a result of which, the Plaintiff took over its management through a receiver-manager. Later on, one Mr. Aslam, the Chairman and Chief Executive Officer of the Plaintiff approached the Defendant with a request that the latter manages that farm on behalf of the Plaintiff. The Defendant's brief was that it rehabilitates the property whilst the Plaintiff sought a suitable buyer. That in order to carry out the Plaintiff's instructions, the Plaintiff extended a facility of Ksh. 5 million to the Defendant.
30. Evidence on record shows that the Defendant entered the said property upon the receiver manager being removed therefrom. The Defendant constructed dams, bridges, roads and carried out farming activities at the instance of the Plaintiff.
31. Both DW 1 and Mrs. Esther Kwinga who testified on behalf of the 3rd party were categorical that the entry of the Defendant to the said property and its remaining thereon until 1999 was at the instance of the Plaintiff. That piece of evidence remained unshaken and uncontroverted. It was also not denied that the Defendant left the property in 1999 at request and direction of the Central Bank of Kenya on behalf of the Deposit Protection Fund, the successor in title of the Plaintiff. DW 1 told the court in his evidence in chief:-

> ***"When a dispute arose there were meetings between Pan African Bank, Crescent and Kwetu. When we were given the farm in 1989 to rehabilitate the farm, were not given any restriction. Even after Aslam died, we were never told to hand over the farm to anybody. We never handed it over. <u>In 1999, the Governor Central Bank of Kenya called us to</u>***

***resolve the issue of the case, loan, rehabilitation and management fees. At that meeting we were told to leave the farm and hand over to Mr. Kwinga. Central Bank of Kenya and Deposit Protection Fund gave me instruction to leave the farm."***

32. I have considered the evidence of both PW 1 and PW 2. They insisted that since there was no contract in writing between the Plaintiff and the Defendant the Kilimambogo Coffee Farm, no management fees could arise. The two however were unable to explain the various correspondences between the Plaintiff (through the Deposit Protection Fund) on the one hand and the Defendant and 3rd Party on the other. In particular, if the Defendant was a busy body in the Kilimambogo Coffee Farm, why didn't the Plaintiff kick them out after the demise of Mr. Aslam? Why didn't the Deposit Protection Fund kick out the Defendant from the farm as were the other squatters?
33. Then there are letters from the Plaintiff acknowledging that there was management fees due to the Defendant. In the letter dated 3rd December 1996. The Plaintiff invited the Defendant Director to a meeting on 10/12/96 **"….with a view to sorting out the matter of the management fees which you are claiming".** The letter asked DW 1 to carry up-to-date farm accounts for the period of the management.
34. There are also minutes of a meeting held on 08/05/97 Exhibit "B" pages 49 and 50 wherein it was agreed that the Plaintiff was to be liable for the Defendants management of the farm upto the date of transfer, 05/10/1990. In the minutes of 16/07/1999, there was an agreement that the Defendant do reduce its claim to Ksh. 220 million and that upon sale of the property, the proceeds be shared between Deposit Protection Fund (for the Plaintiff) and the Defendant.
35. My view is that from the evidence on record, it is clear that there was an arrangement if not agreement between the Plaintiff and the Defendants for the Defendant to rehabilitate/manage the Kilimambogo Coffee Estate Farm on behalf of the Plaintiff. There is also evidence that at all times the issue was who was to pay the management fees after October, 1990. Further, there were attempts to have the Defendant give a rebate on the management fees which had run into hundreds of millions. I am satisfied that the Defendant was at the farm at the instance of the Plaintiff. The Defendant only left after being directed to do so by the Plaintiff. The conduct of the parties was not that of strangers but if parties who had an arrangement between themselves.
36. Equity cannot suffer a wrong without a remedy. The Defendant spent time and money managing the property. There was evidence that whilst the property was valued about Ksh. 30 million in 1990 by April 1999, the Auctioneers who sought to auction the same quoted for it a value of Ksh. 300 million (page 60 Exhibit "B")! Obviously, there must have been proper rehabilitation for the value to have sky rocketed for that much.
37. I have already found that due to the Defendants contribution in rehabilitating the farm which included substantial expenses of its own including the initial facility advanced by the Plaintiff of Kshs. 5 million, the value of the farm shot from a meager Kshs. 23 million to that of Kshs.300 million in 1999. During the period preceding the handing over or surrender of the farm to the Plaintiff, there were negotiations or intimations that the Defendant would share in the proceeds. This was never to pass. The Defendant got nothing out of its effort in rehabilitating the farm. The Plaintiff all along represented to the Defendant that it would be paid management fees or refunded its expenses. Obviously the Plaintiff obtained a benefit at the Defendant's expense. Is it just for the Plaintiff to retain it?
38. In **Fibrosa Soplka Akcyjana vs. Fair Lawson Combo Barbour [1943] AC 32** , Lord wright stated at page 61 thus:-

> **"It is clear that a civilized system of law is bound to provide remedies for cases of what has been called unjust enrichment or unjust benefit, that is to prevent a man from retaining the money of or some benefit derived from another which it is against conscience that he should keep. Such remedies in English Law are generally different from remedies in contract or in tort, and are now recognized to fall within a third category of the common law which has been called *quasi-contract* in restitution".**

39. The Court of Appeal for Kenya held in the case of **Chase international vs. Latman Keshra [1978] KLR 143** at **page 153** thus:-

"**It seems to me that upon a fine analysis the firs category, ie. The contract of guarantee which I have discussed above, blends into the theory of restitution which gives it the foundation to justify it. Goff and Jones in their <u>Treatise Law Of Restitution</u> states (Page II):**

**Most mature systems of law have found it necessary to provide, outside the fields of contract and civil wrongs, for the restoration of benefits on grounds of unjust enrichment……..……The principle of unjust enrichment presupposes three things:-**

**First, that the defendant has been enriched by the receipt of a benefit; Secondly, that he has been so enriched at the Plaintiff's expense; and thirdly, that it would be unjust to allow him to retain the benefit".**

40. To my mind all the three conditions are satisfied in the present case; the Plaintiff has been enriched by receipt of the services of management and rehabilitation of the Kilimambogo Farm at the expense of the Defendant. Obviously, it would be unjust to allow the Plaintiff to retain the benefit of it which includes the repayment of the advances made to the Defendant to rehabilitate the subject farm.
41. From Page 162 to 321 of Bundle Exhibit "B" the Defendant gave details of how its claim was made up. It supplied documents to show that it paid for or supplied fertilizer to the farm; it paid the workers at the farm; paid for expenses on the farm including chemicals, equipment stationery, fuel, cement amongst others. The expenses run for the entire period of the management, 1989-1990.
42. At page 218 Exhibit "B" is the summary of the expenses for rehabilitation of the farm for the period ending 30/10/90. The amount totalled Ksh. 21,470,393/15. At pages 219 to 238 of Exhibit "B" are the components or details on how the said sum of Ksh. 21,470,393/15 is made up. None of the said items was either denied or challenged by the Plaintiff. On my part having scrutinized the same, I see nothing to make them unbelievable. I accept the said expenses as genuine and proved. At page 239 of the same Exhibit "B" are expenses for the period November 1990 to 31/10/91. The total expenditure is shown to be Ksh. 17,680,629/45. The details of how the said sum is arrived at is set out at pages 240 to 255 of Exhibit "B". Once again the said figures were never challenged. I consider them to be genuine and proved. It is clear that the amount proved therefore for the period October 189 and October, 1991 is ksh. 39,151,022/60.
43. I am aware that this is a claim for special damages. The Defendants must not only plead the same but also strictly prove the same. The amount claimed in the statement of claim was Ksh. 29 million. From the exhibit "B" that was produced at the trial, the amount proved was Ksh. 39,151.022/60. I am satisfied that on the basis of the details availed which were never challenged the Defendant's claim has been proved on a balance of probability. I will enter judgment for the Defendant for Ksh. 29 million.
44. The next issue is whether the Defendant is entitled to the prayers sought in the Plaint. In prayer (b) of the Counterclaim, the Defendant prayed that an account be taken as to the amounts due to the Defendants from 31st December 1991. It was submitted on behalf of the Defendant that under the prayer for **"any other further or alternative relief as may be just**" the court do apply **Sections 1A, 1B, 3A and 63(e) of the Civil Procedure Act** and awards the Defendant the sum of Ksh. 523,538,823. In the alternative, that the court should award Ksh.220 million which was the amount the minutes of some meeting of 16/7/1999 had proposed that the Defendant's claim be settled at.
45. The claim is in the nature of a special damage claim. The same need not only be specifically claimed but should be strictly proved. I am aware that twice the court declined to grant the Defendant the opportunity to amend its counterclaim and claim these sums. This was on 5/5/2008 and 5/10/15, respectively. The court gave reasons for declining the proposed amendments in those decisions. I am not aware of any appeal setting aside those decisions.
46. Whilst I appreciate that under prayer (b) an account was prayed for, that prayer was made at the time of filing the counterclaim on 8th December, 1992. It was made on the basis that the Defendant was still on site and the management fees and expenses was continuing. From the

evidence of DW 1 the management of the farm expired on or about 1999. However, it is clear that, in paragraph 7 of the Counterclaim, the account sought was the amount due from 31st December, 1991 to the date of that Counterclaim. It is therefore incorrect to base the claim for accounts for the period of upto the date the Defendant handed over possession of the Farm to the Plaintiff.

47. At the trial, there was no explanation why shortly after filing the Counterclaim, the Defendant could not assess all its expenses and changes, quantify and crystalize the same by way of amendment. These were matters within its own exclusive knowledge. To wait until after trial to ask for such an exercise to be undertaken is in my view unfair both to the court and the opposite party. These are matters that should have been crystallized in the pleadings to enable the Plaintiffs witnesses challenge the same if they so wished. Throwing the documents at the Court by way of figures from ages 269 onwards of exhibit "B" and expect judgment on those figures will not do. In any event, the Defendant should have mitigated its losses by leaving the farm earlier. Accordingly, I decline to grant that prayer.

48. The final issue is the indemnity sought by the Plaintiff against the 3rd party. According to the Plaintiff, the Kilimambogo Coffee Farm was transferred to the 3rd party on 5th October 1990 and any liability in respect of the farm thereafter fell on the 3rd party. On its part, the 3rd party contended that even after the said 5th October, 1990, the Plaintiff insisted that the Defendant should remain in occupation and managing the farm. That the continued stay of the Defendant on the farm was at the instance of the Plaintiff who should therefore bear any liability in respect of the management. The 3rd Party further contended that all the issues between the Plaintiff and the 3rd Party were resolved with finality in **HCCC. No. 634 of 1998** and a consent in respect thereof filed in court.

49. The testimony of DW 1 and Esther Kwinga on behalf of the 3rd party as to the circumstances under the Defendant continued being in occupation of the farm remained unshaken. Indeed it was never challenged. I have already found that the Defendant remained on the farm at the instance of the Plaintiff after 5/10/90. I have also found that the Defendant only left the farm on 1999 at the instance and direction of the Plaintiff. In this regard, I do not see how the 3rd party would be liable for the management fees of the Defendant who was at all times answerable and responsible not to the 3rd party but the Plaintiff. Mrs. Kwinga's evidence that was not challenged was that after the 3rd party paid for part of the purchase price in October, 1990, the Defendants continued to manage part of the farm for the benefit of the Plaintiff.

50. In any event, there seems to have been a suit, **Nairobi HCCC. No.634 of 1998** between the Plaintiff and the 3rd party. Although both parties referred to it in their evidence, none of the parties produced either the pleadings or the final settlement order. What is clear from the evidence on record is that the suit **HCCC. No. 634 of 1998** was between the Plaintiff and the 3rd part; the suit was in respect of the Kilimambogo Coffee Estate, the subject farm in this case. That suit was settled as between the said parties. The terms of the settlement of that suit are not clear. PW 2 testified after some debt was settled in **HCCC. NO. 634 of 1998**, the 3rd party agreed to indemnify the Plaintiff against any claim and all liability, loss damages caused by any party by reason of discharging and releasing the farm. Mrs. Kwinga denied this fact. From the testimonies of both PW 2 and Mrs. Kwinga, it is clear that the settlement of **HCCC. NO. 634 of 1998** was without prejudice and in terms of the letter dated 24/4/99 by the Plaintiff to the Defendant produced by both the Plaintiff and 3rd Party at page 74 of the Exhibit "A" and "EK1" respectively. That letter provided, inter alia that:-

> "**2. That you shall agree to indemnify Pan African Bank Limited (in Liquidation) and Deposit protection Fund Board, the Liquidator, against any claim and all liability, loss damages, costs etc by any party by reason of releasing/discharging the security. Known as LR.No.11317 and 11485 (Kwetu Coffee Estate)."**

51. As at the date that settlement was being entered, the claim by the Defendant for management fees of the farm was known and had been a subject of protracted correspondence and meetings between these parties. The claim could not be said to be at large. The claimant was known. If it was in the contemplation of the parties that the indemnity contained in the letter dated 24/8/1999 covered the

Defendants claim, nothing would have been easier than to expressly refer or include it with specificity. To my mind, the indemnity to that letter was in respect of claims touching on the release or discharging of the security and not the claims relating to the management and rehabilitation of the farm. I reject the Plaintiff's claim for indemnity.

52. In this regard, there shall be judgment as follows:-

a. Judgment for the Plaintiff against the Defendant for Ksh. 19,406,648/90 together with interest thereon at the rate of 15% per annum from the date of this suit until payment in full.
b. Judgment for the Defendant against the Plaintiff for Ksh. 29,000,000/- together with interest thereon at court rate of 12% per annum from the date of filing of the Counter claim until payment in full.
c. The claim for an account by the Defendant is hereby dismissed.
d. The claim for indemnity by the Plaintiff against the 3rd party is hereby dismissed. Since the 3rd party did not deliver any pleadings, I make no order as to costs on the 3rd party Notice.
e. Since the Plaintiff and the Defendant were both successful in their own way, costs follows the event. Each party to bear its own costs.

53. Since the Court finds both parties owe each other, the amounts so owed may be set off and the one found to be still owing to pay the amount outstanding.

It is so decreed.

**DATED and DELIVERED at Nairobi this 28th day of January 2015.**

**A. MABEYA**

**JUDGE**