REPUBLIC OF KENYA

IN THE HIGH COURT AT MALINDI

CIVIL SUIT NO. 47 OF 2002

MARK GERALD BRIERLEY & 2 OTHERS.....PLAINTIFFS

VERSUS

DRIFTWOOD BEACH CLUB ….....DEFENDANT

JUDGMENT

INTRODUCTION

1. The first and second Plaintiff are Mark Gerald Brierley (Mark) and Karen Brierley (Karen) respectively. They are an English couple. Both are directors of the third Plaintiff, Scuba Diving Malindi Ltd, since December, 2001. In the late nineties, they came to Kenya from England as holiday makers. Eventually in the year 2001 having bought off one Frank Scheller (Scheller), they decided to settle in Kenya to take over his scuba diving business at the Driftwood Beach Club.

2. The said Scheller had been operating the business since 1996 or thereabouts. Mark and Karen were introduced by Scheller to the management of the Driftwood Beach Club Ltd., the Defendant owners of the Driftwood Beach Club who indicated they had no objection to Mark taking over. Discussions were held with among others Julian Larby, the Chairman of the Board of Directors of the Defendant.

3. In November, 2001 Mark received a letter from the Managing Director of the Defendant, Philip Chai (DW1). The letter, dated 21st November, 2001 was effectively offering a three year licence to Mark. In addition were conditions that he takes out an insurance cover for the business and obtains work permits for non-Kenyan staff at the diving centre.

4. Mark applied to the Immigration Department for a work permit for himself. The application was rejected in late December, 2001. He lodged an appeal. On 25th February, 2001, Mark replied through his lawyers Muli & Ole Kina Advocates to the Defendant's offer of a licence. The response stated inter alia, that Mark preferred a lease, as opposed to a licence, for the diving centre premises, and proposed that such lease be drawn in favor of the third Plaintiff rather than to Mark personally. Apparently by this date Mark and Karen had acquired shares in the newly registered third defendant. Scheller and his wife or girlfriend, Julia Sekenet Koilel (Julia) the original directors had resigned therefrom.

5. The Defendant's reply was sent on 8th March, 2002. It was a terse email to the effect that the conditions in the letter of 21st November, 2001 were not negotiable. Further, Mark was given the choice to accept the terms as stipulated therein or to “forthwith vacate the scuba diving premises at the club.” The email was written by the same Julian Larby, also a partner in the firm of Kaplan & Stratton Advocates. Mark did not leave or make any further offers to the Defendant. He remained

on the premises and continued to pay the "rent" as stipulated.

6. Mark had already moved into the diving centre with his wife and two children. By a further letter dated 27th April, 2002 Larby informed Mark of the decision reached by the Board of Directors concerning operations of the diving centre. The board demanded:

    a) that the diving centre should not be used as a family home

    b) insurance cover, work permit and PADI certifications (professional divers qualification) for Mark and diving instructors

These conditions were part of the terms of the letter of 21st November, 2001. The Board gave Mark until 15th May, 2002 to comply or else legal action would be taken. Mark did not comply. On that date, another letter issued from the Defendant's Managing director Phillip Chai. Mark was given 24 (twenty four) hours to comply with the earlier demands or face eviction from the premises.

7. To this letter, Mark's lawyers Muli & Ole Kina Advocates replied on 20th May, 2002 stating inter alia that:

    a) The diving centre did not require an insurance cover for divers as each diver was required to expressly assume any risks by signing a standard form (PADI statement) releasing the centre from liability.

    b) Mark had appealed against the rejection of his work permit by the Immigration Department.

    c) The diving centre was sufficient accommodation for a family and, besides, Mark had not been informed earlier that his family could not reside there.

8. The Plaintiffs also threatened to move to court should the Defendant proceed with enforcing the notice. On 18th May 2002 acting on instructions from the Defendant the firm of Ben Ochieng and company Advocates gave notice of the termination of the licence to Mark, citing non-compliance with the fundamental terms of his licence. On 22nd May, 2002 the Plaintiffs came to court under certificate of urgency and obtained an injunction barring their impending eviction from the diving centre. The orders apparently subsisted until 27th June, 2003 when the application was dismissed by Ouna J, (as he then was).

9. On the same date, the Plaintiffs were allowed a 7-day stay, conditional upon the deposit of Kshs, 190,000/- "equivalent to arrears of licence fees", by 30th June, 2003. It would seem that the Plaintiffs did not deposit this sum and from that date onwards, ceased to occupy the diving centre. The foregoing is the background of this suit.

THE PLEADINGS

10. By the amended plaint filed on 24th May, 2006, the Plaintiffs averred, inter alia:

a) That the 1st and 2nd Plaintiffs were directors of the 3rd Plaintiff, whereas the Defendant was the registered proprietor of the Driftwood Beach Club which comprised of a hotel, restaurant, swimming pool and a diving centre.

b) That sometimes in September, 2001 the 1st and 2nd Plaintiffs acquired all the shares previously held by Frank Scheller and Julia Sekenet Koilel, then directors of the 3rd Plaintiff.

c) That the purchase price was USD 50,000 and entitled the 1st and 2nd Plaintiffs to take over the scuba diving business operated by Scheller at the Defendant's premises.

d) That the management of the Defendant had no objection to the arrangement and promised to give necessary assistance to the new operators.

e) That the 3rd Plaintiff entered into a tenancy agreement with the Defendant by which the former paid a monthly rent of shs. 18,000/- during the peak season and a reduced rent in the low season.

f) That having taken possession of the diving centre the 3rd Plaintiff commenced operations, investing in equipment, renovations and other improvements thereon.

g) That at all material times the 3rd Plaintiff was a protected tenant, but in November, 2001 the Defendant purported to alter the terms of the tenancy vide the letter of 21st November, 2001, without complying with the provisions of the Landlord and Tenants (Shops, Hotels and Catering Establishments) Act (The Act).

h) That upon the 3rd Plaintiff's rejection of the overture the Defendants commenced a scheme to evict the said plaintiffs through harassment, and, eventually served a notice to the 3rd Plaintiff to vacate the diving centre.

i) That the Defendants tore down the diving centre advertisements from the club notice board as well as removing all markings and signage to the diving centre, and informed the Plaintiffs that the centre had stopped operations.

j) That the Defendants through their actions constructively confined the 1st and 2nd Plaintiffs and their children to their dwellings and instigated malicious prosecution against them, in addition to destroying their business.

11. The Amended Plaint carries multiple prayers but principally, the Plaintiffs seek several declarations and permanent prohibitory and mandatory injunctions against the Defendant in relation to the tenancy; general damages for false imprisonment, malicious prosecution, breach of contract and lost earnings. They also seek punitive and exemplary damages, “calculated at triple the value of the Plaintiff's investment.”

12. In the final submissions filed on 7th November, 2012 the Plaintiffs assert the value of the said investment to be Kshs. 12,781,593.00. General damages for lost earnings and breach of contract was quantified at shs. 27,300,000.00; general damages for unlawful confinement and malicious prosecution at shs. 3000,000.00; and punitive and exemplary damages at shs. 90,000,000.00. The total claim was therefore quantified at Kshs. 133,081,593/-.

13. On 31st May, 2006, the Defendants filed a Further Amended Defence and Counterclaim. The Defendants asserted that the 1st Plaintiff was allowed into its premises to operate the diving centre as a licensee, as per the letter dated November, 2001. That the 1st Plaintiff rejected the licence forcing the Defendant to terminate the same on 20th may, 2002 and to demand vacant possession. That notwithstanding, the 1st Plaintiff remained in occupation until July 2003 for which a sum of shs. 204,000/- is owing as arrears in licence fee.

14. The Defendant asserts that “the terms and conditions regarding operations of the scuba diving centre were spelt out in the letter of offer to the 1st Plaintiff dated 21st November, 2001” and that the said letter was not an attempt to alter the terms of the alleged tenancy of the 3rd Plaintiff.

15. The Defendant denied all the allegations of illegality pleaded by the Plaintiffs including malicious harassment, false imprisonment and unlawful eviction. They asserted that the licence to the 1st plaintiff was personal to him and that it has “been effectively determined.”

Thus the Defendant counterclaimed for vacant possession and payment of outstanding licence fees amounting to shs. 204,000/-. The Defendant prayed that the Plaintiffs' suit be dismissed. The Plaintiffs did not file a defence to the counterclaim.

THE EVIDENCE

16. This suit is characterized by unusually lengthy pleadings and voluminous documents (exhibits) on both sides. The trial proper took place between 24th October, 2007 and 26th June, 2012, commencing before Ombija J, who heard the Plaintiff's evidence. Thereafter Omondi J took part of the Defence evidence and I took over from her upon her transfer from this station. In total, the Plaintiff called three witnesses being the 1st and 2nd Plaintiff (PW1 and PW2 respectively) and one Abdul Wahid Aboo (PW3) an accountant by profession.

17. The defence called Philip Chai, a director of the Defendant and formerly the Managing Director thereof. Submissions were received on 18th March, 2013.

18. The key events and facts relating to this suit are not in dispute at all. These include the ownership of the diving centre by the Defendant; the taking over of the diving centre located at the Driftwood Beach Club by Mark from the previous operator, Scheller in or about October, 2001; Mark's occupation of the centre with his family; the contentious letter of 21st November, 2001 by the Defendant to Mark; the counter offer by Mark and its rejection by the Defendant; Mark's continued occupation of the diving centre; the notice to vacate given by the Defendants mid – May 2002, leading to the filing of this suit; the exparte injunction against the Defendant; and the eventual departure of Mark in June/July 2003 from the diving centre.

DISPUTED ISSUES

19. From the evidence adduced by the parties and their respective submissions, one chief issue is in dispute namely, the nature of the relationship between the three Plaintiffs and the Defendant company, and the terms thereof. The Plaintiffs assert it was a controlled protected tenancy, while the Defendant contends it was merely a licence personal to Mark. The Plaintiffs' claim is premised upon the Defendant's alleged breach of the said tenancy covenant, as perpetrated through the purported alteration of the terms thereof, harassment and eventual eviction of the Plaintiffs, which, resulted in the destruction of the Plaintiff's business and loss of their equipment and investment.

20. The court must therefore determine whether the Defendants are culpable for the alleged breach of the tenancy covenant and liable to pay the damages claimed and/or whether the Plaintiffs for their part, owe the Defendant the sum claimed in the counterclaim. The foregoing is a close summary of the lengthy statements of issues filed separately by the parties. In my considered view, once the main issue is determined as relates to the relationship of the parties, the rest of the issues being corollary thereto will resolve in tandem. More or less.

THE LAW

21. The starting point is the Landlord and Tenant (Ships, Hotels and Catering establishments) Act (the Act). It defines a controlled tenancy thereunder as one:

"a) which has not been reduced into writing

b) Which has been reduced into writing and which -

i. **Is for a period not exceeding five years.**

ii. **Contains provisions for termination, otherwise than for breach of covenant, within five years from the commencement thereof**

iii. **…..... "**

22. The Plaintiffs' advocates argue that because the Plaintiffs took possession before any written agreement was executed, a controlled tenancy under the Act, and one "deemed to be a lease from month to month" under Section 106 of the Transfer of Property Act (TPA) was created. The question is whether Mark was a licensee or a tenant. Both parties relied on the case of **Marchant v Charters [1977]3 ALLER 918** and **Abbey Field (Harpenden) Society Ltd vs Woods (1968)1 ALLER 352** as to the test applicable in determining whether an occupant is a tenant or licensee.

23. According to Halsbury's Laws of England, Fourth Edition, Volume 27, the main considerations should include the intention of the parties, (but "the law does not impute intention to enter into legal relationships where the circumstances and the conduct of the parties negative any intention of the kind" and, "words alone may not suffice" – per Lord Denning, LJ in **Errington v Errington (1952)1 ALLER 149)**, and a consideration of all the relevant provisions of the agreement (the substance).

24. Thus:

> **"Primarily, the court is concerned to see whether the parties to the agreement intend to create an arrangement personal in its nature or not, so that the assignability of the grantees interest, the nature of the land and grantor's capacity to grant a lease will all be relevant ….in assessing what is the nature of the interest created by the transaction. In absence of any formal document the parties' intention must be inferred from the circumstances and the parties conduct"** (See paragraph 6 Halsbury's Laws of England Fourth Edition Volume 27) underlining supplied)

25. The relevant considerations were summarized by Lord Denning MR in the **Marchant case**. After reviewing relevant case law, including **Errington vs Errington** and **Abbeyfield (Harpenden) Society Ltd v Woods** Lord Denning, MR stated:

> **"Gathering the cases together, what does it come to? What is the test to see whether the occupier of one room in a house is a tenant or a licensee? It does not depend on whether he or she has exclusive possession...whether the room is furnished or not...whether the occupation is permanent or temporary...it does not depend on the label parties put on it...All these factors may influence the decision but none of them is conclusive...Eventually the answer depends on the nature and quality of the occupancy. Was it intended that the occupier should have a stake in the room or did he have only permission for himself personally to occupy the room, whether under a contract or not, in which case he is a licensee?"** (emphasis added)

26. Having reviewed the evidence on record and the parties' respective submissions, I take the following view of the matter. According to paragraph 14(a) of the amended plaint:

> **"The diving centre has traditionally comprised the business premises and the attached residential premises specifically provided for the use of the person operating the centre. It comprises a reasonably large bedroom, lounge, bathroom, kitchen and verandah...such accommodation is sufficient for a couple with two young children."**

27. The Defendant did not dispute the described layout of the premises, but they contend that the rooming of the diving centre was designed for the use of the diving instructor, and not couples. Indeed that point was part of the initial disagreement between the parties. The Plaintiffs assert that their possession of the centre was exclusive and independent of the landlord as evidenced by payment of "rent", and the exercised right to carry out repairs and renovations at the centre.

28. The Plaintiffs' counsel however conceded in submissions that

"The control exercised by the landlord on the use of the residential section of the premises does not necessarily negate the existence of a tenancy. As such, the above exclusive possession was consistent with the exercise of a controlled tenancy."

It is difficult to conceive this reality, as exclusive possession is by definition exclusive control. Secondly, as will be seen later in this judgment the transactions in question were between Mark alone and the Defendant.

29. Did Mark have exclusive possession and independence from the landlord? From the Plaintiff's description of the premises the diving centre was set up as one unit with the living quarters being part and parcel thereof. That is evident from the evidence of Mark and Karen. The centre was very much an appendage of the club. Most of its operational utilities were supplied by the club for example furnishings, water, electricity, and telephone.

30. The landlord did not allow mark exclusive possession of the premises to deal with it as he desired. This too was part of the dispute: that Mark was not allowed to occupy the centre with his family, as a family dwelling. As for the alleged repairs and renovations by the Plaintiffs, no cogent evidence was adduced beyond a couple of receipts for the purchase of a box of screws, a screw driver, padlocks etc. in January, 2002. On the available evidence, the Defendant did not allow Mark to have exclusive possession of the diving centre as a whole.

31. The Plaintiffs' complaint was that the Defendants, while Mark was in exclusive possession, before execution of an agreement (a controlled tenancy situation), the Defendants purported to change the terms thereof by the letter of 21st November, 2001. In order to determine the veracity of this assertion and ultimately the nature of the occupancy, it is necessary to restate the chronology of the relevant events.

32. After Mark purchased Scheller's diving equipment in September, 2001 to which sale the defendant was obviously not a party, he was unable to move immediately into the centre, because Scheller and his wife or girlfriend, and later the latter alone was occupying the quarters until sometime in October, 2001. In the intervening period, Mark and Karen took up a normal villa within the hotel. Mark was by then still learning the ropes of the diving business from Scheller as a newly 'qualified' diver. It is doubtful that he was ready to carry out the instructions or business himself.

33. There is no evidence that at the particular time he had employed any qualified instructors/divers (another point of dispute with the Defendants). But above all, neither Mark nor Karen had a work permit from the Immigration Department – authorising them to carry out any business either directly or through others. Indeed in the letter that came through from the Immigration Department in December, 2001 Mark was expressly prohibited from any such activity. So that even if it is believed, as asserted strongly by Karen that the couple took over the diving centre on 27th September, 2001, they had no legal capacity or even expertise to operate the business, by their own admission. Many documents have been produced but none to prove any active business in the period between September to November, 2001.

34. From the record the couple never obtained work permits in the entire period they remained at the diving centre. They therefore gave prevaricating evidence as to whether or nor they, carried out the business, the roles they played, whether they earned profits, paid taxes etc. Ironically, this appears to be the basis of their claim: that they were operating a diving business as tenants of the Defendant as at 21st November, 2001 when the Defendant purported to alter the terms, by offering them a licence.

35. True, the couple may have procured goods and equipment in readiness for the business, but from the evidence before me, it is difficult to find that any tenancy could have been created in the period prior to the letter of 21st November, 2001. It would appear that Mark went into the premises without establishing the precise nature of the occupancy his predecessor enjoyed or that he would

enjoy upon taking over. It is inconceivable that Larby verbally offered him one thing but soon after gave contrasting instructions to DW1 concerning the contents in the letter of 21st November, 2001.

36. The relationship between the parties was in state of flux as Mark transitioned from the normal hotel villa into the centre, having commenced discussions with the Defendant's management. This situation in my opinion was such that it is impossible to imply a tenancy being intended. The period is too short and events too diffuse to yield to such an inference. Far from being an attempt to alter any existing terms, the letter of 21st November, 2001 was in my opinion the Defendant's attempt to formalize and regularize its relationship with Mark.

37. It is telling that upon receipt of the letter, it took Mark nearly three months to respond, to what if he is believed, should have been a shocking departure from what he understood to be his status at the diving centre. Was Mark buying time in a bid to create room for solidifying claims to a tenancy? Whatever the case, the reply to the letter of 21st November, 2001 by Mark's lawyers must be seen for what it is: a counter offer to the Defendants, which was firmly rejected by the latter party, as early as 8th March, 2002. It was a “take-it-leave-it” response.

38. The Defendants advised that the terms were non-negotiable and gave Mark the option to vacate the premises and move his business elsewhere. He did not leave or make any further offer. So that even though Mark continued to pay “rent” to the Defendants, it did not change the fact that to them he was considered a licensee. From his conduct, it must be concluded that Mark opted to stay on as a licensee, but was unwilling to take the consequences that went with it.

39. It has been suggested by the Plaintiff's advocate that the exhibited copy of licence contract previously prepared in favor of Scheller was a fabrication of the Defendant. The Plaintiffs however did not call Scheller to testify on that aspect. Besides, the Defendant's position is buttressed by the fact that Mark's business successor one Steve Curtis also received a licence from the Defendants and not a lease. DW1 was resolute during his evidence that the Defendant had always previously granted a licence to the operator of diving centre, and not a lease.

40. The Defendant having allowed Mark to come on board, even before the relationship was formalized, it is difficult to impute malice against it on account of the insistence that the business complies with Kenyan law by:

1. taking out an insurance cover for divers (to obviate claims against the Defendant especially as these persons used common utilities of the Defendant e.g the swimming pool.)

2. Procuring work permits for the operators and divers at the centre.

41. In addition, the Defendant consistently maintained that the diving centre was intended for use by the instructor not a family. It demanded for Mark to take out his family therefrom. If indeed the intention of the Defendant was to give Mark exclusive possession of the centre, the Defendant should not have persisted on this score as they did.

42. Upon removing all the evidence before me, I find that in fact the Defendant intended and granted a licence to Mark, which he accepted by remaining on the premises, despite the sanction in Larby's letter of 8th March, 2002, carrying on, albeit illegally, the business of diving, and that he was not at all a protected tenant by any definition.

43. The arrangement was personal in nature, and like his predecessor or and successor, he did not have a stake in the premises. The circumstances of this case and the conduct of the parties negates the existence of a tenancy by implication as provided in the Act.

44. I think this is an appropriate point to deal with the question raised by the Defendant as to whether Karen and the Scuba Diving Malindi Ltd had any privity of contract of whatever nature with the Defendant. The clear answer to that question must be in the negative. This

company (3rd Defendant) was registered on 24th October, 2001, well after Mark had purchased Scheller's equipment, and been introduced to the Defendant. Moreover, it was not until 14th December, 2001 that Mark and Karen acquired shares therein effectively making them directors of the company upon the retirement of Scheller and Julia.

45. The offer communicated by the Defendant vide the letter of 21st November, 2001 was to Mark personally (c/o of the diving centre not the company) and there is no evidence whatsoever that the Defendant transacted with Karen or Scuba Diving Malindi Ltd. All the documentation tendered as a record of the dealings between the parties, including the termination notice, invoices and receipts before that eventuality refer to Mark Brierley of the Scuba Diving (Centre) and not a company. It must be recalled that the request that a lease to be made out in the name of the company was rejected by the Defendant in March 2002, in tandem with the Defendant's insistence that it could not countenance a lease.

46. It would seem that Scheller and Julia contrived to register a company barely a month after selling equipment to Mark and two months later purported to transfer the shares thereof to Mark and Karen. Once more, it seems that Mark rushed headlong into the deal without conducting due diligence as to the assets of this newly created company. He now appears to insist, without any evidence of transfer that the said company owned what he had already bought from Scheller, including the alleged goodwill accrued over thirty years.

47. Surely Mark cannot hope to impose this seeming shell of a company on the Defendants. The said company had barely traded and had no demonstrable assets. On all accounts the new directors may have hoped that acquiring shares therein could give some much needed boost to their application for visas as investors – see letter to Immigration Department from Ole Kina Advocates dated 22nd February, 2002.

48. Neither Mark now his wife Karen had the necessary legal capacity to carry out the scuba diving business or indeed any work in the Republic of Kenya. Indeed if the Defendant instigated their prosecution in that regard by the Immigration Department, and there is no evidence they did or that they and not the Attorney General (then) had capacity to prosecute them, there was reasonable ground based on Mark's and Karen's own admission of their defective immigration status. It is a pity that Mark acted on the basis of what appears to be assumptions and undertook a rather risky venture.

49. Having found as I have that Mark was a licensee, I am satisfied that the notice given by the Defendant on 18th May 2002 essentially terminated the licence. Mark got a reprieve through the court injunction obtained exparte on 22nd May, 2001. The same was discharged in June, 2003 whereupon Mark vacated the premises. He was not unlawfully evicted. Nor can the removal of his notices and signage at the club upon the expiry of the notice be deemed unlawful or constituting harassment. In addition, if he elected to stay indoors and to keep the children in the house upon being served with the notice, that cannot amount to false imprisonment courtesy of the Defendant.

50. As a licensee, Mark and his family were guests of the Defendant. Hence the Defendant upon resolving to terminate the licence or even before such eventuality, was entitled to curtail the enjoyment by the licensee of certain amenities at the club such as public areas. Once the notice expired the licensee became a trespasser. The claim of false imprisonment therefore appears unsustainable.

51. All in all, it is my considered view that Mark's decision to remain at the diving centre after the Defendant's letter of 8th March, 2011 was at the root cause of his subsequent misfortunes, especially as he seems to have laboured under unfounded assumptions as to his entitlement. He had by his conduct placed himself at the mercy of the Defendant as a licensee, but inexplicably continued to expect to be treated like a tenant with protected rights.

52. There can be no question of a breach of any “tenancy” covenant arising from the Defendant's

insistence upon the terms of the licence, which in my view cannot in any way be deemed unreasonable. For instance prudence required that the management of the Defendant ensure that they were protected from assuming any risk arising from the operations of the diving centre, itself a risk prone affair. They were also obligated to confirm compliance with immigration laws by the workers/operators of the centre. In the circumstances of this case, it is difficult to comprehend the basis of Mark's expectations: Could he reasonably expect the Defendant to accept the so called PADI statement as sufficient alternative to insurance cover, and to shut its eyes to his wanting immigration status?

53. In my considered view, shutting down the diving centre, was, in light of the nature of the occupancy and the persistent default by the licensee, about the only sensible and lawful choice available to the Defendants, after a period of over five months of stalemate.

DETERMINATION

The Plaintiff's Claim

54. The 2nd and 3rd Plaintiffs have no sustainable claim against the Defendants and their suit must be dismissed with costs. As for Mark he was a licensee of the Defendant. The termination of the licence by them was proper. It is admitted that Mark took with him most of his goods at that point but some were retained by the Defendant due to the outstanding licence fee and were eventually wasted in some open yard.

55. No inventory or valuation of the goods initially bought by Mark from Scheller or acquired thereafter was tendered. It seemed that Mark was reluctant to produce this equipment sale agreement between him and Scheller earlier attached to his original affidavit. Perhaps because the said agreement is also equally lacking in detail. Neither is there a list showing the quantity or value of the items left behind by Mark. That cannot be the responsibility of the Defendant as was suggested in the Plaintiff's cross-examination of DW1. No loss assessor's report was prepared even in respect of the boats which were allegedly cut off to drift away and be destroyed or damaged. The photographs showing a miscellany of rusty equipment are of no probative value.

56. The remarkably large figures cited in the plaint and submissions appear to have been plucked out of the air, not to say exaggerated, for example good will of thirty years valued at Kshs. 5Million. There is no evidence that accounts produced by PW3 in respect of the 3rd Defendant have any relationship to the goods bought by Mark from Scheller. There was no evidence that the said company purchased any assets after its formation or even after its acquisition by Mark and Karen.

57. The report tendered by PW3 was shorn of all credibility during cross-examination of PW3. It has no supporting documents and as PW3 himself admitted does not amount to audited accounts of the third Plaintiff. There was no evidence of tax returns being made. That an accountant should undertake such an unprofessional task is unethical if not downright dishonest. Suffice to say that there is no proof as to the net value or earnings of the Mark's business at the time it was allegedly destroyed by the Defendants.

58. For the foregoing reasons, it is not clear how the sum of shs. 27,300,000.00 claimed as lost earnings was arrived at, or even shs. 90Million being punitive and exemplary damages “at triple the value of the investment”. It is doubtful whether, even if the breaches and unlawful actions alleged against the Defendant had been proved, such entitled the claimant to the special, general, punitive and exemplary damages, as quantified in the plaint and submissions. The suit by the 1st Plaintiff has no merit and must be dismissed with costs.

The Counter Claim

59. As regards the counterclaim, the evidence led by DW1 did not specify the months for which

the licence fee was outstanding. The particular outstanding invoices were not identified. In as much as no defence was filed to the counterclaim, it was upon the Defendant to prove its claim before the court by tendering proper account documents. The order of the court for the Plaintiffs to deposit shs. 190,000/- as arrears of licence fee did not amount to a finding that such sums were due or outstanding as at the date of that order (27th June, 2013).

60. It is possible that upon receipt of the injunction order in May, 2012 Mark stopped paying "rent". In any event on 8th March, 2003 his lawyers through a letter advised that the Defendants take out proceedings for the recovery of the monies. Still, in light of the serious contention between the parties during the period of occupation, the Plaintiff was duty bound to furnish evidence of its claim. But, and this is secondary to the want of proof, even though some "rent" was outstanding in respect of the business conducted by Mark at the diving centre until he vacated, the premises in June, 2003 it is a fact that until then, Mark had no work permit authorizing him to operate the said business.

61. The Defendants had attempted to remove him in May 2002 but through the court injunction he remained in the premises. It would seem that in allowing Mark to take over the diving centre before establishing his immigration status the Defendants set themselves up for trouble. In a real sense the period between October, 2001 and June, 2003 is a continuous though contentious occupation of the premises by Mark.

62. Basically, whatever the business he carried out was illegal, a fact known to the Defendants, and not cured by the injunction of the court, which was given before hearing of the evidence. In all fairness, I think the Defendants too are responsible for allowing the setting up of a patently illegal enterprise by their failure to conduct due diligence on their licensee before allowing him on their property. On account of public policy their claim for payment of fees in respect of the dubious business ought not to be viewed sympathetically by a court of law.

63. For the foregoing reasons, the counterclaim will also be dismissed but no costs are awarded to the 1st Plaintiff. The Defendant's argument concerning want of privity of contract between the Defendant and the 2nd and 3rd Plaintiffs applies equally, to the Defendant's counterclaim. The arrangements leading to the dispute herein were clearly between the 1st Plaintiff personally and the Defendant. Indeed no cause of action is discernible in the Defendant's counterclaim as regards the 2nd and 3rd Plaintiff. I will dismiss the Defendant's counterclaim against the 2nd and 3rd Defendant with costs.

64. I regret that this judgment was delayed due to the court's involvement in election petitions which took up most of the court's time between April and August, 2013.

Delivered and signed at Malindi this **25th** day of **November, 2013** in the presence of Mr. Ole Kina for the Plaintiff, Mr. Odero for the Defendants.

Court clerk – Samwel

C. W. Meoli

JUDGE