REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI (MILIMANI LAW COURTS)
Civil Case 545 of 2006

ROBERT BROWN..PLAINTIFF

VERSUS

LIVINGSTONE REGISTRARS LIMITED...1ST DEFENDANT

DELOITTE & TOUCHE..2ND DEFENDANT

JOHN KIARIE...3RD DEFENDANT

JUDGMENT

1. The suit in this matter was commenced by the Plaintiff through a Plaint dated 28th September, 2006 and filed on 29th September 2006. In the suit, the Plaintiff claims damages under various heads against the Defendants jointly and severally, for wrongful dismissal and defamation.

2. The Plaintiff's claim is controverted by the Defendants through a Statement of Defence dated 24th October, 2006 and filed on 26th October 2006 in which the allegations of wrongful dismissal and defamation against the Plaintiff are denied.

3. The Plaintiff's case is that by an agreement in writing dated May 2005, the 1st Defendant holding itself as the service company for the 2nd Defendant, offered the Plaintiff a contract of employment as Director of the Enterprise Risk Services Department with the 2nd Defendant. The Plaintiff avers that the 1st and 2nd Defendants by themselves and/or through their agents made various representations to the Plaintiff, which representations were intended to and did induce him to enter into the said agreement. These representations promised, *inter alia*, that the Plaintiff would be admitted as a Partner in the 2nd Defendant after twelve months subject to satisfactory performance; that he would report directly to the Managing Partner of the 2nd Defendant and have direct access to the East African Partnership Board; that the Plaintiff would be awarded performance bonus in the year ended 31st December 2005 after attaining key performance criteria, that the 1st and 2nd Defendants were committed to the highest standards of ethics, integrity and quality associated with the global firm Deloitte Touché Tohmatsu; and that save for cases of gross misconduct, the Plaintiff would be given six months' notice prior to termination of the contract.

4. As a result of the representations aforesaid, the Plaintiff was induced to accept his position and enter into a contract of employment. Those representations were therefore material representations of fact and intention.

5. Subsequent to the contract of employment, the Plaintiff claims that the 1st and 2nd Defendants made further representations that the relationship between the parties would be guided by the Human Resources

Manual and Ethics Guidelines of the 2nd Defendant.

6. As an immediate consequence of acceptance of the contract, the Plaintiff claims to have sustained loss and damage in respect of own share of removal cost and extra hotel room charges, all aggregating to Kshs. 379,513.00.

7. The Plaintiff avers further that pursuant to the contract of employment, and in furtherance of the business of the 1st and 2nd Defendants, he incurred various expenses which he reasonably believed would be reimbursed by the said Defendants amounting to Kshs. 257,103.87. The said expenses were not reimbursed, causing the Plaintiff to suffer loss.

8. It is the Plaintiff's further case that during the course of employment, grievances and ethical issues arose directly from the relationship between him and the 3rd Defendant, which he variously raised with the formal organisation channels. Despite the Plaintiff following the required formal channels for grievance procedure, the 1st and 2nd Defendants failed to comply with their own organizational guidelines, including the requirement for the establishment of a confidential and secure reporting channel and an investigation in good faith. Instead, the Plaintiff was subjected to further harassment and intimidation by the 3rd Defendant. The Plaintiff further claimed that, as a result of the foregoing, his contract of employment was unfairly, unjustly and wrongfully terminated without notice and even without prompt notification.

9. In addition, the Plaintiff avers that during the aforesaid period, the 3rd Defendant published defamatory remarks about him; in particular through a letter dated 11th January 2006. The Plaintiff alleges that the 3rd Defendant knowingly and deliberately published with the actual and/or constructive knowledge and approval of the 1st and 2nd Defendants an injurious libel to other members of the 1st and 2nd Defendants to the effect that the Plaintiff had engaged in "unsatisfactory performance" and "gross misconduct". As a result of the said defamation, the Plaintiff claims that he suffered loss and damage, including grievous injury to his professional reputation, his character and his esteem.

10. The Plaintiff therefore claims special and general damages against the 1st and 2nd Defendants jointly and severally for wrongful dismissal and breach of contract including unreimbursed office expenses, and damages for deceit and negligent misrepresentation. The Plaintiff further seeks aggravated and exemplary damages for libel and defamatory slander against the 1st, 2nd and 3rd Defendants jointly and severally.

11. In reply to the claim, the Defendants in their Defence filed on 26th October 2006 admit having offered the Plaintiff a contract of employment as Director of Enterprise Risk Services Department in May 2005. They however deny that they made representations to the Plaintiff in terms of the promises summarized in paragraph 3 of this judgment. The Defendants further deny the claims for reimbursement of costs incurred by the Plaintiff as summarized under paragraphs 6 and 7 of this judgment. They also deny the allegations that the Plaintiff's grievances were not addressed and further that the termination of employment of the Plaintiff was unfair, unjust and wrongful. Similarly, the Defendants deny the Plaintiff's claim that they published defamatory remarks about the Plaintiff. They conclude that the Plaintiff is not entitled to the reliefs sought in the Plaint and pray for dismissal of the suit with costs to the Defendant.

12. After various interlocutory applications, both parties filed their supporting documentation in preparation for trial. The Plaintiff further filed a Statement of issues on 16th November 2009. The Defendants did not file any statement of issues but appear to have adopted the Plaintiff's statement as discerned from the written submissions by counsel for the Defendants dated 11th May 2012. It will therefore be in order for this court to be guided by the Plaintiff's statement of issues in the determination of the contested positions in this suit.

13. Further, it is worthy of note that the hearing of this suit commenced on 17th November 2009 before my sister Honourable Justice Khaminwa and that the entire evidence of the Plaintiff was taken before that

court.

14. In his evidence, the Plaintiff testified that the 1st Defendant employed him on behalf of the 2nd Defendant and that is why he had sued them both as his employers. He stated that prior to his employment with the Defendants, he had worked with the 2nd Defendant in London as a Senior Manager in Enterprise Work Services. He stated that the 3rd Defendant was a director with the 1st Defendant and that he had sued him in his personal capacity. He claimed that his dismissal letter, which was widely communicated in the offices, had been signed by the 3rd Defendant.

15. The Plaintiff testified further that he was invited to come to Kenya for an interview and was consequently offered to head the Enterprise Risk Services Department of the 2nd Defendant. He also stated that he had queries regarding the proposed terms of the contract and that during negotiations, he was informed that he would have direct access to the board and that he would be reporting directly to Mr. Daniel Ndonye, the Managing Partner. The Plaintiff was also informed that he would be offered partnership within a year. The said representations induced the Plaintiff to enter into a contract of employment with the 2nd Defendant. The Plaintiff indicated that he received a job description, a copy of which he produced in court as "Exhibit 3". Pursuant to the foregoing, the Plaintiff relocated from London to Nairobi and incurred relocation expenses which he claims were not reimbursed. The Plaintiff referred the court to a list of emails marked as **"Exhibit 8"** and in particular **"Exhibit 8 (a)"** which he said covered the issues he had in relation to his work permit and relocation costs.

16. The Plaintiff further stated that after commencing employment on September 5th 2005, he discovered that he would be reporting to John Kiarie instead of Mr. Ndonye as earlier proposed. The Plaintiff claimed that there was no proper induction and for three years he had not had any training yet there was a lot of work. The Plaintiff also stated that he received the Human Resources Manual after he started working which contained disciplinary and grievance procedures.

17. It was also the Plaintiff's testimony that he made certain steps to improve the general Enterprise Risk Services business and that he also implemented change. In the course of doing so, he incurred expenses on behalf of the company which he expected would be refunded. The Plaintiff claims that, the 3rd Defendant, to whom he was reporting, refused to refund the said expenses. The Plaintiff stated that he had receipts and other documentation to show the expenses including his mobile phone call charges. The copies of receipts and invoices were produced as "Exhibit 9".

18. The Plaintiff also testified that via an email dated 9th December 2005, the 3rd Defendant accused him of claiming expenses that could not be reimbursed and further stated that he was living beyond his means. The said email, among other various Emails, was produced in court as "Exhibit 10".

19. The Plaintiff stated that on 6th December 2005 he gave a strategic plan where he mentioned that his ability was being undermined and that he was not involved in decision making. On 20th December 2005, he got a call from the 3rd Defendant asking for a meeting to which he agreed. Before meeting the 3rd Defendant, he spoke to one Caroline Wahome, as he thought it was necessary to have a third party. The Plaintiff expected that they would have discussed the issues fairly. However, at the meeting, the 3rd Defendant accused him on issues of recruitment and expenses threatening him that he was on six months probation and he could be terminated within a day. The Plaintiff was accused of over recruiting and not generating much business.

20. The Plaintiff testified that he learnt of his termination from work while in London via an email which was produced in Court as "Exhibit 13"**.**The Plaintiff claimed that the reasons for his dismissal were malicious. In particular, he stated that the 3rd defendant did not want to pay out to him any dues. The Plaintiff stated that he was dismissed without being given reasons for the dismissal. He further stated that he demanded an apology from the 3rd Defendant and none was offered. The Plaintiff produced copies of the demand letter as "Exhibit 18 (a) and (b)". After he realized that the Defendants were unwilling to

settle, the Plaintiff decided to bring the matter to Court.

21. On cross-examination, the Plaintiff insisted that the representations made to him included an offer for admission to partnership in one year's time if he proved himself and that relocation expenses would be paid for. However, when he signed the contract he was instead appointed as a Director and proceeded to work on the understanding that he would not report to the partners. He testified further that he incurred legitimate business expenses in the course of his employment with a reasonable expectation that he would be refunded, which refund was never made.

22. The Defendants called two witnesses namely John Kiarie (the 3rd Defendant) and Catherine Wahome.

23. In his evidence, DW1 Mr. Kiarie introduced himself as the 3rd Defendant, a Partner in the 2nd Defendant and a Director of the 1st Defendant. In respect of the present case, Mr. Kiarie stated that in his said capacity as a partner and a director, he had participated in the interview of the Plaintiff and had hired him as a director responsible for Enterprise Risk Services. From the letter of appointment, the Plaintiff was to report to him. He could not report to the Board or to the Managing Partner as he was not a partner. The allegation that the Plaintiff had been promised that as director of Enterprise Risk Services Department (ERS), he would be reporting directly to the Managing Partner of the 2nd Defendant or that he would have direct access to the East Africa partnership Board was therefore false. Indeed, the Plaintiff had all along reported to him and had never complained of the reporting line. Under the contract of employment, the Plaintiff was promised to be offered partnership within 12 months subject to attaining defined performance criterion. He stated that when the Plaintiff attended the interview and familiarization tour at Deloitte, it was made clear to him that since he did not meet the requirements to be made a partner, he would be offered a directorship reporting to him. Mr. Kiarie explained the job description outlined for the Director, Enterprise Risk Service and clarified that only partners had access to the Board. He further explained that, as between the Managing Partner and the Director, ERS, there was a dotted line which meant that the Director was not to report to the Managing Partner. However, the Director had access to the Managing Partner.

24. Mr. Kiarie testified that in the four months he worked for them, the Plaintiff was very distracted. He did not concentrate on business and was pursuing mundane interests such as wanting to change the whole switchboard, framing of photos of the sun setting and sending these to clients. He also sought to hire a Ms. Beth Makau who was a receptionist as his secretary, which was a human resource function. The Plaintiff further exhibited poor judgment and attitude against the rest of the staff in the establishment.

25. With regard to the Plaintiff's claim for bonus payment, Mr. Kiarie testified that the bonus was not a legal obligation but was discretionary. It was depended on solid financial performance and although the budgetary targets had been met, the functional management parameters had not been met. In any event, by the time the Plaintiff was terminated, the accounts for the year were still under preparation.

26. On the issue of whether the dismissal of the Plaintiff was proper, Mr. Kiarie testified that the firm had a dispute resolution mechanism both locally and internationally and which was available to the Plaintiff if he was aggrieved. He stated that the Plaintiff had absented himself from work since mid-December 2005 and confirmed that Deloitte did not have a work from home policy. In the event that the plaintiff was to work from home he was required to get his approval or that of his immediate boss which he did not. The Plaintiff's claim that he had opted to work from home due to the fact that he was experiencing back problems and needed an orthopedic seat was therefore inexcusable. He stated that the Plaintiff had been informed that Deloitte did not have a work from home policy and he was required to report back to work. However, the Plaintiff did not report to the office and this position continued till January 2006 when he was terminated. Deloitte was therefore entitled to summarily dismiss the Plaintiff for his absenteeism from office without permission and refusal to obey instructions. He was dismissed for gross misconduct in two main areas: absence from duty and neglect of duty. He testified further that the Plaintiff mistook his firmness on firm policy issues for harassment and intimidation. Mr. Kiarie testified that he was aware that the Plaintiff did contact the Managing Partner and a number of international partners following his dismissal in an attempt to reverse the dismissal.

27. As regards the Plaintiff's claim that he was not reimbursed for expenses incurred, Mr. Kiarie stated that that the Plaintiff was obliged to fill in the Employee Expense Input Form so as to be reimbursed. He stated that when this form was given to him for approval, he declined to do so as the form was incomplete. He had then asked the Plaintiff to properly fill the form identifying the client code for the allocation of cost, which he never did. He stated further that reimbursement was meant for business expenses only and that most of the items for which reimbursement was sought were not of a business nature or did not fall within the Plaintiff's permission to procure.

28. On the Plaintiff's claim that the 3rd Defendant had published defamatory remarks against the Plaintiff, Mr. Kiarie testified that the termination letter addressed to the Plaintiff was copied to persons with the initials "SOO" and "ENN". The plaintiff confirmed that "SOO" was Samuel Onyango, the Staff Partner while "ENN" was Edward, the Finance Manager. He confirmed that the reasons for copying them was because "SOO" as staff partner had a legitimate interest to know the status of employees while "ENN" as the person in charge of finance, would compute the Plaintiff's final dues. He clarified that there was no evidence that the said letter was circulated to other persons other than those appearing on the face of the letter, as alleged by the Plaintiff.

29. In cross-examination, Mr. Kiarie stated that there was no special culture in his firm that required any adjustments for foreign employees. These had the same expectations as locals. The reason it was decided to employee the Plaintiff as a foreigner was because the firm wished to expand and deepen its enterprise risk services in Kenya which needed someone with special skills. He denied that the contract with the Plaintiff was negotiated by David Hodges and maintained that negotiations were done by a group of people. He stated that he was the Partner in charge of enterprise risk services and the recruitment of the Plaintiff was geared at divesting that function from him. He admitted that there was no induction process for the Plaintiff upon his employment. He further admitted that the performance measurement tool known as Global Excellence Model used to assess the competencies of an individual was not applied to the Plaintiff as the tool was applied to measure performance over a period of at least 6 months. His firm had agreed to prepay the Plaintiff for services rendered before he could attain the measurable 6-month service period. He insisted that the Plaintiff was distracted in his work and that he was not the only one complaining about him. In the four months the Plaintiff worked, it was not possible to measure his output although he had acquired new business from existing clients. He admitted that the Plaintiff had organized staff training, had become responsible for the ERS business in Dar es Salaam and Kampala and was highly regarded in ERS in Africa and Europe. Most partners in the firm had also complained and the issue of his performance discussed at meetings. He denied being aware that one of the partners had approached the Plaintiff to complain that the discussion of his performance in meetings of partners was unfair and unprocedural. He was further not aware that the Plaintiff had raised ethical grievances about him. He denied further that the Plaintiff had requested that a third party do attend the meeting between them called to discuss the Plaintiff's performance. He denied that he had given the Plaintiff a retaliatory threat. He admitted that during the period the Plaintiff worked, performance of the ERS Department increased by 14% and that the budgeted bottom-line had been achieved in spite of difficulty conditions. He further admitted that the ground of misconduct was not stated in the termination letter of 11th January 2006. He said that the letter of termination was drafted by HR and he only signed as the Partner to whom the Plaintiff reported. There had also been consultations amongst partners prior to the drafting of the letter.

30. On her part, DW2, Ms. Catherine Wahome introduced herself as the Human Resource Officer of the 1st and 2nd Defendants. She told the court that when the Plaintiff was employed, she took him through the induction process to help him settle down and familiarize himself with the systems and processes of the firm. She also gave him a copy of the firm's human resources manual although employees were expected to access it from the HR office. for expatriates, Deloitte compensated relocation costs in accordance with clause 4 of the Contract of employment but that the Plaintiff had failed to provide any evidence of whether and, if not, why he never made the claim for relocation expenses upon arrival in the country. She added that the Plaintiff had failed to comply with the procedure for reimbursements.

31. With regard to the Plaintiff's grievance in relation to his request for an orthopedic chair, Ms. Wahome stated thatfor the expenditure to be approved, the company policy required that a doctor's certificate be procured confirming that indeed the chair was required for medical reasons. The Plaintiff

had been requested to get that medical certificate but never did so. As regards the Plaintiff's claim that his request for approval of expenditure in the purchase of new furniture, Ms. Wahome stated that the Plaintiff had been informed that the company would be relocating to their new offices in the near future and as such the management had taken the decision not to make capital expenditure on furniture unless it was essential.

32. On the Plaintiff's termination, Ms. Wahome stated that she had been involved in the process and had discussed the matter with Mr. Kiarie. The termination also came after the matter was discussed by the Board of Deloitte. She had also discussed the matter with Mr. Brown himself in the presence of Mr. Ndonye, the Senior Partner.

33. On the Plaintiff's claim that the termination letter was defamatory, Ms. Wahome testified that the letter was written by Mr. Kiarie who was the Plaintiff's immediate boss and who had also signed the Plaintiff's employment letter. He therefore had institutional legitimacy to write the termination letter. Further, as the immediate boss of the Plaintiff, Mr. Kiarie had the capacity and knowledge to make a comment as to the competence of the Plaintiff.

34. In cross-examination, Ms. Wahome reiterated that Mr. Brown was sacked for gross misconduct, namely absenting himself from duty and involving himself in matters not within his domain in the organization. These had affected performance of his core duties. She stated that although Mr. Brown and Mr. Kiarie had not sat down to agree on performance goals, there was an indication of what was expected of him. With regard to induction, she stated that her role was to schedule the induction after which the departmental head would conduct the induction. As regards absenteeism, she stated that there was no formal system of registering attendance at work but there was a clear policy that an employee had to report to work every morning unless there were clear instructions or authorization to work offsite from their supervisors. She added that a member attending a seminar had to notify the administrator and departmental head. There was also a sign off register although for Mr. Brown, she was unable to produce one. On the ethical concerns the Plaintiff had with Mr. Kiarie, she testified that Mr. Brown had expressed concerns about meeting Mr. Kiarie without a third party. She stated further that the decision to sack Mr. Brown was reached with the director in charge of ethics Mr. Kisuu being aware. She admitted that there were no minutes or other evidence that the partners had met to discuss Mr. Brown's termination of employment. She admitted that there was a difference between poor performance and gross misconduct and that for the former, the first step would have been to seek a feedback from the staff. Continued under performance would then escalate into a disciplinary issue and if the disciplinary measures put in place failed, the next step would be a show cause letter followed by eventual dismissal.

35. I have carefully considered the pleadings, the affidavit and oral evidence tendered as well as the respective submissions by counsel for the parties. I am therefore properly placed to make my view on this suit as below.

36. The issues for determination filed by the Plaintiff on 16th November 2009 were set out as follows:

i) Whether the 1st and/or 2nd defendants made material representations of fact and/or intention which were intended to and did induce the Plaintiff to materially alter his position and enter into a contract of employment with the defendants.

ii) Whether the Plaintiff sustained loss and damage as a result of the misrepresentations aforesaid, including relocation costs.

iii) Whether the Plaintiff, pursuant to the contract of employment and various representations of the defendants, incurred reasonable business expenses which the defendants ought to have reimbursed.

iv) Whether in the course of employment grievances and ethical procedures arose directly from the relationship between the Plaintiff and the 3rd defendant, which the plaintiff raised through formal channels and whether the 1st and 2nd defendants managed to comply with their organization

guidelines to the Plaintiff's loss.

v) Whether the dismissal of the plaintiff was proper.

vi) Whether the 3rd defendant, with the approval and at the behest of the 1st and 2nd defendants, published defamatory remarks against the Plaintiff in particular that the Plaintiff had engaged in an "unsatisfactory performance" and "gross misconduct", and whether the statements were defamatory.

vii) Whether the defendants were justified by qualified privilege.

37. With regard to issue No. i) above, it is obvious to me that prior to his appointment, the Plaintiff and the Defendants engaged in discussions through which various representations on the expectations of each side were exchanged. Exhibit No. 4 of the Plaintiff's schedule of exhibits contains the email correspondence exchanged in the lead up to the consummation of the contract of employment. These settle some of the claims by the Plaintiff particularly the question of when he was to ascend to the level of partner as well as the reporting lines of the position of director. In particular, the email dated 21st April 2005 from Mr. David Hodges to Mr. Brown set out the prerequisites that Mr. Brown was to attain so as to achieve partnership. These included demonstration of leadership skills, presentational skills, management skills and achievement of set revenue targets. Although the email acknowledged that these skills would come out naturally "after a couple of months", it was clear that the review of his performance for purposes of consideration of his admission to partnership was unlikely to be done before 12 months as discernible from paragraph 2 of the email. This understanding was reaffirmed in paragraph 3 of the contract of employment itself. All these representations obviously influenced the Plaintiff's decision to move from London and take up the job of director, Enterprise Risk Services with the 2nd Defendant. I am however unable to understand why the Plaintiff has made the question of pre-contractual representations an issue in this case as the decision to join employment with the firm lay entirely with him. There appears to have been no misrepresentation of facts as would be said to have induced him to accept the appointment. The negotiations between the parties appear to me to have been plain and open and the Plaintiff was accorded every opportunity to lay out his terms of engagement. The emails exchanged in the run up to his employment confirm the position that the contract was mutually negotiated by the parties and that the Plaintiff was allowed to review the contract and satisfy himself as to the terms before finally executing it. I therefore concur with the submissions by counsel for the Defendants that by signing the contract of employment, Mr. Brown affirmed the pre-contractual representations and therefore waived any right to rescind the contract on the basis of any perceived misrepresentations.

38. As regards the reporting lines, it is again clear to me that having accepted the position of Director as opposed to partner and knowing that the docket of Enterprise Risk Services fell within a larger department headed by a partner, the Plaintiff was bound to report to the Partner in charge. He could not expect to bypass the partner in charge and have a direct reporting line to the Managing Partner or the Board. In the natural order of things, doing so would have amounted to undermining his immediate supervisor or to elevating himself to the position of such supervisor. Again, I have not been able to fathom what grievance the Plaintiff had with regard to the issue of the person to whom he was designated to report to or what prejudice he stood to suffer by not having a direct reporting line to the Managing Partner or the East African Board. In any event, Mr. Kiarie did testify that the Plaintiff still had a dotted line reporting capability to the Managing Partner and to the Board. This is corroborated in the evidence of Ms. Wahome who told the court of a meeting she, the Plaintiff and the Managing Partner Mr. Ndonye to discuss his grievances which itself indicates that the formal reporting lines attendant to his position did not bar the Plaintiff from accessing the Managing Partner or indeed the Board if he had reason to. I cannot therefore make out any loss or damage that the Plaintiff suffered on account of the reporting line attaching to his position.

39. The second issue that I am required to determine is whether the Plaintiff sustained loss and damage as a result of the misrepresentations aforesaid, including relocation costs. As I have already observed above, the notion created by the Plaintiff that he was lured to take up employment through misrepresentations on the part of the Defendant remains unsubstantiated. The claim that the Plaintiff

suffered “loss and damage” as a result of the alleged misrepresentations therefore fails for lack of any supporting evidence. However, with regard to the losses the Plaintiff claims to have suffered on account of relocation to the country, it is true from the contract at paragraph 4 that the 2nd Defendant firm committed to meet relocation costs borne by the Plaintiff. The paragraph provided as follows:

“The firm will provide an economy airfare ticket for you to enable you travel to your new duty station. We will also arrange temporary living accommodation for a two week period for you to allow you time to identify suitable accommodation. In addition, we will pay the cost of air freighting your personal effects to Nairobi up to a limit to be mutually agreed”

40. DW2 Ms. Wahome testified that the Plaintiff had failed to provide any evidence of whether and, if not, why he never made the claim for relocation expenses upon arrival in the country. She added that the Plaintiff had failed to comply with the procedure for reimbursements. However, from the Plaintiff’s Exhibit 6, the various receipts and invoices that the Plaintiff claims to have incurred in connection with relocation to the country are available. In my view, whether or not the Plaintiff complied with the claims procedure should matter little in view of the contractual commitment by the 2nd Defendant firm to meet these expenses. In the light of that commitment, I would, without more, allow the claim, as the same is wholly undefended and admitted as unpaid by the Defendant through its said witness. The said costs should therefore be reimbursed as claimed together with interest at court rates.

41. The next issue is again in relation to reimbursement of reasonable business expenses incurred by the Plaintiff in the course of his employment with the 2nd Defendant firm. In this regard, Defence Witness No. 1 Mr. Kiarie admitted in his evidence that he did not approve the claim forms presented to him by the Plaintiff ostensibly because the form was not properly filled. With respect, I do not find this a tenable ground to decline reimbursement of costs incurred by an employee in the course of discharge of his duties on behalf of the employer. If indeed the Plaintiff had not properly filled the form, basic management acumen would have informed Mr. Kiarie that he was under an obligation to guide Mr. Brown on how to properly fill the form or at least to refer him to a relevant officer of the firm who would give such guidance. The failure to approve the form in my view signified the repulsive attitude that Mr. Kiarie and Mr. Brown had towards each other and which I would consider the key trigger to the eventual termination of the Plaintiff’s employment. This attitude played out expressly in the email correspondence between the two of 9th December 2005 (Plaintiff’s Exhibit 10) where the 3rd Defendant flatly refused to accede to a request for advance of expenses by the Plaintiff. Whatever the case, this court sees the poor relationship between Mr Kiarie and Mr. Brown as no plausible ground as to why the said business-related costs should not be reimbursed. The Defendants having led no evidence to show that the expenses were not reimbursable but for the incomplete claim form, I would allow the claim and order that the said expenses as documented under Plaintiff’s Exhibit 9 be refunded with interest at court rates.

42. On next issue identified by the Plaintiff for determination of whether inthe course of employment the Plaintiff raised grievances and ethical issues arising directly from the relationship between him and the 3rd defendant, and whether the 1st and 2nd defendants addressed these issues in accordance with the organization’s guidelines, I have just remarked above that the relationship between the Plaintiff and the 3rd Defendant was nowhere near cozy. There was no love lost between the two. The relationship deteriorated to the extent of the Plaintiff alleging threats from the 3rd Defendant as well as being uncomfortable with meeting him without the presence of a third party. Plaintiff’s Exhibit No. 12 is a document covering the various grievances and issues that the Plaintiff raised as against the 3rd Defendant. Neither party led any evidence to show why the two officers could simply not get along. I would not speculate the cause of the rutted relationship. As to whether these were addressed, it is not clear although the material availed before this court indicates that a certain level of intervention was sought by the Plaintiff from Mr. Daniel Ndonye the Managing Partner as well as Mr. Kisuu, the Ethics Officer. It is however safe to hold that the elaborate Discipline and Employee Relations Handling procedure set out in Part 7 of the firm’s HR Manual (Exhibit 7) was not applied or deployed in the Plaintiff’s case. Anyhow, to the extent that the Plaintiff claims having suffered loss as a result of these grievances not meeting any due attention from the firm, I am hard placed to compute any such loss. I take the view that as these grievances contributed to the eventual collapse of the employee-employer relationship, any claim to loss

suffered on account of the grievance procedure not being met cannot stand alone and should necessarily be considered within or merged with determination of the larger question of whether or not the Plaintiff's employment was wrongfully terminated.

43. This brings me to the main issue around which determination of this suit revolves: whether the employment of the Plaintiff was properly terminated. The first port of call in determining this issue is the contract of employment itself. Paragraph 22 of the contract of employment constituted in the letter of appointment dated 9th May 2005 (Document No. 4 Defendant's List of Documents) provided as follows:

"Termination of employment will occur in the event of one of the following: by notice, retirement, summary dismissal, protracted illness, permanent disability or death. Your period of employment with the firm may be terminated by submission of six months' written notice from either party to the other or payment of six months' salary in lieu of notice. In the unlikely event of gross misconduct on your part, the firm reserves the right to terminate your contract summarily without compensation".

44. In the present case, it is the Defendant's contention that the Plaintiff was summarily dismissed for gross misconduct. The evidence led by the two defence witnesses was that the Plaintiff was terminated for his absenteeism from office without permission and refusal to obey instructions. The court was told that gross misconduct on the part of the Plaintiff manifested in two main areas: absence from duty and neglect of duty. DW1 Mr. Kiarie emphatically insisted that the Plaintiff was distracted in his work and that he was not the only one complaining about the Plaintiff's conduct. This was corroborated by DW2 Ms. Wahome who confirmed that the Plaintiff was terminated for involving himself in matters not within his domain in the organization and which had affected performance of his core duties.

45. On his part, the Plaintiff maintains that he learnt of his termination from work while in London via an email and claims that the reasons for his dismissal were malicious. In particular, he singles out the 3rd defendant accusing him of not wanting to pay out to him any dues and for not giving him any reasons for the dismissal.

46. Granted that summary dismissal was contractually provided for, the issue that that I need to address is whether the 2nd Defendant had meritorious grounds for finding the Plaintiff guilty of gross misconduct to warrant his dismissal by way of the summary procedure.

47. From the termination letter dated 11th January 2006 from the 3rd Defendant to the Plaintiff (annexed as Plaintiff's Exhibit No. 17), the Plaintiff was terminated for reasons of unsatisfactory performance and conduct. The particulars of this unsatisfactory position were stated to be as communicated in an email addressed to the Plaintiff by the 3rd Defendant on 21st December 2005. This email (annexed at page 98 of Defendant's affidavit as to documents) warned the Plaintiff that the firm was getting tired of his incessant complaints about almost everything including furniture, PABX and lack of progress and support. The email further advised the Plaintiff to concentrate on client service, winning new work and keeping staff properly utilized or else he would be held to be in gross misconduct. After this email, the next thing the Plaintiff heard of the 2nd Defendant was that his emails could not go through in or around 12th January 2006 ostensibly because he had been dismissed. The email correspondence annexed as Exhibit 13 captures the state of confusion that subsisted around this time. The issue then is whether the matters complained of in the email of 21st December 2005 constituted gross misconduct as to entitle the 2nd Defendant to summarily terminate the Plaintiff's employment.

48. Gross misconduct has been variously defined in law, as follows:

"Most employers would identify intoxication, fighting or other physical abuse, indecent behavior, theft, dishonesty, sabotage, serious breaches of health and safety rules, offensive behavior (such as discrimination, harassment, bullying, abuse and violence) and gross insubordination as examples of gross misconduct. You may wish to specify other offences such as offering bribes, downloading pornography, misusing confidential information or setting up competing business as gross misconduct. Other lesser offences, often relating to work and work performance – for example poor time keeping,

absenteeism, use of workplace facilities, personal appearance, negligence or substandard work do not usually amount to gross misconduct"

(see: www.lawdonut.co.uk/law/employment-law/)

"While there is no formal definition of what constitutes gross misconduct in the workplace, some accepted descriptions include wanton disregard for the safety of others, deliberate acts of violence or hostility, attempts to financially defraud a company, significant levels of insubordination, and dishonesty through falsification of documents or other forms of misrepresentation. Acts such as poor performance, minor errors of judgment or negligence are not typically considered gross misconduct, but rather as poor performance".

(See:www.smallbusiness.chron.com/definition-gross-misconduct-workplace/)

49. Juxtaposed to the foregoing definition, I have little doubt that the conduct complained of the Plaintiff by the 2nd Defendant firm fell under the nomenclature of "other lesser offences" as none of the acts complained of carried the gravity that the law would classify as amounting to gross misconduct. As testified by both Mr. Kiarie and Ms. Wahome, Mr. Brown was a distracted employee, often concentrating on matters that were not within his core docket. He would for instance pre-occupy himself with taking photos and sending them to clients. He would also bother about the quality of furniture, the PABX system, staff employment and promotions and so on. Yet amidst all this distraction and despite the apprehension that the same was bound to affect the Plaintiff's performance, the evidence of both the Plaintiff and the Defendants was unanimous that Mr. Brown was able to achieve a 14% increase in ERS business and, admittedly, under difficult conditions, during the period he worked with the firm. He had also organized training for staff and earned new business across East Africa, among other achievements. Barely any evidence was led to show any adverse impact of Mr. Brown's distracted posture towards work. As for his absenteeism, it is again clear from the definitions above that absenteeism *per se* does not constitute gross misconduct. This notwithstanding that the HR Manual at paragraph 7.2.3 listed absenteeism for a period of 5 days as constituting gross misconduct. From the evidence placed before me, it was also not clear whether Mr. Brown had deliberately absented himself as contrary evidence was also led to show that he may have been suffering from back problems due to lack of an orthopedic chair, he may have been working from home (albeit against the firm's policy) or he may indeed have been away after the firm had closed for Christmas break. Whichever reason it was, such absenteeism, even looking at the number of days of absence, could not in my view constitute gross misconduct in law. DW2 Ms. Wahome did admit that there was a difference between poor performance and gross misconduct and, in my view, the Plaintiff's conduct at most amounted to poor performance. The conclusion must therefore follow that the summary termination of the Plaintiff on grounds of gross misconduct was devoid of merit and was wrongful.

50. What then should the Defendants have done in the light of the above conclusion? DW2 Ms. Wahome explained during cross-examination that the proper procedure that ought to have been followed was to first seek the Plaintiff's feedback on the matters complained of and if the poor conduct persisted to escalate the situation into a disciplinary issue and if the disciplinary measures put in place failed, to issue the Plaintiff with a show cause letter. If all these failed to change the Plaintiff, a dismissal letter could then issue against him. All this was not done. The 3rd Defendant indeed does not appear to have even involved the Human Resource Department in his action to issue a summary dismissal termination letter. He seems to have acted singularly, unilaterally and in a rush without any consultation or concurrence of not only the HR Department but also his Partners. Termination of a senior employee required some level of involvement of the rest of the organization as it was bound to affect the organization beyond the direct effect on the ERS Department. That action is therefore culpable and actionable for damages for wrongful dismissal.

51. The claim for damages for defamation is premised on the fact that the termination letter addressed to the Plaintiff by the 3rd Defendant was copied to persons with the initials "SOO" and "ENN". DW1 confirmed that "SOO" was Samuel Onyango, the Staff Partner while "ENN" was Edward, the Finance Manager. He also confirmed that the reasons for copying them was because "SOO" as staff partner had a

legitimate interest to know the status of employees while "ENN" as the person in charge of finance, would compute the Plaintiff's final dues. He clarified that there was no evidence that the said letter was circulated to other persons other than those appearing on the face of the letter, as alleged by the Plaintiff. My take on this issue is simply that the copying of a letter to persons within the employ of an employer does not constitute publication as these are bound by the duty of confidentiality that inheres in every contract of employment. In any event, the Plaintiff was unable to demonstrate what injury to his reputation the letter of dismissal caused upon him. The claim for damages for defamation therefore fails.

52. Having found the Defendants to have wrongfully terminated the Plaintiff's employment, I am now obliged to enter into computing the quantum of damages that the Plaintiff is entitled to. In this regard, it was submitted by counsel for the Plaintiff that if termination is wrongful, the employee's remedy is the pay for the notice period, or for a reasonable notice period, as well as any other sums he was entitled to as part of his remuneration package. The court was referred to the case of ***Muhota Kimotho Vs. Kenya Commercial Bank Limited (HCCC No. 76 of 1997)*** where the court held as follows:

"The rule is that the wrongfully dismissed employee should so far as money can do so, be placed in the same position as if the contract had been performed, and this is to be done by awarding as damages the amount of remuneration that the employee has been prevented from earning by the wrongful dismissal"

53. In the present case, the contract of employment of the Plaintiff provided at paragraph 22 that his employment could be terminated by either delivery of a 6 months' written notice or payment of 6 months' salary in lieu of notice. I would therefore hold that in view of the summary termination of the Plaintiff's employment having been faulted by this court, the Plaintiff could only have been terminated either through issuance of a 6 months' notice or payment of 6 months' salary in lieu thereof. I would therefore award damages for wrongful dismissal computed at 6 months' salary, in line with the position taken in the ***Muhota Kimotho case***.

54. In the result, and having carefully considered all the issues arising, I am inclined to enter judgment for the Plaintiff against the Defendants, jointly and severally, as I hereby do, in terms of prayers a), b) c), d) and h) of the Plaint dated 28th September 2006 and filed on 29th September 2006.

IT IS SO ORDERED.

DATED SIGNED AND DELIVERED IN NAIROBI THIS 20TH DAY OF SEPTEMBER 2012

J.M. MUTAVA
JUDGE