



REPUBLIC OF KENYA

**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

**Civil Case 51 of 2005**

**(FORMERLY CENTRAL REGISTRY HCCC NO. 5972 OF 1993)**

**GIOVANNI GNECCHI-RUSCONE .....PLAINTIFF**

**V E R S U S**

**HERMANUS PHILLIPUS STEYN .....DEFENDANT**

**J U D G M E N T**

In this suit, the Plaintiff, GIOVANNI GNECCHI-RUSCONE, seeks judgment against the Defendant, HERMANUS PHILLIPUS STEYN, as follows:-

- (a) For the sum of US Dollars 1,206,015/52 or its equivalent in Kenya shillings at the rate of exchange prevailing at the date of **payment, the same being 10% of the monetary compensation due to the Defendant from the Government of the United Republic of Tanzania (herein called the Government of Tanzania).**
- (b) For the sum of US Dollars 2,484,081/70 or its equivalent in Kenya Shillings at the rate of exchange prevailing at the date of **payment, the same being 10% of the value of the property to be restored to the Defendant by the Government of Tanzania.**
- (c) **Costs of the suit.**
- (d) **Interest on (a), (b) and (c) at court rates from the date of filing suit until payment in full.**

The Plaintiff's case as pleaded in the plaint is as follows:-

1. By an agreement between the parties dated 26<sup>th</sup> July 1991 the Plaintiff would act on the Defendant's behalf to procure a settlement with the Government of Tanzania as to compensation payable by that Government to the Defendant for assets seized and properties nationalised in 1982 (paragraph 3 of the plaint).
2. The Defendant would pay to the Plaintiff 10% of the value of any such settlement reached with the Government of Tanzania (paragraph 3).
3. The said agreement between the parties was to remain in force until the end of September 1991, but that the Defendant later extended the validity thereof (paragraph 3).
4. As a result of the effort and influence of the Plaintiff with the Government of Tanzania, an agreement

was entered into between that Government and the Plaintiff which was finalised in June 1993, to the effect that the Government of Tanzania would pay monetary compensation to the Defendant (paragraph 4).

5. Over and above the monetary compensation, the Government of Tanzania would restore to the Defendant a number of his assets which had been seized and nationalised (paragraph 5).

The Defendant duly entered appearance and sought certain particulars of the plaint. The same were supplied. The Defendant then filed a statement of defence. He admitted the agreement with the Plaintiff dated 26<sup>th</sup> July 1991, save that he pleaded that it was not adequately set out in the plaint; he pleaded that the Plaintiff was to be paid only if he procured a settlement with the Government of Tanzania.

The Defendant denied that the agreement he entered into with the Government of Tanzania was as a result of the effort or influence of the Plaintiff. He also pleaded that the monetary compensation agreed was “**not being paid by the Government (of Tanzania)**”, and further, that the agreement with respect to restoration of the Defendant’s assets that had been seized or nationalised was irrelevant to the Plaintiff’s claim as the agreement between the parties referred only to monetary compensation.

The Defendant also made various denials and pleaded in respect to various particulars of the plaint that had been supplied by the Plaintiff. He denied that the Plaintiff dealt with the Government of Tanzania with regard to compensation payable to the Defendant as alleged in the particulars.

I heard this suit between 11<sup>th</sup> October 2005 and 28<sup>th</sup> February 2007. Both parties testified. The Plaintiff called two witnesses. The Defendant in his turn called one witness. The learned counsels appearing chose to put in written submissions. By 28<sup>th</sup> March 2007 the submissions were in place and judgment was reserved for 4<sup>th</sup> May, 2007; however, the same could not be delivered then because of inevitable disruption occasioned by my rather abrupt transfer to another division of this court.

Two agreed bundles of documents were by consent admitted into evidence as Exhibit A and Exhibit D1. In addition, two documents were produced in evidence by PW1 as follows:-

- Exhibit P1: a letter dated 24<sup>th</sup> April, 1992.

- Exhibit P2: a letter dated 15<sup>th</sup> May, 1995.

The following documents were also produced in evidence by DW2:-

- Exhibit D2: a letter dated 7<sup>th</sup> January, 1998.

- Exhibit D3: a letter dated 22<sup>nd</sup> April, 1994.

- Exhibit D4: a letter dated 27<sup>th</sup> January, 1994.

- Exhibit D5: a letter dated 8<sup>th</sup> February, 2006.

- Exhibit D6: Calendar of the year 1991.

- Exhibit D7: Calendar of the year 1992.

A brief background of this case is in order. In the year 1982 the Defendant’s assets in Tanzania were seized by the Government and subsequently nationalised under an Act of Parliament. The Act also provided for compensation. The assets of the Defendant so seized and nationalised included personal effects, motor vehicles, aircraft, houses and companies. The companies owned various expansive parcels of land in which various agricultural activities were conducted. The Defendant was also arrested and held

in jail for economic sabotage for close to a year. He was then declared a prohibited immigrant and deported. He relocated to neighbouring Kenya.

For close to ten years since the seizure and nationalisation of his assets, the Defendant tried, unsuccessfully, to get the Government of Tanzania to pay him fair and just compensation. Then the Plaintiff was introduced to him by a mutual friend who thought that with his experience in Tanzania and influence among Government officials there, the Plaintiff might be able to help. The Plaintiff and the Defendant then talked; they agreed in writing that the Plaintiff would act for the Defendant in trying to get the Government of Tanzania to pay him fair and just compensation. If the Plaintiff's efforts resulted in a settlement that met the Defendant's approval, and if money was paid to the Defendant upon such settlement, the Defendant would pay to the Plaintiff a success fee of 10% thereof.

It is the Plaintiff's case that he then embarked on a campaign to procure for the Defendant a fair and just settlement from the Government of Tanzania. In a period of over one year he had many meetings with high Government of Tanzania officials, negotiating with them and pleading the Defendant's case. He kept the Defendant fully informed of what he was doing. He also managed to arrange various meetings between the Defendant and the Tanzanian officials who included senior civil servants and politicians. His efforts paid off, and a memorandum of understanding was signed between the Defendant and the Government of Tanzania. Subsequently, a formal settlement agreement dated 8<sup>th</sup> November, 1993 was executed. It appears at page 112 of Exhibit A.

It is the Plaintiff's further case that the Defendant has been paid and his other assets restored to him by the Government of Tanzania as provided for in the settlement agreement, and that therefore he is entitled to his 10% success fee.

The Defendant is of a different persuasion. It is his case that the settlement agreement was not procured by the effort of the Plaintiff, that the Plaintiff did not do anything that led to the execution of the settlement agreement, and that it fell upon the Defendant himself to negotiate directly with the Government of Tanzania, leading to the settlement agreement. The Plaintiff is therefore not entitled to the success fee. In any event, it is the Defendant's further case, he has received not a single cent from the Government of Tanzania upon the settlement agreement; therefore, the 10% success fee has not accrued to the Plaintiff.

I have considered the testimonies of the Plaintiff, the Defendant and the witnesses. I have also considered the documents placed before the court. Finally, I have considered the submissions of the learned counsels.

There are three broad issues in this suit:-

- 1. What were the terms of the agreement between the parties dated 26<sup>th</sup> July, 1991? What were the rights and obligations of the parties under that agreement?**
- 2. Was the settlement agreement between the Defendant and the Government of Tanzania a result of the effort of the Plaintiff? Was that agreement procured by the Plaintiff's effort and influence?**
- 3. Has the Defendant been paid by the Government of Tanzania under the settlement agreement, and if so, to what extent?**

#### **1. Agreement dated 26<sup>th</sup> July 1991**

This agreement appears at page 1 of Exhibit A. It is in the form of a letter addressed to the Plaintiff by the Defendant. It reads as follows in the material part:-

**“Dear Giovanni,**

**I refer to our discussions regarding our claims against the Government of Tanzania for our**

**nationalised properties.**

**I confirm that we have agreed that you will act on our behalf, i.e., really on my behalf as the sole claimant, to procure a settlement with the T. Govt. I confirm that we agreed that you will receive ten percentum of any sums of money that might be paid to me in result of such settlement.**

**Our understanding is that an agreement for settlement with the Tanz. Govt. must be signed before the end of September 1991. It is also understood that the terms of the agreement must be discussed with me and that before it goes into print my acquiescence was met.**

**Best of luck.”**

The terms of this agreement are:-

1. The Plaintiff would act on behalf of the Defendant in negotiations with the Government of Tanzania regarding the Defendant's claim in respect of his nationalised properties.
2. The mandate of the Plaintiff would be to procure a settlement with the Government of Tanzania.
3. The terms of such settlement must first be discussed with the Defendant and meet his approval.
4. Such settlement must be reached before the end of September, 1991.
6. The Plaintiff would receive 10% of any sums of money that may be paid to the Defendant pursuant to such settlement.

As it happened, no settlement had been reached by the end of September, 1991. The Defendant extended the Plaintiff's mandate to the end of January, 1992. See page 4 of Exhibit A. Again, no settlement had been reached by the end of January, 1992, and the Defendant extended the Plaintiff's mandate “**until the matter has been satisfactorily concluded**”. See page 8 of Exhibit A.

As will be seen later, under the settlement agreement dated 8<sup>th</sup> November, 1993, the Government of Tanzania would pay to the Defendant a certain specific sum of money. It would also restore to him various assets, including shares in companies, farms, residential houses, etc.

An issue arises whether the Plaintiff's 10% success fee would be confined to the monetary compensation or whether it would also extend to the value of the properties restored to the Plaintiff. From the testimony of the Defendant himself and various documents now before the court it is clear that the Defendant initially had no intention of resettling in Tanzania at all. This is obviously because of the bad treatment that he thought he had received from the Government of that country in 1982. Besides, he was already a prohibited immigrant there. The Defendant's intention and inclination was to get monetary compensation in hard currency for all his assets and remain permanently away from Tanzania.

I am satisfied that when he instructed the Plaintiff to try and reopen negotiations with the Government of Tanzania and procure from it an appropriate settlement, the Defendant expected the entire settlement to be in the form of money. However, following negotiations, the settlement would be partly in the form of money and partly in the form of return of some of his assets. But documents must be allowed to speak for themselves. The agreement of the parties was that the success fee would be a percentage of any **money** paid under the settlement. When it became apparent that the Defendant would not only receive monetary compensation but would also have assets restored to him, the Plaintiff could have renegotiated his success fee. He did not. It is thus clear to me that in the minds of both the Defendant and the Plaintiff, the Plaintiff's 10% success fee was to be based upon the monetary compensation only, and not upon the value of the entire settlement. It must therefore be confined to the monetary aspect of the settlement.

## **2. The Settlement Agreement dated 8<sup>th</sup> November, 1993**

Was this settlement agreement between the Defendant and the Government of Tanzania a result of the effort of the Plaintiff as urged by him? Was it procured by him, or did he have nothing at all to do with its realisation as urged by the Defendant? This is really the main issue in this case. For nearly ten (10) years the Defendant was unable to secure for himself a fair and just settlement from the Government of Tanzania. He had been arrested, imprisoned and then deported from the country. He settled in the neighbouring Kenya from where he made efforts to try and get just compensation for his nationalised properties. His efforts were unsuccessful. He was frustrated and defeated. He was desperate. The Government of Tanzania was no longer talking with him.

Then enter the Plaintiff. He was able to get access to very high Government officials. He soon succeeded in persuading the Government of Tanzania to look at the Defendant's case afresh. Fresh negotiations commenced. There are correspondences in Exhibit A which show clearly that the Government of Tanzania accepted the Plaintiff as the Defendant's representative in these negotiations. The Defendant, in the course of the new negotiations, was mostly in Kenya. The Plaintiff kept him abreast with weekly briefings. Later he was able to secure for him temporary permits to enter Tanzania when his personal presence was necessary. It must be borne in mind that the Defendant had not donated to the Plaintiff a formal power of attorney, and therefore he could not, for instance, execute documents on his behalf or give certain commitments. It would appear that every now and then his personal presence was necessary in the course of negotiations.

In his testimony the Plaintiff gave a detailed account of how he went about executing the mandate given to him by the Defendant. He gave the names of the Government of Tanzania officials that he talked to and had meetings with. He described in detail his strategy. He held over 50 meetings with various high Government officials between July, 1991 and February, 1993. From his testimony alone, I am satisfied that the Plaintiff had the necessary influence and contacts in Tanzanian government circles that enabled him to persuade various high officials of the Government of Tanzania to look at the Defendant's case afresh. These officials included the then Permanent Secretary in the Ministry of Finance one Professor SIMON MBILINYI and the Chief Secretary in the Office of the President, MR. PAUL MILIANGO RUPIA.

Mr. Rupia testified as PW2. I was very favourably impressed by him. He was a dignified elderly gentleman. In his time, he had risen to the highest office in the Tanzanian Civil Service as Chief Secretary in the Office of the President. He was also Head of the Civil Service and Secretary to the Cabinet by the time he left office in 1995. He had held those positions from 1986.

His testimony was straight-forward. The Plaintiff was introduced to him in Dar-es-salaam in 1992 by a family friend. He was then the Chief Secretary in the Office of the President. The Plaintiff wanted to meet him as a representative of his client, one Mr. STEYN. He did not know Mr. Steyn and never met him; but he got to know about his case in his official capacity as Chief Secretary. The Plaintiff wanted him to assist to ensure that Mr. Steyn was properly compensated for his properties confiscated by the Government of Tanzania.

After hearing the Plaintiff, Mr. Rupia briefed the President of the Republic and others about the case. Arising out of that brief, he was instructed to transmit the case to the Prime Minister so that the Prime Minister could call a meeting of all interested parties. He further testified that the Plaintiff got a favourable hearing from him because at that time the Government of Tanzanian had abandoned its hostile nationalisation policy, and there was already a law in place catering for full negotiated compensation for any nationalised properties.

To get things moving, Mr. Rupia wrote to the Vice President and also to the Prime Minister of the Republic (pages 60 and 62 of Exhibit A). After that the state machinery started to move towards resolution of the Defendant's case. He had various official meetings in his office at State House, Dar-es-Salaam with the Plaintiff whom he accepted as Mr. Steyn's representative. In one of those meetings he gave the Plaintiff the assurance that the necessary Government machinery was working towards resolving Mr. Steyn's case. At Mr. Rupia's demand, the Plaintiff had Mr. Steyn write to Mr. Rupia confirming the discussions between himself and the Plaintiff.

Mr. Rupia further testified that he was aware that eventually an amicable settlement between the Government of Tanzania and Mr. Steyn was reached; he saw the settlement agreement while he was still at State House. He did not know if Mr. Steyn had been fully paid the compensation set out in the settlement agreement; but he expected that the Ministry of Finance paid him.

Following the action initiated by Mr. Rupia, the Plaintiff was able to have discussions with other officials of the Government of Tanzania, including one GABINUS EDGAR MAGANGA, who testified as PW3. At the material time he was an Assistant Commissioner of Public Investments in the Ministry of Finance. Within his docket was the Defendant's case. He was instructed by his Permanent Secretary to resolve the case. He testified over two days. His testimony in the first day, briefly, was as follows. The original negotiations with Mr. Steyn in 1983 after his properties were nationalized did not bear fruit as he refused the Government's offer of TShs. 52 million as compensation. Mr. Maganga himself was not a member of the original negotiating team, but in 1992 he was called to the Principal Secretary's office and introduced to Mr. Steyn. He was then instructed to handle personally the issue of compensation to Mr. Steyn. The Principal Secretary was then Professor SIMON MBILINYI.

Thereafter, Mr. Maganga further testified, Mr. Steyn wrote to him a letter and introduced to him the Plaintiff. Mr. Steyn delivered the letter to him accompanied by the Plaintiff. This was at Mr. Maganga's office in Dar-es-Salaam. The letter is at page 3 of Exhibit A. Mr. Maganga was aware that some time in the 1980s Mr. Steyn had been declared a prohibited immigrant in Tanzania and was not allowed in the country. About 1992/1993 Mr. Maganga wrote to the Immigration Department requesting that Mr. Steyn be allowed into the country for negotiations. The request was allowed but he knew that before then, whenever Mr. Steyn would be called to Tanzania for negotiations, he would have a temporary permit to enter the country.

Mr. Maganga further testified that the Plaintiff negotiated with him and other Tanzanian Government officials on behalf of Mr. Steyn. He first met the Plaintiff in late 1992 or early 1993. At this juncture Mr. Kapila, learned counsel for the Plaintiff, complained that Mr. Maganga's testimony was at variance with his statements given to the counsel, and was thus hostile. He sought, and was granted, adjournment to take instructions.

Mr. Maganga resumed his testimony in-chief the following day. He stated that the previous day he was rather confused about dates. He wished now to state that he first met the Plaintiff in July 1991 when he was called to the Principal Secretary's office. Between that time and February 1993 when Mr. Steyn and himself signed a memorandum of understanding (page 96 of Exhibit A), he arranged only once for Mr. Steyn's prohibited immigrant status to be temporarily lifted. But officers in other Government departments could have made similar arrangements for Mr. Steyn. He recalled that at one time Mr. Steyn came through his office after he had been to see the Prime Minister, and there were two or three other times that he had met him. As for the Plaintiff, between July 1991 and 11<sup>th</sup> February 1993 he formally met him more than ten times to discuss Mr. Steyn's case.

Mr. Maganga further testified that from July 1991 there was pressure from above that Mr. Steyn's case be settled; there was also diplomatic and investor pressure. Mr. Maganga was engaged in the technical side of things. The Plaintiff and he sat with the Government valuer when discussing the valuation prepared by Mr. Steyn's valuer. In all the discussions the Plaintiff acted as the representative of Mr. Steyn and was a very active participant in the discussions.

As a result of these discussions progress was achieved. The main areas of difficulty had been the valuation of land, interest rates to be paid upon the compensation and repatriation of the compensation (i.e., payment in U.S. Dollars). Agreement was eventually reached. It was a realization of the discussions. The Plaintiff played a crucial role in the discussions leading to the agreement as Mr. Steyn himself could not be present in the discussions. His representative was the Plaintiff. Mr. Maganga referred to a letter dated 25<sup>th</sup> November 1992 (page 91 of Exhibit A) that he wrote to the Plaintiff at Nairobi as Mr. Steyn's representative. It was a follow-up of discussions held with the Plaintiff.

Mr. Maganga further testified that finally a settlement agreement was reached between the Government of

Tanzania and Mr. Steyn (page 112 of Exhibit A). He witnessed the signing of the agreement. The settlement agreement catered for payment to Mr. Steyn of compensation in cash and for return to him of various assets.

Mr. Maganga testified that his department, which had dealt with the negotiations, initiated payment to Mr. Steyn by the department of the Accountant-General. He knew for a fact that Mr. Steyn was paid the first instalment of one million US Dollars because he initiated the process of payment. He also initiated the payment process for the second instalment and knew for a fact that it was paid. Then there was delay in further payment occasioned by political issues in Parliament regarding some aspects of the settlement agreement, especially with regard to handing back to Mr. Steyn of some of the farms. Mr. Maganga left office in June 1997. He did not know if the rest of the instalments were paid, but he had no reason to think that they were not paid. He further said that a week before he came to testify he enquired from the Treasury about the payments to Mr. Steyn and was advised that there were still some payments outstanding. He was not given a figure. He got the impression that the intention to pay Mr. Steyn any outstanding amount was still there, though the ability to pay may be lacking for now.

Regarding the return of assets, Mr. Maganga testified that other than the Laigwanani Ranch, all the other assets were returned to Mr. Steyn under the settlement agreement. The Laigwanani Ranch was being discussed with a view to compensating Mr. Steyn for it. He stated that he handled the return of all the other assets to Mr. Steyn.

Mr. Maganga reverted to the memorandum of understanding at page 96 that he signed on behalf of the Government of Tanzania and Mr. Steyn signed on behalf of himself. He said that when it was signed the Plaintiff was not present. After it was signed Mr. Steyn told him not to disclose the memorandum to the Plaintiff. He (Mr. Maganga) was surprised at this because all along the Plaintiff had been Mr. Steyn's representative in the discussions.

In cross-examination, Mr. Maganga stated that it was not correct, as he had stated the previous day, that he was first introduced to the Plaintiff by Mr. Steyn in the Principal Secretary's office; he said he was confused in his memory. He stated that in fact it was the Principal Secretary, Professor Mbilinyi, who introduced the Plaintiff to him. He (Mr. Maganga) then told the Principal Secretary that the Plaintiff had to have some written authority from Mr. Steyn to enable him (Mr. Maganga) to talk to him. In September 1991 the Plaintiff brought to him the document at page 3 of Exhibit A addressed to whom it may concern. He then accepted that the Plaintiff had authority to negotiate on behalf of Mr. Steyn.

Other than the letter at page 91 of Exhibit A he never wrote any other letter to the Plaintiff. But there was no need as the meetings he had with the Plaintiff were minuted and kept in the office files. He denied that it was Mr. Steyn who introduced the Plaintiff to him. As far as he knew, Mr. Steyn had only one representative in the negotiations, the Plaintiff. But he had a valuer called Mr. Holmes who sat in on one of the meetings as adviser to the Plaintiff.

All the other letters that Mr. Maganga wrote in connection with this matter were to Mr. Steyn directly as he was the principal. He did not copy them to the Plaintiff. They were collected from him by Mr. Kadri (the one who introduced the Plaintiff to Mr. Rupia), and he knew that Mr. Kadri would fax the letters to the Plaintiff.

Mr. Maganga was then referred to a letter dated 22<sup>nd</sup> June 1995 written by the Principal Secretary, Professor Ngumbullu, to the Plaintiff (page 127 of Exhibit A) to the effect that Government records showed that discussions for compensation to Mr. Steyn were carried out and concluded between Treasury officials and Mr. Steyn himself. He said that was false in so far as it inferred that the Plaintiff was not involved at all in the negotiations. He said he could recall three or four times when he held discussions with the Plaintiff and Professor Ngumbullu in the latter's office.

Mr. Maganga was then referred to a letter dated 22<sup>nd</sup> April 1994 addressed to a Mr. LE PELLE (Exhibit D3). He acknowledged to have signed the letter, though he said that he did not recall writing it or the circumstances under which it was written. The letter states categorically that the Plaintiff did not in any

way influence the negotiations leading to the settlement agreement between the Defendant and the Government of Tanzania. Mr. Maganga stated that what is stated in the letter is not true.

I have revisited the testimony of Mr. Maganga at some length because he appears to have been the key negotiator on the side of the Government of Tanzania. He would know with whom he negotiated on the Defendant's side. Notwithstanding his initial confusion as to when he first met the Plaintiff, and how and by whom he was introduced to him, I accept his testimony that by and large he negotiated with the Plaintiff as the Defendant's representative whom he accepted as such. This is buttressed by the testimony of Mr. Rupia, which I accepted fully. It is also buttressed by various correspondences in Exhibit A which refer to the Defendant's representative in the negotiations. There is no evidence of any other person acting as the Defendant's representative in the negotiations. Mr. Holmes (who never testified) appears to have been the Defendant's valuer who sat in on one or two meetings during the negotiations when the valuation of the Defendant's assets by himself was under discussion. He sat in, not as a negotiator, but as the Plaintiff's adviser in the negotiations.

And it is because Mr. Maganga knew that he negotiated with the Plaintiff that the letter dated 22<sup>nd</sup> April 1994 he wrote to Mr. Le Pelly seemed to embarrass him so. He was not forthright as to how he came to write the letter, the contents of which were obviously untrue. But it is not difficult to discern what may have happened. It would appear that when it was clear to the Defendant that settlement with the Government of Tanzania was imminent, he no longer had use for the Plaintiff; that is why he told Mr. Maganga not to disclose to the Plaintiff the memorandum of undertaking that was signed on 11<sup>th</sup> February 1993. He soon thereafter terminated the Plaintiff's mandate. While Mr. Maganga was still in the witness box the Defendant had no compunction at all telephoning him and talking to him about his testimony; he would have had no compunction talking to Mr. Maganga into writing the letter dated 22<sup>nd</sup> April 1994.

The letter dated 22<sup>nd</sup> June 1995 written by P. J. Ngumbullu (page 127 of Exhibit A) is equally baffling. It is contrary to all available evidence before the court. I note that Mr. Ngumbullu was not called by the Defendant to testify. I do not accept as true the contents of that letter regarding the role of the Plaintiff in the negotiations.

I therefore find, on a balance of probability, that the settlement agreement between the Defendant and the Government of Tanzania was a result of the effort of the Plaintiff; it was procured by his effort and influence.

### **3. Has the Defendant been paid by the Government of Tanzania under the settlement agreement, and if so, to what extent?**

Under the settlement agreement, the Defendant was to be paid US Dollars 12,060,155/23 plus interest thereon at 6% per annum from 17<sup>th</sup> January 1993. There were specific provisions on the mode of payment of the principal amount and interest. See the agreement at page 112 of Exhibit A. US Dollars 1 million was to be paid within 14 days of signing the agreement and in any event not later than 30<sup>th</sup> June 1993. The balance and any accruing interest was to be paid in five annual instalments on 30<sup>th</sup> June 1993, 30<sup>th</sup> September 1994, 30<sup>th</sup> September 1995, 30<sup>th</sup> September 1996 and 30<sup>th</sup> September 1997.

The Defendant says he has not been paid a single cent by the Government of Tanzania. Mr. Maganga said that he knows as a fact that the Defendant was paid the initial US Dollars one million and the second instalment. Although Mr. Rupia did not know if the Defendant had been paid, he expected that he was.

The Plaintiff produced no documentary proof that the Defendant was paid. If there is such documentary proof in existence, it is reasonable to expect that it would be in the possession of the Defendant and the Government of Tanzania. It is not unreasonable that the Plaintiff may not have in his possession such documents, especially as his mandate was terminated by the Defendant.

Obviously, documentary evidence of payment to the Defendant by the Government of Tanzania upon the

settlement agreement would have been the best evidence, but certainly not the only admissible evidence. There is Exhibit D1. It is the Defendant's file of papers kept by his advocate, Mr. ERIC SIKUJUA NG'MARYO, who testified as DW1. Those papers include correspondence exchanged between himself (on behalf of the Defendant) and the Government of Tanzania. They relate to **further** compensation that the Defendant was claiming for loss of use of his farms and houses that were restored to him. He wanted US Dollars 7,327,800 for loss of profits from his farm and rental income on a house for the period he was not able to use them. See the letter dated 15<sup>th</sup> June 2002 at page 8 of Exhibit D1. See also the following correspondence culminating with the letter dated 18<sup>th</sup> March 2005 at page 51 of Exhibit D1. In all these letters there is not a single complaint that the Government of Tanzania had refused or failed to pay the monetary compensation as undertaken in the settlement agreement. On the contrary, it is stated in the letter dated 18<sup>th</sup> March 2005 that the outstanding action on the part of the Government is:-

**“a) Transfer of all shares in**

- (i) Rift Valley Seed Limited**
- (ii) Hashman Estates Limited**
- (iii) Lente Estates Limited**
- (iv) Loldebis Limited**
- (v) Mayoka Estates Limited.....**

**b) Transfer of**

- (i) Aman Estate**
- (ii) Lente Estate**
- (iii) Loldebis Estate**

**c) Settle Mr. Steyn's claim for US Dollars 7,327,899 as shall be agreed between the Government and Mr. Steyn.”**

Surely, if the Government of Tanzania had not paid a single cent to the Defendant notwithstanding the very specific payment schedule contained in the settlement agreement, his advocate would have repeatedly and specifically complained of it in his numerous letters to the Government seen in Exhibit B. Why is there no such complaint? And why has the Defendant not sued the Government of Tanzania to enforce the settlement agreement? Obviously, it is because the Defendant has been fully or substantially paid the US Dollars 12,060,155/23 and accrued interest. That is why he felt confident enough to put forward the new claim for loss of profits on the farms and income on a house. He would not have put forward the new claim had he not been paid as it would have put in jeopardy his chances of being paid upon the settlement agreement. And a new claim it was. It was not a re-negotiation of the US Dollars 12,060,155/23 payable under the settlement agreement as claimed by the Defendant and his advocate.

I am satisfied on a balance of probabilities from all the evidence placed before the court that the Defendant has been fully or substantially paid by the Government of Tanzania under the settlement agreement. Paying to the Plaintiff his success fee should have been the Defendant's first priority after the Government of Tanzania started paying him upon the settlement agreement. People must keep to their bargains.

Both learned counsels seem to agree that the Plaintiff's claim is one of special damages. It appears to me that the Plaintiff is merely holding the Defendant to his bargain as contained in the written contract between the parties (page 1 of Exhibit A). He is seeking what is due to him from the Defendant under that contract.

Having considered all the evidence placed before the court, I am satisfied that the Plaintiff has proved his case against the Defendant on a balance of probabilities to the extent that he is entitled to 10% of the monetary compensation of US Dollars 12,060,155/23 paid to the Defendant by the Government of Tanzania under the settlement agreement dated 8<sup>th</sup> November 1993. I will therefore enter judgment for him in the sum of US Dollars 1,206,015/52 or its equivalent in Kenya Shillings at the rate of exchange prevailing at the date of payment. There shall be interest on that sum at court rates from the date of filing suit until payment in full. The interest shall be calculated upon the Kenya Shillings equivalent, not upon the US Dollars.

The Plaintiff shall also have costs of the suit and interest thereon at court rates from the date of filing suit until payment in full.

Those shall be the orders of the court.

**DATED, SIGNED AND PRONOUNCED IN OPEN COURT**

**THIS 7<sup>TH</sup> DAY OF SEPTEMBER, 2007**

**H. P. G. WAWERU**

**J U D G E**