



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**(MILIMANI COMMERCIAL COURTS)**  
**CIVIL CASE 651 OF 1998**

**AHMED RASHID JIBRIL.....PLAINTIFF**

**VERSUS**

**EAST AFRICAN TELEVISION**

**NETWORK LIMITED.....1<sup>ST</sup> DEFENDANT**

**SAM KRUSCHEV SHOLLEI .....2<sup>ND</sup> DEFENDANT**

**GLADYS BOSS SHOLLEI.....3<sup>RD</sup> DEFENDANT**

**AFRICA BROADCASTING LIMITED.....4<sup>TH</sup> DEFENDANT**

**WILFRED DAVID KIBORO.....5<sup>TH</sup> DEFENDANT**

**RICHARD CHARLES HENRY.....6<sup>TH</sup> DEFENDANT**

**ATTORNEY GENERAL.....7<sup>TH</sup> DEFENDANT**

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

The case surrounds a company called East African Television Network Limited, the 1<sup>st</sup> defendant hereof. This company was incorporated in August 1996. The two share holders and directors were Sam Kruschev Shollei and Ahmed Rashid Jibril, the 2<sup>nd</sup> defendant and the plaintiff, hereof, respectively.

The plaintiff's case is that the 1<sup>st</sup> defendant company was incorporated at the instance of Trans-National Bank Limited which was the employer of both the plaintiff and the 2<sup>nd</sup> defendant. It ought to be noted that the shareholders of Trans-National Bank Limited were '*the who is who*' of the then political elite.

The plaintiffs allege that the Trans-National Bank Limited requested him and the 2<sup>nd</sup> defendant to subscribe and became directors of the 1<sup>st</sup> defendant as trustees and nominees of Trans-National Bank Limited.

The plaintiff therefore alleges that the 2<sup>nd</sup> defendant as a trustee of Trans-National Bank Limited had no capacity to sell shares to the 3<sup>rd</sup> defendant and subsequently to 4<sup>th</sup> and 5<sup>th</sup> defendants.

The plaintiff's case is denied and the defendants allege that the 1<sup>st</sup> defendant was the brain child of the 2<sup>nd</sup> defendant, who wishing to attract a broader outlook of the share holding of the 1<sup>st</sup> defendant, invited the plaintiff to hold shares in 1<sup>st</sup> defendant as nominee of the 2<sup>nd</sup> defendant.

The plaintiff, Ahmed Rashid Jibril, stated that he is a chartered accountant by profession and also a businessman. He is a holder of Bachelor of Commerce degree, a member of the Institute of Chartered Accountants of England and Wales, a certified public accountant and a consultant in Financial and banking matters. The plaintiff sits in several boards and was the vice chairman of the Association of stockbrokers.

He was, in 1994, appointed as a director in the board of Trans-National Bank Limited, from which position he stepped down in 1998.

Because of the plaintiff's qualifications and background he had been charged with the responsibility of re-organization and restructuring of the Trans-National Bank Ltd and sat in various committees of the board of the said bank.

The plaintiff previously worked as the head of internal audit, for standard chartered bank group.

The plaintiff described his relationship with the 2<sup>nd</sup> defendant as a long one. That they had come to know each other in college, at the Nairobi University, they were in the same faculty, year mates and friends. That he came to know the 2<sup>nd</sup> defendant's wife, the 3<sup>rd</sup> defendant hereof, and attended their wedding where he participated fully.

The plaintiff said that he and the 2<sup>nd</sup> defendant joined the bank (Trans-National Bank Ltd) at the same time. That the 2<sup>nd</sup> defendant from March 1994 to 1998 served the bank as the deputy general manager of the bank, and in that position he had oversight over the financial aspects of the bank. That the board of directors of the bank viewed the 2<sup>nd</sup> defendant's work as important, and therefore, even though he was not a director, he was invited to attend all board meetings and shareholders meetings where he participated fully.

The plaintiff stated that he and the 2<sup>nd</sup> defendant worked closely on restructuring, debt collection and re-organisation of the bank.

The plaintiff said that the present suit, he filed it as a nominee of the bank because he and the 2<sup>nd</sup> defendant were directors and share holders of the 1<sup>st</sup> defendant as nominee of the bank.

The plaintiff said that, as a background to the formation of the 1<sup>st</sup> defendant, that The Kenya Television Network (KTN) was heavily indebted to the bank. He said that the bank had a floating debenture on all the assets of KTN.

That because of that indebtedness the bank felt exposed and accordingly got involved in one form or the other in the management of KTN. The bank did so by appointing Mr Mwakai Kikonde Sio as the chairman of the KTN board and the 2<sup>nd</sup> defendant as a member of that board.

In August 1996, the plaintiff said that as he sat in his office at Trans-National bank plaza, the chairman of the bank and KTN, namely Mr Sio and the deputy general manager of the bank and a board member of KTN, namely Mr Shollei (2<sup>nd</sup> defendant) came and asked him to be a director of the 1<sup>st</sup> defendant as a nominee of the bank. That they further told him that the 1<sup>st</sup> defendant company was being formed to protect the operations of KTN.

The plaintiff said that he inquired what his role in the said company was to be since he had no intentions of going into broadcasting. He was informed that he was expected to hold the shares of the 1<sup>st</sup> defendant, as a nominee for the bank and that the 1<sup>st</sup> defendant was not expected to go into operation immediately. The plaintiff further said that to his knowledge Mr Shollei also had no interest in broadcasting and media in his personal capacity.

The plaintiff said that he accepted to the bank's nominee and requested that the papers, in that regard, be sent to his office for execution.

The plaintiff further said that it was explained to him that in order to separate KTN and the 1<sup>st</sup> defendant, Mr Shollei would resign from KTN board. Plaintiff referred to the 2<sup>nd</sup> defendant's resignation letter dated 7<sup>th</sup> August 1996 addressed to Mr M.K. Sio chairman of KTN which stated as follows: -

**“RE RESIGNATION AS DIRECTOR**

I write to inform you that due to personal reasons and other commitments, I have to resign as a Director and member of the Board of the Kenya Television Network with immediate effect.

I wish you success in your endeavours to build the company.

Yours sincerely

**S. SHOLLEI”**

The plaintiff stated that the 2<sup>nd</sup> defendant's aforesaid resignation was on the same day that the 1<sup>st</sup> defendant company was incorporated.

The plaintiff said that prior to the incorporation of the 1<sup>st</sup> defendant company the bank incorporated another company called Kiss Media Holding Limited, with the sole purpose of ensuring that if the court action filed by Mr Jared Kagwana, laying claim to ownership of KTN succeeded, and if as a consequence KTN was enjoined from continuing broadcasting, Kiss Media Holding Limited was to take over broadcasting from KTN.

The plaintiff said that the subscribers of Kiss Media Holding Limited were himself, Ahmed Rashid Jibril, one share, Mwakai Sio, one share, and Sam Shollei, one share. That each of them held those shares as nominees of the bank. The board of the bank, he said found the title 'Kiss' to be unsatisfactory because they felt that it was immoral and tantamount to promoting prostitution. That the company, Kiss Media Holding Ltd, became dormant as a result of those views.

The plaintiff said that he did not participate in the choosing the name East African Television Network Limited (the 1<sup>st</sup> defendant). That he believed this name was chosen at KTN. That the incorporation work was undertaken by Kibet & Company Advocate, one of the advocate firms that represented the bank. That the fee note of Kibet & Company Advocates, dated 8<sup>th</sup> August 1996, for the work of incorporation was paid by KTN on behalf of the bank. That the bank was not in media business but only got involved because of the money owed to it by KTN. That all the costs that arose, as result of the bank's said lending to KTN, were borne by KTN.

Plaintiff disputed 2<sup>nd</sup> defendants claims that the 1<sup>st</sup> defendant company belonged to him because, he said, if it belonged to him he ought to have paid the legal fees of incorporation.

The plaintiff conceded that he did not sign, after incorporation, any document to show that he held the shares in the 1<sup>st</sup> defendant company, as a nominee for the bank; this was because the bank held him, as well as the 2<sup>nd</sup> defendant, in high esteem and because the 1<sup>st</sup> defendant was not intended to operate but was to be a fall back venture, in case Mr Kagwana's claims succeeded against KTN.

The plaintiff, without stating when, said that he came to know that the 1<sup>st</sup> defendant company acquired nation wide radio and television broadcasting licences and frequencies. He said that both Mr Shollei and Mr Sio were involved in obtaining the frequencies and licences. These licenses and frequencies were assets of the 1<sup>st</sup> defendant company but that they did not have much value because it was not the intention of the bank that the 1<sup>st</sup> defendant would compete with KTN.

Plaintiff said that he was surprised to hear that the 2<sup>nd</sup> defendant sold the shares in the 1<sup>st</sup> defendant to Nation Media group, through the 4<sup>th</sup> defendant, namely Africa Broadcasting Limited. He learnt of the sale through the press coverage on 17<sup>th</sup> March 1998. He said he did not understand how the sale had taken place.

That as a result of that alleged unauthorised sale, there was an emergency board meeting at the bank where the chairman of the board, Mr Sio, made it clear that Mr Shollei had acted in breach of trust and irresponsibly. That it was decided at the board meeting that to protect the bank the plaintiff would spearhead action against that sale.

The plaintiff said that he first wrote to the chairman of the 4<sup>th</sup> defendant Mr B. M Gecaga by a letter dated 17<sup>th</sup> March 1998. I think it is pertinent that the letter be quoted hereof.

**“Mr B.M Gecaga,**

Chairman,

African Broadcasting Limited,

P O Box 49010,

**NAIROBI**

Dear Sir,

**SUBJECT: ACQUISITION OF EAST AFRICAN TELEVISION NETWORK LIMITED**

My attention had been drawn to the announcement: that African Broadcasting Ltd; has acquired majority interest in East African Television Limited carried by the Daily Nation Newspaper of today 17<sup>th</sup> March, 1998. I received the new with shock and disbelief.

I would like to advise that I am a director and a 50% shareholder of East African Television Network Ltd. I have not anytime either in the past or present transferred or purported to transfer my interest to your company or any other party. I therefore cannot understand how you acquired your interest in East African Television Limited without my knowledge and approval.

I suggest that you look at the Articles and memorandum of Association of East African Television Network Ltd; and you will confirm that I am indeed a Director and shareholder. Any subsequent transfer if any, have been improperly done.

I have written to the registrar of companies requesting him to hold any transfers of shares until this matter is resolved. Any dealing you have had with Mr Same Shollei have been without my authority or knowledge. This matter is subject of a separate action, which I would not like to draw your company into.

I regret to inform you that your purported acquisition of East African Television Network Ltd; is void and I suggest you take the necessary action to protect your position.

I would like this issue resolved amicably and I request for a meeting with yourselves urgently.

Yours faithfully

**A R JIBRIL**

CC **Mr Wilfred Kiboro –**

**Group Managing Director**

**Nation Newspapers Ltd.”**

That African Broadcasting Limited, through its director W.D. Kiboro responded to the plaintiff's aforesaid letter and stated that they were satisfied that the transaction was bona fide.

Plaintiff also wrote on 17<sup>th</sup> March 1998 to the Registrar of Companies and to the Minister of information and broadcasting where he complained that the 2<sup>nd</sup> defendant had sold his 50% share holding without his consent or knowledge.

The Registrar of companies responded on 18<sup>th</sup> March 1998 and confirmed that the allotment of shares form and the notification of change of directors which had been lodged on behalf of the defendants would not be effected.

The Minister of information and Broadcasting also responded on 18<sup>th</sup> March 1998 to the plaintiff's complaint:

**“MR S.K. SHOLLEI**

CHAIRMAN

EAST AFRICAN TELEVISION

NETWORK LIMITED

P O BOX 40467

**NAIROBI**

Dear Mr Shollei

**CANCELLATION OF TV AND RADIO LICENCE ISSUED TO EAST AFRICAN TELEVISION NETWORK LIMITED**

The Government has decided that, following a dispute that has been brought to the attention of this office by one of the directors of the East African Television Network regarding the sale of shares of the company, to cancel TV and radio licences issued to yourselves vide a letter from this office Ref. NO. MIB/22/49/IO/C dated 9<sup>th</sup> August 1996 with immediate effect. This decision has been made due to the above-mentioned dispute.

The Kenya Posts and Telecommunications corporation has duly been instructed to withhold release of frequencies allocated to M/s East African Television Network Limited until otherwise advised.

Yours faithfully

**Hon Joseph W.N. Nyagah M.P.**

## **MINISTER”**

Plaintiff said that the sale of shares in the 1<sup>st</sup> defendant company, by the 2<sup>nd</sup> defendant embarrassed the directors of the bank because they had, just before the sale of the 1<sup>st</sup> defendant shares, sold KTN to the Standard Newspaper group, the directors of the bank therefore had to come up with an explanation which was in a form of a press statement he issued to the Standard Newspaper in the following terms:

“The following statement was today issued by Mr Ahmed Rashid Jibril, Director and Shareholder, East African Television Network Limited.

**“My attention has been drawn to a story on page one of today’s Daily Nation in which it was stated that its wholly owned subsidiary, African Broadcasting Limited, had acquired a majority stake in East African Television Network Limited from Mr Sam K. Shollei.**

**I was, to put it mildly, extremely coerced for, as a 50% shareholder and Director of East African Television Network Limited I was not informed, consulted, or involved in any negotiations with the Nation Group.**

**Mr Shollei, to my knowledge was holding as nominee, 50% of EATN shares and was a Director of the company which was incorporated in 1996 and holding broadcasting licences for radio and television.**

**As a result I have today informed the Chairman of Africa Broadcasting Ltd; Mr B M Gecaga that any negotiations he may have had with Mr Sam Shollei were without my authority and knowledge.**

**The purported sale of the majority share holding in East African Television Network Ltd. to African Broadcasting Limited is, therefore, void and I have today informed Mr Gecaga, and other regulatory and statutory bodies.**

**I have taken legal advice to protect my position and rights. Any further statement will be issued by my lawyer.”**

**Ahmed Rashid Jibril**

**17<sup>th</sup> March 1998**

The plaintiff said that he saw printed in the daily nation his resignation as director of the 1<sup>st</sup> defendant dated 6<sup>th</sup> January 1998. He said that *“I first saw this letter when it was published in the daily nation and subsequently when parties exchanged documents.”* He said that he did not write this letter of resignation.

The plaintiff accepted that the 2<sup>nd</sup> defendant requested him to sign a blank transfer of shares form and he confirmed that he did sign. He said that the form he signed did not have any writing on it, not even his name, that it was completely clear when he signed it.

The plaintiff denied that he negotiated or agreed to sell his one share in the 1<sup>st</sup> defendant to the 3<sup>rd</sup> defendant Mrs Gladys Boss Shollei and that he was never paid the consideration shown on the transfer and further that he was unaware how that consideration was arrived at.

Plaintiff explained that when the 2<sup>nd</sup> defendant requested him to sign the blank transfer of shares he was about to leave the country for overseas and at that time the sale of KTN to Standard Newspapers was at an advanced stage. He said that he believed that if the bank wished to conclude the sale of KTN to Standard Newspapers that blank transfer form would be used for that purpose in his absence. That when he signed the blank transfer form, they were only the two of them that is he and the 2<sup>nd</sup> defendant. That they were in the bank’s boardroom. He said that he signed that blank transfer form in May 1997 and he signed as principal and on behalf of the bank. That he left that blank transfer with Mr Shollei, the then

General Manager of the bank and he said the 2<sup>nd</sup> defendant understood the reason why the plaintiff signed it.

He said subsequently after this suit was initiated and when he obtained a copy of that transfer form he had signed, he noted that his signature was witnessed by Mr Kibet Advocates. He said that he was disappointed that Mr Kibet witnessed the signature without his authority. He said subsequently, at the bank's board meeting, asked Mr Kibet why he witnessed his signature and Mr Kibet responded that he thought Mr Shollei, in obtaining his witness, he believed, he was acting for the bank.

The plaintiff said that as a director, shareholder of the 1<sup>st</sup> defendant, he was not invited to the board meeting of 6<sup>th</sup> March 1998. That the quorum for board meetings is two and since Mrs Shollei was not a director the meeting held on 6<sup>th</sup> March 1998 was unlawful. In addition the plaintiff said that the rules, contained in the Articles of Association of the 1<sup>st</sup> defendant, were not adhered to with regard to transfer of shares, since he did not write the notice of transfer of shares as required.

The plaintiff was so annoyed with the 2<sup>nd</sup> defendant's transfer of 1<sup>st</sup> defendant's shares that he decided, as he put it, to "muddy" the waters and create a crisis for the Registrar of Companies. He said that on 18<sup>th</sup> March 1998 he presented to the Registrar of Companies notification of change of directors which indicated that the 2<sup>nd</sup> defendant resigned as director of 1<sup>st</sup> defendant with effect from 6<sup>th</sup> March 1998 and instead William Kipchumba Sambu was appointed. The plaintiff by that notification was allotted 1000 shares and Sambu was allotted 250 shares in the 1<sup>st</sup> defendant.

Plaintiff concluded his testimony in chief by saying that he was not the 2<sup>nd</sup> defendant's nominee and that to the contrary it was Mr Shollei was the bank's nominee; and that Mr Shollei had no authority to bind the 1<sup>st</sup> defendant in borrowing from the 4<sup>th</sup> defendant.

The plaintiff said that he made complaint to the officer-in-charge of station at central police station about the alleged forgery of his signature in the letter dated 6<sup>th</sup> January 1998 alleging that he had resigned as director of the 1<sup>st</sup> defendant.

On behalf of the 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> defendant, plaintiff was cross-examined by learned counsel Mr Kiragu.

Plaintiff on being asked why his testimony in chief was inconsistent with his affidavit, sworn in this matter and dated 27<sup>th</sup> March 1998 stated that;

*"I am saying I have had time to think through everything."*

The proceedings record that as the plaintiff gave the aforesaid answer he emphasized the point by hammering his hands together.

The paragraph 24 of the plaintiff affidavit dated 27<sup>th</sup> March 1998 state:

**"That the only entries in the said blank transfer at the time I signed it was my name at the top, the name of the company and my name again in the first space reserved for witness."**

Plaintiff accepted it was unusual for the acquisition of the 1<sup>st</sup> defendant not to be minuted formally in the bank's minute book. He stated that the acquisition was discussed in the bank's board meeting as an item of debt collection but accepted that there was nothing before court to prove that discussion.

Plaintiff said that the bank's then directors were Mr Soi, Mr Kiptanui, Mr Jibril, Mr Charles Nyachae, Mr Kemei and Mr Field Marshal. He said that he was unable to say if all the directors knew about the acquisition of the 1<sup>st</sup> defendant.

Plaintiff in further cross examination accepted that although he had stated that he was approached by the 2<sup>nd</sup> defendant and Mr Sio in August requesting him to be a nominee for the bank in the 1<sup>st</sup> defendant company, he accepted that he signed the Memorandum and Articles of Association on 24<sup>th</sup> July 1996.

Plaintiff stated that KTN's debt to the bank was Kshs 10 million. That it was causing the bank quite some concern in view of the dispute with Mr Kagwana. It was feared by the directors of the bank that KTN would go off air and that was the reason for the board to consider the register another company to be the alternative vehicle for broadcasting.

Plaintiff further accepted that Mr Shollei was compensated very well at KTN while he served as a board member but he refuted that it was some of that payment due to Mr Shollei that was used by KTN to pay the legal fees of incorporation of the 1<sup>st</sup> defendant, payable to Kibet & Company advocates.

Plaintiff said that the then shareholders of the bank were; KABARAK Limited, associated with the then head of state Mr Moi; KANES Limited, associated with Mr Biwott; EUROPA Limited, associated with Mr Gideon Moi; LOSUPUK Limited, associated with Mr George Saitoti, the then Vice-President; and CHEMUSIAN Limited, associated with Mr Kulei.

On being questioned what "*J fund*" was, which he was requested by the 2<sup>nd</sup> defendant to contribute, plaintiff said that it was "Jogoo" fund which fund was set up to assist Kenya African National Union Party (KANU) in the general elections of 1998. Mr Jibril said that he was the treasurer of that fund, Mr Shollei was Nairobi area coordinator; and the chairman of the fund was Abraham Kiptanui.

Plaintiff at one point became very agitated on being questioned whether the telephone numbers on his letter head were those of Mr Kulei's companies.

Plaintiff accepted that on signing the blank transfer he did not tell anyone else in the board of the bank that he had signed. He said that board meetings take place once a month.

Plaintiff accepted that he is aware that banks are prohibited from engaging in business other than banking.

On being cross-examined by the 2<sup>nd</sup> defendant appearing in person, plaintiff accepted that the sale transaction of KTN to Standard Newspaper group was conducted speedily. That in the sale agreement, the 1<sup>st</sup> defendant was not reflected as an asset of KTN.

On being questioned how the incorporation of the 1<sup>st</sup> defendant protected the bank, plaintiff responded that the bank had received legal opinion, not in writing, that if KTN was injected from airing programmes, in the dispute with Mr Kagwana, the 1<sup>st</sup> defendant could continue to air programmes using equipment that belonged to KTN.

P W 2 was **JOHN OMAE SIMBA**. He said that he graduated in Forensic Science and Criminology from Karnataka University India. He said that he has been giving expert opinion in court and also has done consultancy services in matters of disputed documents.

He said that in the year 2001 he received instructions from Ibrahim & Issack Advocates to compare plaintiff's signature with the one in the letter dated 6<sup>th</sup> January 1998. Additionally the witness said that he requested the plaintiff to make his signature in his presence. He said that his finding was that the letter dated 6<sup>th</sup> January 1998; the signature thereof differed with the other signatures. He said the signature on that letter was a freehand forgery that is a simulation of the signature of the plaintiff. The witness submitted in evidence his report.

On being cross-examined on behalf of the 4<sup>th</sup> 5<sup>th</sup> and defendant he responded, that he worked as his first job between 1993 and 1994 at Secupork Ltd as an investigator. That he was the only person in that organization dealing with handwriting and signatures examination. Then he joined Jack & Jill Super

market in 1994 as the chief security officer; between 1995 to 1997 he worked in a large plastic manufacturer; 1997 for 4 months he was employed as a probation officer in the Ministry of Home affairs and after 4 months he rejoined General Plastics where he stayed until the year 2001.

He accepted that he had never worked with any handwriting expert since qualifying.

He said that for this case he was consulted by plaintiff's counsel on 26<sup>th</sup> October 2001, orally. He said "*I received from the said counsel documents bearing the plaintiff's signature.*" He acknowledged that all the documents given to him by plaintiff's counsel were photocopies and that he did not have sight of any of the originals. He accepted that photocopies may obliterate some features of the signature; for example he accepted that plaintiff's exhibit NO. 4 page A3 showed the plaintiff's signature had a gap. He said that on getting instructions from the plaintiff's counsel he was not informed which document was disputed.

He denied that page A7, which is the plaintiff's letter to OCS of Central Police that he had read the content, thereof, which was complaining that the letter dated 6<sup>th</sup> January 1998 was a forgery. He stated; "*A 7 I never read – I don't read documents for which I do not get paid.*"

On being asked, "*apart from the baseline is there any other place you identified defects?*" He answered, "*I did not find any other defect that resembles the defect in the baseline of the signature.*"

On being asked whether anyone identified the alleged document to him he retorted that no one did. On being addressed on his report where he stated;

**"TERMS OF REFERENCE: -**

*To compare the signature in the exhibit marked "1" and purported to have been signed by Mr Ahmed Rashid Jibril with his non – request signatures in the exhibits marked A1, A2, A3, A4, A5, A6, A7, A8 and his request signatures in the exhibit marked A9 and noted the stable characters.....".* The witness said that the terms of reference was a combination of his instructions, from plaintiff's counsel and his own understanding.

P W 3 was **MWAKAI KIKONDE SIO**. He said that he was the principal of Utalii College and was also the chairman of the bank. He was the chairman of KTN from 1993 to 1997.

He said the plaintiff was a director of the bank and in that capacity he advised management and board on banking as he had solid experience as a banker and that he was also a member of the banks audit committee.

That KTN was indebted to the bank for kshs 70 million and to secure its position the bank took 50% share holding of the bank.

That the 1<sup>st</sup> defendant company was incorporated to secure the banks investment at KTN in view of the dispute with Mr Kagwana. That because of dispute the bank's investment directly in KTN would disappear if Mr Kagwana's claim succeeded. That because the bank felt exposed it decided to register the 1<sup>st</sup> defendant.

He said that at first it had been decided that he and Mr Shollei would be directors in the 1<sup>st</sup> defendant. However because of possible conflict because of P W 3 holding the chairmanship of KTN board, 2<sup>nd</sup> defendant resigned as a director of KTN and this he did by his letter dated 7<sup>th</sup> August 1996. P W 3 said that the 2<sup>nd</sup> defendant continued to be a consultant after his resignation from the board at KTN, and this he did until KTN was sold to the Standard Newspapers group.

That the decision of the 2<sup>nd</sup> defendant to be a director and shareholder of the 1<sup>st</sup> defendant was discussed between P W 3 and Joshua Kulei, chairman of Chemusia company, and also Mr Shollei.

That when Mr Soi and the 2<sup>nd</sup> defendant approached the plaintiff to request him to be a director of the 1<sup>st</sup> defendant the plaintiff seemed to have been in the know and he accepted.

P W 3 said that the 2<sup>nd</sup> defendant was handling the day-to-day matters of the 1<sup>st</sup> defendants but that the ownership of the 1<sup>st</sup> defendant was the bank.

He said that the 1<sup>st</sup> defendants broadcasting licences and frequencies were entrusted in the possession of the directors of 1<sup>st</sup> defendant because the bank held both directors in high esteem.

P W 3 said that he learnt of the sale of the 1<sup>st</sup> defendant shares on 16<sup>th</sup> or 17<sup>th</sup> March 1998. That he called the plaintiff to inquire about the sale and the plaintiff responded that Mr Kulei had also called him to inquire what had happened. That a board meeting of the bank was called to discuss the sale. That at that meeting the plaintiff said that he had signed blank transfer of share but that he had not authorised their sale. That the plaintiff explained that he had signed in case there was need of transfer of those shares whilst he was out of the country. The plaintiff did not say at that meeting that he had signed a letter resigning as a director of the 1<sup>st</sup> defendant. That at this time KTN had already been sold to Standard Newspaper group.

P W 3 said that the bank authorised the plaintiff to file the present action to challenge the sale of 1<sup>st</sup> defendant shares and that a decision was reached at the board meeting to terminate the services of the 2<sup>nd</sup> defendant with the bank.

P W 3 said that the bank had incorporated the company, Kiss Media Holding Ltd, and the bank's nominee shareholders were, Mr Jibril, Mr Shollei and Mr Soi. P W 3 was incorporated by the bank because the bank was of the view that the name 'KISS' was repugnant to be associated with the bank.

P W 3 refuted that Mr Shollei had been given the licences to broadcast, 1<sup>st</sup> defendant, in appreciation of his role in resolving the banks financial dealing with another bank called bank of Scotland. That the banks procedure was to reward any outstanding work done by an employee by paying them an annual bonus. That in any case the plaintiff had also been involved in resolving the bank of Scotland issue.

P W 3 said that the 1<sup>st</sup> defendant did not have employees nor a bank account and that its affairs were run by Mr Shollei in his office at the bank.

That the banks board minutes are kept by the company secretary of the bank.

On being asked about the dispute with Mr Kagwana over KTN he said that the dispute surrounded the equipment and not the frequencies of KTN.

On being asked how the formation of the 1<sup>st</sup> defendant would have resolved that dispute he retorted that the purpose was to use the frequencies of the 1<sup>st</sup> defendant with the equipment of the 1<sup>st</sup> defendant to broadcast on behalf of KTN. That the formation of 1<sup>st</sup> defendant was two fold; firstly as a safe haven in case the dispute went in favour of Mr Kagwana; and secondly to facilitate business of KTN by using facilities and equipments of the 1<sup>st</sup> defendant.

Further he said that KTN most valuable asset was the equipment, which was worth kshs 150 million. The KTN debt to the bank stood at kshs 70 million. That although the bank could have appointed a receiver to collect its debt with KTN the bank chose to collect it by taking a share at KTN.

P.W. 3 further said: -

**“The Board did not agree to continue with the process of securing frequencies for EATN (1<sup>st</sup> defendant) after the resolution of the dispute with Mr Kagwana. I think it is Mr Shollei who**

**decided to continue with the process. I don't know whose address P O Box 40467 was. The bank's address is shown as P O Box 75840 Nairobi .....I agree that Box 40467 is Mr Shollei's private address....."**

P W 3 then said that the Trans-National bank shareholding was as follows: -

- Ø CHUMUSION Ltd – associated with Joshua Kulei who was personal assistant of the then President Moi.
- Ø TRADE WORLD Ltd – associated with Mr Kulei.
- Ø EUROPA HOLDINGS Ltd – associated with Mr Gideon Moi.
- Ø LOSUPUK – associated with Mr George Saitoti.
- Ø SIMI INVESTORS Ltd – associated with Mr Simeon Nyachae.
- Ø KENYERERE Ltd – associated with Mr Jared Kagwana
- Ø MODERN KONDOO Ltd – associated with Ibrahim Kiptanua.
- Ø KANES Ltd – either associated with Mr N Biwott or Mr Kip'ngeno Arap Ngeny.
- Ø BARAKA Ltd – associated with the then President Mr Arap Moi.

He said that the board of directors of the bank would communicate with Mr Joshua Kulei who in turn would communicate with the bank's shareholders.

P W 3 said that when he joined the bank as its chairman, the bank was experiencing liquidity problem. He described it as being in "I.C.U"; and that this caused anxiety amongst the shareholders, that the height of anxiety was in 1996.

He accepted that the 1<sup>st</sup> defendant was not reflected as a subsidiary of the bank in the bank's report. He explained that the reason it was not shown in the banks report was because it was set up to support KTN. That the shareholding of KTN was 50% held by the Trans-National bank Ltd and 50% by KANU. On being asked P W 3 said that he was not sure if the 1<sup>st</sup> defendant would have been run by the bank or by KTN.

P W 3 said that he was not sure who paid for the frequencies of the 1<sup>st</sup> defendant and stated;

**"I did not follow every detail of what was happening in the alternative investment vehicle.....  
The beneficial owners of the equity of EATN would have been the shareholders of the bank."**

On being further cross-examined P W 3 said that the bank's board meeting held on 17<sup>th</sup> March 1998 was a scheduled meeting where the issue of sale of 1<sup>st</sup> defendant was addressed in the agenda.

P W 3 accepted that he told the 2<sup>nd</sup> defendant that Mr Kule was furious about his sale of 1<sup>st</sup> defendant shares. He also accepted that he told him that the president, Mr Moi, was also furious.

P W 3 described Mr Shollei as being very brave and he gave an example when he approached the then President Mr Moi and requested him to reinstate sacked employees of KTN, namely Isaya Kabira and Vitalis Msebe, who were sacked for airing police brutality at a saba saba rally of 1997.

In what obviously contradicted the evidence of the plaintiff, P W 3 said that, Mr Jibril said that, he had signed the blank transfer in January or February 1998. P W 3 said although the bank had a board meeting

in February 1998, since board meetings were held every month, Mr Jibril, who was present, did not disclose to the board that he had signed the blank transfer. That disclosure was made by him at the board meeting of 17<sup>th</sup> March 1998.

Again in contradiction to what Jibril said P W 3 said that the issue of obtaining frequencies was left to Jibril and Shollei.

On being cross examined by the 2<sup>nd</sup> defendant P W 3 accepted that KTN's debt to the bank was between kshs 10 to 20 million.

P W 3 accepted that the shareholders of the bank sometimes would allocate government land to debtors to the Trans National bank who in turn sold that land and used the money to off set their debt with the bank. P W 3 accepted that KTN was allocated government land, he stated.

**“.....that land was sold at Embakasi for kshs 60 million through the firm of Nyachae & Co Advocates to pay the debt of KTN to the bank.”**

P W 3 once again gave a different figure as the debt owed by KTN to the bank; he said in further cross-examination that KTN owed the bank kshs 180 million.

He accepted that the 2<sup>nd</sup> defendant during his tenure at KTN was paid for his services by refunding his expenses.

PW 4 was *JINARO KIPKOMOI KIBET* an advocate of the High Court of Kenya at the pertinent period of this case was practising under the name of Kibet & Company Advocates.

He stated in evidence that he was instructed by Mr Shollei, 2<sup>nd</sup> defendant, to incorporate the 1<sup>st</sup> defendant company by a letter dated 8<sup>th</sup> July 1996, which letter was written on 2<sup>nd</sup> defendants own letter head.

He said that he treated Mr Shollei as his client, and did not discuss the incorporation of the 1<sup>st</sup> defendant with any other person in the bank. That on formation he forwarded the certificate of incorporation to Mr Shollei. He forwarded that certificate on 8<sup>th</sup> August 1996.

That the plaintiff did not at any one time speak to him relating to the incorporation of the 1<sup>st</sup> defendant. On further being questioned P W 4 said; *“I believe I was instructed by Shollei.”*

He confirmed that he witnessed the blank transfer form signed by the plaintiff since he was familiar with the plaintiff's signature.

He confirmed that the registration of the 1<sup>st</sup> defendant was very time consuming and this he attributed to the silent ban on registration of radio and television companies.

The second defendant, ***SAM KRUSHEV SHOLLEI*** gave evidence as follows:

That he is presently employed as general manager of Nation Marketing and Publicity Division. He obtained this employment in 2000.

Before that he was deputy general manager at the bank from January 1994 to 17<sup>th</sup> march 1998.

He previously worked as a financial controller for Gestetner Ltd, held senior finance position at Kenya Shell and at Price Water house.

He is a graduate, B.A. commerce at the Nairobi University and a holder of MBA. He qualified as a chartered certified accountant.

When he worked at the bank he was also the acting Managing Director of KTN.

That his intention of informing that 1<sup>st</sup> defendant was to get investors with a view to entering into broadcasting business, in addition to his job at the bank.

That that idea crystallized in March 1996 on a visit to South France. On that visit he met a friend called Patrick Kato, a Ugandan. Patrick Kato was associated with Sanyo T.V. in Uganda and his family was also in banking. Kato convinced the 2<sup>nd</sup> defendant that he would be able to get an investor for television either from East African region or from the rest of Africa.

On his return from France, the 2<sup>nd</sup> defendant attempted to meet with President Moi through Gideon Moi or Mr Biwott. This was April to July 1996.

An appointment with the president was secured for him by Mr Biwott either on 19<sup>th</sup> or 20<sup>th</sup> July 1996. 2<sup>nd</sup> defendant said that Mr Biwott knew that he wanted to ask the President for a personal favour but he did not know the exact favour he was seeking.

Once he was given dates for the appointment, 2<sup>nd</sup> defendant said that he began to embark on making preparation for his project. That is on 8<sup>th</sup> July 1996, he wrote to the firm of Kibet & Company advocates and instructed them to incorporate the 1<sup>st</sup> defendant. That he proposed two names for the company namely, East African Television Network Limited and African Television. He said that he expected that the incorporation would be done within one week.

That on 19<sup>th</sup> July 1996 the 2<sup>nd</sup> defendant in the company of Mr Biwott and Mr Kiptanui proceeded to the President's place at Kabarak where they arrived at about 7 – 730 p.m. That they had dinner with the president and discussed business and politics. That the last discussion was his request when he requested that he be allocated frequencies for radio and television. The president agreed and said that the 2<sup>nd</sup> defendant would be assisted by Mr Kulei to get those frequencies.

2<sup>nd</sup> defendant stated that the following day he met Mr Kulei within the Nakuru state house and Mr Kulei seemed to have known why he went to see him. 2<sup>nd</sup> defendant described Mr Kulei as being both surprised and happy that the 2<sup>nd</sup> defendant had been allowed by the president to be allocated the frequencies. 2<sup>nd</sup> defendant said that he informed Mr Kulei that he had not yet formed his broadcasting company. 2<sup>nd</sup> defendant said that Mr Kulei asked him to write a letter of application for licence to the Minister of Information, Mr Johnstone Makau and requested the 2<sup>nd</sup> defendant to let him have that letter of application.

2<sup>nd</sup> defendant on his return to Nairobi said that he pressurised the firm of Kibet & Co Advocates to complete the process of incorporation.

On the issue of subscribers of the company 2<sup>nd</sup> defendant said that at first he thought he should have only himself and his wife but later considered that the company would not have a national outlook, but would be considered a family affair.

2<sup>nd</sup> defendant said that the natural choice of his co-director was the plaintiff, because they had been friends for many years, together at Nairobi University, classmates, year mates. He therefore approached the plaintiff and after explaining to him what he had in mind the plaintiff agreed to hold one share for the 2<sup>nd</sup> defendant in the company being formed.

2<sup>nd</sup> defendant wrote a letter, to the Ministry of information, dated 30<sup>th</sup> July 1996. The licences to broadcast were delivered to the 2<sup>nd</sup> defendant by the minister himself personally at the 2<sup>nd</sup> defendant's office at the bank on the 9<sup>th</sup> August 1996.

2<sup>nd</sup> defendant said that he resigned as a director of KTN on 7<sup>th</sup> August 1996.

After incorporation 2<sup>nd</sup> defendant said that he began to 'sound out' investors and drawing out a business plan.

He obtained frequencies from Kenya Post and Telecommunication the first set of frequencies on 16<sup>th</sup> June 1997, which he said he collected himself. He said that up to this point no one else knew what he was doing with 1<sup>st</sup> defendant.

In October 1997 2<sup>nd</sup> defendant engaged in negotiations with Capital Radio Uganda, with view to them buying the shares of the 1<sup>st</sup> defendant, the radio segment. Those negotiations were forestalled until after the general elections of 1997.

2<sup>nd</sup> defendant said that Mr Kulei requested him and Mr Sio to find a buyer for KTN. They began to negotiate with the Nation Media group through Mr Kiboro. He said that they handed to Mr Kiboro KTN's financial statements. On informing Mr Kulei that they were negotiating with Nation Media group 2<sup>nd</sup> defendant said that they were instructed to sell to East African Standard Limited.

2<sup>nd</sup> defendant said there were events that strained his relationship with the plaintiff and he began to consider to ask him to resign as 1<sup>st</sup> defendant's director and to transfer his one share.

2<sup>nd</sup> defendant said that the events that strained their relationship were:

Ø That Mr Kulei had asked him to look for someone to work alongside the plaintiff in the management of Mr Kulei's over 20 companies and his interest in the bank. 2<sup>nd</sup> defendant found Mr William Sambu and he was employed to work along side with Mr Jibril

Ø The bank had excessively lent to Mugoya construction, and the plaintiff blamed this on Mr Muhindi and the 2<sup>nd</sup> defendant.

Ø That following this, the 2<sup>nd</sup> defendants began to campaign for the removal of the 2<sup>nd</sup> defendant from the bank amongst the shareholders

On being requested to resign the 1<sup>st</sup> defendant's director and to transfer his share, the plaintiff agreed to do so but the 2<sup>nd</sup> defendant said he did not immediately get the plaintiff to sign the necessary papers.

2<sup>nd</sup> defendant said that on 6<sup>th</sup> January 1998 he sent his secretary, called Josephine, to get the plaintiff to sign the letter of resignation and the share transfer. The plaintiff informed Josephine that he would sign in the evening and that 2<sup>nd</sup> defendant should go and see him.

2<sup>nd</sup> defendant said that the plaintiff did sign in his presence. The 2<sup>nd</sup> defendant informed him that he would get one of the bank's lawyers to witness his signature.

That around that time the 2<sup>nd</sup> defendant began to consult with Nation Media Group particularly Mike Roles who came to know that the 1<sup>st</sup> defendant had licences to broadcast. Thereafter the 2<sup>nd</sup> defendant began to meet the 5<sup>th</sup> defendant, Wilfred David Kiboro, first at his office, and later, when it became clear they were going to reach an agreement, at 5<sup>th</sup> defendant's home.

2<sup>nd</sup> defendant said that on 25<sup>th</sup> February 1998 a sale agreement was concluded for the purchase of the 1<sup>st</sup> defendant's 90% share by 4<sup>th</sup> defendant

At the 1<sup>st</sup> defendant's board meeting held on 6<sup>th</sup> March 1998 it was resolved that the 4<sup>th</sup> defendant would

have 899 shares of 1<sup>st</sup> defendant transferred to it, and the 5<sup>th</sup> defendant would receive one share of the 1<sup>st</sup> defendant.

2<sup>nd</sup> defendant said that the consideration on the share transfer signed by the plaintiff was inserted at this meeting.

That it was on 16<sup>th</sup> March 1998 at a press conference, the Nation Media group formally disclosed the share acquisition by Nation Media group, that is of 90% of 1<sup>st</sup> defendant's share holding. This news conference was broadcasted at the 9 p.m. news.

When 2<sup>nd</sup> defendant arrived at his house at about 11 p.m. he said that he found that he had been called by Mr Kulei, Mr Biwott, Mr Jibril, Mr Gideon Moi and Mr Sambu. 2<sup>nd</sup> defendant said that he spoke to Mr Sambu who told that with the 'mood' the way it was that he should not spend the night at his house.

2<sup>nd</sup> defendant said that the following morning he got a call from Gideon Moi who asked him whether he was unable to get any other investor.

Mr Jibril called the 2<sup>nd</sup> defendant and informed him that his action of transfer of the shares in the 1<sup>st</sup> defendant had infuriated Mr Kulei, Mr Biwott and the then President Moi. 2<sup>nd</sup> defendant stated that the plaintiff told him that he was worried because it looked that he and the 2<sup>nd</sup> defendant had collaborated to sell the shares. That the plaintiff said that if he did not get away of getting out of that situation he would deny that he signed the transfer.

Mr Jibril further told the 2<sup>nd</sup> defendant that he was going to have a rough time and that unlike the case of Mr Murgor who had Gideon Moi against him the 2<sup>nd</sup> defendant had Kulei, Biwott, Gideon and the President against him.

The plaintiff said to 2<sup>nd</sup> defendant that Nation Media was viewed negatively by the President and therefore the whole Government machinery would be put in place to stop the transaction.

2<sup>nd</sup> defendant also heard from Mr Kulei who told him that Nation Media championed Kikuyu interest and it had been fighting the president for a long time and to allow it to broadcast would lead to the over throw of the Government. Mr Kulei advised the 2<sup>nd</sup> defendant that for his own sake he needed to reverse that transaction.

2<sup>nd</sup> defendant in conclusion said that it was normal practise at the bank and KTN to pay director's fees as refund of expenses. Accordingly when KTN paid legal fees on his behalf to the firm of Kibet & Co Advocate it was his directors fees.

He denied that there was a meeting between himself P W 3 and the plaintiff discussing incorporation of the 1<sup>st</sup> defendant.

On being cross-examined 2<sup>nd</sup> defendant stated the registered office of 1<sup>st</sup> defendant, that the 9<sup>th</sup> floor Trans-National plaza was Mrs Shollei legal firm's office.

The 5<sup>th</sup> defendant **WILFRED DAVID KIBORO** gave evidence and stated. That he is the Managing Director and Chief Executive Officer of Nation Media Group Ltd, Nation Printing Publishing Ltd. That the 6<sup>th</sup> defendant was Nation Media Group Director but has since left the company, which he left in 2003.

That the 4<sup>th</sup> defendant fully owned Nation Printing and Publishing Company. That the Nation Media Group which owns the 4<sup>th</sup> defendant is the leading media in East Africa in both print and electronic media. That nation media group is quoted in stock exchange and is ranked top ten at the Nairobi Stock

exchange in terms of capitalisation. That the principal share holder is His Royal Highness the Aga Khan.

That Nation got into print media in 1960 and into electronic media in 1999.

That the relationship with Nation media with 1<sup>st</sup> defendant was that it was the vehicle they wanted to use to enter into electronic media, and hence why the 4<sup>th</sup> defendant purchased shares of the 1<sup>st</sup> defendant. That, that acquisition was in early part of 1998 and the 5<sup>th</sup> defendant signed on behalf of 4<sup>th</sup> defendant.

5<sup>th</sup> defendant said that for 7 years prior, the Nation Media group had tried to get into broad casting but had been unsuccessful.

That Mr Shollei approached Nation and Nation was in turn interested in acquiring licences and frequencies for broadcasting. That Nation had been frustrated by the Government of the day from getting into broadcasting media because that Government was not well disposed to Nation Media.

That a due diligence was done and discussions did take place with Mr Shollei, and sometimes those meetings were at Mr Kiboro's house for security reasons. That once an agreement was reached with Mr Shollei the 5<sup>th</sup> defendant invited his co-director Mr Richard Henry, the 6<sup>th</sup> defendant.

That the agreed purchase price of 1<sup>st</sup> defendant's shares was Kshs. 22 million.

That the purpose of the meetings of 6<sup>th</sup> March 1998 was to formalise the agreement of sale. That the 4<sup>th</sup> defendant became the principal shareholder of the 1<sup>st</sup> defendant and Mr Shollei remained the chairman of the board.

He said that on announcing the said purchase of shares the government of the day cancelled the licences of the 1<sup>st</sup> defendant on the basis that there was a dispute between its directors. Nation Media was therefore not able to broadcast.

That on cancellation of the licences that there followed a public outcry and as a consequence the Government issued Nation Media with licence in 1999 to broadcast only within Nairobi.

To explain the difficulties Nation Media experienced in obtaining licence, the 5<sup>th</sup> defendant said that there was a time they were granted licence to broadcast and within 24 hours they were requested to return that letter because it had a mistake and they did not get the letter back and the licence was withdrawn. On another occasion the 5<sup>th</sup> defendant said that the Nation Media was given frequencies in Nakuru but later found that it was a double allocation with the Kenya Broadcasting Corporation. 5<sup>th</sup> defendant explained that at that time the Government had not liberalised the electronic media, that the only electronic media operating then was KTN. 5<sup>th</sup> defendant said at that time the Nation was agitating for reforms so the Government was uncomfortable with it.

That it was not until year 2003 that Nation obtained national frequencies and now broadcasts in Nairobi, Mombasa, Nakuru, Kisumu, Eldoret, Meru and Wajir.

5<sup>th</sup> defendant denied that they drove the plaintiff out of the company and said that he did not feature in the negotiations because he had transferred his share in the company.

The evidence that has been outlined herein before may seem long-winded but one has to consider that the hearing of this suit began on 29<sup>th</sup> October 2001 and was only concluded with the final submission on 16<sup>th</sup> December 2005.

The plaintiff has in bringing the present suit, invoked Order XXX Rule 1 of the Civil Procedure Rules. This rule provides: -

**“In all suits concerning property vested in a trustee, executor or administrator, where the contention is between the persons beneficially interested in such property and a third person, the trustee, executor or administrator shall represent the persons so interested, and it shall not ordinarily be necessary to make them parties to the suit, but the court may, if it thinks first, order them to be made parties.”**

Therefore the plaintiff brings the present suit in his representative capacity that is representing the allegedly beneficial owner of the 1<sup>st</sup> defendant, that is the Trans-National Bank Ltd.

The court is of the view there are two broad issues that need to be delved into before examining the issues drafted by the parties.

The first of these issues is:

**‘Whether the plaintiff and the 2<sup>nd</sup> defendant held their respective subscription shares in the 1<sup>st</sup> defendant company as trustees and nominees for Trans-National Bank Limited in its capacity as beneficial owner of those shares.’**

The second issue is:

**“Whether the plaintiff held his one share in the 1<sup>st</sup> defendant as or not as a nominee of the 2<sup>nd</sup> defendant, and whether the transfer of the plaintiff’s one share in the 1<sup>st</sup> defendant was transferred to the 3<sup>rd</sup> defendant in conformity with the Articles of Association of the 1<sup>st</sup> defendant.**

On the first issue, the reason given by both the plaintiff and Mr Sio was that the bank, because of the debt owed by KTN and because of the dispute that had arisen on the ownership of KTN, they decided to incorporate the 1<sup>st</sup> defendant. On being questioned by defence they said that the dispute over KTN was in regard to equipment and not the frequencies.

Both plaintiff and Mr Sio on being asked the amount of debt owned by KTN gave conflicting answers. The plaintiff said it was kshs 10 million. Mr Sio on being asked at first said kshs 10 million and later kshs 20 million. On being reminded that KTN debt was repaid on sale of the property in Embakasi Mr Sio inflated the debt to kshs 180 million and on being re-examined by plaintiff’s counsel said it was kshs 110 million. It ought to be noted that the plaintiff was a director at the bank that was owed the money and Mr Sio was the chairman of the board of the bank and of KTN and ought to be expected to know the exact amount of the debt.

Both the plaintiff’s explanation and Mr Sio’s on why it was necessary to incorporate the 1<sup>st</sup> defendant was that the first defendant would be used to carry out the broadcasting business of KTN. If that is to be believed and one considers that KTN frequencies were not in dispute, as stated by the plaintiff, why then did the defendant obtain other frequencies for the 1<sup>st</sup> defendant.

The 2<sup>nd</sup> defendant’s evidence on how he obtained permission from the then president to get licence and frequencies was not challenged. Indeed the plaintiff’s stand on this was that the 2<sup>nd</sup> defendant and Mr Sio were involved to get frequencies for the 1<sup>st</sup> defendant company. Mr Sio did however deny being involved in that process.

The plaintiff’s case is that the bank is the beneficial owner of the 1<sup>st</sup> defendant. One of the shareholders of the bank was Mr Kulei. Mr Kulei, it was stated by the 2<sup>nd</sup> defendant, and was not challenged, assisted the 2<sup>nd</sup> defendant to obtain the licence from the Ministry of information. He indeed took the letter of application for licence to the minister on behalf of the 2<sup>nd</sup> defendant. It would then be expected that being a shareholder of the bank he would have noted that the company applying for licence is a company owned by the bank. The fact that he did not note that, can only mean that the company was not owned by the bank.

The evidence outlined hereinabove clearly shows that out of the witnesses it was only the 2<sup>nd</sup> defendant who gave credible evidence of the genesis of the 1<sup>st</sup> defendant being incorporated and it obtaining its most valuable asset, the licence and frequencies to broadcast.

The evidence of Mr Kibet advocate, who was the plaintiff's witness, supported the 2<sup>nd</sup> defendant wholly.

The second defendant had in his custody the certificate of incorporation of the 1<sup>st</sup> defendant and the letter of allocation of licence and frequencies.

The plaintiff in his testimony said that he was shocked to hear the news of the transfer to Nation Media of the 1<sup>st</sup> defendant share. His first reactions are in the letters to the chairman of the 4<sup>th</sup> defendant, Mr Gechaga, to the Registrar of companies and to the minister of Information and Broadcasting. It is important to note that the plaintiff was fighting his own battle of ownership of 50% shareholding in the 1<sup>st</sup> defendant in those letters. That is in his very initial reaction, the said letters; he did not mention that he held those shares as a nominee of the bank. Indeed the cancellation of the 1<sup>st</sup> defendant's licence by the Ministry of information and broadcasting was on the basis that the directors of the 1<sup>st</sup> defendant were having a dispute.

The plaintiff in his first plaint and the chamber summons dated 20<sup>th</sup> March 1998, did not state that he was a nominee of the bank.

The court accepts as true and credible that the powerful political elite, of that day, were furious over the sale of shares to Nation Media, which transfer would have opened the door to the Nation Media group being able to broadcast both on radio and television.

Having accepted that it is credible as stated by the 2<sup>nd</sup> defendant that the plaintiff wanted to distance himself with the said transfer of share it therefore follows that he would have filed the present suit as a sign of so distancing himself.

The court finds that there is no iota of evidence shown on a balance of probability that the plaintiff and the 2<sup>nd</sup> defendant were nominees of the bank in their shareholding of the 1<sup>st</sup> defendant. The bank did not minute the decision to float the 1<sup>st</sup> defendant company and as stated by defence counsel, if the bank needed to have another company, and if indeed Kiss Holding Ltd was offensive to the banks board the bank could have changed its name. Further more if the 1<sup>st</sup> defendant was to replace Kiss Holding Ltd, the evidence presented before court is that the board of Kiss Holding Ltd continued to meet and pursue licence to broadcast even after the formation of the 1<sup>st</sup> defendant.

The burden to prove that the plaintiff and the 2<sup>nd</sup> defendant were nominees lay on the plaintiff. Section 107 of the Evidence Act states:

**“Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”**

The plaintiff has failed to satisfy this section in regard to the first issue, hereinbefore.

On the second issue, the court will first deal with the question whether the plaintiff held the one share in the 1<sup>st</sup> defendant as the 2<sup>nd</sup> defendant's nominee. The answer lies on whether the court accepts as genuine the letter of resignation dated 6<sup>th</sup> January 1998.

It is important to reproduce that letter as follows

**“AHMED RASHID JIBRIL**

P O BOX 40767

**NAIROBI**

6/1/98

**EAST AFRICAN TELEVISION**

NETWORK LIMITED

P O BOX 40767

**NAIROBI**

Dear Sir

I hereby tender my resignation as a Director of the company with immediate effect and further confirm that I have no claims against the company of whatsoever nature including claims for outstanding emoluments, damages, breach of contract, compensation or loss of office, redundancy or unfair dismissal or on any other account. I further confirm that there is outstanding no agreement or arrangement under which the company has or could have any obligation to me.

Yours faithfully

**AHMED RASHI JIBRIL**”

The court is of the view that if the plaintiff had been a subscriber to the formation of the 1<sup>st</sup> defendant in his own right, he would not have signed such a letter which completely did away with his right in the company without any compensation.

Did the plaintiff then sign that letter? The 2<sup>nd</sup> defendant said that he sent his secretary, with this letter and the blank transfer, to the plaintiff for his signature. The 2<sup>nd</sup> defendant exhibited the complimentary slip that he used to send the two documents, which in part stated.

*“As discussed kindly sign the two.”*

The 2<sup>nd</sup> defendant states that the plaintiff did not sign immediately but did sign later when the 2<sup>nd</sup> defendant went to his office.

The plaintiff denies signing the documents, denies ever having seen it and said that he reported the said forgery to the police. One would expect that the prime suspect and one who the police would have wanted to question in regard to that complaint is the 2<sup>nd</sup> defendant. The 2<sup>nd</sup> defendant said that he has never been questioned by police. The puzzle then is was the report ever made to the police. There was no evidence of the police abstract number given.

The plaintiff's witness No. 2 Mr Simba described himself as a handwriting expert. Indeed the employments he said he had held were unrelated to handwriting examination. It does seem that he mostly worked as a security officer. It is not easily understood why a super market, Jack & Jill, plastic manufacturer, General plastic Ltd, his former employers, would require a handwriting expert.

The court faults the evidence tendered by this witness because he fails to display, with some marking the areas of discrepancies in the plaintiff's signatures. The witness also was not truthful. When on being cross examined stated that he did not read a letter to the OCS Central Police which complained that the letter dated 6<sup>th</sup> January 1998 was a forgery. He also stated that he was not informed either by the plaintiff or plaintiff's counsel with regard to which signature was being disclaimed by the plaintiff, whereas in his

report, where he entitled it “**Terms of Reference**” he clearly states what signature was purported to be the plaintiffs

In the case MUTUNYI – V – REPUBLIC [1982] KLR 203, the court held that:

**“Expert evidence is given by a person skilled and experienced in some profession or special sphere of knowledge from facts reported to him or discovered by him by tests measurement and the like. The expert Evidence in this case was unsatisfactory and the expert witness had failed to prove his competence.”**

Since the court found that it could not rely on the evidence of P W 2, Mr Simba, the court looked at various signatures of the plaintiff, in his affidavits, letters and I find that the signature matches the plaintiffs. The court looked at page 107 and 121 of the plaintiff’s agreed bundle No. 1 and at the plaintiffs signature on his affidavit sworn on 10<sup>th</sup> July 1998 the court is unable to see any difference with the one seen on the letter dated 6<sup>th</sup> January 1998. On the whole the court’s finding is that the plaintiff did sign the said letter.

Having made that finding the court is of the view that the plaintiff signed the letter, aforesaid, the court then finds it credible that the plaintiff was the defendant’s nominee. Having also considered the evidence tendered hereof the court finds that the plaintiff is not a truthful witness and probably did not have much interest in the 1<sup>st</sup> defendant company since he even could not remember when he signed the memorandum and Articles of Association. He said that he was first approached in August 1996 yet he infact executed the same in July 1996. The plaintiff it does seem, in saying that he executed it in August was probably being let by the certificate of incorporation.

The other question to be considered is whether the 2<sup>nd</sup> defendant complied with the Articles of Association in the sale of shares to the 4<sup>th</sup> and 5<sup>th</sup> defendants.

The plaintiff accepted that he signed a blank transfer of shares. At first in his affidavit in support of the injunction application the plaintiff stated that when he signed the transfer it had the name of the company, that is the 1<sup>st</sup> defendant and it also had his name. In oral evidence the plaintiff disowned his affidavit and proceeded to give contrary evidence. He stated that the transfer form was completely blank with no entry.

The court does not believe the plaintiff’s oral evidence. The affidavit was made at the time when the matters were still fresh in his mind and the court therefore find that indeed is the true reflection of events. P W 4 stated that the entry that was not on the transfer was the consideration.

The 2<sup>nd</sup> defendant having received the signed transfer of shares proceeded to appoint the 3<sup>rd</sup> defendant as member of the board, and by extension director. The Companies Act defines Director as:

**“includes any person occupying the position of director by whatever name called.**

Having made that finding that there were two directors in attendance at the board meeting of the 1<sup>st</sup> defendant held on 6<sup>th</sup> March 1998 at 9.30 am as the required quorum of general meetings, the decisions reached at the meetings on 6<sup>th</sup> March 1998 were not fraudulent; the plaintiff has failed to prove such alleged fraud with the required high standard, which needs to prove fraud. Indeed as submitted by the defendants, the plaintiff having resigned as director and having transferred his share in the 1<sup>st</sup> defendant had no locus to allege wrong doing in the transactions affecting the 1<sup>st</sup> defendant because he derived no benefit and assumed no obligations in that company.

In response to the agreed issue of the parties the court states as follows:

1. Was the first defendant .....incorporated on the 2<sup>nd</sup> defendant’s instructions?

The court's response is in the positive.

2. Did the second defendant invite the plaintiff to become a director of the company and to subscribe for one (1) share as his nominee?

The court's response is in the positive.

3. (a) Was the plaintiff a director and shareholder of the company at all material times?

The court's response is that the plaintiff was director and shareholder of the 1<sup>st</sup> defendant up and until his resignation and transfer of his shares.

(b) Were the plaintiff and 2<sup>nd</sup> defendant agent and or nominee of Trans-National Bank Ltd?

The court's response is in the negative.

4 (a) Did the plaintiff resign as a director of the company by a letter dated 6<sup>th</sup> January 1998?

The court's response is in the positive.

(b) Was this document or was it a fabrication and a forgery?

Courts response is in the negative

(c) Was his removal ultra vires the Articles of Association of the Company?

The answer is in the negative.

5. Whether the plaintiff signed the transfer of share form in blank to enable the 2<sup>nd</sup> defendant sell shares in the company

The court's response is in the positive.

6. Whether the 2<sup>nd</sup> defendant held the blank transfer of share form in trust for Trans-National Bank Ltd?

The response of the court is in the negative.

(a) Was the blank transfer used for a purpose, which was not intended by the plaintiff?

The court's response is in the negative.

(b) Whether the transfer of the plaintiff's share to the third defendant materially altered without the plaintiff's knowledge, consent or instructions?

The response is in the negative; the plaintiff resigned as a director and transferred his share in the 1<sup>st</sup> defendant.

(c) Was the signature of Mr Jinaro Kibet Advocate appearing on the transfer procured by fraud and/or misrepresentation?

The court's response is in the negative.

7 (a) Were any meetings held by the second, third, fourth, fifth and six defendants on 6<sup>th</sup> March 1998?

The court's response is in the positive.

(b) If so was it resolved to alter the following

- (1) The issue share capital of the company;
- (2) The directors of the company;
- (3) The registered office of the company
- (4) The bank account of the company.

The court's response is in the positive.

(d) Had the plaintiff waived his presumption right under the Articles of Association of the company?

The court's response is that the notice required under the Articles of Association could not be made to the plaintiff in view of his resignation and transfer of his share.

8. Was the plaintiff's share lawfully transferred to the third defendant on 6<sup>th</sup> March 1998?

The court's response is in the positive.

9. Was the third defendant duly appointed a director of the company on 6<sup>th</sup> March 1998

The court responds in the positive.

10. Are the fourth and fifth defendants purchaser for value without notice of any defect (if at all) in the second defendant title to the shares?

The court's response is in the positive.

11. Is the plaintiff estopped from denying the fourth and fifth defendants ownership of the share?

The plaintiff is estopped from denying 4<sup>th</sup> & 5<sup>th</sup> defendants ownership of shares in the 1<sup>st</sup> defendant having transferred his shares and resigned from the position of a director.

12. Did the plaintiff have any interest in the company at the time the fourth and fifth defendants acquired their shares?

The plaintiff did not have such an interest when the 4<sup>th</sup> and 5<sup>th</sup> defendant acquired their shares in the company

13 (a) Is this suit a shareholders dispute?

(b) Does the plaintiff have any interest in the company?

The present suit is not a shareholders dispute in view of the court's finding that the plaintiff transferred his share before sale of shares to the 4<sup>th</sup> and 5<sup>th</sup> defendants. The plaintiff therefore does not have an interest in the company.

14. Does the plaint disclose any cause of action against the company?

The plaintiff's case discloses no cause of action against the company.

15. Has the plaintiff suffered any loss, damage and injury?

The plaintiff failed to prove on a balance of probability that he suffered any loss damage or injury.

16. Is the Plaintiff entitled to the declarations and injunctions sought?

The plaintiff is not entitled to the prayers for declaration or injunction.

From the foregoing it is clear that the court's finding is that the plaintiff's suit fails and accordingly the same is hereby dismissed with costs to all the defendants.

In the final analysis it does seem that the plaintiff by filing the present suit, and by the use of the Government machinery, for example by cancelling the 1<sup>st</sup> defendant's licence, withdrawing its frequencies did achieve what, he and those that were unhappy with the liberalisation of broadcasting intended to achieve, in that the Nation Media group was denied the opportunity to broadcast on radio and television. In so being stopped the 1<sup>st</sup> 2<sup>nd</sup>, 4<sup>th</sup> and 5<sup>th</sup> defendant were denied a business opportunity to make profit.

The court is aware that the defendants have not counter claimed for any loss. The court having considered the evidence tendered hereof by the plaintiff and his witnesses is of the view that this suit was filed for nuisance value and with the intention of causing maximum disruption to the business operations of the 1<sup>st</sup> defendant. The plaintiff did admit that he forwarded false returns to the registrar of companies with the sole intention of "*muddying*" the waters and to cause crisis.

This case, perhaps more than any other, will stand in the annals of history as an example of how Kenya was once ruled by a clique of political elite, and where that elite did not tolerate divergent views and as a consequence, the media was effectively muffled by denial of airways for broadcasting, both in radio and television

This was a case that ought not to have been filed

The judgement of this court is as follows: -

**(1) That the plaintiff's suit is hereby dismissed with costs to the defendants**

**MARY KASANGO**

**JUDGE**

Dated and delivered this 10<sup>th</sup> day of March 2006.

**MARY KASANGO**

**JUDGE**