



**Gulfstream Tours & Hotels Limited v Development Finance Company Of Kenya Limited & another (Commercial Case 832 of 2009 & Civil Case 1112 of 2002 (Consolidated)) [2025] KEHC 4797 (KLR) (Commercial and Tax) (8 April 2025) (Judgment)**

Neutral citation: [2025] KEHC 4797 (KLR)

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

**COMMERCIAL CASE 832 OF 2009 & CIVIL CASE 1112 OF 2002 (CONSOLIDATED)**

**JWW MONG'ARE, J**

**APRIL 8, 2025**

**(COMMERCIAL CASE 832 OF 2009 & CIVIL CASE 1112 OF 2002 (CONSOLIDATED))  
[2025] KEHC 4797 (KLR) (COMMERCIAL AND TAX) (8 APRIL 2025) (JUDGMENT)**

**NEUTRAL CITATION: [2025] KEHC 4797 (KLR)**

**BETWEEN**

**GULFSTREAM TOURS & HOTELS LIMITED ..... PLAINTIFF**

**AND**

**DEVELOPMENT FINANCE COMPANY OF KENYA LIMITED .... 1<sup>ST</sup>  
DEFENDANT**

**GRAHAM JAMES GREER SILKOCK ..... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

**Introduction and Background.**

1. This matter has a checkered history and has sadly been oscillating in court for over 30 years. Thus, this judgment seeks to address the longstanding dispute between the parties that has engaged their resources and that of the court throughout the litigation period.
2. It all started in 1988 when the Plaintiff's directors conceived a plan to construct a 3-star hotel in Kisumu at Milimani area on the property owned by the Plaintiff known as Title No. Kisumu Municipality Block 101X7 ("the suit property"). In 1989, the Plaintiff approached the 1<sup>st</sup> Defendant ("the Bank") to finance the construction of the Hotel and applied for a loan of Kshs.6,400,000.00= . The Bank offered the loan to the Plaintiff which was consummated by a Loan Agreement dated 26<sup>th</sup>



January 1990 and secured by inter alia a Charge and a Debenture all dated 28<sup>th</sup> February 1990 over the suit property.

3. As per the Loan Agreement, the loan was to be repaid in 72 equal instalments with the first payment being made immediately following the first disbursement of the loan. The parties then entered into a Further Loan Agreement dated 28<sup>th</sup> March 1991 for Kshs.4,600,000.00= which was secured by a Further Charge and a Further Debenture over the suit property. By letters dated 2<sup>nd</sup> February 1993 and 16<sup>th</sup> April 1993, the Bank issued two notifications informing the Plaintiff that it had defaulted in its repayment obligations and that its account was in arrears of Kshs. 6,670,482.00 and Kshs.5,176,019.40= respectively for the two sets of loans.
4. As a result of the default, on 19<sup>th</sup> May 1993, the Bank appointed the 2<sup>nd</sup> Defendant as the Plaintiff's Receiver Manager("the Receiver Manager") and also moved to realize the security by selling the suit property. This action triggered the beginning of court battles between the parties as the Plaintiff filed HCCC No. 2555 of 1993 which morphed into HC Comm. Case No. 1112 of 2002. HCCC No. 139 of 1997 was also filed by the Plaintiff incorporating the Receiver Manager as a Defendant and it is this suit that became the present HCComm. Case No. 832 of 2009 and was subsequently consolidated with HCComm. Case No. 1112 of 2002. The Plaintiff claims that the Receiver Manager was appointed to take over the running of the Hotel without any notice, which the Plaintiff stated was detrimental to its business and that it has suffered irreparable loss for this move.
5. As such, it moved the court by way of an application for injunctive orders to stop the Bank from selling the suit property by public auction until the hearing and determination of the suit. The Plaintiff also sought to stop the Defendants from further holding onto the suit property and hotel business under receivership and to direct the Defendants to lift the said receivership pending the hearing and determination of this suit. This application was dismissed by the court (Bosire J., as he was then) in a ruling dated 24<sup>th</sup> June 1994. Attempts by the Plaintiff to get an injunction from the Court of Appeal also flopped, giving way to the Bank to sell the suit property. The Receiver Manager also made the decision to close down the Hotel for reasons that the same was not profitable.
6. The Bank then sought leave under the repealed Registered *Land Act* to sell the suit property by way of private treaty rather than a public auction. The application was allowed by the court (Ole Keiwua J., as he was then) in a ruling dated 20<sup>th</sup> September 1996. Dissatisfied, the Plaintiff appealed to the Court of Appeal and also filed an application to stay the execution of the aforementioned decision by the court. In a decision dated 15<sup>th</sup> November 1996 (*Gulfstream Tours & Hotel Ltd. v Development Finance Co. of Kenya Ltd.* [1996] KECA 214 (KLR), the appellate court allowed the stay application pending hearing and determination of the intended appeal.
7. The Defendants then instructed auctioneers to sell the suit property by public auction which was slated for 24<sup>th</sup> January 1997 as evidenced by the Notification of Sale of 15<sup>th</sup> January 1997. This prompted the Plaintiff to file HCCC No. 139 of 1997 together with an application for injunction seeking to forestall the sale of the suit property as intended above. After hearing the application, the court(Aganyanya J., as was then), delivered a ruling dated 22<sup>nd</sup> September 1997 where he allowed the application and an injunction was granted largely because of the pending appeal at the Court of Appeal.
8. The appeal was allowed by consent which was adopted as an order of the Court of Appeal on 20<sup>th</sup> February 2001. Thereafter, the Defendants filed an application in HCCC No. 139 of 1997 seeking to discharge the injunction orders issued by the court therein. The court, in rulings dated 11<sup>th</sup> April 2002 and reasons given on 24<sup>th</sup> April 2002(*Gulfstream Tours Hotel vs Development Finance Co-Op Kenya Ltd.* [2002] KEHC 773 (KLR) dismissed this application where it was restated that the injunction was



to remain in force until the hearing and determination of the suit. The court also urged the parties to set down the matter for hearing rather than file intervening applications.

9. During the hearing, the Plaintiff presented its director, James Odera Abok as its witness (PW 1). He relied on his witness statement dated 13<sup>th</sup> May 2022 and produced the consolidated List and Bundle of Documents of the same date (PExhibits 1-21). The documents include Plaintiff's Certificate of Incorporation and Memorandum and Articles of Association, the Charge dated 28<sup>th</sup> February 1990, cheques dated 8<sup>th</sup> May 1990 and 30<sup>th</sup> July 1990 by the Bank to Dev Construction Company, Notification of Change of Directors dated 28<sup>th</sup> May 1990, a cheque dated 30<sup>th</sup> July 1990 by the Bank to TJ Conttingham Technical Services Limited, a cheque dated 6<sup>th</sup> November 1990 by the Plaintiff to the Bank, the Loan Agreement, the Further Charge dated 28<sup>th</sup> March 1991, a Trading Summary dated 17<sup>th</sup> June 1991 by the Plaintiff, Notice of Appointment of the Receiver Manager dated 19<sup>th</sup> May 1993, cheques dated 12<sup>th</sup> August 1993, 16<sup>th</sup> June 1993 and 16<sup>th</sup> June 1993 from the Plaintiff to the Bank; the valuation report by Tysons dated 13<sup>th</sup> October 1993, sale agreement in respect of the suit property between the Bank and Nyanza Supermarket Limited dated 2<sup>nd</sup> August 1996, the Court of Appeal ruling in Gulfstream Tours & Hotel Ltd. v Development Finance Co. of Kenya Ltd(supra), Report on inventory of the Plaintiff by Collins Haggai dated 26<sup>th</sup> March 1999, judgement of the Court of Appeal dated 20<sup>th</sup> February 2001, the ruling of the court in Gulfstream Tours Hotel vs Development Finance Co-Op Kenya Ltd(supra), valuation report by Add Property Consultants dated 13<sup>th</sup> May 2008, ProfitLoss Assessment Report by Prof. RICHARD O.B. MAKOPONDO and the ruling of the court on consolidation of the suits dated 11<sup>th</sup> July 2014.
10. The Plaintiff also presented Luke Okeyo Madende as its witness (PW 2), a valuer who prepared the valuation report dated 13<sup>th</sup> May 2008; Prof. Richard O. B. Makopondo who prepared the Plaintiff's ProfitLoss Assessment Report(PW 3) and George Omondi Arum (pw 4) who prepared and produced the Plaintiff's Audited Accounts for the year ended 31<sup>st</sup> December 1992( PExhibit 2).
11. On its part, the Bank relied on its amended consolidated defence dated 26<sup>th</sup> March 2015 and presented its Credit Officer, Fredrick Omondi Kodada who relied on his witness statement dated 24<sup>th</sup> July 2024. He produced the Bank's List and Bundle of Documents dated 23<sup>rd</sup> November 2023(DExhibit 1-6) which included the Loan repayment schedules for the two loans, Remittance by the Plaintiff up to 27<sup>th</sup> April 1993 before appointment of the Receiver Manager, Notifications of event of Default dated 2<sup>nd</sup> February 1993 and 16<sup>th</sup> April 1993 and Replying Affidavits by the Receiver sworn on 5<sup>th</sup> March 1997 and 18<sup>th</sup> April 2005 together with annexures thereto.
12. In addition to their pleadings and evidence, the parties have also filed written submissions in support of their respective positions and I will make relevant references to the same in my analysis and determination below.

### **Analysis and Determination.**

13. In making this determination, I am guided by the fact that the standard of proof in civil cases is on a balance of probability and that the burden of proof is on the party alleging the existence of a fact which he wants the Court to believe. This is anchored in section 107 (1) and (2) of the *Evidence Act*(Chapter 80 of the Laws of Kenya) which provides that “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” and that “When a person is bound to prove the existence of any fact it is said that he burden of



proof lies on that person”. In *Miller.V. Minister of Pensions* 1947 ALL E.R. 372, Lord Denning aptly summarised the application of the standard in the following terms:-

“That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in criminal cases. If the evidence is such that the tribunal can say: We think it more probable than not; the burden is discharged, but, if the probabilities are equal, it is not. Thus, proof on a balance or preponderance of probabilities means a win, however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept, where both parties’ explanations are equally (un)convincing, the party bearing the burden of proof will lose because the requisite standard will not have been attained.”

14. The Court of Appeal in *James Muniu Mucheru v National Bank of Kenya Limited* [2019] KECA 1058 (KLR) simply put it that ‘Courts will make a finding based on which party’s version of the story is more believable.’ From the parties’ submissions, I find that the court is being called upon to resolve the following issues:-

- i. Whether the appointment of the Receiver Manager in the Plaintiff’s Hotel was justified, lawful, reasonable, prudent and fair or whether the same was illegal, unlawful, reckless, without notice and oppressive to the Plaintiff.
- ii. Whether the Receiver Manager professionally managed the Plaintiff’s Hotel in accordance with his obligations under the law and prudent business standards or whether the management was reckless, careless, malicious arrogant and caused the collapse of the Plaintiff’s Hotel business.
- iii. Whether the Receiver Manager was professionally trained, qualified, competent and knowledgeable to be appointed as the Receiver Manager of the Plaintiff’s Hotel Business or not.
- iv. Whether the 2<sup>nd</sup> Defendant provided accounts in respect of the period when the Plaintiff was in receivership.
- v. Whether the Receiver Manager ruined the Plaintiff’s business and whether his conduct of closing the business after appointment with a view of selling the same was consistent with his statutory duties and obligations as a receiver manager.
- vi. Whether the attempts by the Defendants to sell the suit property both by private treaty and public auction after the appointment of the Receiver Manager and without lifting the receivership was lawful, justified, proper and legal or the same was malicious, unlawful, illegal, unjustified, improper and contrary to the law and therefore null and void.
- vii. Whether the Plaintiff has suffered losses and damages and whether the Defendants are liable as a result.
- viii. Whether the loan owed to the Bank has been repaid in full.
- ix. Whether the Plaintiff is entitled to an order of declaration that the receivership should be lifted.
- x. Whether the Plaintiff is entitled to an order of accounts by the Receiver Manager and in the absence of the same whether there should be a declaration that the entire loan ought to have been recovered during the period of receivership and that the business be returned to the Plaintiff’s directors and shareholders and that all securities over the suit property be discharged.



xi. Who should bear the costs of this suit?

### **Appointment of the Receiver Manager.**

15. It is not in dispute that the Receiver Manager was appointed by the Bank on 19<sup>th</sup> May 1993. The Bank claimed that the Plaintiff had defaulted in its obligations and that as at 27<sup>th</sup> April 1993 it was in arrears of Kshs.2,744,335.80=. However, the Plaintiff pleaded that it was only in arrears of Kshs.800,000.00= or thereabouts at this time. In any case, the Plaintiff admits that it was indebted to the Bank and the only dispute was the level of indebtedness. Article 8 of the Debentures provide in part that “At any time after the security shall have become enforceable....and without prejudice to any other remedies provided by...) DFCK may in writing appoint any person.....to be a Receiver....”As the Plaintiff was admittedly in default, I find that it was within the Bank’s right to appoint the Receiver Manager as per the Debentures.
16. On whether the Receiver Manager was appointed without notice, the Bank rebutted that it issued the Plaintiff with the two Notifications of Default and that the intention thereof was to give the Plaintiff an opportunity to clear the loan arrears to avert realization of the securities including but not limited to the appointment of a receiver. Going through the said Notifications, it is indeed correct that the Bank informed the Plaintiff that it would seek to realize the securities including but not limited to the appointment of a receiver. The Plaintiff did not deny receiving those Notifications of Default and the Receiver Manager’s Notice to the directors on his appointment (pg. 336 of PEXhibit 1-21). I note that the Bank used the same postal address indicated in the facility documents and that PW 1, in a letter dated 17<sup>th</sup> January 1994 referred to the Bank’s earlier letter of 11<sup>th</sup> November 1993 that made reference to the Notification of Default letter dated 16<sup>th</sup> April 1993. This implies that the Plaintiff must have received the said Notifications and the Notice of Appointment of the Receiver Manager and as such, they were aware of the decision by the Bank to appoint the Receiver Manager. I therefore find and hold that since the Plaintiff was in admitted default, the appointment of the Receiver Manager in the Hotel was justified, lawful, reasonable, prudent and fair and as per the Debentures and that the same was not illegal, unlawful, reckless, without notice and/or oppressive to the Plaintiff

### **Management of the Hotel by the Receiver Manager.**

17. The Plaintiff contended that before the appointment of the Receiver Manager, it was being run profitably and for 17 months after the issuance of the loans. However, that the Receiver Manager came in decided to unilaterally and without valid reasons, close down the Hotel and fired all the 200 employees. In response, the Bank stated that the Receiver Manager made the decision to close the Hotel since it was making losses and that it remained closed for 12 years. He denied mismanaging the Hotel and instead blamed the Plaintiff’s directors of not repaying the debt so that the receivership could be lifted. That because of the period of closure, naturally a lot of equipment continued to deteriorate due to non-use, normal wear and tear and exposure to elements. Going through the depositions of the Receiver Manager produced by the Bank, I note that he relied on the Plaintiff’s unaudited accounts to close the Hotel and evince his intention to sell the same. No further information was provided as having been relied upon to come up with the decision to close the Hotel.
18. On its part the Plaintiff has produced the Audit Report by Koimburi Trucker Co. (pgs. 308-319 of PEXhibit 1-21), the Viability Assessment Report (pgs. 403-413 of PEXhibit 1-21) and the Estimation of the Total ProfitLoss and the Audited Accounts for the year ended 1992 which paint a whole different picture than what was presented by the Receiver Manager. The said reports indicate that the Hotel was operating at standard or average profit margins and was a going concern and was not operating at such losses so as to inform its closure. I find that the Receiver Manager’s reliance on the Hotel’s



unaudited accounts rather than its audited accounts and failure to further probe the profitability of the business was unprofessional, reckless, careless and unfair to the Plaintiff. This conduct was contrary to the recognized principles of law on receiverships and commercial practice.

19. Recently, the Court of Appeal in *National Bank of Kenya Ltd & 2 others v Asam-Con Limited* [2025] KECA 504 (KLR) restated the position of receivers and the extent of their liability as follows:-

76. It is trite law that the receivers are agents of the borrower. The law allows the appointment of receivers where the terms of a debenture agreement or security document permit it. However, the conduct of the receivers must align with the law and the terms of the agreement.

77. The law regarding the liability of a receiver has been well captured in the following extract from *Halsbury's Laws of England Third Edition* volume 6 at paragraph 975, which was relied upon by the appellant:

“Liability of receiver. A receiver or manager of the property of a company appointed under the powers contained in any instrument .

(a), is, notwithstanding that he may be an agent of the company and able to bind it by his contracts, to the same extent as if he had been appointed by order of the Court.

(b), personally liable on any contract entered into by him in the performance of his functions except in so far as the contract otherwise provides and is entitled in respect of that liability to indemnity out of the assets; but nothing in this provisions is to be taken as limiting any right to indemnity which he would have apart therefrom, or as limiting his liability on contracts entered into without authority or as conferring any right to indemnity in respect of that liability.”

75. The same principle was captured in “*The Law and Practice as to Receivers appointed by the High Court of Justice or Out of Court*” by William Williamson Kerr, 9th edition at page 298 -301 as follows:

“Persons contracting with a receiver and manager who is carrying on the business of a company and are cognizant of his appointment, must be taken to know that he is contracting as principal, not as agent for the company, whose powers are paralyzed; ... Receivers and managers appointed by the court (except the so called receivers appointed in lunacy

(c), and probably receivers and managers of statutory undertakings

(d), are personally liable to persons dealing with them in respect of liabilities incurred, or contracts entered into by them in carrying on the business (e), unless the express terms of the contract exclude as they may do, any personal liability

(f); but subject to a correlative right to be indemnified out of the assets in respect of liabilities properly incurred,

(g) for receivers are not agents of any person but principals (h) and are therefore assumed to pledge their personal credit...



Similarly, receivers and managers appointed by debenture holders or mortgagees under the powers of an instrument are personally liable to persons dealing with them with knowledge of their position; for they are agents for the mortgagor or mortgagee according to circumstances...”

75. Thus, the general legal position, simply put, is that the receiver or manager of a company under receivership acts as a principal in entering into any contracts in the performance of his functions, and is therefore personally liable on the contracts entered into by him in his capacity as receiver, unless the contract provides otherwise.
20. The Receiver Manager ought to have been more prudent and diligent in the manner in which he handled the operations of the Hotel at the time. Indeed, nothing stopped him doing what the Plaintiff did, which is hire experts such as auditors and/or assessors to help him draw a better picture of the Hotel's position. This conduct by the Receiver Manager lends credence to the Plaintiff's assertion that the Bank never intended to run the Hotel under receivership but was hellbent on selling the same. The hurried manner in which they sought to sell the suit property was faulted and questioned by the Court of Appeal in *Gulfstream Tours & Hotel Ltd. v Development Finance Co. of Kenya Ltd* (supra), which also restated that the Receiver Manager was under a duty to act fairly towards the Plaintiff and not erode the security for instance, by mismanaging the business or disposing the security at a throwaway price.
21. It is therefore my finding that the Receiver Manager mishandled the receivership in closing down the Hotel as there were no sufficient reasons for him to do so. The reason of unprofitability was not demonstrated as he relied on inconclusive material to arrive at that decision.

#### **Competence of the Receiver Manager.**

22. The Plaintiff contends that the Receiver Manager was not qualified to run the Hotel and that he had no proven professional knowledge in hotel management and the hospitality industry. Further, that he had been running the Hotel remotely choosing to send his assistant. In response, the Bank produced the Receiver Manager's deposition where he swore that he visited the Hotel several times, that he was experienced in hotel running and had turned around a hotel, Golden Beach Hotel. This deposition was not substantially challenged by the Plaintiff and I find no valid reasons not to accept the averments therein. In any case, the Debentures give the Bank broad discretion in the appointment of the receiver and the same is not limited to a person possessing the knowledge or expertise of the borrower's business. It is therefore my finding that the Receiver Manager had the requisite professional competence to serve as the Plaintiff's receiver.

#### **Provision of Accounts in Respect of the Period When the Plaintiff was in Receivership**

23. The Plaintiff have stated that the Defendants have never produced any reports by the Receiver Manager after taking over receivership of the Hotel and before closing down the Hotel and that the only report produced is a report from 1<sup>st</sup> May 1993 to 30<sup>th</sup> April 2004, 11 years after closing the Hotel. In response, the Defendants have stated that despite constant requests by the Receiver Manager for the Plaintiff to furnish it with the requisite documentation for him to prepare financial statements pre-receivership, the Plaintiff failed to do so. In any case, the Defendants produced the Receiver Manager's deposition of 18<sup>th</sup> April 2005 where he annexed the abstract of the Hotel's receipts and payments for the period 1<sup>st</sup> May 1993 to 30<sup>th</sup> April 2004, which was within the period of receivership. It is therefore not correct for the Plaintiff to state that the Defendants have never produced any report or accounts in respect of the Plaintiff's receivership. Whether this report satisfied the conditions of the law is another issue



altogether. As this report is admitted, I find that the Defendants have been able to demonstrate that they provided a report and accounts in respect of the Plaintiff for the period it was in receivership.

### **Ruining of The Plaintiff's Business and The Receiver Manager's Conduct.**

24. I have already found that the Receiver Manager did not provide sufficient reasons that led to his decision to close down the Plaintiff's Hotel as documents on record indicate that the Hotel was still a going concern at the time. I have also highlighted the expected conduct of a receiver and how the same must be aligned with the law and the subject agreement. The question is thus whether the Receiver Manager's conduct ruined the Plaintiff's business and whether the same was consistent with his statutory duties and obligations as a receiver manager. DW 1 stated that in the Receiver Manager's report of the period between 1993 to 2004 (pg. 46 of DExhibit 1-6), he made Kshs.14,737,647.00= against an expenditure of Kshs.14,686,647.00= and that the Hotel made no profit and nothing was ever paid towards the loan. He admitted that after the Hotel was vandalized in the 2007/2008 post-election violence, the Receiver Manager never furnished the Bank with any report of the damages. He further admitted that the Receiver Manager did not give a report from 2005 to the date the Hotel was vandalized and that DW 1 could also not explain why the Bank declined the Plaintiff's request to go back to the Hotel premises. DW 1 also stated that even though the receivership has never been lifted, there is no report about

### **The position of the premises.**

25. From the above evidence, it is clear that since 2005 to date, no report has ever been made and submitted by the Receiver Manager to the Bank and the Plaintiff and it appears that he has abandoned his responsibilities as a receiver even though the receivership has never been lifted. During the period he was actively involved in running the Hotel, it also appears that there was never an attempt to settle the Plaintiff's debt with the Bank which was against the interest of both the Bank and the Plaintiff. I have also gone through the Receiver Manager's report that he produced and I am inclined to agree with the Plaintiff that the same is not in conformity with the law at the time. Section 351 of the repealed *Companies Act* provided that the Receiver Manager was to provide the said report within two months after his appointment and section 353 thereof provided that he was to render proper accounts and deliver the same to the Registrar for registration every six months. This was clearly not done because from the record of evidence, the said report only first surfaced in the Receiver Manager's affidavit of 2005, over ten years after his appointment.
26. Let me restate that Receivers and Managers of a company have an equitable and legal duty to answer to the company for the conduct of its affairs as well as to keep or cause full accounts to be kept i.e. fuller than the abstracts of receipts and payments required under section 351 of the repealed *Companies Act*. I have also found that they owe a duty to the owners and guarantors of the company not to be negligent in dealing with the assets and business of the company in repayment of the loan as the guarantors and owners will only be liable for the deficiency of the assets of the company. This entails that they act in good faith and manage the assets and business of the company diligently as to pay the entire debt or as much as possible, thus absolving or reducing the liability of the guarantors and owners. In *Surya Holdings Limited & 2 others v Cfc Stanbic Bank Limited* [2015] KEHC 2209 (KLR), the court (Gikonyo J.) held that aside from the Abstract of Receipts and Payments (Form 223) under section 351(2) of the *Companies Act*, the Receiver Manager also has a duty to prepare audited accounts or financial statements and that failure to prepare and furnish the same to the company is contrary to and in breach of their equitable and legal duty to account. As the Receiver Manager herein never prepared or furnished any audited accounts of proper financial statements to the Bank or the Plaintiff, I find this to be a clear and further breach of his duty to account.



27. It is evident that the Receiver Manager's conduct lacked diligence, accountability and prudence and ultimately led to the Hotel's ruin and business slaughter. From the moment the Receiver Manager made the unjustified decision to close down the Hotel to the time he stopped keeping track of the status of the Hotel after it was vandalized, it is clear that the business stood no chance of success from the onset of the Receiver Manager's appointment. I therefore find that the Receiver Manager's conduct was not consistent with the applicable law and his appointment and that his conduct led to the ruining of the Plaintiff's business.

**Attempted sale of the suit property by public auction and private treaty before lifting of the receivership.**

28. I am in agreement with the Plaintiff's submission that this issue has since been settled by this court and the Court of Appeal in the aforesaid decisions. In *Gulfstream Tours & Hotel Ltd. v Development Finance Co. of Kenya Ltd*(supra), the appellate court faulted the attempted sale for seeking to sell the same by way of private treaty as opposed to a public auction and that no reasons were proffered for this. The fact that the appeal was allowed by consent is an implied admission that the attempted sale of the suit property before lifting of the receivership was unlawful, illegal and a nullity.

**Whether the Plaintiff has suffered losses and damages and whether the Defendants are liable as a result.**

29. The Plaintiff pleaded that they suffered losses and damages as a result of the receivership and that the Defendants were liable for the same. From the evidence above, I have already found that the Defendants mismanaged the Hotel and therefore, they are liable for any losses or damages that may have arisen as a result. The Plaintiff produced an Assessment of Damages report(pg. 437-446 of PExhibit 1-21) which estimated the damages of the property at Kshs.10,450,000.00=. The Plaintiff also produced the report of income lost (Pg 414-436 of PExhibit 1-21) which states that between 1993-2020, the Plaintiff would have made an after tax profit of Kshs.38,576,669.00= and the Plaintiff thus seeks a global award of Kshs.100,000,000.00= as General Damages. As such, the Plaintiff submits that a total award of damages in the sum of Kshs.110,450,000.00= would be sufficient.

30. I note that the said reports were not really challenged by the Defendants and as such, I have no valid reasons not to take them into consideration. However, as the Plaintiff has only pleaded for General Damages in its pleadings, only a sum under this head is payable. An award of General Damages is premised upon discretion and is aimed at putting the aggrieved party into as good a position as if there had been no such breach or interference (see *Kenya Power & Lighting Company Ltd versus Ringera & 2 Others* (2022) KECA 104 KLR). Therefore, having taken into account the reports by PW 2, PW 3 and PW 4 on record, the conduct of the Defendants and the period of the receivership (32 years), I find that an award of Kshs.100,000,000.00= (One Hundred Million Shillings) as General Damages would be sufficient to assuage the Plaintiff's loss.

**Whether the loan owed to the Bank has been repaid in full.**

31. Whereas the Plaintiff's indebtedness to the Bank was admitted at the time of filing the suit in 1993, questions are still remaining as to whether the Plaintiff is still indebted to the Bank for the loan. DW 1 admitted that between November 1993 and February 1994, the Plaintiff repaid a sum of Kshs.7,274,666.70= representing a repayment of 65% of the amount advanced. As stated, the Receivership never repaid any sums to the Bank during the period of receivership even though the evidence indicates that the Hotel was generating sums that were capable of repaying the loan. This can only impute that the Defendants recovered the sums due to them and failed to disclose the same to the



Plaintiff. It is therefore my finding that the Plaintiffs have established that the entire loan ought to have been recovered during the receivership period. This, and coupled by the fact that the Defendants have not counterclaimed for any sums from the Plaintiff leads me to conclude that there is no outstanding sum due to the Defendants from the two subject loans.

**Whether the Plaintiff is entitled to an order of declaration that the receivership should be lifted.**

32. As I have indicated that the Defendants seem to be disinterested in the receivership since they have never been bothered about following on the same since 2008, it follows that there is no valid reason why the receivership of the Plaintiff should remain in effect and I find that the Plaintiff is entitled to an order for its lifting. As a consequence, I find that the Plaintiff is also entitled to orders that the entire loan ought to have been recovered during the period of receivership and that the business be returned to the Plaintiff's directors and shareholders and that all securities over the suit property be discharged.

**Conclusion and Disposition.**

33. In conclusion, it is my finding that the Plaintiff's suit succeeds in its entirety and I now issue the following dispositive orders:-
- a. Judgment be and is hereby entered for the Plaintiff against the Defendants jointly and severally for the sum of Kshs.100,000,000.00=
  - b. A permanent injunction be and is hereby issued restraining the Defendants, its servants and/or agents from interfering with the Plaintiff's quiet operation of the Hotel business.
  - c. A declaration be and is hereby issued that the intended sale of the suit property Kisumu Municipality Block 101X7 in the circumstances of this matter is illegal, null and void.
  - d. An order be and is hereby issued compelling the Defendants to lift the receivership and to hand over the Hotel Business to the Plaintiff for the latter to run and manage within 30 days of this judgment
  - e. The Plaintiff is awarded interest on a) above at court rates from the date of judgment until payment in full.
  - f. The Plaintiff is awarded costs of the suit.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 8<sup>TH</sup> DAY OF APRIL 2025

J.W.W. MONG'ARE

JUDGE

