



REPUBLIC OF KENYA

IN THE HIGH OF KENYA

AT NAKURU

CIVIL SUIT NO 201 OF 2012

FAMILY BANK LIMITED.....PLAINTIFF

-VERSUS-

BENARD GIKUNDI MWARANIA.....1ST DEFENDANT

MARGARET KARWIRWA MWONGERA.....2ND DEFENDANT

STEP UP HOLDINGS (K) LIMITED.....3RD DEFENDANT

PETER MURITHI MWARANIA.....4TH DEFENDANT

CECILIA NYARUAI KIRAGURI.....5TH DEFENDANT

JOHN MUTHAMI MURITHI.....6TH DEFENDANT

AND

MOUNT KENYA UNIVERISTY.....INTERESTED PARTY

JUDGMENT

BACKGROUND

1. By plaint dated **8th June 2012** the plaintiff bank filed this suit against the defendants seeing the following prayers: -

i. A permanent injunction to restrain the 1st and 2nd defendant from withdrawing money from Account Number 0801194005 held in the name of the 3rd defendant at the 7th defendant's Nakuru Branch beyond or below kshs.35,300,000.00.

ii. An order to compel the 7th defendant transfer the said amount of kshs.35,300,000.00 to the plaintiff.

iii. Upon receipt of the said amount apply to reduce the indebtedness of the 3rd defendant to it as regards any amounts which may have been withdrawn or transferred from account numbers 019220330, 019000021365 and 019000015726 variously known as **Mount Kenya University Nakuru Campus** to repay or part pay or redeem the loans by the 1st, 2nd and 3rd defendants or either of them or of the 3rd defendant to the plaintiff for purpose of giving effect to indemnities sought herein against the defendants.

iv. A declaration that the 1st, 2nd and 3rd defendants jointly and severally indemnify the plaintiff against any liability, loss or damage including legal, administrative and related costs incurred or to be incurred by plaintiff in relation to opening, running, withdrawals and transfers from accounts 01922030 and 019000015726 under the name **Mount Kenya University Nakuru Campus** and domiciled at plaintiff Njoro Branch.

v. A declaration that the 1st, 5th and 6th defendants jointly and severally indemnify the plaintiff against any liability, loss or same including legal, administrative and related costs incurred or to be incurred by plaintiff in relation to opening, running, withdrawals and transfers from accounts 019000021365 under the name **Mount Kenya University Nakuru Campus (2)** and domiciled at

plaintiff Njoro Branch.

vi. A declaration that the plaintiff is entitled to indemnity from the 4th defendants from and against any and all liabilities, loss or damage including legal, administrative and related costs incurred or to be incurred by plaintiff in relation to opening, running, withdrawals and transfers from accounts 019220330, 019000015726 and 019000015726 variously styled **Mount Kenya University Nakuru Campus** and domiciled at plaintiff Njoro Branch.

vii. A declaration that the plaintiff is entitled as against the 1st, 2nd, and 3rd defendants to recover any sums in relation to loss or damage including legal, administrative and related costs incurred or to be incurred by plaintiff in relation to opening, running, withdrawals and transfers from accounts 019220330, 019000015726 and 019000015726 variously styled **Mount Kenya University Nakuru Campus** and domiciled at plaintiff Njoro Branch.

viii. An order that corporate veil of 3rd defendant be lifted for purposes of prayers above.

ix. And upon lifting of corporate veil, the 1st and 2nd defendants be held personally, jointly and severally liable to the 3rd defendant's indebtedness to the plaintiff on accounts of loans granted and factoring into account monies deducted from account numbers 019220330, 019000015726 and 019000015726 variously styled **Mount Kenya University Nakuru Campus** and domiciled at plaintiff Njoro Branch. And further plaintiff be entitled to recover from the 1st and 2nd defendant personally any outstanding sum should the securities currently held by the plaintiff when sought to be sold become insufficient to meet 3rd defendant's liabilities to the plaintiff.

x. That accounts be taken in respect of all monies paid to and withdrawn from Account Numbers 019220330, 019000015726 and 019000015726 variously styled **Mount Kenya University Nakuru Campus** Njoro Branch and if any monies be found to have been paid to or withdrawn by the 1st, 2nd, 3rd, 5th and 6th defendants be paid to the plaintiff personally by the defendants.

xi. A declaration that the plaintiff is constructive trustee of the students of **Mount Kenya University Nakuru Campus** who paid fees or monies and any other person who might have paid monies into the three accounts above.

xii. That the 1st, 2nd, 3rd, 4th, 5th and 6th defendants be ordered to pay costs for 7th defendant and the plaintiff.

2. The 1st and 2nd defendants filed joint statement of defence on 9th May 2011. They stated that if they transferred any monies from any account held with the plaintiff, they did so on behalf of the 3rd defendant. Further that the prayers in respect of 7th defendant have been overtaken by events, the 7th defendant having been discharged from these proceedings by consent. The 1st and 2nd defendant stated that the plaintiff admitted that it opened and operationalized accounts for 1st, 2nd, 3rd, 5th and 6th defendants and it should be estopped from denying that the accounts were properly opened;

3. Further that the plaintiff mischievously instituted this suit well knowing that it has no *locus standi* litigating claims for and on behalf of the interested party since it is not privy to contractual arrangements between the 3rd party and the interested party. The 1st and 2nd defendant stated that all monies deposited and transacted through the said accounts belong exclusively to them and the 3rd defendant.

4. Further that the 3rd party collected money from its students and not students of interested party and was free to apply funds in the way it deemed fit.

5. The 1st and 2nd defendant further stated they presented all documents required for opening of accounts and it was the plaintiff who was required to comply with Central Bank prudential guidelines; and all monies in the account belong to the 3rd defendant and plaintiff has not suffered any imaginable loss or damage as a result of operation of the account.

6. Further that the 3rd party has since institution of this suit repaid loan advanced by plaintiff in full and there is no outstanding liability. As shown by discharge issued by plaintiff and release of securities.

7. 3rd defendant filed defence and counterclaim on 6th July 2012. 3rd defendant stated that the accounts were neither opened as a conduit for any irregular procurement of credit and financial accommodations and of unsecured sum of any amount neither were there irregular and unlawful debits or transfers resulting in any unsecured advance; further that the plaintiff totally misapprehended or is seeking to mislead the Court on the relationship between 3rd defendant and Mount Kenya University (Interested party) as enshrined in Memorandum of Understanding; 3rd defendant stated that it was never tasked to manage **Mount Kenya University Nakuru branch** on behalf of **Mount Kenya University** but the term establish and manage meant 3rd defendant was to start and run Mount Kenya University Nakuru campus as its business and not to manage as employee or agent of Mount Kenya University; that all the premises the campus were rent were leased and paid by 3rd defendant and the students sourced and admitted by 3rd defendant but names passed to Mount Kenya University for record; and fees paid was sole property of 3rd defendant. Salaries and statutory expenses were paid by the 3rd defendant; all furniture and equipment used in running the campus were property of 3rd defendant; and all accounts opened and solely operated by 3rd defendant; that the 3rd defendant paid all collaboration fee as per Memorandum of Understanding; That 1st and 2nd defendants opened accounts in their capacity as directors to give effect to Memorandum of Understanding; That the Memorandum of Understanding; was between 2 legal entities; that Mount Kenya University Nakuru campus was a creature of Memorandum of Understanding; and 3rd defendant as legal entity had capacity to open an account and the campus was owned by 3rd defendant not Mount Kenya University; that money paid to the accounts belonged to 3rd defendant and was applied for the benefit of students in Mount Kenya University Nakuru Campus.

8. Further that the 1st and 2nd defendant never transferred any monies to their personal accounts; and the plaintiff has no powers to question how 3rd defendant managed its finances and the 3rd defendant was entitled to transfer funds without giving any reason; that there was nothing fraudulent in transfer of money from 3rd defendant

9. Further the 3rd defendant stated that it dealt with the 4th defendant and other officers of the bank in their official capacity and no loss or damage has been occasioned to plaintiff as a result of opening and running of accounts by the 3rd defendant.

10. In its defence the 3rd defendant listed irregularities by the plaintiff which include failure to release loan documents and discharge of securities which have since been complied with.

11. In the counterclaim, the 3rd defendant sought a declaration that it is the sole proprietor of **Mount Kenya University Nakuru** and account name **Mount Kenya University Nakuru Campus** and its proceeds belong to 3rd defendant and an order requiring plaintiff to indemnify the 3rd defendant against loss it has suffered and will continue to suffer due to illegal interference with the accounts. The prayers that concerned loan advanced to 3rd party and securities held have been settled.

12. The 4th defendant filed defence on 14th September 2012. He denied being a beneficiary of the fraud and false representations made by 1st and 2nd defendant as regards opening and operationalization of accounts in question nor conduit for irregular procurement of credit and financial accommodation; he further denied any association or relationship with 1st defendant for purposes alleged.

13. 4th defendant further stated that as senior bank manager he discharged his duties in collaboration of other bank officials; he denied any gross negligence on his part and that he discharged his duties diligently in so far as credit facilities are concerned and opening and operationalization of an account at plaintiff institution is not a one man's affair but involves approval and consent by various bank officials through collaboration of the legal and credit departments; he added that the 1st and 2nd and 3rd defendants became known to him at the time of opening the accounts and that he acted diligently and all CBK prudential guidelines were ratified by plaintiff's head office.

14. 4th defendant stated that the plaintiff's suit against him is actuated on ill will, bad faith and non-disclosure of material facts. He particularised bad faith on part of the plaintiff which include failure to disclose that the opening and operationalization of account is not sole responsibility of 4th defendant, that all forms of security perfections are carried out at plaintiff's head office and not the branch; and for credit over kshs.1,000,000 a credit relationship manager will have to visit the applicant and release of fund is undertaken through collaboration of legal departments and final disbursement is done after authorisation by head office; that money over kshs.5,000,000 could not be disbursed without approval from head office.

15. In his counterclaim, the 4th defendant stated that he was dismissed after he had resigned and the said the message indicating that the 4th defendant had been dismissed from employment was circulated to other employees. He learnt from an employee of plaintiff who had received the email. Further that the 4th defendant's name was submitted to credit bureau which denied him access to loans and the publication injured his credibility, character, reputation and standing in society.

16. The 5th and 6th defendants filed joint defence on 27th September 2012. They denied allegations set out in the plaint; they denied having acted in collusion with the 1st, 2nd and 4th defendants to open accounts but collaboration between their college **Serein Institute** was discussed and while waiting approval by Mount Kenya University, the plaintiff and 1st defendant opened account number 019000021365 without their knowledge and consent but stated that it was never operated or benefited from the said account. The 5th and 6th defendants maintained that the plaintiff has no cause of action against them and notice of intention to sue was not issued to them before this suit was filed and plaintiff is therefore not entitled to costs.

17. The interested party filed statement of defence on 4th December 2012 and stated that its name was used to rake in money for the defendants in a wider fraudulent scheme hatched by the defendants to siphon in money from the interested party. The interested party stated that the plaintiff is entitled to reliefs sought.

18. The 7th defendant filed statement of defence dated 19th June 2012. By consent of parties, the 7th defendant was discharged from this suit.

PLAINTIFF'S EVIDENCE

19. The plaintiff availed one witness **Diana Leamo** who is a customer service officer with the Plaintiff. She adopted her witness statement dated 4th February 2019 and she produced the bundle of documents filed on the 11th of June 2012.

20. On cross examination, by the 1st and 2nd Defendant she stated that she worked at Nakuru Njoro market in Nakuru town. It was her responsibility to open accounts and do the customer due diligence and process of opening personal and corporate accounts are different. She said for individual accounts what was required are ID Card, KRA Pin For Corporate Accounts, Certificate of Incorporation, Memorandum and Articles of Association, Board Resolution Letter, Seal, Directors ID card, Directors KRA Pin, Copy of PIN; they then carry out a company search. She stated that she was not the final person who decides the matter to open the account. She said the final person to decide whether an account was to be opened was the branch manager and that it was not a must to send the documents to head office; that the discretion to open an account was with the bank. It was her responsibility to ensure that she had all the documents before opening an account.

21. She was aware that Account 019220330 was for **Mt. Kenya University Nakuru Branch**. She further testified that it was the 1st and the

2nd Defendant who applied for the opening of the account. She said she was not aware of the documents presented and if the requirements were not met, then the account would not be opened. She said she was not working at the bank when the account was opened. She testified that the documents she saw were for the 3rd Defendant **Step Up limited** but account opened was in the name of **Mt. Kenya University**. She said there were no documents for Mount Kenya University. She confirmed that she saw the memorandum of understanding between **Mount Kenya University** and **Step Up Limited** and she did not know why the Memorandum of Understanding; was presented.

22. She further stated that the account was a school fees account and she did not know who was depositing the money in the Account. She said she was not sure whether the money that was deposited was from banker's cheques. She was not aware if Mount Kenya University deposited any money in the account or if cheques were drawn by the 3rd Defendant from that account and payable to Mount Kenya University. She was not aware if there were RTGS for that account to accounts of Mount Kenya University. She confirmed that on Page 548 of the 1st and 2nd Defendants documents was an RTGS beneficiary as MKU Nakuru Campus. She said the signatories for Mount Kenya University Nakuru campus are the 1st and 2nd Defendants and they never received a complaint about transfer of money and if the transfer was pursuant to the Memorandum of Understanding; nor if there were several transfers done. She stated that it was her evidence that the accounts were irregularly opened. She said Mount Kenya University should have presented their Certificate of Incorporation and the letter from the Ministry of Education. She was not aware of interim letter from the Ministry of Education. She added that they should have used what existed and the same one used in other branches. She stated that she did not know if due diligence was done as she was not in the bank at the time. She said it was their responsibility to accept or refuse to open an account.

23. PW1 further stated that the account was opened based on the Board's resolution by the 3rd Defendant. She said it was a requirement but it should have come from Mount Kenya University; she said they were given the Certificate of Incorporation from the 3rd Defendant and it was the directors of the 3rd Defendant who applied to open the account. She confirmed that the accounts were closed but did not know when they were closed. She confirmed that they operated for 3 years till 2011. She confirmed that 3 loans were advanced. She further confirmed that after negotiations with the bank, the 3rd Defendant was allowed to sell properties to pay for the loan. She however stated that she was not sure if the bank was claiming for money from the 1st, 2nd and 3rd Defendants.

24. She further confirmed that the 3rd Defendant was their biggest client in Nakuru but she was not aware if the chairman of the bank went to see the directors of the 3rd Defendant. She confirmed that Mount Kenya University wrote to close the accounts but was not sure if there was any fraudulent transaction. She said the beneficiary of the money in the account was the 3rd Defendant. She was not aware if Mount Kenya University claimed any money at the time of operation. She stated that no one was claiming money from the account apart from the 3rd Defendant.

25. She stated that the bank reputation has suffered due to allegations of opening fraudulent accounts. She however said the bank has not filed any claim of loss and she was not aware if the bank suffered money wise but the bank's claim was against the 1st, 2nd and 3rd Defendants for the loss the bank suffered. She however confirmed that that no one had sued the bank claiming money deposited in those accounts and the Bank had not filed any claim seeking compensation for the loss of reputation.

26. On Cross examination by **Mr. Nyamwange**, she stated that **Step Up Holdings Ltd** and **Mount Kenya University Nakuru Campus** was one and the same at the time of opening the account; that the accounts were opened and operated by the Directors of **Step Up Holdings** to the exclusion of everyone else. She confirmed there was an MOU and **Step Up Holdings** established **Mount Kenya University Nakuru Campus**. She also confirmed that before then there was no campus for Mount Kenya University in Nakuru. She did not know if they were operating a business related to education before. She said she had worked with the bank for 5 years. She had worked with Nakuru branch for one year and was conversant with matters dealing with accounts. She confirmed that the 1st and 2nd Defendants deposited their title deeds and the same had been released. She further confirmed that the bank had advanced large sums of money to the 3rd Defendant to purchase land. She said she did not have the correct figure but they were large sums; she confirmed application for the loan was forwarded to the head office for approval; she further confirmed that the documents were released to the 1st and 2nd Defendants to sell property by way of private treaty and confirmed that 1st, 2nd and 3rd Defendants received Clearance Certificates.

27. PW1 further stated that she was not aware if Mount Kenya University had claimed any property and the opening of accounts were to give effect to arrangements in the MOU. She said Mount Kenya University never complained of the transfer of funds. She said she did not know when Mount Kenya University applied for the Charter and whether it was given the interim letter of authority before being awarded the Charter but at the time of the opening of the accounts, Mount Kenya University had an interim authority. She confirmed that **Mr. Simon Gicharu** signed the Memorandum of Understanding; as chairman and the Vice Chancellor of Mount Kenya University.

28. Plaintiff further stated that some of the counterclaims of the 3rd Defendant have been complied with. PW1 confirmed that the 3rd Defendant had been cleared of all liabilities with the bank and has been issued with a certificate of discharge. She also confirmed that Mt. Kenya University was not the plaintiff's customer but wrote a letter asking the bank to freeze the 3rd defendant's account. She was not aware of the judicial review filed that unfroze the account. She further stated that they were directed to unfreeze the account.

29. She further stated that she is aware that the 3rd Defendant had financial obligations to the Bank of Africa to the tune of Kshs.5 Million but was not aware that Family Bank allowed the 1st to 3rd Defendant to offset the facility at Bank of Africa. She said Mount Kenya University never complained concerning the money used to offset the facility.

30. On Cross-examination by 4th Defendant, PW1 stated that she reported to the branch manager but she knew who the branch manager was in 2008. She stated that she could not tell the branch loan limit at that the time but it was Kshs 2 million for SME and a limited liability like the 3rd Defendant was Kshs 2 million and any loan above Kshs 2 million would require approval from the Headquarter. She said in the year 2008, it was recommended that a branch manager could not approve above branch limit.

31. PW1 further stated that it is a requirement for the account-opening officer in Family Bank to forward to the Company accredited lawyers

to do a search. The lawyers confirm that the documents are authentic. In respect to accounts herein, she was not sure if this was done but said an account cannot be opened without conducting a business search and that she had not come across any complaint on account opening.

32. She further stated that the bank was not called to manage the Mount Kenya University Nakuru Campus and the name in MOU was **Step Up Holding (K) Ltd** and in respect to finances, Mount Kenya University was not responsible for the losses incurred by **Step Up Holdings**. She added that there is no provision in MOU for Step Up Holdings to open an account under the name Mount Kenya University. She confirmed that the Account that was frozen. She admitted that it was illegal to freeze accounts without a court order. She stated that she did not have instructions in Human Resource (HR) matters but she was aware that case no. 18 of 2014 with the 4th Defendant had been dismissed irregularly.

3RD DEFENDANT'S CASE

33. The 3rd defendant's witness **Susan Njeri Kamau** testified as DW1. She testified that she worked for the 3rd defendant as an accountant from the year 2010 to 2011. Her duties involved collection of fees, reconciliation and preparation of payroll. She testified that the 3rd defendant entered into a memorandum of understanding (MOU) with **Mount Kenya University (MKU)** and at the time she joined the 3rd defendant, the Memorandum of Understanding was in place. She said that they used to collect fees and do reconciliation and pay MKU. She said the students she collected fees from were for **Step Up Holdings**. She testified that she paid out collaboration fees from **Step Up Holdings** to **Mount Kenya University** for all the period she was at **Step Holdings Limited (SUHL)**.

34. On cross examination by counsel for the 1st and 2nd defendant, DW1 said she was banking money in **Step Up Holding Ltd** account and that students used to pay in bankers cheques then they deposit in Mount Kenya University account Nakuru Campus Bank Account. She showed court the lists she used to prepare. She said they used to do reconciliation based on collaboration and there were fees also paid to Thika account which would be refunded after reconciliation; she said that the money related to HELB and Bursaries. She showed in page 88 of the 3rd defendant's document a cheque for the money and at page 438 an invoice issued to **Mount Kenya University** asking them to pay the 3rd defendant; and at page 482 an invoice from Thika Campus asking them to pay money that was paid to Nakuru Campus. She also showed at page 548 an RTGS from **Mount Kenya University Nakuru** to **Mount Kenya University Thika** for 5 million being collaboration fee. She said the money was from **Step Up Holdings Ltd** Account to **Mount Kenya University** Thika account number 019000015726. She said the reconciliation would be done in Nakuru and Thika and at times she would go to Thika to do reconciliations.

35. On cross-examination by counsel for the interested party **Mount Kenya University**, she said the document at page 557 of 2nd defendant's document was RTGS from **Step Up Holdings Ltd** to **Mount Kenya University Mombasa** branch which she sent on instructions of her director **Ben Mwarania**.

36. On cross-examination by plaintiff's Advocate, she confirmed that the names in the account are **Step up Holdings Ltd, Mount Kenya University Nakuru Campus**. She said it reads **Mount Kenya University Nakuru Campus**. She said her employer was **Step Up Holdings Ltd** and that she was aware there was another institution called **Mount Kenya University**. She said she never found the arrangement odd as there was Memorandum of Understanding.

37. On further cross examination, she said there is no provision in the MOU that allow **Step Up Holdings Ltd** to open an account in the name of **Mount Kenya University**. She said there was sharing ratio which would guide transfer of the money. She said that at the time she was employed, the account was already running. She however confirmed that the account was later frozen at the request of **Mount Kenya University** (interested party) and she is aware that the 3rd defendant filed a counterclaim.

38. On re-examination by **Mr. Nyamwange** for the 3rd defendant, DW1 testified that apart from RTGS payments, there were other payments which included cash deposits and cheques and confirmed that it was her who wrote the cheques while working with **Step Up Holdings Ltd**.

39. DW2 **Fred Ratemo** testified that he worked for **Step Up Holdings Ltd** from January 2009 to September 2011. He said he was initially engaged as a lecturer and head of department then he rose through the ranks to become the principal of the campus. He said he was employed by **Step Up Holdings Ltd**, which traded as **Mount Kenya University Nakuru Campus**, and that he had minimum interactions with **Mount Kenya University**; that his interactions were limited to attending senate meetings among other administrative issues.

40. He said that it is **Step Up Holdings Ltd**, which paid his remuneration and other statutory payments and was responsible for logistics for attending meetings. He said **Mount Kenya University Nakuru Campus** and **Step Up Holdings Ltd** is one and the same thing. He said they used to receive applications from students, process and forward them to main University for record. He said in the year 2011, **Mount Kenya University** decided to take **Mount Kenya University Nakuru Campus**, which according to him was not lawful. He said that together with other employees, he received letters from **Mount Kenya University** indicating that the university was reviewing their terms of employment yet it was not his employer; he said thereafter, through a memo **Mount Kenya University**, purported to transfer him to Eldoret Campus and was transferring other employees to Nakuru Campus.

41. DW2 testified that the Memorandum of Understanding of 1st September 2008 was very clear that the 3rd defendant (Step Up Holdings Ltd) was to establish and manage university at Nakuru town known as **Mount Kenya University Nakuru Campus**. He said that he joined the Nakuru campus in January 2009 when they had intake of students to undertake courses at **Mount Kenya University**. He said that at page 5 of 1st and 2nd defendant's documents indicate that administration fee would be shared between **Step Up Holdings Ltd** and **Mount Kenya University** and exam fee would be remitted as whole to **Mount Kenya University**. He said under page 6 of Memorandum of Understanding it indicates details of financial matters would be developed.

42. He said remittance was by cheque, RTGS pursuant to MOU and reconciliation was done on CDF and HELB; that MKU main campus gave the 3rd defendant's all receipts for payment and no complaints were made; he said in addition to Memorandum of Understanding, there were letters which guided them on how they would remit collaboration fee.

43. On cross examination by **Mr. Konosi** for the 1st and 2nd defendant's, he said the letter on page 525 of the 3rd defendant's documents talk of income sharing between partner institution which are **Mount Kenya University, Gulu University, African International College and Nakuru Campus**.

44. DW2 confirmed takeover of Nakuru Campus by **Mount Kenya University** and said after relocation students from 3rd defendant's to its premise in RESMA building in Nakuru town, **Mount Kenya University** wrote to Family Bank to freeze 3rd defendant's account and sometimes in November 2011 the 3rd defendant's account was frozen by banking fraud; and that they learnt for the first time interested party's complaint when they visited banking fraud.

45. He said he knew little about Account No.01900021365 in respect to Nakuru Campus 2 but said there was an arrangement between **Mount Kenya University** and 5th and 6th defendant for the 5th and 6th defendants to offer courses in psychology in Nakuru which would lead to award of degree certificates of **Mount Kenya University**. He said in the meetings they had they agreed that they were to run separate accounts from the one of the 3rd and the 3rd defendant was to facilitate that process.

46. He said the accounts in **Mount Kenya University** Nakuru were in Equity Bank, Family Bank and Bank of Africa and bankers cheques would be deposited by the 3rd defendant in any of those accounts; and if CDF money was deposit in **Mount Kenya University** Thika, it would be remitted to Nakuru Campus; that the branch would invoice for remittance and vice-versa

47. On cross examination by **Mr. Biko** for the interested party (**Mount Kenya University**), DW2 testified that management of **Mount Kenya University** Nakuru Campus had **Ben Mwararia** (1st defendant) as director, him as the principal, heads of departments and accountant. He added that **Samuel Gichuru** chair of Mount Kenya University was not part of management of Mount Kenya University Nakuru branch. He said that the 3rd defendant never sought accreditation as they were not running a university but a collaboration; and when the university sought accreditation, they involved Nakuru Campus. He said the interested party send members of the commission to Nakuru branch. He further said that at page 8 of Memorandum of Understanding mode of dispute resolution was arbitration but they are not interested in arbitration.

48. He said Mount Kenya University never objected opening of the account. He said other than RTGS to Mount Kenya University cash was also paid. He said as shown on page 593 to 613 of the documents collaboration fee of 100, 000, 70,000 and 80,000 was paid to persons named as collaboration fee following instructions of the chairman. He also said Mount Kenya University Mombasa branch was also paid from Nakuru branch.

49. On cross examination by **Mr. Cheluget** for the plaintiff, he said there is no specific provision permitting **Step Up Holdings Ltd** to open an account in the name of **Mount Kenya University**. He said under **clause 2 (d) of Memorandum of Understanding**, details were to be developed in regard to finances and there was no express provision to open an account in the name of **Mount Kenya University**. He added that there were no developments allowing **Step Up Holdings Ltd** to open an account in the name of **Mount Kenya University** but the authority was given impliedly. He said parties clearly provided sharing ratio and interested party received money for 3 years without raising an issue. He said that implied that approval was given. DW2 confirmed **Mount Kenya University Nakuru Campus** was not registered as a business and the university charter was issued when the bank account was in existence.

50. On reexamination by **Mr. Nyamwange** for the 3rd defendant, DW1 said it is the chairman of the 3rd defendant who issued instructions for transfer of funds shown at page 557. He added that 3rd defendant made moves towards arbitration but the attempts to arbitrate the dispute was rejected and it is no longer interested in arbitration.

51. **Mr. Nyamwange** informed court that the first defendant is the director of 3rd defendant and it will rely on his evidence; that 1st defendant would be a witness in his own capacity and testify on behalf of 3rd defendant. The court therefore directed the counsel for 1st defendant and counsel for 3rd defendant to take the 1st defendant through evidence in chief and the other counsels to cross examine him.

52. 1st defendant testified as DW3. He adopted his witness statement dated 25th September 2018 as evidence. He testified that **Step Up Holding** is a limited liability company which owns **Step Up Institute**. He testified that **Step Holding** which is tertiary institution went into memorandum of understanding with **Mount Kenya University**, which was a tertiary institution also. He said they went into collaboration and drafted memorandum of understanding to regulate activities. He said they agreed that **Step Up Holdings** was to operate as **Mount Kenya University Nakuru Campus** and they decided to put up **Step Up Holding** and operate as **Mount Kenya University Nakuru Campus**. He said they coined the name purposely for collaboration and make the arrangement a good business entity.

53. DW3 testified that in addition to memorandum of understanding, they were given interim letter of authority to facilitate opening of account. He said in all the banks they provided all documents of the company and memorandum of understanding and interim letter of authority. He said approval was done by head office and the account was opened. He said the 1st account was for 3rd defendant and 2nd account for **Serein Education Centre** owned by the 5th and 6th defendants and the 2nd account did not operate.

54. DW3 testified that they would recruit their own students and send the names to Mount Kenya University; that sharing of finances had formulas. He said at the beginning, a smaller percentage went to Mount Kenya University as 3rd defendant was injecting a lot of money and with time the percentage increased.

55. He confirmed that payments were through cheques, direct payment or RTGs. He said the payments depended on instructions given and reconciliation would be done. He said he signed the cheques to MKU and there was no complaint raised on operation of account under **Mount Kenya University**. He confirmed signing a cheque sent to Mount Kenya University Mombasa campus and said there was no issue in the manner the account operated. He said 3rd defendant paid cumulative amount of kshs.43,104,614 at the time Mount Kenya University took over the campus.

56. DW3 said **Mr. Gicharu** the chairman of Mount Kenya University created issues when he wanted to take over the campus by wanting to regulate Mount Kenya University Nakuru Campus. He said they never agreed that Mount Kenya University would regulate them otherwise than the teaching. He said attempt by Mount Kenya University to transfer employees of Step Up were gimmicks. He said the **Simon Gicharu** wrote a letter in November for freezing account and that it was after take over, he said they wanted to take their money.
57. On the issue of arbitration process, DW3 said he had sat with **Simon Gicharu** severally and pleaded that they settle this matter.
58. He said Family Bank closed their account, demanded loan and held their titles but they later recorded consent and they released titles which they sold and paid the loan in full. He said they were given loan clearance certificate by **Family Bank** (plaintiff).
59. DW3 said all they did was on behalf of 3rd defendant not individual capacity and their personal transactions were done elsewhere. He prayed that the case by plaintiff against him be dismissed with costs.
60. While led by **Mr. Nyamwange** for the 3rd defendant in further cross examination, he confirmed that DW1 and DW2 were employees of 3rd defendant. He produced 3rd defendants list of documents. He confirmed that the 3rd defendant raised a counterclaim against the plaintiff. He confirmed that the plaintiff had released all title deed referred to (e) and (f) of the counterclaim. He prayed for the court to grant prayers that have not been complied.
61. He further said that he shares a name with the 4th defendant who worked for the plaintiff because they both come from Meru but they have no blood relation. He said he first met 4th defendant in Nakuru and that they are friends. He said the bank never raised a red flag that the 4th defendant engaged in malpractices on their part and that he is not aware whether the 4th defendant was party to the freezing but he mentioned to him that he told the bank they should not have frozen the account; that he informed the bank that there was Memorandum of Understanding and asked them to move with caution.
62. On cross-examination by **Ms. Mueni** for the 5th and 6th Defendants, DW3 said the second account was between **Mount Kenya University** and **Serein Institute** and that they were involved to facilitate them. That the two directors of **Serein Institute** were brought in but the account was not actualized.
63. On cross-examination by counsel for interested party, DW3 stated that **Mount Kenya University** took over the **Nakuru Campus** on 26th September 2011 and no documents were signed in respect of takeover. He said they started bringing in their staff and it is the students and staff who left. He said it was done bit by bit and he could not confirm the final straw. He said **Mount Kenya University** was a senior partner in the relationship. He said it is **Simon Gicharu**, the chairman of Mount Kenya University who gave him letter of authority dated 30th May 2008. He said he was with his wife and the 4th signatory on Memorandum of Understanding and what put their operations in place was Memorandum of Understanding but the university would go to check to ensure that they do not adulterate their programs. He said they recruited staff and offered degree courses it is the university which graduated the students.
64. In cross-examination by counsel for the plaintiff, the 1st defendant said the business name in account opening form is **Mount Kenya University Nakuru Branch** and address is Box 2675 for 3rd defendant. He said the incorporation certificate number is for 3rd defendant. He said there is no legal entity known as **Mount Kenya University Nakuru Campus**. He said they owned **Mount Kenya University Nakuru Campus** through collaboration and said he agreed to indemnify the bank in case of loss caused by his business; and **Peter Karithi** who is not a party in this suit helped open the account.
65. He said they were not operating the account as individuals and that it was wrong for **Mount Kenya University** to address them individually in the letter addressed to the plaintiff's bank. He said Memorandum of Understanding created a relationship and a name called **Mount Kenya University Nakuru Campus**. He said there is no express provision to open account in the name **Mount Kenya University Nakuru Campus**.
66. On reexamination by **Mr. Konosi**, DW3 testified that on page 4 of plaintiff's documents they would be required to indemnify the bank in the event of unsatisfactory performance on their part.
67. The 3rd defendant further stated that the cheques they issued had the name **Mount Kenya University Nakuru Branch** and **Mount Kenya University** never complained; he said they would have questioned the name. He said at time he would take the cheques personally to **Mount Kenya University** and he was a member of Mount Kenya University Council because of the collaboration. He stated that there was no legal entity known as **Mount Kenya University Nakuru Campus**, it was a creation of Memorandum of Understanding, and Mount Kenya University addressed them in correspondences as **Mount Kenya University Nakuru Campus**.
68. The 2nd defendant adopted her witness statement dated 8th October 2018. On cross examination by **Mr. Wambeyi** for 4th defendant, she stated that they opened a corporate account and not individual account with the plaintiff. She confirmed that they took documents as per plaintiff's checklist to the plaintiff's bank. She confirmed that they come from the same place with the 4th defendant but they came to know each other in Nakuru.
69. On cross examination by counsel for interested party (Mount Kenya University), she said they were not an agent of **Mount Kenya University** but operated as **Step Up Holdings Limited** but had Memorandum of Understanding which allowed them to operate as **Mount Kenya University Nakuru Campus** which was not registered.
70. On cross-examination by counsel for the plaintiff, she confirmed that she is director of **Step Up Holding** and **Mount Kenya University Nakuru Campus** was born out of **Memorandum of Understanding**. She said they opened account in the branch and never interacted directly with the head office. She said they operated an account in the name **Mount Kenya University Nakuru Campus** then do

reconciliation and pay **Mount Kenya University** and they never raised issue with it. She however confirmed that there was no provision in Memorandum of Understanding to open account in the name. She said she was not involved in opening account for **Serein Institute**.

71. The 5th defendant testified as DW5. He said together with the 6th defendant, they are directors of **Serein Educational Centre**. He adopted his witness statement and statement of 6th defendant as evidence. He also adopted documents dated 26th September 2012. He testified that the chairman of Mount Kenya University who is his close friend and college classmate attended their graduation ceremony in the year 2010. He said just before the graduation, they discussed and requested for a collaboration and at the graduation ceremony, he announced that he was allowing collaboration and asked the chairman Mount Kenya University Nakuru Branch (1st defendant) to coordinate.

72. DW5 further stated that after the graduation, he approached the 1st defendant to actualize the discussion; he said they had few meetings to be briefed on way forward. He said they were asked to wait for senate approval and as they waited, they picked account-opening forms and signed them as they had agreed that they would open a separate account. He said the collaboration never took off. He said that the relationship between Mount Kenya University and 1st defendant had broken down after being served with court documents.

73. On cross examination by counsel for Mount Kenya University, he said he dealt with **Dr. Simon Giharu** at Merica Hotel just before graduation and that he invited the 1st defendant to the meeting. He said **Dr. Gicharu** was a guest in the graduation. He said they applied for account opening on 10th January 2011. He said their strength is on counselling department and he wanted collaboration with Mount Kenya University. He said he dealt with 1st defendant who was seconded by chairman Mount Kenya University but never got response to their application. He said the name of account was Mount Kenya University Nakuru Campus 2 and they signed the forms but never participated in opening the account and opening of the account was subject to approval but he did not know whether approval was given.

74. The 4th defendant testified as DW6. He testified that he worked in the banking sector for 21 years and he is now in business. He said he worked in Housing Finance Corporation (KFCK), Equity Bank and finally Family Bank (plaintiff). He testified that he is married with 3 children and is a church elder at PCEA in Nakuru. He said for the entire period he worked for the banks, he has never had an anomaly or impropriety. He adopted his witness statement dated 3rd September 2012 as evidence and 19 documents attached to it as exhibits.

75. DW6 denied having failed to monitor and control or permitting opening an account and stated that it is account's opening clerk who opens a customer's account in the bank but as a team leader, he ensures all the procedures are followed. He said the account in question is Corporate/Business Account and due to competition for corporate accounts, when the bank gets a corporate client, the account opening documents are sent to headquarters.

76. He stated that at the head office, a search is done and after everything has been verified, that opening of corporate account is done at head office and once it is opened, a cheque book is issued at head office. He said Mount Kenya University Nakuru Branch account was current account. He said once authorization is given, it is returned to the branch and it lands at manager's desk who forward to account opening clerk to open the account. He confirmed receiving authorization to open the account and gave the documents to **Peter Karithi** who is the operations manager. He stated that the said **Peter** is now working in Narok branch. He said once the clerical officer signs, the immediate supervisor signs his part; he denied that he failed to exercise due diligence in the opening of the said account. He further stated that if there was an anomaly, the person who was in charge of operations should have been questioned.

77. DW6 stated that the head office tried to question the accounts around September 2011. He said when he got communication from the head office about freezing the account, he sent email asking them to check the details and in particular Memorandum of Understanding which was in their custody. He advised that in the event that his advice is ignored, he should be counted out of that matter. He said he warned them that their action would paralyse university operations and the reputation of the bank would be injured. He said he copied Chief Executive Officer (CEO) and Legal Unit. He said he received response from one **George** who said they got instructions from **Mount Kenya University** and instructed them to stop withdrawals but allow deposits. He said they complied with his instructions.

78. DW6 testified that on 23rd November 2011, he received a call to go to Nairobi and while on the way, he received a call from one of his colleagues who informed him that they had received an email informing them that he was no longer an employee of Family Bank; he said he was Senior Manager in charge of the region. He said another email was sent at 10.22 am, the first having been sent at 9.12 am, he said the email indicated that he should not be near any Family Bank and on reaching Nairobi, a meeting was convened and he was told the matter of **Mount Kenya University** and **Step Up Limited** had been taken to court and his assistance may be required. He was given dismissal letter, which he refused to sign. He resigned on 27th October 2011, he opted to resign and a month later 23rd November 2011 they dismissed him.

79. DW6 said he filed a counterclaim because he was defamed yet he was not told what he failed to comply with and he was not called for questioning being a senior manager. He said his name was in all newspapers and he lost a career he had built for about 22 years, he said his career was ruined as banks ask before they employ. He prayed for general and aggravated damages for defamation. He said the issue of defamation was not dealt with in the employment suit number 18 of 2014, which he filed but the court held that it was a wrongful dismissal.

80. On cross-examination by counsel for 1st and 2nd defendants DW6 stated that corporate accounts are authorized from head office. He said he only knows one account by **Mount Kenya University Nakuru** branch. He said it was a very busy account and most deposits were in bankers cheques. He said that the Chief Executive Officer of plaintiff visited the 3rd defendant on 19th August 2011 when he visited Nakuru as is the practice to meet corporate clients. He further confirmed that the 3rd defendant applied for loan facilities of kshs.3.3million and kshs.45million and both were approved by the head office and were secured by title deeds and if there was an issue of how the account was run, the loan would not have been approved.

81. He said while opening the account, he required Memorandum of Understanding to know if the account had been approved by Mount Kenya University and that Mount Kenya University never deposited money in account run by 3rd defendant and if it did, it would be reversed by reconciliation. He further said Mount Kenya University had an account at Plaintiff's Thika branch and the manager called to ask for

statement of Mount Kenya University Nakuru branch when Mount Kenya University was applying a loan of ksh.520,000,000 but he told him the account was not related to the account in Thika and the Mount Kenya University loan application was declined when they learnt it was not related. He said it was the same time when they were processing the loan of kshs.45million for 3rd defendant. He said the 3rd defendant's account was not regularly frozen.

82. On cross examination by counsel for interested party, he said freezing of the two accounts did not come from authorized authorities; that a letter from an Advocate, **Mirugi Kariuki** was acted on and not Court, EACC or KRA.

83. On cross examination by counsel for the plaintiff, he said he was employed by public service board 2 years after termination of employment by plaintiff and he is still working there. He also said he is still a member of *Njuri Njeke* and elder at PCEA Church a position he held at the time of dismissal. He however said his career in the bank was messed and he was defamed. He stated the bank also listed him in CRB but admitted at the time of listing he had a loan in the bank but the bank also owed him. He said after being listed in CRB he sold his property at throw away price and cleared the loan and he was delisted from CRB. He further stated that the Nation, Standard and Star Newspapers published information about him and they must have gotten information from plaintiff his employer. He said he never filed a separate suit for defamation apart from counterclaim.

84. He confirmed he never saw certificate of registration for Mount Kenya University Nakuru Campus and there are no minutes for account opening. He said he conducted due diligence in the branch before forwarding to head office; he further stated that he got an email dated 12th September 2011 from one **Jacky** who was head of litigation at plaintiff's head office asking if there was Memorandum of Understanding between Mount Kenya University and 3rd defendant to authorize opening and operation of the accounts. He said Memorandum of Understanding indicated that Mount Kenya University appointed 3rd defendants as managers of Mount Kenya University Nakuru Campus and that is where the authority came.

85. He said email dated 23rd November 2011 said he was no longer an employee of the bank and when he arrived in Nairobi he was told to leave the office with immediate effect and was handed over dismissal letter which he refused to receive. He said he never wrote to plaintiff asking for apology.

86. On reexamination by his Advocate, 4th defendant said final authority in opening account in the branch is supervisor and assistant manager and the head of operations in headquarters never wrote back to say the documents he forwarded were insufficient. He said he never personally opened Mount Kenya University Nakuru Campus account and if there is any anomaly a person in head office is mandated to do a search. He availed deputy in charge ELRC registry to produce ELRC Cause No.18 of 2014.

87. Interested party availed **Professor Evan Kerosi** who is deputy vice chancellor in charge administration. He confirmed that the interested party entered into collaboration with the 3rd defendant in the year 2008. He said they entered into Memorandum of Understanding which spelt out terms and conditions of operation. He stated that sometimes in September 2011, the interested party learnt that the 3rd defendant had opened accounts in the name **Mount Kenya University Nakuru Campus** which it did not sanction.

88. On cross examination by **Mr. Konosi** for 1st and 2nd defendants, he confirmed that **Mount Kenya University** has 11 campuses and in all, the interested party employed workers except **Mount Kenya University Nakuru Campus** which was given authority to recruit and manage on behalf of Mount Kenya University. He said relationship between Mount Kenya University and 3rd party was that of principal and agent and 3rd defendant were managers on behalf of Mount Kenya University

89. He confirmed that **Mount Kenya University** never procured premises for 3rd defendant. He said they contracted Mount Kenya University on commission. He said Mount Kenya University rightfully owned students and 20-25% was to be paid by 3rd defendant and the remaining amount was expected to take care of other expenses. He said Mount Kenya University was paying teaching staff through 3rd defendant and confirmed that 3rd defendant was mandated to collect fees. He said the accounts were operating in the name of Mount Kenya University.

90. He confirmed accounts were opened in the year 2009 and said Mount Kenya University were not aware of these accounts. He said he was not aware if cheques were drawn from the accounts. He confirmed cheque in age 553 of 1st defendant's documents is a cheque from Mount Kenya University Nakuru Campus account drawn for Mount Kenya University same to statements of summary of accounts on page 527 of 1st defendant's documents.

PLAINTIFF'S SUBMISSIONS

91. Plaintiff filed submissions dated 18th June 2019. Plaintiff submitted that this case is centered around one main issue, fraud and finding in that issue is where the case turnabout. He submitted that the court should find whether there was fraud. He submitted that the defendants have not controverted that the accounts were opened and that defendants opened the accounts jointly and severally in the names of institutions. He urged court to take note of the fact that this is a civil fraud as opposed to criminal fraud and the prove is higher than ordinary civil case; it's higher than balance of probabilities. He submitted that it is clear there was fraud, which has not been controverted even in defendant's submissions.

92. Plaintiff submitted that ingredients of defamation have not been met. That the question is whether plaintiff published those articles.

93. And in respect to 4th defendant, court should address itself whether his reputation was lowered in the eyes of the public; whether ingredients of defamation were met; whether the articles in Standard Newspapers were published by the plaintiff; that it is not plaintiff who published the articles. Plaintiff submitted that it is evident that he now holds a higher office.

94. Further that the high court held that the defamatory words should be particularized verbatim and even if plaintiff did not file defence on counterclaim, court should find if there was evidence to sustain the claim and urged court to find that the plaintiff has a case.

95.

SUBMISSIONS BY 1ST AND 2ND DEFENDANT

96. By submissions dated 13th August, 2019, 1st and 2nd defendant's Advocate started by analyzing pleadings. He submitted that the issue of fraud is not related to prayers sought by plaintiff and no evidence was adduced to support the issue of fraud. The witness who testified was not able to respond to questions asked and plaintiff's Advocate has tried to prove fraud through submissions.

97. Counsel submitted that the issue of opening account was dealt with fully in the hearing. He submitted that the 1st and 2nd defendants applied to open the account and it was upon the plaintiff to decide to open it or decline. He submitted that it is not true to say the defendants have admitted issue of fraud; he stated the defendants denied and ably demonstrated that in the hearing; that nothing was hidden when accounts were opened and the 3rd party who claims proceeds of the accounts benefited from the accounts for over 3 years.

98. On prayer for indemnity counsel submitted that they cannot have blanket prayer for indemnity and they have not demonstrated what loss suffered which they want indemnified. Counsel submitted that the 1st and 2nd defendant should not have been sued as they were acting as agents of 3rd defendant and as such no liability accrue to them.

99. He further submitted that if one reads through the lines, the plaintiff was prosecuting the interested party's case; that interested party could sue them but they have not been sued and that the Memorandum of Understanding, which was the basis of opening the accounts, the sharing of profits, was agreed.

100. He further submitted that Mount Kenya University counterclaim is that Mount Kenya University Nakuru Campus belong to 3rd defendant and it is on that basis that the 3rd defendant is seeking declaration that they are sole proprietor of what is called Mount Kenya University Nakuru Branch; and no defence was filed on counterclaim and it implies all averments are uncontroverted by way of evidence and cannot be done by submissions; that it is a clear admission of liability. He submitted that the 3rd defendant has proved counterclaim on a balance of probabilities and should be allowed as prayed. He prayed for costs in both plaintiff's suit and 3rd defendants counterclaim.

3RD DEFENDANT'S WRITTEN SUBMISSION

101. The 3rd defendant filed submission dated 29th July 2019 and filed on the 13th August 2019 raised the following issues:

i. Whether the Plaintiff is entitled to the reliefs sought.

102. They draw Court's attention to **Order 3 Rule 9** of the **Civil Procedure Rules, 2010**. They stated that declaratory orders are not granted as a matter of course. The orders will issue to a litigant if there are special circumstances that warrant such orders and the facts are clear. They refer the Court to the case of **Henry Mochoge Ogaro Vs Barnabas Majimo Naset & another [2017] eKLR**. They refer to the case of **Bitange Ndemo v Director of Public Prosecutions & 4 others [2016] eKLR** which laid down the test to be satisfied to warrant the grant of declarations in judicial review proceedings as follows:

“The proceedings must involve the determinations of a question that is not abstract or hypothetical. There must be a real question involved and the declaratory relief must be directed to the determination of legal controversies.”

103. The Applicant for declaratory relief will not have sufficient status if relief is claimed in relation to circumstances that have not occurred and might never happen or if the Court's declaration will produce no foreseeable consequence for the parties. The party seeking declaratory relief must have a real interest to raise it. Generally there must be a proper contradiction. These other rules should in general be satisfied before the Court's discretion is exercised in favour of granting declaratory relief:

i. An Order requiring the Plaintiff to release the said title deed to the 3rd Defendant.

ii. An Order requiring the Plaintiff to indemnify the 3rd Defendant against loss it has suffered and continue to suffer due to illegal interference with its accounts.

104. They submit that through various consents the counterclaim was partially compromised. They state that the **Mt. Kenya University Nakuru Campus** was established by the 3rd Defendant after the conclusion of the Memorandum of understanding. The 3rd Defendant rented premises to house the campus.

105. They further state that the Plaintiff witness informed the Court that no demand and/or claim whatsoever has been made or brought against the Plaintiff by any party in respect of the opening and the operation of the Account. They quote the **Section 4 of the Limitation of Actions Act CAP 22**.

106. The 3rd Defendant in his defence and counter claim dated 6th July 2012, some of the prayers which include loans advanced by the plaintiff and securities held by the plaintiff have been compromised. What remain in the counterclaim are prayers for A declaration that the 3rd Defendant was the sole proprietor of **Mt. Kenya University Nakuru Campus** and A declaration that the accounts in the name of

Mount Kenya University Nakuru Campus and the proceeds deposited therein belong to the 3rd Defendant

4TH DEFENDANT'S WRITTEN SUBMISSION

107. In Submissions dated 18th August 2019 the 4th Defendant submitted that the Plaintiff and Interested Party having not filed a defence to the counterclaim his claim remain uncontroverted. 4th defendant's submission is that he has made out a case for defamation and he is entitled to the orders he seeks in the Counter claim. He submitted that at the time of coming into force of the Charter, the accounts herein were operational. The Charter did not nullify the memorandum of understanding. It did not affect and could not affect already acquired rights indeed.

108. They further submit that they did not defraud the Plaintiff or the Interested Party; they dealt exclusively with the money which it deposited in the account. They draw Court's attention to the case of **Lazarus Masayi Onjallah v Kenya Commercial Bank [2004] eKLR** the gist of the case being that the Bank had not proved that the remission of the money into the Appellant's account was mistaken and that the Appellant was not entitled to the amount so deposited in the account. They further made reference to **Halsbury's Laws of England, 4th Ed. Vol 3 paragraph 4** the gist being that the receipt of money by a banker from or on account of his customer constituted him the debtor of the customer. The Banker is normally liable to repay only the person from whom he received the money.

109. They further stated that the 3rd Defendant through the 1st and 2nd Defendants dealt with senior offices of the Plaintiff and further state that the Plaintiff is not sincere when it alleges that the 4th Defendant single-handedly opened a fraudulent bank account without the knowledge, consent and/or approval of the other offices of the bank at branch or head office, with fraudulent intent prevailed upon the bank to award 2 loans of KShs.3 million and KShs.45 million. The 4th Defendant is not the person whose name appears on the account application form. He is not only the employee of the Plaintiff who dealt with the 3rd Defendant. The only reason he was sued was because he shares a name with the 1st Defendant. The Plaintiff has not demonstrated any wrong doing on the part of the 4th Defendant.

110. The 4th Defendant stated that his only claim was for defamation as it was not addressed in **Cause 18 of 2014: Peter Murithi Mwarania v Family Bank Ltd & another**. They further submit that the legal consequence of failure to file a defence is that the factual basis of the claim is not in contest and liability is admitted. Thus the only issue for determination is quantum for damages. They refer Court to the case of **Wycliffe A. Swanya v Toyota East Africa Ltd & another [2009] eKLR** the gist being that Court should consider the essentials of the tort generally and to see whether these essentials have been established or proved .

111. As to whether the words complained of refer to the 4th defendant. That it must be proved that the defamatory statement referred to the Plaintiff. The statement must be understood by right thinking or reasonable minded persons referring to the Plaintiff.

ii. As to whether the Defendant published the words complained of.

112. As to whether the words complained of are defamatory to the Plaintiff, the 4th defendant submitted that reputation depends on opinion and opinion is the main basis of communication of thoughts and information amongst humans. They further submitted that the test used to determine whether a statement is capable of giving defamatory meaning was discussing in **Sim v Stretch (1936) 2 All ER 123** where **Lord Atkins** held that conventional phrase exposing the Plaintiff to hatred, ridicule and contempt is too narrow. 4th defendant submitted that award of KShs.5,000,000 be awarded as general damages for libel and malicious falsehood and KShs.1,000,000 as exemplary and aggravated damages.

5TH AND 6TH DEFENDANTS' SUBMISSIONS

113. By submissions dated 14th of August 2019, the 5th and 6th Defendants submitted that they are husband and wife and the directors of **Serein Education Centre Limited** which runs a college in Nakuru. They submitted that they are not proper party to the suit and at all times material relevant to this suit, they were acting in their capacities as directors of **Serein Educational Centre Limited**; and being directors of a limited liability company they should not be sued in their personal capacities or as agents of a body corporate.

114. They submitted that it is common ground that the 3rd Defendant and the Interested Party signed a memorandum of understanding dated 1st of September 2008 and the authenticity of the memorandum of understanding was not challenged by either the Plaintiff or the Interested Party. They further submit that where a party authorizes another to act on its behalf and create legal relations with third parties it is assumed in law that there exists an agency relationship.

115. They further state that on or about the 16th of December 2010 an understanding was reached between **Serein Educational Centre** and the 1st Defendant on behalf of the Interested Party that an account be opened with the Plaintiff in the name of **Mt. Kenya University Nakuru Campus 2** with 2 Signatories. One of the signatories was from **Serein Education Centre** and the other from the 3rd Defendant on behalf of **Mt. Kenya University**. The purpose of the account was to have the students taking Psychology courses; deposit their fees there and to ensure accountability. They further submit that they did not in their individual capacities or as directors deal with the Account Number 019000021365 as such they did not expose the Plaintiff to any liability as claimed or at all and are therefore not bound to indemnify the Plaintiff against imminent loss.

116. They submit that they are not guilty of fraud as alleged by the Plaintiff and the Interested Party. They submit further that **Serein Educational Centre's** dealings with the 3rd Defendant through the 1st Defendant were made on the strength and understanding that he was duly authorized to conduct business for and on behalf of the interested party by the memorandum of understanding and for the account to have been opened, the Plaintiff must have been satisfied that all the requirements were met.

117. They refer the Court to the case of **Kinyanjui Karanja V George Kamau Njoroge [2015] eKLR** where the court held that for one to claim fraud the Appellant needed to not only plead and particularize but also lay basis by way of evidence upon which the Court would make a finding.

118. They submitted that Plaintiff has failed to convince the Court that the 5th and 6th Defendants are guilty of fraud and or misrepresentation as alleged and that it has suffered any loss from running of account number 019000021365 nor it has any legal claim against the 5th and 6th Defendant and the Plaintiff is not entitled to the reliefs sought in the Plaintiff.

SUBMISSIONS BY INTERESTED PARTY

119. The interested party filed submissions dated 10th July 2019 and stated that it was enjoined into the instant suit by way of a joinder motion to the suit. It joins the Plaintiff in holding the Defendants liable for the wrong committed against Interested Party at the Plaintiff's bank and supports the prayers for a judgement against the Defendants

120. The Interested Party submitted that the Plaintiff was duped into opening and made accounts operational by the 1st and 2nd Defendants herein and with complicity, collusion aided by the 3rd Defendant and approval, consent and/or assistance and direct and indirect participation and collusion of the 4th Defendant via his deliberate acts of negligence and breach of duty or diligence represented to the Plaintiff that the 1st and 2nd Defendants were the proprietors of the **Mt. Kenya University's Nakuru Campus**, The 1st and 2nd Defendants were self-employed as directors of **Mt. Kenya University Nakuru Campus** a fact which was not true, that **Mt. Kenya University Nakuru Campus** was duly registered with a certificate of registration Number 82805 knowing that the Company registration number was for **Step Up Holdings (K) Limited**, the 3rd Defendant.

121. Further that the 1st and 2nd Defendants or either of them had the capacity and were authorized to open account number 019220330 and 019000015726 in the name of the institution called **Mt. Kenya University Nakuru Campus**; and the 1st, 5th and 6th Defendant or either of them has the capacity and were authorized to open an account number 019000021365 in the name an institution called **Mt. Kenya University Nakuru Campus**.

122. As to whether the representations made by the Defendants in opening the accounts were falsified and if so whether it was deliberately done, Interested Party submitted that the Plaintiff prodded by faith and truth of the said representation and warranties and/or honestly believing that the 4th Defendant had verified and confirmed the truth and veracity of the same opened and operationalized the running of the accounts domiciled in Nakuru Njoro Branch; further that the Plaintiff further submitted that they discovered the representations were untrue. They submitted that the 1st, 2nd, 3rd and 4th Defendant unlawfully, illegally and irregularly colluded to fraudulently open the accounts.

123. It submitted that **Section 44 (2) of the Charter** prohibits the use of the name of the University for the purposes of advertisement, publication, business, trade or profession without the Council's consent. They submit that the standard of proof in allegations of fraud is higher than that required in ordinary civil cases, namely proof upon a balance of probability but certainly not one beyond a reasonable doubt as in criminal cases and referred to the case **Bruce Joseph Bockle v Coquero limited [2014] eKLR** which quoted the case of **Koinange & 13 others v Koinange (1968) KLR 23** where the Court held that the allegation of fraud must be specifically pleaded and strictly proved on a standard below beyond reasonable doubt but above the balance of probability.

124. Interested Party submitted that the 4th Defendant was an accessory and necessary party to the illegal and unlawful machinations of the 1st, 2nd and 3rd Defendants and that he failed to satisfy himself over the veracity of allegations of 1st and 2nd Defendants' alleged directorship of **Mt. Kenya University Nakuru Campus** through inquiries and other official searches in accordance with normal banking practice and as its required of reasonably prudent banker.

125. Further in the case of **Wycliffe A. Swanya v Toyota East Africa Ltd & another Civil Appeal 70 of 2008** the court held that for defamation the following must be proved: -

- a. **The matter is defamatory in character,**
- b. **The defamatory statement or utterance was published by the Defendant,**
- c. **Publication in the sense of defamation means that the defamatory statement was communicated to someone other than the person defamed,**
- d. **It was published.**

126. On whether the 3rd Defendant pleaded and proved its counterclaim at trial, Interested Party submitted that Prayers b, c, d, e and f are spent and the deficit of the prayers in (g) and (h) must fail for want of proof at the trial and costs should follow cause.

ANALYSIS AND DETERMINATION

127. The 1st, 2nd and 3rd defendants have not disputed opening and operationalizing 2 accounts in the plaintiff's Njoro branch. Their evidence is that they opened the two accounts in the name **Mount Kenya University Nakuru branch**. They also admitted that the said name is not a legal entity and that they used the name as result of memorandum of understanding between Mount Kenya University and the 3rd defendant. The interested party Mount Kenya University have not denied entering into memorandum of understanding with the 3rd defendant but denied allowing the 3rd defendant to open an account and operationalize it using its name.

128. The 5th and 6th defendants also stated that they agreed on a collaboration with the interested party Mount Kenya University and after discussion between the 5th defendant and Chairman of Interested Party **Simon Gicharu** and the 1st defendant, the said **Simon Gicharu** tasked the 1st Defendant to facilitate the process of collaboration. The 5th defendant testified that later after the discussion the chairman Mount Kenya University attended their graduation ceremony and announced that he was agreeable to collaboration. The 5th and 6th defendants never denied that they signed account opening forms in respect to account number 019000021365 while waited for collaboration process to be completed. It is not disputed by the plaintiff and interested party that the account had not been operationalized at the time this dispute arose.

129. I also note that prayers in respect to loans advanced to the 3rd defendant by plaintiff and securities held by the plaintiff have been settled. The plaintiff confirmed that the 3rd defendant fully paid the loans and a discharge was issued and title deeds in respect to securities were released to the 1st and 2nd defendant.

130. I also note that by consent, the 7th defendant was removed from the suit. I will not therefor deal with issues that related to 7th defendant.

131. In respect to the 4th defendant, issues touching on employment were dealt with by Employment and Labour Relations Court as evidenced by proceedings in Nakuru ELRC Cause No.18 of 2014. What remain for determination in respect to the 4th defendant's counterclaim is claim for damages for defamation.

132. From the foregoing I find the following as issues for determination:

i. Whether account numbers 019220330 and 019000015726 were regularly opened and operationalized.

ii. Whether by opening and operationalization of accounts numbers 019220330 and 019000015726 the 1st, 2nd and 3rd defendant was intended to defraud the interested of funds.

iii. Whether the 4th defendant colluded to the 1st, 2nd and 3rd defendant in opening and operationalization of the account/whether the 4th defendant failed to exercise due diligence opening and operationalization of the accounts herein.

iv. Whether the 5th and 6th defendants were involved in opening Account number 019000021365.

v. Whether the plaintiff suffered any loss or damage as a result of opening and operationalization of the said accounts.

vi. Whether the 3rd party is entitled to prayers sought in the counterclaim.

vii. Whether the 4th defendant has proved defamation against the plaintiff.

viii. Who is entitled to costs and from whom?

ix. Whether account numbers 019220330 and 019000015726 were regularly opened and operationalized

133. The 1st defendant testified that he presented document for incorporation of the 3rd defendant with memorandum of understanding and with the strength of memorandum of understanding the bank opened the account in the name **Mount Kenya University Nakuru Campus**. PW1 who testified on behalf of the plaintiff confirmed that search is done before an account is opened for a corporate client. The plaintiff's officers were therefore expected to have done search to verify authenticity of the documents presented. In this case, the 1st, 2nd and 3rd defendants argued that it is the memorandum of understanding which gave birth to the name and it was upon the Plaintiff to confirm whether the memorandum of understanding sanctioned opening of the account in the name mentioned in the memorandum of understanding which has been admitted by all the parties herein that it is not a registered entity. It was the duty of the Plaintiff's officials both at branch and headquarters to ascertain whether Mount Kenya University sanctioned use of the said name and whether it was proper to use incorporation documents of the 3rd defendant. Evidence clearly show that they were aware of the memorandum of understanding as it was presented to them and it was the duty of the bank to seek clarification in case of doubt or ambiguity in the memorandum of understanding.

134. It was not disputed that the plaintiff advanced huge sums of loan using the account. The loan having been approved from head office, the plaintiff's officers at the head office should have raised a red flag concerning the account while scrutinizing its documents for loan approval. The 4th defendant availed communication from plaintiff's legal department concerning the account which confirms that they knew about the account and were satisfied that the memorandum of understanding and letter of authorization availed by the 3rd defendant confirmed that it was sanctioned by the plaintiff. It is not also disputed that the account operated for three years without any complain from the interested party, who received funds through the said account confirms that the interested party was aware of the account and had sanctioned its opening and operation. From the foregoing, the 3rd defendant therefore rightfully opened the account as per their collaboration agreement.

(ii) Whether by opening and operationalization of accounts numbers 019220330 and 019000015726 the 1st, 2nd and 3rd defendant was intended to defraud the interested of funds.

135. There is no doubt that the 3rd defendant and interested party agreed that they would come up with modalities of management of finances that relate to the collaboration.

136. I however note that despite the fact that there was no express provision to open account in the name Mount Kenya University Nakuru campus, the interested party was paid in that name for about 3 years before this dispute arose. Bankers cheques were drawn from the account, RTGS were also done which clearly indicated the account name. No complain was raised for the period by interested party. This clearly confirms that they were not opposed to 3rd party using the name Mount Kenya University Nakuru campus in the bank accounts.

137. Through its witness Mount Kenya University confirmed that there was a memorandum of understanding in respect to collaboration with an agreement for 3rd defendant to pay collaboration fee to Mount Kenya University. He confirmed that payments were by cheques or RTGS and the cheques were from **Mount Kenya University Nakuru Campus to Mount Kenya University**. This arrangement run for 2008 to 2011 a period of 3 years. Cheques were confirmed to have been signed by the 1st defendant. Cheques received by Mount Kenya University head office clearly showed there was an account opened in the name Mount Kenya University Nakuru Campus. Both the plaintiff's witness and the interested party's witness confirmed that Mount Kenya University never raised any complaint for the 3-year period Mount Kenya University received money from the account which the 1st defendant stated its total as kshs.45,000,000.

138. It is evident therefore that the opening and operationalization of the accounts was not intended to defraud the interested party of money but instead it benefited by funds received in form of collaboration fee.

iii. Whether the 5th and 6th defendant were involved in opening account number 019000021365

139. The 5th defendant who testified confirmed that he signed account opening forms while waiting for approval from Mount Kenya University. The account was not opened in the name of his college **Serein Educational Centre**. He had not signed memorandum of understanding but having signed the account in the name Mount Kenya University Nakuru Campus he knew account was being opened in plaintiff's branch, he confirmed that him and his wife 6th defendant both directors of **Serein Educational Centre** signed the forms. He cannot therefore claim that he did not know that an account was being opened in respect to the arrangement he expected to enter into with the interested party (Mount Kenya University).

140. However, from their evidence, the 5th and 6th defendants were made by the chairman Mount Kenya University that their request for collaboration had been accepted and what awaited formal approval. The account was however never operationalized. No loss could therefore be occasioned to the plaintiff. Any claim of loss against 5th and 6th defendants cannot stand.

iv. Whether the plaintiff suffered any loss or damage as a result of opening and operationalization of the said accounts.

141. Plaintiff's witness confirmed to court that no complaint has been raised or filed against the plaintiff as a result of opening and operationalization of the two accounts opened by the 3rd defendant. The memorandum of understanding talks of collaboration between 3rd defendant and interested party. Evidence adduced confirm that the interested party was paid the said collaboration fee through the said accounts; reconciliations were also done between the interested party account and 3rd defendants account. The interested party never adduced evidence of being swindled of any money by operation of the said account neither has any student's fee been claimed from the plaintiff. The interested party's witness confirmed that the 3rd defendant was authorized to collect student fees, he also confirmed that it was the 3rd defendant who was paying staff salary and other expenses for students in Mount Kenya University Nakuru Campus. No evidence of misappropriation of funds has been adduced. From the foregoing the plaintiff has failed to prove any loss or damage it suffered or is likely to suffer as a result of running the said accounts.

v. Whether the 3rd party is entitled to prayers sought in the counterclaim

142. Prayers in respect to loans advanced and securities held by the plaintiff have been compromised. The securities used by the Defendant to secure a loan were released to the 3rd defendant and the 3rd defendant were discharged from credit facilities advanced by the Plaintiff. The issue is therefore settled. What remained is a declaration that it owned **Mount Kenya University Nakuru Campus**.

143. From evidence adduced, there is no doubt that the 3rd defendant entered into collaboration with the interested party in the year 2008. Evidence adduced show that the 3rd party is a registered company which run a tertiary institution and collaboration with the interested party would have enabled them to offer degree courses offered by the interested party. The interested party through its witness who adduced evidence in Court confirmed the collaboration. Even though he said it was a principal-agent relationship. His evidence did not tally with the assertion, he confirmed that Mount Kenya University had 11 branches and Mount Kenya University Nakuru Campus was one of them. He confirmed that of the 11 campuses which he listed, he said it was only Nakuru Campus Mount Kenya University which was allowed to establish the college, recruit staff and admitted the students and forward their names to Mount Kenya University for record.

144. Evidence also show that monies paid in respect of HELB and CDF to Mount Kenya University Thika would be paid back to Mount Kenya University Nakuru Campus. Evidence also show that the 3rd defendant was allowed to apply the funds for the running of the campus. 1st defendant's evidence that it paid rent for the premises, paid for staff and met other needs of students was not challenged. From the foregoing it is quite clear that the collaboration arrangement between 3rd defendant and the interested party allowed the 3rd party to open and operate the account and it was not that of principal and agent.

vi. Whether the 4th defendant has proved defamation against the plaintiff

145. The 4th defendant testified his former workmates received emails from the plaintiff while he was travelling to Nairobi. The information about him was circulated to all staff of plaintiff. He was also terminated before being given a hearing. The Employment and Labor Relations Court later determined that his dismissal was unlawful. Besides the emails, the report against the 4th defendant was published in newspaper of wide circulation. The plaintiff never filed defence on 4th defendants counterclaim. No evidence was adduced by plaintiff to controvert evidence of defamation. Evidence adduced confirm that 3rd defendant was granted huge loans through the accounts; and having found that the memorandum of understanding sanctioned the opening of accounts and the accounts having been used to pay the Interested Party collaboration fee for a period of three years and the fact that the Interested Party or any other person never raised any complain or claim, there is no evidence on impropriety on the of the 4th defendant. His name was also listed in CRB. I believe failure to repay the loan that was owing from him to Plaintiff was as a result of the termination of employment which was declared unlawful by the Employment and Labor Relation Court (ELRC) as evidenced by proceeding adduced in ELRC No. 18 of 2014. In my view the listing at CRB was not made in good faith. From the foregoing, there is no doubt that the 4th defendant's reputation suffered and he deserves damages for defamation.

146. FINAL ORDERS

- a. The claim by the plaintiff against the defendants is hereby dismissed.**
- b. That accounts numbers were opened and operationalized with the knowledge and approval of the interested party.**
- c. I hereby declare that the 3rd defendant was not an agent of the interested party but proprietor of Mount Kenya University Nakuru Campus. Proceeds in the two accounts numbers 019220330 and 019000015726 in the name Mount Kenya University Nakuru Campus belonged to the 3rd defendant save for the corroboration fees as agreed in the Memorandum of Understanding executed on 1st September 2008.**
- d. Judgment is entered for the 4th defendant against the plaintiff for kshs.4Million as compensation for defamation.**
- e. Costs of this suit to be paid by the plaintiff to the defendants.**

Judgment dated, signed and delivered via email at Nakuru

This 14th day of May, 2020

RACHEL NGETICH

JUDGE

To:

Ochieng, Onyango, Kibet & Ohaga Advocates for the plaintiff

Konosi Advocates for 1st and 2nd defendant

Masese & Nyamwange Advocates for 3rd defendant.

Ms. Mueni for 5th and 6th defendant and holding brief for

Wambeyi Makombere Advocates for 4th defendant.

Odhiambo & Odhiambo Advocates for interested party