



**REPUBLIC OF KENYA**

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

**COMMERCIAL AND TAX DIVISION**

**CIVIL CASE NO.165 OF 2015**

**SRIRAM BHARATAM.....1<sup>ST</sup> PLAINTIFF**

**IRIDIUM INTERACTIVE LIMITED.....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**LAURA AKUNGA.....1<sup>ST</sup> DEFENDANT**

**BENCHMARK SOLUTIONS LIMITED.....2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

1. The plaintiffs through a plaint dated 30<sup>th</sup> March 2015 and filed on 31<sup>st</sup> March 2015 sued the defendants seeking judgment against the defendants jointly and severally for:-

- a) The amount of \$ 177,894;
- b) Interest of (a) above at 24% as from January 2013;
- c) Interest on (a) above at commercial rates from the date of default until payment in full;
- d) Interest at court rates;
- e) Costs of the suit;
- f) Any such other or further relief as this Honourable Court may deem fit to grant.

2. The defendants drew a statement of defence and set-off dated 29<sup>th</sup> May 2015 and filed on the same day.

3. The plaintiff responded to the defendant's defence and set-off by way of Replying to the defence and defence to set-off dated 21<sup>st</sup> July 2018 and filed on the same day. That on 22<sup>nd</sup> September 2016 the plaintiff's requested for further and better particulars, which request has not elicited any response from the defendants.

4. The trial in this matter commenced on 9/11/2017 before the late Hon. Justice J. Onguto, (God rest his soul in internal peace) who party heard PW1, before I took over this matter. PW1 was cross-examined further after which the plaintiff closed their case. The Defendants called one witness and closed the defence case.

**PLAINTIFF'S CASE**

5. The plaintiffs' evidence is as per plaintiff's witness statement by 1<sup>st</sup> plaintiff dated 11<sup>th</sup> May 2017.

6. The 1<sup>st</sup> plaintiff, a director of the 2<sup>nd</sup> plaintiff and a businessman from India; and who has resided in Kenya since 2011, owns two companies registered in Kenya, namely Iridium Interactive Limited, the 2<sup>nd</sup> plaintiff and Kuza Biashara Limited. The 2<sup>nd</sup> plaintiff provides ICT based technology solutions for various organizations such as Safaricom; the Ministry of Health and National Treasury; Google; G4s security, Kenya Commercial Bank; **KPMG** amongst others since 2011.

7. The 1<sup>st</sup> plaintiff averred that on or about 2012 to 2013, the 2<sup>nd</sup> plaintiff was selected by the National Treasury to spearhead a program dubbed program for Rural outreach and innovative Technology (**PROPIT**). That the 2<sup>nd</sup> plaintiff and Kuza Biashara Limited together with organizations such as Google; Safaricom and Kenya Commercial Bank have since 2012 been providing capacity building solutions for small and medium enterprises; hence as part of Kuza Bishara Limited capacity building solutions for small and medium enterprises; the 2<sup>nd</sup> plaintiff in partnership with China Europe International Business School (**CEIBS**) organized a program to promote small and medium Enterprises "*China meets Africa: Exploring and Investment opportunities*" held in Ghana on 30<sup>th</sup> and 31<sup>st</sup> August 2012. That as the program specifically targeted African Company; exploring ties with China; the 2<sup>nd</sup> plaintiff and Kuza Biashara Limited extended the invitation for attendance to many small and medium enterprises in Kenya's.

8. It is the plaintiff's contention, the 1<sup>st</sup> defendant was afforded an opportunity to meet and entreat for potential investors, network with small and medium enterprises and exhibit the 2<sup>nd</sup> defendant's products and services. The 1<sup>st</sup> defendant was also given an opportunity to speak on behalf of the young Entrepreneurs at the breakfast meeting. Remarkably, during the said summit the 1<sup>st</sup> defendant represented to the plaintiff that she had considerable political influence and connections in Kenya since her late father worked in the Government of Kenya as well as her company, which the 2<sup>nd</sup> defendant herein deals with top clients including the Blue Lakes Limited owned by the former President his Excellency Hon. Mwai Kibaki's son Pan Africa; Dangole Group and Eco Forum among others (*refer to correspondences exhibited at pages 7 to 10 of the plaintiffs bundle of documents*). The 1<sup>st</sup> plaintiff and 1<sup>st</sup> defendant having participated in the program together, became close business friends and ended up exchanging ideas in various business proposals to which the 1<sup>st</sup> plaintiff introduced to the 1<sup>st</sup> defendant to key organizers of the program; Mr. Shah ye and Sun jian, who had key interest in visiting Kenya. It is plaintiff's case that the 1<sup>st</sup> defendant represented to the plaintiffs and the key sponsors of the program that she already has established a business in China and was keen on making business connections with the key organizers. The 1<sup>st</sup> defendant volunteered to organize a trip to Maasai Mara for the 1<sup>st</sup> plaintiff and the key sponsors Mr. Shah ye and Sun Jian upon their visit to Kenya, which the 1<sup>st</sup> defendant later did through her Associate M/s Jane Ntulu at the Fairmount Hotel and Resort and which acts created a strong bond of friendship between the 1<sup>st</sup> plaintiff and key organizers, which culminated to exchange of business cards for ease of communications as well as with an objective of promoting business amongst themselves. It is through such connection the 1<sup>st</sup> plaintiff contents the 1<sup>st</sup> defendant managed to work her way into the 1<sup>st</sup> plaintiff's life by taking an interest in the work of his companies. The 1<sup>st</sup> defendant was able to visit the 1<sup>st</sup> plaintiff's place of work where she showed great excitement and interest in the 1<sup>st</sup> plaintiff 's business, and proceeded to introduce the 1<sup>st</sup> plaintiff and his family to her family at Runda. That at the height of the relationship between the 1<sup>st</sup> plaintiff and the 1<sup>st</sup> defendant, on or about 30<sup>th</sup> January 2012, the 1<sup>st</sup> defendant called the 1<sup>st</sup> plaintiff frantically claiming that she was facing financial crisis and further claiming that several years ago she stood as a guarantor for one of her friends who took a loan from Family Bank and that Bank had called her and informed her that she had 48 hours to pay Kshs. 40,000,000/- failure whereof action would be taken.

9. The 1<sup>st</sup> defendant requested the 1<sup>st</sup> plaintiff to loan her money payable on interest to help her pay off the debt owed to Family Bank and remit the cash directly to Family Bank since all her accounts were frozen. The 1<sup>st</sup> defendant also assured the 1<sup>st</sup> plaintiff she would deliver the title deeds of her properties on Rapture Road; James Gichuru Road and Karen as securities. The 1<sup>st</sup> plaintiff in good faith decided to loan the 1<sup>st</sup> defendant USD 26,000 and Kshs.1, 490,000/- on clear understanding that the 1<sup>st</sup> defendant would repay the amount with interest. The 1<sup>st</sup> plaintiff so as to assist the 1<sup>st</sup> defendant borrowed USD 5000 and Kshs. 850,000/- on interest from his business friends and withdrew USD 21,000 from the 2<sup>nd</sup> plaintiff's bank account held with Kenya Commercial Bank (**KCB**) as well as Kshs.750, 000/- retrieved from his personal Barclays Bank Account and deposited the said sums to the 1<sup>st</sup> defendant's account (*see pages 11 to 13 of the plaintiff's bundle of documents*). The 1<sup>st</sup> defendant then promised the 1<sup>st</sup> plaintiff, she would look for the balance, promising that she would deliver to the 1<sup>st</sup> plaintiff Title Deeds to her properties as security but she failed to do so (*see correspondences at pages 15-19 of the plaintiff's bundle of documents*).

10. On 1<sup>st</sup> February 2013 the 1<sup>st</sup> defendant emailed the 1<sup>st</sup> plaintiff informing him she was arranging for some money owed to him and would pay in a couple of weeks but has since failed to honour her promise. This promoted the 1<sup>st</sup> plaintiff to send a message to 1<sup>st</sup> defendant and her fiancée concerning their willful failure, refusal and/or neglect to pay the outstanding amount of money lent to 1<sup>st</sup> defendant but 1<sup>st</sup> defendant did not respond positively (*see correspondences at page 20-26 of the plaintiff's bundle of documents*). The 1<sup>st</sup> plaintiff kept on following the 1<sup>st</sup> defendant to pay the amount loaned, and though she did not deny, she always gave reasons for failure to pay.

11. In or about June 2013 the 1<sup>st</sup> plaintiff received an invitation to an all expenses paid trip to Oxford University China Africa Network (**OUCAN**) & Alpha Professional Network to deliver a talk on Emerging Powers in Frontier Market; new opportunities for investment and Development in Africa (*see correspondence at page 35 of the plaintiff's bundle of documents*). The 1<sup>st</sup> plaintiff was at the same time requested to identify other suitable panelists to be included and he mentioned the 1<sup>st</sup> defendant amongst others; leading to Oxford University paying for 1<sup>st</sup> plaintiff and the 1<sup>st</sup> defendant Economy class tickets and arranged for their other accommodation expenses. That however the 1<sup>st</sup> defendant purely on her own motion without the knowledge of the 1<sup>st</sup> plaintiff decided to get their tickets upgraded to business class and further claimed that she did not want to travel using economy class. That during the trip the 1<sup>st</sup> plaintiff and 1<sup>st</sup> defendant made numerous connection to white ken Group; Dangote cements; China Development Bank amongst many others and both 1<sup>st</sup> plaintiff and 1<sup>st</sup> defendant discussed business association between their two companies; leading to the 1<sup>st</sup> plaintiff requesting the 1<sup>st</sup> defendant to put together a concept note or what she could offer as services and how they could be structured and finalized as both parties had identified few areas each of them could offer services to each other's companies.

12. On or about May 2013 and July 2013 the 1<sup>st</sup> defendant sent to the 1<sup>st</sup> plaintiff an email regarding the potential engagement model between the Kuza Biashara and the 2<sup>nd</sup> defendant (*see correspondence at pages 36 and 37 of the plaintiff's list of documents*). The parties met and the 1<sup>st</sup> defendant, suggested she would step in as a Non-Executive Director of Kuza Biashara. To that end the 1<sup>st</sup> plaintiff and the 1<sup>st</sup> defendant effected the same from July 2013 and a formal email was sent on 1<sup>st</sup> August 2013, which the 1<sup>st</sup> defendant accepted through her written email on 5<sup>th</sup> August 2013 (*see correspondence at page 38 to 43 of the plaintiff's list of documents*). Consequently, by an email dated 24<sup>th</sup> July 2013 the 1<sup>st</sup> plaintiff and the 1<sup>st</sup> defendant decided that for strategic reasons and also for entrepreneurial growth the 1<sup>st</sup> defendant should join the Global Entrepreneur organization and become the founding member of the Kenya entrepreneurial Organization. That a membership fee of USD 2500 was payable to the 1<sup>st</sup> defendant to join the said Global entrepreneurial organization to which the 1<sup>st</sup> defendant represented that she had given instructions to her Chinese business to transfer the said USD 2,500 membership fee but the organization confirmed that it had not received the money. That all parties agreed that since it was urgent to pay the membership fee on the same day, the 2<sup>nd</sup> plaintiff would pay it on behalf of the 1<sup>st</sup> defendant and once the purported funds by the defendant from China were released, the 1<sup>st</sup> defendant would refund the amount paid and the 1<sup>st</sup> defendant likewise agreed to the said arrangement (*see correspondence at page 44 to 47 of the plaintiff's bundle of documents*). That todate the defendants have not paid the said amount of USD 2,500 for which they are indebted to the 2<sup>nd</sup> plaintiff and obliged to repay.

13. In April 2013 the 1<sup>st</sup> defendant informed the 1<sup>st</sup> plaintiff that one of her suppliers; Alliance Garment Limited, in her company; which is the 2<sup>nd</sup> defendant herein was harassing her to clear an outstanding balance of goods supplied to her and on 6<sup>th</sup> August 2013, in good faith. The 2<sup>nd</sup> plaintiff paid Kshs. 202,000/- to Aliance Garment Limited the supplier herein on behalf of the 2<sup>nd</sup> defendant with the understanding that the 1<sup>st</sup> defendant would refund the said sum but the defendants failed to do so (see correspondence at page 48 to 50 of the plaintiff's bundle of documents). That on or about 13<sup>th</sup> August 2013, the 1<sup>st</sup> defendant requested the 1<sup>st</sup> plaintiff to send sum of Kshs. 120,000/- being payment of salaries of her mother's employees and Kshs. 170,000/- for her personal use which the 1<sup>st</sup> plaintiff did though the 2<sup>nd</sup> defendant's account (see correspondence at pages 51 to 53 of the plaintiff's bundle of documents). That by email of 21<sup>st</sup> August 2013 by 1<sup>st</sup> defendant to 1<sup>st</sup> plaintiff's wife, the 1<sup>st</sup> defendant informed her that she was expecting money from a company namely Techbiz, but to date the debt has not been settled. That again based on the representation, the 1<sup>st</sup> plaintiff and his wife agreed to loan to 1<sup>st</sup> defendant Kshs. 200,000/- and which the 1<sup>st</sup> plaintiff transferred from its KCB to the 2<sup>nd</sup> defendant's Nic Bank account (see at page 55 to 62 of the plaintiff's bundle). That on 21<sup>st</sup> and 26<sup>th</sup> August 2013 the 1<sup>st</sup> defendant emailed the 1<sup>st</sup> plaintiff and his wife frantically claiming that some of her suppliers namely Razaak were demanding payment of an outstanding debt and were threatening to take her to police for obtaining goods by way of false pretense which is a criminal offence (see correspondences at page 55 to 62 of the plaintiff's bundle of documents). That on 28<sup>th</sup> August 2013, in good faith, as well as to safeguard the reputation of the defendants, the plaintiff transferred USD 75,000 though the 2<sup>nd</sup> plaintiff's KCB Dollar account and Diamond Trust Bank (DTB) Dollar account to the 2<sup>nd</sup> defendant purportedly for clearing its debt to its creditors; RAVs, Gizhada and Razaak on strength that the 1<sup>st</sup> defendant would repay the same once her funds were available (see correspondence at page 62 to 72 of the plaintiff's bundle of documents).

14. On 25<sup>th</sup> September 2013, the 1<sup>st</sup> defendant not denying the sum advanced to the defendants; sent to the 1<sup>st</sup> plaintiff an email informing him she was suffering from an anxiety disorder and thereby tacitly, sought the plaintiff's indulgence to settle the debt (see correspondence at page 73 of the plaintiff's bundle of the documents).

15. The plaintiff evidence as regards the joint business ventures, avers that he compensated the 1<sup>st</sup> defendant for her services for the months of August, September and October 2013 at USD 2,000 per month being sum agreed upon, coming to a total of USD 6,000 for 3 months (see correspondence at page 73 of the plaintiff's bundle of documents) but the plaintiff and his wife were on the other hand not compensated by the defendants for their services as stipulated in their invitations into the 2<sup>nd</sup> defendant's Board of director's yet it was clear from the correspondence and sum admitted by the defendants that the plaintiffs continued to offer defendant's invariably advice and support. That the 1<sup>st</sup> defendant did not deliver any concrete business to the plaintiff she voluntarily terminated her retainer contract with the plaintiff's on 11<sup>th</sup> November 2013 ( see correspondences at page 79 to 80 of the plaintiff's bundle of documents); subsequently the 1<sup>st</sup> defendant cut almost all communication with the plaintiffs and ignored most of the plaintiffs emails seeking payments of the funds advanced to the defendants (see correspondence at page 81 to 96 of the plaintiff's bundle of documents). The defendant used all tricks to evade paying the plaintiffs and even linked the plaintiffs with a Mr. Hujian who the 1<sup>st</sup> defendant claimed was one of her agents in charge of organizing for transfer of her money from China only for the plaintiffs to find out that there was no such a person but a vogue account well-orchestrated to defraud the plaintiffs (see correspondence at page 86 to 96 of the plaintiff's bundle of documents).

16. The plaintiffs in light of the foregoing, claim from the 1<sup>st</sup> and 2<sup>nd</sup> defendant sum of USD 177,892/- summarized as follows:-

Date	Particulars	Principal Advanced	References
24/07/2013	Paid for Global EO membership for Laura Akunga	\$2,500	Pages 44, 45, 46, 47, 82 and 134 of the Plaintiff's Bundle of Documents.
06/18/2013	Short term loan to Benchmark Solutions Director's salary	Kshs.120,000 or \$1,412	Pages 18, 49, 82, 133 and 134 of the Plaintiff's Bundle of Documents.
28/08/2013	Paid final settlement of Creditors (RAVS, Granada, Razaak)	\$72,800	Pages 55, 56, 60, 61, 69, 70, 82, 133 and 134 of the Plaintiff's Bundle of Documents.
31/01/2013	For repayment Family Bank	\$10,000	Pages 11 to 26, 82, 133 and 134 of the Plaintiff's Bundle of Documents.
31/10/2013	For repayment Family Bank	\$5,000	Pages 11 to 26, 82, 133 and 134 of the Plaintiff's Bundle of Documents.
31/10/2013	For repayment Family Bank	\$6,000	Pages 11 to 26, 82, 133 and 134 of the Plaintiff's Bundle of Documents.
31/10/2013	For repayment Family Bank	\$15,000	Pages 11 to 26, 82, 133 and 134 of the Plaintiff's Bundle of Documents.
31/10/2013	For repayment Family Bank	\$8,235	Pages 11 to 26, 82, 133 and 134 of the Plaintiff's Bundle of Documents.

31/10/2013	For repayment Family Bank	\$3,529	Pages 11 to 26, 82, 133 and 134 of the Plaintiff's Bundle of Documents.
26/04/2013	For payment to the Creditor (Kshs.1 million of which Kshs.300,000)	\$3,529	Paid in cash.
07/05/2013	For repayment to the Creditor (Kshs. 1 Million of which the remainder Kshs.700,000)	\$8,235	Paid in cash.
07/05/2013	For payment to KK Security & Misc.	\$1,176	Paid in cash.
03/07/2013	For payment to the creditors	\$3,529	Paid in cash.
14/07/2013	For part payment of 3 Creditors (Granada, Razzak, RAVS)	\$34,600	Paid in cash.
14/07/2013	Paid to Laura Akunga for staff meeting	\$118	Paid in cash
	<b>TOTAL</b>	<b>\$177,892</b>	<b>Paid in cash</b>

#### Defence Case

17. The 1<sup>st</sup> defendant gave evidence and averred that she is a resident of Nairobi, a business lady and chief executive officer of the 2<sup>nd</sup> defendant; Benchmark solutions Ltd, which carries out the business of specialized financial and market in Kenya services. That the 1<sup>st</sup> plaintiff is known to her and the two shared a strong friendship which included their families and professional associates. That the 2<sup>nd</sup> defendant offered market linkage and related services which were accepted for due consideration (*see correspondence at pages 1-11 of the defendants' bundle of documents*).

18. That in the month of January 2013, the 1<sup>st</sup> defendant was taken ill and confided in the 1<sup>st</sup> plaintiff as such, on the basis of the close business and professional association. That the 1<sup>st</sup> plaintiff offered to assist the 1<sup>st</sup> defendant by negotiating on behalf of the 1<sup>st</sup> defendant with her creditors in order that the financial obligations could be settled. That the 1<sup>st</sup> defendant was later able to settle all her obligations using resources from her business; pointing out that there was no agreement that existed from the plaintiffs and the 2<sup>nd</sup> defendant to loan her some money.

19. The 1<sup>st</sup> defendant further stated that in July 2013, the plaintiff appointed her to sit on the board of the 2<sup>nd</sup> plaintiff, (*referring to invitation at page 12 and 13 of the defendant's bundle of documents*) and for which she was to receive the sum of USD 2,000 per month but was only paid for 3 months and urging that though she continues to hold that position, she has not been remunerated since October 2013.

20. The 1<sup>st</sup> defendant further testified that, the 1<sup>st</sup> plaintiff proceeded to enroll her in the Entrepreneurs organization, and even through the membership fee was voluntarily paid by the 1<sup>st</sup> plaintiff, the 1<sup>st</sup> defendant averred that she refunded the fee to the 1<sup>st</sup> plaintiff (*referring to correspondence at page 14-16 of the defendant's bundle of documents*).

21. It is the 1<sup>st</sup> defendant's evidence that she never obtained any monies from the plaintiffs by fraud or false pretenses as alleged in the plaint and urging further no loans were extended to her by the plaintiffs and denied being indebted to the plaintiffs.

22. The defendant in her evidence averred that it is the plaintiffs who are indebted to herself as follows:-

**a) Remuneration for market linkage services (approximately 16 introductions to new clients), at the rate of US\$ 30,000 (exclusive of 16% VAT) per client-US\$ 556,800.**

**b) Remuneration for services rendered to the 2<sup>nd</sup> Defendant as director thereof, since October 2013-US\$ 40,000 as at May 2015 (the date of the Statement of Defence) which amount continues to accrue at the rate of US\$ 2,000 per month.**

**c) Loan to the 1<sup>st</sup> Plaintiff at the 1<sup>st</sup> Plaintiff's request, on 20<sup>th</sup> June 2013-US\$ 3,600 for a trip to the United Kingdom. I paid this amount and he was to refund me (see pages 17 and 18 of the Defendant's Bundle of Documents).**

**d) Loan to the 1<sup>st</sup> Plaintiff to fund a business trip for him and his associates to the Maasai Mara, on 1<sup>st</sup> September 2012-US\$ 5,000 (refer to the receipts at pages 19 and 20 of the Defendant's Bundle of Documents).**

23. I have considered the pleadings, the parties evidence and annexures thereto, the parties advocates rival submissions and respective authorities thereto, and the issues arising thereto for consideration can be summed up as follows:-

a) **Whether the plaintiffs proved the defendants borrowed money from the plaintiffs and whether the plaintiffs proved they advanced any money to either of the defendants?**

b) **If the answer to the (a) above is in the affirmative, whether the money advanced by the plaintiffs to the defendants was a loan into to be repaid?**

c) **Whether any interest should be applied to the alleged loans?**

d) **Whether the defendants are entitled to a set-off against any damages that may be awarded to the plaintiffs?**

**A) Whether the plaintiff proved the defendants borrowed money from the plaintiffs and whether the plaintiff proved they advanced any money to either of the defendants?**

24. The plaintiffs claim is for judgment jointly and severally against the defendants. Under paragraph 26 of the plaint the claim is clearly under two limbs. The first is for loans and secured from sum advanced by the plaintiffs to the defendants. In the evidence before court there is no dispute from the 1<sup>st</sup> plaintiff and that 1<sup>st</sup> defendant, that the two developed a personal relationship in which the 1<sup>st</sup> defendant averred the two shared a strong friendship which included their families and professional associates. The two had personal relationship which extended to their business relationship.

25. From the 1<sup>st</sup> plaintiff's evidence, it has been established that on diverse dates the defendant's borrowed money from the plaintiffs on account of their strong friendships and on promise to repay back the money. The defendant has not directly denied having borrowed money from the plaintiffs but avers that when she fell sick she confided on the 1<sup>st</sup> plaintiff who offered to assist her by negotiating with her creditors on her behalf in order that her financial obligation could be settled, without giving any details.

26. In the instant case, I find that the defendants have not contested the plaintiffs assertion that on diverse dates and occasions, the defendants borrowed some money from the plaintiffs and were indeed advanced with various amounts of monies by the plaintiffs on account of representation that the defendants would repay back the amount so advanced. The defendants have at no time disputed being indebted to the plaintiffs and have always promised to repay back the monies. The acknowledgment of the indebtedness by the defendants has been made through various correspondences by the 1<sup>st</sup> defendant. The 1<sup>st</sup> defendant in seeking the sum to be advanced to her by the plaintiffs talked about non-existent monies in China to influence the 1<sup>st</sup> plaintiff and his company to some money and capitalizing on the 1<sup>st</sup> plaintiff kindness and being naïve in dealing with her requests.

27. During the hearing of this matter and especially during cross-examination, the 1<sup>st</sup> defendant admitted that she received a complete statement of the monies owed, accepted to remit a transaction but later in re-examination denied ever seeing the statement or making a promise of a transaction to settle the same. I observed the demeanor of the 1<sup>st</sup> defendant and noted that she was evasive and not to truthful witness hence her evidence was riddled with inconsistencies and contradictions. The 1<sup>st</sup> defendant had committed herself to pay the 1<sup>st</sup> plaintiff the entire amount of sum advanced with interest as mutually agreed by both parties, as clearly found under pages 106, 107 and 110 of the plaintiffs bundle of documents. The 1<sup>st</sup> defendant unconditionally admitted the indebtedness and offered to settle the plaintiff's claim together with interest. I therefore find that the defendants by their own conduct are estopped from denying that they borrowed money from the plaintiffs and owe the plaintiff the monies claimed in the plaint.

28. The above position was very well articulated in the case of **Serah Njeri Mwobi; Vs John Kimani Njoroge Civil Appeal No. 314 of 2009** as cited with authority in **Gatirau Peter Munya Vs Dickson Mwenda Kithinji & 2 others [2014] eKLR** where the Court held:-

**"The doctrine of estoppel operates as a principle of law which precludes a person from asserting something contrary to what is implied by a previous action or statement of that person." The court further expressed, "it therefore follows that where one party by his words or conduct, made to the other party a promise or assurance which intended or affect the legal relations between them and to be acted on, the other party has taken his word and acted upon it, the party who gave the promise or assurance cannot afterwards be allowed to revert to the previous legal relationship as if no such promise or assurance had been made by him but he must accept their legal relations subject to the qualification which he has himself introduced."**

I therefore find as the defendants have always in their communication through email to the 1<sup>st</sup> plaintiff acknowledged that they received money from the plaintiff on diverse occasions and promised to repay the money due to the plaintiffs voluntarily, are estopped from denying the indebtedness.

29. In the instant suit, there is sufficient evidence from the 1<sup>st</sup> plaintiff that monies were being advanced to both the defendants through the 1<sup>st</sup> defendant and the joinder of the parties is appropriate. That it is urged by the defence that emails correspondence is not sufficient evidence of proof of payment, but where email correspondence is an admission of advancement of a loan and admission of indebtedness is sufficient to prove of existence of advancement and indebtedness. In the instant suit, the plaintiffs produced bank statements pointing out several transactions from themselves to the defendants and/or third parties at the defendants behest as well as several email correspondents on the transactions including admission on diverse dates. The statements and email pointed to one thing, thus money was borrowed and advanced to the defendants on various occasions and the defendants promised to repay, which they have not to date. I am satisfied that an admission can be a express or implied either on the pleading, correspondence or other document as what is important is that the admission has been unequivocal and clear. In the case of **Piccadilly Holdings Limited Vs Anwan Hussein & 2 others (2014) eKLR**, the court stated thus:-

**"The admission has to be unequivocal in that material facts are capable of being established and the law argued agreed without the benefit of trial."**

30. I therefore find that the email correspondences, which the 1<sup>st</sup> defendant admitted as her own to the 1<sup>st</sup> plaintiff admitting the plaintiff's claim, point to nothing than acknowledgement of transaction between the 1<sup>st</sup> plaintiff and 1<sup>st</sup> defendant, they are an admission of indebtedness of the defendants to the plaintiffs with promise to settle the outstanding claim herein. The same cannot be dismissed as mere correspondence between the parties which have no bearing to the suit herein. The correspondences speak of the arrangements and agreements between the parties. They are proof of actual transfer of funds. They are supported by the plaintiff's bank statements and various correspondences. The amounts advanced to the defendants were to clear defendants debts to its creditors and not in furtherance of their first business operation as was urged by the defendants.

31. From the above, I find that the plaintiffs has on balance of probabilities demonstrated and proved that the defendants borrowed money from the plaintiffs and were advanced with the sum claimed in the plaint.

**B) If the answer to (a) above is in the affirmative whether the money advanced by the plaintiffs to the defendants was a loan into to be repaid?**

32. The defendants contend, that the bulk of the claim summarized at paragraph 26 of the plaint is in respect to payments allegedly made by the plaintiffs to third parties; and that as the 1<sup>st</sup> defendant had introduced these third parties to the plaintiffs, as suppliers it was likely that these payments were made by the plaintiffs to meet their own obligations to those third parties. The defendants urge that in absence of any evidence that the defendants specifically requested the plaintiffs to pay third parties on their behalf as a loan by the defendants, these amounts cannot lawfully be considered a loan.

33. It is urged from the defendants that they are buttressed on that submission by Chitty on contracts; Twenty-eight Edition volume 2; specific contract:-

**"Money paid to a third party. Where A pays money to B at the request of C, in the terms that he is to be repaid by C, it is sometimes a difficult question to say whether the instruction amounts to a loan by A to C. There is no doubt that in certain contexts, money paid by A to B at the request of C could properly be said to be money paid by A to C, but that does not necessarily mean that the transaction is a loan for all purposes. In Potts' Executors vs IRC, a company director had an arrangement with the company whereby the company paid various accounts on behalf of the director, debiting him with the payments in its books, and crediting him with director's fees and sums paid by him to the company. It was held by the House of Lords that the payments by the company were not payments by way of loan to the director. It was said in this case that whether a payment of this kind amounts to a loan must depend on the circumstances..."**

34. It is further contended that the parties operated business together and invested jointly; they shared supplier, and went to win business together; that the 1<sup>st</sup> plaintiff and 1<sup>st</sup> defendant served as directors of the 2<sup>nd</sup> plaintiff and 2<sup>nd</sup> defendant respectively; and paid apportionments. It is also urged there was no specific request from the defendants to the plaintiffs to pay third parties as a loan to the defendants; consequently the defendants urge that there was no loan from the plaintiffs to the defendants.

35. From the plaintiffs evidence, it is averred that on or about 21<sup>st</sup> and 26<sup>th</sup> August the 1<sup>st</sup> defendant emailed the 1<sup>st</sup> plaintiff and his wife claiming that some of her suppliers namely **RAVs, Granada and Razaak** were demanding payment of an outstanding debt and threatened to take her to police for obtaining goods by way of false pretence. The correspondence is on page 55 to 62 of the plaintiff's bundle of documents. The third parties is clear were creditors to the defendants and the amounts tendered by the plaintiffs were clear the debt owed by the defendants to their creditors. That from the plaintiffs evidence which the defendants never controverted, on demand of payments of monies advanced to the defendants by the plaintiffs, at no time did the defendants deny the debts but instead pointed a very grim picture of their financial situation. I find the defendants claim that the payments were made by the plaintiffs to meet their obligations to third parties to be a mere denial that the defendants did not request the plaintiffs to pay third parties on their behalf as a loan to be an attempt to deny what is obvious by virtue of the defendants own admission that they needed a loan from the plaintiffs on various occasions. This is evidenced from the telephonic conversation transcript produced by the 1<sup>st</sup> plaintiff, which was never disputed during examination in chief; nor was its authenticity denied as credible evidence at the time. I find such document cannot be challenged at the submission stage. In regard to various email referred to by the plaintiffs emanating from the 1<sup>st</sup> defendant, they are in my view referring to would be monetary debt owed by the defendants to the plaintiffs, which the 1<sup>st</sup> defendant, on various occasions; and times, acknowledged as loan which she never denied that she was not aware of.

36. During cross-examination of the 1<sup>st</sup> defendant, she described the 1<sup>st</sup> plaintiff as a friend, brother, mentor and a coach. She testified that she and the 2<sup>nd</sup> defendant received some money from the 1<sup>st</sup> plaintiff. Some of which she claimed was for professional market linkage but did not produce any evidence of how much and for what linkage, as she and stated she had no documents in support of any linkage. The 1<sup>st</sup> defendant denied having made emails referred to her but on rigorous cross-examination, she admitted the emails on money transactions and acknowledging indebtedness as hers. She even acknowledged e-mail are money paid to a third party by the 1<sup>st</sup> plaintiff, such as Alliance Garment industries Limited and Benchmark Limited. She further admitted receiving some more money on 27<sup>th</sup> August 2013 and 29<sup>th</sup> August 2013. She admitted receiving USD 25,000 twice claiming it was for a seminar but could not produce a letter for any seminar or any evidence, stating she had no evidence for what account the money was for. The 1<sup>st</sup> plaintiff further confirmed, in her emails, she was alluding to a particular transaction to which she had offered to pay some monies to the plaintiffs. She had even offered that the 2<sup>nd</sup> defendant would pay the money once certain transactions go through, by transferring the money to the plaintiffs but she did not transfer the money by 19/12/2013 as promised. The defendants in another email explained why the money had not transferred being USD 117,000. The defendant claimed she received money as a director of the 2<sup>nd</sup> defendant, but she did not at any time produce any record to show that she indeed was a director of the 2<sup>nd</sup> defendant, a fact denied by the plaintiffs. In this suit I noted that the 1<sup>st</sup> defendant was very evasive and untruthful witness, who attempted to denial obvious matters and on being pressed hard would change her position. I find she could not be believed. In

view of the above I am satisfied that the plaintiffs demonstrated that the money advanced to the defendants by the plaintiffs were indeed a loan that was to be repaid to the plaintiffs.

**C) Whether any interest should be applied to the alleged loans?**

37. It is urged by the defendants that the 1<sup>st</sup> plaintiff could not show that there was an agreed interest rate on the money allegedly advanced and referred to **Chitty on contract Twenty-Eight Edition volume 2 specific contracts page 711:-**

**"At common law, the general rule was that interest was not payable on a debt or loan in the absence of express agreement or some course of dealing or custom to that effect. Thus, in the absence of express stipulation, it has held that interest was not payable on the price of goods sold, although the price was payable on a certain day, nor for money lent to or paid for, the defendant; nor on a claim for money had and received to the plaintiff's use unless fraud was proved; nor on money due on a building contract for work done by the contractor, payment for which is in arrear. This principle differs from the rule already noted, that interest cannot normally be awarded by way of damages for non-payment of money. The former principle means that interest is not payable under the contract itself, in the absence of express agreement or custom; the latter rule means that interest cannot be awarded by way of damages for breach of contract. The latter rule has largely been superseded by statutory provisions; the former principle remains in force, though its scope has been whittled down by both equitable and statutory developments."**

38. In the instant suit from pages 103 to 110 of the plaintiffs bundle of documents it comes out clearly that the issue of interest was discussed and agreed upon. The said pages has dealt with the issue of interest payable for the sum advanced and it is stated the interest is payable.

39. As regard the authority relied upon by the defendants on General Rule at common law regarding, general rule that interest was not payable or debt or loan in absence of on express agreement or some course of dealing or custom to that effect; I have considered the discussion pertaining to the interest were held between the 1<sup>st</sup> plaintiff and the 1<sup>st</sup> defendant in his course of dealing as evidenced under pages 103 – 110 of the plaintiffs bundle of documents. I therefore find interest should be applied to the loaned sum; but as the parties did not agree on the rate applicable, I find court rate would be proper rate to apply till payment in full.

**D) Whether the defendants are entitled to a set-off against any damages that may be awarded to the plaintiffs?**

40. The 1<sup>st</sup> defendant's claim as set out in set-off is that on various dates the Defendants offered market linkage services to the Plaintiffs, introducing approximately sixteen (16) clients to the Plaintiffs. These services were offered at the rate of US\$ 30,000 (exclusive of 16% VAT) per client. The Defendants therefore claim the sum of US\$ 556,800 from the Plaintiffs.

41. The 1<sup>st</sup> Defendant was appointed as a Director of the 2<sup>nd</sup> Plaintiff and was to receive the sum of US\$ 2,000 per month. The 1<sup>st</sup> Defendant has not received remuneration for her position as a Director of the 2<sup>nd</sup> Plaintiff since October 2013 being the sum of US\$ 40,000 as at the date of this Statement of Defence.

42. On or around 20<sup>th</sup> June 2013 the 1<sup>st</sup> Defendant, at the 1<sup>st</sup> Plaintiff's request, loaned him the sum of US\$ 3,600 in order that he could travel to London, which loan the 1<sup>st</sup> Plaintiff has failed to pay.

43. On or around 1<sup>st</sup> September 2012, the 1<sup>st</sup> Defendant, at the 1<sup>st</sup> Plaintiff's request, loaned him the sum of US\$ 5,000 in order that he could find a trip for his business associates, which loan the 1<sup>st</sup> Plaintiff has failed to repay.

44. The 1<sup>st</sup> defendant gave evidence in support of her claim for set-off. On the claim of USD 556,800 in relation to market linkage services provided by the defendants to the plaintiffs, the 1<sup>st</sup> defendant did not produce any evidence to demonstrate she offered any market linkage services to the plaintiffs. She was unable to neither produce any record nor call any witness to confirm that indeed she even offered any market linkage services to the plaintiffs. She confirmed t the court she had no document to show that she demanded USD 556,000 from the plaintiffs before filing her claim for set-off.

45. On the claim of the sum USD 40,000 being unpaid remuneration for the 1<sup>st</sup> defendant's appointment as Director of the 2<sup>nd</sup> defendant. The 1<sup>st</sup> defendant has not produced any evidence that she was at any one time a director of the 2<sup>nd</sup> defendant. She has not produced any record from the Registrar of Companies or a letter from the plaintiffs offering her the position of the director of the 2<sup>nd</sup> plaintiff. What is admitted is existence of a joint business venture involving Kuza Biashara, in which the 1<sup>st</sup> defendant was involved from July – September 2013 and during which period the 1<sup>st</sup> defendant was fully compensated for her services at a rate of USD 2,000 per month being the amount agreed upon. It is clear further from 1<sup>st</sup> defendant's email dated 11/11/2013 she voluntarily resigned. In view of the fact that the 1<sup>st</sup> defendant resigned on 11/11/2013 I find she cannot claim that she is entitled to payment of USD 40,000. I consider she resigned voluntarily but she was not paid for the month of October and November when she resigned and resigned without giving adequate notice, I consider compensation of USD 2,000 as agreed from October 2013 adequate.

46. On the claim of USD 3,600 loaned to the 1<sup>st</sup> plaintiff for travel to London on 20<sup>th</sup> June 2013, the 1<sup>st</sup> defendant did not produce any documentary evidence nor oral evidence in support of the claim. No air ticket was produced. The 1<sup>st</sup> defendant in her evidence admitted the amount was not a loan and that it was not to be refunded. She admitted she had not demanded the amount before.

47. On the sum of USD 5,000 loaned to the 1<sup>st</sup> plaintiff for his trip to Maasai Mara in September 2012, 1<sup>st</sup> defendant confirmed she did not loan the amount to the plaintiff and that there was no agreement to loan the said amount. I find that this claim is not proved.

**48.** The upshot is that I find save for unpaid remuneration for the 1<sup>st</sup> defendant for the month of October 2013 of USD 2,000; I find the 1<sup>st</sup> defendant has failed to prove all other claims set out in the set-off and are accordingly dismissed.

**49.** The upshot is that I find the plaintiff claim succeeds and I proceed to enter judgement as follows:-

**a) Judgment for the plaintiff for USD 177, 894 with costs.**

**b) Interest on (a) above at court rate from August 2013 till payment in full.**

**c) I find for 1<sup>st</sup> defendant a set-off of USD 2,000 with cost and interest at court rate from October 2013.**

**Dated, signed and delivered at Nairobi this 17<sup>th</sup> day of January, 2019.**

.....

**J .A. MAKAU**

**JUDGE.**