



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**COMMERCIAL & ADMIRALTY DIVISION**

**CIVIL CASE NO. 416 OF 2008**

SAMUEL MWAMBA AMBUNDO.....1<sup>ST</sup> PLAINTIFF  
EPHRAIM KAMOTHO WAMBUGU.....2<sup>ND</sup> PLAINTIFF  
PURITY KINYA MACHARIA.....3<sup>RD</sup> PLAINTIFF  
ELIZABETH ACHIENG OCHIENG.....4<sup>TH</sup> PLAINTIFF  
JOHN KIILU SAMBO.....5<sup>TH</sup> PLAINTIFF  
JULIET NJERI KARANJA.....6<sup>TH</sup> PLAINTIFF  
FREDRICK KIRA.....7<sup>TH</sup> PLAINTIFF  
PRISCILLA GAKII MBUTURA & 380 OTHERS.....8<sup>TH</sup> PLAINTIFF

**-VERSUS-**

SPELL INVESTMENT CO. LTD.....1<sup>ST</sup> DEFENDANT  
CONSOLATA NABWIRE ASEMBO.....2<sup>ND</sup> DEFENDANT  
THE ESTATE OF BONFACE ANDERSON NGOSIA.....3<sup>RD</sup> DEFENDANT  
CONSOLIDATED BANK OF KENYA LTD.....4<sup>TH</sup> DEFENDANT  
FRANSICA ADIKINYI ASEMBO.....5<sup>TH</sup> DEFENDANT  
ROBERT AKUMU ASEMBO.....6<sup>TH</sup> DEFENDANT

*(4th and 5th Defendant sued in their capacity As administrators of the Estate of the late Boniface Anderson Ngosia)*

**JUDGMENT**

1. The Plaintiffs filed this suit vide a plaint dated 24<sup>th</sup> July 2008 and amended on 16<sup>th</sup> January 2009, seeking for judgment and orders against the Defendants jointly and severally as follows:-

(a) Payment of Kshs. 110,288,500

(b) For a declaration that the 3<sup>rd</sup> Defendant bank abused its professional and fiduciary duty to the Plaintiffs as a bank;

(c) *The 3<sup>rd</sup> Defendant and 4<sup>th</sup> Defendant be compelled to repay to the Plaintiffs the sum of Kshs. 54,094,130 together with interest thereon at bank rates;*

(d) *That the Plaintiffs are entitled to the sums of money presently being held at; KNUT House and Harambee Avenue Branches of Equity Bank;*

(e) *For orders that the properties Nairobi L.R. No. 3734/1142 Lavington area and Dagoretti/Riruta/1254 be declared to have been purchased using the money the Plaintiffs invested with the 1<sup>st</sup> Defendant and same to be forfeited to the Plaintiffs;*

(f) *General damages;*

(g) *Costs of the suit;*

(h) *Interest thereon at 17% per month with effect from 1<sup>st</sup> May 2007, till payment in full;*

(i) *Any other orders the court may deem fit*

2. The background facts of the case are that, the 1<sup>st</sup> Defendant (herein “the company”), is an investment company with two directors; the late Boniface Anderson Ngosia (herein “the deceased”) and his sister; the 2<sup>nd</sup> Defendant. The 3<sup>rd</sup> Defendant (herein “the bank”), held bank accounts for the company’s, the deceased and the 4<sup>th</sup> Defendant.

3. That in the year 2007, the company invited members of public to invest therein, whereupon the Plaintiffs in response thereto, signed investment agreements with the company. It was a term of the agreements that, the company would pay interest at the rate of 17% per month and the principal amounts at the expiry of the various investment contracts.

4. The Plaintiffs aver that, the directors of the company, in breach of the investment agreements; fraudulently, unlawfully and irregularly withdrew the investment funds from the company and converted it to their own personal use. As a result, the company defaulted in repayment of the principal and interest sums when it became due and/or the as agreed. Consequently, the Plaintiffs suffered serious financial loss and damage.

5. Similarly, the bank, its servants, employees and/or agents, in breach of its professional and fiduciary duties, fraudulently, unlawfully, negligently and irregularly facilitated the deceased and the mother; the 4<sup>th</sup> Defendant herein, to fraudulently transfer various amounts of money from the company’s bank account into their personal accounts held at the same bank.

6. Additionally, in the year 2008, the bank, its servants, employees and/or agents further fraudulently facilitated the transfer of; Kshs. 54,094,130 which was part of the money the Plaintiffs invested with the company and transferred it to the personal account of the deceased, then to the account of the 4<sup>th</sup> Defendant.

7. That, the funds fraudulently transferred from the company’s accounts was used by the directors of the company to purchase property in their names and/or deposited in various accounts with other financial institutions among them; Equity bank.

8. However, despite demand and notice given to the Defendants to make good the loss and damage suffered by the Plaintiffs, the Defendants have refused and/or neglected to comply and continues and/or persists in such refusal. Hence the necessity to file the suit.

9. Upon service of the Complaint and the summons to enter appearance, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants did not enter appearance. As a result, the Plaintiffs through a letter dated 8<sup>th</sup> September 2011, sought for entry of judgment against them due to; default entry of appearance and/or file of defence. However, the default Judgment was not entered. A subsequent request for the default judgment, was made vide a letter dated 21<sup>st</sup> June 2016, and the judgment was entered against the 1<sup>st</sup> and 2<sup>nd</sup> Defendants accordingly on 23<sup>rd</sup> August 2016.

10. The 3<sup>rd</sup> Defendant filed a statement of defence dated 24<sup>th</sup> February 2009, and averred that the original complaint and verifying affidavit, are defective on face of it, for non-compliance with the mandatory provisions of the law, and cannot be cured by a subsequent amendment. In particular paragraphs 16, 17 and 18 of the amended complaint are defective for want of particulars. The defendant averred that, it would apply for striking out of the defective pleadings at the earliest opportunity.

11. However, it admitted that, it operated bank accounts for the company, the deceased and 4<sup>th</sup> Defendant, but denied owing the Plaintiffs any professional or fiduciary duty, terming them as strangers to the bank. It argued that, it only owed professional or fiduciary duty strictly to its customers and at all material times, it was guided by the customers’ instructions in dealing with their respective accounts and can only be answerable to the bona fide customers.

12. Finally, if the Plaintiffs had any interest in the monies held by it, then same was not communicated to it and that the Plaintiffs should have insisted on opening a trust account, if at all they had interest in the amounts held by the company.

13. The 4<sup>th</sup> and 5<sup>th</sup> Defendants filed statement of defence dated 12<sup>th</sup> February 2009, and similarly, denied knowledge of the averments in paragraphs 1 and 7 of the amended complaint, save to admit that, they are mother and brother to the deceased and co-administrators of the deceased’s estate. Further, they have no knowledge of the fact that, the deceased was a customer of the bank as alleged. It was argued that, the Plaintiffs claim as pleaded in the original and the amended complaint is bad in law in its entirety, should be dismissed with costs.

14. The matter proceeded full hearing on 12<sup>th</sup> April 2017, after the closure of pleadings. The Plaintiff's case was supported by the evidence of Purity Kinyua Macharia. She testified that she is authorized by all the other Plaintiffs to testify on their behalf; and produced authority to that effect dated 3<sup>rd</sup> September 2009. That authority was also given to her and the other seven (7) Plaintiffs, to file a representative suit on behalf of the 380 Plaintiffs.

15. She adopted the statement dated 14<sup>th</sup> June 2016 filed in court and bundles of documents filed on 7<sup>th</sup> October 2009, filed on 21<sup>st</sup> June, 5<sup>th</sup> July 2011 and 26<sup>th</sup> January 2016 as her evidence. She literally reiterated the averments in the plaint, save to add that, after the Plaintiffs entered into agreements with the company, they later learnt from daily newspapers that, the deceased who was the managing director of the company had died in a tragic road accident on 16<sup>th</sup> June 2007. Thereafter a public notice was published in the daily nation newspaper dated 26<sup>th</sup> January 2016, to the effect that the company was re-organizing itself.

16. However, the company offices were subsequently, closed and none of the investors could get their money back. The investigations followed whereupon, the Plaintiffs learnt that the 4<sup>th</sup> and the 5<sup>th</sup> Defendants had filed a Succession Cause No. 201 of 2008, at Busia High Court, petitioning for letters of administration of the estate of the deceased. The Plaintiffs lodged an objection in the Succession Cause but the Court granted the applicants a limited grant to enable this case proceed.

17. Subsequently after filing the suit, the Plaintiffs learnt that the deceased had been running two bank accounts at; Equity Bank Limited and obtained an order freezing the funds therein; in the total sum of Kshs. 17, 285,250.95. The money was subsequently deposited in court by an order issued on 28<sup>th</sup> July 2011. A further order was issued restraining the Administrators of the estate of the deceased, from disposing of properties; L.R. No. Dagoretti/Riruta/1254 and Nairobi L.R. No. 3734/114, believed to have been bought by money received from the Plaintiffs by the company.

18. That, further inquiries revealed that, between the period of; February and May 2007, a total sum of; Kshs.72, 100,000 was transferred from the account of the company and deposited into the deceased's personal account and thereafter on; 25<sup>th</sup> June 2006, a sum of Kshs. 54,093,330 was transferred from the account of the deceased to the account of the 4<sup>th</sup> Defendant held at the same bank. The funds were withdrawn within two days of receipt.

19. The witness testified that, the letters relied on by bank to transfer the funds into the 4<sup>th</sup> Defendant's account was written long after the death of the transferee account holder. That, the death of the deceased was highly publicized in the print and daily media and the bank cannot have missed the notice thereof.

20. During cross examination by the counsel for the 3<sup>rd</sup> Defendant, the witness conceded that, the company was authorized to invest the money in wide business ventures, and could withdraw and deposit the funds deposited by the investor. She also confirmed that, the letter addressed to the bank manager was written on 13<sup>th</sup> June 2007, but maintained that the money transferred from the company bank account was withdrawn without proper signatures and authority, although there was no court order to bar the bank from transferring the money.

21. In further cross examination by the counsel for 4<sup>th</sup> and 5<sup>th</sup> Defendants counsel, she stated that, she was not aware that, other than the eight (8) Plaintiffs named in the amended plaint, the other 380 Plaintiffs are not in the amended plaint dated 16<sup>th</sup> January 2009. She conceded that she did not seek for leave from the court for leave to represent the other 380 Plaintiffs.

22. However, she insisted that the sum of; Kshs. 54,094,130 was transferred from the company's account to the deceased account and then to the 4<sup>th</sup> Defendant's account and that, the letter of transfer of the money to the 4<sup>th</sup> Defendant was forged. However, she conceded that, there are no criminal proceedings against the 4<sup>th</sup> Defendant for forgery. She further conceded that the 4<sup>th</sup> and 5<sup>th</sup> Defendants were sued as Administrators of the estate of the deceased and that the shares of the 1<sup>st</sup> Defendant were not part of the assets in the Succession Cause.

23. In re-examination she maintained that, the eight (8) Plaintiffs have authority to represent the others as per the list of investors produced and signed by the investors. She reiterated that, the Kshs. 54,094,130 was transferred one year after the death of the deceased and that, after the withdrawal of the money the subject suit land was bought.

24. The 3<sup>rd</sup> Defendant's case was supported by the evidence of Njeri Maina, the Relations Manager of the 3<sup>rd</sup> defendant. He relied on the witness statement dated 20<sup>th</sup> November 2016 and bundle of documents dated 14<sup>th</sup> October 2011, supplemented on 17<sup>th</sup> November 2011. He testified that the deceased operated a personal account number 0120650575600, at the Koinange street branch of the bank. The personal savings account was opened on 29<sup>th</sup> December 2006, with the operational mandate of sole signatory. That he was introduced to the bank by the 1<sup>st</sup> Defendant company that held a bank account number 012005057200 with the same branch.

25. That the deceased's personal account was operated with effect from December 2006 to 13<sup>th</sup> June 2007, when he wrote a letter to the bank to the effect that, the 4<sup>th</sup> Defendant would be operating his account on his absence. Subsequently, on 25<sup>th</sup> June 2008, the 4<sup>th</sup> Defendant withdrew Kshs 54,093,330 transferred from the deceased's account leaving a nil balance and deposited it into her account number 0130150615400.

26. On 28<sup>th</sup> July 2008, the bank was served with a court order and the pleadings herein. However, but prior to the service of the said court order, the bank was not aware of the court order. The 3<sup>rd</sup> Defendant argued that, the activities of the 1<sup>st</sup>, 2<sup>nd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants have been a subject of investigations by the criminal investigations agencies, inter alia; Kenya police serious crime unit of; Criminal Investigations Directorate, Banking fraud and Kenya Anti-Corruption Commission.

27. The witness admitted in cross examination that, the deceased was a prominent customer of the bank and the bank was aware he was the

Managing Manager of the 1<sup>st</sup> Defendant. That he was depositing huge sums of money and paid himself several cheques from the company account as per the cheques produced at; page 73 of the Plaintiffs' documents and made cash withdrawals from the account.

28. He also conceded that there was a letter written by the deceased three days before his death authorising, his mother the 4<sup>th</sup> Defendant, to operate his account. He admitted that there was a death announcement in the daily newspaper covering a quarter page of the paper. He also conceded that the bank transferred Kshs. 54,000,000 from the deceased account to the mother's account and it was withdrawn a few days after the death. However, he maintained that the bank owes a duty of confidentiality to its customers.

29. The 4<sup>th</sup> Defendant and the 5<sup>th</sup> Defendants did not call any evidence, whereupon the Plaintiffs applied that, they be compelled to give evidence but their lawyers opposed the same. The court delivered a ruling on the same to the effect that, the Defendants would not be forced to give evidence.

30. At the close of the entire case, the Plaintiffs and the 3<sup>rd</sup> Defendants filed their final submissions; the other parties did not file any submissions. The Plaintiffs submitted in a nutshell that, on the issue of the competence of the representative suit, it suffices to note that; the 4<sup>th</sup> and 5<sup>th</sup> Defendants filed a notice of preliminary objection on 23<sup>rd</sup> February 2009, challenging the authority alleged given to the eight (8) Plaintiffs to file and prosecute the suit on behalf of the rest of the Plaintiffs and the 3<sup>rd</sup> Defendant filed a similar objection dated 11<sup>th</sup> November 2008, both argued that the Plaintiffs were improperly before the court in this suit. However, after hearing the same they were dismissed. That, at the time the objections were raised; the objectors were appearing in the matter as interested parties. Therefore, the court should adjudicate the suit, on the substance of the matter without "undue regard to technicalities procedure" and in view of the public interest the matter raise, pursuant to Article 159(2)(d) of the Constitution.

31. It was submitted that the bank is liable to the Plaintiffs, in that an order was given to freeze the company's account but that was not done, instead all the money was transferred to the account of the 4<sup>th</sup> Defendant, in one transaction a year later and withdrawn immediately. Yet the 4<sup>th</sup> Defendant has declined to come to court to testify and explain how she received "a dead man's money without letters of grant and administration".

32. It was submitted that, to allow the 4<sup>th</sup> Defendant to take away the money she withdrew will be tantamount to unjust enrichment. That she cannot be allowed to benefit from a fraud she actively participated in. That, the entire bank staffs who participated in the transaction resigned from the bank's service within weeks after the suspicious transaction.

33. However, the 3<sup>rd</sup> Defendant submitted that, a banker customer relationship existed between the bank, the deceased director, the 1<sup>st</sup> Defendant, and the 4<sup>th</sup> Defendant in respect to their various accounts but the Plaintiffs had no bank accounts with the bank. Hence there was no privity of contract between the Plaintiffs and the bank and no *locus standi* to sue the bank for alleged breach of fiduciary duty and/or contract.

34. The decision in *Dunlop Pneumonic Tyre v. Selfridge and Co. Ltd* was referred to; where the court observed that; "the essence of the privity rule is that only the people who actually negotiated a contract (who are privity to it) are entitled to enforce its terms. Even if a third party is mentioned in the contract, he cannot enforce any of its terms nor have any burdens from that contract enforced against him."

35. It was submitted that, as far as the bank was concerned, the monies deposited in the company account belonged to the 1<sup>st</sup> Defendant and not the Plaintiffs. The mere acceptance of the money from a third person does not constitute a trust in favour of the depositor. Reference was made to the, Halsbury's Laws of England, fifth edition at Paragraph 859 where it is stated that, the banker is bound in ordinary cases to accept money be paid into a customer's current account by a third person.

36. The bank argued that, it had no control on how the 1<sup>st</sup> Defendant or its directors would invest the deposited amounts. It would not know whether or not the amounts withdrawn by the 1<sup>st</sup> Defendant was not being properly invested and would be unreasonable to expect the bank to interrogate every transaction done by the rightful signatories of the bank accounts. The bank would be acting in breach of contract, if it failed to honour the customer's instructions.

37. The 3<sup>rd</sup> Defendant further submitted that, the Plaintiffs did not produce any evidence to show that the account held with the bank was a trust account. Reference was made to the case of; *Re Gross ex parte Kingston. (1871) 6 Ch App 632* where the account was "headed" in a way to suggest that it was a trust account.

38. That, where bank pays by way of cheques properly drawn and signed by the right signatories of a bank account, it matters not whether the account in question is a trust account; the bank has an obligation to honour the instructions of the customer.

39. It was argued that, whereas the Plaintiffs are accusing the bank of allowing withdrawals from the company account by way of cheques, the Plaintiffs also received various cheques from the very same account. Further the bank was not aware of the death of the signatory to the company account until long after the 4<sup>th</sup> Defendant had withdrawn the money from the deceased account to her own account. The court order freezing the account was served on 25<sup>th</sup> July, 2008 while the withdrawal was done on 25<sup>th</sup> June, 2008.

40. The 3<sup>rd</sup> Defendant submitted that, the allegation that the bank acted on a forged letter lacks merit as no evidence was provided from the document examiner pursuant to the provisions of; section 48 of the Evidence Act, Chapter 80, Laws of Kenya. In the same vein the alleged resignation of bank staff after the withdrawal of the funds in issue, is who speculative and without any basis.

41. The 3<sup>rd</sup> Defendant reiterated that the particulars of; breach of professional and fiduciary duty; fraudulently, unlawfully, negligently and irregularly transferring money; fraudulently facilitating the transfer of Plaintiffs money; and collusion between the directors of the 1<sup>st</sup>

Defendant and the 3<sup>rd</sup> Defendant were not provided. Therefore, it is not clear from the amended plaint, nor did it come out at the hearing, whether the Plaintiffs are accusing the 3<sup>rd</sup> Defendant under the law of Torts or Contract.

42. Similarly, the authority allegedly given to the eight (8) Plaintiffs to represent the others is not complying with Order 1 rule 13 of the Civil Procedure Rules in that, the list that is attached to the verifying affidavits is titled "spell Investors". It is not the kind of authority envisaged under Rules, which must be clear and unambiguous. Further, the other 380 Plaintiffs have not produced the investment agreements executed with the 1<sup>st</sup> Defendant and are riding on "backs" of the eight (8) named Plaintiffs. The purported signed list does not have the appropriate name, if it was intended to be an authority to file the suit.

43. I have considered the evidence adduced, in total and I find the following issues have arisen for consideration whether: -

a) *the plaintiffs' suit is a proper representative suit and/or whether the alleged authority given to the eight (8) named plaintiffs constitute proper authority under the law?*

b) *there are valid investment agreements and/or contracts between the plaintiffs' and the 1<sup>st</sup> defendant?*

c) *whether the 1<sup>st</sup> defendant received money from the plaintiffs as alleged?*

d) *If the answer to (c) above is in the affirmative, whether the money received was refunded in accordance with the terms of the agreement of the parties or it was not refunded;*

e) *whether the 3<sup>rd</sup> defendant had any fiduciary duty toward the plaintiffs and/or if it breached the same;*

f) *whether the 4<sup>th</sup> defendant converted the funds deposited by the plaintiffs; and /or*

g) *whether the plaintiffs have proved their case on the balance of probabilities and/or*

h) *whether the court should grant the orders sought for; and*

i) *who should bear the costs.*

44. In considering the 1<sup>st</sup> issue, I find that, the provisions of; Order 1 Rule 13 of the Civil Procedure Rules provides that: -

*"13. (1) Where there are more plaintiffs than one, any one or more of them may be authorized by any other of them to appear, plead or act for such other in any proceeding, and in like manner, where there are more defendants than one, any one or more of them may be authorized by any other of them to appear, plead or act for such other in any proceeding.*

*(2) The authority shall be in writing signed by the party giving it and shall be filed in the case." (Emphasis added).*

45. The eight (8) named plaintiffs herein have filed verifying affidavits and annexed thereto; a list of 388 names of the alleged investors, who have signed against their names, authorizing the eight (8) Plaintiffs to file the suit on their behalf. I have looked at the subject documents and I find that, they are addressed to whom it may concern and reads as follows: -

*"Spell Investment Recovery*

*We the undersigned 380 do hereby appoint the following persons to represent us in the process of recovering our monies which we invested with Spell Investment Company Limited..... (names of the eight (8) Plaintiffs' inserted)*

*To swear, sign affidavits and any other legal documents on our behalf. This is due to our large number (380) which incapacitates us from appearing individually."*

The document is signed by; Joseph Kiilu Somba; Chairman of Spell Investors Recovery committee and annexed thereto is a list entitled, "Spell Investors" and signed by the 388 investors.

46. I have considered these affidavits in the light of the provisions of Order 1 Rule 13 of the Civil Procedure Rules, 2010 and in my considered opinion, since the 380 investors have expressly authorized the eight (8) Plaintiffs to institute these proceedings for recovery of the various monies they allegedly invested with the 1<sup>st</sup> defendant, these affidavits constitute proper authority to the named persons.

47. I also note from the court file that the firm of; Muciimi Mbaka & Company, filed a notice of objection dated 11<sup>th</sup> November 2008, on behalf of an "Interested party" arguing that; the 2<sup>nd</sup> to 5<sup>th</sup> Plaintiffs were improperly before the court for lack of a verifying affidavit in support of the plaint and that the 323 Plaintiffs, were not proper parties to the suit, because they had the 1<sup>st</sup> Plaintiff had not been authorized to sue on their behalf.

48. As already indicated herein, the preliminary objection and the other filed by the 4<sup>th</sup> and 5<sup>th</sup> Defendants were heard and dismissed by the

court. Therefore, the 3<sup>rd</sup> to 5<sup>th</sup> Defendants cannot raise the same issue again and more so, through submissions. In fact, it does occur that, as a result of the preliminary objections, the Plaintiffs filed additional verifying affidavits, as at that time only the 1<sup>st</sup> Plaintiff had filed a verifying affidavit.

49. Even then, the 3<sup>rd</sup> to 5<sup>th</sup> Defendants have fully participated in the hearing of the case to finality without raising the issue. Therefore the objection raised is an afterthought and Res judicata. The 3<sup>rd</sup> to 5<sup>th</sup> Defendants are estopped from raising the issue at this stage. I shall therefore proceed with the understanding that there is a competent suit before the court.

50. The next issue is to determine whether; the Plaintiffs have proved that they entered into any contract with the 1<sup>st</sup> Defendant. I have considered the documents produced and I find that the Plaintiffs have produced in the list of documents filed in court on 7<sup>th</sup> October 2009 "Capital Investment Agents Agreements". However they relates to the 1<sup>st</sup> to the 8<sup>th</sup> Plaintiffs only. The other Plaintiffs did not produce their agreements.

51. It is therefore not in vain when the 3<sup>rd</sup> Defendant submits that the other 380 Plaintiffs have no investment agreements with the 1<sup>st</sup> Defendant and that they are riding on the "backs" of the other eight (8) named Plaintiffs. However, the only party who can question the existence of this agreement would be the 1<sup>st</sup> Defendant that has disputed the same.

52. The third issue is whether, the 1<sup>st</sup> Defendant received any money from the Plaintiffs. In this regard, the Plaintiffs produced a supplementary list of documents filed in court on 6<sup>th</sup> July 2011, showing a list of; Spell Investment Company Investors. The amount invested by each investor is indicated in the documents produced at pages 80 to page 84, of the Plaintiffs' documents. The grant total sum therein is indicated as; Kshs 110,288,500. In addition, the Plaintiffs filed a supplementary list of documents on 27<sup>th</sup> January 2016, showing the names of; 335 investors and receipts to prove their various deposits.

53. I have gone through all the receipts produced from page 1 to page 365 and I note that, the receipts were issued by the 1<sup>st</sup> Defendant and are in two categories; official and miscellaneous. The official receipts represent the sums of money that was deposited by the respective Plaintiffs in stocks and bonds in the 1<sup>st</sup> Defendant's company for investment. The Miscellaneous receipts represent the registration and legal fees paid by the investors.

54. The receipts of from page 1 to page 365; of the total sums of money deposited with the 1<sup>st</sup> Defendant add to; Kshs, 85,342,000 in respect to bonds and shares and Kshs 660,000, reflected in the miscellaneous receipts. Similarly, there are cheques among the documents produced showing the money paid out to various investors, drawn on the 1<sup>st</sup> Defendant in the total a sum of Kshs, 2, 718,650. Therefore, the sum received less the amount paid out, gives the balance of; Kshs, 82,623,350.

55. The question that arises is whether, the Plaintiffs were repaid their money and/or with interest as stipulated in the agreements According to the Capital Investment Agency agreement produced, it is stated that;

*"the investment company and the investor do hereby agree that in return to the aforesaid capital, the investor shall earn on regular monthly basis 17% of the capital sum contributed for the total period of six (6) months."*

56. As already stated, the documents produced reveal a refund payment of; Kshs. 2, 718,650. Therefore, it not quite clear how much was repaid. The evidence of the 1<sup>st</sup> Defendant and 2<sup>nd</sup> Defendant would have been useful in this regard but was not tendered. That leads me to the main contest herein as to; whether the 3<sup>rd</sup> Defendant is liable as claimed. The main issue is whether; the 3<sup>rd</sup> defendant owed the Plaintiffs a professional and fiduciary duty and if so; whether that duty was breached.

57. The relationship between a bank and a customer is contractual. It is established when a customer pays money into his account and the bank becomes a debtor and the customer a creditor. This was the principle was established in the case of; Foley vs Hill (1848) HL. The contractual terms may be expressly stated and/or implied. The case of; Joachimson vs Swiss Bank corporation (1921) established the implied terms which includes; inter alia; an implied term and/or a duty that; the bank will conduct the customer's affairs with due care and skill.

58. However, generally the bank only owes this duty its customer. Who then is a bank customer? Unfortunately, there is no statutory definition of a bank customer. Be that as it were, a person becomes a customer of the bank when he opens a bank account and a contract is formed. (see; Commissioners of Taxation vs English, Scottish and Australian Bank (1921) PC). In the case of; Barclays Bank vs Okenhare (1966), it was held that the opening of an account without a deposit is sufficient. Thus the mere cashing of cheques over the counter does not mean that the bank had acted for a customer. (see; Great Western Railway vs. London and County Banking Corporation (1901)).

59. Even then, a bank owes a duty to a non-account holder who uses other bank services (see; Woods vs Martins Bank (1959), where it was held that; the bank owed a duty to a non-account holder; to whom it gave in accurate investment advice, the non-account holder being held by the courts as a customer of the bank.

60. There is no dispute in the instant matter that, the Plaintiffs were not customers of the, 3<sup>rd</sup> Defendant and therefore generally speaking, the 3<sup>rd</sup> Defendant did not owe them any contractual and/or a duty of care. However, there are circumstances when the bank can be held liable for breach of duty of care towards a non-account holder. This occurs generally, when a bank opens an account without care and skill and/or collects or pays a cheque to a person who is not entitled thereto. (see; Ladbroke vs. Todd (1914) and Hampstead Guardians vs. Barclays Bank of Kenya Ltd (1923)).

61. Therefore, the greatest risk of the bank and in particular the collecting bank is that of conversion. Conversion was defined in the case of;

Hiort v. Bott (1874) as “unauthorized act which deprives another of his property permanently or for an indefinite time”.

62. The most common example is conversion; is collection of a cheque for a person who has no title to it or a cheque that has a forged or unauthorized essential endorsement. The collecting bank, by facilitating the conversion, even though innocent will be interpreted as a party to the conversion and liable to the true owner. In that case, the bank can only rely on the statutory defence under; section 3 of the Cheques Act (cap 35) Laws of Kenya, if it can prove that; it acted in good faith and without negligence.

63. Generally, the bank will be presumed to have acted in good faith. However, lack of negligence can be elusive. What then constitutes negligence. In that regard the court held in the case of; Lloyds Bank Limited v. E.B Savory and Co. (1933) that;

*“The standard by which the absence, or otherwise of negligence is to be determined, must in my opinion be ascertained by reference to the practice of reasonable man carrying on the business of bankers, and endeavoring to do so in a manner as may be calculated to protect themselves against fraud”*

64. Similarly, in the case of; Marfani v. Midland Bank (1964), it was held that: -

*“What the court has to do is to look at all the circumstances of the case, at the time of the acts complained of, and to ask itself, were those circumstances such as would cause a reasonable banker, possessed of such information about his customer as a reasonable banker would possess, to suspect that his customer was not the true owner of the cheque.”*

65. It suffices to note that, negligence in collection of cheques is divided into two categories namely;

*a) Suspicious matters which are obvious, or ought to be obvious, from the face of the cheque, possibly coupled with the information the bank has about its customer; and*

*b) Purely contextual matters which should arouse suspicion, in the absence of which the cheque could have been safely accepted without inquiry.*

66. Based on the aforesaid, the bank has been held to have been negligent where it collected a cheque out of character, as held in the case of; Nu-Stilo Footwear Ltd vs. Lloyds Bank Limited (1956). The customer paid into the account a series of cheques stolen from his employer, of whom the bank knew nothing. It was held that, the collection of the first cheque for; £172 was not negligent but that the collection of the second for; £550 pounds, without inquiry amounted to negligence, as it was inconsistent with the details the customer had given of his business.

67. Similarly, there are cases where it should be obvious to the collecting bank that, its customer is paying in cheques which he has in his capacity as agent of the drawer or payee. In the case of; Midland Bank Limited vs. Reckitt (1933) HL, the solicitor had power of attorney from Reckitt, authorizing him to operate Reckitt’s account. The solicitor’s account with the Midland bank was overdrawn and he drew cheques on Reckitt’s account, paying them into his own account. Midland bank accepted these without any inquiry and it was held that it was negligent.

68. In the same vein, in the case of; Bute (Marquess of) vs. Barclays Bank Limited (1955), Marques was an employee of; Bute and after leaving employment, he received some government warrants, payable to Marques but also stating ‘for Bute’. The court held that, it was clear from the face of the warrant that; Marques, was entitled to payment only as agent for Bute, and the collecting bank was negligent in not making any inquiries. Similarly, where the bank is acting as a paying bank, it may also be sued in conversion and/or be obviously open to a claim by the true owner, where it pays the proceeds of a cheque to someone other than the owner.

69. The evidence herein reveals that, the 3<sup>rd</sup> Defendant held bank accounts, for both the 1<sup>st</sup> Defendant’s company, and a personal account of its director; the deceased herein. From the account opening documents produced by the parties; it is obvious that the 3<sup>rd</sup> Defendant knew the deceased was the company’s director.

70. The bank in opening a company bank account is expected to conduct due diligence and inter alia, request for and obtain, a memorandum and articles of the company to ascertain; the nature of the business and/or objectives of the company, as expected of a “reasonable banker”.

71. Further evidence reveal that the certificate of incorporation of 1<sup>st</sup> Defendant “Spell Investment Limited” was issued on 20<sup>th</sup> November 2006 and the account opened on 2<sup>nd</sup> December 2006. It is noteworthy that, the deceased’s personal account was opened on 29<sup>th</sup> December 2006, after the 1<sup>st</sup> defendant’s account was opened. The deceased described himself as; a Merchant by occupation and gave the name of the 1<sup>st</sup> Defendant; Spell Investment Limited as his referee. Therefore, the 3<sup>rd</sup> Defendant should have been on guard on the operation and transactions between the two accounts.

72. In the same breath, the bank held the 4<sup>th</sup> Defendant’s account. She is the deceased’s mother. Therefore, three accounts that can be held to have been connected existed and the bank cannot argue that, it could not knit the thread between these three accounts, where the common denominator is the deceased.

73. It also suffices to note that, despite the 1<sup>st</sup> Defendant being a limited liability company with two directors as stated herein, the deceased was primarily named as the sole authorized signatory to the company account. The 2<sup>nd</sup> Defendant and/or director was only introduced as the signatory on; 7<sup>th</sup> May 2007 and with limited authority to sign cheques of; an amount of; Kshs. 500,000 only. Thus it is clear that the deceased was in control of the company account.

74. Be that as it may, the deceased started transferring funds from the company's accounts to his personal account; as evidenced by the cash withdrawal receipts and the bank statements. According to Purity Kinya Macharia; the plaintiffs witness; in particular, as stated at paragraph 16 of her witness statement, the deceased transferred the following sums of money from the company's account to his personal account: -

- a) 18<sup>th</sup> April 2007-----Kshs 10,000,000.
- b) 2<sup>nd</sup> February 2007-----Kshs 7,000,000.
- c) 20<sup>th</sup> February 2007-----Kshs 12,000,000.
- d) 14<sup>th</sup> March 2007-----Kshs 3,000,000.
- e) 4<sup>th</sup> April 2007-----Kshs 1,500,000.
- f) 9<sup>th</sup> March 2007-----Kshs 10,500,000.
- g) 23<sup>rd</sup> May 2007-----Kshs 3,000,000.
- h) 19<sup>th</sup> March 2007-----Kshs 10,000,000.
- i) 4<sup>th</sup> April 2007-----Kshs 1,600,000.
- j) 27<sup>th</sup> February 2007-----Kshs 10,000,000.
- k) 27<sup>th</sup> February 2007-----Kshs 1,500,000.
- l) 23<sup>rd</sup> March 2007-----Kshs 1,200,000.

75. I then considered the above alleged record of payment against the entries of; debits and credits on company's bank account as evidenced by bank statements produced and it revealed that; the following withdrawals were made by the deceased either by cheque and/or cash from the company's account to his personal account: -

- a) 2<sup>nd</sup> February 2007-----Kshs 7,400,000.
- b) 27<sup>th</sup> March,2007-----Kshs 1,500,000
- c) 27<sup>th</sup> February 2007-----Kshs, 10,000,000
- d) 28<sup>th</sup> February 2007-----Kshs, 12,000,000
- e) 2<sup>nd</sup> March 2007-----Kshs 7,000,000
- f) 9<sup>th</sup> March 2007-----Kshs 10,500,000
- g) 14<sup>th</sup> March 2007-----Kshs 3,000,000
- h) 19<sup>th</sup> March 2007-----Kshs 10,500,000
- i) 22<sup>nd</sup> March 2007----- Kshs 10,000,000.
- j) 22<sup>nd</sup> March 2007 -----Kshs 1,200,000
- k) 3<sup>rd</sup> April 2007-----Kshs 10,000,000
- l) 3<sup>rd</sup> April 2007-----Kshs 1,500,000
- m) 4<sup>th</sup> April, 2007-----Kshs 1,600,000
- n) 5<sup>th</sup> April 2007-----Kshs 5,000,000
- o) 12<sup>th</sup> April 2007-----Kshs 10,000,000

p) 10<sup>th</sup> April 2007-----Kshs. 10,000,000.

q) 18<sup>th</sup> April 2007-----Kshs. 25,000,000.00

Total amount: -----Kshs. 153,700,000

76. To confirm these transactions, I noted that, the deceased's personal bank statement shows that he deposited therein cash payments withdrawn from the company accounts as follows: -

a) 13th February 2007 -----Kshs 1,000,000.

b) 19<sup>th</sup> February 2007-----Kshs 1,000,000.

c) 27th February 2007-----Kshs 10,000,000.

d) 28<sup>th</sup>February2007-----Kshs 12,000,000.

e) 2nd March 2007-----Kshs 7,000,000.

f) 14th March 2007 -----Kshs 2,000,000.

g) 19th March 2007-----Kshs 6,000,000.

h) 22<sup>nd</sup> March 2007-----Kshs 10,000.000

i) 5<sup>th</sup> April 2007-----Kshs 5,000,000.00

j) 12<sup>th</sup> April 2007-----Kshs 10,000,000.

k) 18<sup>th</sup> April 2018-----Kshs 25,000,000

Total amount-----Kshs. 77,000,000

77. From the analysis in the above entries, it is revealed that, between the months of; February 2007 to May 2007, a total sum of; Kshs 72,000,000 was withdrawn by the deceased from the company's account to his personal account. This is a large sum by any standards, a large sum of money, inconsistent with the history of transactions on the deceased's personal bank account. Hence out of character. Its noteworthy that, prior to these huge credits and/or deposits into the deceased's personal account, as evidenced by his bank statement for the period of; 1<sup>st</sup> January 2004, there were only five (5) credits; with the most large amount, being two (2) credits separates of; Kshs, 1,000,000 each on; 13<sup>th</sup> and 19<sup>th</sup> February 2007, then followed by the above stated huge deposits.

78. It is also evident that the withdrawals from the company's account was made simultaneously, with deposits in cash into his personal account, on the same day or the following day or immediately thereafter.

79. From all these transactions and/or operations of the subject bank accounts, the 3<sup>rd</sup> Defendant cannot argue that, it was not aroused to raise an inquiry. Any reasonable and prudent bank would inquire as to, what its business the deceased had with the company. The 3<sup>rd</sup> Defendant cannot argue that the deceased had a free hand to invest the funds held on the company's account and that, if the plaintiffs wanted to safeguard its funds they should have opened a trust account.

80. As stated herein, the deceased stated in the bank opening form that he was a "merchant" by occupation. The brochures of the 1<sup>st</sup> Defendant described it as; an investment company. All this was in the knowledge of the bank. The bank should have purposed to inquire and receive an adequate and reasonable answer as why suddenly huge sums of money were being withdrawn from the company account. Indeed, the test of negligence is that, "it is not sufficient to merely ask the right question but the bank must also receive answers and acceptable to a "reasonable banker". It is therefore clear that, had the 3<sup>rd</sup> Defendant been careful, it would have noticed that, within a short period of about two (2) months the deceased had withdrawn quite a substantive amount of money from the company account and deposited into his personal account.

81. It is noteworthy that on 13<sup>th</sup> June 2007, the deceased wrote to the bank authorizing his mother to operate his bank account in his absence. This was just three (3) days before his death. According to the death certificate presented in the Succession Cause, the deceased died on 6<sup>th</sup> June 2007. Whether it was fate or otherwise, is left to anyone's guess. Apparently despite the advertisement of the deceased demise in a quarter page of the daily newspaper, no action was taken on the flagging of the account, of course justifiably so.

82. Subsequently upon grant of the Limited grant of letters of Administration to the 4<sup>th</sup> and 5<sup>th</sup> Defendants, the 3<sup>rd</sup> Defendant; on 10<sup>th</sup> March 2008, transferred a sum of; Kshs, 54,093,330 to the deceased's mother's account, held with the 3<sup>rd</sup> Defendant. Apparently, before the sum of; Kshs. 54,093,330, was credited to the account on 25<sup>th</sup> June 2008, only four (4) credits had gone through, as follows:

- a) 27<sup>th</sup> July 2007.....Kshs. 4,000,000;
- b) 3<sup>rd</sup> November 2007.....Kshs, 1,900,265.45 (on call)
- c) Interest on call .....Kshs. 53,123.00;
- d) 27<sup>th</sup> June 2008.....Kshs. 1,000.00;
- e) Interest .....Kshs. 287.55

83. Therefore, the credit of a sum of Kshs, 54,093,330 was certainly not consistent with the history of the account and was out of character and the bank should have taken note thereof and inquired, especially when the account had been dormant for almost a year after the death of the deceased. I therefore conclude that the 3<sup>rd</sup> Defendant was negligent.

84. I shall now deal with the prayers sought for herein. In that regard, I find and hold that, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants having failed to defend the suit and judgment having been entered in default thereof, I now enter final judgment against them as prayed for and in particular prayer (a) which seeks for payment of; Kshs,110, 288,500. However, in view of the fact that, only a sum of; Kshs, 82, 623, 350, had been proved, I enter judgment for that sum of; Kshs, 82, 623, 350, in respect of that prayer.

85. As regards prayer (b), I find and hold that the 3<sup>rd</sup> Defendant bank was negligent and therefore as a result thereof the Plaintiffs suffered loss. In that case it did breach its professional duty of care and skill. I allow that prayer. However, the Plaintiffs have only proved a sum of Kshs 82, 623, 350. There is evidence that, a certain sum of money was recovered from; Equity Bank limited and deposited in court. There is further evidence that there is property suspected to have been bought with the subject sum therefore, the sum recoverable from both 3<sup>rd</sup> and 4<sup>th</sup> Defendant (if any), is the sum unrecovered after recovery of the sum at; Equity Bank Limited and disposal and/or valuation of the suit property. The sum recoverable shall attract interest at court rates from the date of filing the suit to payment in full. That deals with prayer (c).

86. Similarly, prayers (d) and (e) are allowed as prayed as they were not opposed. However, the Plaintiffs did not indicate what the general damages claimed for under prayer (f) are for and neither is there evidence to support the same, as such I decline to allow the same. Finally, I allow the prayer for the costs of the suit in favour of the Plaintiffs.

76. Those then are the orders of the court.

**Dated, delivered and signed on this 22<sup>nd</sup> day of October, 2019**

**GRACE L NZIOKA**

**JUDGE**

In the presence of;

Mr Kanyangi for the Plaintiffs

No appearance for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants

Mr Njeru for the 3<sup>rd</sup> Defendants & holding brief for

Mr Amolo for the 4<sup>th</sup> and 5<sup>th</sup> Defendants.

Dennis ----- the Court Assistant.