



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION

CIVIL SUIT NO. 590 OF 2003

NDAFARA CO. LTD.....PLAINTIFF

VERSUS

PAUL KIBUGI MUIITE

GEORGE KANGETHE WARUHIU

MBAGE N. NGANGA.....DEFENDANTS

JUDGMENT

1. This is a claim by **Ndafara Company Limited** (the company) against its then advocates, **Waruhiu & Muite** (the law firm). The company has in this case sued the partners of that firm in their individual capacity, namely **Paul Kibugi Muite** the 1st defendant, **George Kang'ethe Waruhiu** and **Mbage N. Ng'ang'a**.
2. The company's claim is that on or about **18th May 1990** it instructed the law firm to act for it in the purchase of **L.R. Nos 7417,8796,2570,2404** and **9287** from **Mukenya Ranch Limited** and **Segera Ranch Limited**. The company pleaded that between **18th May 1990** and **3rd November 1994** it deposited with the law firm a total sum of Ksh 30,664,550 in trust for it to be released in respect of its purchases of the Ranches. That the law firm confirmed to the company the aforesaid amount had been deposited in an interest earning account at 13% per annum. The company pleaded that the intended purchase of the Ranches did not go through and the law firm should have refunded the amount deposited by the company plus 13% per annum interest. Instead the law firm refunded Ksh 5,290,000, on various dates, and in breach of trust refused/failed and/or neglected to refund Ksh 25,374,550 together with interest. The company prays for judgment, jointly and severally, against the partners of the law firm for ksh 25,374,550 together with interest at 13% from **18th May 1990** until payment in full.
3. All the partners of the law firm filed their individual defences but only the 3rd defendant **Mbage Ng'ang'a Ng'ang'a** supported his defence with evidence.
4. By his defence Ng'ang'a denied the company's claim that it deposited Ksh 30,664,550. He denied breach of trust or failure to refund the amount.
5. Ng'ang'a did however plead that the company deposited some money with the law firm which money was received on account, not creating a trust, and which money was disbursed in accordance with strict instructions of the company.
6. Ng'ang'a pleaded that the law firm arranged a bridging loan from standard chartered Bank Ltd for the company for Ksh 140 million. That loan was to enable the company pay the purchase price pending its sale of the property to its members and to other sub-purchasers. The company was however unable to raise the purchase price and was unable to meet the Banks conditions for the bridging loan. The company however kept withdrawing the amount deposited with the law firm and so did the other sub-purchasers. Ng'ang'a pleaded that the law firm disbursed the refunds according to instructions.
7. Ng'ang'a pleaded that in **June 1994** the 1st defendant, **Paul Kibugi Muite** (Muite) resigned from the law firm and that with the company's consent and acquiescence Muite was handed over the matter of the company's purchase of the Ranches, and Muite *"took-over the same together with the power and the right of control over the funds deposited by the plaintiff (company) and others and subject to his (Muite) assuming all the liabilities for the conduct of the brief."* That since 1994 the company dealt with Muite and Ng'ang'a was not privy to the state of the company's account.

8. Ng'ang'a also pleaded that the company's claim was time barred. Ng'ang'a therefore sought the dismissal of the company's claim against him.

COMPANY'S CASE

9. The company's evidence was led by **George Chege Kungu**. He is the secretary of the company and has been for several years. The company on **16th November 1990** entered into a sale agreement for the purchase of the ranches of Mukenya Ranch Ltd and of Segera Ranch Ltd for Ksh 200 million. The purchase was of both Ranches with livestock and other moveable items. The company, on signing the sale agreement paid to the law firm Ksh 13 million. The company eventually paid to the law firm Ksh 30 million.

10. On the sale agreement being rescinded the law firm refunded to the company Ksh 5,290,000 which left a balance of Ksh 25,374,550 which the company claims in this action.

11. The company's evidence was also led by **John Kinyanjui Muriu** and **Loise Wambui Chege**. They were able to confirm that members of the company collected money amongst themselves and that money was deposited with the law firm for purpose of purchase of the Ranches. They were aware that the money deposited with the law firm was Ksh 30 million out of which the law firm refunded Ksh 5 million. **Loise Wambui Chege** was the Vice Chair of the company in 1989. She stated that the company was unable to raise enough money to purchase the Ranches. She confirmed that the company's officials who deposited the money with the law firm; since she was not one of them; showed her the law firm's receipts of such payments.

LAW FIRM'S DEFENCE

12. As stated before, although the partners of the law firm were sued in their individual capacity, and although all the three partners filed their own individual defences only the 3rd defendant, **Mbage Njuguna Ng'ang'a** gave evidence in support of his defence. It follows that the company's case was not defended by **Muite** and **Waruhiu**.

13. Ng'ang'a was a partner in the law firm. He stated that he was testifying with the authority and on behalf of the other two partners.

14. In early 1990 Muite, who was then senior partner of the law firm, requested assistance in a conveyancing transaction involving the sale of big parcel of land known as Mukenya and Segera Ranches that were owned by an American known as William Fonville. Fonville was unwilling to sell the Ranches to the several land buying companies that were interested in purchasing the Ranches. Fonville wanted to sell to a legal entity, controlled by the partners of the law firm, and in return the partners would enter into a back to back agreement with any other purchaser to sell the Ranches.

15. In March 1990 Muite introduced Ng'ang'a to officials of the company. Those officials informed Ng'ang'a they wished to purchase the Ranches. The officials were requested to deposit 10% of the purchase price to enable them get a formal offer of purchase, they only deposited Ksh 2 million with the law firm and subsequently in August 1990 the company deposited Ksh 13 million. Fonville however died, before he signed the agreement. That notwithstanding Muite was able to contact the administrators of the estate of Fonville and they were persuaded to enter into a sale agreement with the company. The company struggled to raise the purchase price while the vendors were complaining over the delay.

16. The company requested Muite to assist them in obtaining a bridging loan. Muite in December 1990 approached Standard Chartered Bank of Kenya Limited. The Bank offered to provide financing on condition that the company partnered with other land buying companies who would assist the company in the repayment of the loan. The company because it wanted to sell the land in the Ranches at exorbitant prices to other land buying companies, those land buying companies refused to accept the offer. Consequently, the bank declined to provide the bridging loan.

17. That as a result of concerted effort of the law firm the vendors, who were then represented by other firms namely Salim Dhanji & Co. Advocates and Archer & Wilcock Advocates, agreed to extend the completion date of the sale. The vendors however, as condition to extend completion date, required to sell the ranches to an entity called Athi Holding Limited (Athi), which entity could proceed to sell to the company. It was also a condition for extension that Ksh 3 million be paid to the firm of Archer & Wilcock Advocates.

18. The company was still unable to meet the completion date and it requested the law firm to negotiate another extension. That further extension was agreed on the further deposit of non-refundable Ksh 5 million at the firm of Salim Dhanji Advocates. On payment of that amount the company was permitted access to the Ranches when they took sub-purchasers to view.

19. Ng'ang'a stated that the directors of the company from time to time went to the law firm to withdraw money to facilitate the directors and other agents who took potential buyers to view the land.

20. The firm of Salim Dhanji and company Advocates by their letter of **20th July 1992** informed the law firm that Ksh 8 million had been forfeited due to the delay by the company.

21. That despite further extension of completion date the company failed to raise the balance of the purchase price. That the directors of the company however insisted they wished to proceed with the transaction. But that another land buying company namely North Tetu Farmers Company, who had deposited with the law firm Ksh 25,350,000 took Ng'ang'a's advise and withdrew from the transaction and were given their deposit back.

22. Ng'ang'a informed the court that on Muite being elected as member of Parliament, Kikuyu Constituency, in 1993 he retired from the law firm. That on retirement he was requested to take with him the company's transaction file.

23. Ng'ang'a was to later learn that the chairman and treasure of the company passed away which he said was a major blow because they were the only ones who understood the structure of the transaction of purchase of the Ranches.

24. Ng'ang'a stated that the company only deposited with the law firm Ksh 22,500,000/=. He therefore denied that the company deposited Ksh 30,664,556 as claimed in this action.

25. Ng'ang'a stated that the law firm acted very professionally in respect to the transaction and acted in the best interests of the company. That it was the company's directors who were solely to blame for the failure of the transaction and who failed to take advise on exiting the transaction when it was apparent they would not be able to complete the same.

26. Although Ng'ang'a stated that the entity Athi Holdings Ltd had refunded the company Ksh 2 million my calculation of the documents at pages 48-56 of company's bundle shows that the company received Ksh 1,950,000 from Athi Holdings Ltd, and not Ksh 2 million.

ANALYSIS AND DETERMINATION

27. As stated above there was no evidence adduced by Muite and Waruhiu, 1st and 2nd defendants, even though they filed their individual defences. It follows that those defences filed by those defendants remain mere allegation. It therefore follows that there is no defence of the company's claim by Muite and Waruhiu. In this regard see the case **Shaneebal Limited v County Government of Machakos (2018) eKLR** viz:

"In Janet Kaphphe Ouma & Another vs. Marie Stopes International (Kenya) Kisumu HCCC No. 68 of 2007 Ali-Aroni, J. citing the decision in Edward Muriga Through Stanley Muriga vs. Nathaniel D. Schulter Civil Appeal No. 23 of 1997 held that:

"In this matter, apart from filing its statement of defence the defendant did not adduce any evidence in support of assertions made therein. The evidence of the 1st plaintiff and that of the witness remain uncontroverted and the statement in the defence therefore remains mere allegations...Sections 107 and 108 of the Evidence Act are clear that he who asserts or pleads must support the same by way of evidence".

28. Similarly in the case of Interchemie EA Limited vs. Nakuru Veterinary Centre Limited Nairobi (Milimani) HCCC No. 165B of 2000, Mbaluto, J. held that where no witness is called on behalf of the defendant, the evidence tendered on behalf of the plaintiff stands uncontroverted.

29. If one is still in doubt as to the legal position reference could be made to the case of **Drappery Empire vs. The Attorney General Nairobi HCCC No. 2666 of 1996** where **Rawal, J** (as she then was) held that where the circumstances leading to the deliveries of goods are not challenged and stand uncontroverted due to the failure by the defendant to adduce evidence, the standard of proof in civil cases (on the balance of probabilities) has been attained by the plaintiff."

28. There are essentially only two issues that will determine this matter. They are:

a. How much money did the company deposit with the law firm?

b. How much money if any is the company entitled to be refunded by the law firm?

29. Before dwelling into those two issues let me give my own perception of the transactions that took place when the company was represented by the law firm.

30. Let me begin by making a broad statement that the delay of the conclusion of this case has led to an injustice to the parties. This is because all of the officials who were directly involved in the transaction have died. The only surviving official was not directly involved in the dealings between the company and the law firm. This case was filed on 22nd September 2003. I finally was able to hear all the witnesses between February and May 2019. It is that delay of the hearing of this case which is inordinate.

Issue (a)

31. The company was registered on **21st December 1989**. According to **Loise Wambui Chege** (PW3) the company, in November 1990 on being informed by Hon George Nyanja that the Ranches were being sold, it began to recruit members who were encouraged to buy shares in form of contribution towards the purchase price. Hon Nyanja introduced the official to Muite and to the law firm. The company managed to raise Ksh 30 million from its membership. That money was deposited with the law firm. The sale transaction did not succeed and the law firm refunded to the company some of its money but did not refund Ksh 25,374,550. **Loise Wambui Chege** stated that the law firm had promised to refund the money together with the accrued interest at the rate of 13%.

32. **George Stephen Kungu** who is presently the treasurer of the company informed the court that he was not an official of the company, when the transaction was taking place. He was merely a shareholder. He however said that after the death of the official who were involved in the transaction the members were able to trace the receipts for money deposited with the law firm. Those receipts represent the total amount of Ksh 22,250,000. On being cross examined this witness said:

"But I don't have all [the] receipts. When directors died those are the receipts we found."

33. The 3rd defendant, Ng'ang'a, by his defence to this claim which is dated 21st October 2003, pleaded at paragraph 4 as follows:

“4. Strictly without prejudice to paragraph 3 hereinabove, the Third Defendant avers as follows:

a. The plaintiff on various dates between 1990 and 1994 deposited with the defendants various moneys with instructions to appropriate the same towards the purchase price of the said pieces of land namely Land Reference Nos. 7417, 8796, 2570, 2404 and 9287.”

34. The company made a request for further and better particulars of that pleading at paragraph 4(a) of the defence of Ng'ang'a. Ng'ang'a responded to that request for particulars as follows:

PARTICULARS (ORDER VI RULE 8)

1. of Paragraph 4 (a)

i. Deposits were made as follows

Date	Ref.	Particulars	Amount
23.03.90	11550	Deposit-Ndafara Co.Ltd	2,000,000.00
20.04.90	11746	Deposit-Ndafara Co.Ltd	2,000,000.00
26.04.90	11796	Deposit-Kenya Commercial Bank	2,000,000.00
18.05.90	11922	Deposit –Ndafara Co. Ltd	2,000,000.00
08.06.90	12068	Deposit-Ruiru Enterprises	2,000,000.00
28.08.90	12670	Deposit-Ndafara Co. Ltd	3,000,000.00
01.10.90	12874	Deposit-Ndafara Co. Ltd	1,000,000.00
14.12.90	13429	Deposit-Ndafara Co. Ltd	1,000,000.00
20.12.90	13464	Deposit J M Njage & Co. Adv	12,571,230.45
21.01.91	13619	Deposit J M Njage & Co. Adv	1,892,161.00
20.02.91	13835	Deposit-Ndafara Co. Adv	600,000.00
26.02.92	16075	Deposit-Ndafara Co. Adv	750,000.00
14.04.92	16393	Deposit-Tenduwet Muiru Co-op society	5,500.00
14.04.92	16394	Deposit-Tenduwet Muiru Co-op society	1,500.00
14.04.92	16395	Deposit-Tenduwet Muiru Co-op society	1,000.00
14.04.92	16396	Deposit-Tenduwet Muiru Co-op society	5,500.00
27.04.92	16452	Deposit-Ndafara Co. Ltd	7,000,000.00
29.05.92	16688	Deposit J.M Njage & Co. Ltd	5,136,608.55
Total			shs. 42,863,500.00

35. It will be seen that by the pleading at paragraph 4(a) of his defence Ng'ang'a admitted that the law firm received from the company on various dates between 1990 and 1994 deposits. In giving particulars of the deposits the company made to the law firm he set out the table above which shows the company deposited Ksh 42,863,500/=. There is no amendment to the defence by Ng'ang'a and it follows, although there are some deposits showing different entities deposited money into the Law Firm, the fact remains that the defence at paragraph 4 (a) states those are the amounts deposited by the company. There is no evidence before court to show that there were other entities which deposited the amount in the particulars supplied.

36. Over and above that obvious admission I find that the law firm, in undertaking the company's transaction failed to meet the very minimum standards one would expect in such a transaction. Let me elaborate on this.
37. The law firm has deliberately failed to avail documents that would have assisted the court reach a just decision in this matter. For example there are correspondences exhibited by the defence between the law firm and other firms such as Salim Dhanji & Co. Advocates and Archer & Wilcock Advocates where the Law firm failed to exhibit its letter which were being responded to by those other law firms. For example the letter of Salim Dhanji, at page 39 of the 1st and 3rd defendant's documents. In that letter, which was addressed to the law firm, Salim Dhanji was responding to the Law Firm's letter dated 14th July 1992. The Law Firm's letter of that date was not exhibited. Had it been exhibited it would have assisted the court to be enlightened on the transaction.
38. The Sale agreements relating to the sale and purchase of Ranches, which are before me, are mind boggling. All of those sale agreements are associated with the law firm and relate to the same parcels of land.
39. There is an agreement of sale dated 16th November 1990 where the seller was Mukenya Ranch Limited and Segera Ranch Limited. The buyer was the Company. What was the subject of that agreement were L.R. Nos 7417,8796,2570,2404 and 9387. The price was Ksh 200 million. The deposit paid into the law firm by the company, as seen in paragraph (3) of that agreement, was Ksh 13 million. The law firm in respect to that agreement acted for both the vendor and purchaser.
40. Another Agreement for sale is dated 16th November 1990. Here the vendor is Athi Holdings Limited and the purchaser is the company. What was being sold, by that agreement, was LR Nos. 7417,8796,2570,2404 and 9387. By paragraph (3) of that agreement the law firm acknowledged the company had deposited Ksh 13 million at the law firm. The law firm was also acting for both the vendor and purchaser in respect to that agreement.
41. There is another agreement for sale where the vendor was the company and the purchaser was Mani Utheri Company Limited. The property that was being sold was L.R No. 9357 Laikipia. The purchase price was Ksh 39 million. No deposit is reflected as having been made to the law firm by the purchaser in that sale agreement. The advocate for the company (the vendor) was the law firm while the purchaser was not represented by any firm.
42. Another agreement which is undated but in its body bears the date 15th November 1990 was between Athi Holdings Ltd and the family of Fonville. The vendor in that agreement was Fonville Enterprises Incorporated (a USA company) and the purchaser was Athi Holdings Ltd. The agreement was for the sale of shares of Fonville Enterprises incorporated. The consideration was USD 6,956,333.33. The agreement provided that on execution the purchaser would pay Ksh 3 million by way of non recoverable deposit to Archer & Wilcock Advocates.
43. According to Ng'ang'a that amount of Ksh 3 million, paid to Archer & Wilcock, and Ksh 5 million, paid to Salim Dhanji was paid on behalf of the company. The total amount of Ksh 8 million; that is Ksh 3 million plus Ksh 5 million; was forfeited when all the transactions failed.
44. In my finding the money paid to Archer & Wilcock and Salim Dhanji were in relation to the transaction between Fonville and Athi Holdings Ltd. It had nothing to do with the company. The law firm cannot therefore alleged that the money forfeited, Ksh 8 million, was part of the funds the law firm held for the company. This is very clear from the letter of Salim Dhanji dated 20th July 1992 (page 39 of 1st and 3rd defendant's bundle) where the letter made reference to the currency of U.S.D. That is the letter which informed the law firm that Ksh 8 million had been forfeited for non compliance and of interest is that the title of that letter is "**FONVILLE**". The company did not at no time at least in the agreements before me, enter into a transaction with Fonville in USD currency. Even the letter of the plaintiff dated 6th May 1992 (page 34 of the 1st and 3rd defendant's bundle) does not show, as Ng'ang'a indicated, that the company authorized the law firm to use the vehicle of the entity Athi Holding to buy the Ranches. Rather what that letter shows is that the company wanted to buy the Ranches directly and not through any entity because that would result in saving of stamp duty. There is no evidence that the company agreed to a back to back transaction between it, Athi Holding Ltd and the Ranches.
45. The fact there is evidence before court of refund of total Ksh 1,950,000 made by Athi Holdings Ltd to the company is acknowledgment that Athi Holdings Ltd transaction was not related to the company's transaction.
46. Further in the agreement of sale dated 16th November 1990 between Mukenya Ranch Limited and Segera Ranch Limited with the company, it will be recalled the law firm acted for both the vendor and purchaser. Under special condition clause No. 4 it provides:
- "the request to the Vendor by the Purchaser for extension of time as provided in special condition 1 above shall not be considered by the vendor unless and until the purchaser has demonstrated its ability to raise the purchase price by paying to the vendor at least a sum of Ksh 50,000,000/= on or before 30th day of November 1990 and in the event of non-payment of the said sum of Ksh 50,000,000/= on or before the said 30th November 1990, this agreement shall stand rescinded and any moneys paid to the vendor by the purchaser shall be refunded to the purchaser free from any interest."***
47. With that clause in mind the company's deposit of Ksh 13 million with the law firm, in that transaction could not have been forfeited.
48. Ng'ang'a, by his evidence, stated that the transaction relating to the company's purchase of the Ranches was taken over by Muite when Muite resigned from the law firm.
49. By paragraph 6 of his defence Ng'ang'a stated that Muite took with him, on his resignation, the Company's transaction file and the funds deposited by the Company and Muite assumed all the liabilities relating to that transaction. Muite resigned from the law firm in 1993. If in 1993 Muite took over from the law firm funds of the Company relating to a transaction which transaction seems to have been all but dead in

1992 then there were funds belonging to the Company in the custody of the law firm. That is when Salim Dhanji indicated that the moneys held by his firm were forfeited. It follows that Muite had in his possession at his resignation funds which the Company was rightly entitled to have refunded to it but was not.

50. But perhaps the most important evidence, which relates to the issue (a) above is a letter written by Muite to his co-Defendants dated 24th October 2002. That letter although it was not part of the bundle of documents relied upon by the parties was attached to an affidavit sworn by the then Chairman of the Company John Chege but who it was stated had died before the hearing of this case. That affidavit was sworn on 25th October 2004. It annexed the letter of P. K. Muite dated 24th October 2002 which letter is as follows:

“P. K. MUI TE ADVOCATE

C/O WARUHIU, KOWANDE & NGANGA ADVOCATES

ELECTRICITY HOUSE, 6TH FLOOR

NAIROBI

P.O. BOX 47122

TEL: 719009

FAX: 718735

24TH October, 2001

George Kangethe Waruhiu,

Advocate,

International House,

12th Floor,

NAIROBI

Mbage Nganga

Advocate

Electricity House,

6th Floor,

NAIROBI

Colleagues,

NDAFARA COMPANY LIMITED”

You will recall that when the accounts (clients and office) of the then firm of Waruhiu & Muite Advocates were taken and settled on my leaving the firm, I assumed responsibility for payment of a sum of Kshs. 26 million which by agreement was transferred to the Fronville File. This file was an ongoing transaction regarding the purchase of land in Nanyuki. The remaining partners (now represented by Mr. George Waruhiu & Mr. Nganga Mbage) assumed responsibility for payment of a sum of Kshs. 7 million.

I have myself been refunding monies to Mwana Mwireri Company Limited and the balance is the subject matter of a civil case and a criminal case against myself. The sum of Kshs. 7 million, the liability in respect of which is on you is payable to Ndafara Company Limited. I am aware that you have refunded to Ndafara Company Limited a sum of Kshs. 1.6 million leaving a balance of Kshs. 5.4 million. The Company wants this money refunded since they have members who have demanded to be refunded their money and who have reported the matter to the O.C.S. Gatundu Police Station. The Company needs immediately the sum of Kshs. 400,000 and the balance of Kshs. 5 million not later than 5th November 2002.

I am taking the liberty of copying this letter to the O.C.S. Gatundu Police Station and the Director of C.I.D. in order for them to be in the picture regarding this matter which as I have stated above has already been reported to the O.C.S. Gatundu Police Station.

Yours faithfully

P.K. Muite

1. Director – C.I.D.

2. O.C.S. – Gatundu Police Station”

51. Although that letter was not adduced in evidence in my view having been the subject of an interlocutory application in this matter it is only right that, in order to do substantial justice to the parties, I take notice of it and its content, which I hereby do.

52. Muite it will be seen from that letter in the year 2002 was admitting to being liable to the Company to the tune of Kshs. 26 million. He stated that Waruhiu and Ng’ang’a were responsible to the Company for Kshs. 7 million. That on its own is admission on the part of the Defendants.

53. Now, in the consideration of issue (a) I would say that the Company provided receipts for deposits made totalling Kshs. 22,250,000. The witness Kungu (Pw1) stated that on the death of the Company’s officials those were the only receipts they could find. However, he did state that as a shareholder he was aware that the Company deposited with the law firm Kshs. 30,664,550. He however could not trace all the receipts after the death of the Company’s officials.

54. Ng’ang’a by his particulars in respect to paragraph 4(a) of his defence admitted the law firm received Kshs. 42,863,500. This is because none of the Defendants were able to show that they received that money from Ruiru Enterprises, J.M. Njage & Co Advocates, or Tenduwet Muiru Co-op Society. There is therefore no reason why those entities should be included in an account giving particulars of Ng’ang’a’s defence paragraph 4(a), which paragraph acknowledge that the law firm received money deposits from the Company. An even if it was accepted that those entities included in that account did indeed deposit the money with the law firm then the other account (at page 37 of the 1st and 3rd Defendant’s bundle) does not tally with that account. Just as an example the amount seen as received from J.M. Njage & Co. Advocates (at page 36 of the 1st and 3rd Defendant’s bundle) is Kshs. 14,463,31.45. Yet the amount that was disbursed to J. M. Njage (at page 37 of 1st and 3rd Defendant’s bundle) is Kshs. 25,350,000/-). In other words if the law firms evidence is to be believed J.M. Njage & Company Advocates, as an example, were paid by the law firm more than is acknowledge as having been deposited by them. It does seem to the Court that the accounts the Defendants wish the Court to believe is one which is contrived.

55. On the whole it needs to be remembered that the Company was dealing with a law firm and the Company would be right to expect certain professionalism from the law firm. In part I find that professionalism was lacking in respect to this transaction. It lacked because the transaction the law firm undertook, as shown above was opaque. There were no proper accounts kept of money going in or out. One would have expected that faced with this Court action the law firm would have provided a proper account of money received and paid out and that account would be supported by documentation. It was not enough for the law firm to attach their bank statement. One is not able to tell from the bank statement who made the payment and who received the payments out of the account.

56. On my own calculation I have found that the Company’s officials authorized withdrawal from the deposits with the law firm of total Kshs. 5,374,000. Further the Company was refunded a total of Kshs. 1,950,000 by Athi Holdings ltd.

57. I have in making those calculations ignored payments made to Hemi Properties of Kshs. 750,000 (page 85 of 1st and 2nd Defendant’s bundle) and this is because that payment was not supported by authority to pay it from the Company. Similarly I have ignored in my calculations the payment of Kshs. 1 million (at page 88 of the 1st & 2nd Defendant’s bundle) because it was not supported by authorization of the Company to pay.

58. On the whole bearing in mind the admissions made by the Defendants in correspondence in their pleading (Ng’ang’a’s defence). I find that the Company has proved on a balance of probability that it deposited with the law firm Kshs. 30,664,550. The issue (a) is found in those terms, that the company deposited with the law firm Ksh 30,664,550.

ISSUE (b)

59. My calculations show that the Plaintiff Company either received or authorized payments out of the deposits, with the law firm, of Kshs. 7,324,000. That amount on being subtracted from the deposits of Kshs. 30,664,550 leaves a balance owed to the Company by the law firm of Kshs. 23,340,550.

60. The law firm by its letter dated 18th April 1990 confirmed that it would hold Kshs. 2 million, of the Company, at interest earning account earning 13% per annum which interest would be accounted to the Company. (see letter at page 2 of the 1st and 3rd Defendant’s bundle). It follows out of the amount I have found as owed to the Company Kshs. 2 million will have application of interest at 13% from 18th April 1990 until payment in full.

COST

61. The Plaintiff Company having succeeded in its claim it is entitled to costs of the suit.

CONCLUSION

62. In the end and view of the holdings herein above judgment is entered for the Plaintiff as follows:

a. Judgment against all the Defendants jointly and severally for Kshs. 21,340,550 with interest at Court rate from the date of filing suit until payment in full.

b. Judgment against all the Defendants jointly and severally for Kshs. 2 million with interest at 13% per annum from 18th April 1990 until payment in full.

c. The costs of the suit are awarded to the Plaintiff.

DATED, SIGNED and DELIVERED at NAIROBI this 5th day of November, 2019.

MARY KASANGO

JUDGE

Judgment read in open court in the presence of

Sophie Court clerk.

..... FOR THE PLAINTIFF

.....FOR THE DEFENDANTS