IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO. 47 OF 2008

JOHN KUNG'U KIARIE.....PLAINTIFF

VERSUS

DYER & BLAIR INVESTMENT BANK LIMITED.....1ST DEFENDANT

STANBIC BANK KENYA LIMITED.....2ND DEFENDANT

JUDGMENT

1. The Plaintiff commenced these proceedings vide the plaint dated 1st February 2008 and filed on the same date. The Plaintiff's claim is based on an Agreement entered into on 28th April 2003 between the Plaintiff and the 1st Defendant for registration of Treasury Bonds and other Securities purchased for him by the 1st Defendant. The first transaction involved a cheque of Kshs.12,000,000 payable to the 1st Defendant which was invested in both bonds and equities. The said cheque was issued on 28th April 2003. In May 2003, the Plaintiff deposited a sum of Kshs.87,700,000/= into the 1st Defendant's account held with the 2nd Defendant. The said sum was used to purchase a Treasury Bond which was sold afterwards and fetched the sum of Kshs.91,630,716/=. All these moneys were invested by the 1st Defendant in the 2nd Defendant Bank. The Plaintiff's case is that these sums although given to the 1st Defendant for purposes of investment were really never invested. The Plaintiff now claims that had the money been invested by the 1st Defendant, it would have grown to Kshs.465.5 Million after deducting principal sum and interest paid to the Plaintiff. The Plaintiff now seeks the sum of Kshs.465,500,000/= with interest from 21st October 2007 at 16% per annum calculated on a daily balance until payment in full.

2. In support of his case the Plaintiff filed the following Documents:

- **Plaintiff's list of Documents on 13th October 2009.**
- **Reply to the 1st Defendant's Defence on 7th March 2008.**
- **Reply to the 2nd Defendant's Defence on 4th March 2008.**
- **Two witness statement by the Plaintiff and Patrick Mbiyu Kagiri both filed on 18th July 2011.**

3. The 1st Defendant filed its defence dated 26th February 2008 on 29th February 2008. It also filed the 1ST Defendant's List of Documents and Witness Statement by Paul Wachira filed on 8th

February 2011. The 1st Defendant totally denies the Plaintiff's claim.

4. The 2nd Defendant filed its defence on 27th February 2008. It also filed on 2nd May 2012, its Bundle and List of Documents and a witness statement by Kelvin Kilach. The 2nd Defendant denies any privity of contract between itself and the Plaintiff and states that its dealings with the 1st Defendant had no regard to the Plaintiff and therefore the Plaintiff cannot make any claims against the 2nd Defendant.

THE PLAINTIFF'S CASE

5. The Plaintiff's case is that he had been investing in the stock markets through the 1st Defendant long before the cause of action herein arose. The 1st Defendant invested the Plaintiffs money with the 2nd Defendant firstly in the Plaintiffs own name, and later on, under a **Nomura Nominee Account No. 1027**. On or about April 2003, one Mohammed Hassan, then General Manager of the 1st Defendant, discussed and agreed with the Plaintiff to invest a substantial sum in the bond markets among others. On or about 23rd April 2003, the Plaintiff availed Ksh. 100 million for that purpose. To secure this transaction and to give the 1st Defendant authority to continually invest the money for profitable purpose, an agreement dated 28th April 2003 was executed between the parties. The Ksh.100 million was used to bid for Treasury bond of the same value but the Central Bank awarded bond worth Ksh.88 million which the Plaintiff paid for. The remaining Ksh.12 million was left for investment as per the Agreement and the same was invested in various securities as shown on *pages 47 of the Plaintiff's Documents.*
6. Although the bond for Ksh.88 million was for 8 years, the 1st Defendant advised for its sale before maturity in order to realize capital gains and invest in another bond that had been floated. The same was sold on 15th May 2003 realizing a capital gain of Ksh.2 million bringing the total to Ksh.91,630,807/=. After deduction of the commissions and custody fees, the balance would be Ksh.91.5 million. Just when the money was being received for the further re-investment, an investigation on the Plaintiff's account was commenced by the Central Bank of Kenya (CBK) Fraud Investigation Unit and immediately, and allegedly in synchrony, and as if they were waiting for this, the 1st Defendant unilaterally and unlawfully froze the Plaintiff's account thereby rendering the reinvestment of the money or access thereto impossible. Following the investigations, the Plaintiff was subsequently charged in Criminal Case No. 1218 of 2003. The criminal case ultimately failed and the money was eventually released pursuant to court orders. The last sum was released on or about 25th September 2007 but the 1st Defendant did not account for interests earned for the entire duration of April 2003 to September 2007. Neither did the 1st Defendant account for the investment earnings nor give justifiable reasons why the money was not invested other than to allege that the account was frozen. So it is the Plaintiff's case that had the funds been invested in mixed funds envisaged in the agreement and invested with prudence, competence and skill, the funds would have grown to Ksh.465.5 Million after deducting the principal sum and interests paid to the Plaintiff. In failing to invest and to realize returns, the Plaintiff avers, the 1st Defendant was negligent, incompetent and failed in its professional duty. But if the Defendants did actually invest the funds as was envisaged, the Plaintiff asserts that the Defendants must have realized profit from the funds and thus breached the obligation to always be candid and transparent in dealing with the Plaintiff's investment by disclosing the returns earned and the specific portfolios the funds were invested in. The Plaintiff thus prayed for judgment for the Ksh.465.5 Million, interest and costs of the suit.

THE 1ST DEFENDANT'S CASE

7. The gist of the 1st Defendant's defence is that it did not enter into any written agreement with the Plaintiff whether on 28th April 2008 or on any other date. The transaction between the Plaintiff and the 1st Defendant was at all material times governed by the customs and usages of the Nairobi Stock Exchange which were implied in the contract between the Plaintiff and the 1st Defendant.

In that regard, it is the 1st Defendant's case that it acted with due diligence, skill and competence in relation to the subject transaction and in the Plaintiff's interest, However, pursuant to a court order in **CRC. No. 1218 of 2003**, it was constrained to freeze the Plaintiff's funds in the 2nd Defendant's books and so the contract was frustrated by operation of law or force majeure. That notwithstanding, the 1st Defendant's case is that it has fully accounted to the Plaintiff for the principal and interest due on the moneys paid, and denies the projected growth of Ksh.465.5 million and that such is not due to the Plaintiff. It also denies the basis of the computation and that in any event the 1st Defendant could not guarantee the Plaintiff a rising market to fulfill the Plaintiff's expectations.

THE 2ND DEFENDANT'S CASE

8. The 2nd Defendant contends that the Plaintiff has no *locus standi* as it was not its customer. There was no privity of contract between the 2nd Defendant and the Plaintiff. The 2nd Defendant had contract with the 1st Defendant and it was not obligated to establish the source of the funds deposited by the 1st Defendant into the **Nomura Nominee account.** Although the 2nd Defendant was served with a court order in **HC Criminal Appeal No. 519 of 2005**, requiring it to release funds from the nominee account, it was not obligated to give a breakdown of interest earned on the account to the Plaintiff. In any event, the 2nd Defendant's case is that it had no contractual duty or obligation to consider how the 1st Defendant would invest funds placed in its nominee account. It denies owing the Plaintiff Ksh.465.5 Million, or any other sum of money.

SUBMISSIONS AND ANALYSIS

9. With the leave of the court, the parties filed written submissions.

The Plaintiff did that on 5th May 2015. The 1st Defendant did that on 2nd June 2015; while the 2nd Defendant filed its submission on 5th June 2015. I have carefully considered the evidence provided by the parties together with the said submissions. The Plaintiff and the 1st Defendant raised largely the same issues for determination. Having reconciled those issued, this court raises the following issues for determination.

a. **Whether there was a contract between the Plaintiff and the 1st Defendant dated 28th April 2003, or at all.**
b. **Whether there was a freezing order.**
c. **Whether the 1st Defendant discharged its duty to invest the Plaintiff's funds in a professional, prudent, competent and skillful manner to ensure best returns.**
d. **Whether the 1st Defendant has fully paid and fully accounted for the interests and returns on investment.**
e. **Whether the 2nd Defendant is jointly and severely liable with the 1st Defendant on this claim.**

In determining these issues, I will simultaneously refer to both the submissions, and the parties witnesses' evidence on record.

Whether there was an Agreement between the Plaintiff and the 1st Defendant dated 28th April 2003 or at all.

10. Although the above issue is raised as one of the issues for determination by the Plaintiff and the 1st defendant, both parties agree, and in fact the 1st defendant has conceeded in its submissions that there indeed existed such an agreement despite the denial in the 1st Defendant's defence. **Paul Wachira, DW1,** concluded that the said Agreement was executed on 28th April 2003 by **Mohamed A. Hassan**, the then General Manager of the 1st Defendant, on behalf of the 1st

Defendant and the Plaintiff. The answer to that issue is therefore in the affirmative.

Whether there was a freezing order;

11. This was the greatest contention put forth by both Defendants. In its paragraph 6 of the Defence, the 1st Defendant contends that ***"… pursuant to a court order in NAIROBI CHIEF MAGISTRATE'S CRIMINAL CASE NO. 1218 OF 2003: REPUBLIC-VS- JOHN KUNGU KIARIE, the Defendants were constrained by law to freeze the Plaintiff's account in the books of the 2nd Defendant and to that extent the 1st Defendant will plead the doctrine of frustration of contact by operation of law or force majeure."*** According to this defence, the court freezing order was made in CRC No. 1218 of 2003. The issue is therefore whether the alleged order was actually made in that case.
12. So, according to the 1st Defendant, the reason why they did not re-invest the Ksh. 91.5 million as agreed was because they were constrained by the alleged court freezing order. The Plaintiff submitted that it follows that if it is found that there was no such order, the Defendants would have no other excuse or justification for not investing the Plaintiff's funds and should be ordered to pay what should have been earned.
13. **DW1, Paul Wachira**, in his statement said that the Central Bank Fraud Investigation Unit gave instruction that the money be put in a frozen account with their Banker Stanbic Bank. He went on to say that the said instruction is reflected in the Affidavit of Geoffrey G. Kahiro (***See page 31 of the 1st Defendant's Documents*****),** and that the court duly issued a freezing order on 24th July 2003. In evidence in chief, he said the order was to freeze A/C No. 1027 and that the said account had a relationship with the account held by them in Stanbic Bank. He also stated that the Plaintiff was aware of the freezing order because he did not give them further instructions on investing the money. He insisted that after they received the alleged court order, they did not touch the funds because it directed the bank to freeze the Account.
14. In cross examination by the 2nd Defendant's Advocate, the witness referred to the letter on *page 23 of the Plaintiff's Documents* and stated that they did not inform CFC Stanbic of the freezing order, but the Central Bank did. On cross examination by the Plaintiff's Counsel, the witness was not able to sustain his evidence on the alleged freezing order. The Plaintiff substantively referred to the witness's statement, and his responses which the Plaintiff submitted contradicted his evidence, as follows:

a. If an account is frozen in any bank it does not and should not attract interest. This clearly shows that the account was not frozen and was actively trading.
b. On the Affidavit by Geoffrey G. Kahiro at *page 31 & 32 of the 1st Defendant's Documents*, he conceded he did not know what an affidavit entailed; that the word freeze was not in the affidavit; that Kahiro did not ask for freezing of the account but for restriction; that the court is not specified in the said affidavit; that the word freeze came from the order on *page 20 of the 1st Defendants Documents* showing that there was an earlier order; that the frozen funds were held in A/C No. 0122021533301 at Stanbic Bank.
c. When shown *page 89 of the Plaintiff's Documents*, the witness accepted that Mohammed Hassan had conceded that there was no court order to freeze the account.
d. That there was no entry of freezing in the statement.
e. That there was no letter from the 1st Defendants to the Plaintiff informing him of the freezing of his account.

15. The Plaintiff further submitted that the defence (see paragraph 6 of its defence) that the freezing order was made in CRC No. 1218 of 2003 was not supported by either oral or documentary evidence. DW1 shifted from the Affidavit of Geoffrey Kahiro and the order on page 20 of the 1st Defendant's Documents as the purported freezing order. It was submitted for the Plaintiff that the Affidavit of Geoffrey Kahiro did not emanate from CRC No. 1218 of 2003 while the order on page 20 of the Plaintiff's Documents was not a freezing order. The Plaintiff urged the court to find that having set up a defence that it was served with a freezing order from CRC No. 1218 of 2003, the 1st Defendant cannot be allowed to rely on another order even if it was a freezing order

emanating from a different proceeding, since parties must be bound by their pleadings.

16. On the part of the 2nd Defendant, the issue of a frozen account is not put up as a defence but features in the witness statement by Mr. Kevin Kilach (DW2) at paragraph 9 and 10, where he states that Stanbic bank received an order to freeze the accounts on 20th May 2003 and a letter on 21st May 2003 alerting the public about the existence of the freezing order. However, on cross examination by the Plaintiff's Counsel, the witness made an about turn and repudiated his statement by stating that the accounts held by Stanbic Bank on behalf of Dyer & Blair were not frozen, and that he was not aware of any account that was frozen. He testified that there is no entry on both accounts held by Stanbic Bank of freezing order. The witness testified that he had meant the document on *page 21 of the Plaintiff's Documents* when he mentioned freezing order. He agreed that if that document is found not to be a freezing order, then that would mean there was no freezing order. He also testified that no letter including those on *pages 20 & 23 of the Plaintiff's Documents* was copied to the 2nd Defendant, and that there was no letter from Dyer & Blair directing them to freeze the accounts, and that the accounts were active, operational and one could do transaction on them.
17. The Plaintiff submitted that other than for purposes of holding DW2 to his admission, the court should treat his evidence as contradictory, discredible and unreliable.
18. I have carefully considered this issue. The issue was also brought up on cross examination of the Plaintiff; the 1st Defendant's counsel referred to the order to unfreeze/unblock the account (*see pages 76 & 77 of the Plaintiff's Documents*) and attempted to imply that there existed a freezing order and that was why it was necessary to apply for orders to "unfreeze/unblock" the account. But, as the Plaintiff explained, these applications and orders were necessitated by desperation. The two Defendants had frozen the account and adamantly insisted that there was a freezing order. Therefore they could not allow the Plaintiff to access the funds without a court order. The court order was to undo what the two Defendants had done; that of wrongfully freezing the account. But as it has turned out in the evidence of DW2, the 2nd Defendant knew very well and had no mistake about the fact that there was no freezing order and that the account was active.
19. It is clear that the 1st Defendant initiated the idea of freezing the account and unilaterally did so on 21st May 2003. In its letter dated 21st May 2003 **(*see page 22 of the Plaintiff's Documents*),** the 1st Defendant volunteered freezing the account by telling the Central Bank Fraud Investigations Unit that following their inquiry**, *"… we will also freeze the account until further instructions from yourselves".*** Strangely, the account was to be frozen until instruction from CBK Fraud Investigations Unit, which had not, in the first place, sought freezing of the account. This appears to have been a clever and mischievous act by the 1st Defendant to found a basis of alleging that the instructions came from CBK. The 1st Defendant took advantage and deliberately misinterpreted the warrants to investigate Account **(*see page 21 of the Plaintiff's Documents*)** as an order to freeze the account. While doing so, it disregarded the fact that the warrants were directed at and served on Stanbic Bank Ltd. It was unlawful and a deliberate malice for the 1st Defendant to purport to freeze the account based on a warrant to investigate not addressed to it. These deliberate and calculated scheme can also be seen in its letter dated 30th July 2003 addressed to the general public (*see page 23 of Plaintiff's Documents*). In it the 1st Defendant brazenly alleges that the account A/C 1027 ***"…is frozen following a request by the Banking Fraud Investigation Unit".*** In other words, the account was being frozen following a request and not a court order. But fundamentally, there was no such request and none was produced before the court. The issue then is why the 1st Defendant would engage in such falsehood unless it had something to gain from it.
20. The 1st Defendant's General Manager, Mohammed Hassan, categorically stated in court under oath that there existed no order to freeze the account but to investigate. **(*See page 29 of the Plaintiff's Documents*).** As evidence has shown, he was the person who negotiated, drew and signed the Agreement dated 28th April 2003 and basically dealt with and invested the Plaintiff funds. The purported freezing took place during his tenure; he signed the letter dated 30th July 2003 (*see page 23 of Plaintiff's Documents*). Now, if he said there was no order on 28th August 2003, anyone purporting there was such an order before that date is engaged in conjectures, fabrications and imaginations.

21. It is to be noted also that the 1st Defendant's initial attempts **(before admission),** to interpret the Affidavit of Geoffrey Kahiro as a freezing order was a calculated falsehood for the simple reasons that, that document is an Affidavit, not an order; the Affidavit itself does not purport to seek freezing orders; the affidavit is dated 24th July 2003, two months after the account was frozen on 21st May 2003. There was no way, even if it were a court order that it could have applied retrospectively. In other words, was it meant to justify the unlawful freezing done two months earlier? Further, the affidavit is not filed in any court and there is no indication it was before which magistrate for determination; again the same was made ex-parte without the participation of the Plaintiff. Further it is not an application for orders as orders can only issue upon application. Lastly it is vague and ambiguous as it only states **"orders to issue as prayed"** begging the question, which orders were prayed for. It is trite that orders must be extracted, dated, signed and certified by the court. Its content must have the number of the case, names of the parties, prayers sought and the specific relief granted and who bears the costs. The genuineness of the affidavit and the purported order on its body are in question, there is no known order which forms part of the body of an affidavit.

    In Sanjay Shah Arunjain v Republic(Misc. Criminal App. No.571 of** 2002,[2002] **eKLR, a similar affidavit was filed and similar orders obtained. The court held, "***In the absence of any other document, the said affidavit stands alone. I am yet to come across a case where an affidavit per se can facilitate the issuance of a court order or where an affidavit is construed as both the application and evidence to support the same"***

    "Further to the foregoing, the wording of section 180(1) of the Evidence Act aforesaid requires proof, and in criminal law, proof is beyond any reasonable doubt."

    "The administration of justice in this country is adversarial. That being the case, unless the law provides that a party may move the court ex-parte for any orders, the other party, should have notice of such a proceeding and accorded an opportunity to be heard. That is the cornerstone of the law of natural justice. There is no law that provides that a warrant such as the one herein can be issued ex-parte."

    The same position was held in Aurelian Ajiambo Akwaro v Republic(Misc. Criminal App. No. 2008) [2009] eKLR.

22. Both DW1 & DW2 stated in evidence the **A/C Nomura Nominee A/C 1027** did not exist in the books of accounts of the 2nd Defendant. Thus any documents which refer to A/C 1027 could not affect A/C No. 0140021533301 or A/C No. 0122021533301 held at Stanbic bank by the 1st Defendant. Thus any action that was taken by the 2nd Defendant based on the alleged freezing order erroneous, wrongful, unlawful and actionable against the 2nd Defendants because clearly those documents addressed A/C 1027 with 1st Defendant and not the accounts with the 2nd Defendant. This reasoning is fortified by the 2nd Defendant's rejection of the Court order dated 19th September 2007 for it mentioned A/C No. 1027 ***(See page 192 of the Plaintiff's Documents*)**.
23. The 1st Defendant's plea of the doctrine of frustration of contract by operation of law or force majeure is defeated based on the foregoing reasoning but further, the said defence is misplaced, baseless and unsustainable for the reasons that there is no provision under the agreement that freezing of the account would amount to frustration of the contract or force majeure. Further, the defence of frustration of contract by operation of law or force majeure would be sustainable if there was an external supervening circumstance beyond the control of the parties. There was no such supervening circumstance. The purported frustration was self induced as it is the 1st Defendant who came up with the idea of a non-existent freezing order. As held by the Court of Appeal in ***Dwijendra Kumar T/A Rafkins College v The Registered Trustees of National Union of Kenya Muslims Coast Province Trust Fund [2015] eKLR,*** *"**The essence of frustration of an agreement is that it should not be due to the act or election of the party seeking to rely on it. A contracting party cannot rely on self-induced frustration, that is, frustration due to his own***

conduct or to the conduct of those to whom he is responsible. Frustration may be self-induced where the alleged frustrating event is caused by a breach or anticipatory breach of contract by the party claiming that the contract has been frustrated."

24. It is therefore the finding of this court that there was no court order freezing the account, and that the act of freezing the same was wrongful, mala fide, malicious and unlawful and resulted in loss and damage to the Plaintiff for the period April 2003 to September 2007. Both Defendants acted jointly in this scheme of unavailing the Plaintiff's funds for investment and shall be severally and jointly held liable for the damage and loss.

Whether the 1st Defendant discharged its duty to invest the Plaintiff's funds in a professional, prudent, competent and skillful manner to ensure best returns.

25. The Agreement dated 28th April 2003, signed between the two parties provided the basis for investment of Ksh 100,000,000/=. The 1st Defendant admits it received the money for purposes of investment in shares, fixed deposits, Treasury bill and bonds. **(*See paragraph 5 of its Defence).*** The heading of the Agreement states the purpose of the agreement as the registration of treasury bonds and other securities. Other pertinent terms of the agreement include:-

a. **The Plaintiff was to pay the 1st Defendant a commission of 0.0625% per transaction and annual custody fees of 0.25% of value of Treasury bond held.** ***See clause 4 of the*** **Agreement at page 18 of the Plaintiff's Documents.**
b. **The Plaintiff was entitled to all interest received through investment vide Nomura Nominee A/C 1027.**

26. Pursuant to the agreement, and as admitted, the 1st Defendant was obligated to invest the funds in treasury bonds and other securities and pay to the Plaintiff all the interest/returns on the investment. As an investment firm with the necessary professional skill and competence, it was expected, and it was its duty, to employ its skill in this area very prudently in order to realize reasonable returns on the investment. Such interest or return would ordinarily be dictated by the market dynamics. It was therefore expected that if the 1st Defendant were to employ its competencies, it would earn capital gains on the investment if the market trends at the period between April 2003 and September 2007 were positive.
27. The Plaintiff has asserted that during that period, the investment market experienced a boom brought about by the new political dispensation under the NARC Government ushered in by the 2002 elections. To augment this, the purchase of Treasury bond of Ksh. 88 million yielded Ksh. 2 million in less than a month (from 28/04/2003-15/5/2003). **(*See page 28 of the Plaintiff's Documents.)*** Mr. Patrick Kagiri (PW1), an investment expert of 30 years experience stated in evidence that ***"…the market as a whole grew very significantly in both the money markets as well as the equity markets between 2003 and 2008 on a year-on-year basis."*** **(*See page 2 of his statement*).** (excluding the capital of Ksh. 91.5 million already paid back). His further conclusion, which is very compelling, is that had the 1st Defendant ***"…done their work diligently according to the Agreement entered with Mr. Kiarie they should have been able to perform as well as, if not better than, the best performing fund in the market."*** According to the agreement, the type of investment envisaged was ***"… a balanced fund, that is to say, one which has a mixture of money markets investments as well as equity investments"*** **(*See page 2 of his statement*).** Accordingly, the 1st Defendant was expected to discharge its duty under the agreement by investing the funds of Ksh.91.5 Million in balanced funds to receive maximum returns. If it failed to do this by not investing the money at all or by not investing in balanced funds, it would be in breach of the agreement and be guilty of negligence and incompetence.
28. The plaintiff submitted that the economy performed well during this material period due to favourable political climate and that this is a matter to be taken judicial notice of under section 60 (1) (o) of the Evidence Act Cap. 80, as a matter of general or local notoriety.
29. The 1st Defendant does not deny owing the Plaintiff the duty to invest his funds in a prudent and professional manner, its assertion is that it actually discharged that duty with all due diligence, skill and competence (*See paragraph 4 of its Defence).* It further contends that it could not

guarantee a rising market to fulfil the Plaintiff's expectations.

The expert witness (PW1) stated that what is expected of a fund's manager is to invest in the most prudent manner that is beneficial to the client. He said a reasonable return would be that obtained by benchmarking returns of a funds manager to that of a flagship product in the market. In Kenya, Zimele Assets Managers and Old Mutual Assets Managers constituted good benchmark standards. He thus made comparisons with the two flagship funds managers as per *pages 13-17 of the Plaintiff's Documents.* This laid down the empirical evidence of what should have been earned by the investment. *See also pages 1-6 of the Plaintiff's Documents.* The report analyzed data from these similar players in the market. Mr. Kagiri proceeded on the basis that there was no freezing order as he was not shown any. Accordingly, it was his opinion that the investment programme ought to have continued as had been agreed.

30. It was put to the witness on cross examination that the figures were speculative; that Zimele and Old Mutual did not help him in writing the report; that the authenticity of the document relied on were not verified by the institutions. In my view there was no need for expert witness from the Plaintiff's side on the same issue. The witness himself was an investment expert of over 30 years standing. He was very knowledgeable on the subject. It was the Defendant who needed to call an expert witness and an expert's report to counter that of PW1. It did not produce any; not even a contradictory document from the said two institutions. The challenge of the expert evidence from the bar cannot affect its value without it being controverted by evidence. As such, the court finds PW1's evidence very useful and persuasive. As an expert witness, PW1's evidence could only be challenged by expert evidence.
31. The 1st Defendant brought up an issue that the Plaintiff did not terminate the agreement if he felt it was breached and that the agreement was valid for one year, implying that if it were to be liable for breach, it could only be so to the extent of one year. It is noteworthy to understand the agreement holistically. Each party was entitled to terminate the agreement; none did. Having pleaded frustration of the agreement by operation of law or force majeure, the 1st Defendant cannot turn around and avail itself the argument of termination. Importantly however, the Plaintiff could not purport to terminate when doing so would be futile and avail nothing to him since the account was already frozen and he would not access the money anyway. Further, the 1st Defendant cannot argue that the agreement was valid for only one year and since it was not renewed, it should not be held responsible for holding the money for five years. If it intended to benefit from such argument, nothing could have been easier than the 1st Defendant returning the money upon the expiration of one year. It did not and continued to hold the money falsely alleging that there was a freezing order. It was wrongful and unlawful to hold the money for the whole of that period and expect that there should be no return on the money it held.
32. Finally, the 1st Defendant cannot use this issue as a defence since the same is not raised in its pleadings. Indeed the issue arose for the first time during cross examination of the Plaintiff's witnesses. As per the holding in ***Civil Appeal 206 of 2001 Moses Onyango Dianga V South Nyanza Sugar Co. Ltd [2008] eKLR*, it is trite law that issues relied upon in a claim must be pleaded and judgment can only be pronounced on such pleaded issues.**
33. The evidence shows that so long as the money remained in the 1st Defendant's possession, it was supposed to continually invest it in bonds and other securities while re-investing back the gains/profits realized to make it grow. That was why the bond of Ksh 88 million was sold hardly a month after its purchase so that the gains could be reinvested in another bond that was being floated. The Defendants are responsible for the resultant damage which they ought to have foreseen or contemplated at the time when the contract was made as being likely. Such knowledge is presumed and the presumption is higher on those with special skill in a particular area. The 1st Defendant is a funds manager and has knowledge of the ordinary course of stock market business. (***See Halsbury's Laws of England, 4 Ed. Vol. 12)***

A broker is liable to the client in damages which is assessed as the difference between the price of the shares at the time of the breach and the price ruling the market thereafter. ***See Halsbury's Laws of England, 4 Ed. Vol.* 45.** In the circumstances the 1st Defendant's is liable for breach of

the contract and ought to be compelled to pay the Plaintiff for the lost expectations.

WHETHER THE DEFENDANTS HAVE PAID AND FULLY ACCOUNTED FOR THE INTERESTS AND RETURNS ON THE INVESTMENT

34. The 1st Defendant contends at paragraph 7 of the Defence that upon releasing Ksh.67.5 Million to the Plaintiff as per the consent court order, it finally and fully accounted for the principal and interest due on the investment. According to the evidence admitted by both sides, out of the investment fund of Ksh. 91.5 million, Ksh. 24 million was released pursuant to the court order dated 5th April 2005 **(*see page 31 of Plaintiff's Documents)*** and the balance of Ksh. 67.5 million pursuant to the court order dated 19th September 2007 **(*see page 37-39 of Plaintiff's Documents*).** The court order required the payment of the principal sum plus accrued interests. The Plaintiff vide letter dated 6th April 2005 **(*see page 7 of the Defendant's Documents*)** demanded the payment of Ksh. 30 million plus interest but was only paid Ksh.28,519,594.75 **(*see page 8-12 of the Defendant's Documents)*.** The Defendants paid the Plaintiff the Ksh.67.5 Million with an interest of Ksh. 2,258,756.00 **(*see page 45 of the Plaintiff's Documents and 25 Defendant's Documents*)** prompting the Plaintiff to demand an explanation on how the interest was arrived at and how the money was invested. Vide letter dated 12th October 2007, the Plaintiff enquired, about, among others, the interest accrued during the periods when the funds were not invested in bonds or equities indicating the rate of interest. In response, **(*see page 44 of Plaintiff's Documents*)** the 1st Defendant evaded the queries and instead discussed how the Ksh. 12 Million was invested. The investment of Ksh. 12 Million was not in dispute; the Ksh 91.5 was. This evasive and inadequate response made the Plaintiff to respond by the letter dated 5th November 2007 **(*see page 55 of the Plaintiff's Documents*)** in which he wondered how a colossal sum of Ksh. 91.5 million could earn an interest of Ksh.2,296, 559.75 over a period of almost five years. The Plaintiff demanded explanation and payment of the interest, capital gain on the investment and further interests. The 1st Defendant did not respond.
35. In evidence, DW1 alleged that the Plaintiff only asked for the moneys to be transferred to his account but did not ask for interest and that upon payment of the Ksh. 91.5 million plus the interests, the matter should have ended there. The Plaintiff did not need to ask for interest since his money was accruing interest while it remained in the bank. But it bellies the obvious to say that he did not ask for interest since as we have seen above the Plaintiff demanded (***see page 7 of Defendant's Documents and, pages 43&55 of the Plaintiff's Documents*)** interest on the money being released to him and complained about their gross inadequacy. DW1 conceded the money in the account earned interest though frozen and that the Plaintiff was paid full interest. DW2 on the other hand stated that the 1st Defendant transferred Ksh.91,682,807.80 to call deposit on 30th May 2003 and the same earned interest at counter rate until being uplifted on 5th October 2007. The witness testified that the counter rates for call accounts were 0.50% at the time. On cross examination, the witness was beeildered when shown the statement at *page 24 of Defendant's Documents.* Asked to confirm if the account was earning 5.5% when on credit and 13.75% when on debit/overdrawn, he fumbled, mumbled and prodded for answer, and admitted he did not understand it. However his view was that the account should not attract interest because it was supposedly a current account. In my view, the witness cannot contradict a document by his oral evidence for that would be contrary to *section 98 of the Evidence Act.* He further stated, upon being shown *page 44 of Plaintiff's Documents*, that they had a role in determination of interest in consultation with the 1st Defendant, though the letter indicates it was the 2nd Defendant who determined interest.
36. The compelling conclusion from the evidence by the Defendants' witnesses is that they are not sure what rate of interest was to be paid and what basis was used to calculate the same. In an attempt to cover for their employers, the witnesses ended up contradicting documentary evidence, which were authored in their absence. If the said account was frozen, the balance should have been Ksh. 67.5 million as at 25/9/2007. If the said amount had been transferred to the call account, the balance would have been zero. Instead, the opening balance is overdrawn by Ksh 9,670,001.9. The other question arising from the statement is why would the 2nd Defendant remove the money

from the account that pays interest of 5.5% (on credit) and 13.75% (on debit) and transfer it to a call account which earns only 0.5% other than for purposes of profiting with the money? The above leads to unassailable conclusion that the Plaintiff's money was being actively traded with by the two Defendants as supported by evidence in the statement of Account at *page 24 of Defendant's Documents and page 25 of the Plaintiff's. It is the finding of this court that the* Plaintiff ought to have been paid 5.5% instead of 0.5%. The Defendants are liable to pay the retained interest together with interest on the same for the entire period the same has been unlawfully held.

37. However, business is not a straight line, and the expectation of interest cannot be mathematically correct in the line of a surgeon's knife. In real life, even a most perfect business expectation occasionally falls short. In this regard, this court cannot take it that the Plaintiff expectation must be held to have succeeded 100% during the five years the Defendants held the Plaintiffs money. In this regard, this court is prepared to scale down the Plaintiff's expectation by one third to cater for unexpected business turns during the said period.

WHETHER THE 2ND DEFENDANT IS JOINTLY AND SEVERALLY LIABLE WITH THE 1ST DEFENDANT ON THIS CLAIM

38. On this issue the 2nd Defendant submitted that it is important to note from the onset that the Plaintiff has in the Plaint and his submissions dated 5th April 2015 consistently and unequivocally maintained that he invested his money with the 1st Defendant and not the 2nd Defendant. At paragraphs 4 and 5 of the Plaint, the Plaintiff avers that he entered into an agreement with the 1st Defendant pursuant to which he deposited a sum of Kshs.91.5 Million with the 1st Defendant. The 2nd Defendant submitted that the Plaintiff does not purport that the action against the 2nd Defendant is for breach of contract or that 2nd Defendant is guilty of any tort as against the Plaintiff. The 2nd Defendant was not privy to the terms of the agreement between the Plaintiff and the 1st Defendant that led to the 1st Defendant investing the Plaintiff's money in various instruments. It is in fact, neither alleged in the plaint or shown in the evidence adduced that the 2nd Defendant knew of the terms of the agreement. The Plaint does not also allege that the 2nd Defendant owed the Plaintiff any duty of care or that such duty of care was breached in terms of particulars set out and as a result the Plaintiff suffered loss or damage. It was submitted for the 2nd Defendant that in law, parties are bound by their pleadings. Any evidence led by any of the parties which does not support the averments in the pleadings is useless and must be disregarded. If the claim against the 2nd Defendant is that it breached a contractual obligation to the Plaintiff, the straight answer is that it had no agreement with the Plaintiff and was not privy to the terms and therefore the consequence of the agreement between the Plaintiff and the 1st Defendant. It was submitted for the 2nd Defendant that in addressing whether the 2nd Defendant was privy to the contract between the Plaintiff and the 1st Defendant, the Plaintiff must address the following key questions, which the Plaintiff failed to do, that is,

a. **Whether the 2nd Defendant was at all involved in the negotiations of the agreement dated 28th of April 2003.**
b. **Whether the agreement was ever sent to the 2nd Defendant.**
c. **Whether there was ever any engagement between the Plaintiff and the 2nd Defendant?**

The 2nd Defendant submitted that ultimately, the policy that underlines the privity of contract doctrine, is that one cannot sue a party in respect of the contract when that party sued could not in turn be able to sue you on the basis of the contract. **(See Joseph Otieno Alur vs Alice Wanjiku Kariuki and Paramount Bank Milimani HCCC 241 of 2011 (Unreported) citing with approval Tweddle Vs Atkinson (1861) 1b & s 393).** There is no way the 2nd Defendant would be able to maintain any claim against the Plaintiff under the agreement the Plaintiff and the 1st Defendant entered on the 28th of April 2003. As to whether the 2nd Defendant has accounted for

funds that were held which is the subject of the suit, it was submitted that the 2nd Defendant held the money in an account operated by the 1st Defendant. The only party it had a bank / customer relationship with was the 1st Defendant. There is no complaint from the 1st Defendant that either, agreed interest was not paid or that there was any instructions it did not carry out.

39. Under the Agreement between the Plaintiff and the 1st Defendant, it was a term of the said Agreement that for purposes of executing all transactions on behalf of the Plaintiff Nomura Nominees A/c 1027 would be opened. There was however no indication as to where the said account would be opened. The 1st Defendant opened a client account with the 2nd defendant for its transactions. In relation to this account, the only signatory was the 1st Defendant and for this reason, only the 1st Defendant was entitled to information relating to the said account and any interest that might be earned therein. The Plaintiff not being a client of the 2nd Defendant by virtue of not being a signatory to the account opened by the 1st Defendant with the 2nd Defendant can therefore not lay any claim on interest earned on the account or be privy to any information in relation to the account.
40. However, on their part, the Plaintiff submitted that this issue is for emphasis only since from what has emerged from the evidence, it is clear that in every turn of the corner, the 2nd Defendant appears hand in hand with the 1st Defendant. The Plaintiff submitted, and rightly so in my view, that the Defendants are tied at the hip like Siamese twins. To wiggle out of this joint commission, the 2nd Defendant contended throughout that there was no bank customer relationship between it and the Plaintiff; that there was no privity of contract between it and the Plaintiff as that existed between it and the 2nd Defendant. If the 2nd Defendant wanted to maintain its purity, it would have earlier avoided the machinations of the 1st Defendant, including being roped into the alleged freeze order. The 2nd Defendant is the one who kept the Plaintiff's money. It moved it from the investment account to call account on 30th May 2003. This, as DW2 admitted, was done without instructions from or information to the Plaintiff or the 1st Defendant. Already, it had started meddling with the Plaintiff's funds without authority.
41. The 2nd Defendant through DW2 admitted it was never served with an order or correspondence from the 1st Defendant freezing the account, yet it dealt with the Plaintiff's funds on the basis that the account was frozen and this is the communication it gave to the Plaintiff. The 2nd Defendant's explanation of the bank statement on *page 24 of the 1st Defendant's Documents* is wanting, inadequate and betrays a consensus *ad idem* between the two Defendants to defraud the Plaintiff of interests earned in the transaction. There is no adequate explanation of the instructions to pay Kshs.2,258,756/=. While pursuing his interests, the Plaintiff was tossed by the two Defendants from one of them to the other each of them stating it is the other who determined interest. The Defendants merely intended to confuse the Plaintiff and waste his time as they continued the machination of trading with his money. The 2nd Defendant was a wily conniving partner in the act. When the Plaintiff sought his money from the 2nd Defendant, it prevented him from getting the same on implausible grounds including that a court order was not accurate **(*see page 192 Plaintiff's Documents*),** yet it is the same 2nd Defendant who had barred access to the funds on the ostensible ground that the same account No. 1027 was frozen. It is the finding of this court that the 2nd Defendant joined the 1st Defendant in a complicated wave of deceit whose aim was to trade with the Plaintiff's money without accounting for interests. This is why the 2nd Defendant must be found liable together with the 1st Defendant.
42. Arising from the foregoing, it is the finding of this court that the Plaintiff has proved his case on a balance of probabilities against both Defendants jointly and severally, and that the Plaintiff is entitled to Judgement in the sum as was projected under the Agreement dated 28th April 2003 between it and the 1st Defendant except as moderated by this court, and that the 2nd Defendant as the custodian of the money that was invested has the duty to return it with interest envisaged under the said Agreement. In the upshot Judgment is hereby entered for the plaintiff against the 1st and 2nd Defendants jointly and severally as follows:

a. **Kshs.310,333,333.30/=**
b. **Interest on above at 16% per annum from the 21st October 2007 to the date the entire sum above is paid.**
c. **Costs of the suit.**

That is the Judgment of the court.Y

READ, DELIVERED AND DATED, AT NAIROBI THIS 10TH DAY OF MARCH 2016.

E. K. O. OGOLA

JUDGE

Ruling Read in open court in the presence of:

Mr. Morara hb Opiyo for Plaintiff

Mr. Gitonga for 1st Defendant

Mr. Ogunde for 2nd Defendant

Teresia – Court Clerk