



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
COMMERCIAL & ADMIRALTY DIVISION
CIVIL SUIT NUMBER 86 OF 2013

GODFREY OTIENO ONYANGO (Suing on behalf of Ronald Onyango).....1ST PLAINTIFF

DONALD RABALA.....2ND PLAINTIFF

HARVEY AGUMBA.....3RD PLAINTIFF

VE R S U S

CRISPIN ODUOR OBUDO.....1ST DEFENDANT

GEORGE OMONDI KAGUMBA.....2ND DEFENDANT

GRIFFIN LEGAL KENYA LIMITED.....3RD DEFENDANT

GRIFFIN CLAIMS MANAGEMENT LIMITED.....4TH DEFENDANT

GRIFFIN LEGAL UK.....5TH DEFENDANT

M/S TANDEM LAW T/A XJA LIMITED.....6TH DEFENDANT

GRIFFINS LEGAL CLAIMS LIMITED.....7TH DEFENDANT

CRIS BOYD LIMITED.....8TH DEFENDANT

FASHION HEAVEN LIMITED.....9TH DEFENDANT

JULIEN IRVING & KEVN MURPHY OF LEONARD

CURTIS AND NICHOLAS WOOD OF GRANT

THORNTON UK LLP (ACTING AS JOINT LIQUIDATORS

OF TANDEM XJA LIMITED-IN LIQUIDATION).....10TH DEFENDANT

**JULIEN IRVING & ANDREW POXON OF LEONARD
CURTIS RECOVERY LIMITED AND JAMES EARP,
OF GRANT THORNTON UK LLP (ACTING AS JOINT
LIQUIDATORS OF ASHTON FOX SOLICITORS**

LIMITED-IN LIQUIDATION).....12TH DEFENDANT

JUDGMENT OF THE COURT

INTRODUCTION

1. The Plaintiffs collectively commenced this suit vide the Plaint dated 8th March, 2013 for orders:-
 - i. **An Order of tracing requiring the 1st, 2nd, 3rd, 4th and the 5th Defendants to deliver a list of all company and personal assets which are held directly or indirectly on their behalf by any 3rd parties both locally and overseas.**
 - ii. **1st Plaintiff salary arrears with effect from the 27th June 2012 to 15th September 2012(date of resignation) Kshs. 1,000,050/=**
 - iii. **Special damages of 12 Million and 3 Million Kenya Shillings payable to the 2nd and 3rd Plaintiffs for breach of contract, namely, none payment of monthly retainers.**
 - iv. **General damages to all the Plaintiffs to be assessed as appropriate by this Honorable Court or in the alternative and without prejudice, an order for the loss of business for the Plaintiffs to be assessed by this Honorable Court.**
 - v. **Specific performance to perform the terms of the Agreements in respect of the 25% share of proceeds in respect of the back end of the Mau Mau referral claims between the parties as previously agreed in writing.**
 - vi. **The costs of the suit hereof together with interests thereon at court rates.**
2. The 1st Plaintiff subsequently and pursuant to the orders of this court on the 28th November 2014 filed a Further Amended Plaint praying for Orders:-
 1. **A Permanent order of injunction restraining and preventing the 1st, 2nd, 3rd, 4th and 5th Defendants from interfering with, transferring to other entities, and or running the project concerning the Mau Mau victims compensation claims or holding themselves out as duly authorized officers of the said companies, namely the 3rd, 4th and 5th Defendants or holding themselves out as Advocates and persons duly qualified to run the affairs of the above companies, namely, the 3rd, 4th and 5th Defendants;**
 2. **A mandatory order of injunction compelling the 1st, 2nd, 3rd, 4th and 5th Defendants to:-**
 - i. **The 1st, 2nd, 3rd, 4th and 5th Defendants to produce statements of accounts in respect of the 3rd, 4th and 5th Defendants from inception to date together with all the list of assets and liabilities of the said companies from inception to date and to produce detailed complete statements of all the bank accounts held in the name of/or on behalf of the said companies from inception to date.**
 - ii. **The 6th, 7th, and 8th, 9th, 10th, 11th and 12th Defendants to disclose the total amount of money paid out to the 1st, 2nd, 3rd, 4th and 5th Defendants to date as well as how much more is due and outstanding in respect of the said Mau Mau project payments;**
 - iii. **The 1st, 2nd, 3rd, 4th, 5th, 6th, 7th, 8th, 9th, 10th, 11th and 12th to (sic) Defendant to deliver up all the contracts/agreements/minutes with regard to all meetings held/all correspondence/companies resolutions from inception to date in connection with the Mau**

- Mau project;**
- iv. **The 1st, 2nd, 3rd, 4th, 5th, 6th, 7th, 8th, 9th, 10th, 11th and 12th Defendants to produce a full list of all their clients in relation to the Mau project.**
 - a. **The 1st Plaintiffs further prays that this Honorable Court do issue an order/judgment for:-**
 - i. **An order of tracing requiring the 1st, 2nd, 3rd, 4th and the 5th Defendants to deliver a list of all company and personal assets which are held directly or indirectly on their behalf by any 3rd parties both locally and overseas;**
 - ii. **1st Plaintiff salary arrears with effect from the 27th June 2012 to 15th September 2012 (date of resignation) Kshs. 1,000,050/= and further sum of Sterling Pound 34,316 unlawfully paid to the 1st Defendant;**
 - iii. **Special damages of 12 Million and 3 Million Kenya Shillings payable to the 2nd and 3rd Plaintiffs for breach of contract, namely none payment of monthly retainers;**
 - iv. **General damages to all the Plaintiffs to be assessed as appropriate by this Honorable Court or in the alternative and without prejudice, an order for the loss of business for the Plaintiffs to be assessed by this Honorable Court.**
 - v. **Specific performance to perform the terms of the Trust deed Agreement dated 26th December 2011 that Ronald Ochieng Onyango entered into with the 1st Defendant in respect of the 50% share of proceeds of the back end of the Mau Mau referral claims between the parties as previously agreed in writing.**
 - vi. **An order directing the 13th Respondent to deposit in Court any money/monies due to and owing and payable to the 1st, 2nd, 3rd, 4th, 5th, 6th, 7th, 8th, 9th, 10th, 11th and or 12th Defendants over Mau Mau claims or any money/monies due to and owing and payable to agents, assigns, successors in title, or any persons, claiming through any of the Defendants over Mau Mau claims.**
 - vii. **The costs of this suit hereof together with interests thereon at Court rates.**
 3. **The 2nd Plaintiff also filed a further Plaintiff which was later amended on 5th February 2015 and filed in Court on the same day.**

THE 1ST PLAINTIFFS' CASE

4. **It is averred by the 1st Plaintiff that on or about 26th December 2011 his principal became a shareholder of the 3rd Defendant by virtue of a Trust Deed executed by the 1st Defendant and his principal. In that case, it is the Plaintiff's position that the 1st Defendant was his trustee. The 3rd Defendant was to, *inter alia*, collect and refer Mau Mau claims from Kenya to various solicitors within the UK with the 5th Defendant. The 1st Plaintiff further averred that the 1st Defendant was at all material times holding 400 shares on behalf of Ronald Onyango (his principal) by way of a duly executed Trust Deed dated 26th December, 2011 and the 2nd Defendant held a further 400 shares. According to the 1st Plaintiff, the 2nd Defendant and by consent of all concerned parties duly executed documents of transfer authorizing the Registrar of companies to transfer his 400 shares to the 1st Plaintiff's principal and at the same time he was required to effect further changes whereby the 1st Plaintiff would replace him as the new director in the 3rd and 4th Defendant Companies.**
5. **The 1st Plaintiff accuses the 1st and 2nd Defendants of negligent mismanagement of the 3rd and 4th Defendant Companies, which he states has seriously prejudiced his interests in the said Companies. The 1st Plaintiff also contends that the said Defendants abdicated their respective obligations and duties to him and are thus guilty of breach of trust, guilty of fraud, deceit and dishonesty.**
6. **The 1st Plaintiff's case against the 7th, 8th and 9th Defendants is that at all material times the said Defendants were used to conceal profits and earnings due to the 3rd and 4th Defendants in which**

he owns shares thereby denying him profits and gains. It is the 1st Plaintiff's contention that the 1st and 2nd Defendants have in the past transferred monies earned by the 3rd and 4th Defendant Companies to the said 7th, 8th and 9th Defendants, without his knowledge and in violation of his right as a shareholder.

7. In brief, it is the above circumstances that led the 1st Plaintiff to sue the Defendants and to seek for the orders he has sought in his pleadings as already listed above.

THE 2ND PLAINTIFF'S CASE

8. The background to the 2nd Plaintiff's case is that he started dealing with the Defendants in the processing of Mau Mau claims in 2011 leading to their commercial relationship. The 2nd Plaintiff averred that the agreements could be traced back to the mother agency agreement between Ashton Fox Solicitors Limited and Griffin Legal UK Limited entered into on 20th September, 2011
9. The 2nd Plaintiff averred that he had a consultancy agreement with the 3rd and 5th Defendants effective from 22/09/2011 that was to run for one year. As per the Consultancy agreement, he was to be paid Kshs. 1,000,000/= for his services per month. He however admits that he was never given any signed copies of this agreement for his records. The 2nd Plaintiff further averred that the Defendants used his law firm to collect the Mau Mau Claims for a period of 29 months and he was thus claiming for a total sum of Kshs.29,000,000/=. It is his assertion that he continued to provide consultancy services to the Defendant companies despite the fact that he had only received a payment of approximately Kshs.1,500,000/= for work done.
10. The 2nd Plaintiff further claims in paragraph 24 (b) of his Further further amended Plaintiff 25% back-end profits due to the 1st, 2nd and 3rd Defendants at the conclusion of the Mau Mau cases processed by him as stipulated in the main contract between the 3rd and 5th Defendant and Ashton Fox Solicitors Ltd. It is submitted by the 2nd Plaintiff that the claims were done under the consultancy agreement between himself and the Defendants. The 2nd Plaintiff also averred that from time to time he would give advice, guidance, go through Claimant's Statements, engaging with the Mau Mau victims and issue statements during the claims processing periods.
11. The 2nd Plaintiff has pleaded fraud on the part of the Defendants and particularized the same and has sought injunctive orders against the Defendants in relation to the 3rd, 4th and 5th Defendants' assets, liabilities and statement of accounts. He has also sought full disclosure of the entire list of Mau Mau claims in the UK as well as an order for depositing in Court of all monies due and owing to the Defendants on account of the Mau Mau claims processing proceeds.

THE 3RD PLAINTIFF'S CASE

12. It was averred by the 3rd Plaintiff (now deceased) that on or around 1st December 2011 he was engaged as a consultant by the 3rd Defendant. To this end they duly executed a written agreement on the same date on the basis of terms and conditions appearing therein. In the said agreement the 3rd Plaintiff was placed on a monthly retainer of Kshs. 225,000/= with effect from the date of the said contract.
13. It was the 3rd Plaintiff's position that despite having fulfilled his part of the contract, the 3rd Defendant had not paid the agreed sum in monthly retainer as it was obligated to, under the consultancy agreement. What had been paid was a sum not more than Kshs. 450,000/= which the 3rd Plaintiff described as out of pocket expenses and partial payment towards the retainer.
14. It is the foregoing circumstances that prompted the 3rd Plaintiff to file the present suit alongside the other Plaintiffs as it became apparent to him that the 3rd Defendant was not honoring the Consultancy agreement. The 3rd Plaintiff claims Kshs. 3 million being the worth of the Consultancy services rendered under the agreement which was allegedly never paid for by the 3rd Defendant.

THE DEFENDANTS' CASE

15. The 1st and 2nd Defendants filed a Defence to the 1st Plaintiff's Further Amended Plaintiff, which Defence was later amended on 11th December, 2014 and filed in Court on the same date. The said Defendants essentially deny the 1st Plaintiff's claim against them jointly and severally. The 1st and 2nd Defendants also relied on their Amended Statement of Defence in denying the 2nd and 3rd Plaintiffs' claims.
16. The 3rd to 9th Defendants although represented during the interlocutory stages by Counsel in this suit, failed to file any Defence.

THE HEARING

17. The hearing of the suit commenced on 22nd April 2015 and was concluded on 22nd January, 2016.
18. The 1st Plaintiff, Ronald Onyango, testified on behalf of his principal his own behalf. The 2nd Plaintiff testified on his own behalf and called two other witnesses, Stephen Kimani Mundia and Edith Nambisia. The 3rd Plaintiff (now deceased) was substituted by the wife, Josephine Awuor Agumba who testified on his behalf.
19. The 1st Defendant testified on his own behalf and on behalf of the 2nd Defendant.

THE WRITTEN SUBMISSIONS

20. The 1st Plaintiff filed his submissions dated 29th January, 2016 on even date. The 2nd Plaintiff filed his written submissions dated 11th February, 2016 on 15th February, 2016 while the 3rd Plaintiff filed his submissions dated 2nd February, 2016 on 3rd February, 2016. In response, the 1st and 2nd Defendants filed their submissions dated 26th February, 2016 on even date.

ISSUES FOR DETERMINATION AND ANALYSIS

21. I have considered the pleadings herein, the oral evidence given by the Plaintiff's and the written submissions by Counsel for the respective parties. Having done so, this Court will address each of the Plaintiff's claims then conclude by addressing the common prayers among the Plaintiffs.
22. Before embarking on the main issues, the Court will deal with a preliminary issue raised by the 1st and 2nd Defendants in their submissions. This is with regard to service of summons upon the 3rd to 9th Defendants. It was the 1st and 2nd Defendants' submissions that the Plaintiffs failed to extract and serve summons upon the 3rd to 9th Defendants as required under Order 5 Rule 1 of the Civil Procedure Rules. I have perused the file and noted that summons duly signed and sealed by this court were issued with regard to the 1st to 6th Defendants. There is however no evidence of service by the Plaintiffs to the said Defendants by way of an affidavit of service upon all of the aforesaid Defendants. This Court acknowledges that the service of summons upon Defendants is paramount as the same adheres to the rules of natural justice by according the Defendants a right to be heard. Service of summons is also couched in mandatory terms under Order 5 of the Civil Procedure Rules and therefore the same should be adhered to strictly.
23. The above notwithstanding, each case should be looked at according to their unique circumstances. It is also worthy to note that this Court is enjoined under Sections 1A and 1B of the Civil Procedure Act to facilitate the just and expeditious disposal of disputes. The Court also has inherent powers under Section 3A of the Act to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court without being limited by the provisions of the Act.
24. In the present matter much as there is no evidence of service, the 1st and 2nd Defendants submitted to the jurisdiction of this Court by filing pleadings and participating in the trial of this suit. Therefore the issue of service does not apply. The 3rd, 4th and 5th Defendants were represented by P.W. Wena & Co. Advocates at the interlocutory stages though they did not file any Defences and it seems the said Advocates ceased acting on their behalf. The 6th Defendant was also represented by Miller & Company Advocates at the interlocutory stages. However, the said Firm of Advocates officially ceased acting for the 6th Defendant before they could file a Defence on its behalf.

25. With regard to the 3rd and 4th Defendants, it is not in dispute that the 1st and 2nd Defendants are directors to the said Companies. This can be discerned in the pleadings and even the testimony given by the witnesses in this matter. In fact the 1st and 2nd Defendants in their submissions have severally referred to the 3rd Defendant Company from a point of knowledge. Under Order 5 rule 3 of the Civil Procedure Rules Service of summons on a corporation (in this case a Company) may be effected on the director or any other principal officer of the corporation. The 1st and 2nd Defendants as directors of the 3rd and 4th Defendant companies were not served with summons. However, they were all along aware of this suit against the said Companies as they actively participated in the suit till hearing. The prudent thing to do would have been for them to seek representation for the companies to protect their interests. In the circumstances, it is the view of this Court that this is one of those cases where knowledge of the case outweighs the need for service. Therefore, for the purposes of this Judgment it shall be considered that the said Defendant Companies were aware of the present suit.
26. The 5th Defendant which was an agent of the 3rd Defendant is also deemed to have been aware of the suit. The said Company was also represented by the firm of P.W Wena & Co. Advocates alongside the 3rd and 4th Defendants in the interlocutory stages of this suit.
27. As for the 6th Defendant, its Advocates officially ceased acting for them. There is no evidence of service of summons upon them. However, the said former Advocates entered appearance on its behalf on 16th September, 2013 which is sufficient proof that the 6th Defendant was well aware of the suit against it. In that case, the 10th Defendant acting as liquidators of the 6th Defendant is deemed to have been aware of the suit as well.
28. With regard to the other Defendants, that is, the 7th, 8th, 11th and 12th Defendants, there is no evidence of service upon them by the Plaintiffs. The said Defendants did not enter appearance in the suit and therefore did not file any Defences. The only inference therefore is that they were not aware of the suit against them. The rules of natural justice require that no man should be condemned unheard and therefore no Judgment should be entered against these Defendants, Default or otherwise. I now turn to the substantive part of this Judgment which will address the Plaintiffs' Claims.

The 1st Plaintiff's Claim

29. The 1st Plaintiff claims for his salary arrears of Kshs. 1,000,050 with effect from 27th June, 2012 to 15th September, 2012 (date of resignation) and a further sum of Sterling Pound 34,316 allegedly unlawfully paid to the 1st Defendant.
30. The 1st Plaintiff testified that he and the 2nd Defendant had agreed to pay each other 10,000 pounds per month once the 3rd Defendant Company was registered. However, it is his contention that the Company failed to pay him hence the claim of salary arrears. The 1st Defendant on the other hand testified that on 17th January, 2012 he paid the 1st Plaintiff £ 10,000 from his personal account for introducing him to Ashton Fox Limited. The foregoing notwithstanding, the 1st Plaintiff failed to produce any document to show that he was entitled to the monthly salary of £ 10,000 per month. He also did not justify the period from 27th June 2012 to 15th September 2012 when he claims to have resigned and there is no proof whatsoever for the total amount of salary arrears of Kshs. 1,000, 050/= he claims. In summary, the 1st Plaintiff has failed to substantiate the special damages which must be strictly proved.
31. With regard to the amount of 34, 316 Sterling Pound, the 1st Plaintiff testified that the 1st Defendant paid himself the said amount in excess of what they had agreed as revealed by the Bank documents filed by the 3rd Defendant. The 1st Defendant denied ever being paid such an amount and testified that the first time he came across those figures was in the Court documents. However, on cross-examination he admitted that the said amount was paid to his account by the 3rd Defendant being payment for a personal transaction with Ashton Fox who had never paid the 3rd Defendant's invoices.
32. At this juncture it is not clear why a personal transaction had to be paid through the 3rd Defendant

- Company and not directly to the 1st Defendant's personal account. The 1st Defendant was the 1st Plaintiff's trustee and he ought to make an account of the said amount to the 1st Plaintiff. On the other hand, the 1st Plaintiff has not tabled any evidence as to how much they had agreed to pay each other in submitting that the 1st Defendant had paid himself in excess of what they had agreed. In any case, if such payment to the 1st Defendant was illegal, it should be transmitted back to the 3rd Defendant Company and not to the 1st Plaintiff. In the circumstances the 1st Plaintiff has not proved to this Court that he is entitled to the amount of 34, 316 Sterling Pound. The same is under special damages and must strictly be proved.
33. It is also the 1st Plaintiff's claim that he is entitled to share 50% of the agreed fees that would have been earned by the 3rd, 4th and 5th Defendants from the Foreign Commonwealth Office on behalf of the British Government to Mau Mau victims for compensation due to them for the activities perpetrated by the British Government to them during the emergency period. He relied on the Trust Deed executed by him on 26th December, 2011 and averred that by this Trust Deed, the 1st Defendant was to be his trustee to hold 400 shares or 50% share in the 3rd Defendant's Company at an agreed consideration of Kshs. 40,000/- as per clause B. The 1st Plaintiff therefore claims for specific performance for the 1st Defendant to perform the terms of the Trust deed Agreement in respect of the 50% share of proceeds of the back end of the Mau Mau referral claims between the parties as agreed in writing.
34. Nowhere in the Trust Deed is it indicated that the 1st Plaintiff was entitled to 50% share of proceeds of the back end of the Mau Mau referral claims. It is however clear that the 1st Plaintiff was to be entitled to 400 shares of Kshs. 100 each which is essentially 50% of the Company's shares. It is on the basis of the 50% ownership in the 3rd Defendant Company that the 1st Plaintiff claims for any profits that may have been paid to the 3rd Defendant by Tandem Ltd.
35. However, at the time of filing this suit the Trust Deed the 1st Plaintiff is relying on was not executed. It was not signed by the 1st Defendant and the same had not been registered. The duly executed Trust Deed produced by the 1st Plaintiff in this Court was registered on 27th August, 2014 after the filing of the suit. The question therefore is whether or not the 1st Plaintiff had any interest or shares in the 3rd Defendant Company prior to its registration. The circumstances of this case show that the Trust Deed was effective from when the 1st Plaintiff signed it. The 1st Defendant admitted in Court that there existed a Trust deed between him and the 1st Plaintiff. His contention however was that the 1st Plaintiff had not paid any consideration for the shares held in the 3rd Defendant. The 1st Plaintiff on the other hand maintained that he paid the consideration of Kshs. 40,000/= for the shares. This Court has perused Clause C of the said Trust Deed which attests that consideration was paid with regard to the 400 shares. Therefore, the 1st Plaintiff has on a balance of probability proved to this Court that he paid the consideration for the shares. The 1st Defendant has also not disputed the registered Trust Deed produced by the 1st Plaintiff in Court meaning it was the intention of the parties all along to enter into a trust relationship.
36. In that case, this Court is of the view that the 1st Plaintiff is entitled to information about the dealings of the 3rd Defendant Company to ensure his interests are adequately catered for. The 1st Defendant as his trustee is obliged to provide any necessary information as regards the Company. This Court has acknowledged that the 1st Plaintiff is entitled to 50% ownership of the 3rd Defendant and it would also follow that the 1st Plaintiff is then entitled to 50% share of proceeds of the back end of the Mau Mau referral claims as the 3rd Defendant was engaged in the said projects. However, this Court is not privy to how much the 3rd Defendant could have earned from these Mau Mau Claims or is yet to earn. It is upon the 1st Plaintiff to follow up as he has interest in the said 3rd Defendant Company. The best this Court can do is to order a statement of accounts from the 3rd Defendant Company.

The 2nd Plaintiff's Claim

37. The 2nd Plaintiff claims for the sum of Kshs. 12 million in special damages for breach of contract being the non-payment of monthly retainers and Kshs. 29 million for the use of the name of his law firm by the Defendants for 29 months. In his testimony however, the 2nd Plaintiff claimed for Kshs. 17 million as damages for the use of his name without his knowledge.
38. The Kshs. 12 million claimed by the 2nd Plaintiff is based on a Consultancy agreement which was to run for 12 months. Under the said Consultancy agreement, the 2nd Plaintiff was to be paid Kshs. 1,000,000/= per month.
39. The 2nd Plaintiff averred that he was only paid Kshs. 1, 500,000/= under the agreement. The 1st Defendant confirmed the aforesaid payment and testified that it was for a period of 3 months for the 2nd Plaintiff's work of witnessing the documents with regard to Mau Mau claims. During the hearing, the 2nd Plaintiff further testified that Motor Vehicle KBH 655 K from the 1st Defendant was part payment to him under the agreement.
40. The 2nd Plaintiff submitted that the 1st Defendant admitted that he was entitled to the monthly retainer of Kshs. 1 million in two emails. In the said email the 1st Defendant proposed to the 2nd Plaintiff that he would be paid Kshs. 1 million every month for a period of 12 months. According to the 1st Defendant this was based on some representations from the 2nd Plaintiff that he had a number of Mau Mau Claims. It was however the 1st Defendant's testimony that when he came to Kenya he realized that the 2nd Plaintiff had not collected claims as agreed and therefore he used some of the 2nd Plaintiff's staff and employed others in collecting the said claims. The 1st and 2nd Defendants submitted that it is at this point that they embarked through the 3rd and 4th Defendants to collect claims from Mau Mau victims and the 2nd Plaintiff was only useful in so far as witnessing the same were concerned. This evidence by the 1st Defendant is however, not entirely correct because the 2nd Plaintiff provided witnesses and proved that he was actively engaged in securing claimants. What is clear is that somewhere along the line the 2nd Plaintiff disagreed with the 1st Defendant. This disagreement however did not solve how the 2nd Plaintiff was to be paid his fees. It also appears the anticipated Consultancy agreement was never executed. This however does not negate the clear intention of the parties. The difficulty, however, is how to assess the payment due to the 2nd Plaintiff under that consultancy agreement. While there is no duly executed consultancy there is an e-mail dated 12th March 2012 under which the 2nd Plaintiff admits receiving Shs.500,000/= and was awaiting a balance of Shs.1,500,000/=.
41. Having perused the said emails, it is not in dispute that a proposal had been made for payment of Kshs.1,000,000/= to the 2nd Plaintiff as Consultancy fees. It was then reduced to Kshs.500,000/= based on claims that had been delivered. However, these emails cannot be said to be binding as they were based on conversations between the parties and it seems that the payment was to be made based on the parties reaching a gentleman's agreement. Given the difficulty of assessing what is due to the 2nd Plaintiff under the said consultancy, it is the finding of this court that the 2nd Plaintiff's claim for Shs.12,000,000/= is not proved, and that in any event the part payment of Shs.1,500,000/= plus motor vehicle Registration No. KBH 655 K is an acceptable compromise in the circumstances.
42. With regard to the Kshs. 29 million, the 2nd Plaintiff's case is that the Defendants used his name for 29 months without his knowledge and consent. There was ample evidence of the use of the 2nd Plaintiff's name in the documents used by the 1st Defendant. The 2nd Plaintiff's claim for Sh.29,000,000/= would imply that his claim is special damages which must be strictly proved. However, that is not the case. The Plaintiff is simply claiming damages for an unauthorized use of his trading tools. It is upon the court to quantify such damages, being in the nature of general damages. The Plaintiff reduced this claim to Shs.17,000,000/=. The Law Society of Kenya, while not being very categorical however, noted in their letter dated 10th March, 2015 that the receipt stamps on some court papers showed that Tandem Law and Griffin Legal group of companies were working in partnership with the firm of the 2nd Plaintiff. They also noted that it had been brought to their attention that Griffin Legal group of companies as the local agent of Tandem Law received instructions from Mau Mau victims using the law firm of Rabala & Company Advocates. I believe this letter, as addressed to the 2nd Plaintiff's firm, was calling for more evidence or

information as regards the observations made which were by all means not conclusive. However, there was adequate evidence before the court that the 2nd Plaintiff's name and stamps were being used by the 1st Defendant without either the 2nd Plaintiff's knowledge or consent. This is not just an action in bad faith but is also an act of fraud. This court is satisfied that the 2nd Plaintiff has proved that he is entitled to general damages for abusive and unauthorized use of his name and tools of trade, and awards the 2nd Plaintiff Shs.9,000,000/=. This assessment is based on the fact that the use of the 2nd Plaintiff's name and tools of trade has the capacity of earning the Defendant a huge amount of money in professional fee, and the 2nd Plaintiff is hence entitled to a minute fraction of that fees.

43. The 2nd Plaintiff also claims for 25% share of the back end profits at the conclusion of the Mau Mau cases. The 2nd Plaintiff submitted that each claim was attracting a back-end profit of £ 750 out of which he was entitled to 25%. Therefore his total entitlement was at £ 1,511,437.50 (£750 x 8061 x 25%). He referred the Court to the Profit Sharing Agreement dated 25th July 2012 and testified that this agreement was confirmed by an e-mail from the 1st Defendant dated 21st October, 2012. He also referred to the agreement dated 20th September, 2011 in his initial list of documents and averred that according to the said agreement £250 was to be paid in advance to the 3rd Defendant on each claim forwarded to the UK and the balance of £750 pounds per claim was to be paid after the claims were settled.
44. With regard to the Mau Mau claims the 2nd Plaintiff testified that he had conceived the idea of collecting claims from Mau Mau victims in Kenya and the same were to be forwarded to the 1st Plaintiff to register the same in the UK.
45. The 2nd Plaintiff's testimony is that a dispute arose when they realized that Tandem Law was using the name of his law firm to get instructions from Mau Mau Victims without his knowledge and consent. It is at this time that he also fell out with Griffins Legal Kenya Limited. The 2nd Plaintiff then involved the Law Society of Kenya to arbitrate over the issue. He testified that the meeting called by the LSK on 1st June, 2013 identified his law firm as the firm that processed 8061 claims from the Mau Mau victims. On the other hand the 1st Defendant testified that the minutes acknowledged that Tandem law had 8061 claims and not the 2nd Plaintiff himself.
46. The 1st Defendant therefore disputed the claim by the 2nd Plaintiff that he had collected 8061 claims. It was his testimony that the 2nd Plaintiff had not gone to the field, but that he ended up facilitating the collection of some of the Mau Mau claims. He testified that the 3rd Defendant collected 2,200 claims which they sent to Ashton Fox Limited. When he realized that Ashton Fox was not settling their invoices he looked for other companies and got into partnership with Tandem Law. It is the 1st Defendant's testimony that Tandem Law did not take over the previous claims. Tandem Law together with the 3rd Defendant embarked on processing witness statements and the 1st Defendant's testimony is that he used only two (2) of the 2nd Plaintiff's staff and paid them himself. According to the 1st Defendant, the 2nd Plaintiff never worked with them including the 3rd Defendant since Tandem Law took over.
47. I have perused the said minutes of the meeting held on 1st June, 2013. There was no conclusive statement to the effect that the 2nd Plaintiff had processed 8061 claims. The 2nd Plaintiff sought to know whether Tandem Law took personal witness statements from all their 8061 clients. Tandem Law on the other hand stated that they could not take all the 8061 Statements to Court as the Courts in the UK could not accommodate them over logistics. The Parties were thereafter requested by LSK to supply a list of their clients to ensure there was no duplication of clients. This Court is not aware whether the parties complied. Nevertheless, it cannot be said with certainty that the 2nd Plaintiff collected 8061 claims which were successfully forwarded to the UK and processed.
48. Moreover, it is not in dispute that the back-end profit was dependent on the Agency agreement dated 20th September, 2011 entered between Ashton Fox Solicitors Limited and the 5th Defendant (UK Agent of the 3rd Defendant). The 1st Defendant has testified that they disengaged with Ashton Fox limited when their invoices were not paid and later started working with Tandem

Law. This evidence has not been disputed by the 2nd Plaintiff and there is nothing on record to show that Ashton Fox Limited paid the invoices. In that case, it appears the Agency agreement between the 5th Defendant (agents of 3rd Defendant) and Ashton Fox Limited was frustrated. In the event that there were some profits paid to the 5th Defendant by Ashton Fox Limited (which evidence has not been shown before this Court), then the 2nd Plaintiff is at liberty to pursue his 25% share, of course upon proof that he forwarded claims that were successfully processed. The finding of this court on the issue is that the 2nd Plaintiff has not proved this aspect of his claim and this court lacks the capacity to determine how many claims were processed by the 2nd Plaintiff.

49. There is also nothing to show that Tandem Law took up any claims from Ashton Fox Limited in form of an official document or otherwise. The emails referred to by the 2nd Plaintiff do not in any way infer that Tandem Law took over claims from Ashton Fox Limited.

The 3rd Plaintiff's claim

50. The 3rd Plaintiff's claim is for special damages to the tune of Kshs. 3

million being non-payment of monthly retainers. He relied on the duly executed Consultancy agreement executed between him and the 3rd Defendant to claim Kshs. 3 million being the worth of consultancy services rendered by him to the 3rd Defendant under the agreement. It was submitted by Counsel for the 3rd Plaintiff that in the absence of any defence from the 3rd Defendant, Judgment should be entered against the 3rd Defendant accordingly.

51. Notwithstanding the absence of a Defence from the 3rd Defendant, the 3rd Plaintiff is required to prove his claim on a balance of probability as this matter proceeded for trial. A look at the consultancy agreement reveals that the 3rd Plaintiff was to provide consultancy services to the 3rd Defendant as and when the same were required. He was also to provide technical legal advice in respect of Mau Mau Torture Claims with effect from 1st December 2011. The 3rd Plaintiff was to be paid a monthly retainer of Kshs. 225,000/=.

52. With regard to the retainer, the understanding was that the same was to be paid monthly so long as the 3rd Plaintiff was still engaged by the 3rd Defendant.

53. However, this consultancy agreement did not have an 'end date' and termination could be made by either party giving a one month's notice to the other. No evidence was given before this Court of the termination of the consultancy agreement by either party to the contract. It was the 3rd Plaintiff's submissions that he offered the consultancy services as described in the Consultancy agreement until the time this suit was filed in March, 2013, when it became apparent to the 3rd Plaintiff that the 3rd Defendant was not honouring the agreement. If we were to go by the 3rd Plaintiff's submissions, it would mean he offered consultancy services to the 3rd Defendant for 15 months, that is, with effect from 1st December 2011 to March 2013 when this suit was filed. Subsequently the 3rd Plaintiff would be entitled to Kshs. 3,375,000/= (Kshs. 225,000 x 15) as retainer fees less the Kshs. 450,000/= which he admitted he had already been paid. That would give us a figure of Kshs. 2,925,000/= yet the 3rd Plaintiff is claiming Kshs. 3 million. However there is no evidence that the said consultancy services, were terminated. In the view of this court, the 3rd Plaintiff has proved on a balance of probability that he is owed Shs. 2,925,000/= based on that Consultancy Agreement.

Common Prayers

54. The Plaintiffs in their initial joint Plaint sought for an order of tracing requiring the 1st, 2nd, 3rd, 4th and 5th Defendants to deliver a list of all company and personal assets, general damages or in the alternative loss of business.

55. With regard to the order for tracing, the same was already granted at the interlocutory stage and can be reinforced in this Judgment. It has been established that the 1st Plaintiff has shares in the

- 3rd Defendant and is therefore entitled to a list of the 3rd Defendant's Company and personal assets as well as the assets of the 4th and 5th Defendants which worked together with the 3rd Defendant in the Mau Mau projects.
56. The 1st Plaintiff subsequently filed a Further Amended Plaintiff and prayed for orders of permanent injunction restraining the 1st to 5th Defendants from interfering with or running the project concerning the Mau Mau victims compensation claims or holding themselves as duly authorized officers of the said companies. However, as submitted by the 1st and 2nd Defendants, this order cannot be granted as the said Defendants are duly authorized officers of the 3rd, 4th and 5th Defendants. Besides, the Plaintiffs have not given any justifiable reasons as to why the said Defendants should be restrained from dealing in the Mau Mau projects.
57. With regard to the prayers for mandatory injunction, it is trite law that the same is to be granted in the clearest of cases. See the Court of Appeal case of **Kenya Breweries Ltd- Vs- Washington Okeyo [2002] IEA 109**.
58. The prayers for mandatory injunction sought for by the 1st Plaintiff include production of statements of accounts in respect of the 3rd, 4th and 5th Defendants. It has already been stated above that by virtue of the 1st Plaintiff's interest in the 3rd Defendant Company he is entitled to know the dealings of the said Company. He is therefore entitled to a Statement of accounts of the 3rd Defendant Company from his trustee and co-director. He is also entitled to Statement of accounts of the 4th and 5th Defendant Companies as they worked together with the 3rd Defendant Company and are run by the 1st and 2nd Defendants. The 1st Plaintiff is also entitled to any relevant documents from the 3rd Defendant Company in terms of minutes, contracts and agreements as well as the full list of clients in relation to the Mau Mau project.

DISPOSITION

59. In the upshot, Judgment is entered herein for the Plaintiffs as follows.

- a. ***An Order of tracing requiring the 1st, 2nd, 3rd, 4th and the 5th Defendants to deliver a list of all company and personal assets which are held directly or indirectly on their behalf by any 3rd parties both locally and overseas to the 1st Plaintiff.***
- b. ***A mandatory order of injunction compelling the 1st, 2nd, 3rd, 4th and 5th Defendants to produce statements of accounts in respect of the 3rd, 4th and 5th Defendants from inception to date together with all the list of assets and liabilities of the said companies from inception to date and to produce detailed complete statements of all the bank accounts held in the name of/or on behalf of the said companies from inception to date.***
- c. ***The 6th, 9th and 10th Defendants to disclose the total amount of money paid out to the 3rd 4th and 5th Defendants to date as well as how much more is due and outstanding in respect of the said Mau Mau project payments;***
- d. ***The 3rd Defendant to deliver up all the contracts/agreements/minutes with regard to all meetings held/all correspondence/companies resolutions from inception to date in connection with the Mau Mau project;***
- e. ***The 3rd Defendant to produce a full list of all their clients in relation to the Mau Mau project.***
- f. ***Judgment is entered for the 3rd Plaintiff against the 3rd Defendant in the sum of Kshs.2,925,000/=.***
- g. ***A declaratory judgment is hereby entered for the 1st Plaintiff that he is entitled to 50% ownership of the 3rd Defendant and is also entitled to 50% proceeds of the back end of the Mau Mau referral PTV claims as the 3rd Defendant was engaged in the said project. Pursuant to this the 3rd Defendant shall avail to the 1st Plaintiff past and future financial statements and accounts.***
- h. ***Judgment is entered for the 2nd Plaintiff against the 1st, 2nd, 3rd, 4th 5th, 6th and 10th Defendants in the sum of Kshs.9,000,000/= being general damages for abusive and***

- unauthorised use of the 2nd Plaintiff's professional name and tools of trade.*
- i. *It is also the judgment of this court that since the Mau Mau claims are still being processed, the orders given herein may be reviewed, and the parties are at liberty to seek further directions from this court after the finalization of the Mau Mau claims, and further that orders and declarations herein may be the subject of fresh suits which parties may find necessary depending on the finalization of the said Mau Mau claims.*
 - j. *Costs shall be for the Plaintiffs.*

READ, DELIVERED AND DATED, AT NAIROBI

THIS 8th DAY OF APRIL 2016.

E. K. O. OGOLA

JUDGE

Ruling Read in open court in the presence of:

Mr. Omino for Plaintiff

Mr. Rambo for Defendant

Teresia – Court Clerk