



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (MILIMANI LAW COURTS)**  
**CIVIL SUIT 943 OF 1999**

**KENYA POSTS AND TELECOMMUNICATION CORPORATION...PLAINTIFF**

**VERSUS**

**BENJA INVESTMENTS LTD.....1<sup>ST</sup> DEFENDANT**

**GEOFFREY C KIRUNDI t/a CO ADVOCATES.....2<sup>ND</sup> DEFENDANT**

**RULING**

The background information to this ruling is that the plaintiff had moved to this court and filed a plaint dated 11<sup>th</sup> day of May 1999 and filed the same date against the defendant herein. Summons to enter appearance were taken out and served on the defendant who entered appearance dated 19<sup>th</sup> day of May 1999 and filed on the 20<sup>th</sup> day of May 1999 simultaneously. Filed with the memo of appearance, was a defence and counterclaim also dated and filed the same date. The plaintiffs' reply to defence and defence to counterclaim is dated 8<sup>th</sup> June 1999 and filed the same 8<sup>th</sup> June.

It is on record that after pleadings were closed parties did discovery and then set down the suit for hearing. A perusal of the record reveals that hearing commenced in this court on 7/10/05. Trial proceeded. When the plaintiffs first witness was taken through the motion of the averments in the plaint, which completed, counsel for the plaintiff then started taking the witness through the averments in the defence. Upon reaching paragraphs 19, the court, noticed that what the plaintiffs' counsel was putting to the witness as contents of the defence which had allegedly been served on them differed from the content of the defence that the court, was using. After a few exchanges off the record, the matter was adjourned briefly to enable both counsels compare the copies they had with the court's, copy and see if they could find an amicable solution to the problems.

At 1.20 P.M., the parties convened. Counsel for the plaintiff drew the courts', attention to the handwritten notes of Visram J as he then was (now JA) in an application for summary judgement which according to counsel went to show clearly that paragraphs 23-27 of the defence were infact admissions of the defendant having received the sum of 62m. Those remarks by the plaintiff, were said to be supported or added weight to by the content of paragraph 8 of the replying affidavit to the application for summary judgement. Counsel said it was now surprising that the record has a different defence, denying payment and a replying affidavit enumerating how the installments were not paid. In the learned counsels' opinion these pleadings are crucial to the plaintiffs' case, and invited the court, to give a firm declaration on the same. In addition to the above, counsel requested the court, to make an order for the file to be kept under

lock and key.

In response, the defence counsel stated that they are a stranger to the alleged alterations, and of importance, to them is that what the court, has is what they have in their possession, and if the plaintiffs have a different one, they have no right to insinuate that the alteration must have come from the defendant. They invited the court to note that the learned judges' hand written notes reflects the submissions made by the plaintiffs' counsel only. They do not contain the reply from the defence because the application for summary judgement was withdrawn, and as such these will not assist the court, in any way to determine the issue at hand, and as such the court, was urged to proceed to hearing on the basis of the pleadings as they are on the record.

Following that arguments the court, made the following orders: - heard sentiments from both sides, and the court, makes the following orders

1. *"File to be kept in the strong room*
2. *Photocopies of the hand written proceedings as at now to be given.*
3. *The entire hand written proceedings to be typed.*
4. *Formal submissions on the law as regards the new trend on the matter be made on 13/10/08 at 2.30 p.m.*

It is on record that the court allowed both sides to make representations on the way forward, in view of the unfolding events in the matter on 14/10/08 at 12.05 noon. These representations gave rise to this courts', ruling of 15/10/08 the salient features of the same are:-

- *The matter had come up for oral submissions to enable the court, sort out the issue of differing documents.*
- *The plaintiffs' counsel had intimated to the court, that they intend to apply to the court to expunge the offending papers from the record.*
- *Plaintiff wanted to ask the court, to investigate the matter as they suspect criminal activities and in doing so the court, was asked to look at the defendants' replying affidavit which had been filed in response to the application for summary judgement as a guide.*

The court, also went on to note in that ruling, that the defence had on the other asked the court, to agree with them that there was no need to avail the affidavit which had been filed in response to the application for summary judgement.

- *That the only remedy available to the plaintiff if they find a discrepancy between the copy of the defence they have, and the copy which is on the record, then they should put in a reply to that defence and or amend their plaint accordingly or alternatively the trial to proceed and if there are any issues to be clarified then, the same to be clarified during the trial in cross examination.*

After due consideration of the afore said rival arguments, this court, made orders that there is no way this court, could resolve that issue without the court, asking the parties to present all the three copies through affidavit evidence in order to enable the court, peruse the same. The court, went on to make an observation, that although it was in apposition to peruse the copy in the record, that alone would not help much as it will not be in a position to peruse that which the plaintiff claims to have been served with, and that which the defence claims to have retained as their own working copy. The same position applies to the copy of the replying affidavit which was also being alleged to have been served on the plaintiff in response to the application for summary judgement, which the court, could not make observations on it as it was not dealing with the application for summary judgement. For this reason, the court, found it fit to have that issue inquired into first before the trial could proceed. The court, opined that the best way to

conduct the inquiry was by way of a formal application objecting to the offending pleadings, in order to enable each side to annex all the papers they have to support their stand, so that the court, can scrutinize the same and arrive at a decision on the way forward in resolving this matter.

It is on the basis of the aforesaid back ground information that the plaintiff has presented the application subject of this ruling. It is brought by way of notice of motion dated 23<sup>rd</sup> October 2008 and filed on 24<sup>th</sup> October 2008. It is brought under section 3A of the CPA order L rule 1 of the CPR and all other enabling provisions of the law. It seeks four prayers:-

1. *That the defendants statement of defence and counterclaim of 31<sup>st</sup> May 1999 and replying Affidavit of Geoffrey Chege Kirundi of 12<sup>th</sup> March 2001 filed herein on the respective dates served on the plaintiff (Annexure 1 and 2 herein) do form part of the court record.*
2. *That the defendants forged and or altered statement of defence and counterclaim and replying affidavit of Geoffrey Chege Kirundi copies of which are marked as annexure 3 and 4 herein be expunged from the court, record.*
3. *That the Honourable court, be pleased to order the commissioner of police to investigate the events leading to the forgery, alteration of documents, and/or making the false documents and take appropriate action against the culprits.*
4. *That costs be provided for.*

The grounds in support are set out in the body of the application, annexures grounds in the supporting affidavits, written skeleton arguments and oral high lights in court. The major ones are as follows:-

- That the suit was filed by the firm of M/S Macharia Njeru and company advocates on or before 11<sup>th</sup> May 1999. Thereafter the matter was taken over by the firm of Ahmed Nasir Abdikair and company Advocates when they filed notice of change on 27<sup>th</sup> April 2000.
- The client file was not immediately released by the firm of Macharia Njeru and company Advocates as their fees had not been settled and by reason of this, the incoming firm of Advocates had to make copies of the plaint and the defence and counterclaim from the court, record. This copy is marked as annexure SKK1.
- Later on, when they received the file from Macharia Njeru and company Advocates, they forwarded the defence and counterclaim that had been served on the said advocate by the defendants to the incoming advocate. It is their stand that the said forwarded defence and counter claim is similar to the one which had been photocopied from the court file SKK1.
- That since the claim is liquidated, and the defendant had admitted the same in their defence, and counterclaim, the plaintiff/applicant herein moved to apply for summary judgement and striking out of the defence and counter claim.
- The defendants responded to that application by filing a replying affidavit of 12<sup>th</sup> March 2001, deponed by one Geoffrey Chege Kirundi, a copy of which is annexed as annexure SKK2
- Counsels of both sides appeared before Visram J as he then was (now JA) and canvassed the application for summary judgement during which the plaintiffs' counsel high lighted some of the paragraphs of the defence and counterclaim, which to them were clear admissions by the defendant receiving sums pleaded for by the plaintiff.
- That the judge then seized of the matter was transferred before concluding the application and when several attempts to finalize the application failed, the plaintiff opted to withdraw the application, in order to expedite the disposal of the matter.

- The plaintiffs' file mysteriously got lost necessitating the counsel on record to prepare a bundle of documents using copies of annexures which had been annexed to the replying affidavit which had been filed by the defendant, to the application for summary judgement. These documents bear the commissioning stamps of the defendants firm of advocates.
- That it is during the presentation of evidence by the plaintiffs witness that they discovered that the defence and counterclaim now on record and replying affidavit of Geoffrey Chege Kirundi, are now different from what was earlier filed and served on the plaintiffs advocates.
- There are a few documents which the applicants contends that they have also been altered otherwise everything else corroborates the original defence and counterclaim and replying affidavit annexure SKK 1 and 2.
- By reason of what has been stated above, the court, is invited to hold that annexure SKK1 is the correct defence and counterclaim that had been filed herein, and served on to the plaintiffs counsel, and as such it is the proper pleading to be regarded as the defence and counterclaim.

In their written skeleton arguments counsel simply reiterated the content of the grounds in the body of the application, and the supporting affidavit and then added the following:-

- The court, is invited to take their assertion as the correct position.
- Maintain that the defendants have never made an application to amend their defence, and counterclaim, and since the defence pleading now on record are different from what the plaintiffs counsel had photocopied from the court record, it is only instructive to note that the only possible way of effecting the said alteration can only be through alteration, forgery and or alteration of the affected pleading.
- The court, is urged to ignore the defence submissions in opposition to the application, as the court, is not dealing with an application for summary judgement, in process of which the court, can deal with issues such as the need for the plaintiff to prove its case at the trial (hearing) onus and burden of proof at the hearing, examination and cross-examination of witnesses and the discovery process. Herein the court, is specifically being asked to make a determination on a matter of forgery and or alteration of a pleading after the same had been filed and served.
- While agreeing in principle, that a party is allowed to amend its pleadings at any stage of the proceedings before judgement, this court, is enjoined not to entertain, allow and or condone such scandalous alteration and or forgery to stand.

Turning to the defence stand, there is no dispute that the defence has put in a replying affidavit in opposition to the applicant's application. The replying affidavit has been sworn by one Geoffrey Chege Kirundi, on the 31<sup>st</sup> day of October 2008. The salient features of the same are:-

- Concede that the defendants' statement of defence was filed on 31<sup>st</sup> May 1999 and copies thereof were served on the then advocate for the plaintiff Macharia Njeru and Company advocates and their stand is that these are copies that have all along been in the court file.
- That the plaintiff has not enlightened the court, where it purportedly obtained the disputed defence and counter claim and the replying affidavit.
- They deny the applicants assertion, that they had un equivocally admitted receipt of the alleged sums prayed for in the plaint, a stand fortified by the fact that they denied the same, moved to defend the application for summary judgement, which was later withdrawn, which withdrawal is a testimony that the plaintiff realized that the application was un meritorious, misconceived and incompetent. In view of the multiple triable issues that had been raised by the defendants in their statement of defence.
- They assert that what has been annexed as SKK4 is what was filed by them.

- They are strangers to the alleged altered replying affidavit SKK2
- Since the application for summary judgement was withdrawn without any condition before the plaintiff had finalized its submissions, this court, is functus officio and it cannot revisit that issue as the court, is functus officio office.
- Contend that nowhere in the affidavit in support of the application for summary judgement does it mention any un equivocal admission of the claim as shown by GCK 1.
- That since no final conclusion was made on the application for summary judgement, recourse to its proceedings will not assist this court, to arrive at any just and fair conclusion of this matter.
- Concede copies of pleadings in the file have been copied not only by the plaintiffs but by the CID, AGs office, and Kenya Anti-corruption commission while carrying out investigation. It is asserted by them that if any record was tampered with, then the same was tampered with by the plaintiff and other agencies who photocopied pleadings from the said court, record without the authority of the court.
- Contend that the court, is bound by law only to look at the pleadings marked as SKK3 and 4, which are on the record, and not any other extraneous documents whose origins are not known.
- They strongly object to the plaintiffs move to replace the defendant's pleadings on record without their consent.
- The court, is invited to hold that even if the disputed defence and counterclaim as well as the replying affidavit are admitted in evidence by this court, the onus still remains on the plaintiff to prove its case on a balance of probability.
- The defendant is entitled to be heard on the basis of the pleadings they have put on the court, record as their pleadings which are properly on the record.
- If the plaintiff feels prejudiced in any way, they are at liberty to amend their pleadings accordingly, more so when the onus is on the plaintiffs to prove the case on a probability of success.
- They denied any knowledge of the alleged offending documents which are wrongly being attributed to the defendants by the plaintiff, and it will be a travesty of justice if this court, were to accept these secondary pieces of evidence and then proceed to rely on them as opposed to the genuine documents on the record.
- Contend that there is no credible evidence against the defendants, more so when investigations are being contemplated as shown by prayer 4 of the application.
- Still contend that all the annextures, relied upon in support of the application do not comprise the best evidence capable of proving a claim.
- The copies of correspondences being paraded form part of alleged correspondence between the plaintiff whose originals can be produced and form part of evidence after being tested on cross-examination.
- That the principles of sound jurisprudence dictates against ruling in favour of the said documents.

In their written skeleton arguments, the defendants reiterated the content of the replying affidavit and then stressed the following points

- Annextures 3 and 4 to the applicants' application are not on record and the defendant is a stranger to their origin.
- The reason why the plaintiffs' seek the expunging of the documents sought to be expunged from the

record, is because they do not contain admissions favourable to the plaintiffs' claim notwithstanding, that it is the plaintiffs' duty to prove their claim on a balance of probability.

- Still maintain that they are strangers to the said documents.
- If the defence pleadings are expunged from the record, it will amount to shutting the defendant out of the proceedings.
- The application is just a ploy to delay the speedy disposal of the suit which was filed 9 years ago.
- It is unjustified to pin the alleged forgery and or alterations to the defendant when the plaintiffs' former lawyers on record or any other person could have tampered with the court record.
- Still maintain that if this court, were to yield to the plaintiff/applicants plea, it will amount to yielding to a plea to introduce extraneous evidence into the proceedings.
- The court, is reminded that there is judicial precedent to the effect that an affidavit is not evidence.
- Since fraud and conspiracy is a serious offence it is up to the plaintiff to prove the same.
- This court, cannot revisit the record on summary application proceedings as they were incomplete and did not yield to any decision.
- The court, to hold that the only way the plaintiff can prove their case is by producing original documents at the trial.

The defence also referred the court, to case law. The case of **GATEWAY INSURANCE CO. LTD VERSUS MJAHID (2003) IEA 74 CAK** where the CA held inter alia that *"it is incumbent upon a trial court, to look and consider a defence placed before it however irregularly."*

The case of **TRUST BANK LTD VERSUS AMALO CO. LTD (2003) IEA 350 (CAK)** In which it was held inter alia that *"the principle which guides the court, in the administration of justice when adjudicating on any dispute is that, where possible disputes should be heard on their own merits."*

(ii) *The appellant was entitled to be heard on the documents he had put before the court, were on record.*

The case of **HASSAN ALI ISSA AND CO. VERSUS JERAJ PRODUCE STORE (1967) EA S55**, on an application for summary judgement, it was held inter alia that *"if the court, grants leave to defend, the affidavit forms part of the record, but it is never evidence in support of the defence which was to be adduced in the ordinary way."*

The case of **CENTRAL KENYA LIMITED VERSUS TRUST BANK LIMITED AND OTHERS (1995-98) 2EA 57 (CAK)** where in it was held inter alia that *"the onus to prove the said allegations of fraud and conspiracy lay with the appellant. Fraud and conspiracy to defraud were very serious allegations and the onus of prima facie proof was much heavier on the Appellant, than in an ordinary civil case."*

The case of **MUTE KANGA VERSUS EQUATOR GROWERS (U) LTD (1995-1998) 2EA 219** where it was held inter alia that *"even where interlocutory judgement has been entered, the burden of proof rests on the plaintiff and the standard of proof is on the balance of probability."*

The case of **LIFE INSURANCE CORPORATION OF INDIA VERSUS PANESAR (1967) EA 614** where it was held inter alia that *"unless otherwise provided for in a written law, the rules of evidence do not apply to affidavits."*

(ii) *There being no such written law the best evidence does not apply to affidavits.*

On the courts', assessment of the facts herein, it is clear from the rules of procedure cited by the applicant that, there appears to be no clear provision either in the CPA or the CPR providing guidelines on how this court, should approach the resolution of this matter. The court, has no doubt that, that is why section 3A of the CPA has been cited, in addition to order L rule 1. It is trite law that order L rule 1 is simply a procedural provision, providing guidelines on whether a litigant should approach the seat of justice either through a notice of motion, or a chamber summons and no more. Section 3A on the other hand is an enabling provision. It is now trite law, as established by the court of appeal, and as dutifully followed by the superior court, that this court, has judicial notice of that, this provision is usually cited in situations where there is no other provision of law through which a litigant can access a relief. It enshrines what is popularly known in judicial jurisprudence as inherent jurisdiction of the court. The section reads:-

*“3A Nothing in this Act shall limit or otherwise affect the inherent power of the court, to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court”*

Applying this provision to the Rival arguments, herein this court, has been called upon to determine which of the two versions is to be protected. The applicant/plaintiff seeks protection from the court, in a summary form, on the basis that the content of the defence and counterclaim on the basis of which the defendant notified him in the first instance as a basis for resisting the plaintiff claim presented, herein, and which was served upon him is not the same as the content of the defence and counterclaim, that is currently on record, as at the time trial herein commenced, which fact was discovered when the plaintiffs' counsel was taking the plaintiffs' witness in examination in chief, through the said document. It is further their assertion that this original document, had been served upon their counsel then on record, and when the plaintiff changed counsels, the original counsel held on to the file on account of failure to be paid his requisite fees. This holding on to the file forced the incoming counsel to photocopy pleadings from the record in order to appraise himself with the matter. These are the copies of the defence and counterclaim that have been found to be at variance with the content of what is currently on the record. It is their assertion that the said original document contained admissions which are missing from the current document.

In an attempt to fortify their stand, they plaintiff/applicants have gone a head to state that in view of the admissions that had been contained in the said original defence and counterclaim, they moved to this court, by way of an application for summary judgement, which was partly argued interparties, but was not finalized and a ruling given on the same, because the judge then seized of the matter, went on transfer and when efforts to have him complete the same did not yield much fruits, they decided to withdraw the same to pave the way for the disposal of the main suit. It is also their stand that the defendants' affidavit in reply also contained similar admissions, which replying affidavit has also been altered. It is their firm belief that the only party who could have had an interest to change the content of the said documents is the defendant, and for this reason the defendants' current defence and counterclaim as well as the current replying affidavit to the plaintiffs' application for summary judgement should be expunged from the record on the grounds that they are forgeries, as their content has been altered and instead the court, to proceed on the basis of the documents that they have presented to the court, as annexure SKK1 supported by the replying affidavit SKK2. They also add that their stand is supported by the bundle of correspondences exhibited to the current application.

To counter that, the defendants have asserted that;

- (i).** There is no proof that the documents currently on the record have been altered.
- (ii).** The documents on the record are similar to what they themselves have, and as such, they are the same ones which were served on to the plaintiff.
- (iii).** They are strangers to the alleged correct documents.
- (iv).** If there is any tampering with the court, records, then the possible culprits are the plaintiffs' and other government agencies like the AGs office, the (C.I.D) and the Kenya Anti Corruption who were investigating alleged fraud during whose sessions the second defendant and the deponent of the replying

affidavit in opposition to the application subject of this ruling was interrogated over the issue.

**(v).** Further add that it will not be proper for this court, to introduce extraneous documents and proceed to dispose off the matter herein on the basis of the same at the expense of the documents already on record and to the prejudice of the defendant.

**(vi).** By reason of what has been stated in No.s “i-v” above, the court, is urged to disallow the application and allow the trial to proceed so that the plaintiff can be called upon to prove its claim to the required standard, namely on a balance of probability.

Due consideration has been made by this court, of the above rival arguments, and in this courts opinion, certain questions have arisen for the determination of this court, and these are:-

1. Was there a defence and counterclaim filed in opposition to the plaintiffs’ claim herein?
2. Was there an application for summary judgement sought herein? If so what was its outcome and the effect of that outcome to the current application in particular and the proceedings generally?
3. Is it correctly asserted that there are two defences and counterclaims on record herein? If so what are their difference and similarities?
4. Is it possible for this court, to determine conclusively how these differences and similarities in the said defences and counterclaims arose?
5. Who could be the possible culprit that can be pinned down by this court, to have been the possible culprit of the said forgery and or alteration among those mentioned herein namely

**(i).** The plaintiffs

**(ii).** The other investigating agencies namely the AGs office, the CID and the Anti corruption unit and lastly

**(iii).** The defendant.

6. What are the final orders herein?

1. In answer to question 1, the answer to the same is in the affirmative, as it is common ground that indeed, a defence and counterclaim were filed herein by the defendants, in opposition to the plaintiffs’ claim that had been lodged herein. This also prompted the filing of the reply to defence and defence to the counter claim dated 8<sup>th</sup> day of June 1999, and filed the same date.

2. In response to question 2, the answer to it is also in the affirmative, as it is common ground from both sides, that indeed one was filed. A perusal of the record reveals that indeed one was filed, it is dated 15<sup>th</sup> January 2001 and filed on the 7<sup>th</sup> February 2001. It was indeed supported by the affidavit of one John Omo sworn on the 15<sup>th</sup> day of January 2001, and filed the same date along side the application. It is also common ground that the defendant responded to the same by way of a replying affidavit deponed by the second defendant, on the 12<sup>th</sup> day of March 2001, and filed the same date. It is common ground and this has been confirmed by the record that indeed hearing of the said application commenced before Visram J as he then was (now JA), on the 16<sup>th</sup> day of October (16/10/2001), when the plaintiff made their submissions on the said application. The matter was then adjourned to 12/11/2001 when it could not be reached and then adjourned to 28/11/01 when it was marked stood over generally, due to the absence of the plaintiffs’ counsels. It is demonstrated on the record, and as correctly asserted by the plaintiff, that thereafter the matter was fixed severally both at the registry and in court, for it to be heard by Visram J as he then was (now JA) as it was part heard before his lordship. This continued till 8/11/02 when the learned judge made orders that the matter be handled and or heard by any judge in Nairobi. It is also

evident from the record that indeed this situation prevailed till 24/6/03 when the plaintiffs counsel intimated to the court, that he wished to withdraw the application with costs to be in the cause. It is on record that the defence objected but were over ruled by the court, by D.M. Rimita J, as he then was the applications for withdrawal was allowed and the matter ordered to proceed to hearing on priority basis.

As regards the outcome of the application for summary judgement, and its effect to that application in particular, and the proceedings generally, is that the application having been withdrawn, its effect of the withdrawal order is that it was withdrawn before it was conclusively argued and determined. As such this court, is not in a position to say for sure what effect its conclusion would have had on to these proceedings. As regards its effect on to the proceedings generally, it is safe to say that the move by the plaintiff to apply for summary judgement, can be construed to mean that there were grounds on the basis of which the plaintiff was compelled to file the same. But as to whether he would have succeeded or not, it is beyond the brain and pen of this ruling as venturing to make any conclusions would amount to mere conjecture.

As regards the 3<sup>rd</sup> question as to whether it is correctly asserted that there are two defences and counterclaims herein, the answer is in the affirmative. The reason for finding so is found in the documentation filed by both sides on record being for and against the application. This is evidenced by presentation of the annexures, 2, 3, and 4 to the supporting affidavit as well as the copy on the court record, the copy that the court, had before it when PW1 was being led in his evidence in chief on it, when the court, detected the discrepancies in PW1s answers, to the questions put to him and the content of the copy that the court, had before it, which prompting led to the filing of the application subject of this ruling.

As regards their differences and similarities these can only be determined by comparing them paragraph per paragraph which the court, proceeds to do as hereunder. In comparing, the court, will use the copy annexed to the application and the copy on the court record, that the court was using during the trial:-

1. The receipt stamps on both indeed read high court of Kenya Central Registry 31<sup>st</sup> May 1999 civil side Nairobi.
2. The stamp on annexure 1 is affixed further up in the right hand top corner and has only the words Nairobi partly rectangled where as the stamp on the copy that is in the court, file, is placed in the middle. It has not rectangled the word “*Nairobi*” but only touched it partially at its bottom tip. It has almost fully rectangled the word “*plaintiff.*”
3. The court, has compared word for word in each paragraph of the two sets and paragraph by paragraph and finds the following paragraphs similar in content, numbering and spacing. Paragraphs 1,2,3,4,5,6,7,8,10,11,12,13,16,26,27,28,29,30,31,32,33,34,35,36,37,38,39,40,41,42,43,44,45,46,47,48,49, 50,51,52,53,54.
4. The following paragraphs are not similar in content and spacing namely 9,14,15,16,17,18,19,20,21,22,23,24 and 25. Their differences are as stated here under:- (d) paragraph 9 in the annexed copy, paragraph 9 reads:-

*“In response to paragraph 7 of the plaint, the defendants aver that the further sum of Kshs. 4,716,471/95 paid by the plaintiff to the first defendant was part of the amount of interest at 19% that had accrued on the purchase price as a result of the delay by the plaintiff to pay the purchase price in breach of the said agreement afore said. The first defendant will aver that the plaintiff failed to pay the total interest payable on the purchase price in terms of the sale Agreement despite demand by the first defendant and the plaintiff was therefore in breach of the clause on payment of interest.”*

Where as that in the copy on the court file reads:-

*“9 in response to paragraph 7 of the plaint, the defendants aver that the further sum of Kshs. 4,716,471/95 alleged paid by the plaintiff to the first defendant was not paid at all, or as part of the*

*amount of interest at 19% that could have accrued on the purchase price as a result of the delay by the plaintiff to pay the purchase price in breach of the said Agreement afore said. The first defendant will aver that the plaintiff failed to pay the total interest payable on the purchase price in terms of the sale Agreement despite demand by the first defendant and the plaintiff was therefore in breach of the clause on payment of interest”*

The differences are as follows:-

(i). In the annexed copy the amount of Kshs. 4,716,471/95 is stated to have been paid by the plaintiff to the first/defendant, is alleged to have been part of the amount of interest at 19% that had accrued to the purchase price. While in the copy in the court, file it is stated that the sum of Kshs. 4,716,471/95 alleged paid by the plaintiff to the 1<sup>st</sup> defendant was not paid at all or as part of the amount of interest at 19%. It is therefore the finding of this court that the difference between the two paragraphs are the words in the court, copy namely *“alleged....., was not paid at all, or as part of the amount”* There is therefore contradiction in the manner of pleading as regards the said amount. The court, finds that in the annexed there is flowing in terms of sentencing. Whereas that in the copy in the court file sentencing does not flow as the court, does not understand how the defence could not simply plead that the amount was not paid.

(b) As regards paragraph 14, in the annexed copy the words read:-*“ If the purchase price is refundable to it”* where as that in the copy in the file reads:- *“If any money is refundable to it”* In this courts’, opinion, the phrase in the annexed copy makes sense, because if any money is recoverable by the plaintiff, then it has to be the purchase price and not just any money.

(c) The type setting of paragraph 15 is different in that, the words arrangement differ. In addition, in the copy annexed, it is stated that *“ The first defendant will contend that it has been willing to transfer the said pieces of land to the plaintiff but subject to the plaintiff paying damages to the 1<sup>st</sup> defendant for breach of contract as prayed for in the counterclaim herein below”*. Where as in the courts copy it reads that:- *“ The first defendant will contend that it has always been willing to transfer the said piece of land to the plaintiff but subject to the plaintiff paying market price for the properties and damages. The additional words are “market price for the properties and....”*

(d) As regards paragraph 16, the lay out differs. The annexed copy ends with 16 (1) with c on the next page where as the court, copy has (16) starting on the paper where (a) (b) are laid out. (16) in the court copy ends with *“or at all”* and puts the plaintiff to strict proof thereof: where as in the annexed copy ends with:- *“ and did so in breach of the Agreement thereof”* it is the courts’, finding that the words in the annexed copy makes no sense, because the court, does not understand how the plaintiff could have been pleaded not to have paid the 62,764/41/= as stipulated in the sale agreement, and then at the same time be said to have done so in breach of the Agreement. The one in the courts copy is flowing.

**16 (d) in the annexed copy,** it is stated that *“the interest of Kshs. 4,716,471.95 was part payment of the penalty payable for non completion of the agreement by 31<sup>st</sup> December, 1991, and the said sum was not the total interest payable to the 1<sup>st</sup> defendant and the plaintiff is yet to complete payment, of interest payable.”*

Whereas in the paragraphs in the courts copy reads:-

*“The interest Kshs. 4,716.95 was demanded but was not paid, but was to be part payment of the penalty payable for non completion of the agreement by 31<sup>st</sup> December 1991, and the said sums was not the total interest payable to the 1<sup>st</sup> defendant and the plaintiff is yet to complete payment of interest payable if there was a valid agreement”*

This courts finding in paragraphs 16 (d) is that the discrepancy are the words *“was demanded but was not paid but was to be part of the penalty payable”* Also added are the words *“if there was a valid sale agreement.”*

(d) Paragraph 17 in the annexed copy has its content spilling over to the next page in which paragraph 18 begins, whereas in the copy in the court, file paragraph 17 does not spill over to the next page and paragraph 18 starts in the same page as paragraph 17. Otherwise the content is the same.

(e) In respect to paragraph 18 the word in the annexed copy reads "contents" where as that in the courts' copy paragraph 18 starts on the same page, where paragraph 17 is contained. Where as on the annexed copy it starts on the page on which the content of paragraph 17 spilled. In the courts' copy the words strict is the end words on line 1, where as it is the first word on line 2 in the annexed copy.

(ii) In the annexed copy the figure of Kshs. 2,000,000/= alone, where as in the courts' copy there is added or Kshs. 4,000,000/= and or any part of any debt.

(iii) In the annexed copy there is added "*but was part refund of stamp duty which the plaintiff was insisting had not been paid.*" Whereas in the courts' copy, it reads:- "*Infact the money is refundable to the first defendant as money paid under mistaken belief by the plaintiff who emotionally demanded the payment as part of stamp duty money that had not been cleared by its bank, and the purchase deposit but the company secretary of the plaintiff insisted that the money must be refunded to show and impress parliamentary public investment committee, that the purported payment of purchase price was under payment schedule which it was not.*"

(iv) In the annexed copy, there is a repetition of the figures Kshs. 2,000.00 followed by the words "*is infact refundable to the first defendant as money paid under mistaken belief by the 1<sup>st</sup> defendant.*" where as in the courts' copy, the figure of Kshs. 2,000.00 is not repeated what follows the words set out in (iii) above are the words "*The company secretary of the plaintiff would renew his preasure every time he was due to appear before the committee but he later discovered the stamp duty cheque had been cashed.*"

(iv) In the annexed copy paragraph 18 ends with the words "*breach of contract and the defence of limitation*" where as in the courts' copy, it ends with:, "*breach of contract and refund of the wrongly refunded money or forfeited and the defence of counter claim.*"

(f) Paragraph 19-

(i) The arrangement of the typing of this paragraph in the annexed copy is slanting where as that of the courts' copy is straight.

(ii) Line 1 of paragraph 19 (a) in the annexed copy starts with "*that the money,*" .Where as that in the courts' copy reads:- "*That any money*"

(iii) Line 3 contains the words "*release the purchase price*" where as that in the courts' copy reads:- "*to release part of the purchase price*"

(iv) In the annexed copy paragraph 19 continues up to paragraph 19 (1) whereas in the courts' copy, it ends at paragraph 19 (d)

(g) Paragraph 20-

(i) In the annexed copy paragraph 20 starts at line 5 from the bottom. Whereas in the courts', copy, it starts at line 1 at the top.

(ii) In the annexed copy paragraph 20 ends with the words "*sale transaction as an advocate*" where as in the courts', copy it ends with "*in the sale transaction*"

(iii) In the annexed copy paragraphs 21, 22, 23, 24, and 25 are on the same page. Whereas in the courts', copy all paragraphs 20, 21,22,23,24 and 25 are on the same page.

(h) Paragraph 22;-

(i). The one in the annexed copy is larger in content than that in the courts' copy.

(ii). In the 4<sup>th</sup> line in the annexed copy, there is found the words:- *"After the sale was frustrated"*

(iii). In the annexed copy there is added the words:- *"In the alternative and without prejudice to the above denial, the defendants will contend that if the plaintiff is entitled to the refund of Kshs. 62,764,141/= which is hereby denied, the refund will be less Kshs. 5,804,767/= being 10% of the purchase price forfeited to the first defendant and without interest"*

(j) Paragraph 24:-

(i). In the annexed copy the word *"effort"* is on line 3. Where as in the courts' copy, it is the second last word in line 2.

(ii). Line 3 in the annexed copy reads in part:-

*"Effort to refund the purchase price less the forfeited sum of Kshs. 5,804,767/= and interest"* where as in the courts', copy it reads in part:-

*"Effort to refund the purchase price otherwise forfeited sum of Kshs. 5,804,767/= by refusing to bank cheque issued"*

(k) Paragraph 20:-

(i). Line 4 of paragraph 5 in the annexed copy reads in part:- *"purchase price only"* where as that in the courts', copy reads in part:- *"purchase price paid"*

It is the finding of this court, that the above assessment on both similarities and differences of both the annexed copy as well as the courts' copy, has clearly demonstrated that indeed there is in place two competing defences and counterclaims. The plaintiffs' side asserting that what has been annexed as an annexure is the copy which was served on them after it was filed in court, and therefore should be the correct defence and counterclaim, to form the basis for trial. Whereas the defence on the other hand, assert that, the courts' copy, which is similar to their own copy is the copy they filed and served and as such it is the correct copy to form the basis for trial. The court, further makes a finding that since the trial is in its infancy it is duty bound and finds it prudent not to analyze and comment on the implications on the evidence of the difference and or discrepancies observed above besides just pointing them out and or highlighting them as set out above. The reason for so refraining is that such in depth comments which cannot avoid going to the root core of the dispute if resorted to is likely to not only pre-empt but prejudice the outcome of the trial and the final conclusion of the case.

The determination of the possibility of how these similarities and especially the difference and who this court, thinks is the possible culprit while await the assessment on the replying affidavit in opposition to the application for summary judgement.

The application for summary judgement traced on records is dated 15<sup>th</sup> day of January 2001, and filed on 7<sup>th</sup> February 2001. It sought 3 prayers namely:-

1. *That summary judgement for Kshs. 180,632,521.48 plus interest at 19% p.a. from 25.1.1999 be entered for the plaintiff against both defendants jointly and severally.*

2. *That the defendants defence and counterclaim be struck out as being scandalous, frivolous and vexatious.*

3. *That the defendant do pay costs of the application"*

This court's reason for excusing into the application for summary judgment is simply to highlight the points that were raised by the plaintiffs in justification of the summary judgment application and then use these to determine the possible responses that could have been invited from the defendants in opposition to that application, compare this with those in the annexed replying affidavit, to have been the replying affidavit that was served on to the plaintiffs in opposition to the application for summary judgment, with those in the copy traced on the court record and the one annexed by the respondent as the one which is the copy that they had served in opposition to application for summary judgment. In a summary form these were as follows as derived from the grounds in the body of application and supporting affidavit:-

*-First defendant was the registered owner of land parcel number 12445 and 12550.*

*- 1<sup>st</sup> defendant entered into an agreement to sell the suit properties to the plaintiff in their capacity as the registered lessees with the 2<sup>nd</sup> defendant acting as advocates for both parties.*

*-Property was sold free from encumbrance and the rate of interest was 19%.*

*-The plaintiff in all paid Kshs. 62, 764, 14.00 inclusive of Kshs. 5,809,767.00 paid by plaintiff as stakeholder and Kshs.4, 716,471.95.*

*-Defendant failed to transfer the property because the 1<sup>st</sup> defendant was not the legal or equitable owner of the suit land. By reason of this the contract was fraudulently executed.*

*-The property was later charged to Kenya commercial bank.*

*-The 1<sup>st</sup> defendant admitted indebtedness to the plaintiff and paid the first installment of 1,000,000.00 but failed to continue the payment of the installments.*

*-The 2<sup>nd</sup> defendant as advocate for both parties breached his fiduciary duties to the plaintiff.*

*-That the defence and counterclaim are both sham, frivolous and vexatious.*

*-The sale agreement was entered into on 7<sup>th</sup> November 1991, purchase price was Kshs. 58,047,670.00. The 2<sup>nd</sup> defendant was advocate for both sides and the completion date was 31<sup>st</sup> December 1991.*

*-The plaintiff duly paid the 10% of the purchase price to the 2<sup>nd</sup> defendant as the stake holder followed by installments namely:*

*(a) 1<sup>st</sup> installment for 5,804,767 on 8/11/91*

*(b) 2<sup>nd</sup> installments for Kshs. 5,313,604 on 10/3/1992*

*(c) 3<sup>rd</sup> installment for Kshs. 5,313,000.00 on 10/01/1992*

*(d) 4<sup>th</sup> installments for Kshs. 5,313,000.00 on 10/01/92*

*(e) 5<sup>th</sup> installment for Kshs. 5,313,000 on 10/1/92*

*(f) 6<sup>th</sup> installments for Kshs. 5,313,000 on 10/01/92*

*(g) 7<sup>th</sup> installments for Kshs. 5,313,000 on 10/01/92*

*(h) 8<sup>th</sup> installment for Kshs. 5,313,000 on 10/01/92*

- (i) 9<sup>th</sup> installment for Kshs. 015,000 on 27/7/92
- (j) 10<sup>th</sup> installment for Kshs. 5,01,000 on 27/7/92
- (k) 11<sup>th</sup> installment Kshs. 5,015,000 on 27/7/92
- (l) 12<sup>th</sup> installment for Kshs. 4,716,400 on 9/12/92 (a bundle of the payment vouchers for the above payments were annexed as JM2).

The total purchase price paid was Kshs. 62,764,141.00 plus stamp duty as well as legal fees to expedite the transfer.

- Instead of embarking on the transfer process, the 2<sup>nd</sup> defendant demanded a fresh agreement for sale at an enhanced purchase price of Kshs. 153,000,000 and an additional figure of Kshs. 163,200,000.00.
- It later transpired that as at the time of the signing of the sale agreement the property was not registered in the name of the 1<sup>st</sup> defendant but in the name of one Clement Gachanja, charged to Mercantile file Finance for Kshs. 10,000,000.00, owed income tax Kshs. 6,000,000.00 and if that was not enough, there was a further encumbrance by supreme investment limited claiming a purchasers interest.
- 1<sup>st</sup> defendant was registered as owner on 31/12/91, on which the 1<sup>st</sup> defendant charged it to KCB for Kshs. 27,000,000.00, showing a lack of bona fide intention on the part of the defendants and their mala fide intentions throughout.
- After the 1<sup>st</sup> installment of Kshs. 1,000,000.00 on 22/12/97, the 1<sup>st</sup> defendant made a further payment of three installments of Kshs. 1,000,000.00 each.
- The 2<sup>nd</sup> defendant should not have paid over the purchase price to the 1<sup>st</sup> defendant until transfer had been effected in the name of the plaintiff and by reason of that; the 2<sup>nd</sup> defendant did betray its trust.
- Asserted that the 1<sup>st</sup> defendant received Kshs. 62,764,141.00 which he has refused to refund to them.

The afore set out salient features of the grounds in support of the summary judgement application, invited the opposition set out in the replying affidavit to that application. The plaintiff has asserted that the copy it has annexed to the supporting affidavit to the application as annexure SKK2 is the correct copy that was filed in opposition to that application. Whereas the stand of the defendant is that the copy found in the court file is the correct copy that was filed in opposition to the application for summary judgement.

Observation has been made by this court, of the two documents and the following observations have been made as reflected in this ruling:-

- (i) The court stamp on SKK 2 is further up and only rectangles the word “**Nairobi and plaintiff**”. Whereas the one in the court, file starts below Nairobi and almost completely rectangles the word first defendant.
- (ii) The following paragraphs are similar in content and material particulars, paragraphs 1,2,3,4,5,9,12,13,14,15,18,19,22,24,28,29,31,32,35,39,40
- (iii) The following paragraphs are not similar in content, material particulars, and general lay out namely:- paragraphs 6,7,8,10,11,16,17,20,21,23,25,26,27,30,33,36,37 and 38.

The material discrepancies are as set out here under:-

**(a) Paragraph 6:-**

(i) In annexure SKK2 the words after paid on 10<sup>th</sup> December 1991 read:- “ *more than amount after*” where as those in the courts copy read: “ *more than thirty three (33) days after*”

(b) Paragraph 7:- in the annexure, the words after the word affidavit read:-“ *as the dates on the payment voucher were not dates of payment to the defendants*” where as those in the court copy reads:- “ *or at all as the defendants are not aware of such payment voucher to the defendants*”

(ii) In line 3 in the annexure, there is found the words:- “ *the same) were paid in breach of the sale agreement*” where as those in the courts’ copy read: “*the same is paid, which is denied, was paid in breach of the sale agreement*”

**( c ) Paragraph 8:-**

(i). In the annexed copy, the words after payable by 31<sup>st</sup> day of December 1991,” read “ *but payments were made as follows in total breach of the sale agreement.*” Where as those in the court copy read:- “ *but no payments were made as follows or at all in breach of the sale agreement.*”

(ii). The particulars of the payments differ from each other. Those in the annexure are arranged as here under;

(a). Kshs. 5,804,767/= 10/12/91

(b). Kshs. 5,313,609/= 30/1/92

(c). Kshs. 5,313,604/= 26/3/92

(d). Kshs. 5,313,604/= 11/5/92

(e). Kshs. 5,313,604/= 2/6/92

(f). Kshs. 5,313,604/= 10/6/92

(g). Kshs. 5,313,604/= 17/6/92

(h). Ksh. 5,313,604/= 17/7/92

(i). Kshs 5,015,890/= 31/8/92

(j). Kshs. 5,015,890/= 8/10/92

(k). Kshs 5,015,890/= 29/10/92

(l). Kshs. 4,716,471.95/= 7/4/93

Those in the court’s copy on the other hand read:-

(a) 1<sup>st</sup> installment for Kshs. 5,804,767/= on 8/11/1991

(b) 2<sup>nd</sup> installment for Kshs. 5,313,604/= on 10/3/1992

(c) 3<sup>rd</sup> installment for Kshs. 5,313,000/= on 10/01/1992

(d) 4<sup>th</sup> installment for Kshs. 5,313,000/= on 10/01/1992

(e) 5<sup>th</sup> installment for Kshs. 5,313,000/= on 10/01/1992

- (f) 6<sup>th</sup> installment for Kshs. 5,313,000/= on 10/01/1992
- (g) 7<sup>th</sup> installment for Kshs. 5,313,000/= on 10/01/1992
- (h) 8<sup>th</sup> installment for Kshs. 5,313,000/= on 10/01/1992
- (i) 9<sup>th</sup> installment for Kshs. 5,313,000/= on 10/01/1992
- (j) 11<sup>th</sup> installment for Kshs. 5,313,000/= on 10/01/1992
- (k) 12<sup>th</sup> installment for Kshs. 4,716,400/= on 9/12/92

(iii) It is noted that in the annexed copy the 2<sup>nd</sup> payment bears the amount of Kshs. 5,313,609/= whereas that in the courts' copy bears an amount of Kshs. 5,313,604 which is the same amount forming payment for the 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup> and 8<sup>th</sup> installments. Where in the courts copy, the amount shown is Kshs. 5,313,000/= and forms the 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup> and 11<sup>th</sup> installments. In the annexed copy payments made in 1992 were on different dates and months. While those in the courts', copy were on the same date and month of 10/01/1992. The writing of the year in the annexed copy is in the abbreviated form where as in the court's copy the year is written in full.

(iv) In the annexed copy there are no additional words after the listing of the installments. Whereas in the courts', copy, the following words are added at the bottom:- “ *and if the plaintiff paid up this money then it should tell the court, to whom the money was paid and why as the agreement had long been terminated.*”

**(c) Paragraph 10.**

(i) In the second line after the word plaintiff in the annexed copy the word “**unbanked**” is missing whereas in the courts', copy, it is the first word in line 3.

**(e) Paragraph 11:-**

(i). At line 3 after the words frustration of the contract, there is added the words: “*with non payment,*” which are missing from the annexed copy.

(ii). At line 7 from the top, after negotiations are the words “*I was frustrated by the plaintiff*” in the courts', copy. Whereas those in the annexed copy read;- “ *fall stalled by the plaintiff.*”

(iii). The type setting and arrangement of words are different.

**(f) Paragraph 16**

(i). The word “*obligation*” is the last word in line 2 in the courts', copy, where as in the annexed copy, it is the first word on line 4.

**(g) Paragraph 17:-**

(i). In the courts', copy, after the word “**purchase price**” in line 2, these are the words:- “ *but never did thus*” where as in the annexed copy there are the words;- “ *but never did, but spread the payment for a period of over one and a half years after the completion date*”

(ii). On the 6<sup>th</sup> line after stamp duty are the words:- “ *but no acknowledgement or replies were received to his letters*” whereas those in the annexed copy read:- “ *and none acknowledgement or replies to his letters*”

**(h) Paragraph 20:**

(i) In the courts', copy the word "*known*" is the first word on line 3, where as it is the last word in line 2 in the annexed copy.

(j) In line 4 after the word refund, in the courts', copy are found the words:- "*the received part of the purchase price then received*" where as in the annexed copy it simply reads:- "*to refund the purchase price then received after the plaintiff was unable to pay the purchase price*" it is contradictory as the purchase price cannot be said to have been received and then the same time the plaintiff was unable to pay the same. A simple deponement that the purchase price was never received could have surficed or alternatively that the plaintiff was unable to pay the purchase price

(k) The words arrangement is different

**(i) Paragraph 21:-**

(i) In the courts', copy in line 3 after the word "**stamp duty**" there are the words:- "*and deposit money,*" whereas in the annexed copy there is only the word "*money*" put.

(ii) At line 5 in the courts', copy after the word "**refund**" are the words:- "*This money and deposit*", whereas in the annexed copy are the words "*this money*"

(iii) In the courts', copy, after the word "**cheque**" are the words "*for stamp duty,*" whereas those in the annexed copy are the words:- "*was discovered by the plaintiff*"

**(j) Paragraph 23:-**

(i) In line 2 of the courts', copy, after the word "**release**" in line 2, are the words:- "*the paid part of the purchase price,*" whereas in the annexed copy are the words:- "*the purchase price then paid*"

**(k) Paragraph 25:**

(i) In the courts', copy the word "the" is the first word in line 2 of paragraph 25 (b) whereas in the annexed copy, it is the last word on line 1 of 25 (b). Whereas the word "**not**" is the last word in line 2, whereas on the other hand it is the first word in line 3 in the courts' copy.

(ii) In 25 (f) line 1 in the annexed copy, the last word is "all" which is missing in the courts' copy, but which has the word ("*the*" also missing in the annexed copy.

(iii) In line 2 before the word capacity, there is the word "*and*" in the courts', copy, whereas in the annexed copy there is the word "*had*")

(iv) In the 3<sup>rd</sup> line after the word "**plaintiff**" there is the word "*has a legal*" in the courts', copy, where as those in the annexed copy read "*had a legal*"

**(L) Paragraph 26:-**

(i) In line 2 in the courts', copy there is the word "**counterclaim**" where as the equivalent in the annexed copy reads "**counterclaim**"

**(m) Paragraph 27:-**

(i). At line 2 of the courts' copy there is the word "issues" whereas its equivalent in the annexed copy reads "**issue**"

(ii). 27 (b) has the words "**sham**" at the end, whereas in the courts copy it is on line 2

(iii). 27 (c ) the word “raised” is in line 1, in the annexed copy, whereas its counter part is in line 2 in the courts’, copy.

(iv). 27 (g) the figure 31<sup>st</sup> is on the first line at the end, while in the courts’, copy it is the 3<sup>rd</sup> last word in line 2.

(v). In the annexed copy the word “**remedy**” is the only word in line 2, where as in the courts’, copy it is the 3<sup>rd</sup> last word in line2

(vi). 27 (n) in the annexed copy the word liable appears twice in line 1, whereas in the courts copy it is written only once.

(vii). In 27 (o) the word “**Kenya**” is the last word in line 1, in the annexed copy. Where as in the courts’ copy, it is the first word in line 2.

(viii). The word “**thereof**” is the first and only word in line 4 in the courts’, copy, whereas in the annexed copy it is the last word but among others on line 3.

(ix). 27 ( R) in the courts’, copy, there are 2 lines with the word “care” being the only one on line 2. Whereas in the annexed copy 27 (r) has only one line.

(x). In 27 (t), in the courts’ copy after the words “*rightful claim*” there is added the words “*without proof of payment and*” which are missing in the annexed copy. Also in the courts’, copy, the word “**refund**” is the only word in line 3, whereas in the annexed copy it is the last word but among others on line 3.

(xi). 27 (w) in the courts copy it has three lines. Whereas in the annexed copy it has only 2 sentences.

#### **(N) Paragraph 30:-**

(i) In the courts’, copy there is the word “of” after 32 in line, and which word is missing in the annexed copy.

#### **(O) Paragraph 33:-**

(i). In the courts’, copy, the words “**Kshs**” are the first words in line 2, whereas in the annexed copy, they are the last words in line 1.

(ii). In the court’s copy, after the words “**second defendant**” in line 2, there is added the words “*knowing very well it did not pay the money and without any proof of payment and*” which words are missing in the annexed copy.

(iii). In the courts’, copy, after the words “**release the**” there is inserted the word “**part**” between “the” and “of”. After the word purchase price, there is also added the words “*it had paid*” which are missing from the annexed copy.

(iv). The courts’, copy, has four (4) sentences where as the annexed copy only has 3 sentences.

#### **Paragraph 36:-**

(i). In the courts’, copy the figure of Kshs. 119,897,380.40 is the first on the 3<sup>rd</sup> sentence, where as in the annexed copy, it is the last on the second sentence.

(ii). The year 1999 appears first in line 4, in the courts copy, whereas it is the 4<sup>th</sup> last word in line 3, in

the annexed copy.

**(q) Paragraph 37:-**

(i). In the courts', copy after the figure of 60,764,141/= there is added the words "which it did not pay the defendants and without any proof of payment" which are missing in the annexed copy.

(ii). The word "have admitted" and "**has admitted**" both appear in the courts', copy. Where as "**has admitted**" do not appear in the annexed copy.

(iii). The courts', copy, has 5 sentences, where as the annexed copy has only 4 sentences.

**(R) Paragraph 38:-**

(i). In the courts', copy after the word "**plaintiff**" in line 2, there is added the words "**by the defendants,**" which are missing in the annexed copy.

(ii). In the annexed copy, the words "**amount Kshs.**" And the figure 62,764,141 both appear in line 3, as the starting words. Whereas in the annexed copy the words "**amount of Kshs**" appear as the last words in line 2.

(iii). The word "**summary**" is the first word in line 4 in the courts', copy, where as it is the last word in line 3 in the annexed copy.

(iv). The courts', copy has 5 sentences, whereas the annexed copy also has five sentences but with only the word "**disputed**" appearing in the 4<sup>th</sup> sentence.

Due consideration has been made by this court, of the rival arguments presented to it concerning the annexed affidavit SKK2 as compared with the copy that is in the court record, and that which also has been annexed as SKK4, and this court, has arrived at the same conclusion or determination as it did, when dealing with the defence and counterclaim SKK1 in comparison with the courts', copy, annexed as SKK3, and makes a finding that there are notable differences and or discrepancies in the above set out paragraphs, as noted above.

It is these differences and or discrepancies that this court, has been invited to make a determination on. The tool of trade that the court, has been called upon to invoke is the inherent jurisdiction of the court. This is enshrined in section 3A of the CPA which has already been set out herein but which reads:-

*"Nothing in this Act shall limit or otherwise affect the inherent power of the court, to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court"*

Case law has now settled the circumstances under which this provision is to be invoked as pronounced by the CA and as dutifully followed by the superior court. There is the case of **WANJAU VERSUS MURAYA (1983) KLR 276** where Kneller JA as he then was held inter alia that:- "*section 3A of the CPA cap 21 although saving the inherent power of the court, to make such orders as may be necessary for the end of justice or to prevent the abuse of the power of the court, should not be cited where there is an appropriate section or order and rule to cover the relief sought*"

Also the case of **MEDITERNEAN SHIPPING CO. S.A. VERSUS INTERNATIONAL AGRICULTURE ENTERPRISES LTD ETCO (MSA) LTD (1990) KLR 183**, where it was also held inter alia that: "*It is now trite law that the inherent jurisdiction of the court should not be invoked where there is specific statutory provision which would meet the necessities of the case*"

Lastly the case of **TANGUS VERSUS ROITEL (1968) EA 618** where it was also held inter alia that "*the court's inherent jurisdiction should not be invoked where there was a specific statutory provision, to meet the case*"

Due consideration has been made by the court, concerning these provisions and applied them to the facts herein, and the court, makes a finding that this is a fit case where this court, can invoke its inherent jurisdiction to do justice to both sides. The reason for saying so is that no provision was cited to this court, by either side, neither is there one that this court has judicial notice of, whereby a court of law, has donated power to strike out pleading of a participating party on grounds other than the traditional grounds for striking out.

The traditional grounds for striking out of a pleading that this court, has judicial notice of, are those donated by order VI rule 13 (1) CPR. Under this provision the court, has jurisdiction to strike out a pleading on the ground that:-

- a. *“It discloses no reasonable cause of action or defence, or*
- b. *It is scandalous, or frivolous or vexatious; or*
- c. *It may prejudice embarrass or delay the fair trial of the action; or*
- d. *It is otherwise an abuse of the process of the court.....”*

Infact the case that the defence has relied on to resist the applicants plea are decisions based on the order VI rule 13 (1) CPR ingredients. Herein what the applicant/plaintiff is contending is not that any of the order VI rule 13 (1) ingredients are present. But because, according to them fraud has been committed in that the defence and counterclaim which had been filed and served has been altered in material particulars, to remove traces of possible admission of the plaintiffs' claims. Also altered are certain portions of an affidavit which had been filed in opposition to the plaintiffs/applicant application for summary judgement.

This court scrutinized the two documents and has noted material discrepancies as set out above. The stand of the applicant is that this court, should not allow the pleadings tainted with fraudulent alterations to form a basis or be part of the trial. The court, has thus been asked to strike out and expunge them from the record. Where as the defence has simply asked the court, to order the applicants to amend their pleadings to be in line with the said pleadings.

In absence of there being a provision and case law providing guide lines on circumstances where a court, has been called upon to strike out a pleading on the ground that it was fraudulently altered after the same had been filed, this court, is of the opinion that this presents a new challenge in this courts' exercise of its civil jurisdiction. The question that follows for determination is whether, in the absence of any provision and case law providing guide lines on how to deal with such a peculiar and challenging situations, the court, is in capacitated to such an extend that it can only fold its arms and perch itself on the judicial fence and do nothing. The answer is no. the reason being that a court of law has sufficient tools which it can employ to enable it do justice to the litigants who come to seek justice from it. This court draws strength from observations made by Nyamu J as he then was (now JA) in the case of **REPUBLIC VERSUS THE BUSINESS PREMISES TRIBUNAL, LEO INVESTMENTS AND SAMIMA INVESTMENTS LTD NAITOBI MISC APPLICATION NO. 562 OF 2007** decided on 6<sup>th</sup> day of June 2008. At page 9 of the ruling line 11 from the bottom, the learned judge as he then was (now JA) made the following observations “ *I have no doubt this is a very unique case and calls for new thinking because of the special circumstances as described above.*

*The fact that the situation is novel is no good reason for me to fold my hands or seek to perch on the nearest fence and do nothing. The facts of each case that comes before the court, cry out in a special way for justice to be done. Some of the past situations have clear guidelines and in most cases the courts', do justice in accordance with those guidelines. However if laws are applied too strictly and mechanically, law ceases to keep pace with social innovation and societal needs. If there is entirely new situation as I have encountered on the basis of the unique facts in this case, such a situation calls for individual justice hence the development of equity. The new facts demand dynamism and growth in the law, to meet the new situation.....*

*I derive great comfort in the thought that the pathways of justice are infinite and every generation of judges will always find the path ways to follow if they are to look out of the window of their chamber or the court room”*

The court encountered a challenging new situation in a recent ruling in the case of **KAMLESH MANSUKHLAL DAMJI PATTNI VERSUS KETAN SURENDRA SOMAIA AND OTHERS NAIROBI HCCC 878 OF 2001 as consolidated with HCCC NO. NO. 879/01, 880/01 AND 881/01.** The ruling is dated 30<sup>th</sup> day of March 2009. The brief facts in the said own ruling were as follows:-

*(i). The plaintiff successfully applied to have a Receiver Manager appointed over the 4<sup>th</sup> defendant’s property subject of the suit.*

*(ii). At some point the plaintiff and the 4<sup>th</sup> defendant entered a consent marking the suit settled during the pendency of the receivership order and without any reference to the court order appointing a receiver.*

*(iii). Counsel for the receiver applied to have those orders set aside.*

*(iv). Objection was raised to the effect that a Receiver Manager is not a party to the proceeding and as such he lacked locus standi to agitate any matter before court, in his own right without going through parties already on board. Discussion on the issue as to whether the Receiver Manager was a party to the proceedings or not starts at page 37. At page 38, this court, quoted with approval Nyamu J observations set out above. At page 46 this court, made observation that since the court, had allowed the Receiver Manager to join the proceedings “howsoever” and not specifically as a plaintiff or defendant, he could not be pinned down by reason that he could not litigate otherwise than as a plaintiff or defendant. The difficulty had arisen because there was no provision both under the CPA and CPR through which the Receiver Manager could anchor his application to apply for setting aside of the orders of the Deputy Registrar which had ousted him from the proceedings. At page 54 of the said ruling, the court ruled that the Receiver Manager had audience before the court.”*

Applying this reasoning to the facts herein, it is this courts’, finding that lack of any provision of law donating power and lack of case law providing guidelines on the power to strike out pleadings allegedly fraudulently altered after the same had been filed and served is no bar to this court, making a pronouncement as regards the said alleged offending pleadings and determine whether to strike out the same or not and why.

The above findings now leads this court, to deal with the last question it had raised namely question 4, 5, and 6. Question 4 and 5 are inter twined and will be dealt with together. These deal with questions as to whether the court, can conclusively determine how these differences and similarities in the said defence and counterclaim arose. In this courts’, opinion, what can be conclusively determined by this court, is that there are similarities and differences or discrepancies as pointed out herein. It is however not clear on the face of the record, to determine who could be the culprit who made those alterations. The court, has therefore to determine if there is any cive that can be used to determine the possible culprit. In determining so the court, was urged by the plaintiff to use both the affidavit and the defence and counterclaim. Whereas the defence urged the court not to revisit the issue of the affidavit as the court, is functus officio in so far as those proceedings are concerned. In this courts’, opinion, this court, is functus officio in so far as making of a pronouncement on the merits of the summary judgement application. But it is not funtus officio and neither is it precluded from scrutinizing a document which forms part of the record, more so when the same has been annexed to the application and the court, has been formerly invited to compare the content of the two annextures and then making findings that the content are not similar.

It is to be noted that in the absence of direct evidence of a person who can say, he has knowledge of the person who did it, which has not been demonstrated, then the best clue that the court, can land on is the signature on these documents. It is to be observed that all the documents SKK1 and SKK3 bear signatures. The same applies to the affidavit SKK2 and SKK4, as well as these traced on the court,

record. Both sides made submission herein. None touched on the signatures. Their failure to do so does not preclude the court, from determining a possible cause of the discrepancies.

In this court's opinion, a verification of the authenticity of the signature on the annexed defence and counterclaim marked SKK1 together with that which is currently on the record, whose copy is marked as SKK3 will go along way in shedding light, of the possible culprit responsible for the said discrepancies. This will assist the court, to determine which of the two sets is a forgery. It is this court's, opinion, that once the authenticity of the signatures on the two sets of defence and counterclaim is determined, and if found to have been made by the same hand, then the author of those signatures will be called upon to explain how the discrepancies arose and on the basis of that explanation, as well as confirmation of the authenticity of the said signatures, the court, will be in a better position to make a pronouncement as to which of the two sets is the proper pleading which is to form the basis of the trial.

As for the affidavit, annexure SKK2 and SKK4, indeed the court, is not inquiring into matters relating to the summary judgement application. But it is common ground that these too were filed in court. They form part of the record. They are interrelated to the subject under inquiry herein, in that the alleged basis upon which summary judgement application was based and which was responded to by the defence in a particular form has allegedly been altered. Since the discrepancies noted have a bearing on the subject under inquiry at the trial, there is no harm in the court, also ordering that these affidavits authenticity also be determined for purposes of adding weight to the allegation of existence or nonexistence of forged pleadings on the record. For this reason only, these affidavits will also be a subject of examination to establish the existence or non existence of a forgery herein. If found positive then it will lead to a conclusion that there was a deliberate move by the perpetrator to erase any traces of what might have amounted to admissions or possible admission of the claim.

For the reasons given in the assessment, the court, proceeds to make the following orders:-

1. The court, made a scrutiny of the content of the defence and counter claim marked SKK1 and SKK3 as well as the copy traced on the court record and made findings that:

(i) paragraphs

1,2,3,4,5,6,7,8,9,10,11,12,13,16,26,27,28,29,30,31,32,3,34,35,36,37,38,39,40,41,42,43,44,,45,46,47,48,49 ,50,51,52,53 and 54 are similar in content, numbering and spacing.

(ii) Whereas paragraphs 9,14,15,16,17,18,19,20,21,22,23,24 and 25 are not similar in content and spacing. The differences are as set out in the body of the ruling.

2. The court, also examined the content of the affidavit annexure SKK2 and 4 and found that:

(i) Paragraphs 1,2,3,4,5,9,12,13,14,15,18,19,22,24,28,29,31,32,35,39 and 40 to be similar in material particulars.

(ii) Whereas paragraph 6,7,8,10,11,16,17,20,21,23,25,26,27,30,33,36,37 and 38 have differences and or discrepancies in them which have been particularized in the body of the ruling.

3. It is common ground that, the defence and counterclaims and the replying affidavit to the application for summary judgement originated from the defence.

4. All these sets of documents were authenticated by a signature before being filed in court.

5. Those exhibited or annexed to the application subject of this ruling had signatures appended on them. Those traced on the court, file also had signatures appended on them.

6. Neither side offered any representations as regards the authenticity of those signatures, with the exception of the defence dismissing and denying any knowledge of documents alleged to have been altered.

7. This court, is not in a position to conclusively say whose signatures these are. It is therefore necessary to have these examined, and their authenticity determined through expert opinion of a document examiner.

8. Upon such confirmation and if it turns out that they were authenticated by the same hand, the court, will call upon the defence to give an explanation which explanation will be considered in the light of this courts', findings that indeed discrepancies exist as set out above and then make appropriate orders as regards which set of documents is to be expunged and which set is to form the basis of the trial.

9. The documents to form the basis for examination are SKK 1,2,34 together with the court, copies which are to form the questioned documents set.

(ii) The second set will be the known signature of the deponent of the replying affidavit to the application for summary judgement and the signature of the person who signed the defence and counterclaim.

(iii) The 3<sup>rd</sup> set will be the spacemen signatures of the deponent of the replying affidavit to the summary judgement application and the person who signed the defence and counterclaim.

10. The above exercise to be complied with within a period of 90 days from the date of the reading of this ruling or alternatively, or within such time as the court may extend from time to time for good cause shown as the case may be.

11. There will be liberty to apply.

12. Thereafter appropriate orders will be made as regards the way forward as regard the trial taking into account the findings of the document examine on the examination as above.

**DATED, READ AND DELIVERED AT NAIROBI THIS 3<sup>RD</sup> DAY OF JULY 2009**

**R.N. NAMBUYE**

**JUDGE**