

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT ELDORET
COMMERCIAL CASE NO. E004 OF 2025
GREEN PLANET INITIATIVE 2050 FOUNDATION
PLAINTIFF
VERSUS
EARTHBANC AB 1ST
DEFENDANT
EARTHTREE COMPANY LIMITED 2ND
DEFENDANT
KHANNAH RISHABH 3RD
DEFENDANT
JOSEPH KARANJA MURATHI 4TH
DEFENDANT

Coram: Justice R. Nyakundi
M/S Kimaru Kimutai & Co. Advocates
M/S Simba & Simba Advocates
M/S C.D. Nyamweya & Co. Advocates

JUDGMENT

1. The Plaintiff instituted this suit vide a plaint dated 21st May 2025 seeking the following reliefs;
 - 1) *A declaration that the Defendants acted in breach of the MOU, the service agreement and fiduciary duty.*
 - 2) *A permanent injunction restraining the 2nd Defendant, its agents or proxies from presenting itself as the project lead or implementation partner under the Kenya Reforestation project or any derivative initiative thereof.*
 - 3) *An order compelling the Defendants to render a full and accurate account of all revenues, carbon credit, donor funds, and financial benefit received or disbursed under the Kenya Reforestation Project from the 15th August 2022 to date.*

- 4) *General damages for breach of contract, loss of revenue, reputational injury and operational disruption,*
 - 5) *Exemplary and punitive damages for fraudulent misrepresentation, abuse of fiduciary duty and tortious interference.*
 - 6) *An order lifting the corporate veil of the 2nd Defendant and holding the 3rd and 4th Defendants personally liable for fraudulent conduct and unjust enrichment.*
 - 7) *An order for the immediate and unconditional release of the donor funds into the Plaintiffs account for the purpose of continuation of the Plaintiffs reforestation project.*
 - 8) *Costs of the suit.*
 - 9) *Interest on (d), (e) and (g) above at Court rates.*
 - 10) *Any other or further relief that this honourable Court may deem just and expedient in the circumstances.*
2. The Plaintiff laid down the background facts of the case and pleaded that on or about 15th August 2022 it entered into a binding and enforceable Memorandum of Understanding (MoU) to implement the Kenya Reforestation Project, targeting reforestation of approximately 13,000 hectares and an eventual scale-up to 100,000 hectares. The same was between the Plaintiff, 1st Defendant and Worldview Impact. The Plaintiff was designated as the "Local Partner" and implementation lead and the 1st Defendant was to act as project financier, exclusive carbon credit marketer, and governance partner, with rights to carbon from trees funded under the project, and limited governance participation via advisory board representation.
 3. The Plaintiff pleaded that the MoU granted exclusive rights to the 1st Defendant only over carbon arising from trees and land facilitated, managed, or pledged through the Plaintiffs activities. The Plaintiff retained implementation control, community liaison, and local fund oversight. That the contractual framework was subsequently deepened and formalised through a Service Level Agreement (SLA) dated 12th December 2023, executed between the Plaintiff, the 1st Defendant, and Festus Kiplagat (The founder of the Plaintiff). This SLA provided further

binding clarity on project scope, implementation timelines, financial terms, and performance obligations. It clearly affirmed the Plaintiffs role as the central implementation partner and entrenched exclusivity and fiduciary reliance.

4. The Plaintiff urged that despite the existence of the MoU and SLA, the CEO of the 1st Defendant maliciously and secretly orchestrated the incorporation of the 2nd Defendant in Kenya. That the 3rd Defendant, in his capacity as the Chief Executive Officer of the 1st Defendant, personally and maliciously orchestrated the incorporation of the 2nd Defendant in Kenya with the intent of displacing the Plaintiff from its contractual mandate under the MoU and the SLA. The 3rd Defendant then caused the 1st Defendant to acquire 1,000 shares in the 2nd Defendant, thereby embedding corporate interest in a local entity designed to usurp the Plaintiffs project role and revenue stream.
5. The Plaintiff urged that the 1st Defendant acquired 1,000 shares in the said company, thereby directly embedding itself into the local project implementation chain to completely circumvent the Plaintiff. That the 1st and 2nd Defendants then colluded to oust the Plaintiff from ongoing implementation and revenue opportunities, redirecting project control, funding, and visibility to the 2nd Defendant under misleading and prejudicial pretexts, in complete disregard of clauses 3, 4.1(b), 6, and 13 of the SLA. In addition, and to the Plaintiffs dismay, the required 90-day notice of termination under clause 6 of the SLA was never issued, further evidencing constructive dismissal without cause.
6. The Plaintiff then particularised the breach of contract, fraud and unlawful interference and prayed the Court grant the prayers as sought.
7. The Defendants filed a statement of defence dated 23rd June 2025 where they denied the allegations in the plaint. Further, they averred that the Memorandum of Understanding (MOU) was, per Article 6 thereof, only an expression of “will” to explore the opportunity to implement carbon projects in the County. Given that any such opportunities, at the time, were only in the exploratory and proof of

concept phase, it was clearly not the intention of the parties that the MOU would be capable of governing any project that was given a go-ahead. That importantly, the main purpose of the aforementioned MOU related to the “Kenya Reforestation Project” which is a different project than the one currently in operation, being the Regeneration Kenya Project. Notwithstanding the aforesaid, it is noted further that fewer than 350 hectares of the purportedly targeted reforestation of approximately 13,000 hectares have actually been planted (in the separately designated Regeneration Kenya Project for which the Services Agreement dated 12th December 2023 was agreed and signed by the parties thereto).

8. The Defendants averred that while the Plaintiff continuously refer to a Memorandum of Understanding entered into between them and the 1st Defendant, the Defendants would like to call into question the weight of the said MOUs on the non-binding element of them on the parties that appended their signatures on them. It is for the said non-binding nature of the MOU that the parties later on elected to formalize their intention vide a Services Agreement dated 12th December 2023.
9. The Defendants posited that the Plaintiff’s characterization of the Services Agreement dated 12th December 2023 as part of a “deepened and formalized” contractual framework is entirely at odds with the express intention set out in Clause 11 (Entire Agreement). Further, that on or about 1st February 2024, the 2nd Defendant and the Plaintiff’s Chief Executive Officer one Festus Kiplagat entered into a Contract Service Agreement. The said agreement sought to have the Plaintiff’s CEO provide advice and assistance to the 1st Defendant towards implementation of the project as a Contractor. Subsequent thereto, and in discussions involving the aforesaid Mr Kiplagat, it was determined that the Plaintiff did not have the capacity to implement the project to ensure its deliverables. The 1st Defendant thus called for a series of meetings between the Plaintiff and the Representatives of the Defendants. In the said meetings, there was an indication that the Plaintiff’s staff did not possess the requisite skills to ensure complete

project deliverables. There was therefore a need for the 1st Defendant to spearhead the implementation of the project. This was done in three-fold; the taking up of the implementation of the project, the setting up of a subsidiary of the 1st Defendant to implement the project and the absorption of employees of the Plaintiff into the 2nd Defendant's employees. The position was later harmonized into an employment relationship vide an Employment Contract between the 2nd Defendant (A local subsidiary of the 1st Defendant) and the Plaintiff's CEO, Mr. Festus Kiplagat. Under the said agreement, Festus Kiplagat was appointed as the 2nd Defendant's Executive Director of Africa. At the insistence of Mr. Kiplagat, the 2nd Defendant also on-boarded a team including certain persons that the Plaintiff introduced (which may have included its employees) to ensure a smooth transition of operations and implementation from the Plaintiff to the 1st Defendant.

10. The Defendants urged that it is undisputed that while the Plaintiff's employees were subsumed into the 2nd Defendant's employment, the Plaintiff effectively ceased performing any implementing partner duties. The 1st Defendant therefore took up implementation by themselves and through its local subsidiary (the 2nd Defendant) and other agents.
11. The Defendants posit that during the Implementation of the project, there were myriads of discrepancies, inefficiencies and financial irregularities in the work that was carried out by the Plaintiff and/or by certain of the 2nd Defendant's employees who had been introduced by and or previously been the employees of the Plaintiff. As a result, the 2nd Defendant issued notices to show cause and upon receiving unsatisfactory responses, the employees were invited for disciplinary hearings. The said disciplinary hearing took place on 20th March 2025. It is imperative to note that the Plaintiff's CEO, Mr Kiplagat, did not show up for the said hearing and instead opted to respond through lawyers, Messrs. Kiptoon and Company Advocates attempting to vacate the said hearing date. With the representations

being meagre, the 2nd Defendant proceeded to dismiss the employees, including the Plaintiff's CEO.

12. With the said employees having worked for the 2nd Defendant for a significant period, it is the Defendants' position that the 2nd Defendant was now sufficiently built to continue with the project implementation. The role of the Applicant became superfluous as it was not carrying out any implementation duties. In view of the foregoing and noting that the Plaintiff's position regarding the implementation of the project now being moot, the 1st Defendant proceeded to issue the Plaintiff with a Termination Notice dated 4th April 2025. The Defendants therefore heavily refute the Plaintiff's position that the said Notice was not served. Service was affected on the Plaintiff's CEO both physically and vide an email of 4th April 2025.
13. They denied the allegations particularised and prayed the Court dismiss the suit.

Hearing of the suit

14. PW1 was Festus Kiplagat who adopted his witness statement dated 21st May 2025 as evidence in chief. He testified that the Plaintiff entered into a Memorandum of Understanding dated 22nd August 2022 with Worldview Impact Limited for the Regeneration Kenya Project in 4 counties worth KES 20 billion (MOU) and a subsequent Service Level Agreement dated 12th December 2023 (SLA) with the 1st Defendant, wherein the Plaintiff was designated as the exclusive local implementing partner for the Regeneration Kenya Project. Further, that at all material times, the Plaintiff was engaged by the 1st Defendant as its local implementing partner for the Regeneration Kenya Project (RKP), pursuant to the SLA. Under the said agreement, the Plaintiff was tasked with conducting due diligence, identifying viable project sites, liaising with local communities, overseeing afforestation activities, and ensuring compliance with relevant environmental standards and carbon offset protocols.

15. Pursuant to the aforementioned mandate, the Plaintiff mobilized community groups, verified and mapped over 5,000 households and a total of 72,000 hectares of land for reforestation across four counties, and submitted detailed documentation—including landowner consent forms, land coordinates, and forestry implementation plans—for approval by the 1st Defendant and its designated validation entities. These efforts were undertaken with full knowledge and active participation of the 1st and 3rd Defendants. In the course of its performance, it consistently submitted reports, community data, land verification records, and other project sensitive materials to the 1st Defendant and its officials, including the 3rd Defendant, in good faith and with the expectation of continued collaboration in line with the binding contractual relationship.
16. He stated that on 7th December 2023, the 1st and 3rd Defendants, in breach of the contractual and Fiduciary obligations owed to the Defendant, fraudulently incorporated the 2nd Defendant and commenced covert operations aimed at duplicating the Defendant's work and reassigning the Defendant's validated project sites to the 2nd Defendant, without lawful termination of the existing agreement or consent of the Defendant. Further, that the 4th Defendant, acting under the instructions of the 3rd Defendant and purporting to represent the 2nd Defendant, made multiple misrepresentations to community leaders, county officials, and other stakeholders falsely alleging that the 2nd Defendant was the rightful project implementer—and solicited access to the Plaintiffs project documents, maps, and landowner contacts under false pretences.
17. He averred that independent of the national-level agreements with the 1st Defendant, the Plaintiff executed separate Memoranda of Understanding with each of the four county governments within which the Regeneration Kenya Project was to be implemented. These county level MoUs affirmed the Plaintiffs exclusive mandate to engage with communities, manage implementation logistics, and coordinate field operations at the local level. That at no point was the 2nd Defendant a

party to any of these county-level MoUs. That prior to the disputes herein, the Plaintiff maintained project-related bank accounts with Diamond Trust Bank for purposes of transacting donor funds. However, in the interest of enhancing transparency and complying with donor and NGO regulations, the Plaintiff and the 1st Defendant jointly sought and obtained the authority of the NGO Coordination Board to open a designated project account. The said account was to be operated jointly by representatives of the Plaintiff and the 1st Defendant, with four authorized signatories—two from each party. During the financial years 2022 and 2023, the operational and financial relationship between the Plaintiff and the 1st Defendant remained stable, and the Plaintiff regularly received donor disbursements through the said channels, enabling uninterrupted implementation of the Regeneration Kenya Project. However, beginning in the financial year 2024-2025, shortly after the incorporation of the 2nd Defendant, operational anomalies emerged, including unexplained diversions of donor funds. Without a lawful basis or amendment of the Service Level Agreement, the 2nd Defendant began receiving donor disbursements that had previously been remitted directly to the Plaintiff, effectively displacing the Plaintiff from its financial and operational roles under the project.

18. He urged that the 2nd Defendant not only assumed financial control but also systematically took over the Plaintiffs field operations, project infrastructure, and human resources, including directly approaching and recruiting the Plaintiffs employees. The Plaintiff was alerted to the malicious nature of the 2nd Defendant's actions when it emerged that several employees of the Plaintiff had been served with "Notices to Show Cause" by the 2nd Defendant despite having no employment relationship with it. These letters were accompanied by inducements to resign or accept redeployment under the 2nd Defendant's structure, thereby effecting constructive dismissal of key personnel. As a direct consequence of the Defendants' unlawful conduct, the Plaintiff was unjustly deprived of its role as implementing partner and excluded from the subsequent implementation phases of the reforestation

project, thereby suffering significant financial loss, reputational damage, and disruption of long-term contractual expectations.

19. He urged that the Defendants failed to provide any notice of termination of the contract or to engage in any dispute resolution process as stipulated under Clause 6 of the Service Level Agreement, thereby breaching the express and implied terms of the contract and denying the Plaintiff a fair opportunity to address any alleged concerns or misunderstandings.
20. He urged that the actions of the Defendants were not only unconscionable but also in flagrant breach of their fiduciary and contractual duties—express or implied—arising from the parties' collaboration, joint project design, and shared stakeholder engagement efforts.
21. DW1 was Khannah Rishabh who adopted her witness statement as evidence in chief. She identified herself as a director in the 1st Defendant Company and a director in the 2nd Defendant Company. She stated that on 15th August 2022 Earthbanc AB entered into a Memorandum of Understanding with Green Planet Initiative 2050 Foundation and Worldview Impact Ltd of the United Kingdom. At the time, the project name being considered was Kenya Reforestation Project (KRP). This project was being evaluated largely in Baringo and Elgeyo Marakwet Counties in the Republic of Kenya. Projects for the purpose of Carbon Trading are registered with the Gold Standard for purposes of implementation. She urged that in March of 2023 an assessment on the viability of the project in Baringo and the lower parts of Elgeyo Marakwet Counties was carried out and the project could not be implemented because of the security risk in these areas.
22. There were other criticisms and consequently, the Kenya Reforestation Project (KRP) could not be registered as anticipated in the Memorandum of Understanding dated 15th August 2022. The Company commuted the project to Kenya Reforestation and Sustainable Livelihoods Project (Regeneration Kenya). This project identified the areas of Uasin Gishu County, Upper Elgeyo Marakwet and also

identified Trans Nzoia -thought the project has not commenced in Trans Nzoia. On 12th December 2023, the 1st Defendant entered a Services Agreement for the implementation of Kenya Reforestation and Sustainable Livelihoods Project (Regeneration Kenya). It is also important to note that at this point in time Worldview Impact Ltd was no longer part of this project.

23. She stated that it was a term of the Services Agreement (clause 11) as follows: This Agreement constitutes the entire understanding between the Parties and supersedes all prior agreements and understandings, whether oral or written and explained that this clause was included because, in view of the developments that had taken place during the feasibility assessment and the changes that had occurred in the parties' thinking around the project that GPI's role would be exclusively and exhaustively defined by the Services Agreement.
24. She stated that therefore, the parties recognising that the nature of the project had changed, entered first into the Contractor Agreement (which superseded inter alia the MoU) to govern a final phase of the feasibility evaluation. The Company and GPI later entered into the Services Agreement in December 2023 which (among other agreements) was to govern the role, rights and responsibilities of GPI in the period thereafter. Accordingly, her view at this point was that the MoU had no further relevance.
25. She stated that when the Plaintiff started to implement the project the issue of capacity arose and it necessitated a new company was incorporated. The Plaintiff organization and directors were assimilated into the 2nd Defendant company, which is a subsidiary of the 1st Defendant company. She urged that the 2nd Defendant company was incorporated and the Plaintiff's chief executive, Festus Kiplagat, was made aware of the same. The witness stated that she personally had discussions with Mr Kiplagat about the terms on which employees and/or associates of the Plaintiff would be hired. In the restructure 10 employees and/or associates of the Plaintiff were hired by the 2nd Defendant as full-time employees who were to be exclusively

dedicated to their employment roles. Their terms of employment were negotiated by the Plaintiff directly.

26. She urged that the role of the Plaintiff was under the Services Agreement of 14th November 2023 contract, the Plaintiff guaranteed that landowners will provide certain services at no cost. However, despite this undertaking, the Plaintiff invoiced for these services and was paid for these services. The dispute arose between the Plaintiff's director and the 1st and 2nd Defendants when it came to; Achieving the set targets of farmers to be on-boarded expected land is 500 Ha of land; The number of trees to be planted; Some of the farmers who had signed collaboration agreements started leaving; There were gaps in species.
27. She stated that the transition from the Plaintiff Organization through the Services Agreement into the 2nd Defendant company came about because of the following realization and the need to realize the project within the stipulated timelines; a) It emerged that the Plaintiff did not have capacity to implement the project fully; b) Of the expected 3,500 Hectares the Plaintiff was struggling to achieve 350 Hectares; c) The staff composition and expertise was missing and the 1st Defendant had to deploy its staff including GIS experts among others; d) There were farmer disputes; e) Imprudent use of resources where the seedlings bought did not meet the seedlings planted.; f) The seedlings planted did not conform with what was invoiced for and paid for and; g) The land agreements with farmers could not be verified and there were no supporting documents for the farmers contracted to grow the tree seedling.
28. She stated that it was a false assertion that the transition was done with malice, fraudulently or facts concealed. The Plaintiff's director would proceed to draw a salary until his services came to an end. It is after the termination of employment that this suit was initiated. Further, that it is untenable, and inconceivable to maintain the services agreement because of the incapacity of the Plaintiff to deliver as earlier stated. That the suit is misconceived. At the center of the Relationship

between the Plaintiff and the 1st Defendant are two documents. The Memorandum of Understanding and the Services Agreement. The Memorandum of Understanding did not materialize due to the issues raised above. The services agreement came in its place under the project —Regeneration Kenya. It is apparent that the Plaintiff is responsible for breach and therefore the case ought to be dismissed with costs.

29. The parties were then directed to file submissions. The Plaintiff filed submissions dated 2nd February 2026 through the firm of C.D Nyamweya & Co Advocates whereas the Defendants filed submissions dated 17th February 2026 through the firm of Messrs. Simba & Simba Advocates.

Summary of the Plaintiffs' submissions on the legal perspectives of the dispute

30. The lead legal Counsel Mr. Nyamweya summarised the parties' respective evidential material and the substratum of the Plaintiff's claim against the Defendants jointly and severally.
31. It was learned Counsel's contention that the role of the Plaintiffs in the regeneration Kenya project is set out clearly in the agreement dated 12th December 2023. That on the heading "purpose" before clause 1, the agreement set out the position to be occupied by the Plaintiff in that agreement, and the agreement states: "the purpose of this agreement is to outline the Roles and Responsibilities of Earthbanc & GPI2050 and Festus Kiplagat in relation to the regeneration Kenya (the regeneration Kenya project) as an implementing partner of the project, GP1 2050 & Festus Kiplagat will serve as the primary nursery management and planting partner (referred to as implementation partner)".
32. He submitted that nowhere in the entire agreement has the Plaintiff been defined differently other than that of an implementing partner. There is also no addendum or anywhere else where the Plaintiff has been redefined. He further submitted that no evidence was adduced by

the Defendants to support that contention of relegating the Plaintiff in the regeneration Kenya project to that of a sub-contractor. Counsel urged that there is no ambiguity in the manner in which the contract defines the Plaintiff so as to require an interpretation of that clause. He placed reliance on the decision in the case of **Shah & 7 others V Mombasa Bricks & Tiles Limited & 5 others (2023)** eKLR, and **Heineken East Africa Import Company Ltd & Another V Maxam Ltd (2024)** eKLR, **Attorney General V Kalsuito Contractors Limited (2023)** eKLR in this regard. Counsel further submitted that the Plaintiff is plainly and unambiguously defined in the contract and no other interpretation is necessary or required.

33. On breach of contract, Counsel laid out the accusations the Defendants levelled against the Plaintiff to wit;
- a) Lack of capacity to implement the project in that the Plaintiff had only 2 employees and independent contractors; they lacked expertise in the staff composition to the extent that the 1st Defendant had to supplement their own experts.
 - b) The Plaintiff did not purchase the right seedlings which they had invoiced the 1st Defendant for and instead of purchasing exotic seedlings, they resorted to indigenous seedling which were of low quality.
 - c) The Plaintiffs contracted farmers who were unverifiable or were unsupported by any contractual evidence.
34. He urged that on the issue of capacity, clause 2 of the agreement was very clear at 2.1 where the agreement states:
- “2.1 - under the terms of this agreement, Earthbanc shall be responsible for:
- a) Providing overall guidance and direction for the project.
 - b) Conducting monitoring and evaluation for the project.
 - c) c. Coordinating with GPI 2050 and Festus Kiplagat to ensure successful implementation of the project”
35. He submitted that this clearly suggests that the 1st Defendants were

not bystanders or aloof from the project, they were actively involved. If there was insufficiency of staff or experts, then it was the 1st Defendants to ask the Plaintiffs to replenish. Further, that other than in these pleadings before the Court, the 1st Defendant had not raised that issue anywhere with the Plaintiff and there is no evidence to that effect. Counsel urged that secondly, the Defendants have admitted to taking in or on-boarding 10 of the Plaintiff's employees to the 2nd Defendant. That it is the 2nd Defendant who created that disadvantage, and therefore, they cannot rely on the same to their own advantage (commonly referred to *maxim nulli vende relicet quod quis non habet*) Counsel placed reliance on the case of **National Bank of Kenya Ltd V piper trust Limited & 3 others (2001)** and the case of **Kenya Ports Authority V Keter & 3 others (2009) eKLR** in this regard.

36. Counsel urged that on cross-examination DW1 was asked specific questions on the names of the farmers who were not paid by the Plaintiff and the amount which they were not so paid, he never offered any answer preferring that the issue was a security risk. There was no evidence to support this particular contention. On the issue of planting wrong seedlings in cross examination PW1 was asked whether that issue had ever been raised with the Plaintiffs, and he failed to provide any such evidence. He urged that this is an issue that surfaced in the pleadings but was never raised with the Plaintiff as the same ought to have been raised under Clause 2.1 of the contract. He urged that that allegation was not proved. He further submitted on the issue of the Plaintiff failing to document farmers as having never been raised with the Plaintiff other than in these proceedings.
37. Learned Counsel submitted that the other issue which was raised orally in Court by DW1 and which was not pleaded was that the Plaintiff resorted to intimidation, bullying and harassment of the 2nd Defendant staff and that there was an attempt to bum down tree nursery at Moiben. None of the allegations were proved as none of the

alleged bullied, harassed or intimidated 2nd Defendant's employees gave evidence. DW1 also could not give the names of the said employees nor the names of the persons intimidating them. Counsel urged that the 1st Defendant had no right to terminate the contract and that that termination was illegal.

38. Counsel submitted on breach, urging that the regeneration Kenya project was a product of an agreement between the Plaintiff and the 1st Defendant. This agreement spelt out the responsibilities of the 1st Defendant as a project developer and the Plaintiff as the implementing partner. He urged that the following were the breaches by the Defendants of the agreement dated 12th December 2023;

- The 3rd Defendant embedded the 2nd Defendant in the regeneration Kenya project without the consent of the Plaintiff and without any legal instrument or without an amendment to the agreement to include the 3rd Defendant as a party in that project.
- All the Defendants admit that the 2nd Defendant participated in the regeneration Kenya project. The 3rd Defendant in his evidence indicated that Festus Kiplagat the CEO of the Plaintiff was aware of the activities of the 2nd Defendant and had acquiesced to the 2nd Defendant being involved in the arrangement thus forming new contractual obligations.

39. Learned Counsel urged that the contract herein was between 2 parties only, there is no clause in the agreement which gave the 3rd Defendant in the absence of any written document to vary the terms of the contract to bring in a 3rd party in the form of the 2nd Defendant. Moreover, clause 12 of the agreement provide that "any changes to the terms of the agreement must be mutually agreed upon in writing by authorized representative of both parties"

40. Counsel urged that that section does not leave room to a party acquiescing nor does it leave room for a party acting without the mutual consent of the other party. The very presence of the 4th respondent together with the over 80 employees in the regeneration

Kenya project was a clear testament of the breach of the contract. The testimony of the 3rd Defendant is livid that the 2nd Defendant took over implementation of the Regeneration Kenya Project from the Plaintiff. That according to the testimonies of DW1 and DW2, they assumed that the 2nd Defendant and the 1st Defendant were one and the same thing, the 2nd Defendant being a 100% owned subsidiary of the 1st Defendant and therefore did not require any legal instrument to be embedded in the regeneration Kenya project. He urged that nothing can be further from the truth as the 1st and 2nd Defendants were different legal entities or personalities in **RE: GLOBAL BANK LTD fin liquidation) (2013) eKLR**, the Court emphasized the separate legal personalities of a company and its subsidiaries. In the case of **Lloyd Masika V Tanzania Breweries Limited & 2 others (2019) eKLR** in this case the Court discussed the principle of separate legal personality in the content of parent and subsidiary companies. Clearly then the 2nd Defendant was an outsider in the agreement dated 12th December 2023 and therefore required a legal instrument to entrench it in the business of the regeneration Kenya project. That the 3rd Defendant hiring and embodying the Plaintiff's employees in the employment of the 2nd Defendant constituted another breach of the contract. He urged that there is nothing in the agreement which arrogated to the 1st, 3rd and 4th Defendants' power to remove and entrench employees of the Plaintiff in the service of the 2nd Defendant, such an action was clearly derogation from the express terms of the agreement.

41. On the part of the 2nd Defendant, it interfered with contractual obligations of parties. He reiterated that the role of the Plaintiff in the regeneration project is spelt out in clause 1 and clause 2.2 of the contract, the 2nd Defendant having been on boarded to the regeneration Kenya project by the 1st and 3rd Defendants assumed the Plaintiffs role and thereby assumed the Plaintiffs role of implementation and whereas there was no privity of contract between the Plaintiff and the 2nd Defendant to engage in the regeneration Kenya project, the 1st and 3rd Defendant completely

violated the contract by assigning the role of the Plaintiff to the 2nd Defendant which clearly was breach of clauses 1 and clause 2.2 of the contract.

42. Counsel urged that clause 4 of the contract provided for payment of services by the 1st Defendant to the Plaintiff. It is in the evidence of DW1, that as from the month of May 2024 no payment was made to the Plaintiff for reasons that the Plaintiffs work was done by the 2nd Defendant and the Plaintiff could not raise any invoice to justify any payment. The 1st Defendant therefore breached clause 4 of the contract by failing to allow the Plaintiff perform its part of the contract and to pay the Plaintiff upon work. As at May 2024, the contract between the Plaintiff and the 1st Defendant had not been terminated which was terminated in July 2025. The 1st Defendant did not have any reason not to pay the Plaintiff which was clearly a breached of clause 4 of the agreement herein.
43. On the role of the 2nd Defendant in regeneration Kenya project counsel submitted that there is no single document which shows who the 2nd Defendant were in regeneration Kenya project or in the agreement dated 12th December 2023, yet there is evidence by the 3rd , 4th and PW1 (Festus Kiplagat) that the 2nd Defendant engaged in the regeneration Kenya project, they occupied offices belonging to the Plaintiff and even worked on the Moiben Nursery, the 4th Defendant is on record that the 2nd Defendant employed more than 80 people to work in the regeneration Kenya project yet there is no single instrument to show how and to what extent was the 2nd Defendant involved in the regeneration Kenya project. That the 3rd Defendant was heard to say that PW1 (Festus Kiplagat) was aware of the activities of the 2nd Defendant and had acquiesced to the 2nd Defendant being part of the arrangement. He cited **National Bank of Kenya (ltd) V Karanja (1987) KLR 665** and urged that the Defendant cannot contradict the agreement by suggesting that PW1 acquiesced to the activities of the 2nd Defendant which introduced an oral agreement. He maintained that the 2nd Defendant was clearly an

outsider.

44. On whether the 3rd and 4th Defendants personally liable for the breaches, Counsel cited *Salomon v Salomon & Co. Ltd (1897) AC 22* established that a company is a separate entity from its directors and shareholders. Therefore, in order to bind the company in contracts and engagements, there has to be a resolution by the company to sanction any such undertaking. He urged that despite that, the 2nd Defendant was engaged and did carry out activities in regeneration Kenya project, there was no resolution of the 2nd Defendant company clothing the 3rd and 4th Defendants with authority to entrench the 2nd Defendant in the affairs of the “regeneration Kenya project. Counsel urged that there being no such resolution or clear authorization the 3rd and 4th Defendants acted on their own whims and therefore are personally liable.
45. Counsel urged that as a general principle, the purpose for damages for breach of contract is, subject to mitigation of loss, the claimant is to be put as far as possible in the same position he would have been if the breached complained of had not occurred. This principle is encapsulated in the Latin phrase *restitution in integrum* and has been dealt with in the following cases: *Kenya industrial estate ltd v Lee enterprises Ltd NRB CA Civil Appeal No. 54 of 2004 (2009) eKLR*, *Kenya Breweries Ltd V Natex Distributors Ltd Milimani HCC No. 704 of 2000 (2004) eKLR*, *Kenya Tourism Development Corporation V Sundowner Lodge Limited Civil Appeal No. 120 of 2017* and *Delilah Kerubo Otiso (suing as legal representative of the estate of Charles Otiso Getugi V Ramesh Chander Dingra Civil Appeal No. 154 of 2009*.
46. On the issue of quantum of damages, clause 3 of the contract/agreement provided that the term of the contract was from 12th December 2023 for a period of 12 years renewable, clause 4 of the contract detailed how the Plaintiff was to be paid. Therefore, based on the principle of legitimate expectations the Plaintiff would have earned from the contract for 12 years. Clause 4.1 indicated that payment to the Plaintiff was to be quarterly and made in USD. And for

the last quarter in which the Plaintiff was paid an amount of Kshs.50,000USD was made. Counsel urged that there being 4 quarters in a year, the Plaintiff would be entitled to 200,000USD in a year. The period of the contract being 12 years that would be 12 X 200,000USD **minus** 2 quarter which had been paid = 2.300,000 USD. He prayed that the Court award these general damages for breach of contract and costs of the suit.

The Defendants' case summary on submissions

47. The Defendants' case was being prosecuted by Learned Counsels Mr. Khamala, Mr. Maritim and Mr. Aloo whose submissions are dated 17th February 2026. First and foremost, it was urged before this Court to answer the question as to whether there was a breach of any of the agreements in place between the Plaintiff and 1st Defendant and whether any such agreement remains binding. The lead learned Counsels cited the decision in the case *Eldo City Limited v Corn Products Kenya Ltd & Another [2013] KEHC 5916 (KLR)*. Secondly, on whether an MOU is legally binding and urged that Section 107 of the Evidence Act places the burden of proof on the party that alleges on the existence of a legal right or liability. On this issue, learned Counsels placed reliance in the Court of Appeal case in *James Muniu Mucheru v National Bank of Kenya Limited [2019] KECA 1058 (KLR)*. In this respect, learned Counsels contention was to the effect that the Plaintiff fell short of discharging the burden of proof on a balance of probabilities.
48. In further beefing up their case, learned Counsels urged the Court to find that there was a Memorandum of Understanding entered into between the Plaintiff, 1st Defendant and Worldview Impact Limited which was effective from 22nd August 2022. This is as stipulated under Article 6 of the MOU which states that it was "the parties' declaration and intention to commence the cooperation and establish the intended partnership agreement referred to in the Preamble." This demonstrates the non-binding nature of the MOU in relation to the parties therein, as it expresses intentions about possible agreement(s)

in the future, which is implicitly subject to a more detailed evaluation of present circumstances. Additionally, the MOU referenced a different project (“Kenya Reforestation Project”) from the subsequently pursued “Regeneration Kenya Project.” The MOU functioned as a basis for exploratory work and proof of concept. It was not intended exhaustively to govern the parties’ legal rights or obligations or constitute the RK Project. The aspects contemplated under the MOU such as governance regulations and the project bank account never materialized. These potential concepts were inapt and never bore any relevance to the RK Project.

49. Learned Counsels further urged that Article 4.2, of the MOU states: *“In entering into this MOU, each Party is aware that this MOU is not legally binding but is meant to express a strong commitment to collaborate as set out in this MOU”*. This further illustrates the intention of the parties not to be bound by the aforementioned MOUs. In essence, according to the Defendants learned Counsels, the Plaintiff failing to prove the existence of a legally binding agreement, the Defendants posit that the Plaintiff has not proved the breach of the two MOUs in contention. Further, that this position is crystalized by the Plaintiff and 1st Defendant Services Agreement. The Parties to this suit have agreed both in documentation and during trial that the Services Agreement was the primary document that governed the relationship between the parties herein. Moreover, Clause 11 of the Agreement states as follows:

“This Agreement constitutes the entire understanding between the Parties and supersedes all prior agreements and understandings, whether oral or written”.

Therefore, there could not have been breach of the MOUs as incorrectly proffered by the Plaintiffs.

50. Learned Counsels argued and urged in their submissions that it appears to be critical to the viability of the Plaintiff’s claims of breach of contract that it is able to show that (a) the Services Agreement conferred upon the Plaintiff some form of exclusivity or rights of

consent (b) that the 1st Defendant breached said rights (c) that the breach caused the Plaintiff to suffer loss and (d) that on the balance of equities it would be just for the Court to give any relevant relief. Learned Counsels submitted that the Services Agreement does not confer exclusivity or consent right upon the Plaintiff as the implementing partner or stipulate any explicit requirement for the 1st Defendant to obtain the consent of the Plaintiff prior to taking any action which it might otherwise lawfully take. That the lack of any express grant of exclusivity or consent rights should in itself give the Honourable Court reason to find that the Plaintiff has failed to meet its evidential burden to prove its claim for breach of contract.

51. It was learned Counsels contention and perspective that there are several other persuasive reasons to doubt that 1st Defendant ever intended to confer exclusivity or consent rights on the Plaintiff. Learned Counsels further urged that the Plaintiff has not even attempted to outline for the Court the scope of the purported exclusivity which it claims to have been granted or to explain the commercial rationale as to why such valuable rights would be granted to it. The idea that there are implied rights of exclusivity or consent must be set against the clear testimony of the 1st Defendant's witnesses and the absence of any evidence in the underlying contractual documentation to support such a claim. He invited the Court to find the Plaintiff has failed to provide any evidence that there was any intention by the parties to the Services Agreement that there should be any restriction on the 1st Defendant doing work itself or engaging additional suppliers or requiring it to obtain any agreement or consent from the Plaintiff prior to doing so.
52. Counsel urged that the Plaintiff does not and simply cannot show that it had any explicit rights of exclusivity or consent in relation to operation of the RK Project, either through the Services Agreement or otherwise. Likewise, it does not and cannot show that the 1st Defendant had agreed contractually with the Plaintiff to limit its otherwise restrict its inherent rights as project developer to manage the RK Project as it saw

fit. Learned Counsels further submitted that if the Court should, contrary to the position advanced above, find that there was any contractual limitation or restriction on the 1st Defendant's right to manage the RK Project as it saw fit, it is submitted that the Plaintiff has failed to show that the 1st Defendant's actions or any of them constituted a breach of such limitations or restrictions.

53. Learned Counsels urged the Court to find that the Plaintiff has also failed to provide any evidence that the persons who came into the employment of the 2nd Defendant were in fact previously in its employment and/or that it has suffered any loss as a result of the 2nd Defendant employing them. Moreover, the Plaintiff's failure to analyse the Services Agreement's remuneration provisions properly and/or provide relevant evidence of loss and or damages also undermines its claim for monetary damages. It is noted that nothing in the Services Agreement provides for a minimum level of remuneration or even a minimum level of work.
54. Learned Counsels in addition argued and submitted that if contrary findings to the above are made by the Honourable Court in the alternative it should find that the Plaintiff had shown on the balance of probabilities that the 1st Defendant may have breached contractual undertakings or covenants owed to the Plaintiff, they invite the Court to regard the behaviour of the Plaintiff as (a) grounds for a defence to be raised by the Defendants to any breach of contract or other claim in tort or otherwise and/or (b) constituting a break in the chain of causation connecting any purported breach of contract or duty to the loss or damage purportedly suffered by the Plaintiff and/or (c) constituting an absolute bar to the awarding of any damages or a circumstance pursuant to which the Court might regard the Plaintiff as having approached the Court with unclean hands.
55. It was learned Counsels contention that on Termination of the Services Agreement, that Clause 6 of the Agreement permitted the 1st Defendant to terminate for convenience at any time on giving a written ninety-day notice period prior to termination. He cited the decision of

the High Court in *Pius Kimaiyo Langat v Co-operative Bank of Kenya Limited [2017] eKLR* which was on the rewriting of contracts by Courts and urged that the Plaintiff cannot have willingly signed and sought enforcement of the agreement on the one part and then on the other invite this Court to misinterpret or rewrite the provisions of the same agreement.

56. As regards Plaintiff's claims against the 2nd, 3rd, and 4th Defendants, the Defendants note that both the Plaint and the final submission assert in various ways that even the 2nd, 3rd and 4th Defendants are in breach of contract and/or some form of fiduciary duty. The Defendants do not understand this allegation, as no evidence has been produced in this proceeding to show that any of them is party to any agreement with the Plaintiff, or which the Plaintiff has any jurisdiction to enforce. There is no circumstance adduced to explain how or on what basis any fiduciary duty should be owed to the Plaintiff. Accordingly, the Honourable Court is invited to disregard such assertions as failing on their face.
57. Learned Counsels submitted on similar vein that the Plaintiff claims by various means that the 2nd, 3rd and 4th Defendants may have committed torts of fraud, misrepresentation and unlawful interference with existing contract, unlawful interference with business expectancy and economic sabotage. That the Plaintiff does not (in its Plaint or elsewhere) particularize each tort, or explain on what basis the Defendants or any of them has a duty of care to the Plaintiff or explain how any specific purported actions of the Defendants breach such duty. Nor does the Plaintiff adduce any evidence to show the required state of mind of the Defendant or other legal requirements that must be satisfied by a claimant under such tort. Learned Counsels maintained in their submissions that the Plaintiff's allegations of fraud are almost entirely unsubstantiated. That the learned Counsels cited the Court of Appeal decision in *Swaleh Omar Said v Khalid Salim Abdulsheikh Civil Appeal No. E040 of 2023* on particularization of fraud.

58. It was learned Counsels factual and legal perspective that the Plaintiff seeks to pierce the corporate veil and cited the decision of Mabeya J in *Multichoice Kenya Ltd v Mainkam Ltd & Another*, urging that the Plaintiff has failed to meet this high threshold for lifting of the corporate veil. That there is no evidence that the 2nd Defendant was created to evade obligations and further, that the 3rd and 4th Defendants, as directors of the 1st and 2nd Defendants, testified that all their actions were taken in their corporate capacities in accordance with proper corporate authority.
59. Learned Counsels similarly submitted that the Plaintiff provided no evidence of any personal benefit or improper personal conduct by either individual. The mere fact that directors managed corporate affairs does not create personal liability. On this issue, learned Counsels further contended that Mr. Kiplagat himself willingly entered into an employment contract with the 2nd Defendant and actively participated in its operations as Executive Director for Africa. That the Plaintiff cannot now claim the 2nd Defendant is a fraudulent entity, when its own founder and CEO was employed by and endorsed it. With this in mind, the Court should now be conscious that there appears to have been an abuse of the process of the Court by the Plaintiff.
60. Learned Counsels urged that the Plaintiff has failed even to formulate a coherent cause or causes of action much less prove each of the necessary elements required in order to successfully obtain a declaration that the Defendants acted in breach of the MOU, the SLA, and fiduciary duty. In furtherance to this issue, learned Counsels submitted that the Plaintiff's Complaint appears to allude to various non-contractual causes of action (or torts) involving some or all of the Defendants, but it fails even to particularize the circumstances underpinning these, much less make the slightest progress in shifting its burden of evidence. That the Plaintiff bears the entire burden of proof in each aspect of its claims for (a) breach of contract and (b) breach of (non-contractual) duty and the Plaintiff has failed to prove any of the following (all of which would be required in order to enjoy

success in its contractual claims): (a) that there was a particular and specific contractual undertaking or covenant that they were owed that was breached by the 1st Defendant (and the exact terms of such specific undertaking or covenant) or other basis for fiduciary duty (b) that said contractual undertaking or covenant was breached by the 1st Defendant or persons acting on its behalf (c) that said breach has caused or will in due course cause loss or damage to the beneficiary of such undertaking or covenant and (d) that on the balance of equities it would be just for the Court to give any relevant relief. Counsel urged that accordingly, the Honourable Court must reject this claim.

61. With regard to the prayer for a Permanent Injunction restraining the 2nd Defendant, its agents, or proxies from presenting itself as project lead or implementation partner of the Kenya Reforestation Project or any derivative initiative thereof, learned Counsels invited the Court to regard this pleading as invalid, in that it appears to refer to the “Kenya Reforestation Project”. That as has been raised in numerous pleadings by the Defendants, the project proposed under that name never materialized, was never registered and cannot be said to exist, as opposed to the Regeneration Kenya (RK) Project. That the Defendants note that the Plaintiff had extensive opportunity to seek leave to amend its plaint in this respect but has not done so. On the basis that the Plaintiff has continued to seek relief in respect of a different (non-existent) project, it would seem to be within the jurisdiction of the Honourable Court to reject it out of hand as defective on its face.
62. Learned Counsels urged that alternatively, if the Honourable Court is minded instead to treat this pleading as preferring instead to the RK Project (as a derivative initiative), the Defendants’ position is that, for a permanent injunction, the Plaintiff would fundamentally be required first to prove breach of an agreement in place between the parties. As has been discussed, the Plaintiff fell hopelessly short of proving the said breach, or that it should be entitled to any relief, among other things because the Plaintiff did not have any rights of exclusivity. More

generally, the Plaintiff failed to establish that any specific breach occurred or to provide proof of the said breach.

63. Learned Counsels further urged that secondly, a permanent injunction is the preserve of equitable jurisdiction. Learned Counsels on this point cited the decision of the Court of Appeal in *Nguruman Limited v Jan Bonde Nielsen & 2 others [2014] eKLR* and urged that the Plaintiff has failed to prove breach of the Services Agreement (or its continuing existence) and in that regard it cannot be said that the Plaintiff has established a prima facie case. The failure to establish the said case automatically disqualifies the Plaintiff from enjoying an injunction. Furthermore, according to learned Counsels, the Plaintiff has also not established to this Court that an award of damages will be insufficient thereby showing their injury to be irreparable. To the contrary, the Plaintiff has actually alleged that they are owed a sum of USD2,300,000 which suggests that the Plaintiff does believe that an award for damages will be sufficient.
64. Learned Counsels submitted that given the status of the RK Project as having been terminated in its present form, it would be fruitless for the Court to grant such an injunction in any terms. The granting of an injunction would serve only to frustrate the legitimate business interests of the 2nd Defendant without in any sense serving the interests of the Plaintiff. Counsel urged that there are compelling reasons to consider that Plaintiff has not adequately performed its obligations in any event and that its conduct, both prior to and during the litigation, have fallen well short of that of an innocent party deserving of equitable relief.
65. On the prayer for an order compelling the Defendants to render a full and accurate account of all revenues, carbon credits, donor funds and financial benefits received under the Kenyan Reforestation Project from 15th August 2022 to date, counsel reiterated its submissions above and urged that alternatively, if the Court is minded instead to treat this pleading as referring instead to the RK Project, the Defendants posit that the Plaintiff in this suit has failed to prove any

entitlement to “revenues, carbon credits, donor funds and financial benefits” that accrue out of the RK Project or any contractual entitlement to obtain information about such matters. They have also failed to prove even the existence of any revenue, any carbon credit accrual or financial benefit to warrant the orders to be issued. The 1st Defendant’s witness Mr. Khanna testified that there are not expected to be any carbon credits developed and there have been no net profits from agricultural commodity initiatives that are relevant for the Services Agreement (e.g., Section 4.1(b)). Additionally, what the Plaintiff is misleadingly calling donor funds are (presumably) operational funds belonging to the 1st Defendant to which the Plaintiff has no legal or other entitlement. The Plaintiff’s own financial statements for the period to end of 31 December 2024 do not recognize that it has any right to grants or contributions in the future, either on a restricted or unrestricted basis.

66. Lastly, according to learned Counsels submissions the termination of the agreement under Clause 6 of the Agreement meant the Plaintiff would surrender and lose all accrued and future benefits. In that regard, this limb fails.

67. As to whether the Plaintiff is entitled to General Damages for breach of contract, loss of revenue, reputational injury and operational disruption, learned Counsels urged this to find in the negative being guided by the principles elucidated by the Court of Appeal in *Kenya Commercial Bank Limited v Charles Otiso Otundo Civil Appeal No. 198 of 2000* which held that there can be no general damages for breach of contract. It is the Defendants’ position that Damages for breach of contract are compensation to the aggrieved party and a reinstatement of what he has lost from the breach. General damages cannot be a restitution of the previous position. That in relation to loss of revenue, the Plaintiff has failed to itemize this particular relief. In relation to reputational injury, the Defendants contend that the Plaintiffs have not provided any documentation proving that their reputation was adversely affected or even highly regarded in the first place. In

consequence thereof, learned Counsels were of the strong view that the Plaintiff has failed to prove either that it has suffered any loss in this respect or to prove that any such loss was caused by the breach of contract or other breach of duty (rather than a loss caused by its agent's own behaviour).

68. Learned Counsels submitted on the claim of exemplary and punitive damages which are only awarded in exceptional circumstances involving oppressive, arbitrary, or unconstitutional conduct, none of which has been pleaded or established in the Plaintiff's case. In this respect, learned Counsels contention was that the Defendants acted within their contractual rights, issued a valid termination notice, and made all payments lawfully due. The Plaintiff's claim is therefore speculative and unsupported by evidence. This limb accordingly fails.
69. Learned Counsels urged that the Plaintiff's prayer seeking to lift the corporate veil of the 2nd Defendant is unfounded. Further, that it is trite law that corporate personality may only be disregarded in cases of fraud, sham, or improper conduct. As was laid out by the 3rd and 4th Defendant, all actions undertaken by the said officers were in their capacities as directors of the 2nd Defendant. They did not perform any duties/actions in their personal capacity or divest from the Memorandum and Articles of Associations of the 2nd Defendant. With the Plaintiff also failing to adduce any evidence to support this limb of prayer, the Defendants prayed that the same be declined.
70. Learned Counsels argued and submitted that the 2nd Defendant was lawfully incorporated as a Kenyan subsidiary to aid in management of the RK Project prior even to entry into the Services Agreement with Plaintiff's inability to perform. There is no evidence that the 2nd Defendant was created to defeat legal obligations or perpetrate fraud. The Plaintiff's mere dissatisfaction with the contractual outcome does not justify piercing the corporate veil, and the Plaintiff has failed to meet the high threshold required for such relief.

71. Learned Counsels further submitted that the Plaintiff's prayer for the immediate and unconditional release of alleged donor funds is similarly unfounded. The Defendants reiterate that the Plaintiff has failed to establish or provide any evidence that donor funds were ever received. The Plaintiff has also produced no evidence that it had any ownership or proprietary rights in relation to any such donor funds (the existence of which has not either been established). In the absence of proof, Counsel urged the Court not to grant orders premised on speculative and non-existent funds.

72. All in all, learned Counsels invited the Court to dismiss the suit for want of proof on a balance of probabilities by the Plaintiff with costs.

Analysis & Determination

73. The following issues arise for determination;

First and foremost whether the case for the Plaintiff measured within the provisions of Section 107(1), 108, 109 and 112 of the Evidence Act has been proven on a balance of probabilities

He who alleges must prove, this position is succinctly captured in Sections 107, 109 and 112 of the Evidence Act. Section 107 provides as follows:

“(1) Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

“(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”

74. Sections 109 and 112 of the same Act states as follows:

“109. The burden of proof as to any particular fact lies on the person who wishes the Court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

112. *In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.*"

- a) *Whether the Defendants acted in breach of the Memorandum of Understanding.*
- b) *Whether the orders for a permanent injunction should issue*
- c) *Whether the orders for rendering of accounts should issue*
- d) *Whether the Plaintiff is entitled to orders for damages*

75. The position of the law on the burden of proof in this country is satisfactory and as such the evidence both direct, circumstantial and documentary by the Plaintiff must be aligned with the standard and burden of proof on a balance of probabilities. The Court in *Briginshaw v Briginshaw* 1938 60 C.L.R 336, 362 Dixon J. pointed out that:

In civil proceedings the seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal. ... Everyone must feel that, when, for instance, the issue is on which of two dates an admitted occurrence took place, a satisfactory conclusion may be reached on materials of a kind that would not satisfy any sound and prudent judgment if the question was whether some act had been done involving grave moral delinquency.

76. Thus, in civil cases no less than in criminal cases the seriousness of the allegations will regulate the degree of probability which a Judge or Magistrate should require before finding a fact proved. It is clear therefore that it maybe a misdirection to tell a Judge or Magistrate in a civil case that a mere balance of probabilities is sufficient to justify a finding of fact in fraud or defamation cases. Essentially the Judge or Magistrate should be told that they must take into account the seriousness of the allegation made and the consequences of their

findings. The Judges and Magistrates handling serious allegations in a civil claim should also be told that they must be satisfied that the Plaintiff's allegations of fact are true. This does not mean that in judicial enquiries and decisions one has to be satisfied to the point of mathematical demonstration as you require to be satisfied of the truth of the propositions in criminal trial.

77. In my view, all that is required is that the evidence being tested to prove existence or nonexistence of fact should be such as reasonable men would act on their serious affairs and this is all what the law intended. What this means is that the Judge and Magistrate presiding over trial as properly constituted under Article 50(1) of the Constitution must be satisfied that the probability of the fact alleged by the Plaintiff being through is high enough in their judgment to justify them in treating the fact as established in the same way as they will act in similar probabilities in their own serious affairs.
78. The Court in *Murray v. Murray (1960) A.L.J.R 521, 524* the Court also delved further into this issue and made the following observations:

What the civil standard of proof requires is that the tribunal of fact, in this case the Judge, shall be "satisfied" or "reasonably satisfied". The two expressions do not mean different things but as in other parts of the law the word "reasonably", which in its origin was concerned with the use of reason, makes its appearance without contributing much in meaning. However, its use as a qualifying adjective seems to relieve lawyers of a fear that too much unyielding logic may be employed. But the point is that the tribunal must be satisfied of the affirmative of the issue. The law goes on to say that he is at liberty to be satisfied on a balance of probabilities. It does not say that he is to balance probabilities and say which way they incline. If in the end he has no opinion as to what happened, well it is unfortunate but he is not "satisfied" and his speculative reactions to the imaginary behaviour of the metaphorical scales will not enable him to find the issue mechanically.

79. It is true from the above principles that the standard and burden of proof in civil causes of action cannot be defined with precision but Judges or Magistrates carrying the burden of adjudication of issues in a dispute can be told no more than the fact that ultimately, they must be satisfied of the truth of the allegations in the claim and that they must be so satisfied on a preponderance of probabilities or a balance of probabilities as it is commonly referred to in various decisions. In the first instance, the burden bearer of proof commonly referred to as the Plaintiff or Claimant in a suit may give prima facie evidence of an allegation which can only stand out if the Defendant may not contradict the Plaintiff's evidence or prove other facts. Notwithstanding that position, the burden of proof is vested and lies upon the Plaintiff at all material times.
80. That is the threshold that the Plaintiff's case must be tested and that hurdle must be surmounted without dispensation. See the principles in the cases of *Kingelen Lena Churu v Safina Ltd, Nairobi High Court Civil Case No. 3796 of 1994*, *Hans Raj Aggarwal v Munishiram and Co. Ltd, Civil Appeal No. 100 of* and *Kimani Kandari v David Gitau Manyeki, Civil Appeal No. 18 of 1993*.

The next issue is whether the Defendants acted in breach of the Memorandum of Understanding

81. The validity of a contract in Kenya is tested within the following metrics:
- a) **Offer and Acceptance:** A clear proposal and an unqualified acceptance.
 - b) **Free Consent:** Consent not obtained through coercion, undue influence, fraud, misrepresentation, or mistake.
 - c) **Lawful Consideration:** The agreement must be supported by something of value.
 - d) **Lawful Object:** The contract cannot be for illegal purposes or against public policy.

e) **Capacity of Parties:** Parties must be of legal age, sound mind, and not disqualified by law.

82. In giving legal effect to the memorandum of understanding and other service agreements which have been the bone of contention, giving rise to this suit under the auspices that the inference to be drawn is that the parties intended to create a legal relationship, this Court has to be guided by the principles in the persuasive case of *Associated Hotels of India Ltd v R. N. Kapoor, (1960) 1 SCR 368* and *Rajbir Kaur v S. Chokesiri (1989) 1 SCC 19*: Thus;

The intention of the parties is to be gathered from the documents itself. Mainly, the intension is to be gathered from the meaning and the words used in the documents except where it is alleged that the document is a camouflage. If the terms of the documents evidencing the agreement between the parties are not clear, the surrounding circumstances and the conduct of the parties have also to be borne in mind for ascertaining the real relationship between the parties. Thus if the document is a camouflage, the mask or veil is required to be removed for determining the true intent and purpose of the document.

83. The crux of the Plaintiffs' claim that the memorandum of understanding dated 15th August 2022 that was entered into by the Plaintiff, 1st Defendant and Worldview impact was breached by the Defendants. The mandate was laid out in the agreement and according to the Plaintiff, it was granted exclusive rights over carbon arising from the trees and land facilitated through the Plaintiff's activities. The dispute and the alleged breach arose from the incorporation of the 2nd Defendant by the 3rd Defendant to displace the Plaintiff from its contractual mandate under the memorandum of understanding.

84. The first port of call is whether there is a contractual mandate arising from the memorandum of understanding and the 'service level agreement'. The Plaintiff's case is pegged on the 'breach of the Memorandum and the Agreements and fiduciary duty'. In order for there to be a breach of an agreement, the same must be legally

binding on the parties. A memorandum of understanding is basically a mutual handshake in writing. By its very nomenclature, it is said to be an understanding to do something.

85. This discussion on interpretation and construction of the governing contractual instrument and its purpose driven objective cannot be complete without a recap of the fundamental clauses in which the Plaintiff based in his claim against the Defendant. According to the Plaintiff, the intentions and conduct of the agreement dated 12th December 2023 was crystallized as follows to form the binder contract:

"The purpose of this agreement is to outline the roles and responsibilities of Earthbanc & Green Planet Initiative 2050 Foundation (GPI2050) and Festus Kiplagat in relation to the Regeneration Kenya (Kenya Reforestation and Sustainable Livelihoods Project) which is hereafter shortened to the title" Regeneration Kenya" (the project). As an implementing partner of the project, GPI 2050 & Festus Kiplagat will serve as the primary nursery management and planting partner (referred to as the implementing partner) This agreement sets out the services the GPI2050 and Festus Kiplagat shall be responsible for delivering to Earthbanc and the terms and conditions of collaboration between Earthbanc & GPI2050 and Festus Kiplagat at (collectively referred to as parties) for the purpose of this agreement"

Clause 2.1 provides for the responsibilities of the 1st defendant.

Clause 3 sets out the term of the agreement (the period) which commences on the 12th of December 2023 and shall remain in force and renewal after a period of 12 (twelve) years unless terminated earlier as per the provisions of this agreement.

Clause 4 of the contract sets out the payment terms between the plaintiff and the 1st defendant. The payment was to be by the 30th of every quarter by the 1st defendant to the plaintiff, the payment being in USD denomination.

Clause 5 of the contract sets out what is called monitoring services by the parties of the project.

Clause 6 provides for termination of the agreement.

Clause 7 provides for confidentiality of information by both parties.

Clause 8 sets out mechanism for dispute resolution.

Clause 9 sets out liabilities in damages from the plaintiff to the 1st defendant.

Clause 10 sets out the governing law and 11 provides that the agreement constituted the entire understanding between the parties and superseded all prior agreements and understandings, whether oral or written.

Clause 12 set out that the amendments, and modification to the terms of the agreement must be mutually agreed upon in writing by authorized representative of both parties.

Clause 13 set out an exclusive clause where the plaintiff would work exclusively for the Regeneration Kenya Project and shall not take any further work without mutual agreement and written consent of the 1st defendant.

86. When considering a memorandum of understanding between parties, the Apex Court in *Supreme Court Petition 13 as consolidated with 18 of 2020 - Kenya Railways Corporation vs Okiya Omtatah & 5 Others* stated as follows: -

“From the above definition, an MoU is preliminary to a contract and or agreement between parties and is characterized as non-binding and unintended to create any contractual obligations on either party. This does not mean that Courts are not faced with the question of establishing the binding nature of an MoU. When

that happens, a Court considers the wording and the apparent intention of the parties. In stating so, we are persuaded by the findings of HH Humphrey Lloyd QC in ERDC Group v Brunel University [2006] EWHC 687 (TCC) in the following words:

“Letters of intent come in all sorts of forms. Some are merely expressions of hope; others are firmer but make it clear that no legal consequences ensue; others presage a contract and may be tantamount to an agreement ‘subject to contract’; others are contracts falling short of the full-blown contract that is contemplated; others are in reality that contract in all but name. There can therefore be no prior assumptions, such as looking to see if words such as ‘letter of intent’ have or have not been used. The phrase ‘letter of intent’ is not a term of art. Its meaning and effect depend on the circumstances of each case.”

87. I have had the opportunity to peruse the impugned memorandum of understanding and from a reading of the same, the intention of the Memorandum was to commence a partnership for implementation and development of projects for regenerative finance to support the Plaintiff’s activities. An interpretation of the preamble and the clauses contained in the memorandum do not give any express or implied meaning to the allegation that the same was legally binding in the same context as a contract would be. Accordingly, I am guided by the decision of the Supreme Court of the United Kingdom in *RTS Flexible Systems v Molkerei Alois Muller GmbH & Co KG [2010] UKSC 14 & 38* where it expressed itself as follows:

“The general principles are not in doubt. Whether there is a binding contract between the parties and, if so, upon what terms depends upon what they have agreed. It depends not upon their subjective state of mind, but upon a consideration of what was communicated between them by words or conduct, and whether that leads objectively to a conclusion

that they intended to create legal relations and had agreed upon all the terms which they regarded or the law requires as essential for the formation of legally binding relations. Even if certain terms of economic or other significance to the parties have not been finalised, an objective appraisal of their words and conduct may lead to the conclusion that they did not intend agreement of such terms to be a pre-condition to a concluded and legally binding agreement.”

88. It is my considered view that the memorandum of Understanding was not a legally binding contract on the parties and therefore, the allegations of breach are unfounded.
89. The Plaintiff contended that there was a breach of the Service Level Agreement dated 12th December 2023 which created the obligations on the part of the 1st Defendant. It is trite law that parties are bound by their pleadings.
90. Having perused the pleadings and the documentary evidence tendered in Court, there is no ‘service level agreement’ that exists between the parties. What exists is a service agreement dated 12th December 2023. A reading of the agreement reveals that it sets out its purpose as outlining the roles of the 1st Defendant and one Festus Kiplagat. It also laid down the exclusivity, confirming that the Plaintiff and Festus Kiplagat were to work exclusively on the Regeneration Kenya Project, including the dedication of the resources and management of GPI2050. However, according to the Defendant, there was an assessment conducted in March 2023 by the 1st Defendant company with regards to the viability of the project in Baringo and Elgeyo Marakwet Counties. The assessment revealed various underperformance gaps in the implementation of the agreed covenants. Thus:
 - a) Unclear registration strategies
 - b) Ambiguities on the planting densities
 - c) Human rights risks
 - d) Site selection criteria
 - e) Absence of comprehensive risk assessment

91. As a result, the Kenya Reforestation Project could not be registered as anticipated in the Memorandum of Understanding and this resulted in the project being commuted to the Kenya Reforestation and Sustainable Livelihoods Project (Regeneration Kenya). Consequently, the parties entered into the service agreement on 12th December 2023, absent Worldview Impact. Under clause 11 of the said agreement, it was expressly stated that the agreement superseded all previous agreements, which included the Memorandum of Understanding. The conclusion from this sequence of events is that the Memorandum of understanding ceased to exist and as such none of the parties were bound to it.
92. Additionally, there was a contractor agreement produced by the Plaintiff in his supplementary affidavit where the same contained a clause in section 11 which stated that it in turn superseded all the previous agreements prior to the same. The conclusion that is drawn from these agreements is that there could not have been breach of either the Memorandum of Understanding and the Service Agreements as they were superseded by the Contractor Agreement.
93. I reiterate that parties are bound by their pleadings. A party cannot file generalised pleadings and expect the Court to blindly select what particulars refer to the allegations. In this regard, the Plaintiff, despite claiming that there was a breach of duties arising from the service 'level' agreements, did not particularise which agreement the breach arose from, leaving it to the Court to decide the same.
94. From the aforesaid submissions, it is apparent that the common intention of the learned Counsels for both the parties is that the Court has to gather and find out true intention of the parties as to whether the document creates a legally binding contract. In the submissions by the learned Counsel for the Plaintiff, the Memorandum of Understanding and subsequent service agreement put in place a machinery in support of the so-called carbon credit benefit to the farmers who would have been recruited to participate in what I can refer to as *reafforestation*. (*Emphasis mine*). This initial and primary

intention was birthed by the Plaintiff and the 1st Defendant. The dominant intention of the parties is to be gathered from the terms of the documents irrespective of the labels that the parties may put upon it. It is to be stated that even though it is the common intention of the learned Counsels for the parties that dominant intention of the parties to be gathered from the documents, yet all throughout the question had remained a vexed one having no easy solution and precise mathematical text. There has got to be a very clear distinction between the Memorandum of Understanding and Service Agreements as infused in this suit. The dividing line is clear though sometimes it becomes very thin or even blurred given the nature of the covenants made to govern that very relationship which later led to the invitation of the 2nd, 3rd and 4th Defendants to the initial contractual relationship initiated by the Plaintiff and the 1st Defendant. The question in all these circumstances is one of intention. Did the circumstances and the conduct of the parties show that all that was intended in the normal elements of offer, acceptance, capacity and consideration was fulfilled for this worthwhile project of *regeneration*.

95. The rules of contract law in Kenya binding upon individuals as set out in the terms of the agreement and its aims and objectives emanates from their own freewill as expressed in the instrument. This is what regulates the relationship between two or three persons or legal entities coexisting as independent persons or institutions with a view to the achievement of the common aims. In this respect from the evidence admitted before this Court, the predominant driving force was the implementation under the Kenya Reforestation Project. This was a project beyond the scope of the Plaintiff and the 1st Defendant for it involved integrating third parties as owners of the land in which the nurseries were to be developed and ultimately be the source of the reforestation project within this region loosely referred to as North Rift.
96. My understanding from the outset is that an MoU can be distinguished by the terms in which they are written. However, the intention of the parties privy to the MoU and as to whether or not they want the

agreement to be binding either in the domestic or International law is what distinguishes an MoU from other contracts. It was therefore the duty of the parties to this dispute to show clearly by the form of the document and its terminology the intention was to either create legally binding obligations or not. However, in the case of a dispute like in the instant suit, formalities and use of terms shall not be decisive on the binding nature for care should be taken to avoid the use of contract language.

97. The importance of having a legal binding contract in place between parties cannot be over-emphasized as it connotes certainty. Where this is not the case that the view I have taken in the instant dispute, Courts are left with the burden of having to decide whether or not a binding agreement exists between both parties. Let us take for instance the legal instrument dated 12th December 2023 which was deemed to have set out the intentions between the Plaintiff and the 1st Defendant. *It is provided for that Festus Kiplagat in relation to Regeneration Kenya Reforestation and Sustainable Livelihoods Project hereafter shortened to the title Regeneration Kenya. That the Plaintiff as an implementing partner of the project will serve as the primary nursery management and planting partner. That further Festus Kiplagat was to be responsible for delivering to Earthbanc the 1st Defendant herein the terms and conditions of collaboration between Earthbanc and GPI2050 and Festus Kiplagat.*

98. However, by the time this suit was initiated and in retrospect the contract had not been agreed with completeness. By the time this suit was filed the price for the work had not been agreed in any ascertainable document. The relationship subsequently broke down there was an entry of other legal entities and persons as named in the suit by the Plaintiff. It is hornbook law that the basic requirements for formation of a legal contract are offer, acceptance of offer, consideration and intention to create legal relation, absence of any element is fatal. In the instance suit the Plaintiff dwelt vehemently and strongly on the existence of donor funding as the source of the

consideration to implement Kenya Reforestation and Sustainable Livelihoods Project. In the commercial context no statements of financial accounts from a reputable financial institution were ever shared and admitted as documentary evidence in support of that element of consideration. According to the Plaintiff this is a project which could only be sustained by the terms Plaintiff and 1st Defendant demonstrating that in on-boarding the respective farmers who were to care for the nurseries and upon maturity transfer to the various farms for the reforestation to take effect required financial resources and human capital to realize its performance metrics. Unfortunately, the Court had no inventory of the farmers recruited by the Plaintiff as part of its fulfilment of the bargain as an implementing partner of the project. As at the time of each party to this suit closing in on the evidential material for and against the claim by the Plaintiff no such inventory of farmers recruited, no scale of nurseries had been shown to have been developed and/or the number of seedlings and its acreage coverage within the collaboration between the Plaintiff and the 1st Defendant. If the Regeneration Project was performed on both sides it will be often unrealistic for this Court to argue that there was no intention to enter into legal relations and it will be difficult to submit that the contract is void for vagueness or uncertainty. As for these clauses being relied upon I find it difficult to find why the two parties from the onset did not deliver on the primary obligations as a true binding contract to deliver on the aims and purposes of Earthbanc and Green Planet Initiative 2050 Foundation.

99. The comparative jurisprudence sheds more light to the controversial issues to this suit as illuminated in *Dodo v Salanke* [2007] ALL FWLR (Pt. 346) 576 at 582G – 593A, *Kekere Ekun JCA* stated:

“a contract is an agreement between two or more parties which creates reciprocal legal obligation or obligations to do or not to do a particular thing. For a valid contract to be formed, there must be mutuality of purpose and intention. The two or more minds must meet at the same point, event or incident. Where or

when they say different things at different times they are not ad idem and therefore no valid contract is formed. The meeting of minds of the contracting parties is the most crucial and overriding factor or determinant in the law of contract. The meeting of minds of the contracting parties is the most crucial and overriding factor or determinant in the law of contract”.

100. According to Blacks Law Dictionary 8th Edition, a contract is defined as a promise or a set of promises, for breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty.

101. Although the Plaintiff through his legal Counsel submitted there was no ambiguity in the manner in which the contract was defined and the binding covenants for each of the parties herein being the Plaintiff and the 1st Defendant and in that sequence urged this Court to be guided by the following case law; Thus; *Shah & 7 Others v Mombasa Bricks & Tiles Limited & 5 Others (2023) eKLR, Heineken East Africa Import Company Ltd & Another v Maxam Ltd (2024) eKLR* and *Attorney General v Kalsuito Constructors Limited (2023) eKLR*.

102. In my view, let us revisit the so referenced agreement dated 12th December 2023. In its purpose and intent at the closure of the evidence by the Plaintiff as an implementing partner no cogent and credible evidence with regard to the level of reforestation, management and deliverables on the collaboration with regard to recruitment of farmers, the level and scale of nurseries which had been developed during the period under review and how many farmers had already undertaken reforestation geared towards the carbon credit benefits. There was so much argument about an invitation of bringing on board the 2nd, 3rd and 4th Defendants primarily initiated by the 1st Defendant with whom the Plaintiff had already set out a Memorandum of Understanding. If one has to conclude on the application of the canon of ambiguity and uncertainty to this suit the answer is to be found on this grievance by the Plaintiff that the 2nd, 3rd and 4th Defendants on-boarded to this relationship to destroy the initial

intention and objectives with regard to Regeneration Kenya Project. To me this is not supported with sufficient evidential material and I hold the view that the ambiguities in the primary legal instruments paved way for the 2nd, 3rd and 4th Defendants to join as subsidiaries or independent persons or legal entities under the Companies Act to beef up capacity on the Regeneration Kenya Project implementation.

103.In so far as the notable memoranda dated 22nd August 2022 and thereafter the one dated 12th December 2023 it is trite law that as a general rule only parties to that instrument also called agreements can sue or be sued on any dispute arising out of the breach of the terms agreed upon and inked as appropriate to give effect to the intention of the parties. In other words, the 2nd 3rd and 4th Defendants in the primary aims and purposes of Green Planet Initiative 2050 Foundation they are strangers and can neither sue or be sued on the contract even if the contract was made for their benefit and purports to give them the right to sue or be sued making them live upon it. In the same vein, the fact that a person or a legal entity duly incorporated under our laws and is a stranger to the consideration of a contract stands in such a near relationship to the party from whom the consideration proceeds that he may be considered a party to the consideration does not entitle him or her or it to sue or be sued upon such contract.

104.As for this case, the primary instrument being referred to by the Plaintiff can only ascribe liability to the 1st Defendant in the event of breach and what accrues to the 2nd, 3rd and 4th Defendants would be liability upon the specific obligations as defined in the governing instrument. If indeed the Plaintiff entered into a contract with the 1st Defendant to manage and implement the Regeneration Kenya Project, it cannot be enforced against a third party. The law in our legal system is sacrosanct that a contract binds only the parties to it and it cannot be enforced against another third party who was not in the negotiation table which led to putting the intention into effect with regard to the obligations, roles and covenants to the impugned contract. The

doctrine of privity of contract postulates that only parties to a contract can be entitled to rights and liabilities arising from the contract.

105. In the instant case further, the Plaintiff is maintaining that he was never privy to the arranged transactions and any agreements entered into as between the 1st, 2nd and 3rd Defendant in the Regeneration Kenya Project are voidable *ab initio*. This assertion was controverted by the 1st, 2nd and 3rd Defendants' evidential material on how they came to be part and parcel of the Regeneration Kenya Project. In the same limb the Defendants also led evidence to demonstrate that the Plaintiff and his co-director Kiplagat was an implementing partner to the project development in accordance with the terms set out in the service agreement. It also came out that the chain of transactions duly negotiated as between the 1st Defendant in collaboration with the 2nd, 3rd and 4th Defendants was on a basis of good faith with no malicious intention to infringe or violate the rights which accrue to the Plaintiff as earlier stipulated in the contract. From the evidence adduced at the trial, I hold the view that from the initial Memorandum of Understanding the governing legal instrument on management and implementation of the Kenya Reforestation and Sustainable Livelihoods Project was eventually under the binding services agreement dated 12th December 2023. It is also not in dispute that the Plaintiff's Executive Director Mr. Kiplagat was also personally involved in the negotiations and adoption of the covenants therein in the aforesaid services agreement. This is the instrument with the ingredients and elements to actualize the deforestation of 13,000 acres of land.

106. Whereas the Plaintiff strongly indicted the 1st Defendant of frustrating the entire scheme of the project but on the other hand no concrete evidence was adduced to demonstrate the fulfilment with completeness of his obligations as agreed in the services agreement together with his legal entity the Plaintiff. This project seems as identified and named as Regeneration Kenya Project had a wider coverage in terms of land use, there was the aspect of human capital and both short term, medium term and long term objectives. The key

player as the Chief Executive happen to be Mr. Festus Kiplagat and the lead consultant Green Planet Initiative 2050 Foundation. It is not in dispute that he was also on a monthly salary within the provisions of the Employment Act hence he wore two hats as the Director of the Plaintiff legal entity as well as the Chief Executive in the implementation of Earthbanc & Green Planet Initiative 2050 Foundation, Regeneration (Kenya Reforestation and Sustainable Livelihoods Project). Curiously, this dual roles of the Plaintiff Mr. Festus Kiplagat was not delved into in detail during his evidence in chief and the documentary evidence filed in support of the claim as against the Defendants.

107.It is my considered view that every party is bound by the contract terms to do all what it takes to complete his or her part of the bargain. This duty to do everything that he or she is enabled to do by force of the terms agreed upon in the contract is implicit for their own interest and also by force of the interest of others who have been placed or compelled to be part of the contract in the name of third parties. This is what I consider to be one of the predominant dispute in this impugned contract between the Plaintiff and the 1st Defendant which spilled over to the 2nd, 3rd and 4th Defendants.

108.The circumstances and facts of this case are better explained by this view I hold that where the contract is executory, the consideration is usually found in the mutual performance by each party of his or her obligations under the contract and the release of each party's rights under it. The critical question therefore for this Court is in being asked to find if there was accord and satisfaction between the Plaintiff and the 1st Defendant and subsequently the 2nd, 3rd and 4th Defendants given that there is no agreement under seal and valuable consideration which was given in exchange for the Plaintiff to release the 1st Defendant from liability.

109.The core issue to this dispute is the dissatisfaction on the completeness of obligations and terms as set out in the impugned instruments to bind both the Plaintiff and the 1st Defendant a

consideration which made the agreement operative. For instance, in this suit the Executive Director by the Festus Kiplagat was issued with notice of termination by the 1st Defendant. Some of the grievances issued by the 1st Defendant were based on non-performance of some obligations by the Plaintiff on the original clauses to implement the Regeneration Project Kenya. In these circumstances, it is understood that satisfaction on execution of the contract became a term of release by discharging him from being part of the contract. From these facts, it became abundantly clear that the contractual relationship as between the Plaintiff and the 1st Defendant had irretrievably broken down. In contract law, the decisions in Kenya have refined the understanding of when a breach constitutes an actionable cause emphasizing that a breach occurs when a party without lawful excuse fails to perform contractual obligations, renders performance impossible or expresses an intention not to be bound either direct or implicit from his or her conduct.

110. Hence this Court finds no tangible evidence to salvage it or rewrite any of the terms in so far as the question of legality of terms and performance has exhibited in the operative agreement.

Thirdly, the issue is whether there was a breach of a fiduciary duty by the Defendants

111. Fiduciary duty within the context of contractual or commercial relationships in Kenya highlights that while contractual parties are generally free to pursue their own interests, fiduciary duties arise where one party assumes responsibility for the interest of another, or where relationships of trust and confidence are established. In the persuasive case of *Island Lubes Distributors Limited and West Indies Petroleum Limited v Levy, John and Levy, Donna et al.* [2021] JMCC Comm 27/30 the Court remarked in the context of breach of fiduciary duty and conflict of interest by directors/officers: **Decision:** “The Supreme Court affirmed that directors owe a fiduciary duty to act in good faith and in the best interest of the company. A director is

precluded from obtaining for themselves a business advantage that belongs to the company, especially if the opportunity arose from their position within the company. This duty can extend to exploiting opportunities post-resignation if the opportunity matured during the tenure.”

112. This case involved allegations by the Plaintiff that there was breach of fiduciary duty by the 1st Defendant and their management in adhering to the governance guidelines in developing the project. That in the course of implementation the 1st Defendant acted in conflict of the Plaintiff Green Planet Initiative 2050 Foundation by requiring that the 2nd, 3rd and 4th Defendants be duly incorporated as partners to the initial agreement. This to the Plaintiff was typically breach of the duty of fidelity provided for in the Memorandum of Understanding and subsequent service agreement. However, what does the examination of the evidence before this Court reveal in terms of the breach of fiduciary and confidentiality? An important point to note at the outset of the analysis of the evidence is that the Plaintiff was all along part and parcel of the negotiations entered into between the 1st Defendant together with the 2nd, 3rd and 4th Defendants. It is therefore the position of this Court that the 1st Defendant together with the 2nd, 3rd and 4th Defendants did not act in breach of any duty or done anything which amounted to a conflict of interest. The services agreements asserted the nature and kind of obligations and the steps to be taken to enlarge the aims and objectives of Kenya Reforestation and Sustainable Livelihoods Project. In determining whether the Directors of the 1st Defendant acted without exercise of due care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances including but not limited to the general knowledge, skill and experience of the Director or Officer in question, this Court is mandated by law to determine what are the best interest of that company or its Director may have regard to the interests of the company shareholders, employees and the community in which the company operates.

113. I have distilled the evidence and submissions on behalf of the Plaintiff and the Defendants on the issue of breach of fiduciary duty. I understand them to be that although the Plaintiff was not happy about the invitation by the 1st Defendant to bring on board the 2nd, 3rd and 4th Defendants, there is evidence to the effect that decision was motivated to acquire opportunities belonging to it and to exploit them for its benefit and for the benefit of others in the Regeneration Kenya Project whom they had already connected however minimally in view of inadequacy of information on the number of farmers who had been signed in by the Plaintiff to be part of the project. It should be noted there are different obligations in posts upon Mr. Festus Kiplagat as an employee of the Kenya Reforestation and Sustainable Livelihoods Project than that of being a Director of Green Planet Initiative 2050 Foundation. As it relates to an employee his ability to pursue business opportunities at the commencement of his contract of employment was dependent upon what had been created pursuant to his contract of employment. There is no dispute that Mr. Kiplagat owed a duty of fidelity which required him as an employee to be loyal and act in the best interest of Regeneration Kenya Project. The salary and emoluments received and paid were not from Green Planet Initiative 2050 Foundation. The Court was being told of enormous donor funding resources which were utilized in funding the project including his employment but at the closure of the proceedings no domiciled financial account in a reputable bank or a financial institution with specifics as to the account holders and signatories and contributors of donor funds to that account with express purposes to manage and operate Regeneration Kenya Project. It follows that in terms of legal and evidential material on the exact source of funds which were being utilized in the deliverables under the Kenya Reforestation Project as between the Plaintiff and the 1st Defendant, none of it made perfect sense. It is against this background that the Plaintiff as the Executive Director bore the highest responsibility and accountability to account

for the cash receivables and expenditure during the period under review in the implementation of the project.

114. In my view, despite claiming that there was a breach of fiduciary duty, the Plaintiff has not laid down which relationship led to the arising of a fiduciary duty. Ideally, a fiduciary duty will arise from a professional relationship such as between a bank and a customer or a trustee and a beneficiary or essentially, a fiduciary and a principal. In the company law of Kenya fiduciary duties arise where a Director of a company or its subsidiaries undertakes to act for or on behalf of another in a particular matter in the circumstances which give rise to a relationship of trust and confidence. There is therefore an aspect of loyalty and a legitimate expectation of one putting the interest of the other above his or her own. It is trite that Courts enforce fiduciary obligations strictly and the consequences of breach are accordingly held very serious to attract sanctions in any event.

115. One such example which could have acquitted the Plaintiff in discharging the burden of proof on a balance of probabilities was to deliver before this Court cogent evidence that the 1st Defendant breach of fiduciary duty caused losses to him as a Director and his foundation Green Planet Initiative 2050 Foundation. This gives rise to two key pillars of fiduciary duties: First, that the 1st Defendant will not put themselves in a position where their duty to the Plaintiff conflicts with their own personal interests and that the 1st Defendant will not make a profit from their position as a fiduciary without the fully informed consent of the Plaintiff. Here the Court considers whether it was the assumption of responsibilities as contextualized in the operative instruments by one party to the contract to act exclusively on behalf of another that was fundamental to a fiduciary relationship. When looking at the claim as pleaded in the plaint it appears more of an ad-hoc situation arising on its own facts rather than being of a category of being recognized as a fiduciary in nature. This inference has been drawn by this Court in considering the relationship objectively as between the Plaintiff and the 1st Defendant and further the hallmark of

trust and confidence on the part of the Plaintiff that the fiduciary would act with a single minded loyalty to the 1st Defendant to the exclusion of the fiduciary's own interest. Generally, in law, trust and confidence is one of the key parameters a consequence of which an indicator of fiduciary duties is measured. This Court is being asked to make a declaration as against the 1st Defendant to account for the profits which no evidence has been adduced by the Plaintiff that on account of the profits, which accrued in the course of their business venture and subsequent termination of the contract he suffered actual loss and damage on the prospective profits to be earned by the Plaintiff as a legal entity and himself as a Director of the foundation. In delving into this issue without material evidence it was not possible for the Court to set off the gains the 1st Defendant had made from the whole affair originally generated from the recruitment, registration and leasehold agreements signed with the farmers specifically in facilitating the implementation of the *Regeneration Project Kenya*.

116. In the context of the Plaintiff by implicit or import of his evidence the supervening events involving the 1st Defendant together with the 2nd, 3rd and 4th Defendants played a role to which he was equally exposed and that exposure of his foundation risked the loss of value of the investment he had done on this important project with a premium of carbon credits to farmers. In the profit or no profit rule, there is no evidence from the Plaintiff that 1st Defendant out of their relationship made some secret profits and by itself he suffered loss of profit which he could have sufficiently made during the period under review but they lost it as a result of the fundamental breach of the fiduciary relationship. It is not very certain from the pleadings and evidence that there was a breach of the corporate opportunity rule and through the lens of the legal instruments being referred to as MoU and service agreements the 1st Defendant approach of bringing on board the 2nd, 3rd and 4th Defendants then investment was an opportunity for them to usurp or divert the secret profits for their own benefit so as to leave him walk naked financially out of the venture which he had invested

both his knowledge, skills, time, experience, human capital and other financial assets. This corporate opportunity doctrine was not sufficiently distilled by the Plaintiff in the evidence adduced and admitted before this Court.

117. The Plaintiff also sought an order for the Defendants to be compelled to render a full account of the revenues earned by the Defendants. With respect the factual scenario of this case has been analysed within the framework of fiduciary obligations and mutual trust in terms of the aims and objectives of Kenya Reforestation Project and also styled as Kenya Regeneration Project. There were no undisclosed profits which Directors of the 1st Defendant obtained as a result of the exclusion of their duties mutually agreed with the Plaintiff.

118. A company can only be asked to render accounts by a Court when there is a demonstrated fiduciary relationship, breach of contract or when a stakeholder as a Director or shareholder can show they are unable to quantify a claim without the company's records. The Plaintiff's case has failed this test and subsequently that prayer is dead on arrival.

Fourthly, whether the corporate veil of the 2nd Respondent should be lifted

119. The concept of corporate veil is a metaphor in law that is used to explain the distinction between the rights, obligations and liabilities of a corporation and the rights, obligations and liabilities of its shareholders and Directors. In Companies Act 2015 a company occupies the position of a legal person or a legal entity. It is capable of surviving beyond the lives of its members since it is a distinct legal person. This Court is being asked to lift the corporate veil. Incidentally lifting the corporate veil is a matter of high level litigation by Courts and other scholars in this field for many years. Some of the challenges confronted by Courts is on the dicta in the landmark case of *Salomon v Salomon & Co. Ltd* in which the Court observed:

“The company is at law a different person together from the subscribers to the memorandum, and, through it may be that after incorporation the business is precisely the same as it was before, and the same persons are managers, and the same hands receive the profits, the company is not in law the agent of the subscribers or trustee for them.”

120. This concept has also been discussed in the case of *Lighting Improvement Co. Ltd v IRC [1923] A.C. 723, 741* the Court summarizes the position in the following manner:

"Between the investor, who participates as a shareholder, and the undertaking carried on, the law imposes another person, real though artificial, the company itself, and the business carried on is the business of that company, and the capital employed is its capital and not in either case the business or the capital of the shareholders. Assuming, of course, that the company is duly formed and is not a sham ..."

121. In *Joel Ndemo Ong'au & Another v Loyce Mukunya [2015] KEHC 6500 (KLR)* the Court expressed itself as follows on the issue of lifting of the corporate veil;

“Notwithstanding the effect of a company’s incorporation, in some cases the Court will ‘pierce the corporate veil’ in order to enable it to do justice by treating a particular company, for the purpose of the litigation before it, as identical with the person or persons who control that company. This will be done not only where there is fraud or improper conduct but, in all cases, where the character of the company, or the nature of the persons who control it, is a relevant feature. In such case the Court will go behind the mere status of the company as a separate legal entity distinct from its shareholders, and will consider who are the persons, as shareholders or even as agents, directing and controlling the activities of the company. However, where this is not the position, even though an

individual's connection with a company may cause a transaction with that company to be subjected to strict scrutiny, the corporate veil will not be pierced''.

122. Additionally, in *Kenagen Contractors Kenya Ltd v Abogno & others [2024] KEELC 5111 (KLR)* the Court held that the corporate veil may only be pierced where a company is used as a vehicle for fraud, improper conduct.

123. It follows therefore, that in order for a Court to lift the corporate veil, it must be proved that there is fraud or improper conduct, and where the veil must be lifted for there to be justice done to the Plaintiff. It is therefore trite that for the veil to be lifted one must prove the existence of fraud on the part of the directors. The lifting of the corporate veil is a last resort remedy applied when the structure is a sham or a façade to avoid company or tax obligations. There is no such evidence from the Plaintiff in this case. This principle of separation of corporate entities emerged from the historic case of *Salmon v Salmon*. The concept legal entity is also one of the fundamental rights enshrined in the Constitution of Kenya. Those fundamental rights guaranteed by the Constitution applies to both corporations and citizens. It is for the Courts to remove the veil where the circumstances demand. This is not one side case of lifting the veil of the 2nd Defendant company. Fraud in a company must be proved through clear and unambiguous evidence as mere suspicion or circumstantial evidence is insufficient.

124. A fundamental principle of fraud is that the same must be specifically pleaded and proved. This was aptly expressed in *Vijay Morjaria vs Nansingh Madhusingh Darbar & Another [2000] eKLR*, where Tunoi, JA (as he then was) stated as follows;

"It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must, of course, be set out, and then it should be stated that these acts were done fraudulently"

125. Indeed, fraud cannot be inferred from facts. In *Moses Parantai & Peris Wanjiku Mukuru suing as the legal representatives of the estate of Sospeter Mukuru Mbeere (deceased) vs Stephen Njoroge Macharia* [2020] eKLR, the Court of Appeal observed as follows:

“In the instant case, the appellants needed to not only plead and particularize the fraud, but also lay a basis by way of credible evidence upon which the Court would make a finding that indeed there was fraud....”

126. In an action of deceit the Plaintiff must prove actual fraud. Fraud is proved when it is shewn that a false representation has been made knowingly, or without belief in its truth, or recklessly, without caring whether it be true or false. A false statement, made through carelessness and without reasonable ground for believing it to be true, may be evidence of fraud but does not necessarily amount to fraud. Such a statement, if made in the honest belief that it is true, is not fraudulent and does not render the person making it liable to an action of deceit.

127. Having considered the evidence tendered by the Plaintiff, on the allegations of fraud, specifically with regards to the issue of the incorporation of a second company with the intent to usurp the role of the Plaintiff, I am not satisfied that the same was fraudulent. The purpose of the 2nd Defendant company being registered was clearly explained by the 3rd Defendant. Upon assessing the capacity of the 1st Defendant to implement the project as per the requirements of the memorandum of understanding, the 1st Defendant company thought it prudent to establish a company that would have the capacity to carry out the project as intended. This was even discussed through various correspondences provided by the 3rd Defendant in her documents and as per her testimony in Court.

128. The point of contestation between the Plaintiff and the 1st Defendant is on the incorporation of the 2nd Defendant company as a subsidiary of the 1st Defendant. *While traditional corporate law has not articulated different rules for a parent company in its role as a shareholder than for*

individual investor shareholders, parent companies in fact present different policy issues and their limited liability should be determined by a different analysis. The core idea is that a parent company as a shareholder in its subsidiary companies is in quite a different economic role and performs quite a different management function than individual investor shareholders, including public shareholders in the parent company itself. A parent company creates, operates and dissolves subsidiaries primarily as part of a business strategy in pursuit of the business goals of the larger enterprise, which the parent and all the subsidiaries are pursuing together.

129. In this same discourse on lifting the corporate veil, Lord Denning in *Littlewoods Mail Order Stores Ltd vs IRC [1969] W.L.R 1241, 1254* had this to say:

“Case a veil over the personality of a limited company through which the courts cannot see. The courts can, and often do, pull of the mask. They look to see what really lies behind.” Likewise, in the United States in the early decision in *United States v Milwaukee refrigeration transit Company 142 F 247 (1906)*:

“A corporation will be looked upon a legal entity as a general rule but when the notion of legal entity is used to defeat public convenience, justify wrong, protect fraud or defend crime the law will regard the corporation as an association of persons.”

130. This matter is largely in the discretion of the Court and is underpinned upon the underlying social economic and moral factors as they operate in and through the incorporation. The facts of this case show that each company being the 1st Defendant and the 2nd Defendant respectively are separate entities. The only area in which the corporate veil would be lifted by this Court is for the Plaintiff to adduce both direct and circumstantial evidence in relation to fraud, deceit, corporate debts, the subsidiary is a sham, the character of the legal obligation of the 1st Defendant is being evaded and the motive of incorporation is to advance adverse aims and objectives outside what has been agreed

and reduced into writing in the form of the Memorandum and Articles of Association.

131. Applying the circumstances of the case to the threshold for a Court to order the lifting of the corporate veil, I find that the Plaintiff's prayer for the same lacks merit.

Fifth issue is whether a permanent injunction should be granted to the Plaintiff in the circumstances of this suit

132. In this case, first and foremost grant of a permanent injunction is a discretionary remedy and is dependent upon the legal rights of the parties and also upon the facts that are in dispute upon them. If at the hearing of the main suit the evidence is incomplete, even when tested by oral cross examination, the discretion to grant a permanent injunction must be denied.

133. The Applicant bears the heavier responsibility of demonstrating that the rights to be vindicated can be better be served by this Court exercising this discretion to grant a permanent injunction. A permanent injunction is a final remedy granted after full trial to protect a clear established right in contrast with temporary injunctions governed by the principles in *Giella vs Cassman Brown [1973] EA*. Some of the key principles governing grant of permanent injunction require proof of absolute right over the property. The basis of it is that where the Defendants act is likely to cause irreversible damage to the land's utility, a permanent injunction then is issued to prevent further intermeddling or interference.

134. In *Kenya Power & Lightning Company Ltd -vs- Sheriff Molana Habib (2018) eKLR*, the Court made the following pronouncement as regards a perpetual permanent injunction;

"A permanent injunction also known as a perpetual injunction is granted upon the hearing of the suit. It fully determines the rights of the parties before the Court and is thus a decree of the Court. The injunction is granted upon the merits of the case after evidence in support of and against the claim has been tendered. A permanent

injunction perpetually restrains the commission of an act by the Defendant in order for the rights of the Plaintiff to be protected.”

135. I have carefully reviewed the cases relied on by both Counsels and their applicability to the issue of granting a permanent injunction. In deciding this issue, the Court is mindful that the grant of an injunction is discretionally remedy which should be exercised judicially and not arbitrarily. In finalizing this file, there is no strong case made by the Plaintiff for grant of a permanent perpetual injunction as against the Defendants jointly and severally.

136. A permanent injunction at its finality of the trial for it to be granted by a trial court the Plaintiff must demonstrate irreparable harm. In the *American Cyanamid Co. vs Ethicon Ltd [1975] AC 396* constitutes the following elements:

“Irreparable” refers to the nature of the harm suffered rather than its magnitude. It is harm which either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other. Examples of the former include instances where one party will be put out of business by the court’s decision...where one party will suffer permanent market loss or irrevocable damage to its business reputation... or where a permanent loss of natural resources will be the result when a challenged activity is not enjoined...The fact that one party may be impecunious does not automatically determine the application in favour of the other party who will not ultimately be able to collect damages, although it may be a relevant consideration.

137. Having considered the merits of the case, and having found that there was no proof of any breach on the part of the Defendants, the order for a permanent injunction cannot issue in the circumstances.

The sixth other justiciable issues by the Plaintiff are on the award of damages for breach of contract.

138. In Kenya's legal system with regard to damages for breach of contract the principle of fundamental importance is that of *restitutio in integrum* – putting the innocent party in the position they would have been in had the contract been performed. Damages are generally compensatory, not punitive, and special damages must be specifically pleaded and strictly proved. The following authorities form part of the settled principles to guide courts on award of damages under a contract breach scenario: Thus in *Haco Industries Limited & another v Doshi Ironmongers (2025)*: The Court of Appeal upheld damages for breach of a settlement agreement, awarding compensation for funds paid under the agreement and legal fees incurred due to the breach. Whereas in another Court in *Busienei v Lizano Limited (2025)*: The Court affirmed that where a breach is proved, the court can award special damages (value of goods) and ordered interest on the liquidated sum as provided in the contract. Similarly, on the same trajectory *Lutomia v Kings Pride Properties Limited & another (2025)*: The court awarded a refund of the purchase price, stamp duty, legal fees, and special damages for lost rental income due to breach of a property sale agreement. In addition, the Court in *Kimaru v Machira (2023)*: The court awarded special damages for loss of business/use of a motor vehicle, emphasizing that such loss must be specifically pleaded and proved. The Court in *Kenya Breweries Ltd v Kiambu General Transport Agency Ltd [2000]* remarked in this foundational case that where wrongful termination of a distribution contract led to damages for lost business, highlighting that breaches affecting the core business (material breach) attract significant compensation. Finally, in *Savannah Development Company Limited vs Post Telecommunication Employees Housing Co-operative Society Limited (1991)*: Cited in subsequent rulings to emphasize that special damages must be strictly proven. The learned Author Anson's Law of Contract, 28 Edition at Page 589 and 590 added his voice to this legal principle that: *Every breach of a contract entitles the injured party to damages for the loss he or she has suffered. Damages for breach of contract are designed to compensate for the damage, loss or injury the*

claimant has suffered through that breach. A claimant who has not, in fact, suffered any loss by reason of that breach, is nevertheless entitled to a verdict but the damages recoverable will be purely nominal.

139. It is trite law that generally general damages in contract claims are not awardable as pleaded by the Plaintiff in this case. The guiding principles are to be found in the case of *Consolata Anyango Ouma v South Nyanza Sugar Co. Ltd* [2015] eKLR;

“The next question is whether the appellant was entitled to damages as a result of the breach. As a general principle, the purpose of damages for breach of contract is, subject to mitigation of loss, the claimant is to be put as far as possible in the same position he would have been if the breach complained of had not occurred. This principle is encapsulated in the Latin phrase restitution in integrum (see Kenya Industrial Estates Ltd v Lee Enterprises Ltd NRB CA Civil Appeal No. 54 of 2004 [2009] eKLR, Kenya Breweries Ltd v Natex Distributors Ltd Milimani HCCC No. 704 of 2000 [2004] eKLR). The measure of damages is in accordance with the rule established in the case of Hadley v Baxendale (1854) 9. Exch. 341 that the measure of damages is such as may be fairly and reasonably be considered arising naturally from the breach itself or such as may be reasonably contemplated by the parties at the time the contract was made and a probable result of such breach (see Standard Chartered Bank Limited v Intercom Services Ltd & Others NRB CA Civil Appeal No. 37 of 2003 [2004] eKLR). Such damages are not damages at large or general damages but are in the nature of special damages and they must be pleaded and proved (see Coast Bus Service Ltd v Sisco Murunga Ndanyi & 2 others, NRB CA Civil Appeal No. 192 of 92 (UR) and Charles C. Sande v Kenya Co-operative Creameries Ltd, NRB CA Civil Appeal No. 154 of 1992 (UR))”.

140. In matters of contract compensation, the guiding factors are evidential as stipulated in Section 107, 108 and 109 of the Evidence Act.

Essentially the Plaintiff or the Claimant must discharge the standard and burden of actual loss even if the actual sum is pleaded in the plaint. The essence of it is that when actual loss is calculable it must be proved for penalty clauses in a contract are not enforced blindly for only reasonable compensation is allowed by a Court of law. In my appreciation of the evidence the Plaintiff alleged that the breach of certain clauses in the contract have occasioned him loss and damage in which he invited this Court to award general damages, loss of revenue, reputational injury and operational disruption. Unfortunately, in the entire oral and documentary evidence there is no credible and convincing material to clarify the pre-estimated liquidated damages and actual liquidated damages which this Court can place reliance to establish the estimated loss suffered by the Plaintiff as a result of the breach of the terms of the contract by the 1st Defendant.

141. In the case at bar looked at from the legal lens on the covenants agreed upon by the Plaintiff and the 1st Defendant one cannot lose sight of some elements of non-performance on the part of the Plaintiff with regard to registration and recruitment of farmers, the realization of the number of nurseries and the subsequent reforestation which ought to have included the acreage under utilization or implementation by the project. There is also inadequate evidence on the part of the Plaintiff whether the enforcement of the terms of the contract was so difficult, expensive or ineffective due to some internal or external forces which impacted on the performance of the contract as stipulated in the instrument. The most important justification for a regime of compensation on breach of the contract is one based on economic analysis on the part of the Plaintiff or Claimant. This economic approach prevalent in our legal system supports and justifies breach of contract where performance will cost the promisor more than paying compensation to the promisee for the breach. One has got to read in and read out the extent upon which the intentions of the parties in the agreement dated December 2023 were fulfilled to the letter. The fundamental principle is that damages are compensatory, not punitive

aimed at placing the aggrieved party in our case the Plaintiff in the same financial position he would have been had the contract been performed. This duty to prove actual loss suffered by the Plaintiff as a natural consequence of the breach of the aforementioned contract was never discharged and the award of any sum cannot be expected to be automatic. A quick perusal and analysis of the evidence produced and admitted before this Court only laid emphasis on complains of the breach arising out of the contract which had been broken by the 1st Defendant. He could have been entitled to some reasonable compensation whether or not he suffered actual damage or loss but the same ought to have been proved by way of evidence.

142. It is trite that a suit for damages could be maintainable only on the ground of breach of terms and conditions of the contract. What that this means is that the Court has to look at the acceptance of the contract, the performing conditions or receiving considerations and the modification of the contract entered into between the 1st Defendant and in our case it includes the 2nd, 3rd and 4th Defendants. Loss and damage in contract law as litigated by the Plaintiff is not a property. It is only a promise supported by the same considerations upon which either the remedy of specific performance or that of damages is available. The Plaintiff in this case based his suit on the injuries suffered by the breach of the contract as initially entered to with the 1st Defendant and later in his own evaluation of the terms the introduction of new parties was meant to frustrate the initial terms of the contract hence justification to bring an action for damages. Therefore, damages in this sense means compensation in terms of money for the loss suffered by the Plaintiff.
143. As I have said elsewhere in this Judgment the burden lies on the injured party to prove his or her loss. It is also trite that every action for damages raises two problems. The first one being remoteness of damage and the second that of measure of damages. In the case at bar the Plaintiff laid down a claim for general damages, special damages and aggravated damages. In terms of definitional dimension general

damages are those which arise naturally in the usual cause of things from the breach itself.

144. The award of general damages for breach of contract is governed primarily by our contract law which entitles injured party to receive compensation for losses that naturally arise in the usual course of things from the breach. The aim of general damages is to restore the injured party to the economic position he or she was expected from performance of the contract. It must be acknowledged that assessment of damages is a very wide area of the law and it is also very technical in nature and covers important areas of Kenya's civil litigation where there is an alleged civil wrong including the realm of contract law. It actually permeates almost all civil claims from tort, contract and it goes further to find rest in constitutional torts. That is why when a claim for damages is made as it was pleaded by the Plaintiff in this case, he is required under the law of evidence to provide both oral and documentary evidence in support of the claim and to give facts upon which the damages could be assessed. The failure to provide evidence is fatal to the claim and the Court cannot judiciously exercise discretion to salvage it. The Court in *Royal Dutch Airlines & another v Farmex Ltd. [1989-90] 2 GLR, 623* made the following observations on the principles applied to damages in contract:

"On the measure of damages for breach of contract, the principle adopted by the courts was restitutio in integrum, i.e. if plaintiff has suffered damage not too remote - he must, as far as money could do it, be restored to the position he would have been in had that particular damage not occurred. What was required to put the plaintiffs in the position they would have been in was sufficient money to compensate them for what they had lost..."

145. The same principle was echoed in the case of *Jusxon-Smith v KLM Dutch Airlines [2005-2006] SCGLR, 438* where it was held as follows:

"Where a party has sustained a loss by reason of a breach of contract, he was, so far as money could do it, to be placed in the same situation with respect to damages, as if the contract had been

performed. In carriage of persons contract, as in the instant case, the normal measure of damages for failure to carry, was the cost of obtaining substitute transport less the contract price and consequential losses such as hotel expenses and the like and non-pecuniary loss such as physical inconvenience and discomfort”.

146. In the case at bar I have reviewed the evidence by the Plaintiff and weighed it against the elements on the remedy of general damages for breach of contract within the strength of the above authorities, in every piece of evidence adduced before this Court during the trial none of it can be applied to grant the remedy of general damages for breach of contract in favour of the Plaintiff. This claim is also lost on the basis of not discharging the standard and burden of proof on a balance of probabilities.

147. Whereas special damages are which arise on the account of the unusual circumstances affecting the Plaintiff. Special damages in breach of contract are defined as specific, quantifiable financial losses that directly resulted from the Defendant’s breach which must be strictly pleaded and proved with evidence such as receipts, invoices, statements of accounts, profit and loss account or valuation reports on material terms of the contract. This is unlike general damages which cannot be estimated or inferred. The Superior Courts have spoken on imperatives of special damages as herein under demonstrated by sampled case law:

- ***Equity Bank Limited v Gerald Wang'ombe Thuni (2015) eKLR and Okulu Gondi v South Nyanza Sugar Company Limited (2018) eKLR***: *The High Court highlighted that special damages must be specifically pleaded and strictly proved with a degree of certainty and particularity before they can be awarded.*
- ***Coast Bus Service Limited v Murunga Danyi & 2 Others (Civil Appeal 192 of 1992)***: *The Court of Appeal emphasized that it is not sufficient to aver that particulars of special damages will be supplied later; they must be stated in the plaint to allow for strict proof.*

- **Total (Kenya) Limited v P.K. Njoroge (1985) eKLR:** Cited for the principle that special damages are not the natural consequence of the breach and must be specially claimed and proved.

148. This claim by the Plaintiff based on the above evaluation of evidence and applicable principles also fails the set standard and burden of proof on a balance of probabilities.

How has the Plaintiff fared in terms of aggravated damages?

149. In the case of aggravated damages the Court in the case of *George Ngige Njoroge v Attorney General (2018) eKLR*, it was held thus:

“Aggravated damages are awarded in actions where damages are at large. They are normally awarded in actions of defamation, intimidation, false imprisonment, malicious prosecution, and trespass to land, persons or goods. The matters that the court should take into account in awarding such damages include the Defendant’s motive, conduct and manner of committing the tort. The court has to consider whether the Defendant acted with malevolence or spite or behaved in a high handed manner.”

150. This Court cannot avoid to mention that in this impugned contract there was a failure of performance of obligations by the Plaintiff resembling those created by the contract itself in the aims, roles and responsibilities of Earthbanc & Green Planet Initiative 2050 Foundation. Generally, in a claim for general damages the Plaintiff was vested with the duty to assert and prove the loss suffered in monetary form. In the case of special damages, he has specifically to plead and prove that he sustained such a special loss and the details of loss must be pleaded in the plaint. The reason is that the measure of damages is governed by some key principles as established in our case law.

151. The Plaintiff in this case also argued and agitated by way of evidence that he was entitled to damages for loss of reputation and business as a result of the breach of contract by the 1st Defendant who went further

to bring on board strangers in the name of the 2nd, 3rd and 4th Defendants. First and foremost, loss of reputation and business focuses on proving the actual, direct impact of defamatory statements or action on the Plaintiff's economic standing, credibility or personal standing. Compensation in this class of damages is often awarded by the Court as a *solatium* – a form of consolation for injured feelings rather than purely financial restitution. The Superior Courts have laid down the key principles upon which trial Courts can apply to exercise judicial discretion on assessment of damages under this limb. Thus, in the case of *C A M v Royal Media Services Limited Civil Appeal No. 238 of 2005 (2013) eKLR* where it was stated that: *No case is like the other. In the exercise of discretion to award damages for defamation, the court has a wide latitude. The factors for consideration in the exercise of that discretion as enumerated in many decisions including the guidelines in Jones V Pollard (1997) EMLR 233-243 include objective features of the libel itself, such as its gravity, its province, the circulation of the medium in which it is published and any repetition; subjective effect on the Plaintiff's feelings not only from the prominence itself but from the Defendant's conduct thereafter both up to and including the trial itself; matters tending to mitigate damages for example, publication of an apology; matters tending to reduce damages; vindication of the Plaintiff's reputation past and future.* Similarly, in *Miguna Miguna v Standard Group Limited & 4 others [2017] eKLR*, the Court of appeal stated as follows regarding defamation: *“Speaking generally a defamatory statement can either be libel or slander. Words will be considered defamatory because they tend to bring the person named into hatred, contempt or ridicule or the words may tend to lower the person named in the estimation of right-thinking members of society generally. The standard of opinion is that of right-thinking persons generally. The words must be shown to have been construed or capable of being construed by the audience hearing them as defamatory and not simply abusive. The burden of proving the defamatory nature of the words is upon the plaintiff. He must demonstrate that a reasonable man*

would not have understood the words otherwise than being defamatory. See *Gatley on Libel and Slander* (8th edition para. 31).

152. The Court also further in *KL v Standard Limited [2014] KEHC 4185*: Established that in actions for loss of reputation, the principle of restitution in integrum (restoring the party to the position before the wrong) is highly subjective and serves as both a vindication to the public and a consolation for the damage done.
153. On the part of the Plaintiff going by these principles there was no evidence of actual reputation damage based on breach or termination of contract with the 1st Defendant and that threshold of reputation loss must be proven on a balance of probabilities. This Court refuses to award damages under this limb. I have also further weighed the elements to prove the award of general, special and aggravated damages and notwithstanding the insistence by the Plaintiff that he has placed before this Court sufficient material evidence none of it met the standard and burden of proof as laid down in Section 107(1), 108, 109 and 112 of the Evidence Act.
154. What can be deduced from above is that regarding reputation and loss of business the law often focuses on defamation (libel/slander) and passing off where the Courts are expected to assess a business's goodwill has been damaged or a person's character lowered in the eyes of the public. The law envisages defamation of corporate and personal reputation in which evidence explores the meaning of words published, innuendo and at all material times burden of proof in defamation cases involves reputational damage in which a distinction must be drawn between general character and professional standing of the Plaintiff in a suit. The Supreme Court of Jamaica in *Terrence Williams v Rowe et al JMSC Civ 92 - [2024]* stated:

"In this case, the court recognized that a person's reputation is not confined to their general character, but extends to their trade, business, or profession. It highlights that defamation can be actionable without proof of specific loss (special damage) if it disparages a person in their profession."

155. The claim by the Plaintiff on loss of reputation and goodwill was to the effect that the 1st Defendant in signing agreements with the 2nd, 3rd and 4th Defendants it did cause injury to his reputation often leading to loss of business in the Kenya Reforestation Project. The test always in these kind of claims is for the Court to assess the evidence by evaluation of the statements made as against the Plaintiff's reputation and loss of business in the estimation of the right thinking members of society as a result of which his commercial reputation was attacked. The Plaintiff was under a duty in law to establish that his goodwill or reputation was attacked by the entry of the 2nd, 3rd and 4th Defendants as part of the persons and legal entities to implement the project which was initially a preserve between his foundation and the 1st Defendant company. This in my view could have involved him demonstrating a misrepresentation by the 1st Defendant to the public more particularly the farmers who had been registered, on boarded and signed agreements to implement the Kenya Reforestation Project for purposes of the ultimate beneficial interest in the so called carbon credits. It was also required of him by this Court to demonstrate that he suffered or in a *quia timet* action and that he is likely to suffer damage by reason of the erroneous belief engendered by the Defendants' misrepresentation that the sources of the Defendants' services is the same as the source of those offered by the Plaintiff.
156. The question which remained unanswered by the Plaintiff is, what is it about the add of the 2nd, 3rd and 4th Defendants did what makes people think of the Plaintiff and his foundation in terms of the aims and objectives of the Kenya Reforestation and Sustainable Livelihoods Project (Regeneration Kenya) to lower his reputation and his business enterprise?
157. This Judgment would be incomplete without highlighting in a precise summary some of the key features of what constituted the obligations vested with the Plaintiff in the Service Agreement between Earthbanc AP and Green Planet Initiative. The latter being the Plaintiff in this suit. In its codification given the present facts and circumstances wherein

the impugned agreement by way of specifics of obligations the Plaintiff's Director Festus Kiplagat was responsible to deliver the following services:

a) Nursery Operations:

- *Oversee and manage all operations within the forest nurseries.*
- *Ensure the health and quality of planting materials.*
- *Implement best practices for nursery management.*
- *Coordinate with nursery partners.*

b) Material Delivery:

- *Coordinate the timely delivery of planting materials to the nurseries.*
- *Work with suppliers and logistics teams to ensure efficient material transportation.*

c) Labor Management:

- *Hire, train and supervise nursery and allied staff*
- *Ensure a safe and productive work environment.*
- *Monitor labour performance and provide necessary support.*
- *Ensure compliance with Modern Slavery Annex*

d) County-level Workflow:

- *Streamline workflow at the County Level to optimize efficiency.*
- *Collaborate with County Coordinators and stakeholders for smooth operations.*

e) Financial Management:

- *Monitor and manage cash flow for the Counties.*
- *Prepare financial reports, budgets, and forecasts.*
- *Ensure compliance with financial policies and procedures.*

f) Procurement:

- *Oversee procurement processes for the nurseries.*
- *Collaborate with the Earthbanc team and vendors and suppliers to obtain competitive pricing*

- *Ensure timely delivery of required materials.*

g) Administrative Duties:

- *Assign work and tasks to the County Forest Nursery Coordinators.*
- *Streamline County-level workflow for improved efficiency.*
- *Maintain records and documentation related to administrative activities.*

h) County Level Coordination and Communication:

- *Where necessary and in consultation with the Earthbanc team, organize and conduct meetings with government officials to discuss project progress and requirements.*
- *Act as a liaison between the organization and County-level stakeholders.*
- *Ensure any feedback is communicated back to Earthbanc in a timely manner.*

i) Documentation and Reporting:

- *Ensuring thorough documentation of project activities, outcomes and lessons learned, and providing regular reports to Earthbanc.*

j) Monitoring and Evaluation:

- *Implementing a quality assurance program to continuously assess and improve the quality of project deliverables and outcomes.*
- *Establishing a robust monitoring and evaluation framework to assess the project's progress, impact, and effectiveness over time.*

k) Land preparation, planting and maintenance of the trees

- *Ensure that land preparation is done on time for the planting season.*
- *Ensure that fencing and fire lines are created for minimizing the mortality of the trees.*
- *Ensure that planting is carried out as per agreed plans and budget.*

- *Ensure that communities protect the trees for 44 years.*

158. In a nutshell, this forms the root of the contract as intended to be executed between the Plaintiff and the 1st Defendant. The key terms of reference and obligations conferred upon the Plaintiff have also been alluded elsewhere in this judgment when the entire case on the claims made by the Plaintiff was put into perspective to answer the corpus of breach which may have been committed by the 1st Defendant. The evidence by the Plaintiff in this respect and as against the 1st Defendant sued jointly and severally with the 2nd, 3rd and 4th Defendant must mirror the extent in which he performed his obligations as tabulated above. The law is settled in this area to the effect that non-performers of contractual obligations emphasizing the sanctity of the contract, the requirements of clean hands for equitable remedies and the assessment of damages based on the position that the injured party would have been in if the breach had not occurred. Essentially, a party who fails to perform his or her side of the bargain cannot enforce the contract against the other party.
159. With respect to the Plaintiff each element of his obligations formed the backbone of his contractual relationship with the 1st Defendant. Where non-performance of a contract as it seems to the case at bar filed by the Plaintiff it undermines the entire contract. It is settled law that a contract is breached when a party fail to perform his or her obligations or performs them improperly or wrongfully repudiates the contract by conduct. The Plaintiff to this suit was vested with the standard and burden of proof by way of evidential material that he performed his obligations to the service agreements before alleging non-performance by the 1st Defendant. *See the principles in Maritime National Fish Ltd v Ocean Trawlers Ltd (1935) UKPC 1, Transitional Computer Technology (Kenya) Ltd v Principal Secretary, Ministry of Internal Security [2024] eKLR, Associated Japanese Bank v Credit du Nord [1988] (HC) and Tarzan Matu & another v Nassim Sharrif Nassir Abdulla & 2 Others [2009] Eklr, Federal Commerce, Navigation Co. Ltd v Molena Alpha Inc*

(1979) AC 757, Poussard v Spiers (1876) 1 QBD 410 & Kenya Case - Koya & Company (2021).

160. The case for the Plaintiff if the non-performance of the above obligations is anything to go by and if by any chance they were performed with completeness, the Court happen to have only an advantage of minimal documentary evidence which was incapable of discharging the standard and burden of proof on a balance of probabilities. The basis of this finding drives this Court to bring to perspective the concept of good faith in contractual relationships. Thus in Article 1 of the American Uniform Commercial Code where good faith is defined as honest in fact in the conduct or transaction concerned. The same Article defines good faith in the case of a merchant to mean honesty in fact and observance of reasonable commercial standards of fair dealings in trade. The essence of good faith in any society is adherence to the common contract norms. If a person has sufficiently met those norms in any instance - something that can never be determined except in a particular social context - the person has acted in good faith, if the person has not met those norms he has not acted in good faith, other abstract values such as justice, reasonableness, fairness and equity. This is in contrast with the concept of bad faith whose examples include overreaching interpretation of contract language, abuse of bargaining power, lack of diligence, wilful failure to perform in full the contract terms and repeated assurance of performance etc.
161. This foregoing synthesis underscores the claim filed by the Plaintiff that the piece-meal approach in management and execution of the classified obligations may have led to the inclusion of the 2nd 3rd and 4th Defendants to the scheme of Regeneration Kenya Project.
162. For those reasons the suit filed by the Plaintiff lacks merit, legal foundation and substance on the face of it and though indicative of serious accountability and governance issues on the part of the 1st Defendant who is stated to have allegedly gone out of the terms and covenants as agreed upon with the Plaintiff, all those fell short of the

threshold set out under Section 107, 108, 109 and 112 of the Evidence Act being the standard of proof on a balance of probabilities.

DISPOSITION

163. It is hereby ordered as follows:

- (a) That the orders sought for granting a permanent injunction by the Plaintiff as against the Defendant jointly and severally as stipulated under Order 40 Rule (1) & (2) of the Civil Procedure Rules fails the threshold test.*
- (b) That a declaration be and is hereby made that the alleged contractual breaches alleged by the Plaintiff against the Defendants as contextualized and textualized in the Memorandum of Understanding and Services Agreements stands dismissed for want of merit within the provisions of Section 107(1), 108, 109 & 112 of the Evidence Act.*
- (c) That a further declaration be and is hereby made that the claim under the several limbs of general damages, exemplary and punitive damages, aggravated damages and special damages fails within the admissibility and non-admissibility criteria of both legal and evidential material provided by the Plaintiff to prove existence and non-existence of facts in issue to secure Judgment in his favour.*
- (d) That the claim of release of donor funds remains in the realm of remoteness as no financial statements and/or the financial institutions in which the donor funds accounts are domiciled to facilitate funding the project during the period under review.*
- (e) That an order compelling the Defendants to render a full and accurate account of all revenues, carbon credit, donor funds, and financial benefit received or disbursed under the Kenya Reforestation Project from the 15th August 2022 to date fails for being grounded on sinking sand as the Services Agreements demonstrates the Plaintiff to have been the main actor in implementing the contract on the ground. Hence no such concrete evidence was shared with the Court on the above ends of claims.*

(f) That the lifting of the corporate veil of both the 1st Defendant and the 2nd Defendant is also dismissed for lack of the Plaintiff meeting the legal threshold as expressly fashioned in the law.

(g) That this suit in its entirety and in directing my mind and will is lost with an order of costs payable to the Defendants. It is so ordered.

**DELIVERED, DATED AND SIGNED AT ELDORET THIS 28TH DAY OF
APRIL 2026.**

.....

R. NYAKUNDI

JUDGE