



Spire Properties (K) Limited & another v Mwabora & 70 others & 60 others (Civil Appeal 135 & 139 of 2018 (Consolidated)) [2022] KECA 947 (KLR) (29 July 2022) (Judgment)

Neutral citation: [2022] KECA 947 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPEAL 135 & 139 OF 2018 (CONSOLIDATED)
SG KAIRU, A MBOGHOLI-MSAGHA & P NYAMWEYA, JJA
JULY 29, 2022**

BETWEEN

SPIRE PROPERTIES (K) LIMITED APPELLANT

AND

MARIAM SAIDI MWABORA & 70 OTHERS 1ST RESPONDENT

HOTEL SPAN LIMITED 2ND RESPONDENT

R T DUNNET 3RD RESPONDENT

TRANSNATIONAL BANK LIMITED 4TH RESPONDENT

**AS CONSOLIDATED WITH
CIVIL APPEAL 139 OF 2018**

BETWEEN

TRANSNATIONAL BANK LIMITED APPELLANT

AND

MARIAM SAIDI MWABORA 1ST RESPONDENT

BENSON KITETO 2ND RESPONDENT

ROSEBUD STELLA MUBIRU 3RD RESPONDENT

KOON CHOO & CHRISTINE LYN JOGSCHAT 4TH RESPONDENT

ANTHONY BWIE AKUKHA 5TH RESPONDENT

JOSEPH ONG'UTI 6TH RESPONDENT

STEPGEN K. NDEGWA 7TH RESPONDENT



SAMULE G MOMANYI	8 TH RESPONDENT
DANIEL O OMUYA	9 TH RESPONDENT
OBADIAH G MBUGUA	10 TH RESPONDENT
ESPIE NJUGUNA	11 TH RESPONDENT
MOSES S KILUSU	12 TH RESPONDENT
GEORGE K MULWA	13 TH RESPONDENT
SWALLEH K KURAUKA	14 TH RESPONDENT
RASHID M MDEMU	15 TH RESPONDENT
ALI HAMISI MAMBO	16 TH RESPONDENT
JACKSON MUTHAMA MUTISO	17 TH RESPONDENT
KENNEDY N ONCHOMBA	18 TH RESPONDENT
JONATHAN KAMANDA NGUMA	19 TH RESPONDENT
MWANIA KITUNGUO	20 TH RESPONDENT
MARTHA NJERI KIGWINI	21 ST RESPONDENT
NANCY NJERI KARIUKI	22 ND RESPONDENT
TOM KIGINDWA NYANGWESO	23 RD RESPONDENT
JONES KERONGO OMWERI	24 TH RESPONDENT
ABDUL M MWENDO	25 TH RESPONDENT
EDWARD SIMIYU MAKONGE	26 TH RESPONDENT
JOHN NDIPO ISHMAEL	27 TH RESPONDENT
KENNETH ZEBAMARE	28 TH RESPONDENT
MAJUMAA HAMIS MACHESO	29 TH RESPONDENT
ROSELYN NDUATA NJENGA	30 TH RESPONDENT
FREDRICK NATO WEKESA	31 ST RESPONDENT
SOFIA HAMISI MFUKO	32 ND RESPONDENT
PULINE MULI KASIU	33 RD RESPONDENT
MARSDEN K MBITI	34 TH RESPONDENT
REGINA KOKI GATILU	35 TH RESPONDENT
JOSEPH MUMA OMWANGA	36 TH RESPONDENT
ASHA K MBONDE	37 TH RESPONDENT
ALI WATURI MWAKUTALA	38 TH RESPONDENT
NORMAN NDAMBO	39 TH RESPONDENT



SOLOMON CHARO	40 TH RESPONDENT
JOSEPH LWAMBI	41 ST RESPONDENT
KELVIN NGALA	42 ND RESPONDENT
ABDALLAH MASHOBO	43 RD RESPONDENT
RAMADHAN YAWA	44 TH RESPONDENT
LEONARD K CHUBUA	45 TH RESPONDENT
ATHUMAN MWARACHETI	46 TH RESPONDENT
RASHID SALIM MWAKULOLA	47 TH RESPONDENT
MWANATUMU OMARA NGUTA	48 TH RESPONDENT
JOHN MOKOMBA OBOIKO	49 TH RESPONDENT
RAMADHAN MWASERA	50 TH RESPONDENT
SAMSON KASUNGU	51 ST RESPONDENT
DOMINIC AMARI MWARUBE	52 ND RESPONDENT
DEOGRATIS WANDERA EKEYA	53 RD RESPONDENT
SAIDA MZURI THOYA	54 TH RESPONDENT
ALPHONSE AMBANI BARASA	55 TH RESPONDENT
MARK MOTURI ONCHAGWA	56 TH RESPONDENT
HARRISON YAWA SHEHI	57 TH RESPONDENT

(Appeals against the Judgment of the Employment and Labour Relations Court at Mombasa (Rika, J) dated 8th September 2017 in Mombasa Industrial Court Cause No. 79 of 2013 Previously Mombasa HCCC No. 62 of 2007)

JUDGMENT

Introduction

1. The genesis of this matter is Mombasa High Court Civil Case No. 62 of 2007, which was subsequently transferred to the Employment and Labour Relations Court (ELRC) and given a new number, being Cause No. 79 of 2013. The said suit was brought by the respondents in Civil Appeal 135 of 2019 (hereinafter “the Claimants”). The 71 Claimants’ case was as follows. The Claimants were employed by a limited liability company called Hotel Span Limited (Hotel Span) at its five-star beach hotel called Diani Reef Grand Hotel (Diani Reef) on diverse dates between 1981 and 1997. They were employed in different departments on permanent and pensionable terms, were entitled to annual leave allowance, and upon termination they were supposed to be paid gratuities calculated in accordance with the period of service.
2. Pursuant to what they termed a fraudulent loan advanced to Hotel Span by Transnational Bank Limited, R. T. Dunnet (hereinafter “the Receiver”) was appointed as the receiver and manager of the hotel sometime in 1998. The Receiver then purported to sell Hotel Span to Spire Properties (K)



Limited (Spire) on or about 16th April 2003, a sale that the Claimants also viewed as fraudulent. The Receiver terminated the services of the Claimants between the time he took over in 1998 and the time of the sale in 2003.

3. The Claimants position was that, no actual sale of the Hotel had taken place and that Spire was simply Hotel Span, with a changed name, purely for the purposes of defeating paying the Claimants their terminal benefits. Further, that all the Respondents in the claim acted in the fraudulent manner as particularised below:
 - a. Purporting that there was loan payable by Hotel Span to Transnational Bank when no such loan was granted.
 - b. Even assuming there was such a loan, the Receiver was bound to call for a creditors' meeting to disclose Hotel Span's debts and how the debts should be paid.
 - c. Upon arriving at the decision to sell the hotel, Transnational Bank ought to have adequately advertised the sale within and outside Kenya through local and international dailies to receive the best possible price.
 - d. The Receiver never advertised the sale to anybody either in Kenya or internationally.
 - e. No auction sale took place.
 - f. The sale was shrouded in great mystery and Spire was simply wearing a different colour of cloth.
 - g. All the Respondents in the claim were guilty of corruption and acting in bad faith.
4. The Claimants stated that as of the time of the takeover, they were owed terminal dues comprising gratuity, annual leave, notice pay and other dues amounting to Kshs. 32,457,007. The Claimants urged the court find termination of their contracts of employment to have been irregular, unlawful and improper. The Claimants prayed for judgment against Hotel Span, Transnational Bank, the Receiver and Spire for a declaration that they were entitled to be paid their terminal dues, judgment for the sum of Kshs. 32,457,007, general damages, and costs plus interest.
5. The Receiver's position was that Hotel Span borrowed some monies from Transnational Bank and all the necessary security documents were prepared and perfected. That he was appointed a receiver manager as per the security documents in particular the Debenture, as Hotel Span had defaulted in the repayment of the loan. The Receiver stated that he did not terminate the Claimant's contracts as he did not have the capacity to do so as they were not his employees. He averred that the claim was statute barred having been filed more than six years after the alleged cause of action, and no leave of court was obtained prior to filing the claim.
6. In its defence, Transnational Bank stated that it had all the rights to appoint a receiver/manager after Hotel Span defaulted in the repayment of the loan. That it did not terminate the Claimants' contracts as it did not have the capacity to do so. The bank denied the particulars of fraud attributed to it and also averred that, the claim was statute- barred having been brought more than six years after the alleged cause of action and without leave of the court.
7. Spire filed a similar defence stating that it had never entered into any contracts of employment with the Claimants and could not be held liable for the termination of the Claimants' employment. It stated that it was a legal entity separate from the other defendants and was a stranger to the defendants' operations, and could not be held liable for their acts or omissions. It denied engaging in any acts of fraud with any party and stated that it had been improperly joined in the suit and the claim did not disclose any reasonable cause of action against it.



8. Spire then raised a preliminary objection primarily on the ground that the claim was time barred by dint of Section 4 of the *Limitation of Actions Act*, having been filed outside the six year limitation imposed on filing of contractual disputes. The objection was declined by the court which found that, the High Court had already made a ruling on the issue dated and delivered on 1st December 2009 to the effect that Section 4 [1]
 - (a) of the *Limitation of Actions Act* was not applicable to the case. The learned judge, in his judgement, therefore found that the issue was res judicata and that the ruling of the High Court was not appealed against.
9. Hotel Span did not file any papers or participate in the proceedings in the ELRC.

The ELRC Proceedings

10. The hearing in the ELRC began with the Claimants' case. Samson Stanley Mubiru's testimony was that he was appointed a Financial Controller of Diani Reef run by Hotel Span on 1st July 1982. Hotel Span was in a joint venture with Sonotel Kenya Limited, and the shareholding of the venture comprised of stakes owned by the Industrial Development Bank, Sonotel Hotel Kenya Limited and Sonotel UK. Hotel Span owned Plot No. 12830 at Diani Beach, the property on which the hotel was developed. Hotel Span obtained a loan from IDB Limited and National Bank of Kenya and the hotel was properly run and the loan serviced. In January 1984 the shareholding changed from Kshs 14 million to Kshs 45 million. Sonotel UK held 51%, IDB 30% and Siara Moria Limited 19%. Sonotel UK, the majority shareholder planned to increase the number of rooms of the hotel.
11. Hotel Span took a loan from the Bank of Scotland guaranteed by Transnational Bank. Materials for the new rooms were to be sourced from the UK and Italy and paid for in foreign currency. Hotel Span was later run by Transnational Bank through the Receiver until 2003. Mubiru never went for meetings with the Receiver and his involvement was limited to writing a statement of affairs/last balance sheet on the date of the receivership which was filed on 18th December 1998. The Receiver never wrote to him to inform him that the receivership had ended and the hotel transferred to another person.
12. When cross-examined, Mubiru stated that he did not have a copy of the joint venture or copies of statements. That he was aware that Transnational Bank gave a loan to Hotel Span of about Kshs. 50 million. That there was a Debenture of about Sterling Pounds 4 million guaranteed by Transnational Bank and property No. CR 15751 was charged to it. The charge and the debenture ranked pari passu. That Hotel Span was unable to repay the loans and Transnational Bank had the right to appoint a receiver but the procedures were not followed. That Hotel Span had an outstanding debt with Transnational Bank of Kshs. 29 million. That to his knowledge the loans due to KCB and IDB were not paid. Transnational Bank guaranteed the Bank of Scotland loan and not any other local loans. That he did not have a copy of the statement of affairs that he prepared. That he was not an employee of Transnational Bank, Receiver, or Spire Limited. That the statement of Samuel Momanyi, the Personnel Manager who looked after staff welfare, was to the effect that everyone was paid. That he was not under the Personnel Manager.
13. Joseph Benson Onguti, a hotelier, stated that he was Hotel Span's employee at Diani Reef from 1984. Diani Reef was a 5 star hotel opened in 1981 with 150 rooms, and another 150 rooms were later added. Diani Reef sat on 32 acres beach front land. The acreage went down after 5 acres were sold and one portion given to Nicholas Biwott and Sansone Banin the Managing Director. Onguti rose up the ranks to acting General Manager in 1998. Sigi Joschart was General Manager from 1984 to 1998. Samson Mubiru was Financial Controller while Samuel Momanyi joined as Accountant and became Personnel



- Manager until 2003. Onguti produced a bundle of documents relating to employees of Diani Reef who left in 2003 and earlier.
14. Onguti stated that, in 1996 a majority of the shareholders died and new directors came on board being Sam Shollei, Ahmed Jabril and Akbar Ismail. They were assured that their employment was safe and there was no loss of service. In September 1998 Ray Dunnet informed them that he had been appointed as Receiver by Transnational Bank. Onguti was asked to act as General Manager and to assure the employees that their jobs were secure. The General Manager and the Financial Controller were laid off by the Receiver. Part of the hotel was leaking and they sought money for repairs. Transnational Bank was not ready to put in money but preferred the property be sold. The employees were not told the reason for the receivership, which was the Debenture issued by Transnational Bank and IDB in favour of Hotel Span. There was no borrowing from Transnational Bank.
 15. Onguti had no knowledge whether the monies were received. A letter dated 19th December, 2000 signed by the Managing Director of Transnational Bank addressed to the Receiver stated that, Transnational Bank was not a beneficiary per se of the sale but it was looking after the interest of IDB and KCB. Onguti also made reference to a letter, attached to the witness statement of John Ziro, from auditor Deloitte to the Managing Director Transnational Bank to the effect that, the guarantee was discharged in 2003, which Onguti understood to mean that the debt was paid in 2000 and by 2003 removed from the books altogether; and that Transnational Bank did not have the mandate to appoint the receiver. Onguti stated that he did not know where the gross proceeds from the sale of the hotel went and that they were never invited to a creditors' meeting. That he saw no other advertisements in the international press and that he expected the value to be over Kshs. 1 billion.
 16. On cross-examination, Onguti stated that the Receiver paid workers from 1998 to 2003; that they did not know how the receivership came about. That Transnational Bank brought in the Receiver but it did not have a right to do so. That the receivership was not above board. That the receiver did not even know that the hotel was being sold, he called the Receiver and informed him. That he did not know if Hotel Span paid the debenture amount. That Transnational Bank was liable to the employees because it appointed the Receiver.
 17. Samuel Momanyi Omao testified that he worked at Diani Reef from 1989 to 2003. He was the Personnel Manager in 2003. In 1998 Omao was called by the late General Manager and asked to commence a meeting to all DODs. At the meeting, they were introduced to the Ray Dunnet who chaired the meeting and informed them that the hotel had been taken over under receivership. Omao learnt that Transnational Bank appointed the Receiver due to the debenture loan from the Bank of Scotland of about Sterling Pounds 5 million. They were asked to convince the hotel employees that the hotel was not going to be sold. 90% of the employees remained. The receivership went on until 2005 and the employees continued to serve on the same terms. Around Easter holiday of 2003, Omao was told that the hotel had been sold. The Receiver said that the employees would not be affected. Together with the Receiver, Omao prepared a list of employees and their entitlement.
 18. During cross-examination, Omao stated that he did not agree with the manner in which the receivership was conducted. That there was no debt requiring the hotel be placed under receivership. That the Receiver did not sack anybody or issue fresh letters of appointment but the employees resumed working on the same terms. That as of preparation of the documents indicating the employees' dues, Spire was not in the picture.
 19. On re-examination, Omao stated that the receivership and sale of the hotel led to the loss of their employment. That after April 2003, they were told that they would continue. There was no proper handing over. That he had produced certificates of service covering the entire period up to the two



- week transition when Spire took over. That the Receiver was his employer and it was the duty of the employer to keep all employee records. That there was no debt requiring the hotel to be placed under receivership.
20. Two witnesses testified for Transnational Bank. Ngowa Ziro, a Credit Officer of Transnational Bank testified that the Claimants were strangers to the bank, that they were not involved in hotel accommodation nor employ people to run hotels. According to Ziro, Hotel Span was their client to whom they granted credit facilities. Security documents and a debenture were prepared and a charge document as an additional document. Money was advanced to the borrower and guarantee issued. The hotel failed to pay the bank. At no time did the hotel say that they did not advance the money. The receiver was appointed on 2nd September 1998. The bank could not be held liable for what happened before 1998. The claimants were not their employees. The receiver became the agent of company Hotel Span and not the bank. The bank did not act fraudulently or in good faith. The documents showed that the money was advanced.
 21. During cross-examination, Ziro stated that the bank was entitled to appoint a receiver after the hotel failed to pay and after the conditions under paragraph 10 of the debenture occurred. That they sent a demand letter under paragraph 11 of the debenture. That they never paid any money to the Bank of Scotland under paragraph 1 of the debenture and that he was not aware of any demand made by the Bank of Scotland. That the charge document was a separate arrangement between the hotel, Transnational Bank and Transnational Finance and that the debenture was available as security for other monies. That the letter of 19th December 2000 to the Receiver stated that the bank is not a beneficiary.
 22. Ziro stated that he did not know why the bank appointed the Receiver. That the hotel was sold for Kshs. 157 million, according to the Receiver's documents, and by that time in 2003 the value of the hotel was about Kshs. 1.5 billion. That he did not know whether the hotel employees were paid benefits by the time the hotel was sold. That the agreement for sale was dated 6th March 2002 between Hotel Span, the Receiver and Xenon. Paragraph 14 stated that the employees' preferential dues were to be paid by the Receiver. Another letter from the receiver to Xenon indicated that all employees would be employed by Xenon.
 23. Ziro stated that the Receiver was validly appointed and was therefore a valid agent. That he did not know whether the Receiver held creditors' meetings or filed statements of account. Ziro denied that other creditors apart from the employees were not engaged. He stated that he did not have any entries showing Kshs. 29 million or Kshs. 11 million was paid. That he did not know if the receiver carried out valuation. That Spire was not a party to the debenture or the charge.
 24. On re-examination Ziro stated that it was not the Receiver to pay the employees on termination as he was the agent of Hotel Span. That IDB and KCB had never complained that their money was not paid. That the Receiver used the letterhead of Hotel Span. That the hotel was sold for Kshs. 157 million and Vipul Shah and Co. confirmed that the sum was the bona fide best price. That the sale was by the Receiver and there was an advertisement on the East African from KRA giving the Receiver a go-ahead to continue with the sale.
 25. Faryd Abdulrazak Sheikh, the General Manager of Transnational Bank, testified that none of the claimants were engaged as employees of the bank. The bank was not in a position to terminate them. Hotel Span wanted to expand to 300 rooms and wished to borrow from the Bank of Scotland in Sterling pounds. The Bank of Scotland wanted Transnational Bank to guarantee the facility and to assist it realizing any security. The facility was to be repaid directly while the bank remained guarantors. They prepared the debenture allowing them to access all the assets in the event of default. They also



- created a charge over the land to secure the guarantee and other facilities including overdraft. The debenture was executed and certified. The facility was advanced and captured in their books.
26. The witness stated that the hotel failed to perform its obligations with the Bank of Scotland, which bank demanded that Transnational Bank impress upon the hotel to meet its obligations or appoint a receiver manager. Transnational Bank then appointed the Receiver in September 1998, who was an agent of the hotel, and the sale was conducted by the Receiver in consultation with all the stakeholders. That a potential buyer was identified and a sale agreement dated 6th March 2002 was executed by the Receiver and other parties, with Transnational Bank signing as holder of the guarantee.
 27. Further, that once the receivership was in place, there was no claim by the employees for terminal dues, as they were unsecured creditors. There was also no effort made to stop the Receiver from taking over the hotel. Other creditors such as IDB and KCB who had advanced a facility to Hotel Span to create the charge were informed and involved, and the property was properly advertised for sale in the East African and the Daily Nation, and the bank was not involved in the sale. That IDB and KCB were not able to recover their debts. The hotel was sold for Kshs. 157 million in an effort to salvage whatever little they could, as tourism was doing poorly at the time and several hotels in the area were under receivership. They all took a big hit, including the claimants as unsecured creditors, who could not be paid as well.
 28. On cross-examination, Sheikh stated that they received some money out of the sale to pay the Receiver but he did not know how much was received. That the Receiver did not pay any money to the bank. That they did not pay any money to the Bank of Scotland. He denied that the receivership had nothing to do with the debt obligation. He disagreed that the Bank of Scotland had first right and that it was not a contradiction for Transnational Bank had no beneficiary interest. Sheikh stated that valuation was done by Lloyd Masika but he did not have information of the figure attached to the valuation. That he did not know the exact value of the property and it should have been Kshs. 800 million on executing the charge. That Kshs. 157 million was a fair price in the circumstances. That they received a brief state of the receivership but never saw financial statements of the hotel at the time of the receivership. That he was aware that the hotel was a going concern but they never went into the details of the status of the employees. The Receiver managed the hotel on behalf of Hotel Span. That sale agreement did not involve Spire and Xenon was not a party in the matter. That the supplemental agreement introduced Spire. That the Receiver was to pay dues.
 29. On re-examination Sheikh stated that the letter of 19th December 2000 saying that the bank was not a beneficiary meant that they did not have any interest in the charge. That the best price was obtained for the hotel as confirmed by Vipul Shah's certificate dated 26th May 2003. That at the time of the receivership the industry was on its knees.
 30. The witness for Spire was Carren Aluoch Sadia, the company's Legal Officer. Sadia stated that they did not know the Claimants. That they knew Hotel Span and Transnational Bank from the sale agreement dated 6th March 2002. That there was another agreement dated 20th December 2003 in which Spire was added as a purchaser. The hotel was transferred to Xenon. Spire did not have any relationship with the Claimants.
 31. On cross-examination Sadia stated that in the agreement Xenon was the purchaser but Spire replaced Xenon and they stepped in in terms of assets and not liabilities. That Xenon bought and transferred to Spire. That the agreement was specific on assets. That they could not presume liabilities. That they knew that there were terminal benefits to be paid and the terminal benefits were paid before they took over. That the letter by Raffman Elms & Virdee acting for Spire and which asks for all employees' terms of employment was for due diligence reasons and was not binding on them. That the Receiver



- and Xenon should have paid terminal benefits under Clause 14. That a letter by the Receiver to the Director of Xenon said that according to Clause (c) all members of staff would be employed by Xenon.
32. On re-examination, Sadia reiterated that according to the agreement, Spire was not involved with the liabilities. That the Receiver warranted to Spire and Paragraph 5.2 stated that the title was unencumbered.
 33. After the close of the Claimants' case, and at the concurrence of the parties, a verification exercise was carried out to verify and update the bona fides of the Claimants. At the conclusion of the exercise, the court treated the Claims by 10th, 16th, 18th, 19th, and 25th Claimants to have abated, and the Claims by 2nd, 32nd, 46th, 50th, 53rd, 54th, 58th, 62nd and 64th Claimants as unsustainable and therefore rejected.
 34. In his judgement, the learned judge first sought to set out the facts that appeared undisputed. The learned judge summarised the circumstances that led to the loans obtained by Hotel Span, leading to the execution of a Debenture which was supplemented by a Charge over the premises on which the hotel stood. That Hotel Span was the borrower, Transnational Bank the guarantor and the Bank of Scotland the manger and sole lender. That alleging to exercise the powers conferred on them by the Debenture, Transnational Bank appointed Raymond Thomas Dunnet as the Receiver and Manager of Hotel Span after it was alleged that Hotel Span had failed to meet its obligations. That on 2nd September 1998, Dunnet, the Receiver, was presented with a list of existing staff and computation of terminal dues owed to them. Some employees including the Claimants opted to remain with the hotel after assurances from the Personnel Manager that they would be paid all their dues.
 35. The learned judge found that at the end of the receivership, the employees' terminal dues remained unpaid and totalled Kshs. 32, 457,007. The hotel was sold to Xenon Limited by the Receiver and Transnational Bank vide a Sale Agreement of 6th March 2002. Spire was introduced to assume some obligations under the Agreement and was deemed to have replaced Xenon. In the end, the hotel was sold to Spire and not Xenon; and the Claimants' terminal due were not paid as agreed. That a letter from the Receiver to Xenon of 5th June 2002 indicated that there was a meeting between the Receiver and Xenon's director in which they agreed, inter alia, that all employees would make fresh job applications; that all employees would be employed by Xenon on a probationary period of 3 to 6 months; and that services of some of the most highly paid employees would be terminated forthwith.
 36. That a letter from Raffman Elms & Virdee, Advocates to Transnational Bank dated 22nd October 2002 revealed that they were in the process of forming a new company, Spire. A letter from Spire to Minah Jaffah, Assistant Front Office Manager, dated 26th April 2003 stated that Spire had acquired the Hotel from midnight and taken over all the employees on provisional and probationary basis from 17th April 2003; that employees had been paid all their salaries by the Receiver/Manager up to 16th April 2003, notice pay of one month ending 16th May 2003, and all dues including severance pay; and that the hotel would close down for major renovation from 1st May 2003. Spire advised employees they would be paid by Spire for 14 days at the same rate inclusive of overtime and that once the hotel upgrade was complete, it would expect job applications for all positions, but preference would be given to existing and qualified employees.
 37. Regarding the sale of the hotel, the learned judge found that it was undisputed that the hotel fetched a purchase price of Kshs. 157 million and the Receiver took the position that amount realized out of sale, was insufficient to pay unsecured creditors. That Vipul Shah & Company, Certified Public Accountants issued a Certificate Pursuant to Section 7 [c] of the *Transfer of Business Act*, Cap 500 the Laws of Kenya, dated 26th May 2003, certifying that the amount of Kshs. 157 million was the best price obtainable.



38. On the issue of the relationship of the parties, the learned judge observed that the general rule is that the Receiver/Manager is an Agent of a Debtor Company. That the appointment of a Receiver/Manager does not of itself automatically terminate contracts of employment unless there is a concurrent sale of business; if the Receiver/Manager enters into new contracts; or existing contracts are inconsistent with the receivership. The learned judge held that the receivership and the conduct of the Receiver in this case did not fit into any of the exceptional circumstances to lead to termination of the employee contracts. That, in fact, the Claimants were asked to continue working, their contracts were kept alive and they were promised that their terminal dues would be paid. That the Receiver had a duty to act bona fide and in good faith in the exercise of his power of sale. He had a duty to exercise due care, skill and judgment in selling the Hotel, more so with regard to the Claimants as unsecured creditors.
39. The learned judge held that even though Transnational Bank did not employ the Claimants, there was an allegation that the bank was a principal wrongdoer who set in motion circumstances leading to their deprivation of terminal dues. That there were statutory, contractual as well as tortious liabilities, alleged by the Claimants to attach to the bank. That Transnational Bank took a lead role in the sale of the hotel and issued instructions to the Receiver regarding the sale resulting in the Receiver being in effect an agent of the bank. That Transnational Bank could therefore be called to account vicariously, for the acts or defaults of the Receiver/Manager, made in pursuit of such instructions or directions.
40. The learned judge found that Spire took over the obligations of Xenon, as Xenon was not to fulfil its obligations under the Sale Agreement. That the letter from Raffman Elms & Virdee Advocates of 22nd October 2002 suggests Spire was incorporated solely with the intention of stepping in the shoes of Xenon. That the Raffman letter contemplated that there were existing employees who kept the hotel running and possibly with unpaid dues. That Clause 14 of the first Sale Agreement made a similar acknowledgment as did Clause 3.2.7 of the Supplemental Sale Agreement. That the letter of Spire to Minah suggested that there was an employment relationship between the Claimants and Spire in terms of payment of certain remuneration and overtime, as well as the promise of preferential treatment in re-employment when the hotel reopened. That Spire was for a very brief period a successor employer of the Claimants.
41. Regarding the validity of the receivership, the learned judge held that according to Clause 1 [a] of the Debenture, Transnational Bank needed to show there was demand made by Bank of Scotland for payment of the sum secured of Sterling Pounds 5,358,821, or any balance of this sum, for appointment of Receiver/Manager and subsequent sale of the Hotel, to become substantively valid. That while the Transnational Bank General Manager told the court that the Bank of Scotland wrote letters demanding payment of its debts, none of the letters were produced in court. That the General Manager testified that Transnational Bank appointed the Receiver as a matter of prudence and not waiting until they were hit by the guarantee. The learned judge concluded that it was therefore clear that Transnational Bank did not have justification in appointing the Receiver. That it was not shown that Hotel Span had defaulted with regard to the obligation it owed to the Bank of Scotland. That the sums demanded by Transnational Bank were overdraft facilities were totally unrelated to what was owed the Bank of Scotland. That there ought to have been some form of Statement of Account availed to the court indicating what Hotel Span indebtedness to the Bank of Scotland was at the point the Receiver was appointed. That Ziro, the Credit Officer, stated that he did not know why the Receiver was appointed.
42. The learned judge made reference to *Re Jaffe Limited [in liquidation] v. Jaffe* [No. 2] [1932] NZLR 195 for the proposition that Purported Receiver/Managers and Purported Debenture Holders who appoint them, may be held to be trespassers in relation to their conduct, towards the assets of the Debtor Company; and *Azim Virjee & 2 Others v. Glory Property Limited* [2007] eKLR where the High Court, having found the Plaintiffs to have appointed a Receiver/Manager under an invalid Charge,



characterized the purported appointment of Receiver/Manager as sheer masquerading and held that, everything and anything purportedly done under receivership powers therein, is null and void and of no legal consequence.

43. Regarding the exercise of receivership and particularly the sale of the hotel, the learned judge was not convinced that the advertisement published in the East African and Daily Nation were sufficient. He held that the Receiver had an obligation to advertise the Hotel properly, highlighting actual and potential value and brought the sale to the notice of the international hotel industry. That the Receiver did not seem to have engaged industry experts in selling the Hotel as the advertisement was not well circulated and focused on the specialized industry, contrary to the finding in *American Express International Banking Corp v. Hurley* [1983] 3 All ER 564.
44. The learned judge held that it was highly questionable that Kshs. 157 million was the best price of the hotel in the face of Transnational Bank's General Manager's testimony, that the hotel value should have been Kshs. 800 million at the time of execution of the debenture; the Profit and Loss Statement of 31st August 1998 attached to the affidavit of Samuel Momanyi giving the value of the hotel and its assets as Kshs. 1.3 billion; the fact that the Receiver did not seem to have based the sale on any valuation carried out in 2002; and in the face of KCB's suggestion that the hotel be revalued and thereafter intensively marketed to achieve the best value. That the certificate of Vipul Shah served only as a formality was not based on any assessment of true value. The learned judge cited *Cuckmere Brick Co. Limited v. Mutual Finance Limited* [1971] Ch. 941 where it was held that the Receiver/Manager has a duty not to merely act in good faith, but also to take reasonable care, in exercising his power of sale, to obtain a proper price, or the true market value of the asset.
45. The learned judge found that apart from failing to obtain the best price attainable, the Receiver also initially sold the hotel to an entity that was unprepared to pay the extremely low purchase price. That the result was the deferment of the rights of the employees to know their status and have their long-withheld benefits. That this was negligent exercise of the role of a Receiver/Manager. The learned judge concluded that the sale of Hotel cannot be said to have been done lawfully, appointment of Receiver/Manager having been substantively invalid. That the Receiver was masquerading and everything done under his purported power as a Receiver/Manager, including sale of the Hotel is null and void because, at the time of appointment, the power of sale had not accrued or crystallized.
46. As for the parties liable for the payment of the Claimants' dues, the learned judge held that the issue must be viewed against the concept of a going concern and the Receiver's assurances to the employees that they would continue working, without any adverse effect on their terms and conditions of service and would receive all their terminal dues, for the totality of their years of service. That the hotel was offered for sale as a going concern without threat of closure in the foreseeable future, and this was understood by Xenon and Spire. That while the Receiver appeared to have issued termination letters and paid dues only for the period of receivership, in accordance with the sale agreements with Xenon and Spire, the employees' terminal dues for the period of cumulative years of service were not paid. The learned judge observed that the manner in which Spire supplanted Xenon did not convince the court that it was a mere purchaser for value without notice. That Transnational Bank engaged directly with Purchasers without the involvement of the purported Receiver. That Spire continued to run the hotel under the same name using the same assets, and exploiting the goodwill which was built over the years, and from the toil of the Claimants.
47. The learned judge found that under the impugned Deed of Appointment of the Receiver, Transnational Bank undertook to indemnify the Receiver for claims and damages incurred by the Receiver for anything purported to be done by the Receiver and for matters connected therewith.



48. The learned judge held that the employees' terminal dues could not be allowed to be forever irretrievable due to acts of corporate scheming and the employees needed the protection of the court. That Creditors such as IDB and KCB could afford to haemorrhage the huge amounts lost as seen by their giving their consent to Transnational Bank and the Receiver to go ahead with the sale of the hotel. That while these banks had Government shareholding, the employees had no one to bail them out.
49. The learned judge concluded that Hotel Span, the Receiver and Transnational Bank were liable to pay the Claimants. That Hotel Span directly employed the Claimants, the Receiver adopted the Claimants' existing contracts of employment and offered to retain them and pay their dues, while Transnational Bank undertook to indemnify the Receiver against all claims made against the Receiver in the event that Hotel Span was unable to do so. That under Clause 3.2.7 of the Supplemental Agreement, the three parties were to pay the amounts due to the Claimants. That there was nothing in the record suggesting that Spire would pay the terminal dues owing to the Claimants.
50. On the issue of damages, the learned judge observed that the Claimants' terminal dues have been withheld since 2003 and they suffered as a result of the wrongful receivership imposed on Hotel Span by Transnational Bank, and also suffered as a result of the sales transactions. That the Claimants suffered mainly due to the fraudulent acts of Hotel Span, the Receiver and Transnational Bank and were therefore merited damages. That damages were also merited for breach of contract directly against Hotel Span and the Receiver for wrongful termination by terminating their contracts without payment, and by advising the Claimants that they would go on working for Xenon which never happened.
51. That general damages were awardable against all the respondents in the Claim from the perspective of a going concern. That the hotel re-opened as a phoenix but there was no evidence that Spire lived up to its promise to re-employ the Claimants. That Spire created a legitimate expectation in the Claimants' minds that the acquisition of the hotel would not end their careers. That Spire reopened the hotel under the same name and appears not to have recalled the claimants at any time after reopening. That Phoenix syndrome must be discouraged and damages against Spire was merited as a way of discouraging phoenix activities. The learned judge therefore granted general damages to the Claimants against the respondents in the Claim severally and jointly.
52. As for the issue of quantum, the learned judge considered the number of Claimants and that their prayer for terminal dues and interest therefore was also allowed, the general damages ought to be lower than the Kshs. 1 million per Claimant as urged by the Claimants in submissions.
53. The learned judge therefore declared that termination of the Claimants' contracts of employment was irregular, unlawful and improper; granted each Claimant general damages at Kshs. 500,000 amounting to Kshs. 28,500,000, to be paid by all the Respondents severally and jointly; granted costs to the Claimants; interest on terminal dues at 14% per annum from the date of filing the Claim, amounting to Kshs. 29,603,973; and that Hotel Span, the Receiver and Transnational Bank shall severally and jointly pay terminal dues, as shown in the computation drawn on 16th April 2003, to the successful Claimants.
54. The judgment gave rise to the two consolidated appeals before us, by Spire and Transnational Bank, which we shall proceed to examine.

Spire's Appeal

55. Spire filed Civil Appeal No. 135 of 2018, on the broad grounds that the learned judge erred in:
 - i. Finding that the sale of the Hotel was flawed and finding that the Hotel was sold at a 10th of its apparent value.



- ii. Finding that there was an employment relationship between the Claimants and Spire and that Spire took over the Claimants as employees for a fleeting moment.
 - iii. Finding that Spire made a promise to re-employ the Claimants, created a legitimate expectation in the minds of the Claimants, and breached obligations to the Claimants.
 - iv. Awarding general damages against Spire.
56. On the learned judge's finding that the sale of the Hotel was flawed, it was Spire's submission that these were matters that did not fall under the judge's jurisdiction. Counsel for Spire cited Joyce Wanja Mwangi v Nairobi County Government & 2 others [2016] eKLR for the proposition that the ELRC has no jurisdiction to handle matters of a commercial nature. Counsel submitted that it was wrong for the learned judge to link the receivership to the sale transaction as Spire did not play any role in the appointment of the Receiver. That the judge's decision extended liabilities that were owed by other parties and imposed them upon Spire. Counsel contended that Spire was a bona fide purchaser and carried out proper due diligence and even included a clause in the Supplemental Agreement for the payment of Employees' full terminal dues by the Receiver.
57. It was also Spire's submission that the learned judge held that the Hotel was sold at a tenth of its apparent value without any supporting evidence. That the court did not take into account the Receiver's position that the Hotel was in a state of disrepair and in his estimation could not attract more than Kshs. 100 million. That the issue of valuation was not pleaded and ought not to have formed the basis for the judge's finding. That the finding that even when the sale transaction assumed the posture that Spire was merely assuming partial obligations yet in truth Spire assumed all obligations was not in line with the pleadings and evidence tendered in court. That the findings were based on conflicting, contradictory and speculative positions taken in the pleadings and the evidence. That the Claimants pleaded that Spire was simply Hotel Span changing its name purely for the purpose of defeating paying the Claimants, and that the Spire was a beneficiary to the illegal acts by conveniently keeping quiet when the acts were carried out in its name. That instead of proving the allegations as pleaded, the Claimants' narrative changed to allege that Xenon and Spire were the same company, and the judge agreed with the latter position yet there was no supporting evidence. That the learned judge had no basis for concluding that Spire was speedily incorporated solely with the intention of stepping into the shoes of Xenon and that there was no proof of the supposed relationship between Spire and Xenon to demonstrate collusion.
58. On the learned judge's finding that there was a brief employment relationship between Spire and the Claimants, Counsel submitted that the Claimants did not assert that there existed such a relationship. That the findings were not based on evidence adduced in court. That throughout the trial, the Claimants' evidence was geared towards demonstrating the existence of a contractual relationship with Hotel Span and/or the Receiver. That pursuant to the Initial and Supplemental Agreement, Hotel Span, the Receiver and Transnational Bank were under an obligation to deal with the termination of the Claimants' employment and by the time Spire was taking over the Hotel, the contracts for the Claimants' employment had been terminated. That how Spire was part of the Claimants' problems was too remote to be the basis for any reasonable justifiable finding of liability. That no claim was made by the Claimants regarding the fleeting period in which the court found that there existed a relationship.
59. Regarding the learned judge faulting Spire for not re-engaging the Claimants, Counsel contended that Spire did not undertake to mandatorily re-employ the Claimants and did not take over any liabilities. That the finding amounted to varying of contractual provisions and violated the parole rule of evidence which provides that extrinsic evidence is inadmissible to vary a written contract. Counsel



cited *National Bank of Kenya v Pipeplastic Samkolit (K) Ltd & another* [2001] eKLR and *Kundan Singh Construction International Limited v Bank of Africa Kenya Ltd & another* [2015] eKLR for the proposition that a court of law should not re-write contracts for the parties. That Spire never got a chance to respond to issues such as the Phoenix syndrome which were never pleaded and eventually not supported by the facts and the law. That the judge's findings on the Phoenix syndrome alluded to the flawed conclusion that Hotel Span and/or Xenon collapsed and re-emerged as Spire yet the companies were separate legal entities in law. That the judge erred in finding that Spire was liable to have and should have enforced promises that were said to have been made by Xenon. That Spire made no such promises, and that even if there were promises made to the Claimants, the promises would not be enforceable, as Spire would have to consider various factors and its own requirements for employees as any new employer would. Counsel cited *Ali Abdi Mohamed v Kenya Shell and Company* [2017] eKLR and *Lucy Mirigo & 550 others v Minister for Lands & 4 others*. That the promises would also not be enforceable in the context of legitimate expectation as found by the judge. That one of the requirements for legitimate expectation is that representations underlying expectation must be clear, unambiguous and devoid of relevant qualification as per *Willis Ogola Okendo v Collins Oyuu & 3 others* [2018] eKLR. That legitimate expectation can only be enforced against the maker of the representations underlying the expectation which in this case was Xenon and not Spire. That more, importantly, the issue was not pleaded and Spire therefore had no chance to respond.

60. Finally, on the judge's decision to award general damages as against Spire, Counsel contended that the award was without basis in law, as the learned judge had found that the Claimants' suffering resulted mainly from the fraudulent acts of Hotel Span, the Receiver and Transnational Bank; and that damages were also merited against the three for breach of contract which Spire had no part of, and which violated the principle that general damages are not awardable in a claim for breach of contract. That the judge's finding that general damages were awarded against all the respondents from the perspective of a going concern had no basis as Spire had made no promises creating a legitimate expectation, the findings on the Phoenix syndrome were erroneous, and there was no evidence to show that Spire was guilty of unethical corporate practices.
61. Counsel contended that, in any event, the award of damages of Kshs. 500,000 per Claimant is not contemplated in the *Employment Act* or any other law. That in *Kenfreight (E.A.) Limited v Benson K. Nguti* [2016] eKLR, this Court considered the remedies that ought to issue in an employment matter and held that the trial judge ought to have considered the provision of Section 49 of the *Employment Act* which sets out the applicable remedies in termination of employment claim. That in *Walter Musi Anyanje v Hilton International Kenya & another* [2008] eKLR this Court stated that there can be no general damages in respect of suits based on termination of employment contracts; and in *Standard Group Limited v Jenny Luesby* [2018] eKLR this Court stated that remedies outside Sections 49 and 50 of the *Employment Act* can only be justified when violations of Constitutional rights are established and no such violations were pleaded and/or established against Spire. Counsel submitted that the employment law and constitutional framework does not contemplate the award of general damages against a third party who has no contractual or other relationship with employees.

Transnational Bank's Appeal

62. Transnational Bank filed an appeal, namely Civil Appeal 139 of 2018, on the broad grounds that the learned judge erred in:
 - a. Failing to appreciate that there was no contractual relationship of employment between Transnational Bank and the Claimants.



- b. Failing to appreciate that Transnational Bank had all the rights to appoint a receiver under the Debenture, and that according to the Debenture Hotel Span alone was liable for the acts, default and remuneration of the Receiver; and that the Claimants did not challenge the receivership in a Commercial Court and had no locus standi to challenge that commercial transaction between Hotel Span and Transnational Bank.
 - c. Interfering and interpreting all the contractual documents between Hotel Span and Transnational Bank and other parties in favour of the Claimants who were not parties to those contractual documents.
 - d. Failing to appreciate that the allegations of fraud were not proven as per the requirements of the law; and failing to appreciate that the Claimants failed to prove that the late retired president Moi, the late Biwott and Mr Kulei were directors and/or shareholders or Directors of Hotel Span.
 - e. Proceeding to award general damages of Kshs. 500,000 to each Claimant in contravention of the *Employment Act*, and failing to appreciate that the Claimants were working under different job groups and earning different salaries and were employees of Hotel Span which is supposed to keep the employee records.
 - f. Failing to consider Transnational Bank's submissions and the authorities cited in support of the submissions.
 - g. Failing to analyse the evidence tendered by Transnational Bank and proceeding to consider extraneous issues in his judgment.
 - h. Failing to appreciate the facts laid before him but instead proceeding to re-state his own version of facts in complete departure from the pleadings before him apparently with the aim of justifying his decision.
63. In written submissions, Counsel for Transnational Bank submitted that the court failed to appreciate the clear evidence that there was no contractual relationship of employment between Transnational Bank and the Claimants. That the Claimant's first witness confirmed that he was not an employee of Transnational Bank and that most of the Claimants he knew were employees of Hotel Span. That Mr Onguti and Mr Sheikh also tendered evidence to the effect that none of the employees were engaged as employees of Hotel Span. That the Claimants also pleaded in their Claim that they were employed by Hotel Span.
64. Regarding the validity of the receivership, Counsel submitted that the court appreciated the validity of the documents leading to the appointment of the Receiver but proceeded to hold that Transnational Bank were the principal wrongdoers as they set in motion the circumstances leading to the deprivation of the Claimants' terminal dues. That the learned judge made this finding despite holding that all the formalities of putting the Receiver in place were met as all the security documents, in particular the Debenture, were perfected. That the particulars of fraud as pleaded in the Claim were not proved as per the requirement of the law, and the tort of vicarious liability was not pleaded and proved either. That it was clear from the Debenture that the Receiver was an agent of the Debtor Company and not Transnational Bank the Debenture Holder. That the court erred in holding that Transnational Bank was liable against the Receiver as there was no claim and/or suit against the bank instituted by the Receiver. Counsel contended that the Claimants were not a party to the documents constituting the Debenture yet the court proceeded to re-state its own version in regard to the documents in favour of the Claimants.



65. Counsel reiterated that the particulars of fraud were not proved as no evidence was tendered to show the relationship of fraud between Hotel Span and Transnational Bank. That the burden of proof lay with the Claimants who failed to discharge it.
66. On the issue of the award of general damages, Counsel submitted that the court did not consider that the Claimants were employed under different job groups also failed to consider the provisions of Sections 49 and 50 of the Employment Act which provide for remedies for wrongful dismissal and unfair termination. That the Court ought to have ascertained the monthly salary payable to each Claimant. That the burden of proof of the monthly salary payable to each Claimant was not discharged as per the requirement of the law.

The Claimants' Response

67. Counsel for the 1st to 10th Claimants filed submissions in Civil Appeal No. 139 of 2018. Counsel began with supporting the learned judge's finding that a principal agent relationship existed between Transnational Bank and the Receiver. Counsel submitted that the court rightly observed that there are exceptions to the general rule that the Receiver is the agent of the Debtor Company, citing International & Commercial Development Corporation (ICDC) v Patheon Limited [2015] eKLR as an example of where the court established such a relationship from the fact that the receiver in that case was an employee of the debenture holder, reported all activities to the debenture holder and all proceeds of the sale of the company went to the debenture holder. That the court held that agency may be presumed where the parties have agreed to what amounts in law to such a relationship, even if they do not recognize it themselves and even if they have professed to disclaim it.
68. Regarding Transnational Banks assertion that the issue of the validity of the receivership was not before the learned judge for him to entertain and make finding on, Counsel submitted that the issue was pleaded in paragraph 10 of the Amended Plaint/Claim. That even assuming the issue was not explicitly stated in the pleadings, so long as the bank was able to comprehend the gist of the complaint, the degree of precision of the Claimants would not matter. That the issue of receivership stood out from the evidence in chief and cross-examination. Counsel cited Herman P. Steyn v Charles Thys [1997] eKLR for the proposition that a court may base its decision on an unpleaded issue if it appears from the course followed at the trial that the issue has been left to the court for decision. That the bank produced numerous documents to justify the receivership and the witnesses extensively testified and/or were cross-examined on the issue.
69. Regarding whether the court had the jurisdiction to address the issue of receivership, Counsel submitted that in a ruling dated 25th March 2013, Mwongo, J. found that the suit fell within ELRC's jurisdiction and accordingly transferred it from the High Court. That Transnational Bank did not appeal the ruling and therefore could not mount a collateral challenge to that ruling. That determination of the receivership was intertwined with the main claim for terminal dues and general damages. Counsel referred to this Court's finding in Paramount Bank Limited v Vaqui Syed Qamara & another [2017] eKLR that the ELRC could entertain a dispute dealing not only with issues relating to unfair termination but also aspects of the claim relating to general damages for malicious prosecution and defamation which flowed directly from the dismissal. That it would be inimical to the courts duty of efficient, timely and cost-effective delivery of justice to file separate proceedings relating to the commercial aspects of the case as per Judicial Service Commission v Gladys Boss Shollei & another [2014] eKLR. Counsel submitted that at the time of filing the suit in 2007, the High Court could hear both the receivership and terminal dues claims. But after the re-engineering of the courts post the 2010 Constitution, the High Court could no longer entertain terminal due issues which was the main issue.



70. Regarding the assertion that the Claimants lacked locus standi to challenge the commercial transaction leading to the receivership, Counsel submitted that the bank does not say what it is that denies the Claimants the right to point to certain infirmities in the receivership. That the courts have heard and continue to hear claims by employees whose futures are doomed by Receivers either acting alone or in cahoots with Debenture Holders.
71. Regarding the ground that fraud had not been proved to the required standard, Counsel contended that the evidence overwhelmingly proved fraud. That the bank did not receive any demand from the Bank of Scotland but placed Hotel Span in receivership; its principal officers could not explain the reason for the receivership; it supplanted the Receiver's decisions at will; was in a rush to conclude the sale of the hotel; sanctioned the sale at Kshs. 157 million yet its own estimation of the value of the hotel 15 years earlier was Kshs. 800 million; prepared, executed and implemented a contract to pay terminal dues but failed to do so; and received the proceeds of sale but did not credit them anywhere to settle the alleged indebtedness, not even to pay Bank of Scotland.
72. Regarding the award of general damages and terminal dues, Counsel submitted that the learned judge did not suggest that there was an employment relationship between the bank and the Claimants but appreciated the nature of the complaint that the Receiver's and the bank's actions was the reason for or at least contributed to the non-payment of the terminal dues leading to the Claimants' suffering. Counsel cited *Top Time Enterprises Limited v P V R Rao as Receiver/Manager & another* [2014] eKLR where this Court held that the receiver may be held personally liable on any contract entered by him in the performance of his functions except in so far as the contract otherwise provides. Counsel submitted that the Receiver bound himself to clear all terminal dues and present evidence of the same to Xenon and could therefore be held personally liable for the claims by the Claimants. That the learned judge also appreciated that the bank had agreed to indemnify the Receiver for any awards made against him.
73. As for the bank's liability, Counsel submitted that the bank's conduct caused or materially contributed to the Claimants' injury, and it mattered not whether the Receiver, Hotel Span and Spire were also to blame. That the evidence was clear that the bank was the catalyst for all the troubles that befell the Claimants by putting the receivership in motion. Counsel cited the Canadian Supreme Court decision of *Athey v Leonati* [1996] 3 SCR 458 for the proposition that it is not necessary for the plaintiff to establish that the defendant's negligence was the sole cause of the injury; as long as the defendant is part of the cause of an injury, the defendant remains liable for all injuries caused or contributed by their negligence.
74. Counsel submitted that the Claim involved not only breach of employment contracts but also of tortious acts or omissions attributed to the respondents in the Claim, as stated in Paragraph 12 of the Amended Plaintiff. That the learned judge, having found that the respondents were involved in questionable transactions which occasioned the Claimants' economic and emotional harm, was justified in awarding general damages. Counsel cited *R.J.T. v H.M.T* [1977] eKLR for the proposition that general damages are assessed without regard to the defendant's means, the sole criterion being what is fair and just compensation for the injury suffered by the plaintiff. Counsel submitted that the learned judge considered the Kshs. 1 million sought by each Claimant and found it too high. That doing the best he could, the learned judge found that Kshs. 500,000 would be fair and just compensation. That unless the sum is shown to be manifestly excessive, an appellate court must not interfere with the exercise of discretion.



The Determination

75. The duty of this Court in a first appeal is set out in *Selle and another v Associated Motor Boat Company Limited and others* [1968] 1 EA 123 as follows:
- “Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.”
76. The issue of the jurisdiction of the ELRC to determine the issues in the original suit was resolved vide a ruling delivered by Mwongo, J. dated 25th March 2013 when determining an application to transfer the suit to the Industrial Court. In so doing, the learned Judge said as follows,
- “Given the provisions of Article 162 (2) and the Industrial Court Act 2011 cited above, the primary constitutional concern in this matter is whether on a proper reading of the pleadings, the dispute herein relates to employment and labour relations. I have no doubt in my mind that the dispute herein relates to employment and labour relations. The monetary prayer is for payment of terminal benefits from employment of the plaintiffs who were allegedly employees of the 1st defendant, subsequently put under receivership of the 2nd defendant allegedly with the involvement of the 3rd defendant.”
77. The 3rd respondent (the Transnational Bank) never preferred an appeal against the said ruling and the issue of jurisdiction was not prosecuted again in the course of the suit.
78. That said, the ruling of Mwongo, J cannot be construed as having extended the jurisdiction of the Employment and Labour Relations Court beyond the jurisdiction conferred on that court by the [Constitution](#) and by statute. It could not possibly have done so. As the Supreme Court of Kenya stated in [Republic vs. Karisa Chengo & another](#) [2017] eKLR, the [Constitution](#) of Kenya, 2010 has pronounced itself clearly on the jurisdictional competences of the various courts; that the drafters of the [Constitution](#) had the intention of clearly demarcating the jurisdictions of the courts; and that from a reading of the statutes regulating the specialized courts, it is a logical inference that their jurisdictions are limited to the matters provided in those statutes. Article 162(2) of the [Constitution](#) as read with Section 12 the [Employment and Labour Relations Act](#) limit the jurisdiction of the ELRC Court to hearing and determination of disputes relating to employment and labour relations. The pronouncements by the court effectively invalidating and nullifying a receivership was a matter beyond the court’s jurisdiction. See also [In the Matter of Interim Independent Electoral Commission](#) [2011] eKLR and also [Samuel Kamau Macharia vs. Kenya Commercial Bank & 2 others](#) [2012] eKLR.
79. The basis for the learned judge awarding damages and terminal dues to the Claimants was not primarily based on an allegation that the 3rd respondent had an employer-employee relationship with the Claimants but that there was no basis for Transnational Bank to place the hotel under receivership; and that the receivership was the root cause for the Claimants’ termination and deprivation of their terminal dues. A receiver is an agent of the company (in this case the 1st respondent) and not the appointing authority. To attach any liability on the part of the 3rd respondent solely on the basis of appointing the receiver would be ultra vires the jurisdiction conferred upon the ELRC as contemplated



in Article 162 (2) of Constitution aforesaid. It follows any orders against the 3rd respondent who prompted the appointment of the receiver cannot stand the test of law when it comes to be any liabilities attributable to the 1st respondent.

80. The Receiver, keen on having the hotel continue to exist as a going concern, preserved the contracts of the employees and promised them that their employment would continue as usual and their dues would be paid. It is on the basis of the Receiver's representations and assurances that the Claimants went on serving the hotel up until the end of the receivership period and even after Spire purchased the hotel.
81. Spire came into the picture as a separate entity outside the agreements the Receiver had made with Xenon concerning the employees' fate. Spire took on all the employees after the termination of their original contracts on a probationary basis for a two-week period and finally terminated their employment without any assurances of their continued employment once the hotel was renovated.
82. The Claimants alleged that Spire was simply Hotel Span posing as a different entity with the purpose of defeating the payment of the Claimants' terminal dues, as evidenced by the sale which was shrouded in mystery. In as much as the circumstances of the sale were unusual, no evidence emerged to indicate that the directors or beneficial owners of Hotel Span and of Spire were the same persons. Spire was able to sufficiently insulate itself from liability connected to the claims the employees had through the Sale Agreement and Supplemental Agreement, which placed on the Receiver the obligation to terminate the original contracts of service of all employees as at the Completion Date. The employment relationship between the Claimants and Hotel Span therefore cannot be said to have been transferred to Spire. This case highlights the gap in the legal framework regarding the protection of employees' rights where a business is transferred to another entity as a going concern, an issue which is best left to the legislature to resolve. The bottom line is that no liability can be attached upon Spire and therefore its appeal must succeed in its entirety.
83. The second limb of the Claim specifically concerned the Claimant's terminal dues. It is not disputed that the terminal dues accrued in the period prior to the appointment of the receiver. The terminal benefits constituted an unsecured debt owed to the Claimants by Hotel Span, which could only possibly be recovered from the surplus available after the debenture holders recouped their secured debts from the hotel sale proceeds. The learned judge's finding that the Sale Agreement and Supplemental Agreement between the Receiver, Xenon and Spire catered for the payment of the terminal dues is inaccurate. Clause 14 of the Sale Agreement between the Receiver and Xenon addressed only the termination of the employees' contracts and ensuring that the Claimants received their preferential payments upon termination, as provided under Section 95 and Section 311 of the repealed Companies Act (Cap 486). There was no express commitment to settle the terminal dues in the contract. According to the law as it was then was, and as it currently subsists, the Claimants' terminal dues remained classified as unsecured debts and the claims of the debenture holders had priority over their claim during the receivership, even when the Claimants continued performing the contracts during the receivership.
84. The conclusion, from the foregoing, is that the Receiver terminated the Claimants' employment by reason of redundancy. Therefore, the 1st respondent must bear that liability. We have considered what would be the fair compensation for the Claimant's labour in the circumstances of this case. Taking into consideration all attendant facts, we award 6 months gross salary to each deserving Claimant.



85. In awarding general damages, the learned trial Judge said as follows,

“The Claimants pray for general damages. Their terminal dues have been withheld from 2003. They suffered as a result of the wrongful receivership of their former employer by the 3rd respondent. They suffered to as a result of the sale transactions. They have suffered economically as well as emotionally. The suffering resulted mainly from the fraudulent acts of the 1st, 2nd and 3rd respondents. They were proximate to the unlawful actions of the purported receiver/manager and the purported appointing Debenture/ Holder....”

86. We have already found that the learned Judge had no jurisdiction to entertain the issue of the validity and or legality of the appointment of the receiver. On that ground, and by extension, no general damages were awardable on that basis. It follows therefore that, the said award must be set aside.

87. In the end we find that both Civil Appeal Nos. 135 of 2018 and 139 of 2018 must succeed and are therefore allowed. The only order that remains in favour of the Claimants is the six months gross salary due and payable by the 1st respondent. The appellants herein shall bear their own costs but the claimants shall be entitled to costs and interest, payable by the 1st respondent.

88. It is so ordered.

DATED AND DELIVERED AT MOMBASA THIS 29TH DAY OF JULY 2022

S. GATEMBU KAIRU, FCIArb

.....

JUDGE OF APPEAL

A. MBOGHOLI MSAGHA

.....

JUDGE OF APPEAL

P.NYAMWEYA

.....

JUDGE OF APPEAL

I certify that this is a true copy of original.

Signed

DEPUTY REGISTRAR

