REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT AT MOMBASA

CAUSE 79 OF 2013

[Previously Mombasa H.C.C.C No. 62 of 2007]

BETWEEN

1. MARIAM SAIDI MWABORA

2. ANDERSON K. GARAMA

3. BENSON K. KITETO

4. SAMSON S. MUBIRU

5. SIGFRIED E. JOGSCHAT

6. ANTHONY BWIRE AKUKUA

7. JOSEPH ONGUTI

8. STEPHEN K NDEGWA

9. SAMUEL O. MOMANYI

10. CHRISTOPHER MWANGOLA

11. DANIEL O. OMUYA

12. OBADIAH G. MBUGUA

13. ESPIE NJUGUNA

14. MOSES S. KILUSU

15. GEORGE K. MULWA

16. JANE MAINA

17. SWALEH K KURAUKA

18. MINA JAFFAH

19. ESTHER W. KAMAU

20. RASHID MADEMU

21. ALI HAMISI MAMBO

22. JACKSON MUTHAMA MUTISO

23. KENNEDY N. ONCHOMBA

24. JONATHAN KAMANDA NGUMA

25. JOHN OTECH ACHIENG

26. MWANIA KITUNGUO

27. MARTHA NJERI KIGWINI

28. NANCY NJERI KARIUKI

29. TOM KIGINDWA NYANGWESO

30. JONES KERONGO OMWERI

31. ABDUL M. MWEDO

32. ALEX M. NYANGE

33. EDWARD SIMIYU MAKONGE

34. JOHN NDIPO ISHMAEL

35. KENNETH ZEBA MARE

36. MEJUMA HAMISI MACHESO

37. ROSELYN NDUTA NJENGA

38. FREDRICK NATO WEKESA

39. SOFIA HAMISI MFUKO

40. PAULINE MULI KASIU

41. MARDSEN K. MBITSI

42. REGINA KOKI GATILU

43. JOSEPH MUMA OMWAGA

44. ASHA K. MBONDE

45. ALI WATURI MWAKUTALA

46. PETER W. KAMAU

47. NORMAN NDAMBO

48. SOLOMON CHARO

49. JOSEPH LWAMBI

50. PAUL ABUTOKELVIN NGALA

51. KELVIN NGALA

52. ABDALLA MASHOBO

53. ANDERSON MUTENGO

54. SAMMY MUTUA

55. RAMADHANI NYAWA

56. LEONARD K. CHUBUA

57. ATHUMANI MWARACHETI

58. JOHNSON SULUBU BEJA

59. RASHID SALIM MWAKULOLA

60. MWANATUMU OMAR NGUTA

61. JOHN MOKOMBA OBOIKO

62. AGNES M MUTUNGA

63. RAMADHAN MWASERA

64. JUMA SWALEH

65. SAMSON KASUNGU

66. DOMINIC AMANI MWARUBE

67. DEOGRATIAS WANDERA EKEYA

68. SAIDIA MZURI THOYA

69. ALHONSE AMBANI BARASA

70. MARK MOTURI ONCHANGWA

71.HARRISON NYAWA SHEHI

VERSUS

1. HOTEL SPAN LIMITED

2. R.T. DUNNET

3. TRANSNATIONAL BANK LIMITED

4. SPIRE PROPERTIES [K] LIMITED……. RESPONDENTS

Rika J

Court Assistant: Benjamin Kombe

Gikandi & Company Advocates for the Claimants

No appearance for the 1st Respondent

Muturi Gakuo & Kibara Advocates for the 2nd and 3rd Respondents

S.M. Onyango Associates, Advocates for the 4th Respondent

JUDGMENT

The pleadings:

1. This Claim was initiated by the Claimants at the High Court Mombasa, on 30th March 2007. The Plaint was subsequently amended. The Claim was transferred to the Industrial Court Mombasa, through a Ruling of the High Court, dated 25th March 2013.

2. The Claimants state the 1st Respondent is a Limited Liability Company. It was at the time the dispute arose, involved in running hotel business. It owned a 5 Star Beach Hotel, popularly known as Diani Reef Grand Hotel, based at the South Coast of Kenya. The Claimants were employed by the 1st Respondent at the Diani Reef Grand Hotel. They worked in different departments. Some were in Management, others in Accounts; Food and Beverage; Housekeeping; Security; Reception; and Guest Relations, among other dockets. They were employed on diverse dates, from as early as 1981.

3. The 2nd Respondent was appointed as a Receiver and Manager of Diani Reef, sometime in 1998.

4. He was appointed by the 3rd Respondent, which is described as a Bank, duly incorporated in Kenya.

5. The 4th Respondent is a Limited Liability Company, also involved in hotel business. It is said to have purchased Diani Reef, and taken over operations in 2003.

6. The Claimants state as of 16th April 2003 when Diani Reef was taken over by the 4th Respondent, they were owed terminal dues comprising gratuity, annual leave, notice pay and other dues. They tabulated terminal dues at a total amount of Kshs. 32,457,007.

7. They allege the Respondents acted fraudulently in the process of receivership and sale of Diani Reef. As a consequence of this fraud, the Claimants left employment without terminal benefits after years of toil. They urge the Court to find termination of their contracts of employment to have been irregular, unlawful and improper. Beyond an order for payment of these terminal dues, they ask the Court to grant them general damages. They pray for costs and interest. Judgment is sought against the Respondents, jointly and severally.

8. The 1st Respondent did not file any Response to the Claim, or participate in the proceedings in any way.

9. The 2nd and 3rd Respondents filed Statements of Defence, which were subsequently amended, and filed at the High Court on 25th October 2013. The 2nd Respondent states he was appointed Receiver/Manager

Diani Reef, in terms of security documents, in particular Debenture, after the 1st Respondent defaulted in repayment of loan which had been advanced to the 1st Respondent by 3rd Respondent. The 2nd Respondent did not employ the Claimants. He did not have a contractual relationship with the Claimants.

10. The 3rd Respondent similarly argues there was no contract between the 3rd Respondent and the Claimants. The 1st Respondent borrowed some monies from the 3rd Respondent. Necessary security documents were prepared and perfected. The 1st Respondent defaulted. The 3rd Respondent exercised its right under Debenture and appointed the 2nd Respondent as Receiver/Manager of Diani Reef.

11. The 2nd and 3rd Respondents deny they acted fraudulently. They state the Claim is time-barred having been filed more than 6 years, after the alleged cause of action arose.

12. The 4th Respondent filed its Statement of Defence on 22nd August 2007. Its position is that it never employed the Claimants. It is a different legal entity from the 1st, 2nd and 3rd Respondents. It has no knowledge of the dealings involving the Co-Respondents. It did not engage in any acts of fraud with any Party. The 4th Respondent had no obligation to employ the Claimants. There is no reasonable cause of action against the 4th Respondent.

Preliminary Objection: **-**

13. The Respondents have raised objection on the validity of the Claim. They argue the Claim was filed out of the 6 year- limitation imposed on filing of contractual disputes, under the Limitation of Actions Act, Cap 22 the Laws of Kenya.

14. Objection was made preliminarily at the Industrial Court, after transfer of the matter from the High Court. The Court ordered objection is joined with the main Claim.

15. In a Ruling dated 25th November 2016, this Court noted that the issue of limitation of time had been raised by the Respondents at the High Court. Parties were asked to persuade the Industrial Court, why it should depart from the Ruling of the High Court, at the time they were to present their Final Submissions

16. The Respondents submit that what was before the High Court was an Application to strike out the Claim, on the ground that it did not disclose a reasonable cause of action. The Application was not about limitation of time. The High Court did not deliberate on limitation of time.

17. The Claimants submit the same objection on time-limits, was raised before the High Court. Objection was rejected. The issue is *res judicata*. The Claim was filed in 2007. Termination of employment took place in 2003. The Claim is founded on fraud, which has a limitation period of 6 years from the date fraud is discovered.

18. The Court must resolve the recurrent question of limitation of time, as it is a question of jurisdiction, affecting the ability of the Court to examine other aspects of the dispute.

19. Objection at the High Court was made by the 3rd Respondent, through a Chamber Summons Application, dated 13th May 2008. The 3rd Respondent based its Application on various grounds. Among the grounds, under paragraph [f] was that, the *plaint is statute-barred having been filled more than 6 years after the action accrued without obtaining leave of the Court. Therefore there is in law no plaint, and [the plaint] should be struck out.*

20. In its Ruling dated and delivered on 1st December 2009, the High Court was clear 3rd Respondent had raised the issue of the Claimants having no reasonable cause of action, as well as the issue of limitation of time. The Hon. Judge stated:

''Mr. Gakuo further argues that the Plaintiffs' Suit is time-barred by virtue of Section 4 of the Limitations

of Actions Act Cap 22 the Laws of Kenya…''

The Court concluded that Section 4 [1] [a] of the Limitation of Actions Act is not applicable to this case.

21. The Ruling was not appealed against. Instead the Respondents have persistently raised an issue which the High Court ruled on. The 4th Respondent raised the same issue through a Notice of Preliminary Objection filed on 26th November 2013, 4 years after the High Court made its Ruling. Same arguments were placed before the first Trial Judge at the Industrial Court, who advised a Ruling on the subject would be given at the time of delivering Judgment.

22. The Court is convinced the issue of limitation of time is *res judicata*. The same issue was raised between the same Parties, based on a common nucleus of operative facts, and a binding Ruling which has not been appealed against, made. All Parties have always known there is a Ruling on limitation of time, which has not been reversed whatsoever. Relying on ***Industrial Court at Nairobi, Cause Number 405 of 2012 between Paul Seki Nzau & 27 others v. Laico Regency Hotel***, the Court finds objection raised by the Respondents on limitation of time, is *res judicata*. The same objection, based on common nucleus of operative facts, was raised at the High Court and rejected.

23. Even if the issue is not *res judicata*, it is difficult to understand how 6 year- limitation applies to this Claim. There is a common thread in the Pleadings, Evidence and Submissions of the Parties that receivership ended in 2003. There is likewise a common position by the Parties that the Claimants are owed terminal dues. There were repeated, but unfulfilled promises to pay. The disagreement has been about who should pay. The Claimants left employment in 2003. They Claim terminal dues and damages as of the year 2003. Certificates of Service on record, issued to the Claimants by Diani Reef Hotel, uniformly show the date the Claimants left employment as 30th April 2003. They filed the Claim at the High Court in 2007. They were not time- barred, whether their Claim is viewed against limitation of time placed on disputes under contract, or fraud.

24. The Respondents did not show in their Closing Submissions, that the High Court did not make a binding Ruling on limitation of time. Broadly looked at, the facts do not support the argument that the Claim is time.

25. ***Objection by the Respondents, that the Claim is time-barred is declined. The Court must assume jurisdiction, and move on to look at the substance of the dispute.***

Hearing:-

26. The dispute was partly heard at the Industrial Court by Hon. Judge Radido before he was transferred to another duty station. Parties sought directions from the Court on further proceedings, and the undersigned, incoming Judge, issued directions in writing, dated 16th October 2014. It was directed, that hearing proceeds from the point at which the outgoing Trial Judge left off. Parties would have typed copies of proceedings from 21st May 2014.

27. Samson S. Mubiru [Claimant Number 4] gave evidence on 30th October 2013. Joseph B. Ong'uti [Claimant Number 7] gave evidence on 2nd December 2013, and on 10th February 2015. Samwel O. Momanyi [Claimant Number 9] gave evidence on 11th February 2015.

28. Credit Officer of the 3rd Respondent, John Ziro, gave evidence on 22nd July 2015, as did 3rd Respondent's General Manager Faryd Abdulrazak Sheikh. 4th Respondent's Legal Officer, Carren Aluoch Sadia gave evidence on 14th March 2016.

29. Proceedings closed on 14th March 2016. Parties were directed to file and exchange Closing Submissions thereafter, and highlight those Submissions on 17th May 2016. The Claimants subsequently filed an Application to amend Pleadings after hearing had closed, which Application was rejected in a

Ruling dated 25th November 2016. The Advocates for the respective Parties finally underlined their Closing Submissions, in brief oral presentations made in Court on 12th June 2017.

Verification exercise:-

30. The dispute has been in Court for 10 years. Some Claimants have died; others appear to have wearied and lost interest in pursuing the Claim; while others, for various reasons, could not be accounted for. At the end of the Claimants' case, it was thought necessary to verify the *bona fides* of the Claimants, through their identity cards and letters of administration. The exercise was carried out with the concurrence of all the Parties.

31. The Court makes the following findings from the verification exercise:-

a) Samson S. Mubiru [4], Sigfried Jogschat [5], Chrisopher Mwangola [10], Jane W. Maina [16] Minah Jaffah [18], Esther W. Kamau [19], and John Achieng' [25] are deceased.

b) Limited Grant of Letters of Administration of the estate of Samson S. Mubiru [4], issued at the High Court in Mombasa, to Rosebud Stella Mubiru, on 1st August 2014. A copy of the Grant was filed with the Industrial Court on 8th October 2014.

c) Grant of Probate of written will of Sigfried Jogschat [5] issued at the High Court in Mombasa naming Kathleen Koon Choo and Christine Lyn Jogschat as executrices. The Grant was filed at the Industrial Court on 8th October 2014.

d) There were no letters of administration filed at the Industrial Court with regard to other deceased Claimants. ***The Claims by the 10th, 16th, 18th, 19th and 25th Claimants are not sustainable, and shall be treated to have abated***.

e) Another category of Claimants did not supply original identity cards when required to do so, or anytime thereafter. These include Anderson K. Garama [2], Alex N. Nyange [32], Anderson Mutengo [53], and Juma Swaleh [64]. The 4 did not satisfy the demands of authentication of *bona fides* as agreed amongst the Parties. They did not, in the absence of original identity cards, give evidence establishing they are indeed Claimants in this Claim, with any interest in the dispute. Proceedings closed without the particular Claimants supplying the Court with any acceptable material or evidence, establishing who they are in the proceedings, as was intended by the Parties in the verification exercise. ***Having failed in showing they are validly in Court, their respective Claims have not been established and are hereby rejected.***

f) Peter W. Kamau [46] was similarly not verified as a *bona fide* Claimant. A lady by the name Monica Ngugi Ng'endo supplied an original identity card on verification. The Court was not told what her relationship with Peter W. Kamau is; whether the particular Claimant is alive, or deceased. If he is deceased, there was no Grant shown to have issued to Monica Ngugi Ng'endo as would allow her to continue with the Claim on behalf of the 46th Claimant. ***The Claim by the 46th Claimant is rejected***.

g) The last group comprises Claimants who did not supply any identification documents. It is not even known, if they were in Court during verification. These are: Paul Abuto [50], Sammy Mutua [54], Johnson Sulubu Beja [58], and Agnes Mutunga [62]. ***The Claims by these 4 unaccounted for Claimants are not sustainable, and are declined.***

h) In effect the verification exercise allows the Court to treat 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 as unsustainable and therefore rejected.***

i) As stated by the Court in its written directions dated 16th October 2014, the Industrial Court [Procedure] Rules 2010, which regulated proceedings on transfer to the Industrial Court, did not have any specific provision on substitution of deceased Claimants. The Industrial Court Act 2011 did not have a provision on substitution, but as argued elsewhere by the Claimants, Rule 20 of the Industrial Court guided the Court to act without undue regard to technicalities.

j) Although Grants with regard to Claimants [4] and [5] were filed with the Industrial Court, there was no application in any form, allowing the persons named as administratrix and executrices to represent their deceased spouses in these proceedings. The Court in its directions left the question of substitution to the Claimants' Advocates. The Claimants' Advocates did not make any formal application for substitution. The record indicates there was a Notice of Substitution of Plaintiffs [Claimants] [4] and [5], filed on 16th October 2014, the date the Court issued directions. The Notice is stated to be made under Section 20 of the Industrial Court Act, and Article 159 of the Constitution of Kenya. The Court however was not moved, to formally bring in the representatives of Claimants [4] and [5] to the proceedings.

k) The Court is of the view that by filing the Notice of Substitution and the Grants at the Industrial Court; considering the objective of the verification exercise; and the absence of a clear substitution law in proceedings of the Industrial Court at the relevant time; the Parties intended the holders of respective Grants, would represent their deceased spouses in the proceedings herein. The Closing Submissions filed by the 2nd and 3rd Respondents at page 7, suggests some Claimants are deceased, and had been substituted. The Parties intended filing of Notice and Grants would signal substitution, although the Court is of the view in an ideal set of proceedings, commenced, processed and concluded under a single procedural regime, there ought to have been made application for substitution. Obtaining Limited Grant from the High Court, and filing that Grant and Notice of Substitution under Section 20 of the Industrial Court Act, at the Industrial Court, would not confer the holders of Grant with the authority to act for deceased Claimants, without a specific order of substitution.

i) It is ordered that Rosebud Stella Mubiru shall represent Samson K. Mubiru [4], while Kathleen Koon Choo and Christine Lyn Jogschat shall represent Siegfried Jogschat [5].

m) The verified final list of Claimants, whose Claims against the Respondents must be examined, excludes the 14 Claimants listed under paragraph 31 [h] of this Judgment, but includes the representatives of Claimants [4] and [5] named under paragraph 31 [i] above.

32. There were other objections of a technical nature raised by the 2nd and 3rd Respondent's Counsel in his Closing Submission, which must be looked into, as they too, touch on the sustainability of the whole Claim. These procedural challenges are rooted on Rules 9 and 24 of the Industrial [Procedure] Rules 2010. The Rules of 2010 have since been repealed under the Employment and Labour Relations Court [Procedure] Rules 2016. Rules 9 and 24 have been retained under the new Rules, albeit with some modifications.

33. The first Rule was that in a suit where more than one Employee is instituting a Claim against one Employer in respect of breach of contract, the Judge could allow one Statement of Claim to be filed by the Labour Officer, or by one of the Claimants in the Suit on behalf of all other Claimants. The Claim filed as such would be proved by the Labour Officer, or by the Claimant authorized by the Court.

34. Rule 24 required the Court to give directions as would be necessary to enable the Parties prepare for hearing. The Court was required to explain the order of hearing.

35. The 2nd and 3rd Respondents' Counsel submits that the Claimants filed only one Claim, and proceeded as if there was a representative Claim. No leave was obtained and directions issued under the above Rules. It was the duty of the Claimants' Counsel to obtain leave and take out proper directions. This was not done and the Claim must fail.

36. It must first be appreciated that this Claim was initiated at the High Court in Mombasa, under the Civil Procedure Act and Rules, which do not govern proceedings of the Industrial Court, now renamed Employment and Labour Relations Court. Rule 9 related to institution of Suits. It would not apply to a Suit instituted at the High Court. The initial hearing was conducted with the full participation of the Parties before Judge Radido as mentioned at the outset. There was no objection as to the manner of filing and hearing, at the time Parties gave evidence before the Honourable Judge.

37. Upon transfer of the first Trial Judge, the undersigned incoming Judge gave written directions on the mode of hearing. No Party complained that those directions were insufficient for purposes of preparing and proceeding with the hearing. No further directions were sought. The submission that Claimants did not obtain directions is incorrect; there are written directions on record. The order of the proceedings, and mode of taking evidence, were never disputed.

38. Rule 9 related to a Claim represented by the Labour Officer on behalf of multiple Employees as Claimants, or by a Claimant/Employee on behalf of multiple Claimants/Employees. At the centre of the Claim contemplated under this Rule is breach of contract. As mentioned in the Ruling of the High Court on limitation of time, the dispute herein involves much more than breach of contract. The Respondents argue they were not in contractual relationships with the Claimants. Rule 9 related to Claims based on breach of contract. It related to institution of Claim. The Industrial Court took cognizance of the dispute when it was already instituted. The new Rule 9, under the Employment and Labour Relations Court [Procedure] Rules 2016, is in much similar language as the predecessor Rule 9.

39. The role of a Labour Officer under the old Rule has been done away with. The Suit is filed by, and in the name of one Party. The Statement of Claim, rather than have the names of all Claimants, is to be accompanied by a schedule of the names of other Claimants and their details. It is further provided that the other Claimants file a letter of authority signed by all of them. The Rule gives the Court discretion, in appropriate circumstances, to dispense with the letter of authority. A Claim filed by a Claimant on behalf of other Claimants is not defeated only on the ground that there was no letter of authority signed and filed by the other Claimants. There is discretion left to the Court in managing how Claims of this nature are filed and prosecuted.

40. It must be noted that this dispute has been through different procedural regimes. It has been dealt with by different Judges from different Courts. At the High Court, proceedings were regulated under the Civil Procedure Act. On transfer to the Industrial Court, there have been various changes in the law governing proceedings of the Court. As observed by this Court in past decisions, there is no seamless legal regime governing how Claims transferred from the High Court to the Employment and Labour Relations Court, are to be handled. It requires Parties, their Advocates and Courts to look at the overriding objective, and uphold the administration of substantive justice, without undue regard to technicality. It has not been shown that the Claimants defaulted in applying any procedural Rule, in a way which would occasion the Respondents miscarriage of substantive justice. The 2nd and 3rd Respondents did not in any case raise objection under Rule 9 and 24 during the hearing, to enable the Claimants make an appropriate reply. This Claim is not by one Claimant on behalf of the others, but a Claim in which 71 Claimants are named, and based on a commonality of facts, selected 3 of their most articulate Colleagues, to give evidence. There is no Rule which requires all Claimants, in a Claim filed against the same Respondents, based on common facts, to give evidence. The Rules contemplate that Courts manage their own proceedings without violating Parties' right to be fairly heard. In a case where there is a multiplicity of Claimants, whose grievances arise from the same or similar facts, against the same Respondent or Respondents, there is no Rule which demands all such Claimants give evidence individually. If the opposing Party however wishes a certain Witness/Party to give evidence, an appropriate application can always be placed before the Court, and considered on its merits. There is however no justification in having all Claimants, in an action against the same Respondent or Respondents, called to give evidence unless the evidence proposed to be adduced is radically different. Ultimately the Court must be able to manage its proceedings. It is common to have large groups of Employees, from the same workplace, bring a collective grievance to this Court. They should not all be called to give evidence. ***Objection under the two procedural Rules is rejected, paving the way for the Court to move into the essence of this longstanding dispute.***

Claimants' Position:-

41. **Samson S. Mubiru** testified he was employed by the 1st Respondent as the Group Financial Controller, on 1st July 1982. The 1st Respondent operated Diani Reef Hotel, a 5 Star Beach Hotel based in Diani, South Coast of Kenya.

42. At the time Mubiru was employed, the Hotel was operated as a joint venture. Shareholders in the venture were Industrial Development Bank, Siana Mara Lodge Limited and Sonotels International BV. Through Sonotels Kenya Limited, Sonotels International BV would engage in operation, maintenance and management of Diani Reef. Loans to grow the Hotel were obtained from the Industrial Development Bank and the National Bank of Kenya, from 1981, and these loans were adequately serviced.

43. The 1st Respondent was the registered owner of Plot L.R. 12830 where Diani Reef Hotel stood. Without feasibility studies, Sonotels International BV proposed to increase guest rooms from 149 to 302. Other improvements would include a new swimming pool, water lagoon, casino and floating restaurant. The expansion was to be financed from a combination of loans and shares. Sonotels BV was authorized to source financiers from the domestic and international markets. The project was estimated to cost Sterling Pounds 8 million. Sonotels BV proposed it was in a position to bring down the cost by 20%, translating to Sterling Pounds 2 million. The balance of Sterling Pounds 6 million would be obtained from the Bank of Scotland, with Transnational Bank Limited, the 3rd Respondent herein, being the Local Guarantor.

44. Mubiru explained that relevant Government Departments had to guarantee export of goods and services from Europe. ECGD for example guaranteed goods and services from the United Kingdom; while SACE did the same for goods and services from Italy. To handle goods and services exported from Europe, Sir Leon Taman Company ICIG [UK], IGIC [Italy] and IGIC [Kenya] were used. The Bank of Scotland was used in disbursing the full amount to Sonotels BV. The process was repeated for goods and services from UK. Once the goods were received in Kenya, the assets value was increased by the invoice amount of 20% to the credit of Sonotels BV. The balance was credited to the loans account, Bank of Scotland. Sonotels BV increased its shareholding without paying a single penny.

45. No tax was paid for goods and services which were procured. By the time expansion was completed, the equity ratio had been thrown out of gear. The entire project was less able to resist any changes. Kenyan Shilling devalued in late 1980s and early 1990s. The project's resilience was heavily eroded. Sonotels BV had made its money- Sterling Pounds 2 million.

46. After 1990, tariffs were lowered to attract guests. The income did not match the new size and quality. After 2 years' moratorium, interest had to be paid. This, coupled with the devaluation of the Kenyan Shilling meant the Hotel could not meet its loan obligation. It was proposed to do the following to meet this challenge:-

a) To have the 1st Respondent pay its foreign loan and interest through a Government Fund which had been set up to assist Parastatals. Treasury rejected this.

b) Siana Mara Lodge Limited was approached to buy back Sonotels BV's shares at Kshs. 500 million, which would be used to repay Bank of Scotland. Siana was receptive to the proposal.

c) The Hotel was to be placed under receivership through Transnational Bank. Other Banks, Industrial Development Bank [IDB] and National Bank [NBK] objected strongly pointing out they were holding first charge on the property.

47. Mubiru stated that shareholders of Hotel Span Limited and Transnational Bank Limited were highly influential personalities in the KANU Government, then in power in Kenya. The running of the Hotel was shrouded in mystery. In 1998, Transnational Bank [3rd Respondent], appointed R.T. Dunnet [2nd Respondent] as Receiver/ Manager. The Books of Account showed at the time that the Hotel still owed Industrial Development Bank Kshs. 290 million, and owed Kenya Commercial Bank [KCB] Kshs. 344

million.

48. These two other Banks did not act jointly with the 3rd Respondent in the receivership process. The money owed to them was not recognized during the purported receivership and sale of the Hotel. The Hotel was sold by the Receiver/Manager upon the instructions of Transnational Bank, to Spires Property Limited [4th Respondent] in 2003.

49. Mubiru told the Court he was not involved in any Creditors' meeting. He knew everything about the affairs of the 1st Respondent. He was not consulted. No Creditors' meetings were ever held.

50. It was never clear at the end of the receivership, if IBD and KCB were paid their monies.

51. The Hotel was 5 Star Hotel. It was expected the Receiver/Manager would advertise sale of the Hotel locally and internationally, to receive the best possible bids. This was never done.

52. Employees were not paid their dues. They worked till the end of the receivership in 2003. When the Receiver/Manager was appointed, Mubiru compiled a Statement of Affairs. Details of Employees and their dues were stated. Employees' dues were preferential credit. Mubiru told the Court the Claimants have a right to be paid their terminal dues. The purported receivership, sale of the Hotel, and non-payment of Employees' terminal dues, smacked of bad faith and corruption. The Receiver/Manager did not inform Mubiru that receivership had ended, and Hotel transferred to the 4th Respondent.

53. Cross-examined by Counsel for 2nd and 3rd Respondent, Mubiru told the Court he did not have a copy of the joint venture agreement involving IDB, Siana and Sonotels BV. 1st Respondent was properly servicing its loans. He was aware 3rd Respondent availed a loan facility of about Kshs. 50 million to the 1st Respondent. He was aware there was a Debenture of about Sterling Pounds 4 million, which was guaranteed locally by the 3rd Respondent. The 1st Respondent also borrowed Sterling Pounds 5 million, and had its property charged. The Charge and Debenture ranked *pari pasu.*

54. 1st Respondent was unable to pay the loans. The 3rd Respondent had a right to appoint a Receiver/ Manager, but the right procedure in doing so was not followed. Page 82 of 3rd Respondent's documents confirms the 1st Respondent owed the 3rd Respondent Kshs. 29 million. There were other loans from KCB and IDB. 3rd Respondent's loan was the smallest. To his knowledge, loans due to KCB and IDB were not repaid. 3rd Respondent guaranteed Bank of Scotland, not any local loans. Mubiru testified he prepared a statement of affairs, but did not have a copy in Court. He was not an Employee of the 3rd Respondent.

55. The Receiver/Manager took over in August 1998. Samuel Momanyi was the Personnel Manager. He looked after the welfare of staff. He mentioned that Employees were paid. Mubiru did not have a letter of appointment issued by the Receiver/Manager.

56. Questioned by Counsel for the 4th Respondent, the Witness told the Court he did not work for the 4th Respondent; he was employed by the 1st Respondent. Redirected, he stated Employees were not paid dues with regard to the period before receivership. 3rd Respondent's loan was the smallest. He did not know if IDB and KCB were paid. The two did not appoint Receiver/Manager.

57. **Joseph Benson Ong'uti** testified he was employed by Diani Reef in 1984, as a Trainee Internal Auditor. He was later promoted to be Resident Manager. In 1998, he became the Acting General Manager. He was in this position until 2003, when the Hotel was taken over by the 4th Respondent.

58. Hotel Span Limited Chairman and Director, Sir Leon Taman, died in 1996. Two gentlemen named Sam Shollei, and Ahmed Jibril, informed Ong'uti and his Colleagues that they had become Directors, as there had been changes in the shareholding. Employees were assured all terms and conditions of

employment would be honoured. Nothing in their respective contracts of employment would change.

59. 1n 1998, there was another visitor. Ray Dunnet arrived, and told Employees he had been appointed Receiver/Manager. He would be managing the Hotel on behalf of Debenture holder, 3rd Respondent. Details of receivership were not disclosed to staff. Ong'uti was asked to assure Employees that their jobs were secure.

60. In 2003, Ong'uti received a gentleman of Indian extraction, who advised Ong'uti to hand over the Hotel to him. The gentleman said he was representing the new owners. Ong'uti advised the gentleman the right person to approach, and make the demand for handing over of the Hotel, was the Receiver/Manager. The Receiver/Manager was shocked, to learn of the takeover. Ong'uti stated he was paid his dues for the period of the receivership, but had worked for 19 years, and expected he would receive dues for the entire service period.

61. The Hotel sat on 32 acres of beachfront. The acreage was reduced, after 5 acres were hived off. One portion was given to Cabinet Minister Nicholas Biwott, and another sold to Managing Director Sansone Banin.

62. Ong'uti identified the Certificates of Service of Employees produced in a bundle as Claimants' exhibit 1. Employees were not given reason for the receivership.

63. There was a Debenture for approximately Sterling Pounds 5.3 million. Transnational Bank was a Guarantor. The Parties were Transnational Bank, Transnational Finance Limited, Hotel Span and IDB. The Hotel undertook to pay the amount upon demand made in writing by the Bank of Scotland.

64. Deed of Appointment of Receiver is shown a page 77 of the Statement of Witness filed by John Ziro. Appointment was based on Debenture held by 3rd Respondent. Ong'uti was not aware what was going on although he was the Acting General Manager. He did not know why the Receiver/Manager was appointed. By the time the Receiver exited, about 180 Employees were still working. Personnel Manager prepared a Statement of Affairs on instructions of the Receiver/Manager. A list of Employees and their details, including amounts due to them was prepared and handed to the Receiver/Manager Ray Dunnet.

65. In 2003, Employees were advised the Hotel had been sold. The new owner would determine if Claimants would continue working for Diani Reef.

66. Clause 14 of the Sale Agreement of the Hotel, between the Receiver/Manager and Xenon Limited, dated 6th March 2002, stated upon completion of sale, the Receiver/Manager would terminate the services of all Employees of the Hotel, and pay all their preferential dues. The Agreement involved 3 Parties. These dues were not paid as agreed.

67. A Supplemental Agreement of Sale was concluded on 20th December 2002 by the same Parties, with Spires Limited, the 4th Respondent, added as a Co-Purchaser. It required, under clause 3.2.7 that the Receiver/Manager's Advocates would deliver to 4th Respondent's Advocates, copies of letters of termination of employment served upon staff of the 1st Respondent, terminating their employment as at the completion date, and paying the Employees all amounts due to them, as of that date. These dues were not paid as agreed.

68. The Receiver/Manager stated requirements for completing statement of affairs had been achieved. On'guti did not see any statement of affairs. KCB stated it had first legal charge, which ranked *pari pasu* with that of IDB. The Receiver/Manager is said to have advertised the Hotel as a going concern. Employees were still working. KCB confirmed it was owed Kshs. 531 million by the 1st Respondent.

69. A letter dated 5th April 2005 from 3rd Respondent's Auditors, Delloite & Touche to 3rd Respondent, states guarantee was discharged in 2003. Debenture would have been discharged. It would mean the 3rd

Respondent did not have the mandate to appoint the Receiver/Manager. Ong'uti understood this to mean the debt was paid in 2000, and by 2003, removed from the books altogether.

70. Dunnet wrote on 14th July 2003, indicating the Hotel was sold for Kshs. 157,000,000 to the 4th Respondent. Secured Creditors' amount stood at Kshs. 1,663,376, 529, while Preferential Creditors' stood at Kshs. 23,394,093. It was not shown where the gross proceeds went to. Employees were never invited to any Creditors' meeting.

71. Ong'uti told the Court there was a valuation of the Hotel carried out around the year 2001, not on any other occasion. Sale of the Hotel was advertised on 31st March 2001. It was not advertised in the international press. The Hotel had international clientele. Ong'uti expected sale to fetch over Kshs. 1 billion.

72. He accepted on being questioned by 2nd and 3rd Respondents' Counsel, that the 2nd Respondent did not employ him. Receiver/Manager paid Employees dues for the period between 1998 and 2003. Employees did not know how the 3rd Respondent brought in the Receiver/ Manager. Transnational Bank did not have the right to appoint a Receiver/Manager. Receiver/Manager is accountable to the appointing authority. The Witness was aware the Receiver/Manager was an agent of the Debtor Company. The terms of Debenture were not read and explained to the Employees by their Advocates.

73. Receivership was not above board. The Receiver/ Manager did not even know the Hotel was being sold. Ong'uti called him, and told him about the sale. Ong'uti was aware Transnational Bank was a guarantor. Debenture was prepared. A charge was created.

74. Page 81 of the Witness Statement filed in Court on 28th August 2013, by 3rd Respondent's Credit Officer John Ngowa Ziro, shows the 1st Respondent's Account with the 3rd Respondent, had been overdrawn in the sum of Kshs. 11.1 million. Page 82 reaffirms indebtedness. There were letters of demand issued for 3rd Respondent, but not in relation to the issues in dispute herein. Ong'uti was not able to say if the 1st Respondent paid the Debenture amount. He would not say this was the reason the 1st Respondent was placed under receivership.

75. Transnational Bank is liable to Employees because it appointed the Receiver/Manager. Deed of appointment of Receiver/Manager was regular. The letter by Deloitte confirms Debenture amount was paid. Certificate issued Pursuant to Section 7 [c] of the Transfer of Business Act, issued by CPS Vipul Shah & Company on 26th May 2003, suggests the transaction was above-board. The 1st Respondent did not seek to restrain appointment of the Receiver/ Manager. KRA approved transfer of assets and stocks on hand, as a going concern, without charging VAT. Receiver stated sale proceeds were insufficient to pay Preferential Creditors.

76. On cross-examination by Counsel for the 4th Respondent, Ong'uti told the Court he was testifying on his own behalf, and on behalf of Co- Claimants. Sale of the Hotel to the 4th Respondent was mysterious. The 4th Respondent bought a Hotel which had a dispute. The 4th Respondent did not employ the Claimants.

77. Redirected, Ong'uti testified the Sale Agreement of 6th March 2002, and the Supplemental Agreement of 20th December 2002, involved the 4th Respondent and others. Xenon meant Spire. The two Companies were entwined, and knew about the transactions. The transaction was compliant in some aspects, but deficient on others. The Claimants were ready to continue working. They made demand for payment from the Receiver/ Manager. They were assured they would be paid their terminal dues.

78. **Samson Momanyi** was employed by Diani Reef Hotel as a Cost Controller, on 19th August 1989. He was promoted to the position of Personnel Manager, which position he held until 2003, when the Hotel was bought by the 4th Respondent and his services, alongside those of his Co-Claimants, terminated.

79. The events leading to termination of the Claimants' contracts started after the death of the former Hotel Chairman, Sir Leon Taman. Around mid-1996, a meeting was called by General Manager Jogschat, attended by all Heads of Department. Two gentlemen, named Hemed Jibril and Sam Shollei were introduced. They informed the meeting the directorship of the Company had changed. They had assumed directorship. Sonotels Limited would no longer be involved. Banin, representing Sonotels would no longer be a Director. The gentlemen assured Employees that they would continue to work normally. Momanyi called in Shop Steward to the meeting. Unionsable Employees were assured they would continue to serve in accordance with the terms and conditions of service applicable to them under the existing Collective Bargaining Agreement.

80. Around 2nd September 1998, then General Manager introduced Ray Dunnet. Dunnet said he had been appointed as Receiver/Manager by Transnational Bank. Dunnet told the Employees he would run the Hotel until the debt owing was liquidated. He would run the Hotel with the existing staff, since it was not intended that the Hotel closes.

81. Momanyi was asked to prepare a list of staff, and their accrued dues, as of the date receivership commenced. It was part of the statement of affairs needed by the Receiver/ Manager. The Receiver/Manager assured the Employees and the Works Committee that, Employees needed not panic, as they would be paid their dues, just like other Creditors. Momanyi went on to prepare report on final dues as of 16th April 2003. He handed over the report to the Receiver/Manager who confirmed the correctness of the amounts claimed.

82. Momanyi was asked to convince Employees to stay on. He managed to do so with the assistance of the Works Committee. Most Employees opted to stay on. Some opted to leave. Momanyi prepared final dues for those who opted to leave. They were paid through the accounts department.

83. The Receiver/Manager wrote a letter around 2nd April 2003, terminating contracts of all Employees. He made payment for the period of receivership only. The Employees' assumption was that the new owner of the Hotel would continue to employ them. The Employees were told the Hotel would close down for refurbishment. They were paid for 15 days worked in April 2003, and 14 days' salary in lieu of notice. They were paid for a total of 28 days and left.

84. The secretive transactions, leading to sale without advertising, were aimed at denying the Claimants their dues. Receivership was a cover-up. If it was genuine, all Creditors would have been called to a meeting. Advertisement did not conform to international standards. No consent of the Land Control Board was obtained, before sale. If there was genuine sale, all liabilities including those of the Claimants, would have been satisfied. The 4th Respondent ought to show it followed proper procedures in purchase of the Hotel. The 4th Respondent was not an innocent purchaser of value.

85. Momanyi told the Court on cross-examination that he is presently a Consultant and Lecturer in personnel management. He is conversant with the Employment Act 2007. It is the duty of the Employer to keep custody of employment records. He was not aware of demand letters made by 3rd Respondent to the 1st Respondent. Demands related to overdraft. He saw Deed appointing the Receiver/Manager, and Receiver/Manager's acceptance of appointment. Receiver took over in 1998.

86. Receiver/Manager did not sack everybody. Employees went on working on the same terms and conditions of employment. There were no letters of appointment issued by the Receiver/ Manager. Momanyi testified he continued to work as Personnel Manager.

87. Clause 14 of the Hotel Sale Agreement, states Receiver/Manager would terminate the contracts of employment of all Employees. Momanyi was not aware the 1st Respondent objected to receivership. The manner of placing a Company under receivership through Debenture is clear. Momanyi felt there was fraud. There was no debt, requiring the Hotel is placed under receivership. Momanyi emphasized he was testifying on his own behalf, and on behalf of his Co-Claimants.

88. In response to questioning by 4th Respondent's Counsel, Momanyi stated 4th Respondent entered the scene around April 2003. It was the same time Employees' contracts were terminated. Momanyi issued Employees with their Certificates of Service. Gratuity was calculated as at 12th September 1998. The 4th Respondent was not at the scene at the time. In particulars of fraud, Claimants state the Receiver/Manager did not advertise sale. This is incorrect. Claimants allege no sale took place.

89. In winding up his evidence on redirection, Momanyi insisted sale of the Hotel led to loss of employment. Receiver/Manager had control from the date he took over management. After April 2003, Employees were told they would continue working.

2nd and 3rd Respondents' Position:-

90. **John Ngowa Ziro** is 3rd Respondent's Credit Officer. He reaffirmed that the 1st Respondent was 3rd Respondent's Client. The 1st Respondent borrowed some money from the 3rd Respondent. The money was loaned after all security documents were perfected.

91. The 1st Respondent defaulted in repayment of the loan. 3rd Respondent appointed a Receiver/Manager in accordance with the security documents. The 3rd Respondent did not terminate Claimants' contracts of employment as the 3rd Respondent did not employ the Claimants. 3rd Respondent appointed the 2nd Respondent as Receiver/Manager,

92. In support of this position, Ziro produced a bundle of documents, including Debenture dated 26th March 1987; Charge over title C.R.15751; and Deed of Appointment of Receiver/Manager and Indemnity dated 2nd September 1998. The Debenture was the principal document, binding the 1st Respondent and 3rd Respondent.

93. 3rd Respondent is not involved in hotel business. It does not employ persons to run hotels. He did not know who the Claimants are, and did not have a relationship with them.

94. Bank Statements at page 82 and 83 of the Witness Statement filed by Ziro, show the 1st Respondent owed the 3rd Respondent Kshs. 29.6 million and Kshs. 11.6 million, by the time demand letters issued. At no time did the 1st Respondent allege it was not advanced money by the 3rd Respondent. The Receiver/Manager was appointed by the 3rd Respondent Bank on 2nd September 1998. Appointment was not before this date, and the Bank cannot therefore be held responsible for liabilities which arose before 2nd September 1998.

95. The Receiver/Manager became an agent of the Company under receivership, in this case Hotel Span Limited, the 1st Respondent herein. Debenture was properly executed. Hotel Span did not apply for injunction restraining the appointment of the Receiver/Manager. The 2nd and 3rd Respondents were not corrupt. They did not act in bad faith. 3rd Respondent is allowed to lend money by the Central Bank of Kenya. Documents show money was loaned by 3rd Respondent to 1st Respondent. 3rd Respondent did not act fraudulently.

96. Questioned by the Claimants' Counsel, Ziro told the Court that the 3rd Respondent was entitled to appoint Receiver/Manager under paragraph 10 of the Debenture. 1st Respondent attempted to breach covenant. Ziro was not able to say in which way attempted breach happened, under paragraph 10 [f] of the Debenture.

97. He testified further that the 3rd Respondent Bank, sent demand letter to the 1st Respondent under paragraph 11 of Debenture. 3rd Respondent did not pay any money to the Bank of Scotland under paragraph 1 of Debenture. Ziro was not aware of any demand for payment made by the Bank of Scotland. He agreed 3rd Respondent was to pay Bank of Scotland, if 1st Respondent failed to pay the money

advanced by Bank of Scotland.

98. The charge document was separate from the Debenture. Charge was between Hotel Span of the one part, and Transnational Bank and Transnational Finance, of the other part. Ziro did not agree that 3rd Respondent did not act in exercise of its powers under the charge, in appointment of Receiver/Manager. Debenture was available as security for other monies.

99. Ziro conceded 3rd Respondent's Managing Director P.H. Noble wrote to the Receiver/Manager on 19th December 2000, stating 3rd Respondent was not a beneficiary. Ziro stated he did not know why his Bank, 3rd Respondent herein, appointed a Receiver/Manager.

100. He was unable to say value of the Hotel was about Kshs. 1.5 billion by the time it was sold. 2nd Respondent's documents show it was sold for Kshs. 157 million. 3rd Respondent was aware there were people working at the Hotel at the time of sale. Ziro did not know when these people started working. 3rd Respondent was not concerned with management of the Hotel. He did not know if Employees were paid terminal dues.

101. Sale Agreement is dated 6th March 2002. Clause 14 of the Agreement referred to Employees. Their preferential dues were to be paid by the Receiver/Manager. Dunnet wrote to the Purchaser, Xenon Limited, on 20th May 2002, disclosing that all Employees would continue to be employed by the Purchaser.

102. Appointment of the Receiver/Manager was valid. He was a valid agent of the Hotel Span Limited. Ziro did not know if the Receiver/Manager ever held Creditors' meetings, or filed Statements of Affairs. Ziro did not know why Employees were not involved. He did not know if the Bank of Scotland was aware that the Hotel was sold. 3rd Respondent has not been properly joined as a Respondent in this Claim. Its actions were above board.

103. Ziro did not have any account entries showing Kshs. 29 million or Kshs. 11 million, was paid to 3rd Respondent. The Directors of Transnational Bank Limited are not known to him. He was not aware that Nicholas Biwott, Joshua Kulei and former President Daniel Arap Moi were Directors of 3rd Respondent. He did not know who the Directors of Hotel Span were. He did not agree that there was a scheme by the Respondents, placing the Claimants at a disadvantage. Advertisement for sale of the Hotel is indicated to have been placed in local press in March 2001. The Witness did not know if advertising was carried out in foreign press. He was not aware if there was advertising done in the year 2002. He was unsure if valuation was carried out before sale. Questioned by Counsel for the 4th Respondent, Ziro told the Court his evidence was based on Debenture and Charge. The 4th Respondent was not party to these security documents. He did not know if sale of the Hotel to the 4th Respondent had been challenged anywhere.

104. Redirected by Counsel for 2nd and 3rd Respondent, Ziro testified the Employees did not write any demand to the Receiver/Manager. Bank of Scotland has never claimed the money. Bank guarantee was given. 3rd Respondent extended overdrafts. The asset was the Hotel. The charge secured hotel land. The principal document was the Debenture. 3rd Respondent enforced the Debenture to appoint Receiver/Manager. It did not enforce the charge.

105. Hotel Span failed to pay loan under paragraph 10 [f] of the Debenture. 3rd Respondent appointed Receiver/ Manager as was entitled to do. The Claimants were not parties to the Debenture and are total strangers.

106. It was for the Receiver/Manager to pay Employees on termination. He was an agent for Hotel Span. Hotel Span agreed Dunnet was its agent, under paragraph 13 of the Debenture.

107. The Claimants are not entitled to the prayers sought. Receiver/Manager was properly appointed.

Hotel Span never complained about his appointment. KCB and IDB never complained about not receiving what was owed to them. Vipul Shah & Company confirmed Kshs. 157 million realized in sale of the Hotel, was the best price obtainable. The Bank did not sell through auction. Advertisement was carried out in the East African Newspaper, with circulation in Eastern Africa.

108. **Faryd Abdulrazak Sheikh** testified he is the General Manager of Transnational Bank Limited, with over 29 years' experience, having been employed in 1986.

109. None of the Claimants was employed by the 3rd Respondent. 3rd Respondent was not in a position to terminate Claimants' contracts.

110. Hotel Span wished to borrow money from the Bank of Scotland, in Sterling Pounds. The Bank of Scotland wished to have 3rd Respondent, guarantee the facility. 3rd Respondent would assist the foreign Bank in realizing any security.

111. The Bank of Scotland extended the facility to 1st Respondent. The money would be repaid directly, while 3rd Respondent remained a guarantor. Debenture was prepared on the understanding it would not be easy for the Bank of Scotland to come here and execute, in event of default by the 1st Respondent. 1st Respondent wished to extend its rooms. Debenture allowed 3rd Respondent, in event of default, to have access to all the assets of the Hotel.

112. 3rd Respondent also created a charge. This secured the guarantee and other facilities including overdraft. The principal document was the Debenture. It was executed, certified and registered. It was not signed by any of the Claimants.

113. Hotel Span did not respect its obligations with the Bank of Scotland. The Bank of Scotland demanded 3rd Respondent impresses upon 1st Respondent to meet its obligations, or 3rd Respondent exercises its right to appoint Receiver/Manager.

114. The Bank appointed R. Dunnet, a Certified Public Accountant, as Receiver/Manager, in September 1998. He was an agent of Hotel Span under paragraph 13 of the Debenture.

115. It is incorrect to say 3rd Respondent did not advance the facility. The Books of Account show facility was granted. Deloitte & Touche confirms guarantee in its letter to 3rd Respondent dated 5th April 2005. Guarantee was discharged in 2003, when the Hotel was sold. There was an actual sale conducted by the Receiver/Manager, in consultation with all stakeholders. Purchaser was identified. Sale Agreement was executed on 6th March 2003. Receiver executed with other Parties. The 3rd Respondent signed as Debenture Holder.

116. Bank of Scotland did not go on to claim more money once Hotel was sold. There was no claim by Employees for terminal dues. They were Unsecured Creditors.

117. The property was properly advertised before sale, in the East African and Daily Nation Newspapers. The Bank was not involved in sale. It did not exercise its right under the charge.

118. There was not a single letter to the Receiver/Manager, from the Claimants, claiming their dues. There was no effort to bar the Receiver/Manager from taking over the Hotel. Other Creditors such as KCB and IDB were informed about receivership and sale of the Hotel. They had advanced facility to Hotel Span and created charge.

119. All other interested Institutions were involved. It would not have been possible to transact, without their involvement. They gave their consent to the transaction. KCB and IDB however, were not able to recover their debt.

120. The Receiver/Manager oversaw the transaction. There were no further claims. He disbursed the proceeds of sale. KCB was owed Kshs. 531,724,904. The sale fetched Kshs. 157 million. KCB did not recover its debt. Sale was to salvage what little could be salvaged. All lending Banks took a big hit. It was unfortunate Claimants as Unsecured Creditors, could not be paid.

121. At the time of receivership, there was a general problem in the industry. Tourism was doing poorly.

122. Sheikh testified on cross-examination by Counsel for the Claimants that he was not sure how much was received on sale of the Hotel. The Hotel was sold for Kshs. 157 million. Some money went into paying the Receiver/Manager. The records were retained by the Receiver/Manager. The 3rd Respondent was not paid any money by the Receiver/Manager. There was no money owed to 3rd Respondent, other than guarantee.

123. Documents presented by Ziro in his Witness Statement showed 3rd Respondent, was owed by the 1st Respondent, Kshs. 29 million and Kshs. 11 million. These debts were owed before appointment of Receiver/Manager. The 1st Respondent had overdraft with 3rd Respondent, which was paid after receivership. There were no documents showing receipt of this money from the Receiver/Manager.

124. The Bank of Scotland made demand for recovery of its money. These letters of demand were not available in Court. Receivership started because money owed to the Bank of Scotland had not been paid. The primary purpose of receivership was to realize money owed to the Bank of Scotland.

125. Transnational Bank Limited did not pay any money to the Bank of Scotland. It was called upon to pay. Sheikh did not have any letter from the Bank of Scotland demanding Transnational Bank honours its guarantee. The debt was either written off or paid in 2003, as suggested in the letter from Deloitte & Touche.

126. As long as guarantee demanded, 3rd Respondent had to appoint Receiver/Manager, notwithstanding that 3rd Respondent had not paid any money to the Bank of Scotland. 3rd Respondent had to be prudent, and not wait until guarantee *hit 3rd Respondent,* to use the words of Faryd Abdulrazak Sheikh.

127. It is not true that receivership had nothing to do with debt obligation. KCB and IDB were secured Creditors with a first Charge. 3rd Respondent stated in its Managing Director's letter dated 19th December 2000, that it was not a beneficiary. 3rd Respondent held Debenture and did not release its right. KCB and IDB Charges ranked *pari pasu*. Their claims had priority, but 3rd Respondent's was superior.

128. Sheikh did not agree that the Bank of Scotland had first right. It was contradictory to say 3rd Respondent did not have beneficiary interest.

129. 3rd Respondent was interested in achieving the best outcome from the receivership. Sheikh did not know when valuation was done. It was done by Lloyd Masika Firm, but the Witness did not have information on the figures attached to value. Sheikh testified the value should have been above Kshs. 800 million on executing the charge. Kshs. 157 million was a fair price for the property considering all circumstances. He never saw the financial statements of the Hotel during receivership. There were no Creditors' meetings except with KCB and IDB.

130. Sheikh told the Court he was aware the Hotel was sold as a going concern. There were Employees working for the Hotel, but the Witness was not able to get their details. He supposed Employees were paid their dues by the Receiver Manager, as agreed under clause 14 of the Sale Agreement.

131. Sheikh's evidence when questioned by 4th Claimant's Counsel was that the Sale Agreement involved Xenon Limited, which is not named as a Party in the Claim. Sale Agreement did not involve Spire. Spire was introduced in the Supplemental Agreement. It did not appear in the Debenture. Receiver/Manager was to pay Employees' dues.

132. Redirected, Sheikh testified Employees, who were engaged by the Receiver/Manager under receivership, were the Employees to be paid by the Receiver/Manager. Those Employees were paid. Responsibility was with the Receiver/Manager. 3rd Respondent's letter dated 19th December 2000 meant 3rd Respondent did not have an interest in the Charge. Valuation was to be done by the Receiver. Best price was obtained. Vipul Shah confirmed this.

4th Respondent's position:-

133. Counsel, **Carren Aluoch Sadia**, testified that 4th Respondent does not know the Claimants. Hotel Span was under receivership. Dunnet was appointed Receiver/ Manager.

134. Receiver/Manager sold the Hotel to Xenon Limited, in an Agreement dated 6th March 2002. Spire Limited was added as a Purchaser, in a Supplemental Agreement dated 20th December 2002. Hotel was transferred to Spire.

135. Clause 14 of the Sale Agreement provided that upon completion of sale, Receiver/Manager would terminate all Employees' contracts, and pay all their dues. 2nd Agreement dealt with assets only, not liabilities. Spire Limited did not have any relationship with the Claimants. There were no letters of employment, or any other form of contract emanating from the 4th Respondent to the Claimants.

136. Cross-examined by Counsel for the Claimants, Sadia testified Purchaser was Xenon Limited. Spire replaced Xenon Limited. Spire stepped in, in terms of assets, not liabilities.

137. Spire could not take responsibility for liabilities. Clause 5 of the Supplemental Agreement did not refer to the Sale Agreement. Operative provisions defined 'Agreement' to include the Sale Agreement of 6th March 2002. Sadia testified she just noticed this inclusion in Court.

138. 4th Respondent was aware there were Employees' terminal benefits to be paid. Terminal benefits were paid before 4th Respondent took over. She was not sure if terminal benefits were paid. Terminal benefits were partially paid. By the time 4th Respondent took over, it was not a live issue. Xenon bought the Hotel. Xenon had a financial issue and Spire assumed certain obligations under sale.

139. Raffman Elms & Virdee Advocates acted for Spire. Raffman asked for a list of all Employees and their terms and conditions of service. This was done for due diligence. The letter does not bind the 4th Respondent to take responsibility for Employees' dues. Xenon should have paid terminal benefits to the Employees under clause 14 of the Sale Agreement.

140. Dunnet wrote to Xenon's Director William Sambu on 20th May 2002, stating it had been agreed, between Receiver/Manager and Xenon Limited, that existing Employees would be employed by Xenon Limited. None was employed by Spire Limited. Sadia denied that she failed to disclose any material evidence to the Court. She stressed on being questioned by Counsel for 2nd and 3rd Respondent that the Receiver/Manager alone, was to pay terminal dues.

141. Redirected, Sadia told the Court Xenon is not a Party to the Claim. Xenon and the Receiver/Manager took responsibility for Employees' terminal dues under the Sale Agreement. Parties in the Sale Agreement of 6th March 2002 are identified. Spire was not a Party. Spire became involved only as per the Supplemental Agreement of 20th December 2002.

142. Completion date in the Sale Agreement was stated as 5th June 2002. Supplemental Agreement of 20th December 2002 was after the completion date of 5th June 2002. Spire did not take over liabilities. Receiver/Manager warranted to Spire. No liabilities were mentioned.

Submissions:-

143. **The Claimants** submit 3rd Respondent had no justification in setting in motion a totally unwarranted receivership. 3rd Respondent was granted ample opportunity in Court, to justify receivership. It completely failed to do so. The Sale Agreement, the Supplemental Agreement and the correspondence from Raffman Advocates for Spire Limited, show Respondents were all aware of unpaid Employees' terminal dues, but opted to ignore the issue.

144. The Claimants lost acknowledged terminal dues, as a result of cumulative illegal actions of the Respondents: 3rd Respondent unlawfully placed 1st Respondent under receivership; 1st Respondent failed to protest an illegal act; 2nd Respondent unlawfully sold the assets of the 1st Respondent, and failed to act in such a way as to obtain the best possible price, which could have settled Claimants' terminal dues; and the 4th Respondent failed to pay Claimants' dues as undertaken in the Sale and Supplemental Agreements.

145. From an alternative perspective, Claimants submit had the 3rd Respondent acted lawfully, and not placed 1st Respondent under receivership, Claimants would not have lost their employment and would have ordinarily received their terminal dues at the end of their service. Assuming, without admitting that 3rd Respondent acted lawfully, 2nd Respondent was duty bound to carry out the process of receivership lawfully. If this was done, the Hotel would have been sold for an amount commensurate with its real value. The Claimants would have received their terminal benefits as Preferential Creditors. Irrespective of the foregoing, had the 2nd, 3rd and 4th Respondents lived up to what they agreed to, in the Sale and Supplementary Agreements, Claimants would have received their terminal benefits.

146. 4th Respondent stepped in the shoes of Xenon Limited. It was not right for the 4th Respondent to hold that Xenon, not Spire, should have paid Claimants' terminal dues.

147. The Bank of Scotland never demanded payment of Sterling Pounds 6 million. 3rd Respondent had no capacity to set in motion receivership. Receivership could not have been set in motion unless and until the Bank of Scotland demanded, 3rd Respondent pays any part of the loan, under the terms of guarantee. Only then could 3rd Respondent take steps to recover money due to the Bank of Scotland. 3rd Respondent acted on a frolic of its own.

148. Citing a decision of the Court of Appeal of Uganda in ***Mistry Amar Singh v. Serwano Wofunira Kulubya [UCA No. 74 of 1960***], the Claimants argue the law does not permit a party to retain a benefit obtained illegally. No Court ought to enforce an illegal contract, or allow itself to be made an instrument of enforcing obligations alleged to arise out of a transaction which is illegal. They rely on the statement of Lord Denning in ***Lazarus Estates v. Beasley [1956] 1 QB 702 at 712-713***: illegality unravels everything. Where a Bank unlawfully exercises its statutory power of sale, the resulting action is a nullity as held in ***Sharok Kher Mohammed Ali & another v. Southern Credit Banking Corporation Limited & another [2008] e-KLR***.

149. The Claimants submit Respondents did not dispute the computation of terminal benefits sought by the Claimants. Proof of debt is not in issue. Interest should be granted from the date of filing the Claim.

150. The Claimants submit further that they deserve damages. 2nd, 3rd and 4th Respondents terminated the Claimants' contracts unlawfully and unfairly. The Claimants have suffered tremendously as a result of the wrongful acts of the Respondents. The Claimants urge the Court to grant them damages at Kshs. 1 million each. In support of this prayer, they cite the Nairobi High Court Civil Case, ***C. Mehta & Company Limited v. Standard Bank Limited [2014] e-KLR***, where the Plaintiff was granted Kshs. 3 million in damages, for breach of contract.

151. **2nd and 3rd Respondents** submit 3rd Respondent is a Bank. It is not in the business of running hotels. It did not employ the Claimants. It did not contract the Claimants.

152. It is not disputed the 1st Respondent borrowed some monies from the 3rd Respondent. The loan was

advanced after security documents were perfected. The security documents were exhibited before the Court by Ziro. The main document is the Debenture dated 26th March 1987.

153. It is not disputed that the 1st Respondent defaulted, prompting the 3rd Respondent to appoint a Receiver/Manager. Appointment was in accordance with the terms of Debenture.

154. The Receiver/Manager became an agent of the 1st Respondent. He alone became liable for his acts and defaults. 2nd and 3rd Respondents, adopting the holding in ***High Court of Kenya at Nairobi Civil Case Number 78 of 2014 between Surya Holdings Limited & another v. CFC Stanbic Limited***, emphasize that the Receiver/Manager only becomes an agent of the Debtor Company, not any other Company. He remains so, until the end of the receivership. Even if he continues to carry on business upon appointment, he does not become an agent of the Debenture Holder.

155. The 3rd Respondent had the right to appoint the 2nd Respondent as Receiver/Manager under Debenture. The appointment was governed by the Debenture and not the Companies Act *per se*, as held in Nairobi ***High Court Civil Case No. 718 of 2008 between Multi Options Limited v Kalpana S. Jai & 2 others.***

156. Receivership was not fraudulent. Particulars of fraud were not established. Receivership was not challenged by the 1st Respondent.

157. The 2nd Respondent did not owe any duty of care to the Claimants. He only owed a duty of care to the 1st Respondent, and a statutory duty of care to Preferential Creditors. 2nd and 3rd Respondents anchor this submission on the authority of ***Michael Oyugi & 178 others v. Industrial Plant E.A. Limited [in receivership] & another [2006] e-KLR.***

158. There was no contractual relationship between the Claimants and 3rd Respondent. As a general rule, a contract only affects a person party to it. This position is explained in ***Halsbury's Laws of England 3rd Edition Volume 8 at paragraph 110.*** The contract between the 1st Respondent and the Claimants cannot be enforced against the 3rd Respondent. This submission was upheld in ***Court of Appeal Civil Appeal Number 104 of 1984 between Agricultural Finance Corporation v. Lengetia Limited & another***. There was no contract of employment within the meaning of the Employment Act, between the Claimants and the 3rd Respondent.

159. **The 4th Respondent** submits that the Claimants were not Employees of the 4th Respondent. They did not show they were Employees. The term 'Employee' is defined under the Employment Act. They did not show the Court that they were Employees of the 4th Respondent, within this definition.

160. The Supplemental Sale Agreement required the 1st, 2nd and 3rd Respondents, upon receipt of the purchase price, to deliver to 4th Respondent's Advocates certain documents, among them, letters of termination served upon Employees of the 1st Respondent. The letters were to indicate that Employees had been paid all amounts due to them as of the date of termination.

161. The 4th Respondent issued a notice of closure of Diani Reef Hotel. The notice states 1st Respondent's Employees were taken over by the 4th Respondent on provisional and probationary basis from 17th April 2003. They were paid salaries by the Receiver/Manager up to 16th April 2003, and notice pay up to 16th May 2003. They received also, severance pay. The 4th Respondent had reason to believe that the Receiver/Manager complied with the terms of sale.

162. The 4th Respondent submits there is no question the Claimants deserved to be paid their dues. The 4th Respondent endeavoured to ensure the issue of Employees' terminal dues was taken care of by the 1st and 2nd Respondents, before 4th Respondent took over the Hotel.

163. Clause 2.9 [6.iv] of the Supplemental Sale Agreement states the Hotel was transferred to the 4th Respondent, free of any encumbrances. Such encumbrances included Claimants' terminal dues. No Court can re-write or alter a contract for the parties. The 4th Respondent relies on ***Civil Appeal Number 95 of 1999 between National Bank of Kenya v. Pipeplastic Samkolit [K] Limited & another*** in supporting this submission. The responsibility of the Court is limited to only enforcing contracts within the law as held in ***Kundan Sigh Construction International Limited v. Bank of Africa & Kenya Commercial Bank [2015] e-KLR.***

Issues for determination:-

164. The issues as broadly understood by the Court are:

a) What relationship if any, Parties had with each other.

b) Whether appointment of Receiver/Manager was lawful.

c) Whether the 1st, 2nd and 3rd Respondents acted lawfully in selling the Hotel to the 4th Respondent.

d) Whether Claimant suffered as a result of the receivership and sale of the Hotel, whether they are entitled to terminal benefits, damages, costs and interest , and if so, from which Respondent, and to what extent?

The Court Finds:-

Undisputed/indisputable facts:-

165. It is not disputed that the Claimants were employed by Hotel Span Limited, at Diani Reef Grand Hotel, on diverse dates. They worked in various capacities and departments.

166. The Hotel is shown, by the common evidence of the Parties to have operated from as early as 1980, on loans obtained from Banks such as Industrial Development Bank and National Bank of Kenya. Other loans were later obtained from Transnational Bank, Kenya Commercial Bank, and the Bank of Scotland. The history of these loans leading up to the appointment of Receiver/Manager is well captured in the evidence of the late Stanley Mubiru.

167. Big loans were obtained with a view to expanding the Hotel. The history of the Hotel's shareholding, from 1982, and arrangements made in raising money to finance expansion, is succinctly told in the evidence of Stanley Mubiru. The loan obtained from the Bank of Scotland was for Sterling Pounds 5,358,821. It was secured through a Debenture signed by the 1st Respondent, 3rd Respondent, Transnational Finance Company Limited, and the Industrial Development Company. The Debenture was made on 26th May 1988.

168. This Deed of Debenture, together with other security documents, is exhibited in the 3rd Respondent's Witness Statement of John Ngowa Ziro, filed in Court on 28th August 2013. The formal validity of the Debenture is not in issue.

169. There is evidence the Debenture was supplemented by a Charge over 1st Respondent's Land Reference Number 12830, being premises comprised in a Grant registered in the Land Titles Registry at Mombasa as Number C.R. 15751/1. The Charge is dated 26th May 1988, same date as the supplemented Debenture.

170. The 1st Respondent, 3rd Respondent and the Bank of Scotland had concluded a Credit Agreement before the making of Debenture and Charge, on 2nd April 1987. The Credit Agreement was varied

through subsequent Supplemental Credit Agreements involving the 1st Respondent, 3rd Respondent, and the Bank of Scotland.

171. 1st Respondent was the borrower, 3rd Respondent Guarantor, and Bank of Scotland as Manager and Sole Lender. 3rd Respondent irrevocably and unconditionally guaranteed to the Bank of Scotland the due and punctual payment of the loan amount.

172. Pursuant to the terms of the Credit Agreement, the 1st Respondent undertook and covenanted, in the Debenture, to pay the 3rd Respondent, or the Transnational Finance Company Limited, upon demand in writing, all moneys which 3rd Respondent or Transnational Finance Company Limited may be called to pay the Bank of Scotland under the terms of Guarantee.

173. The formal validity of these documents leading to the appointment of Receiver/Manager; their presence; execution; and authenticity, are not issues which are disputed.

174. It is common ground that, alleging to exercise the powers conferred on them by the Debenture, 3rd Respondent, and its wing Transnational Finance Company Limited, appointed Raymond Thomas Dunnet, 2nd Respondent herein, as Receiver and Manager of the 1st Respondent. It was alleged 1st Respondent had defaulted it meeting its obligations under the terms of Debenture. The Deed of Appointment of Receiver/Manager is dated 2nd September 1998, and is signed by the Debenture Holders. The date of Debenture and the sum secured are shown in the Deed of Appointment of Receiver/Manager. The Deed of Appointment of Receiver/Manager was submitted to the Registrar of Companies on 2nd September 1998, as was the Receiver/Manager's acceptance of appointment. The formal validity in the process of the appointment of the Receiver/Manager does not appear questionable. It is undisputed. It is indisputable.

175. It may also be concluded that upon taking over as Receiver/Manager, on 2nd September 1998, Dunnet was presented with a list of existing staff and computation of terminal dues owed to them, as of 2nd September 1998. There was no evidence disputing that this list and computation was presented to Dunnet. It was a necessary plank in preparation by the new Receiver/Manager of the 1st Respondent's Statement of Affairs.

176. Some Employees opted to exit, upon the Hotel being placed under receivership. They were paid their full terminal dues. The Claimants were among those Employees who remained. Dunnet asked Momanyi to persuade Employees to stay. They were promised they would be paid all their dues. They were not paid their dues. They continued to work for the period the Hotel was under receivership, expecting that in the end, they would receive their full terminal benefits, based on totality of their creditable years of service. They continued working and received their monthly dues from the Receiver/Manager. At the end of receivership in April 2003, Employees' terminal dues remained unpaid. A computation of terminal dues as of 16th April 2003, when receivership came to an end, shows total terminal dues at 32, 457.007. This is the sum claimed in the Plaint filed by the Claimants at the High Court. The amount is not disputed. There is proof that this debt is real. It is owed to the Claimants.

177. It is common evidence that the Hotel was sold to Xenon Limited by the 2nd and 3rd Respondents, in a Sale Agreement dated 6th March 2002. The Agreement was executed by the 3 Parties. Clause 14 states that upon completion of the sale, the Receiver/Manager would terminate the services of all Employees of the Hotel, and pay all their unpaid preferential dues.

178. There was a second Sale Agreement dated 20th December 2002. It was concluded by the Parties to the Sale Agreement of 6th March 2002, and a newcomer, Spire Properties Kenya Limited. It is explained that Xenon had requested Spire Properties to assume some obligations under the Agreement for Sale. Spire was deemed to have replaced Xenon in the Sale Agreement. The new Sale Agreement under clause 3.2.7, required the Advocates for the Receiver/Manager, the Hotel Span Limited and Transnational Bank Limited, upon receipt of the purchase price in an escrow account, to deliver to Spire's Advocates, among

other documents, copies of letters of termination of employment served upon staff of the Hotel as at the completion of sale, and paying them all amounts due as of that date. The Hotel was in the end sold to Spire Properties [Kenya] Limited, not Xenon Limited. Terminal dues were not paid as agreed.

179. The change of Purchaser from Xenon to Spire was explained through the evidence of Spire's Witness, Carren Aluoch Sadia: she told the Court that Xenon had financial difficulties, compelling Spire to step in as a Purchaser.

180. Other significant and undisputed facts are contained in the letter of the 2nd Respondent to the Director of Xenon Limited, dated 20th May 2002; the letter of Raffman Elms & Virdee, Advocates for the proposed Spire Limited to the 3rd Respondent, dated 22nd October 2002; and the letter of Spire Limited to Minah Jaffah, Assistant Front Office Manager, dated 26th April 2003. There is no question on the authenticity of these letters.

181. In the first letter from Dunnet to Xenon, it is disclosed there was a meeting between Dunnet and Xenon's Director on 5th June 2002, with regard to the handing over of the Hotel to Xenon. It was discussed and agreed, *inter alia*, that Xenon was arranging for completion of the purchase price; 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.

182. In the second letter from Raffman Elms and Virdee, the Advocates reveal they were in the process of forming a new Company called Spire Property [Kenya] Limited, the 4th Respondent herein. The Advocates asked for a complete list of the Employees presently employed by the Hotel, details when the Employees started their respective employment, and what their present salaries were.

183. The third letter from Spire to Minah states Spire had acquired Diani Reef Grand Hotel, from midnight, the 16th April 2003. It is revealed that Spire took over all the Employees on provisional and probationary basis from 17th April 2003. It is noted 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. Confirming that Receiver/Manager issued termination letters, and paid receivership terminal dues, is a letter of termination of services to Minah dated 17th April 2003. This evidence agrees with that of Samuel Momanyi who indicated Employees received terminal dues for the period of receivership, 1998- 2003. The Hotel would close down for major renovation from 1st May 2003. In addition to what had been paid by the Receiver/Manager, Spire advised Employees they would be paid by Spire '*for 14 days at the same rate as you were previously being paid. In event you have accrued during this period any overtime or leave, please contact Mr. Ramakrishnan to ensure those are calculated or given to you before the 1st May 2003.''* Lastly, Spire assured Employees once hotel upgrade was complete, Spire expected job applications for all positions, but preference would be given to existing and qualified Employees.

184. The Hotel fetched a purchase price of Kshs. 157 million. It is not disputed that the Receiver/Manager took the position that amount realized out of sale, was insufficient to pay unsecured creditors. Dunnet states in a letter to Omondi Waweru & Company Advocates dated 14th July 2003, that money owing to Secured Creditors stood at Kshs. 1.6 billion, while that owed to Preferential Creditors was Kshs. 23 million. Lastly it is not disputed 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.

185. The presence of this trail of documents, and their formal validity, appears to the Court undisputed.

[a] Relationships:-

186. The Claimants were no doubt employed by the 1st Respondent on various dates. They remained

incontestably, Employees of the 1st Respondent up to the date Receiver/Manager took over the running of the business. They were contracted by the 1st Respondent to work in various departments. They were directed, controlled, provided with their tools of trade, and remunerated for their labour, by the 1st Respondent, at least up to the date of appointment of Dunnet.

187. The general rule, with respect to the relationship between Receiver/Manager and the Debtor Company, is that the Receiver/Manager is an agent of the Debtor Company. This position has been stated in Kenyan Decisions, ***H.C.C.C between Surya Holdings Limited & 2 Others v. CFC Stanbic Limited [2014] e-KLR, Court of Appeal Civil Appeal between Lochab Brothers v. Kenya Furfural Company Limited & Others [1976-1985] E.A. 257***, and ***Industrial Court Cause between Joseph Ashioya v. Kenya United Steel Company Limited [2013] e-KLR***. This is a concept which is long wedded to the law of receivership in Kenya. Raymond Dunnet, the Receiver/Manager appointed by 3rd Respondent would therefore under this general rule, be an agent of the Debtor Company, Hotel Span Limited 1st Respondent herein.

188. The appointment of Receiver/Manager does not of itself, automatically terminate contracts of employment. This was first recognized by ***Plowman J in Re Foster Clark Ltd's Indenture Trusts, [1966] 1 WLR 125 at 132*** who said:

'' At first sight there appears to be no very good reason why the appointment of a Receiver, who is agent of the Company should determine the contracts of employment.''

189. There are good reasons for this general rule. Despite the appointment, the Debtor Company retains the legal title to its assets. Secondly there is the business reality. The Employees continue to work at the same premises as part of the same business. The Receiver/Manager opted to continue running the business, and would not do so, without the Employees. Employees were advised the Hotel was not closing down. It would continue to run. Eventually when sold, they were told it was being sold as a going concern.

190. Appointment may have the effect of terminating employment contracts if there is a concurrent sale of business; if the Receiver/Manager enters into new contracts; or existing contracts are inconsistent with the receivership. These exceptions to the general rule were recognized in ***English Decisions Re Mack Trucks [1967]1 WLR 780 at 787***; and ***Griffiths v. Secretary of State for Social Services [1974] QB 468 at 486.*** The position was restated by the Employment and Labour Relations Court at Mombasa in a Ruling made in ***Rosephine Mumbe Munyoki & 4 Others v. Blue Edge Hotels Limited & Another [2016] e-KLR.***

191. Dunnet did not enter into new contracts with the Claimants. There was no concurrent sale of business, with his appointment. Existing contracts were not inconsistent with the receivership. Business reality demanded the Claimants continue serving. There was evidence by 3 Claimants who testified that they were asked to go on serving. They went on serving and kept the business afloat. The Receiver/Manager continued to employ the Claimants. Their contracts were kept alive. They were not terminated with the entry of the Receiver/Manager. They were promised all terminal dues would be paid.

192. Transnational Bank Limited, the 3rd Respondent, agreeably, is a Banking Institution as proposed in its Closing Submissions. It does not run hotels and did not have a contractual relationship with the Claimants. If there is any relationship between the Claimants and 3rd Respondent, it would only be through the 2nd Respondent, and the series of transactions leading to sale of the Hotel which employed the Claimants.

193. The 3rd Respondent undertook in the Deed of Appointment of Receiver and Manager to indemnify the 2nd Respondent. Indemnity was to the extent that the 1st Respondent was unable to indemnify, and keep indemnified the Receiver/Manager, against all actions, proceedings, losses, damages and claims, incurred or suffered by the Receiver/Manager, or which he may be or become liable by reason of anything done or purported to be done by him as such Receiver/Manager.

194. The Claimants do not restrict their Claim to one of a simple breach of a contract of employment by an Employer; they extend their Claim to one for damages against what they view as a collective wrongs committed against them by the Respondents, as a result of the decision by the 3rd Respondent to appoint Receiver/Manager without substantive justification.

195. While the Court agrees the 3rd Respondent did not employ the Claimants, and the 2nd Respondent was not *per se* an agent of the 3rd Respondent, there is an allegation by the Claimants that the 3rd Respondent was a principal wrongdoer, who set in motion circumstances leading into their deprivation of terminal dues for ages.

196. The Receiver/Manager 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. The Claimants state they were Unsecured Creditors of the 1st Respondent. They were in such proximity to the Receiver/Manager, that the Receiver/Manager owed them a duty to act *bona fide* and in good faith, in sale of the Hotel.

197. The 3rd Respondent's relationship with the Claimants must not be viewed solely, against the simple principles applicable in determining whether there is an Employer-Employee relationship. There are statutory, contractual as well as tortious liabilities, alleged by the Claimants to attach to the Respondents. It is alleged, as suggested above, that appointment of the Receiver/Manager was without substantive justification. Should the Court find appointment was invalid, the Receiver/Manager, will be deemed to have been a Purported Receiver. ***In Re Jaffe Limited [in liquidation] v. Jaffe [No 2] [1932] NZLR 195***, it was held Purported Receivers and Debenture Holders who appointed [or purported to appoint] them, may be held to have been trespassers, in relation to their conduct towards the assets of the Debtor Company, even though they may have been acting *bona fide*. Damages would be recoverable from the Purported Receiver/Manager and Purported Debenture Holders, in case the Court was to find no validity in the appointment of the Receiver/Manager. If the Receiver/Manager is invalidly appointed, his appointer, that is to say the Debenture Holder will be vicariously liable for the acts and defaults of his Purported Receiver as held in ***Standard Chartered v. Walker [1982] 3 All ER 938.*** Even if it is concluded appointment was valid, the Receiver/Manager would have, as a general rule, a duty of care, to exercise reasonable care and skill in discharging the role of Receiver/Manager. Persons, who satisfy the test of proximity to the actions or defaults of the Purported Receiver, are entitled to seek redress.

198. It is noted that there were instances when the Debenture Holders gave specific instructions or directions to Dunnet with respect to sale of the Hotel. One such instance is shown in the letter dated 9th February 2001. P.H. Noble, 3rd Respondent's Managing Director wrote to Dunnet that 3rd Respondent's Board of Directors had met, and decided immediate steps are taken to advise the purchaser of the Hotel, that in event the purchaser did not sign the Sale Agreement and pay non-refundable deposit within 14 days, Dunnet should re-advertise sale. Receiver/Manager does not act on the instructions of the Debenture Holder in discharging his role. A Receiver/Manager is held as an agent of the Debenture Holder, where such express instructions or directions are given. In selling the Hotel, 3rd Respondent took a lead role, specifically issuing instructions to the Receiver/Manager. The 3rd Respondent acted as a Principal to the 2nd Respondent. Although the law and the Debenture recognizes the 2nd Respondent as an agent of the 1st Respondent, the actions of the 3rd Respondent resulted in the 2nd Respondent being in effect, an agent of the 3rd Respondent. 3rd Respondent could therefore be called to account vicariously, for the acts or defaults of the Receiver/Manager, made in pursuit of such instructions or directions.

199. Spire, the 4th Respondent as seen above, supplanted Xenon in the Sale Agreement. The 4th Respondent like the other Respondents disputes having any relationship with the Claimants, arguing it did not employ the Claimants and bought the Hotel free of any encumbrances. It is submitted the 4th Respondent was an innocent purchaser of value without notice.

200. The letter of Spire to Minah suggests however, that there was an employment relationship between the Claimants and the 4th Respondent. The 4th Respondent paid the Claimants certain remuneration stated to be at the rate of 14 days, as previously paid by the Receiver/Manager. The letter suggests Employees

with claims of overtime and annual leave could contact a designated Officer of the 4th Respondent for computation and payment. The 4th Respondent went further to promise the Claimants preferential treatment in re-employment, when the Hotel reopened. The 4th Respondent was, if for a very brief period, a fleeting moment, a successor Employer of the Claimants. An Employee, as defined in employment law, is a person employed for wages or salary. There is no room for provisional employment. What is this remuneration, the 4th Respondent undertook to pay at the same rate as paid by the previous Employers, if the 4th Respondent was not a successor Employer? It cannot be said there was no relationship between the Claimants and the 4th Respondent whatsoever, in light of the letter of the 4th Respondent to Minah.

201. The Court is persuaded Spire took over the obligations of Xenon, as Xenon was not able to fulfill its obligations in the Sale Agreement. The letter from Raffman Elms & Virdee Advocates suggests Spire was incorporated solely with the intention of stepping in the shoes of Xenon. It was a quick incorporation, a kind of a speedy, special vehicle, created solely for the acquisition of the Hotel. Raffman Elms and Virdee Advocates were the initial subscribing shareholders and directors, acting as nominees for their unknown Clients. Notwithstanding the legal separateness between Xenon and Spire, there appears to be an element of truth in the Claimant's submissions that Xenon and Spire were one and the same Company. If they were not, why did not Spire or its Advocates express interest in purchase of the Hotel directly to Dunnet, upon advertisement? The Supplemental Agreement was not in reality supplemental, but a new Agreement where Spire bought the entire Hotel, as opposed to assuming partial obligations under sale. Xenon walked away completely. The Raffman letter did however contemplate that there were existing Employees, who kept the Hotel going, and possibly with unpaid dues. Clause 14 of the first Sale Agreement made a similar acknowledgment as did clause 3.2.7 of the Supplemental Sale Agreement. All the Respondents, in the view of the Court, had one form of relationship or the other, with the Claimants. There was an intricate web of relationships amongst the Parties. It is worth exploring whether there were rights and obligations attaching to these relationships; whether there were breaches; and whether in event there were breaches, there are remedies available to those who were wronged.

[b]. Validity of Receivership:-

202. The Receiver/Manager was appointed under the terms of the Deed of Debenture made on 26th May 1988. The Deed of Appointment of Receiver and Manager dated 2nd September 1998, specifically refers to the Debenture of 26th May 1988 and the sum secured on Sterling Pounds 5,358,821. There were a myriad of loans and obligations owed by the 1st Respondent to different Institutions such as KCB, IDB, Transnational and Bank of Scotland. The obligation, leading to receivership however, was the one owed to the Bank of Scotland, and guaranteed by Transnational Bank.

203. To understand if the appointment of the Receiver/Manager was substantively valid, the Court would have to seek guidance from the Deed of Debenture in relation to the Bank of Scotland.

204. As concluded above, there is no doubt all formalities in putting the Receiver/Manager in place, were met. The 2nd and 3rd Respondents state all security documents were perfected. The Court does not doubt all documents were perfected, in the sense that they were complete and executed. They were perfected, in the sense that they were filed in the required registries. There is no question on the formal validity. The dispute is on the substantive validity of the transactions.

205. Clauses 1 [a] of the Debenture is of primary focus in this dispute. It is in the following words:

Clause 1

''The Company [1st Respondent] hereby undertakes and covenants with the Bank [3rd Respondent] and Transnational Finance Company [TNFC] that it will-

[a] Pay to the Bank or TNFC upon demand in writing all the moneys which the Bank or TNFC may be called upon to pay the Bank of Scotland under the terms of the Guarantee or Supplemental Guarantee,

together with usual bank charges and all other costs, charges and expense…''

206. The 3rd Respondent 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.

207. John Ngowa Ziro testified the 1st Respondent owed 3rd Respondent Kshs. 29,671,023, and Kshs. 11,640,010 as captured in the Bank Statements at pages 82 and 83 of his Witness Statement. Demand for payment was made in writing to the 1st Respondent, as shown in Ziro's Witness Statement at pages 80 and 81. At page 61 of 2nd Respondent's List of Documents filed on 25th October 2013, there is a letter from 3rd Respondent's Managing Director to Kibet & Company Advocates alleging to communicate private information, to the effect that 1st Respondent owed 3rd Respondent Kshs. 127.6 million in overdraft. These inconsistently stated debts, in the view of the Court were overdrafts advanced to the 1st Respondent by 3rd Respondent, and did not fall within the obligation owed to the Bank of Scotland.

208. Cross-examined, Ziro stated 1st Respondent attempted to breach the covenants under Debenture. He stated he did not know in what way this attempt was made. He was not aware if any of the conditions justifying receivership under the Debenture, happened.

209. He testified 3rd Respondent, Transnational Bank, did not pay any money under the guarantee to the Bank of Scotland. He did not know if the Bank of Scotland knew if the Hotel was sold. He was not aware of any demand made by the Bank of Scotland. He conceded Transnational was to pay the Bank of Scotland, if the 1st Respondent, Hotel Span, failed to pay the money advanced by the Bank of Scotland. He told the Court P.H. Noble, Managing Director of Transnational Bank had written to Dunnet, advising that Transnational did not have any beneficiary interest in the Hotel. Lastly, John Ngowa Ziro, speaking as an Officer of Transnational Bank, told the Court he did not know why the Receiver/Manager, Raymond Dunnet, was appointed.

210. Faryd Abdulrazak Sheikh is the General Manager of 3rd Respondent, as indicated elsewhere in this Judgment. His evidence is important in understanding the circumstances of Dunnet's appointment.

211. He testified the Bank of Scotland extended loan facility to the 1st Respondent. 3rd Respondent was a guarantor. The facility would be repaid directly by the 1st Respondent to the Bank of Scotland.

212. Sheikh confirmed his Bank was owed by 1st Respondent the sums mentioned by Ziro, by way of overdraft. He said nothing of the amount mentioned by P.H. Noble to Kibet & Company Advocates.

213. He told the Court the Bank of Scotland wrote letters demanding payment of its debts. None of the letters was available before the Court. Receivership was put in place, specifically because money owed to the Bank of Scotland had not been paid. The primary purpose of receivership was to realize money owed the Bank of Scotland.

214. The General Manager, Sheikh, told the Court his Bank did not pay any money to the Bank of Scotland. There was demand Transnational Bank pays. He did not have any such demand letters in Court. Finally, Sheikh testified Transnational Bank had to appoint Receiver/Manager as a matter of prudence, and not wait until 'hit' by the guarantee.

215. From the evidence of 3rd Respondent's Witnesses above, it is clear 3rd Respondent did not have justification in appointing Receiver/Manager. The Court has no reason to second guess Ziro and Sheikh on the reason why Ray Dunnet was appointed. It was not shown that 1st Respondent had defaulted in its direct obligations to the Bank of Scotland. There was no demand made by the 3rd Respondent to the 1st Respondent with regard to the obligation owed the Bank of Scotland. There was nothing showing the Bank of Scotland called upon Transnational Bank or its Finance wing, to meet their terms of guarantee.

The sums demanded by the 3rd Respondent against the 1st Respondent were overdraft facilities, which did not have any relation with what was owed the Bank of Scotland. The Bank of Scotland did not make any demand as far as the documents on record show, on Transnational Bank to meet any terms of its guarantee. There is not a single letter shown to originate from Bank of Scotland demanding for its money.

216. It is not lost on the Court that Debenture was created way back in 1988. The Receiver/Manager was appointed in 1998, 10 years after Debenture was made. In those 10 years, there ought to have been generated some form of demand, in case there was default on the part of the 1st Respondent. There certainly ought to have been some form of Statement of Account availed to the Court indicating what 1st Respondent's indebtedness to the Bank of Scotland was, 10 years after Debenture was made. There would have to be a default in repayment, to justify appointment of Receiver/Manager. This default was not shown to the Court.

217. Sheikh stated the Receiver/Manager was appointed as a matter of prudence. The Debenture did not have a clause permitting for appointment of Receiver/Manager as a matter of prudence. Ziro was a more forthright Witness, of the 2 Witnesses presented by Transnational Bank: he told the Court he did not know why the Receiver/Manager was appointed. 3rd Respondent did not know why it appointed the Receiver/Manager. With this evidence from 3rd Respondent, the Court has no reason to speculate on the reasons why the Receiver/Manager was appointed.

218. As indicated in ***Re Jaffe Limited [in liquidation],*** 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. The High Court of Kenya made a similar holding in ***Azim Virjee & 2 Others v. Glory Property Limited [2007] e-KLR***. In this High Court case the Plaintiffs were found to have appointed a Receiver/Manager under an invalid Charge. Hon. Justice Prof. Onesmus Mutungi characterized the purported appointment of Receiver/Manager as sheer masquerading. The Court held that everything and anything purportedly done under receivership powers therein, is null and void and of no legal consequence. One can only give that one has, nothing more. The Decision by Lord Denning in ***Lazarus Estates v. Beasly*** cited by the Claimants expresses the same legal position.

219. The High Court of Kenya went on to declare the Deed of Appointment of Receiver/Manager null and void *ab initio*; declared that neither the power of sale, nor the power to appoint Receiver/Manager had crystallized or accrued at the time of appointment of the Receiver/Manager; and ordered an enquiry on the damages payable by the Plaintiffs and Receiver/Manager for purported receivership, trespass and illegal occupation.

220. The present Claim is not dissimilar to the High Court Case. The Debenture Holders testified they did not know why they appointed the Receiver/Manager. The Purported Receiver/Manager went on to take certain actions that culminated in the Claimants losing their jobs, and indefinite deferment of payment of their hard earned terminal benefits.

[c]. Exercise of Receivership and Sale of the Hotel.

221. The other challenge made by the Claimants against the actions of the Respondents is that, even assuming receivership was valid, the Receiver/Manager did not discharge his role properly and in good faith. Sale of the Hotel was tainted with legal infirmities. The Receiver/Manager was indifferent, or grossly careless in protecting the Claimants' interests on sale.

222. The Claimants argue that the Receiver/Manager failed to advertise the Hotel in the international market. He did not take reasonable care to sell the Hotel for not less than its fair market value, or in the absence of a market value, the best price obtainable. In the end the Hotel was bought by local Companies Xenon and Spire for Kshs.157 million, which the Claimants state was below a fair market value and was not the best price obtainable. As a consequence of the Receiver/Manager's negligence, the Hotel was sold for a song, which had the effect of closing the Claimants out in the sharing of the sale proceeds.

223. The 2nd and 3rd Respondent's position is that the Hotel was advertised in the Daily Nation Newspaper and in the East African Newspaper. The best price was obtained as certified by Vipul Shah. The 2nd and 3rd Respondents attached copies of newspaper cuttings, showing that indeed the Hotel was advertised in the Daily Nation and the East African, the latter which is a business publication circulated within the East African region.

224. The Court is not convinced advertisement was sufficient. The Hotel, as stated by the Parties is a 5 Star Hotel with an international clientele. Potential buyers would have been sought from within the broader international market, rather than restricted to Kenya and equally economically challenged East African Neighbours.

225. Dunnet had an obligation to advertise the Hotel properly, highlighting actual and potential value. He needed to bring sale to the notice of the international hotel industry. In ***American Express International Banking Corp v. Hurley [1983] 3 All ER 564***, the Court held that where assets would only be saleable to a particular specialized market, the Receiver/Manager should seek expert advice from a person with expert knowledge in the particular industry, and take steps to advertise the assets to persons in that specialized industry. The Receiver/Manager, Dunnet, does not seem to have engaged industry experts in selling the Hotel. Advertisement was not well circulated and focused on the specialized industry.

226. It is highly questionable if Kshs. 157 million was the best price obtainable. The Receiver/Manager appears not to have based the sale on any valuation carried out in the year 2002. There was allusion to valuation carried out in 2001, but even this was not exhibited in Court. He had an obligation to take steps to ascertain the market value of the Hotel, and assess the best price obtainable, in comparison to the market value. There is nothing on record to show he took steps to ascertain the true market value. There is no valuation report among the documents produced by the 2nd and 3rd Respondents.

227. 3rd Respondent's General Manager told the Court the true value of the Hotel, at the time of executing Debenture should have been above Kshs. 800 million. That was in 1988. The Hotel was sold in 2003, 15 years on, and one would expect it was more valuable in 2003 than it was, in 1988. In the Profit and Loss Statement, as at 31st August 1998, which is attached to an Affidavit sworn by Samuel Momanyi on 14th November 2012, the Hotel and its assets is given a value of 1.3 billion shillings. Claimant Ong'uti, told the Court the Hotel at one point sat on 32 acres of beachfront. A portion was hived off, and gifted to a powerful KANU regime Cabinet Minister, Nicholas Biwott, who is also alleged by the Claimants, to have some interest Transnational Bank. In the Newspaper Advertisements, Dunnet described the Hotel to comprise 30 acres, having a frontage to an excellent coral sand beach of approximately 300 metres in length. It was stated there was abundant land still available for further development. The best price obtainable can hardly have been Kshs. 157 million.

228. KCB Head of Corporate Support Division, Paul Asamba, wrote to Dunnet on 13th February 2002, suggesting that the Hotel be revalued, and thereafter widely and intensively marketed, to achieve the best value. Dunnet replied, lamenting that the Hotel was in a state of disrepair, and in his estimation would not attract more than Kshs. 100 million. Its roof was leaking. It is strange that the Hotel would be in disrepair, granted the huge amounts of money allegedly loaned to the 1st Respondent over the years, by multiple lenders, purposed on expansion, and infrastructural upgrade. It would not make sense, unless as suggested in the evidence of the Claimants, these loans never reached the intended beneficiary. This was the background against which Dunnet accepted an offer of Kshs. 157 million. He did not carry out a valuation but trusted his own estimation. He adopted rule of the thumb. It is also apparent from the record that he was under pressure from 3rd Respondent to sell the Hotel. 3rd Respondent complained it continued to pay the Receiver/Manager, while KCB and IDB were the actual beneficiaries. There was pressure to have the Hotel sold. The 3rd Respondent assumed a lead role in the transaction. Dunnet had a duty not to cause a precipitate sale, at an undervalue. He sold the Hotel at a 10th of its apparent true value, which can hardly pass for the best price obtainable. The Certificate by Vipul Shah was not based on any assessment of true value. It only served, like other documents exhibited by the 2nd and 3rd Respondents, the objective of meeting formal validity.

229. In ***Cuckmere Brick Co. Limited v. Mutual Finance Limited [1971] Ch. 941***, 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. In the Australian decision ***Forsyth v. Blundell [1973] 129 C.L.R,*** there was similar holding, with the Court finding Receiver/Manager to have acted with gross carelessness or at least, calculated indifference.

230. Dunnet not only failed to attract the best price obtainable, but also, initially sold the Hotel to an entity which was not prepared to pay the lowly full purchase price of Kshs. 157 million. Xenon, going by the evidence of 4th Respondent's Witness, was unable to proceed with purchase, because of financial constraints. The result was that there was further delay is sale of the Hotel, and deferment of the rights of the Employees, to know their employment status, and to have their long-withheld terminal benefits. Payment of their terminal dues was once again deferred and made murkier, and pushed into a black hole, from which this Court has been told, the terminal benefits cannot be retrieved. There can be no greater negligence by a Receiver/Manager than demonstrated by Dunnet, in selling the Claimants' means of livelihood, to an entity that was cash-strapped. Dunnet sold the Hotel to Xenon and went on to organize meetings, and enter into agreement with Xenon on Employees' dues and future. Xenon did not have the ability to meet its end of the bargain. The impression one gets in the end, is that Xenon was a kind of a broker, who Dunnet chose to deal with. Even when sale to Spire was made, there was this posturing that Spire was merely assuming partial obligations under sale. In truth, Spire assumed all obligations. That is why it owns Diani Reef Grand Hotel. Xenon has no interest here. This was negligent exercise of the role of a Receiver/Manager. It can be explained on the ground that Dunnet was under pressure, instructions and directions of Transnational Bank to sell the Hotel. He was to all intents and purposes, an agent of Transnational Bank. Although Kenyan Law of receivership is long wedded to the concept of a Receiver/Manager, as an agent of the Debtor Company, the conduct of the Debenture Holder can lead to holding of the Receiver/Manager as an agent of the Debenture Holder. This is the case where appointment in the first place is invalid. Secondly, the exception to the general rule applies where the Debenture Holder enters the field of receivership, issuing instructions and directions upon the Receiver/Manager on discharge of the role with regard to sale of Debtor's assets. Dunnet's conduct amounted to carelessness, or calculated indifference within the context of ***Forsyth v. Blundell***. He did not exercise reasonable care to the Claimants who, in the estimation of the Court, satisfied the test of proximity to the receivership.

231. The Claimants fault the 2nd Respondent for not inviting them to a Creditors' meeting. The evidence given by Momanyi is that around 2nd September 1998, the 1st Respondent's General Manager called a Senior Staff meeting. He introduced the newly appointed Receiver/ Manager. Dunnet explained he had been appointed Receiver/Manager. He would continue running the Hotel with the current Employees. The intention was not to close down. He asked for a list of Employees and computation of dues owing to them. These were supplied to form part of Receiver/Manager's Statement of Affairs.

232. Momanyi states there was another meeting involving Dunnet, Momanyi and the Shop Steward. The Receiver/Manager assured the Unionisable Employees the Hotel was not closing down, and Employees would be paid just like any other Creditors. If the Hotel was sold, Employees would not be affected adversely as the Hotel would be sold as a going concern.

233. There were other subsequent meetings alluded to in the evidence of Momanyi. The Court does not think it was a significant departure, in not having all Creditors in a meeting under one roof. The meetings held between Momanyi, Shop Steward and Receiver/Manager, met the minimum objectives of a Creditor's meeting. The issues affecting the Employees were discussed, and a way forward explored.

234. The Receiver/Manager went on to prepare an Interim Report of Affairs, dated 17th November 1998, addressed to 3rd Respondent. He reports that Employees had been paid their salaries for August 1998, and were most keen to see past misfortunes of the Hotel put behind them. Employees keenly supported the decision to keep the Hotel functioning for the future.

235. The Court does not therefore agree with the Claimants that there were no Creditors' meetings. There

were meetings where their concerns were aired, and undertaking made by the Receiver/ Manager to retain them in employment.

236. The sale of Hotel cannot have been done lawfully, appointment of Receiver/Manager having been substantively invalid. As held in ***Azim Virjee & 2 Others v. Glory Properties Limited*** the Receiver/Manager was masquerading and everything done under his purported power as a Receiver/Manager, including sale of the Hotel is null and void. At the time of appointment, the power of sale had not accrued or crystallized. 3rd Respondent's evidence is that it did not know why it appointed 2nd Respondent.

[d]. ***Remedies***:-

237. The Respondents uniformly agree the Claimants are owed terminal dues, but are unable to agree who should pay these dues. There is little doubt that Claimants have endured for long, without being paid what they had worked for. Some have died pursuing these dues; others seem to have despaired, and walked away from the proceedings.

238. It was agreed between the Employees, and the Receiver/Manager, that Employees, would continue working and would receive all their terminal dues, for the totality of their years of service. A computation was done in 1998 and in 2003 at the end of the purported Receivership.

239. Liability for payment of these dues must also be seen against the concept of a going concern. The Hotel, as shown from the earliest assurances by Dunnet to Employees, would continue functioning, without any adverse effect on the Employees' terms and conditions of service.

240. The Receiver/Manager, in his Advertisements for Sale, offered the Hotel for sale as a going concern. This in the view of the Court, meant the business would remain open and functional, without threat of closure in the foreseeable future. The business remained the same, under the name Diani Reef Grand Hotel. It was acquired as such by Xenon, then Spire.

241. Xenon understood this, as shown through in the discussion and agreement between Xenon and Dunnet, captured in the letter of 20th May 2002. The Employees were to continue in employment.

242. It should similarly have been understood by Spire that the Hotel was offered as a going concern. Spire took over the Employees in what was said to be provisional basis. The Court has found Spire was an Employer to the Claimants, even though for a fleeting moment. It has also been concluded that Spire offered to re-employ the Claimants once the Hotel reopened. This is in keeping with the sale of the business as a going concern.

243. Clause 14 of the Sale Agreement involving Xenon without Spire, required the Receiver/Manager to terminate Employees' contracts on completion of sale, and pay them their dues.

244. The completion date was of course affected with the entry of Spire. The Receiver/Manager as shown with regard to Minah issued termination letters and paid terminal benefits computed only under the period of receivership. The 4th Respondent however took over as a Successor Employer, remunerating the Claimants and finally advising the Claimants on temporary closure and reopening of the Hotel.

245. Clause 3.2.7 of the Sale Agreement involving Spire again required the 1st Respondent, 2nd Respondent and 3rd Respondent to provide Spire with letters of termination, and pay all the amounts due as of the date of termination. This demand by Spire was to the other 3 Respondents. While Receiver/Manager appears to have issued letters of termination and paid dues only for the period starting in 1998, it is the common evidence of the Parties that terminal dues for the period of the cumulative years of service, were not paid. Notably, Raffman Elms & Virdee Advocates for Spire wrote to Transnational Bank on 22nd October 2002, prior to incorporation of Spire, asking for a complete list of serving Employees together with details of when they started employment, and details of their current salary.

There was specific request for the date when Claimants were employed, which would indicate Spire was alive to the need for payment of Employees' dues, based on the totality of the Employees' creditable years of service.

246. The 4th Respondent did not disclose to the Court if these details were supplied. 4th Respondent went ahead to supplant Xenon and engage the Claimant momentarily, with promises to continue employing the Claimants once the Hotel reopened.

247. The letter from Raffman to 3rd Respondent, dated 25th October 2002, like previous letters involving 3rd Respondent relating to sale of the Hotel, again shows 3rd Respondent engaged directly with Purchasers, without the involvement of the purported Receiver/Manager. The letter was not even copied to the Receiver/Manager. This was a Debenture Holder sidestepping the Receiver/Manager it had purportedly appointed, and engaged directly with a Purchaser of Debtor Company's property.

248. The 4th Respondent made reasonable enquiries before purchase, but given its manner of supplanting Xenon, does not convince the Court that it was a mere innocent purchaser for value without notice. The infirmities in the transaction leading to the acquisition of the Hotel by Spire ought to have been manifest to Spire. There was a call for list of Employees and evidence that letters of termination had issued, and all terminal benefits paid. Did the 4th Respondent have evidence that all terminal dues were paid, before acquiring the Hotel?

249. Spire continued to run the Hotel, re-using the name Diani Reef Grand Hotel. The name was reserved with the Registrar of Business as shown in the letter by Dunnet, dated 15th April 2003. All indications are that the business continues much as before, a practice often referred to as the phoenix syndrome. Spire operates from the same premises, using the same assets, and exploiting the goodwill which was built over the years, from the toil of the Claimants. Not surprisingly, unpaid Creditors become aggrieved by such practices.

250. The 1st Respondent did not participate in the trial. It was not clear to the Court if the 1st Respondent is still a registered Company, or was dissolved after losing the Hotel. The Company was not liquidated. So long as the 1st Respondent is in existence, it cannot be absolved from meeting its former Employees' liabilities.

251. 2nd and 3rd Respondents as discussed above acted irresponsibly in putting in place a Receiver/Manager, and in exercise of receivership.

252. Appointment of the Receiver/Manager was not valid. 3rd Respondent is shown is a string of letters, to take a lead role in selling the Hotel, giving instructions and directions to the purported Receiver/Manager, and dealing directly with the 4th Respondent, on Sale.

253. As suggested above, the Debenture/Holder, even were it to be assumed there was a validly appointed Receiver/Manager, assumed the role of a principal and treated Dunnet as its agent. To the extent that appointment was invalid, the Debenture/Holder cannot argue that Dunnet was solely an agent of the Debtor Company.

254. Under the impugned Deed of Appointment of Receiver/Manager and Indemnity, 3rd Respondent undertook to indemnify 2nd Respondent for claims and damages incurred by the 2nd Respondent, for anything purported to be done by the 2nd Respondent, and for matters connected therewith. 3rd Respondent would indemnify 2nd Respondent, to the extent that the 1st Respondent was unable to indemnify the 2nd Respondent. The 2nd Respondent was not presented to this Court. His whereabouts is unknown. His ability to meet any obligations decreed in favour of the Claimants cannot be vouchsafed. The 1st Respondent similarly did not participate in the proceedings.

255. In all the Sale Agreements, and in the evidence of the Parties, it was agreed Claimants merit their terminal dues. There is no shortage of material, and oral evidence, to leave any doubt in the mind of the Court that the Claimants merit payment of their terminal dues.

256. Employees terminal dues must not be allowed to fall into a bottomless black hole and remain there, irretrievable forever, due to acts of corporate scheming. General Manager Sheikh told the Court that all concerned Creditors took a hit. In the view of the Court Employees, need the protection of the Court. The Secured Creditors such as KCB and IDB gave their consent to Transnational Bank and Dunnet to go ahead with sale. They were owed huge amounts. KCB was owed Kshs. 531 million. They had prior charge over the Hotel which was sold. KCB and IDB are Institutions with Government Shareholding. They can afford to hemorrhage such huge amounts. Employees have no-one to bail them out when hit. They are not like Banks, which can have their debts turned to equity. These Banks can be bailed out by the State. Although KCB and IDB were Secured Creditors, they were willing the let the 3rd Respondent appoint a Receiver/Manager solely, and consented to the sale of the Hotel.

257. It was also mentioned by the Claimants, but without conclusive proof, that the persons behind the shady deals were prominent persons in the Moi Regime. Moi, Biwott and Kulei were mentioned. Transnational Bank was alleged to be owned by these individuals, which would explain why KCB and IDB, Banks with substantial state participation, surrendered their priority rights to Transnational Bank. It was also suggested in the evidence of the Claimants that at some point, it had been suggested to aid Hotel Span in meeting its foreign debt, through a mechanism reserved for Parastatals. The Directors of the Hotel, this would suggest were, persons with some links to the KANU regime. Why would a private Hotel pay its foreign debt through a mechanism reserved for state companies? It is not beyond belief, that there was some degree of influence by these persons in the transactions affecting the Hotel and the respective State Banks. In the High Court Case of ***Azim Virjee*** the Court suggested the confounding appointment of a Receiver/Manager was driven by certain corrupt objectives. There are certain pointers in the current dispute that underlying the sale of the Hotel, were corrupt influences.

258. It must be appreciated this business was built by the toil of the Claimants. Some worked for as many as 20 years. To deny them their dues, after such long service, would result in this Court endorsing the view that they worked in servitude. The current law governing insolvency of Employers is under Part 8 of the Employment Act 2007. It allows the Cabinet Secretary for Labour, upon application, to pay an Employee of an Insolvent Employer, from the National Social Security Fund, the amount which in the opinion of the Cabinet Secretary, the Employee is entitled to with regard to the debt. This mechanism was not available to the Claimants, as this law was not in force. The N.S.S.F itself was among the Creditors whose statutory dues, could not be paid by the Receiver/Manager. Rogue corporate behaviour weakens social security systems.

259. As to who should pay, the Court is persuaded the 1st Respondent, 2nd Respondent, and 3rd Respondent are liable. The 1st Respondent is not in liquidation. It directly employed the Claimants. The 2nd Respondent adopted the Claimants' existing contracts of employment, and offered to retain the Employees, and pay them all accrued dues. The Claimants continued to work after the 2nd Claimant was irregularly appointed as Receiver/Manager by the 3rd Respondent. 3rd Respondent undertook to indemnify the purported Receiver/Manager against all Claims made against the Receiver/Manager in event the 1st Respondent was unable to do so. It has not been shown by the 3rd Respondent that the 1st Respondent, or 2nd Respondent are available to pay the Claimants their dues. It was a condition of Sale under Clause 3.2.7 of the Supplemental Agreement that 1st, 2nd and 3rd Respondents would deliver to the 4th Respondent letters of termination of the Claimants' employment, and pay all amounts due as of the date of sale. All 3 Respondents were to pay amounts due to the Claimants. 3rd Respondent as concluded above conducted itself as a Principal to the 2nd Respondent with regard to the sale of the Hotel. It adopted the lead role, engaging with Spire, even without the involvement of the Purported Receiver/Manager. The amount due to the Claimants was known to the 2nd Respondent as at the time of sale of the Hotel. Terminal dues as communicated to 2nd Respondent by the Claimants, and acknowledged in the evidence of the Respondents, should therefore be paid by the 1st, 2nd and 3rd Respondents.

260. The 4th Respondent did not give any undertaking to pay the Claimants accrued dues, other than what had accrued by way of overtime and annual leave, as the time 4th Respondent took over the Hotel. The 4th Respondent, as shown in the letter to Minah dated 26th April 2003, also undertook to pay the Claimants remuneration for 14 days at the rate previously paid by the Receiver/Manager. There is nothing on record to suggest however, that the 4th Respondent would pay terminal dues owing to the Claimants. There is no justification in requiring 4th Respondent to pay Claimants' terminal dues.

261. The Claimants pray for general damages. Their terminal dues have been withheld from 2003. They suffered as a result of the wrongful receivership imposed on their former Employer by the 3rd Respondent. They suffered too as a result the sale transactions. They have suffered economically as well as emotionally. Their 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. The 2nd and 3rd Respondents' conduct, to the 1st Respondent, was the conduct of trespassers. The Claimants suffered as they were in close proximity to the acts of the trespassers. Damages are also merited for breach of contract directly against the 1st Respondent and 2nd Respondent as a Successor Employers, for wrongful termination. Claimants' contracts were terminated without payment of their agreed terminal dues. They were advised they would go working for Xenon, which never happened. There was direct breach of contract against the 1st and 2nd Respondent.

262. General damages are awardable against all Respondents from the perspective of a going concern. The 4th Respondent made a promise to re-employ the Claimants once the Hotel re-opened. The Hotel re-opened as a phoenix, but there is no evidence the 4th Respondent lived up to its promise. Re-employment would have mitigated the suffering of the Claimants. The 4th Respondent created in the Claimants minds legitimate expectation, that flawed acquisition of the Hotel by the 4th Respondent would not end the careers of the Claimants, and there would be re-employment. The Court does not think that Employees, and their dues, can be equated to inanimate encumbrances, as submitted by the 4th Respondent. The 4th Respondent purchased a property which was sold as a going concern, and found an agreement to retain the Employees concluded between the 2nd Respondent and Xenon, at the time the 4th Respondent supplanted Xenon. 4th Respondent breached its obligation to the Claimants. It made a promise to re-employ the Claimants, then closed the Hotel, reopened under the name Diani Grand Reef Hotel, the brand built by the Claimants over the years, but appears not to have recalled the Claimants at any time after reopening. Phoenix syndrome must be discouraged, and damages against the 4th Respondent, are merited as a way of discouraging phoenix activities. Unethical corporate practices must not be allowed to take root, more so when directed at disadvantaged Employees. The manner of termination of the Claimants' contracts as soon as the 4th Respondent acquired the Hotel, given that the Hotel was sold as a going concern, was wrongful and the Claimants merit damages. All the Respondents were involved in various questionable transactions as argued elsewhere in this Judgment. The infirmities of these transactions occasioned the Claimants economic and emotional harm. Had the Respondents acted above board, such harm would not have been inflicted upon the Claimants.

263. General Damages are granted to the Claimants, against the Respondents, severally and jointly based on the above reasons.

264. On the quantum, the Claimants rely on the ***High Court decision of C.Mehta & Company Limited v. the Standard Bank Limited [2014] e-KLR*** where the Plaintiff was granted Kshs. 3 million for in general damages for breach of contract. They urge the Court to grant each of them Kshs. 1 million, which they submit is a modest sum, compared to general damages granted in the above decision. The High Court decision was restricted to general damages for breach of contract. As explained by the Court, the Claimants herein would merit general damages for much more than breach of contract. Considering the number of Claimants involved however, and the fact that they have been allowed the prayer for terminal dues and interest, the Court is inclined to allow general damages assessed at a lower amount than submitted by the Claimants.

265. ***The Court grants each Claimant general damages at Kshs. 500,000.***

266. ***Costs granted to the Claimants against all the Respondents.***

267. ***Interest granted on terminal dues at the rate of 14% per annum from the date of filing the Claim.***

IN SUM, IT IS ORDERED:-

a) Preliminary objection raised by the Respondents is res judicata, without merit and is rejected.

b) It is declared termination of the Claimants' contracts of employment was irregular, unlawful and improper.

c) The Claims by the 10th, 16th, 18th, 19th and 25th Claimants have abated.

d) The Claims by 2nd, 32nd, 46th, 50th, 53rd, 54th, 58th, 62nd, and 64th have not been established and are rejected.

e) Rosebud Stella Mubiru shall represent the 4th Claimant, while Koon Choo and Christine Lyn Jogschat shall jointly represent Siegfried Jogschat the 5th Claimant.

f) The 1st , 2nd and 3rd Respondents shall severally and jointly pay terminal dues as shown in the computation drawn on 16th April 2003, to the successful Claimants as follows:-

1. Miriam Saidi Mwabora- Kshs. 64,647

2. Benson Kiteto- Kshs. 88,804

3. Rosebud Stella Mubiru- Kshs. 7,849,293

4. Koon Choo & Christine Lyn Jogschat- Kshs. 9,562,537

5. Anthony Bwire Akukua- Kshs. 15,814

6. Joseph Ong'uti- Kshs. 3,189,293

7. Stephen K. Ndegwa- Kshs. 826,364

8. Samuel G. Momanyi- Kshs. 1,640,543

9. Daniel O. Omuya- Kshs. 322,032

10. Obadiah G. Mbugua- Kshs. 170,209

11. Espie Njuguna- Kshs. 306,507

12. Moses S. Kilusu- Kshs. 348,042

13. George K. Mulwa- Kshs. 716,835

14. Swalleh K. Kurauka- Kshs. 120,008

15. Rashid M. Mademu- Kshs. 403,267

16. Ali Hamisi Mambo- Kshs. 14,784

17. Jackson Muthama Mutiso- Kshs. 92,189

18. Kennedy N. Onchomba- Kshs. 14,784

19. Jonathan Kamanda Nguma- Kshs. 14,784

20. Mwania Kitunguo- Kshs. 92,184

21. Martha Njeri Kigwini- Kshs. 87,881

22. Nancy Njeri Kariuki- Kshs. 82, 839

23. Tom Kigindwa Nyangweso- Kshs. 164,497

24. Jones Kerongo Omweri- Kshs. 51,628

25. Abdul M. Mwedo- Kshs. 133,263

26. Edward Simiyu Makonge- Kshs. 81,328

27. John Ndipo Ishmael- Kshs.43,689

28. Kenneth Zeba Mare- Kshs. 76,017

29. Mejumaa Hamis Macheso- Kshs. 74,393

30. Roselyne Nduta Njenga- Kshs. 75,045

31. Fredrick Nato Wekesa- Kshs. 100,116

32. Sofia Hamisi Mfuko- Kshs. 79,092

33. Pauline Muli Kasiu- Kshs. 87,658

34. Marsden K. Mbiti- Kshs. 74,697

35. Regina Koki Gatilu- Kshs. 101,472

36. Joseph Muma Omwagwa- Kshs. 90,806

37. Asha K. Mbonde- Kshs. 86,778

38. Ali Waturi Mwakutala-Kshs. 103,008

39. Norman Ndambo- Kshs. 157,715

40. Solomon Charo- Kshs.42,739

41. Joseph Lwambi- Kshs. 115,175

42. Kelvin Ngala- Kshs. 51,585

43. Abdallah Mashobo- Kshs.66,372

44. Ramadhan Yawa- Kshs. 70,382

45. Leonard K. Chubua- Kshs. 179,233

46. Athuman Mwaracheti- Kshs. 545,948

47. Rashid Salim Mwakulola- Kshs. 158,735

48. Mwanatumu Omar Nguta-Kshs.77,182

49. John Mokomba Oboiko- Kshs.61,556

50. Ramadhan Mwasera- Kshs. 78,403

51. Samson Kasungu- Kshs. 135,985

52. Dominic Amari Mwarube- Kshs.84,677

53. Deogratis Wandera Ekeya- Kshs. 55,796

54. Saida Mzuri Thoya- Kshs. 75,101

55. Alphonse Ambani Barasa- Kshs. 69,618

56. Mark Moturi Onchagwa- Kshs. 67,338

57. Harrison Nyawa Shehi- Kshs. 63,268

Total……. Kshs.29,603,973

[g] General damages granted to the above 57 Claimants, at Kshs. 500,000 each, total Kshs.28,500,000, to be paid by all the Respondents severally and jointly.

[h] Costs to the Claimants against all the Respondents.

[i] Interest granted on terminal dues amount of Kshs. 29,603,973 at 14% per annum, from the date of filing the Claim.

Dated and delivered at Mombasa this 8th day of September 2017.

James Rika

Judge