



**Maina & 4 others v Maina & 2 others (Commercial Case 394 of 2011)
[2025] KEHC 5295 (KLR) (Commercial and Tax) (25 April 2025) (Judgment)**

Neutral citation: [2025] KEHC 5295 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE 394 OF 2011
JWW MONG'ARE, J
APRIL 25, 2025**

BETWEEN

**FRANCIS CHEGE MAINA 1ST PLAINTIFF
JOSEPH MACHARIA MAINA 2ND PLAINTIFF
JAMES KIHARA MAINA 3RD PLAINTIFF
DEDAN MUTHAIGA MAINA 4TH PLAINTIFF
AMBASSADEUR INVESTMENT (K) LIMITED 5TH PLAINTIFF**

AND

**JOHN KAGUMA MAINA 1ST DEFENDANT
CHARLES KANYUGA MAINA 2ND DEFENDANT
STANLEY KARIUKI MAINA 3RD DEFENDANT**

JUDGMENT

1. In the plaint filed before this court on 15th September 2011 and amended on 28th May 2012 the Plaintiffs are seeking the following reliefs against the Defendants:-
 - a. Special damages for Kshs.620,000,000/=
 - b. Further special damages from October 2011 until the date of judgment or until the defendants shall allow the Plaintiffs joint management, control and/or accounting of the income from the assets in issue with income being calculated on Kshs.5,000,000/= per month or such higher figure as shall be estimated as the actual monthly income on actual auditing of the income from the suit premises;



- c. That this Honourable court do hereby issue an order against the above-named 1st, 2nd and 3rd Defendants/Respondents John Kaguma Maina, Stanley Kariuki Maina and Charles Kanyuga Maina to hereby render account for funds received on behalf of the Ambassador Investments(K) Limited and all transactions pertain to the following accounts from 25th May 2011 until the date of filing this suit: -
- i. Standard Chartered Bank of Kenya Limited, Moi Avenue Branch, Nairobi, Account No. 01XXXX700
 - ii. Commercial Bank of Africa Limited, International House Branch, Nairobi, Account No. 51XXXX009
 - iii. Bank of India Kenya Limited, Nairobi Branch, account No. 50XXXX61
 - iv. Equity Bank Limited, Kimathi Street Branch, Nairobi, Account No. 02XXXX432
- d. That this Honourable Court do issue an order against the above-named JOHN KAGUMA MAINA, STANLEY KARIUKI MAINA and Charles Kanyuga Maina that upon rendering accounts of the above of the following accounts:-
- i. Standard Chartered Bank of Kenya Limited, Moi Avenue Branch, Nairobi, Account No. 01XXXX700
 - ii. Commercial Bank of Africa limited, International House Branch, Nairobi, Account No. 51XXXX009
 - iii. Bank of India Kenya Limited, Nairobi Branch, account No. 50XXXX61
 - iv. Equity bank Limited, Kimathi Street Branch, Nairobi, Account No. 02XXXX432
- e. Interest at prevailing bank commercial rates on the amount quoted in paragraph (a) and (b) above from 25th May 2001 until payment in full
- f. General damages for conversion
- g. Costs and interest
- h. Any other or further order that this Honourable Court may deem just and expedient to grant.
2. The Defendants filed a defence and a counterclaim to the suit. In the statement of defence filed on 12th June 2012 and amended on 14th December 2012, the Defendants admitted the jurisdiction of this court but denied the claim as pleaded in the plaint and urged the court to dismiss the suit. The Defendant then filed a counterclaim seeking for the Judgment against the Plaintiffs in favour of the Defendants for the following:-
- a. A total sum of Kshs.228,662,000/=.
 - b. An order against the 1st, 2nd, 3rd and 4th Plaintiffs to render true and full account of monies belonging to the 5th Plaintiff channelled through Bank Account numbers 017-13-179, 017-611, 11175, 11034 and 017-2159 all held at Kenya Commercial Bank, Moi Avenue Branch, Nairobi.
 - c. A declaration that the Defendants are entitled to a fair share of all monies belonging to the 5th Plaintiff Company found to have been misappropriated and diverted into the Plaintiffs' personal use.



- d. Interest at commercial bank rates on (a) and (c) above.
- e. Costs of the Suit.
3. The 1st – 4th Plaintiffs (“the Plaintiffs”) and the Defendants are brothers and sons of the late Samuel Maina Gatonga (“the Deceased”) whereas the 5th Plaintiff is a company in which the Plaintiffs and the Defendants claim to be shareholders and directors. In their Further Amended Plaint dated 10th June 2021, the Plaintiffs claim that jointly with the Defendants and as beneficiaries of the Deceased, they purchased the Company known as Ambassadeur Investment limited upon terms that each member of the Deceased’s 1st Household which included the Plaintiffs and Defendants would be allotted 666 shares each in the Company, that they would automatically become directors of the Company and that they would be entitled to receive dividends.
4. The Plaintiffs aver that the Company, upon the said date of purchase had various assets including: Rajab Manzil (Bilmass Hotel) Building on Tom Mboya street bequeathed to their mother whose collection of income/rent is collected by the Company as trustee on her behalf; A Building at Gikoe, Murang’a; A bungalow in Buruburu Estate as trustee on behalf of the estate of VWM; A stall at Kibera Market as trustee on behalf of the estate of VWM; House and shops at Mulango Kubwa, Nairobi, as trustee on behalf of the estate of the VWM; Flats and shops at Spring Valley Shopping Center, in trust for the estate of VWM; Godowns at Athi River on L.R. No.337/853; Ambassadeur Hotel, Nairobi (L.R. No. 209/8688); Capital House, Nairobi (L.R. No.209/8688) and Spring Valley Nairobi-Petrol Station leased to Oil-Libya Petroleum Company Limited.
5. The Plaintiffs contend that the collective income derived from the above listed properties and due to the Company was and has been in the excess of Kshs 5 million per month as from May 2001 until 31st May 2012 when their management was taken over by Messrs. LLOYD Masika Limited pursuant to a court order issued in the subject matter on 24th April 2012.
6. The Plaintiffs further contend that during that period, the Company has been under the sole control and management of the Defendants who were duty bound and had a fiduciary duty to act in the best interests of the Company. The Plaintiffs claim that contrary to this fiduciary duty to the Company and by extension the beneficiaries of the Deceased, the Defendants illegally and unlawfully have proceeded to misappropriate monies due to the Company by collecting such income in the form of rent and diverting it into their personal use and gain and for the reasons aforesaid have been put to great trouble, inconvenience and have suffered harm and loss.
7. The Plaintiffs thus claim special damages of Kshs.1,011,543,539.00/= and further special damages from October 2011 until date of judgment and/or until the day the Defendants shall allow the Plaintiffs joint management, control and/or accounting of the income from the assets in issue with income being calculated on Kshs.5,000,000.00/= per month or such higher figure as shall be estimated as the actual monthly income on actual auditing of the income from the aforementioned properties.
8. They also seek an order of accounts from the Defendants for funds received on behalf of the Company between 25th May 2001 until 31st May 2012 in respect of various bank accounts; General damages for conversion, costs and interest.
9. In response, the Defendants filed a Further Amended Statement of Defence and Counterclaim dated 30th August 2021 wherein they stipulated that they did not owe the Plaintiffs the monies claimed. That by an agreement for sale dated 5th May 2001, the 1st and 2nd Defendants jointly with one JWM in their capacity as administrators of the Deceased purchased all shares in the Company for a consideration of



Kshs. 121 million and that at the time of the purchase, the only asset owned by the Company was a property situated in the City of Nairobi known as LR 209/8688.

10. They claim that when the Company was being acquired, it was operating at a loss and it took the efforts of the Defendants to turn it around from loss to profit making and initially, profits made by the Company were invested in the rehabilitation of one of the Deceased's properties, Rajab Manzii, which was converted into a hotel (Bilmas Hotel) and shops. That Bilmas Hotel was started and run by mutual agreement where the Plaintiffs were to manage the same and the Defendants were to manage Hotel Ambassadeur. The Defendants state that a statement of account for the year 2008 for the month of April shows the 2nd and 3rd Plaintiffs actively participating in the withdrawal of the funds received by Bilmas Hotels which funds were never accounted for.
11. The Defendants aver and admit that following the death of one of their sister, VWM in 2002, the Defendants jointly with the Plaintiffs mutually agreed that pending the issuance of the Grant of Administration in respect of her estate, all the assets that had been assigned and, or allocated to her will be managed by the Company in trust for her estate. That such assets include L.R. No. 1870/VII/144 — Spring Valley, Nairobi L.R. NO. 36/VII/556 — Mlango Kubwa, Nairobi and Stall No. 380 Kibera Market also in Nairobi. That in or about November 2007, following discussions among members of the Deceased, the Company was allocated several assets forming part of the Deceased's estate which assets are listed on the distribution schedule in the Certificate of Confirmation of Grant in Succession Cause No. 361 of 2001.
12. The Defendants maintain that contrary to the allegations in the Complaint, they have managed the assets of the Company in their control diligently and have rendered full and accurate accounts of the Plaintiffs whenever required to do so. That the contention that they have misappropriated monies due to the Company is both false, malicious and baseless. The Defendants dispute the manner in which the claimed Kshs. 1,011,543,539.00/= was arrived because from the Financial Statements contained in the Company's report for the year 2010, it is clearly seen that the Plaintiffs in that year declared to the Kenya Revenue Authority that no profit was made for the year 2010 and the Statement of Comprehensive Income clearly showed that the operating and administrative expenses for the year 2010 were higher than that income generated for the same year.
13. The Defendants state that this is a complete opposite of the report prepared by the Plaintiffs for the estimated period of between 10 and 11 years from May 2001 to May 2012 which apparently estimated the profit for the 10 and 11 years at Kshs. 1,011,543,539.00/=. That the figure highlighted herein is allegedly arrived at after the profits of each year between 2001 to 2012 were calculated and yet in the year 2010, the Plaintiffs indicated that no profits had been made.
14. As such, the Defendants state that the Plaintiffs have no legal capacity to demand an account on any money received or held by the Defendants on behalf of the Company and that their claim is totally misconceived, bad in law and discloses no cause of action against the Defendants.
15. They conclude that the gravamen of the Plaintiffs' litigious appetite is founded on an unjustifiable fundamental misapprehension, first, on the imaginary assumption that they are entitled to the proceeds from the operations of the Company having based its reasoning on unproven and unsubstantiated allegations; and second, erroneous misinterpretation of laws.
16. In their counterclaim, the Defendants aver that between March and November, 2011 the Plaintiffs illegally and forcefully took over that control of Ambassadeur Hotel and during the said period all monies accruing to the hotel business was misappropriated and converted



into the Plaintiffs' personal use. The Defendants thus estimate that the total amount misappropriated at Kshs.36,000,000.00/= and claims the same from the Plaintiffs.

17. The Defendants further claim that some of the funds accruing to the Company were channeled through various bank accounts exclusively in the control of the Plaintiffs before being shared out and the Defendants thus claim from the Plaintiffs, full and true accounts of all monies belonging to the Company channeled through the said bank accounts, including but not limited to all deposits and withdrawals.
18. In total, the Defendants thus seek Kshs.228,662,000.00/=, an order of accounts of the said bank accounts, a declaration that the Defendants are entitled to a fair share of all monies belonging to the Company found to have been misappropriated and diverted into the Plaintiffs' personal use, interest and costs of the suit.
19. When the matter was set down for hearing, the Plaintiffs relied on the testimony of the 2nd Plaintiff, who adopted his witness statement dated 2nd March 2015(PW 1). He produced the List and Bundle of Documents dated 15th September 2011(PEXhibit 1- 11) which included: A Letter from the Registrar of Companies to SM Muhia & Company Advocates dated 18th July 2011; A Letter from Paragon Property Consultants Limited to Tenants of Bilmas Hotel dated 2nd August 2011; A Demand Letter from Messrs. Khaminwa & Khaminwa Advocates to the Defendants dated 18th August 2011; A Letter from Messrs. Khaminwa & Khaminwa Advocates to the Registrar of Companies dated 17th August 2011; Rent Schedule for the subject matter as at 1st June 2011; Consent to distribute the estate of the Deceased in Succession Cause No. 361 of 2001; Letter from Messrs. Kirundi & Company Advocates to Messrs. D.V. Kapila & Company Advocates dated 9th April 2001; Agreement for the purchase of the Company dated 25th May 2001; Certificate of Confirmation of Grant in Succession Cause No. 361 of 2001 dated 3rd July 2008; Chamber Summons application for leave to apply for orders of mandamus in HC Misc. Application No. 218 of 2011(JR) and; Statutory Statement in HC Misc. Application No. 218 of 2011(JR).
20. PW 1 also produced the List and Bundle of Documents dated 2nd March 2015(PEXhibit 12-19) which included: Certificate of Confirmation of Grant in Succession Cause No. 361 of 2001; Orders issued on 24th April 2012 and 29th May 2012 placing the management of the assets the subject of this matter under the management of Llyod Masika Limited; Minutes of the 1st meeting held with Llyod Masika Limited pursuant to the orders of 29th May 2012; List of tenants in the premises, Ambassadeur Hotel building, Spring Valley Shopping Center, Mlango Kubwa, Capital House, Rajab Mazil Building, Athi River Godowns, Kibera Stall and Buruburu Bungalow; Breakdown of rent payable by each tenant in the aforementioned premises; Lease status for each tenant in each of the premises and the Lease document for the petrol station at Spring Valley Shopping Center leased to Mobil (K) Limited; Receipts of Ambassadeur Hotel for the years 2006-2011 and; Audited Accounts by JW Matheka Associates in respect of the approximate income for the period in issue in respect of the premises.
21. PW 1 also produced a Supplementary Bundle of Documents dated 29th March 2016(PEXhibit 20-23) which include: Copy of minutes of the meeting held on 18th June 2001; Letter from Njumbi Chief's office dated 5th February 2001; Petition for a special limited Grant in Succession Cause No. 361 of 2001 filed on 25th April 2001 and; An order for Special Limited Grant issued on 4th May 2001 in Succession Cause No. 361 of 2001. He further produced a List and Bundle of Documents dated 10th April 2017(PEXhibit 23-29) which include: Letter dated 10th June 2014 from KRA, Letter dated 5th August 2016 from KRA, Letter dated 6th October 2016 from KRA, Letter dated 27th October 2016 from Co-operative Bank, Real Time Gross Settlement (RTGS) Advice from NIC Bank for a



transaction made on 2nd November 2016 and RTGS advice from Co-operative Bank for a transaction made on 16th November 2016.

22. The Plaintiffs also called as their witness, Jones Nzioka Matheka(PW 2), a Certified Public Accountant who relied on his witness statement dated 2nd March 2015 and produced his Expert Report dated 11th July 2012(PExhibit 30). On their part, the Defendants relied on the testimony of the 2nd Defendant(DW 1) who adopted his witness statements dated 12th June 2012 and another one filed in court on 28th July 2015. He produced the Defendants' List and Bundle of Documents dated 12th June 2012(DEXhibit 1-4) which include: Various correspondences dated 21st June 2011, 9th May 2011, 14th April 2011 and 19th September 2011; Certificate of Registration number 354603 for Hotel Bilmas; Certificate of Incorporation for Hotel Bilmas Limited and; the Ruling of the court dated 13th March 2012 in HCCC No. 399 of 2011. He also produced the List and Bundle of Documents dated 28th July 2015(DEXhibit 5 – 19) which include: Copy of handwritten notes of a meeting of the parties held on 15th April 2011; Landlord's Notice to terminate tenancy dated 19th August 2011; letter dated 29th August 2011(to Colour view Studio) in Misc. Application No. 218 of 2011; Supporting affidavits of the 2nd Plaintiff sworn on 15th September 2011 and 29th November 2011; affidavit of WT together with annexures thereto sworn on 6th September 2011 in BPRT case No. 590 of 2011; Copy of Certificate of Registration of Hotel Bilmass; Copy of Certificate of incorporation of Hotel Bilmass Limited; List of directors of Hotel Bilmass Limited, bank statements for various account numbers at KCB, payment receipts, vouchers, invoices, memos and schedules.
23. After the hearing, the parties were directed to file written submissions which are on record and together with the pleadings and evidence on record, I will make relevant references to in my analysis and determination below.

Analysis and Determination.

24. it is trite that the standard of proof in civil cases is on a balance of probability and that the burden of proof is on the party alleging the existence of a fact which he wants the Court to believe. This is anchored in sections 107, 108 and 109 of the Evidence Act(Chapter 80 of the Laws of Kenya) which provide in part that:-

“ whoever desires any Court to give Judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist” and that “When a person is bound to prove the existence of any fact it is said that he burden of proof lies on that person”.

(see Ignatius Makau Mutisya v Reuben Musyoki Muli [2015] KECA 612(KLR). The Court of Appeal in James Muniu Mucheru v National Bank of Kenya Limited [2019] KECA 1058 (KLR) simply put it that ‘Courts will make a finding based on which party’s version of the story is more believable.’

It is from the above premise that I now delve to the issues arising from the suit and the counterclaim.

25. I have carefully considered the evidence availed to the court by the parties both in support of the Plaintiff and the Counterclaim and the pleadings filed thereto and the rival written submissions by the parties. Upon careful analysis of the same I find that the court needs to determine the following issues to wit:-
- a. Whether the Plaintiff's have locus standi to bring the present suit
 - b. If the answer to the above is yes, whether the plaintiffs have established a claim for an award of special and general damages as pleaded in the Plaintiff together with interest at prevailing commercial bank rates?



- c. Whether the Court should order the defendants to render accounts in the various bank accounts as pleaded in the Plaint for the period between May 2001 and September 2011
- d. Whether the Defendants have established their Claim as pleaded in the Counterclaim.
- e. Who bears the costs of this suit.

Whether the Plaintiffs have locus standi to bring the present suit

26. I note that the Defendants filed a Preliminary Objection dated 16th December 2019 challenging the competence of the suit for the reasons that the Plaintiffs are neither Bonafide shareholders nor directors of the Company and that they have contravened section 238 of the *Companies Act* (Chapter 486 of the *Companies Act*) by not filing a derivative claim. However, I find that this Objection is flawed for a number of reasons. The predecessor of the Court of Appeal in *Mukisa Biscuit Manufacturing Co. Ltd v. West End Distributors Ltd. (1969) EA 696* and affirmed by the Supreme Court in *Joho & another v Shahbal & 2 others [2014] KESC 34 (KLR)* held that a preliminary objection ‘....consists of a pure point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit..... It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.’
27. It is clear that the aforementioned Objection is blurred by factual details calling for evidence as the Defendants is inviting the court to infer to the evidence so as to ascertain whether the Plaintiffs are directors and/or shareholders or members or former members of the Company. The Defendants are also inviting the court to check whether all directors of the company have been enjoined in this suit and if not, the reasons why that is. Among the documents filed by the Plaintiffs is a consent to distribution of the assets of the Deceased in Probate and Administration Cause No. 361 of 2001, estate of Samuel Maina Gatonga clearly demarcating how the shares in Ambassaduer Investment limited were to be distributed equally between the Plaintiffs and the Defendants. It is therefore clear in my mind despite the failure by the Administrators to ensure that the shares were duly allotted and the Companies Register updated to reflect as heirs and beneficiaries of the estate, that the Plaintiffs as beneficiaries of the estate of their late father, Samuel Maina Gatonga have locus standi to bring the present suit.

Whether the plaintiffs have established a claim for an award of special and general damages?

28. Having affirmed that the Plaintiffs have the locus to file the present suit, I now turn to determine whether on a balance of probabilities established their claim for the award of Special and general damages. It is clear that the Plaintiffs and the Defendants are siblings. The subject matter of the Plaintiffs’ claim and the Defendants’ Counterclaim is rent that each group alleges that the other collected during certain periods of time when either group was allegedly in control of management of their late father’s properties.
29. Save for the Ambassadeur Hotel, all other properties were receiving income through rent collection. An examination of the evidence adduced shows that the Defendants did indeed control the collection of the rent. In his ruling dated 24th April 2012, Justice J. M. Mutava (as he then was), stated as follows:-

“The Plaintiffs are aggrieved that collection of rent and other income of the properties is currently within the control of the defendants as the same is collected by an estate agent appointed exclusively by the defendants. They also seek orders that the defendants should give an account of all such income. On the other hand, the defendants claim that the



plaintiffs are non-director shareholders and should not therefore be allowed to meddle with the management of the properties and income of the company”.

In a subsequent ruling dated 29th May 2012, the Judge Justice J. M. Mutava (as he then was), appointed Lloyd Masika Limited to manage all the properties with effect from 1st June 2012.

30. The Plaintiffs have filed a claim to be paid as the sum of Kshs.1,011,543,539/= as special damages; and the additional sum of Kshs.5,000,000/= per month from October 2011. As I have earlier in this decision, the Plaintiffs have specifically pleaded the amount being claimed. To support the claim, they called PW 1 who laid a basis for the claimed amount and then called PW 2, the auditor to support the claim.
31. PW 2, an Auditor from J. N. Matheka & Associates produced a Report dated 11th July 2012 at pages 151 to 172 of the Plaintiffs’ Trial Bundle dated 2nd February 2020. He testified that the report covered the period between May 2001 and May 2012. In the report produced at page 153, the Plaintiffs confirm that they supplied PW 2 with the Rental Schedules with the prevailing rates, Accommodation cards for the Ambassadeur Hotel for the period of 2006 and 2011, Bank statements for some of the Company accounts and other related bank accounts. At page 155 of his report, PW 2 extrapolated the income to a period monthly, annually and for 11 years, between May 2001 and May 2012. This amount came to Kshs.1,011,543,539/=.
32. I have perused the report and noted the report covers all the properties the Plaintiffs and the Defendants were disputing over. At page 150 is a summarized list of Land Rates, Land Rent and Insurance Costs. In summary, the costs summarized there are as follows: Rates payable per annum Kshs. 645,796.00 Land Rent payable per annum Kshs. 711,683.00 Land Rent and rates per annum Kshs.1,357,479/= bringing the total for the rates and rent due during the period in question to Kshs. 1,357,479/= X 8 years equating to Kshs. 10,859,832/=
33. I however note that the report does not capture other operational expenses incurred in the running of the Ambassadeur Hotel. As the Defendants did not provide any contradictory report or information or rebut in any way the report by PW2, it therefore follows that the same is unchallenged and the court has no difficulties in relying on it as evidence to make its findings in this case.
34. However, and as I have pointed out the expenses with respect to the land rent and rates for all the properties; as well as the operational expenses for Ambassadeur Hotel, have not been applied appropriately. In such a case, the court is left to assess what is a reasonable applicable discounting factor that can assist rationalize the absence of an estimate of the costs and expenses. In addition, there was the seizure of the sum of Kshs. 150,682,355/= on account of Income Tax which can only be taken to suggest that all the tax had been recovered by the revenue authorities.
35. In conclusion, I find that the Defendants are liable to pay the Plaintiffs the special damages claim but the quantum therefore must be reduced appropriately to take into estimated expenses for land rent/ rates be applied as rental income. This is the sum that I estimated to be Kshs.10,859,832/= . With respect to the income from the Ambassadeur Hotel, I have estimated that the sum assessed by PW 2 ought to be discounted by 30% to consider operational costs and related expenses.
36. In this regard I find guidance in the case of South Nyanza Sugar Company Limited v Oreko [2022] KECA 570 (KLR), where the Court of Appeal assessed/computed the expenses and proceeded to award the income less the expenses. Similarly, and in the matter of Micro-City Computers Limited & another v National Social Security Fund Board of Trustees & another [2024] KECA 444 (KLR) The Court of Appeal found that even though special damages had to be strictly proved, where such



evidence had been availed and not challenged, the court was obligated to award such claim. The Court of Appeal stated as follows:-

“ 58. Coming back to the present appeal, the learned trial Judge, while dealing with proof of loss of business and profit by Micro-City, expressed himself as follows in his judgement: “On special damages, the law remains trite that the same must not only be specifically proved but also strictly proved. Having reviewed the evidence I find that the plaintiff did not produce evidence in support of the particulars of loss of business profits and costs. I note that the trial Court disallowed the findings in the audit report and evidence by PW2 solely on the ground that the expenses specified in the report were not supported by any payment documents. The trial Court in my view ought to have analysed the relevance, reliability, and credibility of the findings in the report and evidence, and whether the said evidence was sufficient to make a reasonable assumption or inference as regards the income and expenses that Micro-City would have incurred over the subject period.

61.

.....

.....

66. . In the premises, I find that Micro-City was, based on the evidence on record, entitled to an award of loss of business and anticipated profits, in addition to the award for the various tender preparation costs and consultancy costs which were proved. I accordingly allow the appeal by Micro-City, set aside the award of special damages by the trial Court and substitute therefore an award of Kshs. 103,447,136/=, being loss of anticipated profits.
.....”

37. Guided by the holdings in the above cited cases, I find and hold that the Plaintiffs have established their claim for an award of special damages as claimed in the Plaint. I proceed to compute the Plaintiffs’ claim:-

Amount Kshs.

a. Loss Claim as special damages: Kshs. 1,011,543,539/=

Less Assessed Land rent and rates; Kshs. 10,859,832/=

b. Less estimated discount on expenses

30% X Ambassadeur Hotel

Rooms/Food & Drinks; Kshs. 161,507,744/=

Kshs. 340,198,131/=

Kshs. 501,705,875/=

Less 30% taxes Kshs.150,511,763/=)

Kshs.150,511,763/= 161,371,595/

Net income due to the Beneficiaries (Plaintiffs and Defendants from the suit premises Kshs. 850,171,944/=.



38. It is my finding that both the Plaintiffs and Defendants, being beneficiaries of the estate of the late Samuel Maina Gatonga (“the Deceased”) and as per the Consent filed in P&A 361 of 2001, were to benefit equally from the investments in Ambassador Investment limited and hence should share these profits equally. This would translate to each of the Seven (7) beneficiaries receiving the sum of Kshs.121,453,134.85/= for the period in question. I find therefore arising from the above tabulation the Plaintiffs are entitled to the collective sum of Kshs.485,812,539.40/= and I award the same to the Plaintiffs as special damages. This sum will attract interest at court rates from the date of filing until payment in full.
39. On the Plaintiffs’ claim for a sum of Kshs.5,000,000/= per month, my view is that the claim would amount to a duplication of the interest that the court has found to be payable. In any event, the management of the various properties was handed over to Lloyd Masika Limited, in 2011 and therefore there is no issue of another claim arising.

Whether the Court should order the defendants to render accounts for the period between May 2001 and September 2011

40. Additionally, the Plaintiffs have sought an order that the Defendants render accounts for the Bank Accounts listed in the Further Amended Plaint. The accounts listed are as follows:-
- a. Standard Chartered Bank Kenya Limited
Moi Avenue Branch, Nairobi
Account No. 015700
 - b. Commercial Bank of Africa Limited
International House Branch, Nairobi
Account No. 51009
 - c. Bank of India Kenya Limited
Nairobi Branch
Account No. 5061
 - d. Equity Bank Limited
Kimathi Street Branch, Nairobi
Account No. 02*432

41. From the evidence adduced before this court by the Plaintiffs, it is clear that the above Bank accounts received rental income before the intervention of the court on 29th April 2012 and the subsequent directions issued by Justice Mutava (as he then was) on 29th May 2012. Despite a very clear pleading by the Plaintiffs that accounts be rendered on the receipts banked into the above four (4) accounts, no information has been provided by the Defendants to at least explain the status of the Bank accounts in the said 4 Bank accounts. A careful perusal of the evidence adduced by the parties in support of the Further Amended Plaint on the one hand; and the 1st, 2nd and 3rd Defendants’ Further Amended Counterclaim; reveals that at least until 2011, the management of the income of which is claimed by the Plaintiffs and the Defendants was in the hands of the Defendants. I say this for the following reasons and observations:-

- a. In documents filed by the Defendants, the 1st, 2nd and 3rd Defendants Supplementary List of Documents are letters dated 9th May 2011 and 29th July 2011. These letters from Ambassador



Investments Kenya Limited to ALL TENANTS requiring them to bank rent into an account in KCB in the names of James Kihara Maina J/A, KCB-Moi Avenue Branch (Advantage Current Account) Number 11458. This newly opened account establishes that the named 3rd Plaintiff was not a party to the management of rent from the Tenants of Ambassadeur Investment (Kenya) Limited until 2011.

- b. The opening of the KCB Account Number 112*458 is confirmed by DW 1 in his undated witness statement filed on 29th July 2015 in which he states that the KCB account was opened. At page 26 of the Defendants' bundle filed on 28th January 2020, DW 1 states that "Several bank accounts were opened at Kenya Commercial Bank, Moi Avenue Branch, Nairobi specifically for the new hotel and shops at Rajab Manzi building with the 1st and 2nd Plaintiffs, jointly with the 2nd Defendant being the signatories."
- c. Additionally, the parties seem to have opened an account and a business name called Hotel Bilmass. From the evidence adduced by the parties, the business name was registered jointly on 3rd June 2002 by all seven (7) brothers. This business name was converted into a company on 13th December 2006. These documents pages 11 to 13 of the Defendants' bundle of Documents filed on 28th January 2020.
- d. Information about Hotel Bilmass appears to be within the knowledge of the Defendants. In the Supplementary Bundle filed by the 1st, 2nd and 3rd Defendants produced a statement for the Hotel Bilmass for the period 31st March 2008 to 30th April 2008 for account number 017-234684611. Another statement is produced at page 74 of the Defendants Bundle filed on 28th January 2020.
- e. During cross-examination, DW 1 admitted that the Defendants had control of the management of the assets listed in the Further Amended Plaintiff. He also admitted that he was a signatory of the Bank Accounts for the 5th Plaintiff.

42. Section 112 of the [Evidence Act](#) Chapter 80 of the laws of Kenya provides:-

"In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving of disproving that fact is upon him." Where a party has custody or is in control of evidence which that party fails or refuses to tender or produce, the court is entitled to make adverse inference that if such evidence was produced, it would be adverse to such a party. In the case of *Kimotho –vs- KCB* (2003) 1 EA 108 the court held that "adverse inference should be drawn upon a party who fails to call evidence in his possession. " Why withhold such documents if they exist" Section 112 of the [Evidence Act](#) Chapter 80 of the laws of Kenya provides:- "In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving of disproving that fact is upon him."

43. For the above reasons I find that the Plaintiffs have proved on a balance of probabilities that they are entitled to being furnished with the accounts from the Defendants for the income received under the management by the Defendants of the accounts in issue as listed in the Plaintiffs' Further Amended Plaintiff and stated hereinabove.

Whether the Defendants have established their Claim as pleaded in the Counterclaim

44. In their counterclaim, the Defendants seek the sum of Kshs. 228,662,000.00/= and an order for accounts of money channeled through various bank accounts held at KCB Bank. However, DW 1



admitted that he did not provide any evidence as to how this sum of Kshs.228,662,000.00/= was arrived at. The Defendants cannot therefore succeed in this claim as I have not found any evidence that the Plaintiffs misappropriated any money belonging to the Company and therefore, I decline to grant this prayer.

Who should bear costs of this suit?

45. It is trite that costs follow the event. In this case, the Plaintiffs have proved their case against the Defendants to the required standards on a balance of probabilities. I therefore find that it is only just that they be awarded the costs of this suit.

Conclusion and Disposition

46. In conclusion, Judgment be and is hereby entered for the Plaintiff against the

Defendant as follows:-

1. Special Damages assessed at Kshs.485,812,539.40/= with interest at court rates from the date of filing this suit till payment in full.
2. The Defendants are hereby ordered to render accounts to the Plaintiffs as pertains to the following accounts for the period between 25th May 2001 to 31st May 2012 (both dates inclusive) in;-
 - a. Standard Chartered Bank Kenya Limited, Moi Avenue Branch Nairobi Account No. 0150*8700.
 - b. Commercial Bank of Africa Limited, International House Branch, Nairobi Account No.51*009
 - c. Bank of India Kenya Limited, Nairobi Branch Account No.5*61.
 - d. Equity Bank Limited Kimathi Street Branch, Nairobi Account Number 029*32.
3. The Defendants Counterclaim is dismissed in its entirety.
4. Costs of this suit are awarded to the Plaintiffs.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 25TH DAY OF APRIL 2025

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J.W.W. MONG'ARE

JUDGE

In the Presence of:-

Mr. Mwangi for the 1st and 2nd Plaintiffs.

N/A for the 2nd and 3rd Plaintiffs.

Mr. Mbakaya holding brief for Mr. Muchemi for the Defendants.

Amos - Court Assistant

