Gathungu v Ernst & Young LLP (Commercial Case E419 of 2018)
[2025] KEHC 18356 (KLR) (Commercial and Tax) (1 December 2025) (Judgment)

Neutral citation: [2025] KEHC 18356 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

COMMERCIAL CASE E419 OF 2018

JWW MONG'ARE, J

DECEMBER 1, 2025

BETWEEN

LABAN GATHUNGU ..... PLAINTIFF

AND

ERNST & YOUNG LLP ..... DEFENDANT

JUDGMENT

Introduction and Background

1. By a Plaint dated 5th December 2018, the Plaintiff filed the present suit stating that he first worked for the Defendant from 2003 to 2008 and rejoined the firm in 2012 as a Partner -Advisory, with the role of leading the Public Sector Advisory Services line in Kenya, South Sudan and Eritrea. He avers that his efforts revived the largely dormant Public Sector Advisory department, transforming it into the firm's most successful division. He states that on 22nd October 2018, the CEO raised allegations against the Plaintiff concerning Somalia projects, requiring a response within seven days which he submitted through a detailed rebuttal on 28th October 2018, disproving the allegations. That despite this, the Defendant wrote off the response as 'unsatisfactory' and dissolved his partnership via a letter dated 6th November 2018, citing unsatisfactory explanations without substantive justification.

2. The Plaintiff challenged the decision on 8th November 2018, citing procedural unfairness, baseless allegations, and non-compliance with Clause 21 of the Partnership Agreement. The Defendant upheld its position on 13th November 2018, and the Plaintiff claims that it ignored his concerns and demanded that he vacate the premises. The Plaintiff further claims that two days before the letter of allegations, the Defendant issued a profit-sharing notification dated 19th October 2018 with a 27.4% negative variation. The Plaintiff asserts this was a fictitious profit-sharing notification done with fraudulent intent to deprive him of terminal benefits, as it was inconsistent with the firm's performance, his contributions,

and the allocations of peer partners. As such, he is seeking several orders primarily relating to the declaration that his termination was unlawful and for his reinstatement as a partner or, alternatively, for special damages totaling Kshs.450,042,500.00/=.

3. The claim is denied by the Defendant through the amended Statement of Defence and Counterclaim dated 26th September 2022 where it is seeking damages for the Plaintiff's breach of the Partnership Agreement and breach of fiduciary duty. The Defendant denies the Plaintiff's claim that his expulsion from the partnership was unlawful and unprocedural. The Defendant argues that the Plaintiff breached the Partnership Agreement and his fiduciary duty, providing just cause for his expulsion under Clause 21(g) of the Agreement.

4. The Defendant bases its justification for the expulsion on the Plaintiff's breaches of inter alia the Ernst & Young(EY) Global Code of Conduct (GCC) and that states that the Partnership Agreement binds partners to the GCC which requires officers to reject unethical practices, avoid working with third parties whose standards are incompatible, and promote a culture of consultation on ethics. The Defendant claims the Plaintiff engaged in secret, unethical communication with one MOM, a Somali government official and the focal point for the Intergovernmental Authority on Development (IGAD) Drought Resilience and Sustainable Livelihoods Program (DRSL) Project. That Mr. M provided the Plaintiff with confidential information about discussions between IGAD and the African Development Bank (AfDB) regarding expert recruitment and advised the Plaintiff on the proposed project price

5. That Mr. M introduced the Horn Economic & Financial Institute (HEFI) and asked the Plaintiff to recruit them as a subcontractor and the Plaintiff failed to report his communication with Mr. M to other partners or EY structures. He later introduced HEFI as a sub-contractor, implementing the secret agreement. Further, that the Plaintiff failed to report or escalate a whistleblower letter dated 10th March 2018, which made allegations of fraud and corruption concerning the DRSL Project and a forensic audit conducted by EY South Africa confirmed misconduct related to projects implemented by the Plaintiff.

6. The Defendant states that the Plaintiff's unethical conduct and failure to disclose information constituted a breach of his fiduciary duty to act in good faith and in the best interest of the firm and that his actions caused the Defendant substantial loss, including IGAD terminating the DRSL Project and calling on the performance guarantee of USD 564,000, the Defendant being debarred by the World Bank for 30 months for failing to disclose a conflict of interest and the involvement of an agent and loss of trust and confidence from the other partners, which is sufficient justification for expulsion.

7. The Defendant argues it did not breach the Partnership Agreement, asserting that the expulsion process complied with Clause 21(g) as the process was handled by the relevant Africa Executive Committee due to the whistleblower report and audit, that the Plaintiff was given an opportunity to present his case when he received the letter dated 22nd October 2018, setting out the audit findings related to him and the Plaintiff's 17-page response dated 28th October 28 2018, proves he was given ample opportunity. The Executive Committee considered the response, found it unsatisfactory, and resolved to dissolve the Plaintiff's membership immediately. This decision was subsequently adopted by a resolution of the partners on 18th May 2019.

8. As such, the Defendant prays that the Plaintiff's claim be dismissed with costs and for judgment as prayed for in the counterclaim for USD 1,053,778.98, ZAR 850,001.40 and Kshs.5,690,564.00/=, Interest and an inquiry as to the total payments made by the Plaintiff under the Partner Capital Facility Agreement dated 29th May 2018 and an order for the deduction of the outstanding balance, if any, of the Partner Capital Facility from the capital contribution found due to the Plaintiff.

9. The matter was set down for hearing where the Plaintiff testified on his own behalf(PW 1) where he produced the Bundle of Documents dated 5th December 2018(PExhibit 1) and the supplementary Bundles of Documents dated 10th March 2021(PExhibit 2), 9th September 2023(PExhibit 3) and 18th November 2024(PExhibit 4). Anthony Makenzi, a former Partner and Chief Operating Officer of the Defendant testified on its behalf (DW 1) and he produced the Bundle of Documents dated 17th February 2023(DExhibit 1-32) and the supplementary Bundles of Documents dated 6th July 2023(DExhibit 33-34) and 9th July 2024(DExhibit 35-36). After the hearing, the Court directed both parties to supplement their arguments by filing written submissions which are now on record and which together with the pleadings and evidence, I have considered and I will make relevant references to the same in my analysis and determination below.

Analysis and Determination

10. As these are civil proceedings, it should not be lost that the court's determination is on a balance of probabilities and is guided by the principle that he who alleges must prove. Denning J., in Miller v Minister Of Pensions [1947]2 All ER 372 discussed the burden of proof and he stated as follows:

> " That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say: 'we think it more probable than not', the burden is discharged, but, if the probabilities are equal, it is not. Thus, proof on a balance or preponderance of probabilities means a win, however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept, where both parties' explanations are equally (un) convincing, the party bearing the burden of proof will lose, because the requisite standard will not have been attained."

11. The aforementioned position has now been espoused by our superior courts and finds statutory comfort in sections 107 and 108 of the *Evidence Act*(Chapter 80 of the Laws of Kenya) which provide as follows:

> 107. Burden of proof.
>
> (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
>
> (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.
>
> 108. Incidence of burden.
>
> The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.
>
> (Also see Ignatius Makau Mutisya v Reuben Musyoki Muli [2015] KECA 612 (KLR)

12. From the parties' submissions, the court is being asked to determine the following issues:

a. Whether the Plaintiff is a partner in the Defendant's firm.

b. Whether the purported dissolution of the Plaintiff's membership as a partner in the Defendant's firm vide the letter dated 6th November,2018 was undertaken in full compliance with the provisions of the Partnership Agreement

c. Whether the purported dissolution of the Plaintiff's membership as a partner in the Defendant's firm was a valid act of the Defendant's Chief Executive Officer.

d. Whether the due process was followed in the reduction of the Plaintiff's profit allocation as communicated on 19th October,2018.

e. Whether the Defendant acted in good faith in varying the Plaintiff's FY2018 profit allocation by -27.4% having failed to issue him with a prior notification Quality Monitoring notice (QMT) of the intended significant negative variation.

f. Whether the Plaintiff is entitled to a revision of the profit allocation upwards from the FY2017 allocation by at least 40% in line and in comparison with the allocation awarded to the other partners of his rank in the firm for the same time period.

g. Whether the Plaintiff was personally implicated in any wrongdoing by the whistleblower vide the whistleblower letter dated 10th March,2018 and 17th March,2018.

h. Whether the plaintiff breached the partnership agreement.

i. Whether the plaintiff breached his fiduciary duty to the Defendant

j. Whether the Defendant breached the partnership agreement

k. Whether the plaintiff is entitled to general damages.

l. Whether the plaintiff is entitled to the special damages claimed

m. Whether the Defendant is entitled to the special damages claimed.

The Plaintiff's Partnership Status

13. The Plaintiff stated that his partnership remains legally valid because he was never given a 3-month notice of removal, the Partnership Council did not pass a 3/4 majority resolution for expulsion as required by Clause 21 and 14 of the Agreement and that he never executed a Deed of Separation. In response, the Defendant stated that the partnership was validly dissolved immediately under Clause 21(g) due to breach of the GCC and fiduciary duty and that the Plaintiff himself abandoned the prayer for reinstatement in court. Whereas it is correct that the Plaintiff is still listed as a partner as per the Business Registration Service (BRS) search of 22nd January 2020, the Plaintiff indeed admitted in his testimony that his partnership had been terminated, albeit unlawfully, by the letter of 6th November 2018 and that he is in court challenging the process and authority of his termination and removal as a partner. Further, that whereas he is seeking reinstatement as a partner, he admitted and submitted that this is not possible owing to the "bad blood" between the parties 5 years down the line.

14. Thus, for all practical purposes, the partnership has been terminated since 6th November 2018. The Plaintiff has been locked out of the offices, his access revoked, and he has been negotiating for a final settlement through this.

15. His own admission that reinstatement is not feasible confirms this de facto or practical reality. It is therefore my finding that the Plaintiff's partnership in the Defendant is terminated.

Lawfulness of the termination and the Plaintiff's removal as a partner

16. Whereas I find that the Plaintiff's partnership was more or less terminated by the Defendant on 6th November 2018, the Plaintiff has argued that the partnership still legally exists because the Defendant

failed to follow the mandatory termination procedures outlined in their Partnership Agreement particularly under Clause 21 which provides as follows:

In any of the following events:

(a) the death; or

(b) the retirement; or

(c) the bankruptcy of any Partner or his having suffered his share or interest in the partnership to be charged; or

(d) if an order is made by a court of competent jurisdiction for the expulsion of a Partner or otherwise on account of the lunacy, incapacity or misconduct of that Partner; or

(e) if the other Partners by three fourths majority (in accordance with Clause 14) determine that a Partner has become incapacitated from carrying on business or that any Partner has failed to devote such time and attention to the partnership business as may be reasonably necessary for the proper conduct thereof or that for any other reason his continued membership of the partnership is undesirable; or

(f) if a Partner becomes incapacitated by reason of ill health preventing him for a period of nine months from carrying out his duties as a Partner; or

(g) if a Partner commits any act or allows any omission which may have the effect of the partnership breaching any of its obligations in terms of the EY Global Regulations and/or the EMEIA Regulations and/or EY Africa Regulations;

> then (in all instances other than 21(e), (f) and (g)), such Partner shall be deemed to have ceased to be a partner in the Partnership.

In respect of the instances 21 (e), (f) and (g) above, the other Partners may by three fourths majority (in accordance with Clause 14) determine to notify such Partner by not less than three months' notice in writing of their intention to dissolve the partnership as regards the incapacitated Partner.

The Executive Committee shall obtain the approval of the Board of EY Africa before a decision to expel the Partner is executed. If so desired, the Partner subject to expulsion shall be afforded an opportunity to present his case to the Executive Committee and to the Board of EY Africa before a final decision is made

Then and in any such case the partnership shall be dissolved so far only as regards that partner....

17. My interpretation of the aforementioned clause is as follows. Clauses (a)-(g) list the events that can trigger the exit of a partner from the partnership. For events (a) - (d): "such Partner shall be deemed to have ceased to be a partner...". However, for events (e) - (g): "the other Partners may by three fourths majority determine to notify such Partner by not less than three months' notice in writing of their intention to dissolve the partnership...". In my view, the requirement for a three-fourths majority vote and a three-month notice period is mandatory for terminations under Clause 21(g), and a termination therein is not therefore immediate. The clause deliberately creates two distinct categories of cessation of the partnership: automatic cessation in (a)–(d) that is; death, retirement, bankruptcy, or court-ordered expulsion, which events cause an immediate and automatic end to the partnership for that member. Then, there is the discretionary and procedural removal under (e) -(g) that is; incapacity, failure to devote time, undesirability, or a breach of global regulations. For these, the partnership is not automatically dissolved. The other three fourths majority of the partners are given the option to initiate

a removal process and the phrase "may... determine to notify... by not less than three months' notice" is a single, cohesive procedure. The partners' discretion is to initiate the formal notification process. Once they make that determination, the method of that notification is explicitly defined: it must be a notice of at least three months. The clause states the notice is of "their intention to dissolve the partnership." This means the dissolution is not effective upon the decision or the breach, but rather at the expiry of the notice period and the notice itself is the formal act that begins the dissolution process.

18. I find that if the partners wanted the right to terminate immediately for a breach of the GCC under Clause 21(g), they could have drafted the clause to place it in category (a) –(d). By placing it in category (e)-(g), they subjected it to the same procedural safeguards. This suggests that even a serious breach like this was not intended to result in summary dismissal without a partner vote and a notice period. Therefore, regardless of the severity of the alleged breach under Clause 21(g), the Partners were required to hold a meeting, pass a resolution by a three-fourths majority to issue a notice and provide the Plaintiff with a three-month notice of their intention to dissolve the partnership. DW 1 admitted that no notices were sent to the Plaintiff and no meeting of the partners was ever held to discuss the Plaintiff's removal as a partner. It follows that the Defendant's letter of 6th November 2018 was not a "notice of intention" but rather, it was an immediate termination, which was a clear procedural violation of the Partnership Agreement.

19. The Defendant have argued that the decision to remove and terminate the Plaintiff's partnership was ratified on 18th May 2019 post-facto. However, this is a ratification of an action that had already been taken, rather than a resolution authorizing the action to be taken. While I agree that ratification can sometimes cure unauthorized acts, for it to be valid, the act being ratified must be one that the ratifying body could have authorized in the first place (see East African Safari Air Limited v Anthony Ambaka Kegode & Elizabeth Ann Kegode [2011] KECA 160 (KLR)]. In this case, the fatal flaw is one of procedure and timing. The sequence of events violated the prescribed procedure. By acting first and seeking approval later, the Executive Committee reversed this sequence. The Plaintiff was subjected to the termination before the partners had formally decided on it. This undermines the very protection that Clause 21(g) is designed to offer, which is a collective decision of his peers prior to such a severe sanction.

20. In my view, the initial decision to terminate the Plaintiff was procedurally flawed because it was not taken in accordance with the specific process mandated by Clause 21(g). It was, therefore, void at the time it was made. The partners' subsequent resolution attempts to validate this flawed action. However, it does not change the fact that the process leading to the decision was defective. The partners are ratifying the outcome, that is, the termination but cannot retroactively fulfill the procedural steps that were skipped. The requirement for a super-majority partner resolution under Clause 21(g) is not a mere technicality; it is a substantive condition precedent. Allowing post-facto ratification would render the procedural safeguards in the Agreement meaningless, as the management could always act first and seek forgiveness later. Therefore, the post-facto ratification does not cure the procedural defect under Clause 21(g). The termination was effected through a process that did not comply with the mandatory steps outlined in the Partnership Agreement. As a result, the termination remains invalid and unlawful and I find that the purported dissolution of the Plaintiff's membership as a partner in the Defendant's firm vide the letter dated 6th November,2018 was not undertaken in full compliance with the provisions of the Partnership Agreement

Actions of the CEO

21. Having found that the process leading to the dissolution or termination of the Plaintiff's partnership was flawed, it follows that this letter by the CEO of 6th November 2018 was invalid and unilateral.

The Profit Allocation Deduction of the Plaintiff

22. The Plaintiff stated that the 27.4% deduction of his profit allocation was made without explanation and without prior notification via a Quality Monitoring Notice (QMT), which is required for such a significant negative variation and that the timing, that is, two days before the allegations and the amount, 27.4% proves bad faith and a fraudulent, premeditated intent to deprive him of terminal benefits. In response, the Defendant stated that the profit allocation adjustment, while not explicitly defended as procedural, is overshadowed by the immediate expulsion for gross misconduct, which justifies the severance of all benefits and financial adjustments. The Defendant submits that the Plaintiff's conduct was the breach of utmost good faith and that the Plaintiff's own unethical conduct in the Somalia projects caused the firm losses and justified all subsequent financial and relationship-based actions.

23. Whereas the Partnership Agreement itself does not explicitly mention a "Quality Monitoring Notice" or a "QMT" process, the parties make reference to a "QMT penalty" during the appeal process of FY 2016 meaning this is a known and established mechanism within the firm's profit allocation system(see pgs. 113-120 of PExhibit 2). From this practice, it is legitimately expected that a partner is given QMT notice prior to a significant negative variation in profit allocation as was done during the FY 2016. The Defendant provided no such QMT for the FY2018 27.4% negative adjustment. I have also gone through the comparative statements showing profit allocations from FY 2013 – 2017 and note that the Plaintiff's performance ratings and profit allocations show a consistent positive trajectory to FY 2017 and then a sudden plunge to a -27.4% variation the very next year, without a documented performance collapse, which appears arbitrary. I am also suspicious of the timing of this profit allocation notice and I note that even DW 1 was evasive in his responses as to how this was done, attempting to shift the process to EY South Africa. The profit reduction notice was issued on 19th October 2018, just three days later, on 22nd October, the Plaintiff was presented with the investigation letter containing allegations of misconduct. This sequence strongly supports the Plaintiff's argument that the profit reduction was a premeditated act, intended to lower the base upon which his terminal benefits would be calculated, rather than a genuine reflection of his performance.

24. The Defendant attempted to justify the profit reduction by linking it to the subsequent expulsion for alleged gross misconduct. However, the profit allocation for FY2018, covering the period up to 30th June 2018 should have been based on the Plaintiff's performance during that financial year. The investigation into the Somalia projects occurred between March and June 2018, and its findings were not communicated until 22nd October 2018. The profit allocation, decided and communicated before the findings were even put to the Plaintiff, cannot logically be justified by those same findings.

25. There are also the email correspondences of March 2018 (see pgs. 122 -126 of PExhibit 3). In one such correspondence, CM, the Advisory Leader and Engagement Partner writes to the Plaintiff on 18th March 2018, stating: "These are quite serious allegations - what is the background to this? Internally, we need to escalate immediately through our risk and independence systems even if only allegations at this stage. Let me know ASAP. Will alert GG in the meantime. "This email shows that as of mid-March 2018, the leadership was treating the allegations as something that needed to be investigated. It contradicts any notion that a conclusive, performance-affecting audit finding already existed at that time, which would have been necessary to justify a profit penalty for the financial year ending just three months later at the end of the FY on 30th June 2018.

26. The Defendant did not also produce any documentation, such a final audit report from EY South Africa or performance reviews as requested by the Plaintiff in his Notice to Produce and Request for Particulars showing how the Plaintiff's specific actions during FY2018 directly led to a quantifiable

performance failure that would warrant a 27.4% financial penalty. The Defendant's overarching argument that the Plaintiff's conduct justified all subsequent financial and relationship-based actions is undermined by its consistent failure to follow due process, both in the profit allocation and in the termination, as required by the Partnership Agreement. It is therefore my finding that due process was not followed in the reduction of the Plaintiff's profit allocation as communicated on 19th October,2018 and that the Defendant did not act in good faith in varying the Plaintiff's FY2018 profit allocation by -27.4% having failed to issue him with a prior QMT of the intended significant negative variation.

Revision of the profit allocation upwards from the FY2017 allocation by at least 40%

27. The Plaintiff contends that allocation should be revised upwards by at least 40% in line with the allocation awarded to other partners of his rank in the firm for the same time period, as detailed in the Plaint's particulars of special damages. The Plaintiff bases this request on the Defendant's failure to produce the FY2017 and FY2018 profit allocations for all the partners in the Advisory Line and as such, an adverse inference may be drawn against them. As the Plaintiff himself has submitted, the increase by 40% is in the nature of special damages which must be pleaded and proved. While the Plaintiff has proven that a wrong likely occurred in his dismissal, he has not provided evidence that quantifies that wrong as being exactly a 40% increase. The claim is based on a speculative assumption of what his peers received, but without the actual profit allocations of those peers, the 40% remains an assertion, not a proven fact. Further, while an adverse inference can prove that the Plaintiff was treated worse than others, it will not automatically quantify by how much and I am therefore hesitant to latch onto the Plaintiff's specific 40% figure without some other benchmark. In any event, the Plaintiff admitted in his testimony that based on the allocations between 2014 and 2017 he used to receive around Kshs. 16 million and that it increased to Kshs. 21 million in 2017 because of his work in the Somalia projects among other factors. In short, this prayer for an increase of his allocation by 40% by the Plaintiff has no merit and it therefore fails.

Implication in Wrongdoing by the Plaintiff and Fiduciary Duty

28. The Defendant stated that the Plaintiff's conduct was in breach of his fiduciary duty and that he was found culpable by a forensic audit for engaging in secret, unethical communication with a Somali government official and failure to report a whistleblower letter alleging fraud, authorizing payments that were essentially facilitation payments to government officials. That the Plaintiff's unethical and undisclosed actions constitute a breach of fiduciary duty to act in the best interest of the firm and that this breach resulted in actual losses for the firm, including a $564,000 guarantee call and a 30-month debarment by the World Bank for the firm.

29. In response, the Plaintiff averred that he submitted a 17-page rebuttal that he believes disproved the allegations and that the Defendant's failure to produce the full forensic audit report in court suggests a weakness in their proof of his personal culpability. The Plaintiff maintains he did not breach his duty, as the termination was based on a procedurally flawed and unjust process, not actual wrongdoing.

30. Going through the evidence, I note that while the Plaintiff raises valid procedural concerns and questions about the completeness of the evidence against him, he is not entirely blameless and the evidence reveal several areas where his judgment and actions were questionable and fell short of the standards expected of a partner. The forensic report (DExhibit 10) and the Plaintiff's termination letter highlight that the Plaintiff received the whistleblower letter on 10th March 2018 containing serious allegations of fraud and corruption involving HEFI and the Defendant's staff. The Plaintiff did not report or escalate this matter internally until the complainant escalated it to the Defendant's leadership on 16th March 2018 and whereas he claimed he was in Mogadishu with poor connectivity

and that the Engagement Partner, was ultimately responsible, for a partner in a position of leadership and trust, receiving such a high-risk allegation requires immediate and proactive escalation, regardless of connectivity challenges or the primary responsibility of another partner. His delay represents a significant failure in his duty to protect the firm's reputation and manage risk. In any case, the Plaintiff admitted in his testimony that he was able to receive emails while in Somalia meaning that the poor connectivity as the reason for not notifying his partners immediately of the whistleblower emails is not credible.

31. This act of the Plaintiff not reporting clear “red flags” is captured in the forensic report where in one instance, a Mr. A asked for the project work plan "to look into potential companies ahead of time" and to "recruit them," clearly seeking an unfair advantage in the tender process. While the Plaintiff states he did not act on the request, his failure to report this clear red flag and attempted improper influence to the firm's risk or compliance structures is a serious lapse in judgment and a breach of his fiduciary duty to act in the firm's best interest. The report also captures the project manager, SG, objecting to paying HEFI invoices because the subcontractor had not provided the required resources for the first four months of the project forcing the Defendant’s resources to do the work. Despite this, the Plaintiff, as Engagement Partner, "instructed him to proceed with payment nonetheless. “This action demonstrates a disregard for internal controls, a waste of firm resources, and poor judgment. It creates a conflict between delivering value to the client and managing subcontractor relationships, and it undermines the project manager's authority and the firm's financial integrity.

32. The forensic report also raises serious concerns about payments to HEFI that could be construed as "facilitation payments" to government officials. The HEFI subcontract included a line item of USD 52,000 for a "Government Liaison Officer" which the Plaintiff stated in his testimony was a cost to set up meetings and USD 600 for "Government Officers allowances" which he described as payments to drivers to pick up Government officials. I cannot fault the Plaintiff for concluding and perceiving these payments as bribes or facilitation payments to government officials as they were being paid to perform duties that they were already being paid for by their own government. Such payments definitely exposed the firm to reputational and legal risk and it is expected that a partner has a duty to identify and mitigate such risks, not to justify them as the Plaintiff attempted to do in his testimony.

33. Further, going through the Plaintiff’s rebuttal as per his response letter of 28th October 2018, while he puts up a spirited defense that highlights his contributions and questions the investigation's motives, the response does not convincingly absolve him. He consistently shifts primary responsibility to CM as the Engagement Partner for the troubled project, downplaying his own role as Project Director and market leader. His explanations for not escalating the whistleblower letter and the improper client requests are based on circumstances rather than a principled acknowledgment of his duty to act and he disputes the interpretation of his actions but does not convincingly refute the core facts for example, that he authorized payments without proper support and failed to escalate serious red flags.

34. I have also gone through the emails between the Plaintiff and Mr. MOM (DExhibit 33). They appear to suggest that the Plaintiff was involved in negotiations to reallocate funds from various project components to increase the management fee for the Defendant implying that the Plaintiff was party to a plan that may have compromised project deliverables or transparency, especially if these reallocations were not fully disclosed or properly approved. There are also suggestions in the correspondence that the Defendant, through the Plaintiff, would be single-sourced to implement capacity-building activities using local partners like HEFI and HODE, after already receiving an increased management fee. This raises questions about favoritism, lack of competitive bidding and maybe even double-charging or duplicate fee structures

35. Later emails between 2017–2018 show internal concerns by the Defendant about HEFI's performance, invoicing, and value for money. SG's emails suggest HEFI failed to provide qualified resources on time, invoices were submitted for work not fully performed and that the Defendant's leadership was hesitant to pay these invoices. Multiple emails indicate that HEFI invoiced the Defendant for deliverables that were not completed or were delayed, and SG questioned the legitimacy of these invoices. I also note Mr. M's repeated use of "Confidential" in email subjects and the tone of some messages like "keep it with yourself quietly" could be interpreted as an attempt to conceal the nature of the negotiations or avoid scrutiny and imputes improper motives on the Plaintiff's part.

36. Then, there is the World Bank debarment and the ICPAK disciplinary notice are direct consequences of the exact misconduct that the Defendant alleged formed the basis for the Plaintiff's expulsion. Word Bank states that the debarment is due to "....sanctionable practices as part of the Somali Core Economic Institutions and Opportunities Program (SCORE) and Second Public Financial Management Capacity Strengthening Project (PFM II) projects in Somalia", the very same projects at the heart of the internal investigation into the Plaintiff and HEFI. This demonstrates a clear reputational and financial damage to the Defendant and corroborates the Defendant's claim that the Plaintiff breached the GCC through his actions and inactions. World Bank indicts the Defendant for "failure to disclose a conflict of interest, involvement of an undisclosed agent, and making provisions for allowances to be paid to project officials". It is now a matter of public record that the Defendant, whose lead on these projects was the Plaintiff, has been sanctioned for corrupt and fraudulent practices. It is therefore not illogical for the Defendant to hold the responsible partner accountable, in this, case the Plaintiff.

37. Thus, I find that whereas the Plaintiff is not personally implicated in any wrongdoing by the whistleblower vide the whistleblower letter dated 10th March 2018 and email of 16th March 2018, his failure to immediately and formally escalate the 10th March letter is not about being implicated in its contents but to respond to a glaring red flag. A partner's duty is to protect the firm. When handed a document alleging massive fraud on a flagship project, his first action must be to trigger the firm's risk management protocols. His delay and informal handling of it are, in themselves, a breach of duty. Emails from Mr. A show a government official explicitly asking for insider information to rig the bidding process. The Plaintiff acknowledged he understood the corrupt intent but did not report it which is a clear, independent failure of ethical leadership and risk management. The is evidence that he pressured a manager to pay HEFI for work not performed is a separate, internal control failure. It shows a pattern of prioritizing a subcontractor relationship over the Defendant's financial integrity and its own staff's professional judgment. Thus, the Plaintiff's culpability is not for being a perpetrator of the fraud alleged by the whistleblower, but for being a negligent manager and a failed fiduciary.

38. It is therefore my finding that the plaintiff breached the Partnership Agreement and his fiduciary duty to the Defendant. I have also already found that the Defendant breached the Partnership Agreement because of the unprocedural manner in which it terminated the Plaintiff's partnership.

Plaintiff's Entitlement of General Damages

39. The Plaintiff has submitted that noting he has suffered serious difficulties finding work on account of the Defendants' allegations, his inability to secure permanent employment, and having his name dragged and his image associated to corruption, he submits that an award of general damages for injury to his reputation in the sum of Kshs.50,000,000.00/=, in addition to lost past and future earnings will be sufficient. I agree with the Plaintiff's submission that in KPMG East Africa Association & another v Richard Boro Ndungu [2021] KEHC 9374 (KLR), Tuiyott J., (as he was then) held that "At the heart of the objective of an award of damages is to put an injured party, in so far as possible, in money terms, in

the same position he would be had he not suffered breach or violation." However, based on my findings that the Plaintiff is not entirely blameless for the position he and the Defendant are in, I find that an award of Kshs.50,000,000.00/= would not be reasonable. If there is any compensation due to the Plaintiff then it can only be in respect to his unprocedural termination as a partner in the Defendant. In the circumstances, I find that an award of Kshs.5,000,000.00/= is what would be appropriate as general damages for that infraction by the Defendant.

Plaintiff's Entitlement to Special Damages

40. As stated, the Plaintiff has sought special damages of Kshs.450,042,500.00/=. However, I agree with the Defendant's submission that much of this, that is, Kshs.382,200,000.00/=, is based on account of undrawn profits for 13 years and the plaintiff has arrived at this figure by assigning himself a profit allocation of Kshs.29,400,000.00/=. However, as I stated before, this increase, which is based on the Plaintiff's 40% proposal, is speculative and unproven and that the Plaintiff admitted that his average profit allocation was Kshs.16,000,000.00/=. I also do not agree with his multiplier of 13 years as the Defendant had solid grounds to terminate his partnership at the time but then failed to follow the procedure in doing so. There is no reason to assume that he would have been in the partnership for 13 years until he retired. However, I note that the Defendant is amenable to compensation of Kshs.15,578,628.00/= and a multiplier of 2 years and I will therefore award the same and award special damages on the profit allocation at Kshs.31,157,256.00/=.

41. I note that the Plaintiff is also claiming Kshs.34,500,000.00/= as his capital contributions. However, in his testimony, he admitted that took out a facility of USD 150,000 from Chase Bank and out of this amount, the Plaintiff contributed USD 97,881 as capital in the Defendant. The Plaintiff also admitted that he had not fully repaid the facility he had taken out to contribute to the capital of the firm and that as at 29th May 2018, the outstanding balance was Kshs. 24,449,705.00/= and by the time he was leaving the Defendant, he had not paid the outstanding balance. The Defendant has also stated that the Plaintiff was being paid one -half of his salary, that is Kshs.344,615.00/= per month with a payment of Kshs.291,068.00/= being remitted to the Capital Facility. The Defendant submits that the payments that have been made to the Plaintiff should also be deducted from any award to be made to the plaintiff as damages. The Plaintiff agreed that indeed, it would not be possible to ascertain how much has been paid in the capital account at this stage unless accounts are taken. Simple math tells me that if the Defendant has been remitting Kshs. 291.068.00/= towards the facility, since say, January 2020 to date, then it is likely to have paid Kshs.17,464,080.00/= leaving a balance of around Kshs.6,985,625.00/= which is the outstanding capital contribution due to the Plaintiff and I award the same.

42. I find no basis to award the unpaid holiday/leave of Kshs.12,617,500.00/=, undrawn profits of Kshs.6,205,000.00/= and Monetary equivalent of 6 months' notice of Kshs.14,700,000.00/= and these prayers are hereby dismissed.

Defendant's Entitlement to Special Damages

43. The Defendant stated that due to the Plaintiff's breach of fiduciary duty, it is entitled to the Counterclaim amounts, including the $1,053,778.98 and ZAR 850,001.40 in damages incurred due to the Plaintiff's misconduct. The Defendant submitted that IGAD terminated the its engagement for the DRSLP II project and demanded payment of USD 564,000 under the advance guarantee provided to IGAD by the Defendant for the performance of the project. A further sum of USD 42,380 had to be refunded to IGAD under the DRSLP II project and a sum of USD 447,398.98 had to be paid to EY India on account of forensic review during the World Bank audit. A sum of ZAR 850,001.40 had to be paid to EY South Africa with respect to the cost for the audit into the allegations of fraud, irregularity

and corruption and that a sum of Kshs.5,690,564/= had to be paid to the Defendant's advocates for legal services offered to the Defendant with respect to the audits by the World Bank Group.

44. I am satisfied that the Defendant has adduced evidence of payments for the aforesaid sums. It is also my finding that the Plaintiff's specific misconduct, that is, the secret communication, failure to report, authorizing improper payments was the direct and proximate cause of each expenditure claimed by the Defendant and I will therefore award the Defendant the sums of USD 1,053,778.98, ZAR 850,001.40, and Kshs. 5,690,564/= claimed in the Counterclaim.

Conclusion and Disposition

45. In the upshot, I find and hold that both the plaintiff and the Defendant have to a large extent proved their respective claims both in the plaint and in the counterclaim to the required standard of proof established by law and precedent. I enter judgment for both the Plaintiff and the Defendant respectively and now proceed to make the following dispositive orders:-

    1. A Declaration be and is hereby made that the process of terminating the Plaintiff's partnership was unlawful.

    2. The Plaintiff is awarded General Damages of Kshs.5,000,000.00/= for the unlawful dismissal.

    3. The Plaintiff is awarded Special Damages totaling Kshs.38,142,881.00/=, comprising:

        a. Profit Allocation: Kshs.31,157,256.00/=

        b. Outstanding Capital Contribution: Kshs.6,985,625.00/=

    4. The Defendant's Counterclaim is hereby allowed to the extent that the Defendant is awarded the following sums against the Plaintiff:

        a. USD 1,053,778.98

        b. ZAR 850,001.40

        c. Kshs.5,690,564.00/=

    5. The judgment sums awarded to the Plaintiff and the Defendant shall be subject to a set-off to determine the final net amount payable by either party upon the exchange rate applicable on the date of this judgment

    6. The final currency exchange and calculation shall be settled by the parties or, failing agreement, be subject to formal application to the Deputy Registrar for final computation.

    7. Interest shall accrue at Court rates from the date of this judgment until payment in full.

    8. Each party shall bear their own costs of the Suit and the Counterclaim.

DATED SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 1ST DAY OF DECEMBER 2025

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J.W.W. MONGARE

JUDGE

In the presence of

1. Mr. Eredi for the Plaintiff.

2. Mr. Lawson Ondieki for the Defendant.

3. Ivan - Court Assistant