REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 56 OF 2019 (AS CONSOLIDATED WITH CIVIL APPEAL NO. 57 OF 2019)

MARY WANJIRU KIHUGU.....1ST APPELLANT

JOHN MBUGUA NJENGA.....2ND APPELLANT

LUCY GICUKU MAINA.....3RD APPELLANT

FRANCIS KIMANI.....4TH APPELLANT

DAVID GITHINJI WANJOHI.....5TH APPELLANT

MARY JESIRE KIPYEGON.....6TH APPELLANT

CO-OP HOLDINGS CO-OPERATIVE

SOCIETY LIMITED.....7TH APPELLANT

VERSUS

REGENCY CO-OPERATIVE SAVINGS

AND CREDIT SOCIETY LIMITED.....RESPONDENT

(Being an appeal against the judgment & decree delivered by of the Co-operative Tribunal, Hon. C. Kithinji, Hon. N. Kitiva & Hon. D. Swanya delivered on 7th January, 2019 in Co-operative Tribunal Case No. 431 of 2016)

JUDGMENT

1. This judgment arises from two appeals namely, HCCA No. 56 of 2019 and HCCA No. 57 of 2019 which were consolidated pursuant to directions given by the court on 14th November, 2019 as they both emanated from the decision of the Co-Operative Tribunal dated 7th January 2019.

2. By way of background, the Respondent, Regency Co-operative Savings and Credit Society Limited instituted suit before the Co-operative Tribunal (hereinafter the Tribunal) against all the seven Appellants. The seventh Appellant was named as the 1st Respondent while the 1st – 6th Appellants were the 2nd to 7th Respondents. In its statement of claim, the Respondent sought the following reliefs:

> ***i. A mandatory injunction to compel the Respondents to jointly and severally facilitate the re-transfer of 851,900 shares currently in the names of the 2nd to 7th Respondents held in the 1st Respondent Society to the Claimant at their own cost.***
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> ***ii. An order of permanent injunction to prohibit the 1st Respondent, its agents, servants and/or employees from registering any other person or entity other than the Claimant as the transferee/owner of the 851,900 shares or any other shares currently in the names of the 2nd to 7th Respondents in the 1st Respondent Society at all.***
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> ***iii. A mandatory injunction to compel the 1st Respondent to release dividends for the year 2015 being Kshs.574,283/= and all other dividends purportedly due to the 2nd to 7th Respondents held in the 1st Respondent to the Claimant.***
>
> ***iv. An order of permanent injunction to prohibit the 1st Respondent, its agents, servants and/or employees from releasing***

dividends for the year 2015 being Kshs.574,283/= and all other dividends purportedly due to the 2nd to 7th Respondents and held in the 1st Respondent Society to Respondent 2nd to 7th, or to any other person or entity other than the Claimant.

v. A mandatory injunction to compel the Respondents to jointly and severally refund the Claimant Kshs.1,486,886/= being dividends due and paid since the year 2009 to 2014 by the 1st respondent to the 2nd to 7th Respondents.

vi. General damages.

vii. Costs of the claim together with interest.

viii. Any other or further reliefs that the Honourable Tribunal may deem fit to grant.

3. The Respondent pleaded that sometime in the year 1996, it purchased 6,085 Class "A" Co-operative Bank of Kenya Limited shares at Kshs.100 per share which shares were at all material times held by the 7th Appellant, Co-op Holdings Co-Operative Society Limited (Co-op Holdings) which was the strategic investor of Co-operative Bank of Kenya Limited.

4. The Respondent further pleaded that on or about the month of August 2008, the 1st - 6th appellants purported to purchase, allocate, distribute and/or transfer the above shares amongst themselves in the manner particularized in paragraph 11 of the Statement of Claim; that the shares have since been split several times and they amounted to 851,900 shares at the time of lodging its claim in the Tribunal.

5. It was the Respondent's case that the acquisition and transfer of the said shares to 1st-6th appellants (the first six appellants) was fraudulent and illegal and constituted a breach of trust; that Co-op Holdings facilitated the fraudulent acquisition and transfer of the said shares as well as payment of dividends. The particulars of fraud and breach of trust were set out in paragraph 14 of the Statement of Claim.

6. In addition, the Respondent averred that as a consequence of the fraudulent transfer of the shares, the first six Appellants had received dividends to the tune of Kshs.1,486,886 from Co-op Holdings in the years between 2009 and 2014 to its detriment and majority of its members; that Co-op Holdings was in the verge of paying the first six Appellants further dividends for the year 2015 in the sum of Kshs. 574,283 which if paid will occasion it further loss and prejudice.

7. Co-op Holdings filed its response dated 8th September, 2016 and denied the Respondent's claim. In particular, it pleaded that as the strategic investor for Co-operative Bank Limited, it only issues share certificates to its shareholders who are co-operative societies only and not individual persons.

8. It further expressly denied having issued or transferred any shares to the 1st – 6th appellants or having paid dividends to them. It pleaded that since the year 2009, it has been paying dividends to the Respondent and not to the first six appellants and hence, there was no reasonable cause of action against it.

9. On their part, the first six Appellants filed their joint Statement of Response and Counterclaim. They denied the Respondent's allegations of fraud and breach of trust in acquisition of the said shares. They claimed that in the year 2008, they jointly and severally lawfully purchased 6,085 shares from the Respondent for value in accordance with its by-laws. They admitted that they had been receiving dividends from the shares but denied that the dividends amounted to the sum claimed in the Statement of Claim. They also denied that payment of dividends for the year 2015 would occasion the Respondent any prejudice. The Respondent's alleged loss and damage as particularized in the statement of claim was also denied.

10. In their Counterclaim, the six appellants pleaded that they were at all material times bonafide members of the Respondent; that John Mbugua Njenga and Mary Jesire Kipyegon were at all material times the Chairman of the Management Committee and the Secretary to the Education Committee respectively while the other appellants were ordinary Members.

11. They further pleaded that by way of resolutions made in the Joint Committee meeting and The Education Committee meeting held on 1st August, 2008 and 16th August, 2008 respectively, the Respondent offered for sale it's 6,085 shares in Co-operative Holdings Sacco to its members at a price of Kshs.150 per share but at the lapse of the timelines set for expression of interest in purchasing the shares, they were the only ones who had applied to purchase the shares; that their acquisition of the shares was done above board and they were purchasers for value without notice.

12. According to the first six appellants, after buying the shares in the year 2008, the Respondent facilitated payment of dividends to them in the years between 2009 and 2014 on a pro rata basis without any complaint; that their dealings with the Respondent created a constructive trust in their favour and that the Respondent continues to hold the shares in trust for them.

13. They further pleaded that upon payment for the shares, both the Respondent and Co-op Holdings facilitated issuance of investment certificates as proof of ownership of the number of shares they had each purchased.

14. Finally, the first six Appellants averred that the Respondent's claim was statute barred as its cause of action had arisen eight years before the statement of claim was filed; that consequently, the claim offended *Section 4* of the *Limitation of Actions Act* and ought to be struck out.

15. On the basis of the foregoing, the appellants sought the following reliefs in their counterclaim:

a) A declaration that the Claimant holds the shares in the 1st Respondent in trust for 2nd - 7th Respondents.

b) An order requiring the 1st Respondent to facilitate the transfer of the shares from the name of the Claimant to the names of the 2nd - 7th Respondents or to an entity authorized to hold the same in trust for the 2nd - 7th Respondents.

c) An order of permanent injunction against the 1st Respondent and the Claimant against transferring the shares or making payment to any other person or entity other than the 2nd - 7th Respondents.

d) An order requiring the 1st Respondent and the Claimant to facilitate the payment of dividends for the year 2015 and subsequent years to the 2nd - 7th Respondents.

e) In the alternative, and without prejudice to the foregoing, an order requiring the claimant to buy back the shares from the 2nd - 7th Respondents at market prices.

f) Costs of the suit plus interest.

g) Any other or further relief as this court may deem fit and just to grant.

16. The Respondent filed a Reply to all the appellants' Statements of Response reiterating the contents of the Statement of Claim and denying all the allegations made in the counterclaim.

17. Co-op Holdings also filed a Reply to the first six appellants' Response and a defence to the counterclaim. It denied the contents of the appellants' response and counterclaim and put them to strict proof thereof.

18. After a full hearing, the Tribunal vide its judgment delivered on 7th January 2019 entered judgment in favour of the Respondent against all the appellants and dismissed the 1st - 6th appellant's counterclaim with costs. The Tribunal granted the Respondent all the reliefs sought in the Statement of Claim and awarded it costs of the claim.

19. The first six appellants, who as stated earlier were the 2nd - 7th Respondents in the proceedings before the Tribunal were aggrieved by the Tribunal's judgment. They proffered the appeal in High Court Civil Appeal No. 56 of 2019 in which they advanced the following grounds of appeal:

i. THAT the learned Tribunal erred in law and fact by finding that the 1st to 6th Appellants fraudulently purchased 6,085, class "A" shares from the Respondent.

ii. THAT the learned Tribunal erred in law and fact by finding that there was no evidence of payments by the 1st to 6th Appellants to the Respondent for purchase of the 6,085, class "A" shares.

iii. THAT the learned Tribunal erred in law and fact by finding that the 1st to 6th Appellants were officials of the Respondent at the time of the purchase.

iv. THAT the learned Tribunal misdirected itself and based it's finding on breach of trust on wrong considerations.

v. THAT the learned Tribunal failed to consider the fact that the Respondent had failed to prove that it suffered loss by selling the 6,085, class "A" shares.

vi. THAT the learned Tribunal erred in fact by failing to make a finding that the Respondent's case was time barred by statute.

vii. THAT the learned Tribunal erred in law and fact by failing to find that the Respondent held the 6,085, class "A" shares in trust of the 1st to 6th Appellants.

viii. THAT the learned Tribunal erred in law and fact by passing a collective judgment against the Appellants.

ix. THAT the learned Tribunal erred in law by making an award for general damages of Kshs.2,000,000/= recoverable jointly and severally against the Appellants when no assessment or submission was made by the Respondent.

x. THAT the learned Tribunal erred in law and fact by dismissing the Appellants' counterclaim against the Respondent.

xi. THAT in all the circumstances of the case, the findings of the learned Tribunal are insupportable in law or on the basis of the evidence adduced.

20. The 7th Appellant, Co-op Holdings Sacco Ltd which was the 1st respondent was also dissatisfied with the Tribunal's decision. It filed High Court Civil Appeal No. 57 of 2019 and raised the following grounds of appeal:

i. THAT the learned Tribunal erred in law and fact by finding that the it participated in the impugned transfer, allotment, distribution and registration of the Respondent's shares in the names of the 1st – 6th Appellants and further facilitated the

issuance of investment certificates to the 1st – 6th Appellants.

ii. THAT the learned Tribunal erred in law in finding that the claim for fraud succeeded against it without having due regard to the legal principle that fraud must be specifically pleaded, that the particulars of the alleged fraud must be stated on the face of the pleadings and that fraud should not merely be inferred from the facts.

iii. THAT the learned Tribunal erred in law and fact in entering judgment in favour of the Respondent against the it in complete disregard of the indoor management rule as the transfer or registration of shares in the Respondent is an internal affair over which the Co-operative Holdings Sacco has no control or influence.

iv. THAT the learned Tribunal erred in law in holding that the Respondent had proved its case against the it on a balance of probabilities.

v. THAT the learned Tribunal erred in law in making an award of general damages of Kshs.2,000,000/ recoverable jointly and severally against it and the 1st – 6th Appellants.

vi. THAT the learned tribunal erred in law and fact in finding that the Respondent's claim succeeded in its entirety and in granting the orders prayed.

vii. THAT the learned Tribunal erred in law and fact in making an award of costs as against it.

21. By consent of the parties, the appeal was canvassed by way of written submissions which were briefly highlighted before us on 22nd September 2020 by learned counsel *Mr. Kinyanjui* for the 1st -6th appellants, *Ms Koskei* for the 7th appellant and *Mr. Nyarango* for the respondent.

22. In their submissions dated 4th September 2019, the first six Appellants argued that whereas the Respondent pleaded fraud in its claim, it did not tender any evidence to support the particulars of fraud pleaded against them. They submitted that the standard of proof in cases of fraud surpasses that of a balance of probabilities as espoused in the case of ***Vivo Energy Kenya Limited V Maloba Petrol Station Limited & 3 Others, [2015] eKLR*** where the Court of Appeal cited with approval its holding in ***Central Kenya Ltd V Trust Bank Ltd & 4 Others, CA No. 215 of 1996*** where it stated as follows:

"…The appellant has made vague and very general allegations of fraud against the respondents. Fraud and conspiracy to defraud are very serious allegations. The onus of prima face proof was much heavier on the appellant in this case than in an ordinary civil case…"

23. Reference was further made to the case of ***Gichinga Kibutha v Caroline Nduku, [2018] eKLR*** where the Environment and Land Court (ELC) listed the following as the key elements of fraud:

a. false representation of an existing fact;

b. with the intention that the other party should act upon it;

c. the other party did act on it; and

d. the party suffered damage.

24. The first six Appellants further argued that whereas the Respondent alleged that the shares were obtained without approval of the Annual General Meeting (hereinafter AGM), it did not adduce any evidence to prove that its shares could only be disposed of with the authority of an AGM.

25. In addition, they submitted that the Tribunal erred in determining that they had not made any payments towards purchase of the shares in spite of documentary evidence produced during the trial to prove payment. They claimed that the Tribunal overlooked the admission made by the Respondent's witness that the Sacco had received money from them as well as the deposit slips confirming payment into the Respondent's bank account which supported their averment that they had purchased the shares for value.

26. They also contended that the Respondent's by-laws authorized the Management Committee to make investments on its behalf and that there was nothing to demonstrate that the Respondent suffered any loss as a result of their purchase of its shares; that the Tribunal failed to appreciate the role played by the 7th Appellant in the acquisition of the shares and therefore erred in dismissing their counterclaim.

27. In addition, they advanced the view that the Tribunal fell into error by determining that at the time of the purchase, they were either officials or were related to the officials of the Respondent which was not the factual position.

28. According to them, the judgment delivered by the Tribunal is unenforceable for the reason that they purchased unequal number of shares and received dividends in accordance with the number of shares each purchased yet the Tribunal entered a **'collective'** judgment; that the award of general damages in the sum of Kshs.2,000,000 was erroneous because there was no submission or assessment made by the Respondent to support such an award. They further challenged the Respondent's claim for a refund of Kshs.1,486,886 arguing that no

evidence was adduced to show that dividends of that amount were ever paid to them.

29. In the end, the first six Appellants urged us to allow their appeal and set aside the Tribunal's decision as in their view, it was erroneous having been made before the Tribunal considered all the evidence placed before it. They relied, *inter alia*, on the case of ***Attorney General V David Marakau, [1960] EA 484*** for the proposition that a decision is considered erroneous when no court could reasonably arrive at the same decision given the primary facts presented before it.

30. In its submissions, the 7th Appellant contended that according to its by-laws, only co-operative societies are its members and hence, its obligations and mandate was limited to such societies; that it is not disputed that the Respondent was its member and that it had purchased the shares in question at Kshs.100 each in 1996; that it had proved by way of evidence that it did not have any control over or mandate to distribute the said shares to the 1st - 6th Appellants.

31. The 7th Appellant also argued that it has never participated in the meetings held by the Respondent and had no role in the allotment or transfer of the shares to the first six appellants; that in any case, the Respondent did not produce any evidence to show that it had issued share certificates to the 1st – 6th Appellants; that reliance was placed on the certificates of investment which the Tribunal correctly recognized were issued by the Respondent to the first six Appellants.

32. The 7th Appellant further submitted that it was paying dividends directly to the Respondent and at no time did it make any payment to the 1st – 6th Appellants; that after paying dividends to the Respondent, it was not under any obligation to inquire into the internal mechanisms of the Respondent and should not therefore be affected by any irregularities for which it had no knowledge.

33. It also asserted that the Respondent's claim against it does not meet the threshold for fraud since it did not specifically allege any collusion or conspiracy between it and the other appellants nor did it prove the same at the trial. Reliance was placed on the case of ***Vijay Morjaria V Nansingh Madhusingh Darbar & Another, [2000] eKLR*** in which the Court of Appeal pronounced the following:

> ***"It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must of course be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and distinctly proved, and it is not allowable to leave fraud to be inferred from the facts…''***
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> See also: ***Davy V Garrett, (1878) 7 Ch. D 473 at 489."***

34. The 7th Appellant further cited the Court of Appeal decision in the case of ***Gladys Wanjiru Ngacha V Treresa Chepsaat & 4 Others, [2013] eKLR*** where it held that:

> ***"…. Allegations of fraud must be strictly proved: although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required.***
>
> ***It is not enough for the appellant to have pleaded fraud; she ought to have tendered evidence that proved the particulars of fraud to the satisfaction of the trial court. In Mutsonga vs. Nyati (1984) KLR 425, at pg 439, this Court held: "Whether there is any evidence to support an allegation of fraud is a question of fact". We find that the appellant did not prove fraud on the part of the respondents…"***

35. It was the 7th appellants contention that since it did not participate in the distribution of the shares to the first six appellants and was not party to the Respondent's internal affairs, there was no evidence to show that it had committed any wrong against the Respondent; that the Tribunal's award of damages recoverable jointly and severally against it had no legal basis and should be set aside.

36. On a without prejudice basis, Co-op Holdings submitted that a reasonable award of general damages would have been the sum of Kshs.1,486,886 being the dividends allegedly paid to the 1st – 6th Appellants between 2009 and 2014, which sums ought to be recovered solely from the 1st-6th Appellants.

37. For all the foregoing reasons, the 7th Appellant urged us to allow its appeal and set aside the impugned judgment.

38. The Respondent filed its submissions on 23rd September, 2019. Briefly, it supported the learned Tribunal's decision and submitted that the Tribunal was correct in finding that the shares in question, being class A shares could only be held by a co-operative society and not by individuals which fact was reiterated in the evidence of its witness; that the holding of class A shares by only Co- operative Societies received judicial recognition in the case of ***Orion East Africa Limited V Mugama Farmers Co-Operative Union Limited & Another, [2018] eKLR*** where the court expressed itself as follows:

> ***"…The evidence of Nahashon is that Co-operative Bank (the Society) changed its name to Co-opholdings (a society) and so the Shares of the Co-operative Societies (who are shareholders of Co-opholdings) are held as a block in the Bank (the Company). This structure and its rationale is explained as follows in the Information Memorandum of the Bank issued during its proposed listing of 22nd December 2008;***
>
> ***"Co-op holdings Co-operative Society Limited with the above structure now holds the equivalent of the entire shareholding previously held by the 3,805 Co-operative societies countrywide (formerly class "A" shareholders) and is hence the strategic***

investor and majority shareholder in the Bank; The structure as approved ensures the bank will retain its strategic identity as a 'Co-operative movement in Kenya…"

39. The Respondent further submitted that the purchase of the shares by the 1st – 6th Appellants did not follow due process as it was not sanctioned by a resolution in a General Meeting and that it was only mentioned in passing at the Annual General Meeting (AGM); that therefore, the purchase of the shares by the 1st-6th Appellants had no legal effect and no title in the said shares could pass to them; that consequently, any documents issued to the 1st-6th Appellants in respect of purchase of the said shares was null and void.

40. According to the Respondent, whereas the 1st – 6th Appellants produced copies of deposit slips purporting to prove payments made towards purchase of the shares, the Tribunal correctly found that this did not constitute full payment as there was evidence to show that the shares were sold for a higher amount than what the Appellants claim to have paid.

41. The Respondent supported the finding of the Tribunal that the 1st-6th Appellants were either officials or members of the Respondent at all material time, a position which was confirmed by the 2nd Appellant in his oral testimony. It contended that the first six Appellants held a position of trust in the Respondent and that they had a responsibility of ensuring and promoting its best interest; that the appellants took advantage of their positions and unlawfully sold to themselves its shares and paid themselves dividends through the 7th Appellant from the year 2009 to 2014 thereby causing it financial loss.

42. The Respondent further denied the 1st-6th Appellants argument that its claim was time barred contending that its claim was founded on fraud and breach of trust and that its cause of action arose on 22nd July 2015 when it became aware of the fraud perpetuated by the Appellants; that since the claim was lodged on 29th July 2016, it could not have been statute barred; that in any event, the 1st-6th Appellants who had committed a grave illegality cannot purport to rely on the statute of limitations to conceal such an illegality.

43. Reference was made to the case of ***Kenya Pipeline Company Limited V Glencore Energy (U.K.) Limited, [2015] eKLR*** where the Court of Appeal held that:

"…We respectfully agree with that pronouncement of the law that still speaks unmistakably more than two centuries later. What the English courts could not do to assist a lawbreaker, Kenyan courts and courts anywhere, should not do.

There is a consistent line of decisions of this Court where it has set its face firmly and resolutely against those who would breach, violate or defeat the law then turn to the courts to seek their aid. The Court has refused to lend aid or succour and has refused to be an instrument of validation for such persons…"

44. In refuting the argument by the 1st-6th Appellants that the shares were being held in trust for them, the Respondent submitted that it was holding the shares as a legal entity and not in trust for any of its members. Further, the Respondent asserted that the shares were not available for purchase by its members in the first place and that therefore, the argument by the 1st-6th Appellants was unfounded.

45. The Respondent urged this court to consider the findings of the court in the case of ***David Sironga ole Tukai V Francis Arap Muge & 2 Others, [2014] eKLR*** where the court held thus:

"No court of law will enforce an illegal contract or one, which is contrary to public policy. Decisions of this Court abound on the point. In Mapis Investment (K) Ltd V Kenya Railways Corporation [2005] 2 KLR 410 this Court cited with approval Lindley L.J in Scott V Brown, Doering, Mcnab & Co (3) [1892] 2 QB 724, at 728 as follows:

"Ex turpi causa non oritur action. This old and well known legal maxim is founded in good sense, and expresses a clear and well recognized legal principle, which is not confined to indictable offences. No court ought to enforce an illegal contract or allow itself to be made the instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal, if the illegality is duly brought to the notice of the court, and if the person invoking the aid of the court is himself implicated in the illegality . It matters not whether the defendant has pleaded the illegality or whether he has not. If the evidence adduced by the plaintiff proves the illegality the court ought not to assist him." (Emphasis added)."

46. In response to the submission by the Appellants that the Tribunal erred in passing a **"collective"** judgment, the Respondent submitted that the 7th Appellant played an active role in disposal of the shares and payment of dividends to the 1st-6th Appellants by issuing them with certificates of investment knowing fully well that the shares were not available for disposal to individual members of the Respondent. According to the Respondent, this constituted sufficient evidence of the 7th Appellants involvement in the fraudulent scheme making them equally liable to right the wrongs committed against it; that the Tribunal's decision to enter judgment against all the appellants jointly and severally was thus correct and should be upheld.

47. The Respondent also denied the appellants' claim that the Tribunal erred in awarding it general damages of Kshs.2,000,000. It submitted that a prayer for general damages was among the reliefs it had sought in its statement of claim and that the award was justified since it had demonstrated the loss the Sacco suffered as a result of the transfer of its shares to the 1st-6th Appellants with the assistance of the 7th Appellant. The Respondent further contended that it was entitled to a refund of Kshs.1,486,886 being the amount paid as dividends to the 1st – 6th Appellants at its expense between the years 2009 and 2014.

48. Finally, the Respondent submitted that the Tribunal was correct in dismissing the 1st-6th appellants counterclaim as the same was untenable in law.

49. This being the first appellate court, we are duty bound to re-evaluate all the evidence and material presented before the Tribunal afresh and arrive at our own independent findings and conclusions but in doing so, we must bear in mind that unlike the Tribunal, we did not have the advantage of seeing the witnesses as they testified and give due allowance to that disadvantage. This position was well articulated by the Court of Appeal in ***Selle V Associated Motor Boat Co. & Others, [1968] E.A. 123*** where it referred to its duty as the first appellate court which is similar to that of the High Court. The court stated as follows:-

> ***"An appeal to this Court from a trial by the High Court is by way of a retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally…."***

50. We have considered the grounds of appeal, the evidence on record and the parties' rival written and oral submissions together with the authorities cited. We have also read the judgment challenged in the consolidated appeals. Having done so, we find that four key issues crystalize for our determination which are:

i. Whether the Respondent's claim was statute barred.

ii. If our answer to issue number (i) is in the negative, whether the Tribunal erred in finding that the acquisition of the Respondent's shares by the first six Appellants was illegal and fraudulent.

iii. Whether the Tribunal erred in granting all the reliefs sought in the statement of claim in favour of the Respondent against the appellants jointly and severally.

iv. Whether the Tribunal erred in awarding the Respondent costs of the claim.

51. On the first issue, the 1st-6th Appellants pleaded in their counter claim that the Respondent's claim was statute barred having been filed eight (8) years after the cause of action arose. This claim was strongly denied by the Respondent.

52. After our own analysis of the material before us, we agree with the Respondents position that its claim was founded on fraud and illegality and not breach of contract. We have combed through the entire *Limitation of Actions Act, Cap 22 Laws of Kenya* (the *Act*) and have not come across any provision that prescribes a time limit for instituting actions based on fraud. *Section 4 (1)* of the *Act* prescribes the limitation period for actions founded on *inter alia* contract and torts and makes no reference to actions based on fraud. *Section 26* of the *Act* makes it clear that even for actions which have a limitation period, if fraud is involved, time does not start running until the date the alleged fraud is discovered. The section is in the following terms:

> ***" Where, in the case of an action for which a period of limitation is prescribed, either—***
>
> ***(a) the action is based upon the fraud of the defendant or his agent, or of any person through whom he claims or his agent; or***
>
> ***(b) the right of action is concealed by the fraud of any such person as aforesaid; or … the period of limitation does not begin to run until the plaintiff has discovered the fraud or the mistake or could with reasonable diligence have discovered it."***

53. The Respondent claimed that it had a new management team in the year 2015 who discovered the fraudulent acquisition of its shares when the first six appellants started demanding for payment of that year's dividend. This claim was not disputed by any of the appellants. Consequently, we find that time began to run from the date the alleged fraud was discovered and noting that the Tribunal cause was filed in the year 2016, we are satisfied that the claim was not statute barred.

54. We are in agreement with the Appellants submissions that as a matter of law, claims arising from fraud must be specifically pleaded and strictly proved. *Order 2 Rule 4* of the *Civil Procedure Rules* clearly sets out this position- See also the case of ***Vijay Morjaria V Nansingh Madhusingh Darbar & Another, (Supra).***

55. Regarding the standard of proof, it is now settled that though the standard should not be beyond reasonable doubt like in criminal cases, it should be higher than proof on a balance of probabilities which is the standard of proof in all other civil cases. The Court of Appeal acknowledged this position in ***Gladys Wanjiru Ngacha V Teresa Chepsaat & 4 others [2013] eKLR*** where it rendered itself thus:

> ***"….Allegations of fraud must be strictly proved: although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required.***
>
> ***It is not enough for the appellant to have pleaded fraud; she ought to have tendered evidence that proved the particulars of fraud to the satisfaction of the trial court. In Mutsonga vs. Nyati (1984) KLR 425, at pg 439, this Court held: "Whether there is any evidence to support an allegation of fraud is a question of fact"…''***

56. The rationale for requiring a slightly higher standard of proof in cases founded on fraud was explained by the Court of Appeal in ***Vivo Energy Kenya Limited V Maloba Petrol Station Limited & 3 others [2015] eKLR*** where it had the following to say:

"…The appellant has made vague and very general allegations of fraud against the respondents. Fraud and conspiracy to defraud are very serious allegations. The onus of prima face proof was much heavier on the appellant in this case than in an ordinary civil case…"

57. From our perusal of the Respondent's pleadings, we note that the particulars of fraud were clearly and specifically set out in paragraph 14 in line with the legal position set out above.

58. That said, we now have to address ourselves to the question whether the Respondent proved to the required standard that the first six appellants fraudulently acquired from it the shares in question. We start by noting that it is not disputed that the shares purchased by the 1st – 6th Appellants were all class "A" Shares which had been bought by the Respondent from the Co-operative Bank of Kenya Limited and were held by the 7th Appellant. The first six Appellants have claimed that purchase of the shares was sanctioned by meetings called by the Management Committee which was mandated by the Respondent's By-laws to regulate its operations.

59. We have perused the Respondent's By-laws which are part of the Record of both Appeals. Under By-laws 33, the supreme authority of the Respondent is vested in the General Meeting of members and any business not completed at the Annual General Meeting may be taken up at a special General Meeting or the next General Meeting. This position is reinforced by *Section 27* of the *Co-operative Societies Act* which specifically recognizes the general meeting of members as the supreme organ of co-operative societies being the forum in which members participate and vote on all matters concerning their society.

60. Under By-law 47, the Management Committee is the governing authority of the Respondent. It is mandated to direct the affairs of the society subject to any direction from the General Meeting or the Commissioner of Co-operative Development.

61. We have also perused the 7th Appellant's By-laws. Our reading of the By-laws reveals that both individual members of registered societies and registered co-operative societies can be members of the 7th appellant but By-law 7 clearly provides that class "A" shares can only be held by registered co-operative societies. Individual members of registered societies can only hold class "B" shares. This means that the first six appellants being members of the respondent were only eligible to hold class "B" shares.

62. We now turn to the Minutes of the meetings referenced by both the 1st-6th Appellants and the Respondent. The meeting of 1st August, 2008 is described as a "Regency Sacco Joint Committee Meeting". The minutes of the meeting show that it was attended by 12 Officials and two Members of staff. Under agenda No. 2 which is headed "shares", the Chairman informed the Committee that the Society had 6,085 shares at Co-operative Bank. That after deliberations on whether to sell the shares or to divide them between the members, it was decided that the KUSCO Officials be informed prior to the issue being raised before the Members.

63. In the meeting of 16th August, 2008 headed "Regency Sacco Members Education Meeting", there was attendance by 11 Officials, two staff Members, two KUSCO Members, one Ministry of Co-operative Development Official and one attendee appearing under the subheading "Homeward Agency Ltd." The minutes of that meeting show clearly that the issue of whether the Co-operative Bank shares should be sold was briefly discussed under A.O.B, item No. C; that after a lengthy discussion, it was agreed that the said shares be sold at a price of Ksh.150. The deadline for purchasing the shares was set as 30th August, 2008.

64. We observe from the minutes of the Members Education Meeting that the meeting did not fall into the category of either an Annual General Meeting or a Special General Meeting as defined by the Respondent's By-laws. The sale of the Respondent's shares was not tabled for discussion and resolution by the Respondent's members in any subsequent AGM or Special General Meeting.

Consequently, we hold that the Education Committee did not have any mandate to authorize sale or transfer of the Respondent's shares to the first six Appellants.

65. In the Annual General Meeting of 28th December 2008, the Auditors just reported a change in the Respondent's investment portfolio which was said to have reduced from 619,5000 to Ksh.11,000 following sale of the Co-operative Bank shares. As noted earlier, the AGM is the supreme authority of a co-operative society and it is the only organ mandated by the law to make decisions on matters that affect the society. We agree with the first six appellants that the Management Committee is mandated by the By-laws to run the day to day affairs of the society and to make investments on the society's behalf. The purported sale of the shares in our view is an act that would have divested the Respondent of its assets and cannot by any stretch of imagination qualify to be an investment.

66. We are therefore of the considered view that having not received the sanction of the Respondent's membership in an AGM or Special General meeting, the purported sale of the shares was done contrary to the law as provided for by the *Co-operative Societies Act* and the respondent's By-laws. The sale was unprocedural and illegal. Moreover, it related to class "A" shares which as stated earlier could only be held by registered co-operative societies and not individual members.

67. The sale was also fraudulent considering that each of the 605,800 was priced at Kshs. 150 but instead of paying the full purchase price which according to our calculations was Kshs. 90,870,000, the first six Appellants in their own admission in the counterclaim paid a paltry total sum of KShs.1,234,000 though the financial statements for the year ending 31st December 2008 indicated that the amount received by the Respondent for sale of the shares was Kshs. 608,500. The deposit slips produced in evidence as proof of payment for the shares confirm the amount indicated in the counterclaim. The first six Appellants therefore made a false representation of fact that they had purchased the shares for value on the basis of which they were paid dividends for six good years between year 2009 to 2014 to the detriment of the Sacco and its other members.

68. The position taken by the 7th Appellant, as per the evidence of it's Chief Executive Officer *Mr. Fredrick Ndegwa* (RW1), was that the 7th Appellant had no relationship with the Respondent's Members and that the shares in question were sold to the Respondent and not to any of

its members but the witness admitted having signed the certificates of investment issued to the 1st – 6th Appellants. He maintained that the 7th appellant was paying dividends directly to the Respondent and not to the first six Appellants.

69. The above position was supported by the bundle of documents produced by the 7th Appellant as part of its evidence which included copies of three Co-operative Bank cheques it had drawn in favour of the Respondent for Ksh.317,710, Ksh.373,494, and Ksh.324,64 being payment of dividends issued on 28th June 2013, 30th August 2014 and 29th June 2015. We did not come across any evidence showing payment of dividends from the 7th Appellant to any of the six Appellants.

70. The certificates of investment produced as exhibits by the Respondent reflect on the face of it that they were issued by the Respondent, Regency Sacco Ltd to the 1st – 6th Appellants on 21st September, 2010. The said certificates were signed by the Respondent's Chairman, Treasurer and Hon. Secretary. They were verified by the Manager, Co-operative Holdings Sacco who also signed them. The said certificates further show that the 1st – 6th Appellants held the shares reflected therein being the "Regency Sacco shares purchased in Co-op Holdings Co-operative Society Ltd, the majority and strategic investor of Co-operative Bank Kenya Limited."

71. In our view, the evidence of *Mr. Fredrick Ndegwa* (RW1) when compared with the content of the certificates of investment is inconsistent and self-contradictory in the sense that he maintained throughout his evidence that the 7th Appellant never issued, transferred or allocated any shares to the 1st – 6th Appellants yet he verified and signed the certificates of investment issued to the first six Appellants certifying that they had purchased the Class A shares shown in the certificates. The big question then is: If the 7th Appellant was not complicit in the sale of the said shares, why did RW1, its Manager sign the certificates of investments? The 7th Appellant did not offer any explanation for its action. In our view, the verification of the certificates of investment by the 7th appellant had the effect of validating the purported sale and made it possible for the first six Appellants to claim and obtain dividends from the Respondent.

72. Given the foregoing, we have come to the conclusion that the shares in question were fraudulently purchased and allotted to the 1st – 6th Appellants with the assistance and facilitation of the 7th Appellant who verified and authenticated the issuance of certificates of investment to the first six Appellants. We therefore have no reason to differ with the finding of the Tribunal that the 7th Appellant cannot escape blame for the illegal transaction.

73. On the issue of payment of dividends, the first six Appellants did not dispute having received dividends from the Respondent from the year 2009 to 2014. They only disputed the total amount the Respondent claimed they had received. It is a cardinal principle of the law of evidence that he who alleges must prove. Having claimed that the six Appellants had received a total of Kshs. 1,486,886, it was incumbent upon the Respondent to substantiate that claim by tendering credible evidence to that effect.

74. However, from the material placed before us, we did not come across any credible and cogent evidence that proved the Respondent's allegation. The various tables purported to be schedules showing the payment of dividends paid to the first six Appellants either bore signatures which were not proved to belong to any of the six appellants or bore no signatures at all and in any case, the total figures displayed therein did not amount to the sum claimed by the Respondent. In our view, the only credible evidence which reflected payment of dividends was the three cheques issued to the Respondent by the 7th Appellant which was for a total sum of Kshs. 1,015,851. Since its not disputed that once the payments were made to the Respondent its office bearers distributed their proceeds to the six appellants on a *pro rata* basis, we find that the amount shown on the three cheques is the only amount we can safely conclude was paid as dividends to the six appellants.

75. Regarding the award of damages, the Respondent claimed that it was entitled to the damages awarded to it by the Tribunal having prayed for general damages in its statement of claim and having proved that it had suffered financial loss as a result of the Appellants fraudulent actions. We are satisfied that the Respondent actually suffered financial loss as alleged since it lost the monies it would have received as dividends which was instead distributed to the six Appellants. If the dividends had not been paid to the first six appellants, the money would have been reinvested for the benefit of the Sacco or be distributed to all its members. It follows that payment of dividends to the first six Appellant's occasioned financial loss to the Respondent directly and indirectly in the form of opportunity cost.

76. The Tribunal awarded the Respondent general damages in the sum of Ksh.2,000,000. We have considered the following comparable awards of general damages in cases of fraud:

i. ***Alton Homes Limited & Another V Davis Nathan Chelogoi & 2 others, [2018] eKLR*** in which the court awarded general damages in the sum of Kshs.5,000,000 to the plaintiffs in a claim of fraud and illegality.

ii. The case of ***Jan Wulfert Verwoerd & another V Victor Innocent Otieno & 5 Others, [2019] eKLR*** where the court awarded nominal general damages in the sum of Kshs.1,000,000 as compensation in claims of fraud and illegality, though in this case nominal damages were awarded in the absence of proof of loss.

77. The Respondent sought general damages in its Statement of Claim. The Tribunal in its discretion awarded it Ksh.2,000,000 which in our view is reasonable. We find no reason to disturb that award and the same is hereby upheld.

78. This brings us to the issue of whether the Tribunal erred in granting all the reliefs sought in the statement of claim in favour of the Respondent against all the Appellants jointly and severally including the award of damages. We have already found that the first six Appellants fraudulently acquired the aforestated shares from the Respondent and in so doing, they were facilitated by the 7th Appellant who validated the certificates of investments issued by the then management of the Respondent who included the 2nd and 3rd appellants.

79. It is clear from the evidence that the certificates of investments were meant to prove ownership of the shares shown therein and formed the basis for payment of dividends to the first six appellants which legally belonged to the Respondent. In our opinion, the 7th Appellant was

equally responsible for the loss incurred by the Respondent and cannot escape blame. We are thus unable to fault the Tribunal's finding that all the appellants were jointly and severally liable to the Respondent for the loss it suffered as a result of the illegal transactions referred to hereinabove. We thus find no basis to interfere with that finding.

80. We however wish to note that prayer (iv) was superfluous and granting it was unnecessary as prayer 3 sufficiently served the purpose it was apparently meant to serve. We also find that the Tribunal erred in granting prayer (v) on terms sought for two main reasons:

81. First, it failed to appreciate that the Respondent had not proved to the required standard that the first six Appellants had received a total of Kshs. 1,486,886 as dividends for the years 2009 to 2014. As stated earlier, the only credible evidence on record shows payment of dividends in the sum of Kshs. 1,015,851 to the Respondent which must have been distributed to the first six appellants. This is the amount that the first six Appellants should have been compelled to refund to the Respondent not kshs. 1,486,886.

82. Secondly, the Tribunal's finding that the 7th Appellant was jointly and severally liable to refund Kshs. 1,486,886 was erroneous since there was no evidence to prove that the 7th Appellant received or retained any money meant to be dividends payable to the Respondent. The 7th Appellant's evidence that it paid all dividends accruing to the Respondent through cheques issued in its favour was not disputed by the Respondent. The 7th Appellant was not therefore liable to refund anything to the Respondent.

83. In view of the foregoing, the Tribunal's decision regarding prayer (V) is hereby set aside. It is substituted with an order issuing a mandatory injunction compelling the first six Appellants to refund Kshs. 1,015, 851 to the Respondent. All the other reliefs granted by the Tribunal in terms of prayer one (1) to three (3) are hereby upheld.

84. Last but not least, we now address the issue whether the Tribunal erred in awarding costs of the claim to the Respondent. It is trite law that costs follow the event and are at the discretion of the court. As held by the Court of Appeal in ***Supermarine Handling Services Ltd V Kenya Revenue Authority, [2010] eKLR***:

> ***"Costs of any action, cause or other matter or issue shall follow the event unless the court or Judge shall for good reason otherwise order. See Section 27 (1) of the Civil Procedure Act.***
>
> ***In the case Devram Dattan v Dawda [1949] EACA 35 it was held:***
>
> ***"It is well established that when the decision of such a matter as the right of a successful litigant to recover his costs is left to the discretion of the Judge who tried his case, that discretion is a judicial discretion, and if it be so its exercise must be based on facts....If, however, there be, in fact, some grounds to support the exercise by the trial Judge of the discretion he purports to exercise, the question of the sufficiency of those grounds for this purpose is entirely a matter for the Judge himself to decide, and the Court of Appeal will not interfere with his discretion in that instance.""***

85. Noting the above rendition by the Court of Appeal and having found that the Tribunal correctly found in favour of the Respondent and properly dismissed the first six Appellant's counterclaim, we are unable to fault the exercise of the Tribunal's discretion in awarding costs to the successful party who was the Respondent herein.

86. The upshot therefore is that both Appeals partially succeed to the limited extent specified above.

87. On costs, the best order that commends itself to us is that all the Appellants will bear the Respondents costs in the Tribunal but each party will bear own costs of the appeal.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 17TH DAY OF MARCH 2021.

C. W. GITHUA

JUDGE

B. THURANIRA JADEN

JUDGE

In the presence of:

Mr. Kinyanjui for the 1st – 6th appellants

Ms Koskei for the 7th appellant

Mr. Nyarango for the respondent

Ms Orodi: Court Assistant