



Musti Investment Limited v Moses Kibathi t/a Osoro Chege Kibathi & Company Advocates (Civil Suit 400 of 2018) [2020] KEHC 7086 (KLR) (Commercial and Tax) (31 March 2020) (Judgment)

Musti Investment Limited v Moses Kibathi t/a Osoro Chege Kibathi & Company Advocates [2020] eKLR

Neutral citation: [2020] KEHC 7086 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL SUIT 400 OF 2018
DAS MAJANJA, J
MARCH 31, 2020

BETWEEN

MUSTI INVESTMENT LIMITED PLAINTIFF

AND

**MOSES KIBATHI T/A OSORO CHEGE KIBATHI & COMPANY
ADVOCATES DEFENDANT**

JUDGMENT

INTRODUCTION AND BACKGROUND

1. The subject of this case is the enforcement of several undertakings given by the defendant to the plaintiff (“the Company”). In the Originating Summons (“the Summons”) dated 28th September 2017 made under Order 52 rule 7(6) of the Civil Procedure Rules, the Company seeks, amongst others, the following order:
 - (2) THAT the Respondent to honour the professional undertaking given by him to the Applicant on diverse dates between the 15th May 2015 and 4th June 2015. The Respondent issued to the Applicant his professional undertakings to pay it as the full agreed consideration upon the transfer from the Applicant’s name and the registration of titles number Kajiado/Kaputiei-North/83159, Kajiado/Kitengela/79865, 81696, 81687, 81708, 81659, 81712, 81679, 81714, 81657, 81654, 81656, 81664, 79868, 81680, 816666 & 81658 in favour of the borrowers/purchasers namely Benson Mbivu Mutambai, Anthony Kamau Waithaka, Louise Kemunto Araka, Daniel Kisemei Kirrinkol, Misheck Ngunjiri Gathiti, Moses Mwaniki Waweru, Charles Mugecha Maina, Wycliff Cheruiyot Langat, George Mutiso Mutua, Michael Brian Njenga, Samuel Thiongo Kamau, Adan Adou Kinyua, Doreen Nyambura Nganga, Kipkirui Bosuben



Dixon, Charity Nyambura Ngubiru, Rose Nanjala Wekesa and Peter Muhia Macharia on behalf of his client Equity Bank Limited.

2. The Company's claim is grounded on 17 professional undertakings issued by the defendant on various dates between 15th May 2015 and 4th June 2015 in which he undertook to pay a total of Kshs. 26,100,000.00. The Company's contention is that it fulfilled its part of the bargain by forwarding to him all the documents necessary for transfer of title to the purchasers. The purchasers were employees of Equity Bank which had advanced them money to purchase land from the Company. It contended that the defendant failed to honour his side of the bargain by failing to release the balance of the purchase price.
3. The defendant opposed the Summons through the replying affidavit of Kariuki Kingori, the Legal Services Manager of Equity Bank, sworn on 26th April 2018. He admitted that Equity Bank ("the Bank") directed the defendant to issue a professional undertaking to pay to the Company the balance of the purchase price upon successful transfer of the properties to the purchasers, who were at the material time, its employees.
4. The thrust of the defendant's defence is that following an internal audit at the Bank, it discovered that its employees conspired with the Company to overvalue properties sold to them. The Bank advanced facilities on the basis of the overvalued amount after which its employees and Company would share the difference between the actual and overstated price of the properties. In the Bank's view, the undertaking given by the defendant to the Company was vitiated by fraud.

Preliminary matters

5. The Summons was heard by Tuiyott J., and in a ruling dated 1st February 2019, he identified and resolved three preliminary issues. First, he held that it was proper for an officer from the Bank to respond to the Summons on the ground that the Bank had a substantial interest in the matter and as the disclosed principal of the defendant, it had a right to defend the suit as it would probably meet any decree that would be issued against the defendant.
6. Second, the learned Judge held that an advocate may give a professional undertaking to a non-advocate since the duty of an advocate to honour a professional undertaking remains in every case.
7. Lastly, the learned judge held that since the issue of fraud was raised, it could only be determined by taking oral testimony. The learned judge therefore framed the following issues for trial;
 - (a) Whether the transactions upon which the professional undertakings were given were tainted by fraud.
 - (b) If so, whether the Plaintiff was party to the fraud.
 - (c) If so, whether the professional undertakings have been vitiated by fraud.
 - (d) Costs of the suit.

The Fraud

8. As I stated earlier, the only issue for consideration is whether the undertakings given by the defendant were vitiated by fraud. The general rule is that fraud must be specifically pleaded and the particulars of fraud set out in the pleadings with particularity (see *Kuria Kiarie and 2 others v Sammy Magara NRB CA Civil Appeal No. 326 of 2017 [2018] eKLR*). The particulars of fraud were set out in the affidavit of Kariuki King'ori sworn on 26th April 2018.



9. The particulars of fraudulent misrepresentation by the Company, borrowers and valuers were as follows;
 - i. The Company in collusion with the borrowers and valuers of the various parcels of land overstated the purchase price for the benefit of the borrowers and to the detriment of the Bank with the intention of defrauding the Bank.
 - ii. The Company knowingly and or recklessly executed various agreements for sale with the borrowers with the purchase prices pegged on significantly higher values whilst knowing that the true value of the parcels of land was significantly lower.
 - iii. The Company and the borrowers induced the Bank to finance higher amounts while knowing that the values of the properties were significantly lower.
 - iv. The Company through concealment or non-disclosure of material facts as to the true values of the parcels of land intended to cause loss and injury to the Bank with a gain to the borrowers and itself.
 - v. The Company executed transfers in favour of the borrowers based on lower amounts on the stamp duty while being aware that the Bank had undertaken to finance the purchase of the parcels of land base on the overstated values. The overstated values are at least thrice the amounts of the true value of the various parcels of land.
10. The Bank contended that fraudulent conduct by the borrowers as employees of the Bank in collusion with the Company and the initial property valuers is expressly prohibited by the provisions of sections 11(1)(d)(i) and (h) and 11(1A) of the Banking Act (Chapter 488 of the Laws of Kenya) which places a statutory obligation on the Bank not to grant to permit to be outstanding a loan facility that is not fully secured.
11. The Bank also alleged that the contracts for financing applied for by the borrowers/purchasers and subsequently issued by the bank were induced by fraud and tainted with illegality and therefore not enforceable and provided the following particulars.
 - i. The contract for financing by the Bank was not fully secured in contravention of section 11(1)(d)(i) and (h) and 11(1A) of the Banking Act.
 - ii. They facilitated a fraud on the exchequer by enabling the underpayment of stamp duty contrary to the provisions of section 10A of the Stamp Duty Act while financing was based on overstated values.

The Hearing and Evidence

12. Since the undertakings were not disputed, I directed the defendant to begin his case. He called Kariuki Kingori (RW 1), Elijah Matheri (RW 2) and Daniel Muriuki Kibuchi (RW 3) as witnesses. The Company called its managing director, Stephen Muturi Ngugi (PW 1). At the close of the hearing both parties filed written submissions.
13. The Legal Services Manager for the Bank, RW 1, testified that an investigation into the subject transactions was triggered by an audit report titled, "Staff Development Loans Review", which revealed the fraud in staff loans between 2010 and 2015. The report compared the valuations done by Lloyd Masika who did the initial valuation of plots purchased by the employees before the borrowing was approved and Acumen Valuers who did valuations after the fraud was discovered. The report



concluded that the valuations used to apply for the development loans were generally overstated. RW 1 admitted in cross-examination that none of the 17 transactions in this case were part of the audit report.

14. RW 2, the Bank's Fraud Investigation Officer, testified that the Security Department received the audit report and proceeded to investigate the alleged fraud which implicated the Bank's employees. The thrust of his evidence was that the nefarious scheme involved two employees; EKK and MMN who had received money from Stephen Ngugi (PW 1) and one AM, who was his wife and one PM. He stated that he interviewed members of staff about why they were receiving money from the Company and they failed to provide any plausible explanation. He produced a report of his investigation as evidence.
15. RW 2 further testified that his team established that when staff applied for the loans, the funds would be disbursed and transferred to the Company's accounts and upon receipt of money, there was evidence of suspicious deposit back to the Bank's employees which was evidence that the Company was returning the excess money to the employees as the properties had been overvalued.
16. RW 3 was the principal valuer working under Acumen Valuers. He stated that he was not aware of any investigations by the Bank in the subject properties and that he gave an independent opinion based on his professional judgment.
17. PW 1, the managing director of the Company, denied that he was involved in the fraud. He stated that he was entitled to the balance of the purchase price as he had complied with all the conditions of the agreement and undertaking by forwarding all the documents. He denied that AM was his wife and stated that his wife was Susan Njeri Nganga. He further admitted that he had a business relationship with EKK and MMN but denied that it had anything to do with the fraud alleged by the Bank.
18. From the evidence and for ease of reference, a summary of the 17 transactions, the purchaser, property number, purchase price and amount financed, valuations and stamp duty paid was as follows:



	PURCHASER	Property Number	PURCHASE PRICE/ AMOUNT FINANCED (KSHS)	VALUATION BY ACUMEN VALUERS	VALUATION BY ACCURATE VALUERS	STAMP DUTY PAID (KSHS)
1	Misheck Ngunjuri Gathithi	81708	1,500,000		450,000	14,560
2	Samuel Thiong'o Kamau	81654	1,500,000	500,000.00		15,060
3	Moses Mwaniki Waweru	81659	1,500,000	500,000.00		11,570
4	Wycliffe Cheruiyot Langat	81679	1,500,000	500,000		11,460
5	Benson Mbivu Mutyambai	79865	1,500,000		500,000	14,670
6	Anthony Kamau Waithaka	81686	1,500,000		450,000	14,670
7	Louise Kemunto Araka	81686 & 81687	3,000,000	1,000,000		22,600
8	Charles Mugecha Maina	81712	1,500,000		450,000	11,460
9	Michael Brian Njenga	81657	1,500,000	500,000		14,670
10	Adan Adou Kinyua	81656	1,500,000	500,000		13,760



11	Doreen Nyambura Nganga	81664	1,500,000	500,000		13,760
12	Kipkurui Bosuben Dixon	79868	1,500,000		500,000	13,760
13	Rose Nanjala Wekesa	81666	1,500,000	500,000		13,760
14	Peter Muhia Macharia	81658	1,500,000	500,000		14,760
15	Daniel Kirinkol	83159	950,000			
16	George Mutua	81714	1,500,000	500,000		11,570
17	Charity Ngubiru	81680	1,200,000	500,000		13,760

The Defendant's Case

19. Based on the evidence, the defendant's case is that it proved the first element of fraud was proved by a comparison between the consideration for the plots and the true valuation of the properties based on a comparison of the valuations undertaken by Lloyd Masika before the properties were purchased and those undertaken by Acumen and Accurate Valuers.
20. Counsel for the defendant referred to *The Collector v Kassam Shivji Bhimji and two others* (Respondents in Civil Appeal No. 58 of 1959) [1959] EA 1063 where it was held that the onus to prove irregularity in a valuation report lies with the objector. Counsel further submitted that RW 3's testimony was not controverted by an independent valuation to validate the prices at which the plots were sold. Further that RW 3's valuations were supported by the values assigned to the plots by the Collector of Stamp Duty who assessed the value of each plot at Kshs. 700,000.00. He submitted that while valuation is not an exact science, it is a quasi-scientific art which ought to be coupled with common sense in drawing deductions.
21. According to the defendant's submissions, the next element of fraud was that the Company deliberately failed to state the consideration in the instruments of transfer. It submitted that under the sale agreements, it was the responsibility of the Company to complete and execute the instruments of transfer. In this case therefore, the Company's failure to insert the purchase price in the transfer forms was deliberate and circumstantial evidence of the fact that the consideration stated in the agreements for sale was not the true consideration.



22. The defendant added that the manner in which the instruments of transfer by the Company facilitated a breach of the provisions of section 10 of the Stamp Duty Act (Chapter 480 of the Laws of Kenya) which provides:
- 10(1) All the facts and circumstances affecting the liability of any instrument of duty, or the amount of the duty with which any instrument is chargeable, shall be fully and truly set out in the instrument; and every person who negligently or with intent to defraud the Government-
- a) Executes any instrument in which all those facts and circumstances are fully and truly set forth; or
 - b) Being employed or concerned in or about the preparation of any instrument, neglects or omits fully and truly to set forth therein all those facts and circumstances, shall be guilty of an offence and liable to a fine not exceeding one hundred thousand shillings. [Emphasis supplied]
23. In the circumstances, counsel for the defendant submitted that in view of the demonstrated and deliberate violation of the Stamp Duty Act, the fraudulent transaction should be voided. Counsel relied on several decisions including *Holman v Johnson* [1775] 1 Cowp 341, *Wamukota v Donati* KSM CA Civil Appeal No. 6 of 1986 [1987] eKLR and *Patel v Singh* (No. 2) [1987] KLR 585. Citing the decision of the Court of Appeal in *Kenya Pipeline Company Limited vs Glencore Energy (UK) Limited* NRB CA Civil Appeal No. 67 of 2014 [2015] eKLR, the defendant submitted that once it was established that the defendant acted in breach of a statute, it was not necessary to delve into the merits of the case.
24. The defendant added that RW 2 gave an account of the investigation that he undertook to unravel the intricate scheme that the Company had put in place to facilitate the borrowing by the Bank's employees. The defendant contended that PW 1 did not deny knowledge of the two individuals who were identified as 'brokers' and who were able to entice the purchasers. The defendant urged that court to reject PW 1's explanation regarding the relationship between him and the brokers.
25. Counsel for the defendant also urged the court to conclude that it had established fraud from several circumstances. That the prices of the subject properties were set at a non-negotiable price hence the initial valuations must have been tailor made to fit the price agreed as a result of the fraudulent scheme thus excluding the possibility of willing buyer, willing seller purchase. Also, the fact that the Company was able to secure from so many purchasers the exact value of each property that is put on the market or the exact price that is demanded was contrary to normal human behavior and evidence of fraud.
26. The defendant submitted that it demonstrated to a standard beyond the ordinary preponderance of evidence that the Company connived to create a covert scheme with the aim of defrauding the Bank and the Exchequer. It maintained that it would be unjust and unconscionable to enforce the professional undertakings which would result in the Bank being required to pay amounts which were not a true reflection of the values of the properties in question. Counsel submitted that the Company should not be allowed to benefit from the undertaking when it's hands are tainted with fraud, deception and concealment and urged the court to dismiss the Summons by citing the words of Lord Denning stated in *Lazarus Limited v Beasley* [1956] 1 ALL ER 341, 193 that, "No court in this land will allow a person to keep an advantage which he has obtained by fraud".



Plaintiff's Case

27. The thrust of the Company's submission was that the defendant had the burden to adduce evidence and establish two issues; whether the 17 subject properties were actually overvalued and whether the 17 employees actually shared the overstated value with the Company.
28. As regards the first issue, the plaintiff submitted that the audit report that triggered investigation and which was produced by RW 1, did not implicate the subject properties. Consequently, it was not established that the report had anything to do with the 17 transactions, whose professional undertakings are being enforced before this court.
29. On the issue that concerning stamp duty and the defendant's argument that purchasers/borrowers paid stamp duty using values lower than the values stated in the sale agreements and that consideration was not stated in the transfer forms, counsel for the Company submitted that it was not disputed that the stamp duty was paid by the defendant who was the advocate acting for the Bank. Counsel further submitted that all the instruments of transfer were endorsed at the bottom by, "Moses Kibathi Advocate & Commissioner for Oaths P.O. Box 21838 00100 Nairobi," at the part of 'signature and designation of the person certifying' by the defendant who drew the transfer forms.
30. Counsel further stated that the Company performed its obligations under the agreements and professional undertakings and the defendant, being in possession of the sale agreements and transfer form and the purchase prices could not have acted on the Company's instructions to pay less stamp duty. Counsel also pointed out that the defendant was not called to testify on the contents and details of any of the documents he prepared and his role in the transaction despite the fact that documents he prepared were at the centre of the fraud allegations.
31. The Company contested the valuation of the suit properties by RW 3. Counsel agreed that valuation is not an exact science and is a matter of opinion and that it was possible for there to be a variation in valuation done by different valuers. He submitted that the Company contended that RW 3's valuation was biased as he was retained for the purpose of validating the results of the audit report. Counsel emphasized that in as much as the Bank claimed collusion between the Company and the valuer, it did not adduce any evidence to support that allegation. Counsel for the Company urged the court to find that the allegations of fraud in the 17 transactions were speculative and unsubstantiated and the evidence showed that the actions and omissions complained of were executed by agents of the Bank, its valuer being Lloyd Masika and the defendant.
32. On the question whether the Company actually shared the overstated value with the employees, it was submitted that the defendant did adduce any evidence to show that money was shared as the purchase price had not been paid and that is why this matter was in court. The Company discounted the evidence of RW 2 that money moved between the Company and purchasers. Counsel submitted that RW 2's report listed the employees whose outstanding loans were allegedly by the Company but none of those named in the report were among the 17 employees who had bought land from the Company.
33. Counsel for the Company submitted that the defendant's case was based on mere suspicion and hearsay which could not be substantiated. Counsel urged the court to dismiss the case and referred to *Katende v Haridas and Company Limited* [2008] EA 173 where the court observed that, "...a large part of the appellant's testimony consists of hearsay evidence as none of his agents or officials ... was called to give evidence. The logical conclusion is that none of the agents carried out necessary investigation... if investigations were properly done then the failure by the appellants to call his agents to give evidence was suspect." (emphasis mine).



Determination

34. The question for determination as framed is whether the professional undertakings were tainted by fraud and whether the Company was involved in that fraud. If it was, then the undertakings would be nullified.
35. The fraudulent scheme implicating the Company was explained in evidence by RW 1 and RW 2. RW 2 produced an investigation report dated 11th June 2015 which summarized the finding of the investigations. It was alleged that the fraud involved the Company, valuer and the employees. According to the report, 12 members of staff were investigated and two of them, EKK and MMN, were identified as brokers who had a relationship with PW 1 and his wife who was identified as AMM.
36. I have studied the report and it shows that one of the members of staff identified as EKK was mentioned adversely by staff who received money from him before or after the loan disbursements. The report listed the names of 5 Bank's employees. None of them were among the 17 employees subject of the undertakings in this case. RW 2 also produced EKK's bank statement which revealed transactions between EKK and PW 1 and the other brokers but none of the transactions involved the 17 employees in this case.
37. The other member of staff who was identified as a broker, MMN, was adversely mentioned by 4 Bank employees who received money from him but none of them are the subjects of the undertakings in this case. His bank statement showed dealings with PW 1 and the other brokers but one of the transactions involved the 17 employees herein.
38. Although the report was produced in evidence, its contents amount to hearsay in so far as it is intended to prove the truth of the contents therein. The employees who were questioned about the fraud were not called as witnesses. The Privy Council in *Subramanian v Public Prosecutor* [1956] WLR 965 gave the universally accepted definition of hearsay where it stated as follows:

Evidence of a statement made to a witness by a person who is not himself called a witness may or may not be hearsay. It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay and is admissible when it is proposed to establish by the evidence, not the truth of the statement, but the fact that it was made.
39. Apart from setting out what I have stated is hearsay, the only direct evidence produced by RW 2 were the bank statements for EKK and MMN which connected them to PW 1 but not to the 17 Bank employees and transactions subject of the undertakings. The testimony of RW 1, RW 2, the audit report and the security alone do not establish fraud.
40. Then there is the issue of the valuation of the properties. It is not disputed that the initial valuation of the properties was done by Lloyd Masika Valuers. The Bank did not call anyone from Lloyd Masika to testify as a witness or adduce evidence to show that the said valuations were influenced by the Company or the Bank's employee or that it was involved in the fraud. It is also unfortunate that the defendant failed to produce the valuation reports prepared by Lloyd Masika to enable the court evaluate the basis of those reports in light of its claim that the land parcels were overvalued. Further, those reports were not put to RW 3 for comment to enable the court carry out a meaningful evaluation of the expert evidence and reach its own conclusion. While it is true that there is a basis for suspecting fraud based on the variation between the initial valuation and the one carried out by RW 3, that alone cannot implicate the Company in the fraud in the absence of any other evidence connecting the valuer to the Company. The variance in the valuations is at best evidence of negligence or recklessness by the original valuer.



41. Finally, the defendant grounded its case against the plaintiff on deliberate breach of the Stamp Duty Act and Banking Act. As regards the Stamp Duty Act, the evidence is clear that the consideration was not included in the transfer forms leading to the undervaluing of the property vis-a-vis the purchase price set out in the sale agreement and amount financed by the Bank. Failure to provide full information facts affecting liability to pay tax is clearly a breach of section 10 of the Stamp Duty Act. The question is whether the undertakings should be voided on the basis that the transfer instruments were intimately tied to or connected to the undertakings sought to be enforced.
42. The position regarding enforcement of transactions tainted with illegality was summarized in *Kenya Pipeline Company Limited v Glencore Energy (UK) Ltd* (Supra) where the Court of Appeal stated as follows:
- 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. We still refuse. See *Mistry Amar Singh vs. Kulubya* [1963] EA 408, *Heptulavs. Noor MohaMMED* [1984] KLR and *Festus Ogadavs. Hans Mollin*(supra). In the last case the Court stated, and we are content to merely restate it as good law, that no court ought to enforce an illegal contract where the illegality is brought to its notice and if the person invoking the aid of the court is himself implicated in the illegality.
- We are amply satisfied that by an elaborate scheme hatched and executed by itself while using Triton as a front, cover and cloak, the respondent entered and traded in the Kenyan oil market without a licence, a flagrant illegality. That illegality defeats all its claims herein against the appellant and the learned judge should have so found. In failing to do so despite pleadings and strident pleas by the appellant, he fell into error and must be reversed.
43. My reading of the aforesaid decisions and the decisions quoted is not that the court will refuse to enforce every contract cloaked in illegality but it will do so when the person who seeks to enforce the contract is himself implicated in the illegality. Indeed, in the *Kenya Pipeline Case* (Supra), the court made a finding that the party seeking to enforce the contract engaged in deliberate acts aimed at circumventing the licencing provisions of statute.
44. A further factor to consider is the nature and purpose of the statute contravened and the consequences thereof. In *Githunguri v Jimba Credit Corporation Ltd* [1988] KLR 825 the court rejected the contention that since the bank loaned money in contravention of section 10(1) of the Banking Act (Chapter 488 of the Laws of Kenya), the money was irrecoverable. The court held that the bank was entitled to recover its money as the contract was valid and binding between both parties. A similar position obtained in *National Bank of Kenya v Anaj Warehouse Limited* SCOK Petition No. 36 of 2014 [2015] eKLR where the Supreme Court reversed long standing Court of Appeal precedent that violation of section 34(1) of the Advocates Act (Chapter 16 of the Laws of Kenya) would invalidate the instrument drawn by an unqualified person under the said Act. At the end of the day, it is the duty of the examine facts, the culpability of the parties, the purpose and intent of the statutory provision and the consequences of such violation.
45. The defendant relied on the fact that the sale agreement between the plaintiff and the respective purchasers provided at Clause 8 that, “before completion the vendor shall apply for consent to transfer and procure all completion documents which may be necessary to effectively register the purchase as the proprietor namely; Original Title Deed to the property, A duly executed Transfer (in triplicate) of the property in favour of the Purchaser” The defendant’s view was that it was the plaintiff’s obligation to insert the purchase price in the Transfer instrument. The plaintiff takes a contrary view



and states that despite the sale agreements, the transfer instrument was prepared and endorsed by the defendant and stamp duty paid by the Bank. In fact, clause 9 of the sale agreements provided that the, “purchase shall pay for the stamp duty and registration fees on the transfer.”

46. I am inclined to find that the defendant being the Bank’s advocate is the one who prepared, endorsed and presented the transfer instruments for the registration. Since the Bank was charging the properties, it also paid stamp duty. The documentary evidence speaks for itself and locates the burden of preparing and presenting the transfer on the defendant. The defendant was not called as a witness. Neither was he questioned why he prepared and presented incomplete transfer forms for registration. This was a matter within his knowledge and he only could explain this in line with section 112 of the Evidence Act (Chapter 80 of the Laws of Kenya). In the absence of this evidence, this court is entitled to make an adverse inference against the defendant.
47. The result of this finding, is that the plaintiff cannot be blamed for infraction of section 10 of the Stamp Duty Act as it did not prepare, endorse or present the transfer documents for registration or pay for the stamp duty. In the circumstances, the defendant cannot use its own default to avoid the legal consequences of its unlawful act. The defendant did not lead any evidence to show the plaintiff was involved in this infraction.
48. The defendant called in aid the provisions of sections 11(1)(d)(i) and (h) and 11(A) of the Banking Act. The effect of those provisions is that a bank governed by the provisions of the Act is prohibited from advancing loans or credit without security to its officers or significant shareholders or their associates. It is also prohibited from lending in a reckless or fraudulent manner. The obligation to comply with the aforesaid provisions of the Banking Act is on the bank. It is not imposed on the vendor of a property to the Bank’s employees as obtains in this case. The Bank cannot invoke its own breach of the law to avoid an otherwise lawful obligation. I therefore reject this line of defence.

Conclusion

49. This is a case where the plaintiff has sought to enforce 17 undertakings. In order to avoid them, the defendant had to prove that the plaintiff was involved in the fraud. The classic definition of fraud or fraudulent misrepresentation was established by the House of Lords in *Derry v Peek* [1889] 14 App Case 337 where it was held that fraud is proved when it is shown that a false representation has been made (1) knowingly, or (2) without belief in its truth or (3) recklessly careless whether it be true or not.
50. Having evaluated the evidence, I find and hold that the defendant did not establish any evidence to show that the plaintiff was involved or colluded with the 17 employees of the Bank and Lloyd Masika Valuers to inflate the value of the land in order to induce the Bank to finance the purchase of each of the 17 parcels of land from the plaintiff.
51. The defendant did not adduce any evidence to show that the defendant colluded with or was involved in a fraudulent scheme to induce the Bank to issue the undertakings. I find and hold that the evidence presented by the defendant did connect the plaintiff to each of 17 bank’s employees and the persons alleged to be brokers or intermediaries of the Company. The scheme alleged by the defendant involved payments from the Company to the Bank’s employees. Such scheme was not proved by admissible evidence in relation to each of the 17 employees and therefore each undertaking. Finally, I do not find any evidence that the plaintiff was implicated in the alleged breaches of the Stamp Duty Act and the Banking Act.
52. Allegations of fraud are serious and our courts have demanded proof on a higher standard than on the balance of probabilities. While there may be serious suspicion that the Company was involved in fraud with the Bank’s employees, the court is concerned with proof not conjecture. A smell test will not do!



In this case I find and hold that the defendant has failed to establish fraud necessary to vitiate each of the 17 undertakings given to the plaintiff by the defendant.

Disposition

53. Since the undertakings are admitted and the defendant had failed to prove fraud on the part of the plaintiff, I allow the Summons with costs. I therefore order as follows:
- a. That the defendant do within thirty (30) days from the date of this judgment honour the professional undertakings given by him to the applicant on diverse dates between the 15th May 2015 and 4th June 2015 to pay it as the full agreed consideration upon the transfer from the applicant's name and the registration of titles number Kajiado/Kaputiei-North/83159, Kajiado/Kitengela/79865, 81696, 81687, 81708, 81659, 81712, 81679, 81714, 81657, 81654, 81656, 81664, 79868, 81680, 816666 & 81658 in favour of the borrowers/purchasers namely Benson Mbivu Mutambai, Anthony Kamau Waitihaka, Louise Kemunto Araka, Daniel Kisemei Kirrinkol, Misheck Ngunjiri Gathiti, Moses Mwaniki Waweru, Charles Mugecha Maina, Wycliff Cheruiyot Langat, George Mutiso Mutua, Michael Brian Njenga, Samuel Thiongo Kamau, Adan Adou Kinyua, Doreen Nyambura Nganga, Kipkirui Bosuben Dixon, Charity Nyambura Ngubiru, Rose Nanjala Wekesa and Peter Muhia Macharia on behalf of his client Equity Bank Limited.
 - b. The defendant shall pay costs of the suit.

DATED AND DELIVERED AT NAIROBI THIS 31ST DAY OF MARCH 2020.

D. S. MAJANJA

JUDGE

Order

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15th March 2020, this ruling has been delivered to the parties online with their consent. They have waived compliance with **Order 21 rule 1** of the *Civil Procedure Rules* which requires that all judgments and rulings be pronounced in open court.

D. S. MAJANJA

JUDGE

Court Assistant: Mr M. Onyango

Mr Biketi instructed by Biketi and Company Advocates for the plaintiff.

Mr Ohaga instructed by TripleOKLaw LLP Advocates for the defendant.

