



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL & TAX DIVISION

MISC. CIVIL APPLICATION NO. 264 OF 2015

IN THE MATTER OF THE COMPANIES ACT (CAP. 486) LAWS OF KENYA

AND

IN THE MATTER OF RECTIFICATION OF THE COMPANY REGISTER OF CATHAM PROPERTIES LIMITED

BETWEEN

GUO DONG.....PLAINTIFF

VERSUS

MULTI-WIN TRADING (E.A) COMPANY LTD.....1ST DEFENDANT

HAI CHEN2ND DEFENDANT

CHENG-DU UNI-TRUST WITH MUTLI-WIN

INVESTMENT & MANAGEMENT CO. LIMITED.....3RD DEFENDANT

PENG ZHANG.....4TH DEFENDANT

ONGALO TOBIAS MUGA

T/A ONGALO & COMPANY ADVOCATES.....5TH DEFENDANT

CHRISTINE ANYANGO MUGA..... 6TH DEFENDANT

CATHAM PROPERTIES LIMITED..... 7th DEFENDANT

AND

THE REGISTRAR OF COMPANIESINTERESTED PARTY

JUDGMENT

1. Sketching out the relationship between Multi-win Trading (E.A) Company Limited (the 1st Defendant or Multi-win), Hai-chen (the 2nd Defendant or Chen), Cheng-du Uni-trust with Multi-win Investment & Management Co. Limited (the 3rd defendant), Peng Zhang (the 4th Defendant or Peng) and Catham Properties Limited (the 7th Defendant or Catham) is like drawing a small family tree.

2. Multi-win is a Limited liability company incorporated on 28th March 2014 under the provisions of the Repealed Companies Act (Chapter 486 Laws of Kenya). Its shareholders are Cheng-du Unit-trust and Cheng-du Lezi Trading Company (hereinafter both called the Chinese

Companies).

3. Under the same law, Catham had been incorporated earlier on 10th January 2014. At inception the subscribers to Catham are Li Wen Jie and Guo Dong (the Plaintiff) with 150 shares and 850 shares respectively. At the time of filing of these originating summons Chen and Peng were registered as Directors of Catham, while Chengdu Unitrust and Multi-Win as shareholders. This company is the owner of two properties in Nairobi, namely, Nairobi/Block 17/556 and Nairobi/Block 17/557 (jointly referred to as the Kilimani Properties).

4. Germane to these proceedings is the assertion by the Defendants that the 850 shares held by Guo Dong were in trust for Cheng-du Unitrust and Cheng-du Lezi Trading Co. Limited. This trust arrangement is said to be captured in the Entrustment Agreement dated 28th February 2014 (the **Trust Deed or Entrustment Agreement**) (D. Exhibit Pages 50-616).

5. These proceedings, commenced by way of Originating Summons but which proceeded as though incepted by Plaintiff, were brought by Guo Dong whose substantive prayers are for the following orders:-

(1) That the Court directs the Registrar of Companies to rectify the Company Register of CATHAM PROPERTIES LIMITED by deleting the names of the 1st to 4th Respondents as Directors or Shareholders of the Company and that the Register do reflect the following as the shareholding and Directorship of the Company.

Shareholding:

(a) Guo Dong 850 Shares

(b) Li Wen jie 150 Shares

Total 1,000 Shares

Directorship:

(a) Guo Dong Director

(b) Li Wen jie Director

(2) That the Honourable Court be pleased to direct the Registrar to delete the names of 5th and 6th Respondents as Advocates and Secretary of the Company respectively.

(3) That any acts, conducts and/or activities so far executed and/or performed by the 1st to 4th Respondents on behalf of CATHAM PROPERTIES LIMITED as directors and or shareholders be declared null and void.

6. In the affidavit in support of the summons, Guo Dong states that he learnt of the changes in the register of Catham on reading a Public Notice published on the Daily Nation of 25th May 2015 stating that he was no longer a Director of Catham.

7. Produced in Court are copies of the records in respect of Catham (P. Exhibit 1) by Peterson Wachira (PW1), a records officer in the Registry of Companies. One of the documents is an affidavit allegedly sworn by Guo Dong on 17th December 2014 in which he deposes that he had, with effect from that date, resigned as a Director of Catham and transferred his shares in the company to Multi-win. As well is a Transfer Deed of 850 shares allegedly signed by Guo Dong in favour of the new owner. He grieves that the signatures appearing on the documents are not his and alleges forgery and fraud.

8. Reacting to the summons, the Defendants filed a Statement of Defence and Counterclaim dated 3rd March 2016. In it they vouch for the truthfulness of the affidavit of 17th September 2014 and Transfer Deed of the same date.

9. As a background, it is averred that Guo Dong executed a Trust Deed on 28th February 2014 (Exhibit P.9 Pages 70) declaring himself to be a trustee with the understated rights and obligations:-

(a) As an agent, the Plaintiff was entitled to participate in the management of Catham Properties or supervise the operations as a shareholder. The Plaintiff was not to take advantage of his nominal position as shareholder to seek personal gain. The Plaintiff was to take instructions from the 3rd Defendant on operations and management.

(b) As a nominal shareholder of Catham Properties, the Plaintiff agreed to exercise the right of shareholder with the limitations set forthwith in that agreement. The Plaintiff was to give notice to the 3rd Defendant at least 3 days before exercising rights of vote in written form or e-mail and the Plaintiff could not exercise the right to vote without the prior written approval by the 3rd Defendant.

(c) The Plaintiff agreed to hold shares on behalf of the 3rd Defendant strictly in accordance with that Agreement, legally exercise relevant rights and obligations with good intention, discretion, diligence and protect the 3rd Defendant's legal rights. The Plaintiff agreed to pay the return of such investment (including but not limited to dividend, residue assets and cash dividends and other earnings) to the 3rd Defendant timely, and was not to hold any right or interest of the 3rd Defendant relating to the share, including

but not limited to return of the investment, the preemptive right of newly issues shares, the right to asset after liquidation, and other rights or interests.

(d) The Plaintiff was not to transfer or dispose the right of shareholder or any other rights or interests relating to the said share without the 3rd Defendant's written approval. The Plaintiff was neither to create any charge, pledge or guarantee or easement which may place limitation on the right of the shareholder nor any conduct that may harm the right or interest of the 3rd Defendant. The failure to comply this provision would entitle the 3rd Defendant to claim the shares back and compensation for damage. Besides the Plaintiff was to be civilly and/or criminally liable for such stealing.

(e) The 3rd Defendant was to exercise the share right in accordance with laws, regulations and Articles of Catham Properties Ltd.

10. The Defendants state that until his services were terminated on 26th January 2015, Guo Dong was remunerated in accordance with his contract of service. That upon the termination, it was discovered that Guo Dong had in August 2014, withdrawn USD 310,000.00 without the authority of the Company and for his sole use. That sum is part of the counterclaim mounted by the Defendants.

11. Another aspect of the counterclaim is for the return of motor vehicle registration number KBY 888X said to have been used by Guo Dong at the time of his employment and which he continues to possess. The Defendants contend that the continued possession constitutes trespass to a chattel.

12. The Defendants crave the following prayers:-

(i) A declaration that at the time the Plaintiff subscribed for 850 shares allotted in the 7th Defendant, he did so as a nominee or trustee obliged to transfer them to the beneficial owner upon termination of the trust.

(ii) A declaration that in September 2014, the Plaintiff lawfully transferred to the beneficial owner, the 1st Defendant herein, the 850 shares formerly registered in his name.

(iii) A declaration that the duly executed transfer of shares by the Plaintiff lodged with the Registrar of Companies reflects the common intention of the Plaintiff and the 1st Defendant that the shares which the Plaintiff held upon trust for the 1st Defendant be transferred to it.

(iv) In alternative to (iii) above, an order that the Plaintiff executes new transfers of shares in fulfilment of the terms of the declaration of the trust deed which the Plaintiff signed on 28th February 2014.

(v) An order that the Plaintiff refunds US \$310,000 to the 1st Defendant.

(vi) An order that the Plaintiff hands over forthwith to the 1st Defendant its motor vehicle, Registration No. KBY 888X.

(vii) General damages for user of KBY 888X from 26th January 2015 to the time of delivery.

(viii) Costs of this suit.

(ix) Interest on US £310,000 and costs of the suit from 11th June 2015 until payment in full.

13. The Counterclaim attracted a reply dated 11th July 2016. As a technical issue, Guo Dong censures the joint statement of Defence and argues that the matters complained about call for individual statements of Defence.

14. It is averred that the Statement of Defence is based on false statements of fact, false documents, witness statements and affidavits. Li Wen Jie, who swore the affidavit verifying the contents of the Defence and Counterclaim, is accused of committing offences of perjury and against the due administration of justice. It is alleged that the affidavit has been filed for a collateral purpose of abuse of office and for unjust enrichment.

15. On the competence of the Defence, it is argued by Guo Dong that no authority to appear, plead and swear affidavits has been given and filed as required by law and that no resolution has been given by Cheng-du and Catham for the filing of the Defence

16. Guo Dong denies that he was an employee of the 1st and 7th Defendants and reiterates that he was at all material times a shareholder and director of the two companies. He gives his version of the background to the incorporation of Catham.

17. That in 2013, he met Li Wen Jie who informed him of his intention to acquire the Kilimani properties whose purchase price was Kshs.600 Million. That he was to contribute Kshs.300 Million which he did. The two agreed to form a company for purposes of foregoing investments hence the birth of Catham.

18. That in mid 2014, Guo Dong found documents that showed that the properties had been purchased at Kshs.100 Million each. Further that the purchase and sale of the Kilimani properties was marred by fraud and Catham ended up with forged title deeds. That Li and a law firm by the name Ongweny and Moibi Advocates were involved in the fraud.

19. Guo Dong states that he subsequently reported the fraud, conspiracy, theft and allegation of obtaining by false pretences to officers of various law enforcement agencies but so as to forestall the criminal investigations, Li commenced the process of ousting him from the company with the assistance of the law firm of Ongalo & Company Advocates.

20. Apposite to the controversy herein is that the alleged Trust Deed is a false document manufactured by Li who is purporting to represent a Mr. Qiu Yan who is not a party to these proceedings. It is asserted that Multi-win is neither a shareholder nor a director of Catham as at the time of its incorporation and that, in fact, there are no documents lodged with the interested party showing any link between the two companies and that attempts to link the formation of the Catham to Multi-win, which was incorporated later, is *ex facie* evidence of fraud.

21. Regarding the alleged loss of USD 310,000.00, Guo Dong states that having been a director and majority shareholder in Catham, he used all the funding for the intended purposes and that in any event, he could not have stolen from himself.

22. The Plaintiff contends that KBY 888X is an asset of Catham but argues that none of the Defendants have any right over it.

23. A day after presenting these proceedings, Guo Dong filed Nairobi Commercial and Admiralty Misc. Civil Application No. 268 of 2015 in which he challenged changes made to the Directors, Secretary and Advocates of Multi-Win. In directions issued on 17th December 2015, Hon. Justice Kariuki ordered that both matters be heard together as Plaints. While there was deference to the Order converting the Originating Summons to Plaints, I am not too certain that the hearing of this matter also involved the second suit. Indeed, in their closing submissions, Counsel for both sides make arguments only in regard to this matter. As the two were not consolidated, they can be no difficulty in rendering a decision only on this matter and leaving parties to agree on how they want to conclude the latter suit.

24. Trial commenced with the hearing of the Defence witnesses. These were Qiu Yan and Yu Dong Hui. Qiu Yan did not complete his testimony as he was only partly cross-examined by the Plaintiff's counsel. In an application dated 28th February 2019, the Defendants explained that he was not available for further hearing as he had returned to China and would not be outside China for a long time period without causing much loss and inconvenience to Cheng-Du. The Court will keep in mind that part of his evidence was untested if and when evaluating his evidence.

25. Peterson Wachira testified on behalf of the Plaintiff. A feature of this case was the unavailability of Guo Dong at the trial. It is common ground that he is under detention in China under the Chinese authorities. There is a blame game as to who is responsible for his fate. He alleging that it is at the malicious instance of the Chinese Defendants in this matter, they insisting it is because of crimes he committed (see the evidence of Yan). Whatever the case, an issue arises as to how to treat the affidavits he swore in this matter.

26. It has to be remembered that Hon. Justice Kariuki made an order that these proceedings continue as though commenced by way of Plaintiff and that the affidavits filed in support of the summons be deemed as pleadings. The effect of that order was that the affidavit filed together with the summons was no longer evidence as it had converted to pleadings. Again, the Plaintiff's further affidavit of 8th July 2015 was never adopted as his evidence in chief and must, unfortunately, be altogether disregarded. There may have been a case, in the circumstances of incarceration, for Guo Dong's affidavits to be admitted as untested evidence, but no attempt was made by him to move the Court for such an Order.

27. The parties did not file a joint set of issues, each one preferring to propose their issues in their respective written submissions. I have looked at those proposals in light of the pleadings and think the following arise for resolution:-

- i. Whether the Plaintiff held 850 Shares in Catham as a nominee or trustee for Multi-win.
- ii. Was the removal of the Plaintiff's name as a director and shareholder in the register procedural?
- iii. Was Guo Dong an employee of Catham, and if so, did he misappropriate the sum of USD 310,000.00.
- iv. Should the Plaintiff hand over motor vehicle registration KBY 888X to Multi Win?
- v. What are the appropriate orders to make on the substantive matters and on costs?

28. Although Guo Dong had challenged the competence of the Statement of Defence because allegedly no authority to appear, plead and swear affidavits had been given and filed in Court and also because no resolution had been given by Cheng-Du Uni-trust and Catham to file the Statement of Defence, Counsel appearing for him did not identify it as an issue for determination. That argument may have been abandoned. To note nevertheless is that in the verifying affidavit that accompanied the Statement of Defence and Counterclaim Li Wen jie deposes as follows:-

“That I have the authority of all the Defendants herein to make this affidavit.”

This was not debunked.

29. As regards the resolutions of Cheng-Du Uni-trust and Catham Properties Limited to file defence, the Defendants filed a copy of a resolution by Catham of 15th June 2015 to defend those proceedings (D. Exhibit 1 Page 1). However, the Court did not find a similar resolution in regard to Cheng-Du Uni-trust.

30. Yet I agree with Senior Counsel Dr. Kamau Kuria for the Defendants that the complete answer to that objection is the holding of the Court of Appeal in **Saraf Limited and Augusto Arduin 2016 eKLR** where it held;

“15. In short, the respondent’s case for striking out the appellant’s defence was that the latter had not demonstrated that it had legal capacity to defend the suit. We know of no law that makes it a requirement for a limited liability company that has been sued to furnish proof or to demonstrate that its Board of Directors or its shareholders have authorized it to defend the suit. If this were the law, logistical reasons would render it difficult or near impossible for companies to defend suits having regard to the strict time-lines within which appearance and defence must be filed. A limited liability company is a legal person with capacity to sue and be sued (see **Solomon & Solomon** [1897] AC 22 (H. L.)) Because it has no blood and tissue, a limited liability company acts through its Board of Directors. The directors are invested with management and superintendence of its affairs and may lawfully exercise all its powers subject to the Articles of Association and to the law. It has always been the law that directors are the persons who have authority to act for the company but the majority of the members of the company are entitled to decide, even to overrule, the directors. In **Shaw and Sons (Salford) v. Shaw** [1935] 2 KB 113, Greer LJ reiterated that –

“if powers of management are vested in the directors, they and they alone can exercise these powers...”.

He also observed what **Solomon v. Solomon** had much earlier held, namely, that –

“a company is an entity distinct from its shareholders and directors.”

The law on the position where one is dealing with a limited liability company shows that one cannot probe into the internal affairs of a company. A party dealing with a limited liability company which has instituted a suit against him/her seeking relief or making a claim cannot go behind what ex facie appears to be legitimate and fail to answer the allegation on the claim and instead question legality of the action against him, that is to say, whether there was a resolution of the Board of Directors or a resolution of the general meeting. He must proceed on the footing that ex facie the action was commenced with the authority of the Board or the general meeting. The decision in **Royal British Bank v. Turquand** [1856] 6 E & B 327 is in support of this proposition. In that case a limited liability company was sued on a bond for £2,000 which two directors of the company had signed on behalf of the company. The deed of settlement registered under the Joint Stock Company Act 1847 allowed directors to borrow on bond to the extent authorized by general meeting of the company. In an action on the bond, the company pleaded that there had been no resolution authorizing the making of the bond. The English Court of Exchequer Chamber held that –

“...a person, on reading the deed of settlement, would find, ... not a prohibition against borrowing, but a permission to borrow on certain conditions, and, learning that the authority might be made complete by a resolution, he would have a right to infer the fact of a resolution authorizing that which on the face of the document appeared to be legitimately done; and therefore, the company was liable whether or not a resolution had been passed.”

31. The Court now turns to the substance of this matter. At the very heart of this dispute is the Entrustment Agreement of 28th February 2014 (D. Exhibit 1 Pages 57 to 60). It is an agreement made between Cheng-Du Uni-trust with Multi-win Investment and Management Company Limited on the one part and Guo Dong on the other. Under Clause 1 on the subject of assignment, it provides:-

“Party A voluntarily entrust Party B to nominally hold 85% shares of CATHAM PROPERTIES LIMITED (hereinafter referred to as Catham Properties), a company duly incorporated in Nairobi, Kenya, and to exercise shareholder’s rights on its behalf. Party B voluntarily accepts the entrustment and exercises shareholder’s rights on Party A’s behalf.

Party A entrusts Party B to exercise the following right; to register as shareholder, to receive the dividends or profit, to attend and vote at the meeting of shareholders, and to exercise other rights of shareholder specified by the Company Law and the Articles of Association of Catham Properties.”

32. Guo Dong challenges this document as being false and forged by the 2nd, 4th, 5th and 6th Defendants. Yet, no evidence was led to prove that it was either false or forged. In the affidavit in support of his summons, Guo Dong makes no mention of the Trust Deed at all. There is then his further affidavit of 8th July 2015 and filed on 13th July 2015, in which he states in respect to the Trust Deed:-

“That indeed, the document marked LW8 is a false document manufactured by Mr. Li who is purporting to represent a Mr. Qiu Yan who is not party to the current proceedings. See erased date on Page 50 of Mr. Li’s affidavit.”

33. But as earlier held by Court this affidavit is not evidence and this Court was not told of any other effort made by the Plaintiff to obtain proof that the document was forged.

34. By alleging that the Trust Deed was a forgery, Guo Dong was imputing criminal conduct on the part of the 2nd, 4th, 5th and 6th Defendants. Those allegations needed backing of evidence to the threshold of proof required of such allegations which is higher than on a balance of probabilities although not as high as beyond reasonable doubt. The allegation that the Trust Deed is a forgery cannot be inferred on facts. It needed distinct proof (See Justice Tunoi JA (as he then was) in Vijay Morjaria –vs- Nansingh Madhusingh Darbar & Another [2000]Eklr).

35. The Trust Deed placed the following obligations on Guo Dong:-

1. As a Trustee, Party B is entitled to participate in or supervise the operations and management of Catham Properties as a nominal shareholder provided that Party B shall not seek personal gain. Party B shall obey instructions of Party A on operation and management.

2. Party B shall not entrust a third party to hold the said shares and/or other rights and interests concerned without a prior written approval by Party A.

3. As a nominal shareholder of Catham Properties, Party B undertakes that the shares held by him is subject to the restrictions here under. Party B shall give a notice in writing or via email to Party A for written approval (including via email) at least 3 days before voting on operation and management.

4. Party B undertakes to hold shares on behalf of Party A strictly in accordance with the Agreement, legally exercise the rights and obligations with good intention, discretion and diligence, and protect Party A's legal rights. Party B shall timely pay the return on such investment (including not limited to bonus, residual assets disposed of and interests, cash dividends and other earnings) to Party A, and shall not misappropriate or hold back the return on such investment, the preemptive right of newly-added registered capital, the right to dispose of residual assets, and the interests due to Party A. Party B undertakes to transfer such earnings to the account designated by Party A within two days after receipt. If Party B fails to timely pay the earnings, Party B shall pay 0.3% of the earnings every day as liquidated damages.

5. Party B shall not transfer or dispose of the shares and all earnings without Party A's written approval. Party B shall not create any mortgage, pledge, guarantee or any other obligations that may limit the shareholder's rights on the shares. Party B shall not conduct any act that may damage the interests of Party A. Otherwise, Party B shall return the assets and compensate for losses for Party A, and further be held civilly and/or criminally liable for such misappropriation of assets.

6. Party B shall not dispose of the assets of Catham Properties without written approval by Party A.

7. Party B shall exercise the shareholder's rights in accordance with laws, regulations and Articles of Association.

8. If the shares is compulsorily disposed of through judiciary process due to the debt disputes of Party B, Party B shall take full responsibility for both direct damages and indirect but foreseeable damages thus incurred to party B.

9. Party A is responsible for full compensation for economic losses incurred to Party B for nominally holding shares on behalf of Party A.

36. As earlier stated, Catham was incorporated under the repealed Companies Act (Chapter 486). Second, at the time the Trust Deed was entered on 28th February 2014, that was still the operative law. The effect of the Trust Deed must therefore be examined under the provisions of that repealed statute.

37. Section 119 of that statute provided:-

“No notice of any Trust, expressed, implied or constructive, shall be entered on the register, or be receivable by the registrar.”

38. While Section 120 reads:-

“The register of members shall be *prima facie* evidence of any matters by this Act directed or authorized to be inserted therein.”

39. I have recently had to consider whether the prohibition in Section 119 on registration of a notice of Trust in the register of members has the effect of barring Trust arrangements in regard to shareholding. In Farouk Ravate & Another –vs- Eric Agbeko & 2 others; Ravasam Development Company Limited (Interested Parties) [2020] eKLR I held:-

“[40] To be gleaned from the decision and commentaries is that even where the company is aware that a registered member holds a share as a trustee, the member is not absolved from the responsibilities, obligations or liabilities that accrue from membership. Nevertheless, the trustee member is entitled to indemnity against liabilities by the beneficiary. In addition, and this is from the decision, the beneficiaries lack legal standing to institute petitions or such like proceedings under the repealed Companies Act against the Company, a preserve of registered members. However, nothing in the three passages I have set out suggests that the effect of this provision is to outlaw or bar trust arrangements in regard to shares in a company. Quite to the contrary, it recognizes that they may exist but that rights of the beneficiaries as against the Company (and perhaps against third parties as I shall be proposing) are circumscribed because no notice of such Trust is to be entered in the register of members. This leads to another matter.

[41] Section 119 and 120 are found under the part of the Act dealing with “Register of Member”. The register of members is *prima facie* evidence as to the membership of a company. This in fact is the import of Section 120 of the Act which provides;

“S.120. Register to be evidence.

The register of members shall be *prima facie* evidence of any matters by this Act directed or authorized to be inserted therein.”

[42] In my view one policy objective of Section 119 when read with Section 120 is that members of the public and any third party dealing with a company must be deemed to deal with the company on the basis of membership of the company as reflected in the registry and will not be required to look beyond the information in the register to find out whether Trusts exist and if so their nature. In that sense the two provisions, construed together, protects third parties against claims based on a Trust of which they do not have

notice.

[43] That said, the provisions of Sections 119 and 120 cannot be read as invalidating a Trust arrangement entered by a registered member with a beneficiary. The Trust arrangement although not enforceable as against a third party who has no knowledge of it or the company remains valid between the parties and is enforceable as between the Trustee and Beneficiary. The arguments around Sections 119 and 120 of the repealed statute cannot aid the 1st and 2nd Defendants in invalidating the Trust arrangement between them and the Plaintiffs.”

40. Now, how could the Trust arrangement be cancelled and terminated? The answer is in clause VII of the Trust Deed which reads:-

“VII. Cancellation and Termination of the Agreement:

i. Cancellation of the Agreement

1. Party B shall produce a written application for cancellation to Party A at least three months before such cancellation if Party B doesn't want to continue to nominally hold the shares on behalf of Party A. The Agreement shall be cancelled upon approval of Party A.

2. Party A may cancel the Agreement at any time when Party A thinks it necessary to transfer the said shares nominally held by Party B to himself/herself or any third party designated by Party A.

ii. Termination of the Agreement

1. During the term of the Agreement, in case of any matters that disable Catham Properties' existence according to laws, regulations and Articles of Associations, including but not limited to liquidation, winding up or bankruptcy, the Agreement will survive until Catham Properties nullifies the company registration.

2. The Cancellation or termination of the Agreement shall be subject to laws, regulations, Articles of Associations and the Agreement with proper treatment of right and obligations of each party and protection of Party A's rights to the utmost.”

41. It is an express term of the Agreement that the entrusting party could, at any time, and it would seem without giving of notice, cancel and terminate the Agreement and insist on the transfer of the shares nominally held by the Trustee to itself, or any third party designated by it.

42. The evidence by the Defendants is that Guo Dong visited the headquarters of Cheng-du Uni-trust and Cheng-du Lezi Trading Company Limited and upon request to cease to be a trustee, he resigned as a Director of Catham and signed a transfer of shares to Multi-win. Of course the Defence of Guo Dong is that he did not sign the Transfer Document, the letter of resignation and affidavit of 17th September 2014. He asserted forgery. Again, just like the Trust Deed, the Plaintiff failed to mount sufficient evidence to prove that the signatures appearing on the documents are not his. And I must wonder why the Plaintiff did not find it necessary to summon a Forensic Examiner to prove the fraud in the affidavit of 17th September 2014.

43. Cheng-du Uni-trust would require Guo Dong to sign these documents because as stated earlier, under Section 119 Notice of Trust of any kind were not registrable and so the Trustee would have to transfer the shares to the Entrusting party.

44. Although Mr. Wachira took the Court through the process of transferring shares, he is not a lawyer and without disrespect to him, I would rather look for law in the statute itself and in the Memorandum and Articles of Association of Catham.

45. Section 75 of the repealed Act provides that shares of any Member of a company shall be movable property transferable in a manner provided by the articles of the company. That places the articles as the focal point on the manner of transfer. However, Section 77 has the following restriction;

“Notwithstanding anything in the articles of a company, it shall not be lawful for the company to register a transfer of shares in or debentures of the company unless a proper instrument of transfer has been delivered to the company:

Provided that nothing in this section shall prejudice any power of the company to register as shareholder or debenture holder any person to whom the right to any shares in or debentures of the company has been transmitted by operation of law.”

46. Articles 9 to 12 is a raft of provisions in respect to transfer of shares but deals mainly on the rights of pre-emption and approval of transfers to a new member. Those may not have a direct bearing on this dispute. So I turn to other Articles. Article 1 reads

“Subject as hereafter provided the regulations contained in Table “A” in the first schedule of the Companies Act (such table being hereinafter called table A) shall apply to the Company.”

47. Regulations 22 and 23 of Table A are not excluded by the Articles of the Catham and therefore constitute part of the regulations of the company. These two provide;

“22. The instrument of transfer of any share shall be executed by or on behalf of the transferor and transferee, and the transferor shall be deemed to remain a holder of the share until the name of the transferee is entered in the register of members in respect thereof.

23. Subject to such of the restrictions of these regulations as may be applicable, any member may transfer all or any of his shares by instrument in writing in any usual or common form or any other form which the directors may approve.”

48. From the above provisions transfer of shares in Catham is by way of an instrument of transfer executed by or on behalf of both the transferor and transferee. Admittedly, that instrument is critical because it is the instrument that has the consideration, number of shares transferred and the name of the transferor and transferee.

49. In respect to the resignation letter, the affidavit and transfer deed, Qiu Yan said as follows while under cross-examination:-

“After the three of us saw Guo Dong sign we forwarded it to Ongalo. We asked the advocates to attest the documents”.

50. A person can only properly attest to signing of a document if he, as the attester, sees the person signing. The person attesting would have to be physically (or perhaps now through virtual platform) present with the person signing. It is fairly obvious that the lawyer who supposedly attested Guo Dong’s signature on the Transfer Deed and affidavit did not see him sign the documents. The provisions of Section 77 only recognizes delivery of “*a proper instrument of transfer*”. A transfer deed that has not been properly attested is not a proper instrument of transfer. For that reason, the affidavit and Transfer Deed were fundamentally flawed. It being so, the transfer that was effected on the strength of those defective documents was a nullity.

51. Yet, the Trust Deed gave Cheng-du Uni-trust the power to cancel the Entrustment Agreement at any time and require the transfer of the shares nominally held by Guo Dong to itself or to a third party it designates. The truth of the matter is that Cheng-du Uni-trust wants the 850 shares held by Guo Dong in Catham transferred to Multi-win but Guo Dong refuses. The very existence of these proceedings is evidence of the standoff. The duty of a Court is to give effect to rights and obligations which parties place on themselves in a contract or agreement. Perhaps sensing that it may have a difficulty defending the legality of the Transfer Deed, the Defendants had sought an alternative prayer that this Court orders the Plaintiff to execute new transfer of shares in fulfilment of the terms of the declaration of the Trust Deed which he signed on 28th February 2014. The Defendants have proved their case in this respect and have earned their prayers.

52. The Court reaches that conclusion notwithstanding Guo Dong’s proposition that Multi-win was neither a shareholder nor director of the Catham at the time of its incorporation and that no documents were lodged with the Registrar of Companies showing the connection between the two companies and attempts to link the formation of Catham to Multi-win which was incorporated later in *ex facie* evidence of fraud.

53. As this Court has already observed the law then (Section 119 of the Companies Act), expressly prohibited the entry into the register of notice of any trust and barred the registrar from receiving such notice. It would therefore have been futile for the parties to lodge the Trust Deed or notice of it with the Registrar.

54. And as regards the fact that Multi-win was incorporated earlier than Catham, nothing can turn on it because Guo Dong, in the Entrustment Agreement, promised that it would on cancellation of the Agreement, transfer the shares he held on behalf of Cheng-du Uni-trust to it or a designated third party. It matters not that the third party came into existence after Catham, what matters is that the third party was in existence at the time the cancellation and instruction to transfer happened. As Multi-win was in existence in September 2014, when the two Chinese companies requested Guo Dong to transfer shares to Multi-win then the argument does not defeat the claim by the Defendants.

55. Before turning to another aspect of the case, this Court notes that at the same time of the transfer of shares by Guo Dong, Li Wen Jie also transferred his shares to Chendu Le Zi trading company and further, resigned as Director of Catham. His place as director was taken up by Peng Zhang (the 4th Defendant). The person who would be aggrieved by these changes would be Li Wen jie. He raises no such complaint and it is not in Guo Dong’s place to speak on his behalf.

56. The second claim by the Defendants is based on Guo Dong’s employment with Multi-win and is a claim for USD 310,000.00 said to have been misappropriated by Guo Dong. Guo Dong answers this by saying he is a Director of Catham and used all the funds for the intended purposes and he could not have stolen from himself. Even in the submissions before Court, Guo Dong points to the share Entrustment Agreement to contend that he was empowered to exercise discretion in decision making provided he was not making a personal gain in the said decision.

57. What however Guo Dong misses is that the money said to be misappropriated is that of Multi-win and not Catham.

58. In respect to Guo Dong’s employment to Multi-win there is an Employee Registration Form showing the date of start of service as 2013.3 (D. Exhibit Pages 22-26). His monthly remuneration was Kshs.600,000 (D. Exhibit 27). In addition to his employment, Guo Dong was at all material times a Director of Multi-win and a signatory to the company’s Bank account at Development Bank of Kenya.

59. The evidence is that on 15th August 2014, Kshs.27,156,000.00 was transferred from that account to Longren Tours and Travel (D. Exhibit Page 149). There is then a note from Peng Juan Xie of Longren dated 20th January 2015 which reads:-

“I, Peng Juan Xie, of Longren Tours & Travel, hereby to certify that I have received Kshs.27,000,000.00 (Twenty Seven Million) on 15th August 2014 from Mr. Guo Dong of Multi-win Trading (E. A) Company Limited. Then, I withdrew all the amount in cash and gave back to Mr. Guo Dong.

Peng Juan Xie (Signed)

2015.1.20.”

60. Although the money is expressed in Kenyan currency, the amount claimed is USD 310,000.00 that this was the amount converted to Kshs.27,156,000.00 upon the request of Guo Dong (D. Exhibit Page 144).

61. DW1 was cross-examined at length about this claim. What emerged is that Longren had arranged for about 5 trips of delegations of between 7 and 30 persons on behalf of Defendants. DW1 also travelled to Mauritius for a wedding, this was arranged by Guo Dong. Clearly then Longren was a travel agent of Multi-win or Catham and there was therefore a business relationship.

62. Counsel for Guo Dong submitted that Longren used to book tickets and make travel arrangements on credit and money paid to it at a later date. That the Plaintiff being a director and shareholder of the 1st Defendant was in charge of the day to day operations of the company including paying of salaries, administrative expenses and costs associated with the 7th Defendant’s investments.

63. That may be so but what is not explained is why money paid to Longren would be paid back to Guo Dong in person. If the money was to pay for services offered by Longren, then the final recipient of the money ought to be Longren. For his part Guo Dong has not put forward evidence that he put this particular sum of money into the use of company business.

64. There is distinct evidence that proves that Guo Dong misappropriated a sum of USD 310,000.00. In doing so the Plaintiff failed in his fiduciary duty as a senior employee of the company and as well as a Director. Counsel for the Defendants referred this Court to this passage from the 2nd Edition of Company Directors, Duties, Liabilities and Remedies edited by Simon Mortimore ,QC;

“The position of a director has historically been likened to that of a trustee. Since both are fiduciaries, their positions are analogous. Strictly speaking, however, a director is not a trustee, although he may become subject to the same liabilities as a trustee in certain circumstances. It is actual control of assets belonging beneficially to a company which causes the law to treat directors as analogous of those assets.

I endorse that proposition.

65. Related to this claim is a request by the Defendants that Guo Dong pays interest on the sum of USD 310,000.00 from 11th June 2015 until payment in full. The significance of 11th June 2015 is that it is the date when the Originating Summons was presented.

66. The law for grant of interest on a sum adjudged is found in Section 26(1) of the Civil Procedure Act.

“(1) Where and in so far as a decree is for the payment of money, the court may, in the decree, order interest at such rate as the court deems reasonable to be paid on the principal sum adjudged from the date of the suit to the date of the decree in addition to any interest adjudged on such principal sum for any period before the institution of the suit, with further interest at such rate as the court deems reasonable on the aggregate sum so adjudged from the date of the decree to the date of payment or to such earlier date as the court thinks fit.”

67. A prayer for compound interest or for interest on special damages from a date earlier than the date of presentation of a suit is one of substantive law and must not only be pleaded but also proved. How do the Defendants bespeak interest in this case? They pray as follows:-

“Interest on USD 310,000.00 and costs of this suit from 11th June 2015 until payment in full.”

68. In their submissions the Defendants make out a case for interest at compound rate. Whatever the merit of that argument, compound interest is not awardable because it was not pleaded.

69. When the Defendants ask for interest to run from 11th June 2015, they plead for interest to be effective from a date prior to the presentation of their claim, as the Counterclaim was filed on 5th March 2016. The evidence is that Guo Dong converted company money into personal use on 15th August 2014. It is from that date that Multi-win lost the use of the money on account of the unlawful conduct of Gou Dong. An order for interest from that date would have compensated Multi-win for the loss it suffered as a result of the fraudulent conduct of Guo Dong. From this standpoint, the request by Multi-win for interest from 11th June 2015 (and not 15th August 2014) is concessionary. It will be awarded.

70. As to the request to have the principal sum converted into Kenyan currency and payable in that currency, this is a reasonable request. See the Court of Appeal decision in **Mollo Edilio v Abdullahi H. Khalil & another [1994] eKLR** :-

“The trial judge gave judgment in foreign currency as he was asked and was right to do so as Kenyan Courts are not restricted to giving judgments in local currency. What is being challenged is the fixing of the date that the judgment was to be satisfied at the rate prevailing when right to damages accrued. Taking that period and the date of judgment, there was a gap of approximately 5 years. This appeal has taken three more years to be heard and determined. During that period of eight years, the value of currency worldwide has fluctuated. If the appellant were to be paid damages at the rate of exchange prevailing at the time of the accident, he will be very much at a loss and would not be adequately compensated. The Kenya currency has depreciated while foreign currency has appreciated. No country in the world can claim that its currency will

remain static and will not be affected by fluctuation and inflation. Considering the *Miliangos* case and the time factor between the date of accrual of damages, the filing of the suit and the time of obtaining judgment and possible appeal and time for execution; the appropriate date for making payment would be the date toward the end of the road for determining the rate of conversion of foreign currency with the local currency. In our view, the appropriate date for conversion is at the date of payment. This ground of appeal succeeds and the date fixed by the trial judge is set aside and substituted with the date of payment.

The 1st Defendant is entailed to convert the sum of USD 310,000.00 into Kenyan currency at the rate of conversion on the date of the enforcement of the Decree or date of payment.

71. The Court moves to the last limb of the claim which is for return to the 1st Defendant of motor vehicle registration KBY 888X and general damages for user from 26th January 2015 to the time of delivery.

72. A copy of the Registration Certificate to Motor vehicle KBY 888X (D. Exhibit Page 119) shows that it is registered in the name of Multi-win Trading E.A Company Limited. Section 8 of the Traffic Act reads:-

“The person in whose name a vehicle is registered shall, unless the contrary is proved, be deemed to be the owner of the vehicle.”

73. The Court agrees with the Defendants’ counsel that the interpretation to be given to this provision was restated by the Court of Appeal in Ignatius Makau Mutisya –vs- Reuben Musyoki Muli [2015] eKLR to be:-

It is trite law that the ownership of a motor-vehicle is to be proved by the registration of a person as the owner of the motor-vehicle, unless proved otherwise. Section 8 of the Traffic Act provides that;

“The person in whose name a vehicle is registered shall, unless the contrary is proved, be deemed to be the owner of the vehicle.” (emphasis supplied).

This section has been interpreted to mean that the registration of the motor-vehicle is not conclusive proof of ownership. In the case of Osapil vs Kaddy [2000] 1 EALA 187 the Court of Appeal of Uganda held that a registration card or logbook was only *prima-facie* evidence of title to a motor vehicle. The person in whose name the vehicle was registered was presumed to be the owner thereof unless proved otherwise

74. The Plaintiff has not provided any evidence that contradicts the evidence of ownership in the registration certificate. The vehicle belongs to the 1st Defendant and should be returned to it. In the submissions the 1st Defendant asks that Guo Dong delivers the vehicle complete with tools and accessories and in a roadworthy state of repair and condition or in the alternative the Court orders for valuation of the motor vehicle as at 26th January 2015 and that the Plaintiff pay the full value of the vehicle. I am afraid the Court will not grant the alternative prayer because it was not pleaded. The Court will not grant more than what was sought in the pleadings.

75. In the submissions, Multi-win also prays for mesne profit from 26th January 2015 until payment in full. Whilst that may have been deserving, not an iota of evidence was presented to the Court upon which the order would have been made. Mutil-win must have noticed its deficiency on this aspect and did not even suggest a quantum. The same are not granted.

76. In the end the following are the Orders that endear themselves to the Court;

I. Prayer 3 only of the Originating Summons of 11th June 2015 succeeds but only in respect to the Shares and Directorship of Guo Dong.

II. Prayers (i) and (iv) of the Counterclaim of 3rd March 2016 are granted and allowed.

III. Prayers (ii) and (iii) of the said Counterclaim are dismissed.

IV. Each party shall bear its own costs in the Originating Summons and prayers (i) to (iv) of the said Counterclaim.

V. Prayers (v) and (vi) of the said Counterclaim are allowed with Costs in that regard.

VI. The 1st Defendant shall be at liberty to convert the said sum of US \$ 310,000 at the rate of conversion applicable at the time of enforcement of the Decree or payment thereof.

VII. Prayer (vii) of the said Counterclaim is dismissed.

VIII. The 1st Defendant shall be entitled to interest on US \$ 310,000 at Court rates from 11th June 2015 until payment in full.

Dated, Signed and Delivered in Court at Nairobi this 30th Day of June 2020

F. TUIYOTT

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 17th April 2020, this Judgment has been delivered to the parties through virtual platform.

F. TUIYOTT

JUDGE

PRESENT:

Mr Obuya for the Plaintiff.

Dr Kamau Kuria SC for the Defendants