



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CORAM: D.S. MAJANJA J.

CIVIL CASE NO. 37 'A' OF 2008

BETWEEN

GUDKA WESTEND MOTORS LIMITED.....PLAINTIFF

AND

INDUSTRIAL & COMMERCIAL

DEVELOPMENT CORPORATION.....DEFENDANT

JUDGMENT

1. The plaintiff is a private company incorporated under the *Companies Act (Chapter 486 of the Laws of Kenya) (Repealed)* while the defendant ("ICDC") is a state corporation established under the *Industrial and Commercial Development Corporation Act (Chapter 445 of the Laws of Kenya)*.

2. The plaintiff's claim against ICDC is that in February 1995, it purchased 300,000 underwritten shares representing 19.5% of the shareholding in Kisii Bottlers Limited ("Kisii Bottlers") for Kshs. 10,710,000/- at Kshs. 35.70 per share. Besides those shares, the plaintiff claimed that ICDC undertook to sell and transfer to it the remaining 243,928 shares but it sold them to third parties in breach of the agreement and to its detriment.

3. After ICDC failed to effect transfer of the 300,000 shares and instead attempted to rescind the agreement, the plaintiff filed *Kisii HCCC No. 234 of 1995 (Gudka Westend Motor v Industrial and Commercial Development Corporation)* in which the court ordered specific performance of the sale agreement. The plaintiff contends that despite the orders of specific performance, ICDC failed to effect the transfer and registration of the 300,000 shares and as a result it lost the benefit of bonus shares and rights issues with effect from June 1995 together with accrued interest. The plaintiff, in its re- amended plaint dated 19th October 2016, seeks the following reliefs:

a. Payment of Kshs. 1,324,792,317/= only being the loss of dividends on total shares, profits and benefits due and payable on account of bonus issues, rights issues and shares issues;

b. An order for the Defendant to be compelled to tender and/or render accounts to and in favour of the Plaintiff relating to all the dividends, profits and all benefits received and / or receivable, on behalf of the Plaintiff, arising from the Plaintiff's shareholding portfolio in Kisii Bottlers Limited (now Almasi Beverages Limited);

c. General damages for Negligence based on the sale and/ or concealment relating to the sale of 243,928 shares which ought to have been sold to the Plaintiff, but were offered and discreetly sold to third parties;

d. Payments of dividends on total shares for the years 2009, 2010, 2011 and 2012, paid by Kisii Bottlers to the Defendant;

e. Payments of Dividends on total shares for the years 2013,2014,2015 and 2016 paid by Almasi Beverages Limited to the Defendant;

f. Interests at courts (14%) w.e.f 1995;

g. Costs of the suit be borne by the Defendant.

4. ICDC denied the plaintiff's claim in its Re-Amended Statement of Defence and Counterclaim dated 25th November 2016. It admitted that

judgment for specific performance was entered against it in **Kisii HCCC No. 234 of 1995**. It however contended that the transfer of shares could not crystallise as consent of the Government of Kenya through the relevant Minister of any shares held by ICDC was not sought and that the consent of Kisii Bottlers (now Almasi Beverages Limited), a private limited liability company in which ICDC was a shareholder, was denied in accordance with its Articles of Association. It also stated that by dint of the law and frustration, ICDC could not procure the transfer of shares.

5. ICDC also denied that the plaintiff was entitled to any other shares, bonus shares or rights as it was never entered into the register of members of Kisii Bottlers. It also referred to **Kisii HCCC No. 525 of 2012 (Gudka Westend Motors Limited v Kisii Bottlers Limited)** where the court dismissed the plaintiff's bid to become a shareholder before the merger of Kisii Bottlers with other related companies was dismissed.

6. ICDC denied that the plaintiff was entitled to any of the reliefs sought. It averred that the claim for Kshs. 1,324,792,317/- did not have any basis in law and was barred under the provisions of the **Limitation of Actions Act (Chapter 22 of the Laws of Kenya)**.

7. In its counterclaim, ICDC contended that despite the orders of specific performance made in the plaintiff's favour in **Kisii HCCC No. 234 of 1995**, it could not effectively transfer the shares to the plaintiff because the procedure of divestiture of shares required under the **ICDC Act** was not followed. It further stated that following the said order, it erroneously paid the plaintiff monies in the form of dividends amounting to Kshs. 27,390,000/- which it now claims as it did not have legal capacity to pay out. It therefore seeks the following orders in its defence and counterclaim:

A. This Honourable Court be pleased to declare that the Plaintiff is not and has never been a shareholder of Almasi Beverage Limited (Formerly Kisii Bottlers Limited).

B. This Honourable court be pleased to declare that the Plaintiff is not entitled to the rights of shareholders of Almasi Beverage Limited including but not limited to dividends, bonus issues and rights issues.

C. This Honourable Court be pleased to declare that the Plaintiff is duty bound to refund the Defendant an aggregate sum of Kshs. 27,390,000/- being the sum irregularly paid to the Plaintiffs as dividends.

D. The Plaintiff do bear the costs of this suit together with interest on C above at commercial rate till payment in full.

E. Any other relief that this Honourable Court may deem just and fit to grant.

8. After several interlocutory applications regarding the amendment of pleadings, the matter was set down for hearing. It was initially heard by Okwany J., who took the testimony of Ashwin Ramji Gudka (PW 1), one of the directors of the plaintiff. The plaintiff relied on the pleadings, a bundle of documents dated 11th June 2014, a further bundle of documents filed on 18th April 2016 and PW 1's written statement to support its case.

9. I took over the matter and heard the re-examination of PW 1. I wish to point out that when the matter came up for hearing on 9th October 2018 and 5th December 2018, hearing notices had been served on the firm on record for ICDC, **Kithi and Company Advocates** but neither the advocates nor defendant's representatives appeared in court to defend the claim or prosecute its counterclaim. I heard the remainder of the plaintiff's case and proceeded to dismiss the counter claim with costs at the plaintiff's instance.

10. Despite the fact that the defendant did not call any witness to testify on its behalf and rebut the plaintiff's case it is not automatic that the plaintiff's claim against the defendant would succeed. The plaintiff still bore the duty to discharge its evidentiary burden of proof. As the Court of Appeal stated in **Kirugi & Another v Kabiya & 3 Others [1987] KLR 347**, "The burden was always on the plaintiff to prove his case on the balance of probabilities even if the case was heard on formal proof." The same principle applies to the Counterclaim which has now been dismissed. Any statement therein unless they are admissions remain devoid of evidentiary value (see **Shaneebal Limited v County Government of Machakos MKS HCCC No. 25 of 2016 [2018] eKLR**). I would however hasten to add that the the plaintiff was cross-examined extensively by counsel for the defendant.

11. Before I deal with the matters in issue let me summarise the evidence of PW 1. He testified that in November 1994, the plaintiff applied to Kisii Bottlers to purchase 800,000 underwritten shares. At the time, ICDC held 943,928 shares in Kisii Bottlers. On 8th February 1995, it sold to the plaintiff 300,000 shares for Kshs. 10,710,000/=. A transfer document was prepared by ICDC, executed by both parties and stamp duty duly paid. ICDC did not transfer the shares causing the plaintiff to file **Kisii HCCC No. 234 of 1994**. Despite the order of specific performance issued in that case, ICDC did not transfer the shares to the plaintiff but it paid dividends to the plaintiff from 1995 to 2007. PW 1 was of the view that on that basis, the plaintiff became a shareholder of Kisii Bottlers.

12. PW 1 further testified that the 300,000 shares would have increased to 3,281,250 shares if bonus and rights issues declared by Kisii Bottlers had been credited to the plaintiff. He also stated that the plaintiff would have earned Kshs. 433,426,250/= as dividends from those shares. PW 1 complained that the plaintiff incurred substantial losses since it was not informed about the rights issues and sale of shares. PW 1 recalled that at the time the plaintiff purchased the 300,000 shares, it should have been offered 243,928 shares ICDC intended to offload but those shares were offered to third parties to its detriment hence it lost Kshs. 845,096,564/=. Additionally, in 2001 Kisii Bottlers offloaded 100,000 shares and an additional 64,332 shares were sold in 2002. He also testified that the Development Finance Company Kenya (DFCK) a company fully owned by ICDC sold 500,000 shares. PW 1 stated that he was unaware of what happened between 2007 and 2015 and was therefore unable to take this period into account when computing the loss suffered.

13. PW 1 refuted the suggestion that the plaintiff had purchased shares from ICDC without the authority of the Government or without following the procedure laid out in the **ICDC Act**. He stated that the Parastatals Reform Committee had approved the sale of shares to the plaintiff. He insisted that the plaintiff owned shares in Kisii Bottlers as ICDC had written to it a letter asking to buy back the shares. He

contended that this would not have been possible if the plaintiff did not own the shares. He denied that Kshs. 20,190,000/= received by the plaintiff as dividend had been wrongly remitted. He told the court that the plaintiff had not received any dividends since 2007.

14. PW 1 admitted that he was aware of the Kisii Bottlers Board of Director meeting held on 21st June 1996 in which the directors declined approve the transfer of shares to the plaintiff. He was also aware that Kisii Bottlers' shares had been transferred to Almasi Beverages Limited which had been in existence since 2015 but was not formally appraised of these developments by ICDC. When referred to Clause 15 (i) of Kisii Bottlers' Articles of Association which indicated that the directors were entitled to refuse to register a transfer of shares in cross-examination, PW 1 admitted that ICDC had no mandate to register transfers. PW 1 further admitted that the plaintiff's name was never entered into the Kisii Bottlers shareholders register and that it had never been issued with share certificates.

15. After the close of the plaintiff's case, its advocates filed written submissions dealing with several issues that were framed for trial. Before I deal with those issues, it is apparent from the pleadings, evidence and submissions that there are matters of common ground. It is not disputed that the plaintiff purchased 300,000 shares in Kisii Bottlers from ICDC. The transfer of the shares was never effected and causing the plaintiff to file suit and obtain orders of specific performance in *Kisii HCCC No. 234 of 1995*. Even after the orders were obtained, the shares were still not transferred to it. This suit therefore deals with the consequence of the transaction for the sale of shares between the plaintiff and ICDC.

16. The plaintiff framed 5 issues for determination by the court as follows;

(i) *Whether the Defendant herein had capacity to sell and indeed sold the 300,000 underwritten shares to the Plaintiff?*

(ii) *Whether upon the sale of the shares, the Plaintiff herein was entitled to benefit from the dividends, bonus and/or rights issues and if so, whether the Plaintiff indeed benefitted?*

(iii) *Whether the Defendant herein held the sold and accruing shares for and on trust for the Plaintiff and if so, whether the Defendant violated the fiduciary duty/trust?*

(iv) *Whether the Plaintiff's claim is barred by the **Limitation of Actions Act**?*

(v) *Whether the Plaintiff is entitled to the relief sought.*

17. The first issue is not contested. ICDC had capacity to sell shares and did sell 300,000 shares to the plaintiff. As I understand, the plaintiff's case is that after consummation of the agreement of sale of shares between it and ICDC and the subsequent order of specific performance, ICDC became its trustee for those shares. Consequently, the plaintiff was entitled to all the rights of a shareholder including the right to receive dividends, right issues and bonus shares and dividends accrued from the additional shares. It contends that its position as trustee was affirmed by the fact that ICDC paid it dividends.

18. Since the plaintiff's case is based on trust, I will outline briefly the law of trusts in relation to this case. It has been held that courts will only imply a trust in order to give effect to the intention of the parties and the intention of the parties to create a trust must be clearly determined before a trust is implied (see *Ayoub v Standard Bank of South Africa Ltd. and Another [1963] EA 619 and Mbothu and 8 others v Waitimu and 11 Others [1986] KLR 171*). The onus lies on the party relying on the existence of a trust to prove its existence through evidence (see *Gichuki v Gichuki [1982] KLR 285*).

19. In *Twalib Hatayan & Another v Said Saggar Ahmed Al-Heidy & 5 others CA Civil Appeal No. 51 of 2014 [2015]eKLR*, the Court of Appeal examined the creation of trust relationships as follows:

Trusts are created either expressly (by the parties) or by operation of law. An express trust arises where the trust property, its purpose and beneficiaries have been clearly identified (see Halsbury's Laws of England vol 16 Butterworths 1976 at para 1452). In the absence of an express trust, we have trusts created by operation of the law. These fall within two categories; constructive and resulting trusts. Given that the two are closely interlinked, it is perhaps pertinent to look at each of them in relation to the matter at hand. A constructive trust is an equitable remedy imposed by the court against one who has acquired property by wrong doing. (see Black's Law Dictionary) (Supra). It arises where the intention of the parties cannot be ascertained. If the circumstances of the case are such as would demand that equity treats the legal owner as a trustee, the law will impose a trust. A constructive trust will thus automatically arise where a person who is already a trustee takes advantage of his position for his own benefit (see Halsbury's Laws of England supra at para1453). As earlier stated, with constructive trusts, proof of parties' intention is immaterial; for the trust will nonetheless be imposed by the law for the benefit of the settlor. Imposition of a constructive trust is thus meant to guard against unjust enrichment...

A resulting trust is a remedy imposed by equity where property is transferred under circumstances which suggest that the transferor did not intend to confer a beneficial interest upon the transferee (see Black's Law Dictionary) (supra). This trust may arise either upon the unexpressed but presumed intention of the settlor or upon his informally expressed intention. (See Snell's Equity 29th Edn, Sweet & Maxwell p.175). Therefore, unlike constructive trusts where unknown intentions maybe left unexplored, with resulting trusts, courts will readily look at the circumstances of the case and presume or infer the transferor's intention. Most importantly, the general rule here is that a resulting trust will automatically arise in favour of the person who advances the purchase money. Whether or not the property is registered in his name or that of another, is immaterial (see Snell's Equity at p.177) (supra).

20. There is no evidence to support the existence of an express trust between the parties. The relationship between the plaintiff and ICDC arose from the sale and purchase of 300,000 underwritten shares in Kisii Bottlers. Since the relationship and its intent excluded the possibility of an express trust, the next question is whether a trust can be imposed by operation of the law.

21. The plaintiff submitted that the purchase of shares was meant to enable it benefit by receiving dividends and other incidentals and that ICDC breached its fiduciary duty by using its shareholding to acquire additional shares and participate in rights issues at the plaintiff's expense. Its claim for special damages is grounded on the fact the rights and bonus issues were offered to shareholders of Kisii Bottlers on a pro rata basis and the plaintiff would have benefitted accordingly.

22. To buttress its case, the plaintiff relied on the decision in **Kisii HCCC 234 of 1995** where the court issued an order for specific performance directing ICDC to transfer the 300,000 shares in Kisii Bottlers to it. In that case, Kisii Bottlers made an application to be joined to the suit as an interested party. In rejecting the application, the court, by a ruling dated 17th July 1998, held as follows:

It is clear from the above that the order sought by the Plaintiff were confined to the transaction between it and ICDC and had nothing to do with Kisii Bottlers. In line with that the judgment that was entered in this matter is confined to the resolution of the matter in dispute between Gudka Motors and ICDC.

In this respect it should be noted that Gudka Motors have not sought registration of the transfer of the share involved in this matter in the books of Kisii Bottlers. All they sought and obtained was a declaration that the cancellation of the sale was unlawful and an order of specific performance of the contract of sale. All these orders have absolutely nothing to do with Kisii Bottlers. It has no interest in the matter and its attempt to be joined in the suit is nothing more than intermeddling in a court case in which it has no interest. [Emphasis mine]

23. It is evident that the decree in **Kisii HCCC 234 of 1995** was limited to the sale of shares. In fact, the learned judge, as I have shown above, was clear that the plaintiff had not sought registration of the transfer in the book of Kisii Bottlers. The order of specific performance was aimed at securing the agreement between the plaintiff and ICDC and was not decisive or definitive of the relationship between the plaintiff and third parties or indeed any other action consequent upon the agreement for sale.

24. PW 1 acknowledged that ICDC had no mandate to register the transfer of shares. He also admitted that the plaintiff did not have any share certificates and that the directors of Kisii Bottlers had declined to register the transfer of shares in accordance with Article 15 (i) of the Kisii Bottlers' Articles of Association which provides as follows:

15(i) The Directors may refuse to register any transfer of a share: (1) where the Company has a lien on the share or (2) where they are not satisfied that the proposed transferee is a responsible person or (3) where the Directors consider that the proposed transferee (not being a member) is not a desirable person to admit to membership, but proviso (1) and (2) shall not apply where the proposed transferee is already a member nor to a transfer made pursuant to sub-clause (b) hereof.

25. **Section 28** of the **Companies Act (Repealed)** defined a member as:

28.(1) The subscribers to the memorandum of a company shall be deemed to have agreed to become members of the company, and on its registration shall be entered as members in its register of members.

(2) Every other person who agrees to become a member of a company, and whose name is entered in its register of members, shall be a member of the company. Emphasis added

26. Kisii Bottlers is a private company whose membership to the company was restricted in the manner provided by the articles of association. The order of specific performance issued in favour of the plaintiff could not surmount the blockade erected by **Article 15(i)** of the Articles of Association and **section 28** of the **Companies Act (Repealed)** hence I am able to answer issue no. (ii) in the negative. The Court of Appeal in **Arthi Highway Developers Limited v West End Butchery Ltd. & 6 Others Civil Appeal No.246 of 2013[2015] eKLR** as well as in **Mwangi Kibaki & Another v Mathingira Wholesalers Company Limited & 6 Others Civil Appeal No. 6 of 2017 [2018] eKLR** emphasized the need to adhere to the procedures set out in the Memorandum and Articles of Association for a valid transfer of shares.

27. The plaintiff did not become a member of Kisii Bottlers by virtue of paying the purchase price for the shares. There was therefore no obligation on ICDC to inform the plaintiff of its dealings in Kisii Bottlers. Further, the plaintiff did not prove that ICDC had used its shareholding to enrich itself unjustly. I therefore find and hold that the plaintiff has not proved a constructive trust against ICDC that would entitle it to the benefits of shareholding when the Articles of Association and the law did not contemplate that fact. The following observations of the Court of Appeal in **Mwangi Kibaki & Another v Mathingira Wholesalers Company Limited & 6 Others (Supra)** are apposite

The learned Judge employed equitable principles that were not and could not apply in the case before her where there was express statutory law governing how shares should be transferred from existing members either to other members or to outsiders. The Companies' Law Cap 486 Laws of Kenya (repealed) and the Memorandum and Articles of Association of the 1st respondent had specific and definite procedure on how shares in the 1st respondent could pass from a member to another member or to a new member. Where, as here, such express conditions existed had to be complied with strictly. The evidence produced through the witnesses called by the 1st respondent which we have set out in this judgment was to the effect that new members (if they can be so called) heard about existence of a corporate body, the 1st respondent, and believed that that corporate body owned the suit premises and that, upon this belief, and without carrying out any due diligence on the 1st respondent they walked into the 1st respondent, allegedly bought shares and believed to have become shareholders and owners of the suit land. According to them they did not know that there was a process to be followed to acquire shares. The learned Judge was in error to accept that position as ignorance could not be tolerated in a serious issue like the matter before the trial court. It was incumbent on any new shareholder to carry out necessary due diligence and know with exactitude the process necessary to be admitted to be a member of the 1st respondent. Without that, and in the face of flagrant disregard of procedures set out, the "new" members did not acquire any rights in the 1st respondent that were known or could be recognized in law.

28. I now turn to consider whether the court could imply a resulting trust as the plaintiff paid a tidy sum to ICDC for purchase of shares. In addition to what the Court of Appeal stated in *Twalib Hatayan & Another v Said Saggar Ahmed Al-Heidy & 5 others (Supra)*, the Court in *Heartbeat Limited v Ng'abwa Heartbeat Community Children's Home and Rescue Centre MSA CA Civil Appeal No. 83 of 2017 [2018] eKLR* accepted the statement of the learned authors in *Halsbury's Laws of England, 4th Edition Vol. 48* at para 597 regarding a resulting trust as follows:

A resulting trust is a trust arising by operation of law:

i. Where an intention to put property into trust is sufficiently expressed or indicated, but the actual trust either is not declared in whole or in part or fails in whole or part; or

ii. Where property is purchased in the name or placed in the possession of a person ostensibly for his own use, but really in order to effect a particular purpose which fails; or

iii. Where property is purchased in the name or placed in the possession of a person without any intimation that he is to hold it in trust, but the retention of the beneficial interest by the purchaser or disposer is presumed to have been intended.

29. I doubt that the facts of this case fall within the illustrations given above. The clear intent of the parties was to purchase shares. As I have shown, the sale could not be completed as the consent of Kisii Bottlers was necessary. The consent was rejected and the transaction could not proceed any further. The plaintiff did not take any steps against the refusal by Kisii Bottlers to consent to the transfer. This was not a case where the ICDC was purchasing shares on behalf of the plaintiff. It was a sale that was frustrated by want of compliance with the Articles of Association.

30. To support its case for a trust, the plaintiff contended that ICDC recognised its shareholding on the basis that it paid to it Kshs. 20,190,900/- being dividends for the 300,000 shares from 1995 to 2007. In its counterclaim, ICDC stated that these sums had been paid to the plaintiff in error and sought a refund of the money. In as much as ICDC did not support its claim with proof, the plaintiff was required to prove the existence of a trust. The clear intent of the parties in this case was that ICDC would transfer the shares to the plaintiff which intention was frustrated by the refusal by Kisii Bottlers Board of Directors to consent to the transfer of the shares to the plaintiff. The plaintiff failed to establish an intention that the shares purchased were to be held by ICDC in trust for it and that it was intended that the beneficial interest accruing from those shares including dividends would be paid to it. The totality of the facts is that the plaintiff and defendant entered into an agreement for the sale of shares. The agreement was conditional on the Directors of Kisii Bottlers giving its consent to the purchase and subsequent registration of the plaintiff as shareholder. Since the consent was refused, no shares were purchased and none were held in trust for the plaintiff. What the plaintiff was entitled to was refund of the purchase price. The right to a refund could not, in my view, morph into a trust for shares.

31. The plaintiff placed much emphasis on the agreement for the sale of shares. He argued that the binding nature of the agreement had been settled by the judgment in **Kisii HCCC No. 234 of 1995**. Counsel for the plaintiff cited the case of **John Onyancha Zurwe v Oreti Atinda CA Civil Appeal No. 217 of 2003 (UR)** where the court held that:

Extrinsic evidence cannot be received to prove the object with which a Document was executed or that the intention of the Parties, was other than that appearing on the fact of the document.

32. This submission does not take the plaintiff very far. It is true that the agreement relied on to imply a trust was for sale of shares and the court gave the plaintiff an order for specific performance. But, as I stated earlier, the court merely preserved the contract and recognised in the subsequent ruling (see para. 22 above), that the issue of the transfer of the shares in the Kisii Bottlers was a separate issue for which the plaintiff ought to have sought separate relief. The matter was governed by the Kisii Bottlers Articles of Association, a matter outside the agreement between the parties and **section 28** of the **Companies Act**.

33. The rule against parol evidence is captured in **section 98** of the **Evidence Act (Chapter 80 of the Laws of Kenya)**. **Section 98(1)** provides for an exception to the general rule against introducing or admitting any oral agreement or statement to depart from the strict terms and conditions of a document. It provides, in part, as follows:

98. When the terms of any contract or grant or other disposition of property, or any matter required by law to be reduced to the form of a document, have been proved according to section 97, no evidence of any oral agreement or statement shall be admitted as between the parties to any such instrument or their representatives in the interest for the purpose of contradicting, varying, adding to or subtracting from its terms:

Provided that –

(i) Any fact may be proved which would invalidate any document, or which would entitle any person to any decree or order relating thereto such as fraud, intimidation, illegality, want of due execution, want of capacity in any contracting party, want or failure of consideration, mistake in fact or law;

34. The fact of the consent and requirement of law that a shareholder must be registered are exceptions to the rule against parol evidence. At the end of the day, the sale agreement was frustrated. I decline to infer a resulting trust and for the reasons I have stated above, I answer issue no (iii) negatively.

35. The final issue for determination is whether the plaintiff's claim is time barred under the **Limitation of Actions Act**. This issue that was raised by the defendant in its statement of defence. It was a general averment without specific reference of the provisions of the statute relied on. A defence of limitation is an affirmative defence and it must be specifically pleaded. In **Mohamed Abdikadir Mohamed v Sammy Kagiri**

and Another MRU HCCA No. 102 of 2016 [2016]eKLR, Gikonyo J., expressed the following sentiments which I adopt:

In my understanding, our law on pleading, as encapsulated in Order 2 rule 4 of the CPR, is that, the party relying on limitation should specifically plead it. He may or may not do so for any or no reasons at all. Thus, the plaintiff is entitled to wait to hear from the defendant whether limitation is taken up as a defence. If the defence is taken, it is up to the plaintiff to bring his case within any of the exceptions to the Limitation of Actions Act or other statute of limitation as may be the case. There are good reasons for the position of the law that the defence of limitation should be pleaded specifically. First, it is intended to avoid ambush upon or taking the plaintiff by surprise on such a fundamental issue as limitation of actions. Second, the Plaintiff is notified of the defence of limitation; in effect he is told that his claim is not maintainable in law. And, third, the plaintiff gets the opportunity to plead such facts as are necessary to bring his claim within the exception of Section 27 of the Limitation of Actions Act. Ordinarily, he will do so in his reply to defence. Accordingly, a party who wishes to invoke or rely on a defence of limitation must specifically plead it in his defence or any other subsequent pleading, if he is to rely on limitation as a basis of defeating the plaintiff's claim.

36. I did not have the advantage of the defendant's submissions hence I cannot definitively state that the plaintiff's claim was statute barred. The plaintiff's position the suit was filed in 2008 after it received the last payment on account of dividends in 2007. I have no hesitation in answering issue (iv) by holding that the defendant did not establish the defence of limitation under the **Limitation of Actions Act**.

37. It must now be clear that the plaintiff's suit is for dismissal and the question I must deal with is for costs. This court has discretion to order costs subject to the general rule that costs follow the event. The plaintiff's claim has failed hence the defendant is entitled to costs for defending it case. On the other hand, I have already dismissed the counter claim with costs to the plaintiff. At the end of the day both parties have succeeded and failed in their respective claims hence the final order I now make is that each party shall bear its own costs.

38. I dismiss the plaintiff's claims and the defendant's counterclaim. Each party shall bear its own costs.

DATED and DELIVERED at KISII this 28th day of MARCH 2019.

D.S. MAJANJA

JUDGE

Mr Oguttu-Mboya instructed by Oguttu, Ochwangi, Ochwal and Company Advocates for the plaintiff.

Kithi and Company for the defendant.