



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**COMMERCIAL & ADMIRALTY DIVISION**

**HCC. NO. 7 OF 2018**

**TALVINDER SINGH SAGOO.....PLAINTIFF**

**VERSUS**

**NANAK CRANKSHAFT GRINDERS LIMITED.....1<sup>ST</sup> DEFENDANT**

**AVTAR KAUR SAGOO.....2<sup>ND</sup> DEFENDANT**

**JASWINDER KAUR SAGOO.....3<sup>RD</sup> DEFENDANT**

**MANJIT KAUR SAGOO.....4<sup>TH</sup> DEFENDANT**

**DIPTINDER KAUR SAGOO.....5<sup>TH</sup> DEFENDANT**

**HARVINDER KAUR SAGOO.....6<sup>TH</sup> DEFENDANT**

**ASHWIN BROTHERS.....7<sup>TH</sup> DEFENDANT**

**ALEXANDER REGISTRARS.....8<sup>TH</sup> DEFENDANT**

**JUDGMENT**

1. The dispute herein revolves around some Kshs.42,000,000.00 paid into the account of Nanak Crankshaft Grinders Limited (Nanak or the 1<sup>st</sup> Defendant or the Company) on 23<sup>rd</sup> March 2012. There is contestation as to whether or not this was a loan to the Company.
2. Nanak is a family business duly registered and incorporated as a limited liability company under the provisions of the repealed Companies Act (Cap 486). Avtar Kaur Sagoo (Avtar or the 2<sup>nd</sup> Defendant), Jaswinder Kaur Sagoo (Jaswinder or the 3<sup>rd</sup> Defendant) and Manjit Kaur Sagoo (Manjit or the 4<sup>th</sup> Defendant) are shareholders of the Company. Jaswinder as well as Talvinder Singh Sagoo (Talvinder or the Plaintiff), Diptinder Kaur Sagoo (Diptinder or the 5<sup>th</sup> Defendant) and Harvinder Kaur Dadhiala (Harvinder or the 6<sup>th</sup> Defendant) are its directors.
3. It is the case of Talvinder that sometime in March 2012, faced with financial distress, Nanak requested him for financial assistance and that on 23<sup>rd</sup> March 2012 he advanced a loan of Kshs.42,000,000.00 to the company by transfer of money from his personal account No. 00300359082001 to the 1<sup>st</sup> Defendant's account No. 00251550100 in the same bank. That the transfer of monies was effected and overseen by Ashwin Brothers (the 7<sup>th</sup> Defendant) and Alexander Registrars (the 8<sup>th</sup> Defendant) as external/independent auditors of the company.
4. It is further averred that the agreement between the parties was that the loan would be repaid in full but the Company has refused, failed and/or neglected to pay hence this suit. In his claim, Talvinder states that the loan attracts interest of 14% p.a. He seeks Kshs.82,824,000.00 as at November 2017 made up as follows:

a) Principal sum as at 23<sup>rd</sup> March 2012 Kshs.42,000,000.00

b) Interest thereon at 14% from 23<sup>rd</sup> March 2012 up to November 2017 which is:

14% x 42,000,000 x 5 years	=	29,400,000.00
Subtotal	=	71,400,000.00
Add VAT at 16%	=	11,424,000.00
Amount due	=	82,824,000.00

5. On another front, there is a complaint about the 2<sup>nd</sup> to 5<sup>th</sup> Defendants. It is stated by Talvinder that the four, who together, constitute the majority shareholders/directors of the Company have taken actions that are prejudicial and oppressive to the interests of himself and the 6<sup>th</sup> Defendant. The particulars of prejudice are given as follows:-

- a) Failure to include the 6<sup>th</sup> Defendant in the conduct of the company management and directorship affairs.
- b) Calling for shareholders meeting on short notice by way of a letter in an attempt to vote out the 6<sup>th</sup> Defendant as a director in the company.
- c) Threatening to transfer the company assets without the consent of the 6<sup>th</sup> Defendant.
- d) Failing to adhere to the memorandum and Articles of Association of the company in the running of the company.

6. The Plaintiff seeks the protection of the 6<sup>th</sup> Defendant from been voted out as a director by the 2<sup>nd</sup> to 5<sup>th</sup> Defendants. So, in all, the Plaintiff seeks the following orders:-

- a) The Defendants to pay the loan amounting to Kshs.82,824,000.00 (Eighty two million eight hundred and twenty four thousand) with interest thereon at 14% from the date of filing suit till payment in full.
- b) In the alternative, the Defendants to compensate the Plaintiff by way of shares equivalent to the amount owed plus interest thereon at 14% per annum.
- c) Damages for breach of agreement.
- d) A permanent injunction restraining the Defendant whether by themselves, their agents, employees, assigns, servants or otherwise howsoever and any person whatsoever be restrained from selling, transferring, disposing of, charging, pledging, diluting, dealing, interfering with and/or intermeddling in any manner whatsoever with:
  - i. The shares and shareholding in and of the 1<sup>st</sup> Defendant Company.
  - ii. All other properties, funds and assets belonging to the 1<sup>st</sup> Defendant.
  - iii. The composition and structure of the company with regard to directorship that is to say change in directorship or appointment of new directors.

Or otherwise disposing of the 1<sup>st</sup> Defendant's properties or interest in properties of any description and wherever situated.
- e) A permanent injunction restraining the Defendant whether by themselves, their agents, employees, assigns, servants or otherwise howsoever and any person whatsoever from withdrawing or otherwise dealing with the Company's bank accounts with any bank.
- f) A permanent injunction restraining the Defendant whether by themselves, their agents, employees, assigns, servants or otherwise howsoever and any person whatsoever from disposing of their interests in the 1<sup>st</sup> Defendant company where they are directors and/or shareholders or from disposing or transferring their assets.
- g) A permanent injunction restraining the Defendant whether by themselves, their agents, employees, assigns, servants or otherwise howsoever and any person whatsoever from issuing, allotting or transferring any shares in the company or causing or permitting any shares in their company to be issue, allotted or transferred or otherwise dealt with without the consent of the Plaintiff until the dispute on ownership of shares is resolved and pending the hearing and determination of this suit.
- h) A permanent injunction restraining the Defendant whether by themselves, their agents, employees, assigns, servants or otherwise howsoever and any person whatsoever from appointing any person or body corporate, or causing any person or body corporate to be appointed as a director, managing director, manager or other officer or employee of Nanak Crankshaft Grinders Limited.
- i) A permanent injunction restraining the Defendant whether by themselves, their agents, employees, assigns, servants or otherwise howsoever and any person whatsoever from removing any person or body corporate or causing any person or body corporate to be

removed, from his or its office as a director, managing director, manager or other officer or employee of Nanak Crankshaft Grinders Limited.

j) A permanent injunction restraining the Defendant whether by themselves, their agents, employees, assigns, servants or otherwise howsoever and any person whatsoever from signing or executing or doing, or causing to be signed or executed or done, any document, deed, act or thing.

k) Costs of this suit.

l) Interest at Court rates on item (c) and above from the date of filing this suit.

m) Any other or further relief that this Honourable Court may deem fit to grant.

7. Harvinder's states that the Company was unable to service an overdraft facility extended to it by I & M Bank prompting the Bank to issue a 7 day notice of intention to invoke a guarantee held as security. She avers that Talvinder advanced Kshs.42,000,000.00 to the company and the same was credited to the shareholders account in the company books with the approval and knowledge of the directors and shareholders.

8. As to the effort to have her removed as a director, she takes the position that any changes to the composition of the board should await the finalization of the probate of the estate of Gurdip Kaur Sagoo (Gurdip) which is also a shareholder to the company.

9. Ultimately, Harvinder and Manjit support the claim by the Plaintiff.

10. Save for Harvinder and Manjit, the other Defendants filed a joint statement of Defence dated 14<sup>th</sup> August 2018 and filed on 15<sup>th</sup> August 2018. They give their perspective of how the money was paid into the Company's account.

11. It is averred that the Company's founding directors, to wit, Balwant Singh Sagoo and Gurdip Kaur Sagoo (Gurdip) now both deceased set up Khanda Trust (The Trust) and appointed Barclays Private Bank & Trust (Isle of man) Limited as the Trustees (The trustees). On or about 1<sup>st</sup> August 2006, the Company applied and obtained an overdraft facility of Kshs.42,000,000.00 to fund the working capital of the Company. The facility was secured by, inter alia, a fixed and floating debenture over the entire assets of the Company but which assets were held by The Trust.

12. Due to financial difficulties, I & M Bank threatened to invoke the guarantee which was held as security. Because of this state of affairs, Gurdip who was the surviving settlor of the Trust instructed the Trustees to transfer £300,000 to her account which she subsequently transferred to the Plaintiff to be applied towards repayment of the loan secured by the assets held by the Trust.

13. That the Plaintiff wrote to I & M Bank confirming that he had received £300,000 from the Trust to be used to offset the facility held by the Company. That the Plaintiff however opted to put the money in a personal fix deposit interest earning account and it was not until 22<sup>nd</sup> March 2012, and after the Company raised the issue of the whereabouts of the funds, that he transferred Kshs.42,000,000.00 to the credit of the Company and retained the interest earned. That the Company has sought the Plaintiff to account for this interest but in vain.

14. Simply, it is the case of the company that it never borrowed any money from the Plaintiff nor does it owe the Plaintiff the amount claimed.

15. As an alternative plea, the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 5<sup>th</sup> Defendants aver that if any loan was advanced by the Plaintiff then the same is not enforceable (repayable) as there was no resolution of the Board of the Company authorizing the borrowing. Secondly, the loan would ordinarily be reflected in the audited accounts of the Company which accounts have always been signed by the Plaintiff.

16. As to any role of the 7<sup>th</sup> and 8<sup>th</sup> Defendants, both deny effecting or overseeing the transfer of the monies as their roles as the company secretaries and/or auditors are merely to effect/communicate the decision of the Board and to examine the Books of accounts of the Company.

17. As to why the amount was credited to the shareholders account in the books of the Company, the said Defendants aver that a decision was made to this effect by the Board of Directors of the Company. A decision informed by the fact that the shareholders were the legal beneficiaries of the Trust funds and as the funds were received by the Company from the Trust to offset the loan, this represented additional capital injected into the Company by the shareholders.

18. On the grievances made on behalf of the 6<sup>th</sup> Defendant, the co-defendants state that the Plaintiff should not hold her brief as she is at liberty to raise and ventilate them using legal mechanisms available to her.

19. The Court is asked not to micromanage the activities of Company as it is a legal entity whose management is done in accordance with its articles of association. In that regard it is averred that the Plaintiff has frustrated attempts by the company to convene annual meetings. Examples of the attempts are given as follows:

i. On 2<sup>nd</sup> November 2017 the Company issued Notice for shareholders meeting scheduled for 5<sup>th</sup> November 2017.

ii. That on the request of one director Manjit Kaur Sagoo (mother to the Plaintiff) and the Plaintiff, the meeting was rescheduled for 20<sup>th</sup> November 2017.

iii. On 20<sup>th</sup> November 2017, which was set as the date for the meeting, the Plaintiff through his lawyers wrote a letter alleging that the deliberations of the meeting would be null and void as only the company secretary could convene such meeting.

20. At the hearing three witnesses testified; Talvinder for himself as Plaintiff, Harvinder as the 6<sup>th</sup> Defendant (and presumably on behalf of Manjit) and Diptinder for and on behalf of the remaining defendants. Their evidence as is relevant to the issues to be determined is discussed in the next part of this decision. The issues that emerge following the pleadings are:-

i. Was the amount of Kshs.42,000,000.00 a loan by the Plaintiff to the company?

ii. If so, what were the terms of the loan and is the Plaintiff entitled to the claim made in that respect.

iii. Are the 2<sup>nd</sup> to 5<sup>th</sup> Defendants running the Company in a manner that is prejudicial and/or oppressive to the interests of the Plaintiff and the 4<sup>th</sup> and 6<sup>th</sup> Defendants?

iv. Is the Plaintiff entitled to the prayers sought?

21. It is common cause that on 22<sup>nd</sup> March 2012, Kshs.42,000,000.00 was paid into the account No. 00251550100 domiciled at I & M Bank belonging to the Company. This amount was from a fixed deposit account in the name of Talvinder (D Exhibit 2 Page 28)

22. It is also not in contest that a sum equivalent to Kshs.45,540,000.00 had early, on 17<sup>th</sup> August 2011, been transferred from the account of Gurdip into the account of Talvinder (See Plaintiff Exhibit Page 8 ). It would seem that on the very same day Talvinder opened a separate account and moved Kshs.42,000,000.00 out of the Kshs.45,540,000.00. That account would be the fixed deposit account referred to in the preceding paragraph.

23. It is the submission by Talvinder that the money transferred from his account to the Bank was a loan and had to be repaid. He submits that:-

“.. it is immaterial how he got the money so long as it came from his account”.

Further, that the money originated from her grandmother Gurdip as a gift.

24. What needs to be asked is whether there is evidence that this money was in fact a gift from Gurdip to Talvinder?

25. In considering this question, it has emerged from the common evidence of all the three witnesses that on various occasions Gurdip would gift her children with money from the Trust. For instance, on 11/12/2012, she informed Trustees to the fund that she would advance a gift in the sum of £100,000 to her daughter Harvinder K. Dadhiala (D. Exhibit 1 Page 50). Again on 04/06/2015 she instructs the Trustees to make a transfer of £250,000 to enable her pass it to her daughter Harvinder as her final gift (D. Exhibit 1 Page 62). Copies of these instructions are produced by the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 5<sup>th</sup>, 7<sup>th</sup> and 8<sup>th</sup> Defendants. None is produced by the Talvinder, Manjit or Harvinder.

26. Of significance is that in these letters to the Trustee, Gurdip is unequivocal that the money transfer is for the purpose making a gift. I reproduce the letter of 11<sup>th</sup> December 2012 as an example;

*Gurdip Kaur Sagoo,*

*NAIROBI*

*Khanda Trust*

*Barclays Private Bank & Trust Ltd.*

*Douglas*

*Isle of Man*

*11 / 12 / 2012*

*Dear Sir,*

*I would like to gift my daughter Mrs Harvinder K. Dadhiala £100,000 payable into my account.*

*Regards,*

*Mrs Gurdip K. Sagoo*

27. Again in respect to the two examples when she made gifts from the Trust, Gurdip sought and obtained a no objection letter from the other

beneficiaries to the Trust. For example, in respect to the gift of £100,000 made through instructions of 11/12/2012 is the following no objection letter from the beneficiaries to the Trustees (D. Exhibit 1 Page 52).

*The trustees,*

*Khanda Trust*

*Barclays Private Bank & Trust Ltd.*

*Douglas*

*Isle of Man*

*Dear Sirs,*

*We the family beneficiaries are aware and accept that our mother-in-law, Mrs Gurdip Kaur Sagoo is gifting her daughter, Mrs. Harvinder Kaur Dadhiala one hundred thousand pounds as a final settlement to her. We have no objection to this.*

*Mrs. Manjit Kaur Sagoo*

*Beneficiary*

*Mrs Jaswinder Kaur Sagoo*

*Beneficiary*

*Mrs Avtar Kaur Sagoo*

*Beneficiary*

*Mr. Talvinder Singh Sagoo*

*Fund Advisory*

28. There is a similar letter for the second gift of £250,000 (D. Exhibit 1 Page 63)

*The Sagoo Family*

*Plot No. 7788/4*

*Rosslyn Estate*

*Nairobi.*

*4<sup>th</sup> June 2015*

*Dear Sirs,*

*Hope this email finds you well. We the beneficiaries are aware and accept that our mother-in-law, Mrs Gurdip K. Sagoo is gifting her daughter, Mrs. Harvinder Kaur Dadhiala £250,000.*

*Regards,*

*Mrs. Manjit Kaur Sagoo*

*Beneficiary*

*Mrs Jaswinder Kaur Sagoo*

*Beneficiary*

*Mrs Avtar Kaur Sagoo*

*Beneficiary*

Mr. Talvinder Singh Sagoo

Fund Advisory

29. In regard to the money that eventually found its way to Talvinder's account and finally into the Company account, the letter initiating movement of the money from the Trustees is that dated 29<sup>th</sup> July 2011 (D Exhibit 1 Page 24) which read as follows:-

Plot No. 7788/4

Rosslyn Estate

Nairobi.

29<sup>th</sup> July 2011

Dear Sirs

Khanda Trust (the "Trust")

In your capacity as the Trustee of the Trust, we should be grateful if you would consider distributing the sum of the three hundred thousand to the following account.

Account Name: Mrs. Gurdip Kaur Sagoo

Bank: Barclays Bank & Trust Limited.

Bank SWIFT: Code: BARCGB22

Beneficiary Account No. 710449

We confirm that this distribution is for the purpose of repaying a loan secured by assets held within the trust.

We also confirm our understanding that we are responsible for any taxation liabilities arising on us as a consequence of receiving the above funds.

Guldip Kaur Sagoo

30. To be observed is that unlike where Gurdip made gifts and stated as much, she is fairly unequivocal here when she says that:-

"We confirm that the distribution is for the purpose of repaying a loan secured by assets held within the trust".

It is of course not in dispute that the loan referred to in this letter is that held by the Company with I & M Bank and for which there had been default. Just four days before Gurdip gave instructions to the Trustees, I & M had threatened to call in the guarantee (D. Exhibit 1 Page 23).

25<sup>th</sup> July 2011

The Directors

Nanak Crankshaft Grinders Limited,

Nairobi

Dear Sirs,

RE: INVOKING OF STAND BY LETTER OF CREDIT FROM BARCLAYS BANK

PLC: LONDON REF MRDC4852864 – GBP. 700,000/-

We refer to the above referenced guarantee for an amount of GBP. 700,000/- issued on your behalf by Barclays Bank PLC, London.

Kindly note that due to unsatisfactory conduct/operation of your overdraft account operated with us of which the above mentioned guarantee is held as security. TAKE NOTICE that bank will invoke the guarantee in the NEXT SEVEN (7) DAYS from the date hereof.

*Be advised accordingly*

*Yours faithfully*

*For: I & M Bank Limited*

*Pius Thomas Alappatt*

*Branch manager*

*Oscar Wainaina*

*Relationship officer*

31. It would seem to this Court that Gurdip dealt with the £300,000 transferred from the fund to the Talvinder's account in a manner different to when she was making a gift. When she was made a gift she said as much!

32. What is the Court to say to Talvinder's argument that the source of the money did not matter and that all that counted was that the money had come into his account from which payment was made into the Company account?

33. Talvinder had partly testified that;

"I received money from my grandmother not the trust.....

My grandmother gave me the money to bail out the Company. I was the Director, I needed the money to save the Company. If my grandmother really wanted to save the Company then she would have lent the company directly ....

She said that she would give me the money to sort myself out. My grandmother was not interested in the Company. She was assisting me".

34. What is to be made of this evidence?

35. On 23<sup>rd</sup> August 2011 (D Exhibit 1 page 26), Talvinder writes to the Bank as follows:-

*Talvinder Sagoo,*

*Nairobi*

*23<sup>rd</sup> August 2011*

*The Manager*

*I & M Bank*

*Nairobi.*

*Dear Sir,*

*I wish to confirm that I have received £300,000 from my grandfather's Trust to be used for facilities granted to the account of Nanak Crankshaft Ltd. as the company requires working capital.*

*Yours faithfully,*

*Talvinder Sagoo*

36. The contents of this letter are at odds with what the Talvinder told Court. In this letter he informs the Bank that the money was received from his "grandfather's Trust" (the Trust) while to Court he had testified that the money was from his grandmother and not the Trust. Confronted with this inconsistency he answered;

"This was just a formality for the Bank. The money came from my grandmother not the Trust".

37. What Talvinder did not and has not explained to Court is why the formality to the Bank required that it be disclosed that the money was from his grandmother and not the Trust. Without any explanation, the Court concludes that Talvinder was well aware that the money was from the Trust. Talvinder was simply relaying true and accurate information to the Bank.

38. One other truthful disclosure that he made in that letter, I would think, is that the money “was to be used for facilities granted to the account of Nanak Crankshaft Grinders Ltd”. Talvinder did not claim the money as a gift to himself which he then was lending to the Company. In addition, one more matter fortifies this Court’s conclusion that the money paid into the account of Talvinder was not a gift to him but money to be applied for purposes of paying off the Company debt.

39. At the time the money was transferred from the Trust to his grandmother’s account, then to his account and subsequently to the Company, Talvinder was the Managing Director of the Company (or in the least a Director). The accounts for the year ended 31<sup>st</sup> December 2012 shows Talvinder alongside Jaswinder, Harvinder and Diptinder as Directors of the company. The accounts are signed by all directors and just for emphasis including Talvinder. As to how the accounts were prepared, Diptinder told Court;

“The Accounts prepared by Accountant, myself, 6<sup>th</sup> Defendant. The Auditor and company accountant met and agreed that the Kshs 42 million be treated as a shareholder’s loan. There was no duly constituted Board meeting”.

40. To be fair to Talvinder he was not part of the decision to treat the sum of Kshs. 42,000,000.00 as shareholders loan and that decision was made in an informal setting. Yet all directors of the Company including himself and Harvinder signed the Audit report and accounts which captured the sum of Kshs.42,000,000.00 transferred from his account into the company account as shareholders loan. In his testimony, however, Talvinder said;

“I did not know that the money had been allocated the shareholder’s account.”

But he was later to blow hot and cold when he said.

“Even in the accounts there is an acknowledgement of the loan. As Shareholders loan.

41. As to Harvinder who also signed the report and accounts, she testified as follows:

“The money lent to the company was captured as a shareholder’s loan. The Plaintiff was aware of this”

42. She contradicts Talvinder who had initially said he was not aware that the money had been “allocated” to the shareholders account. Nevertheless, what has to be crucial is that having signed the accounts both were fully aware that the controversial Kshs.42,000,000.00 was accepted and treated by all directors of the Company as a loan by shareholders.

43. This is of significance because of two related reasons. One, Talvinder was and is not a shareholder of the company. And being a non-shareholder director, and by signing the accounts, he acknowledged that the Kshs.42,000,000.00 which had been paid to the account was not a loan from himself but payment from the Trust to bail out the Company. If not, then why did he not insist as Director (indeed Managing Director) of the Company that the accounts reflect that the money was owed to him as an individual? Given the state of affairs of the Company, the amount was not insubstantial and it is unlikely that Talvinder would not be attentive as to how it was treated in the accounts.

44. Second, it has to be remembered that the source of the money was the Trust. The evidence of Harvinder is that at the time of the accounts under discussion the following were the shareholders of the Company;

i. Manjit

ii. Jaswinder

iii. Avtar

iv. Gurdip

45. From the documents available in evidence the beneficiaries to the Trust were Majit, Jaswinder and Avtar. Gurdip was, as noted earlier, the co-creator of the Trust. At the material time all four were also the shareholders of the Company. It does not seem illogical therefore that monies paid from the Trust for the benefit of the Company should be treated as a loan to the account of the three shareholder beneficiaries. The Court accepts the submissions by Counsel for the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 5<sup>th</sup>, 7<sup>th</sup> and 8<sup>th</sup> Defendants in this regard.

46. Even without considering whether or not the lack of a resolution to borrow by the Company would defeat the Plaintiff’s claim, I find that there is overwhelming evidence that the money paid into the account of I & M from the account of Talvinder was not a loan from him and there is no merit in his claim.

47. As to the complaints made by the Plaintiff on behalf of Harvinder, she too is a party to these proceedings as a Defendant. Order 1 Rule 24 of the Civil Procedure Rules permits a Defendant to mount a claim against a co-defendant. Harvinder choose not to claim against her co-defendants and no orders can be made to her benefit at the behest of the Plaintiff. It is not surprising that neither Counsel for Talvinder nor Harvinder made any closing submissions on that aspect of the case.

48. Ultimately the entire suit is without merit and is dismissed with costs.

**Dated, Signed and Delivered in Court at Nairobi this 29<sup>th</sup> Day of November 2019.**

**F. TUIYOTT**

**JUDGE**

**PRESENT;**

Kisaka for 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 5<sup>th</sup>, 7<sup>th</sup> and 8<sup>th</sup> Defendants

Olewe holding brief Kimere for 4<sup>th</sup> & 6<sup>th</sup> Defendants

Mirei for Plaintiff

Court Assistant: Nixon