



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL CASE NO. 157 OF 2009

USHAGO DIANI INVESTMENT LIMITED PLAINTIFF

VERSUS

JABEEN MANAN ABDULWAHAB DEFENDANT

J U D G M E N T

Outline of facts as pleaded by the parties

1. The plaintiffs, a limited liability company, incorporated in Kenya has sued the defendant, who is one of its shareholders and directors, and sought some 6 prayers being:-

- a) **A permanent injunction restraining the Defendant by herself, her agents and/or servants from selling, transferring, charging, leasing, alienating or in any way whatsoever and howsoever interfering with or dealing with the property known as Kwale/Diani Beach Block/1463.**
- b) **A declaration that the Defendant's action of refusing to transfer parcel no. Kwale/Diani Beach Block/1463 to the Plaintiff is a breach of her obligation as a shareholder of the Plaintiff and of its agreement with its co-shareholders in the Plaintiff.**
- c) **A declaration that the parcel of land known as Kwale Diani Beach Block/1463 is liable to be transferred to the Plaintiff.**
- d) **An order directing the Defendant to effect transfer of the parcel of land known as Kwale/Diani Beach Block/1463 to the Plaintiff and in default the Deputy Registrar of this Honourable court be authorized to execute all documents on her behalf to effect the said transfer.**
- e) **Damages for fraud and/or misrepresentation as in paragraph 16, 17, 18, 19, 20 and 21.**
- f) **Costs of this suit and interest thereon.**

2. The facts as pleaded by the plaintiff are that sometimes in the year 2007, four persons held meetings and agreed to incorporate the plaintiff and that each of the four promoters would hold 25 shares and would for that matter contribute to the assets and capital of the plaintiff equally whether by cash or kinds. The agreement between the parties is said to be both oral and written. The written part is pleaded to be in the Memorandum and Articles of Association (henceforth MEMARTS) while the oral part is contained in various meetings held at Diani, elsewhere in Kenya and also in the United Kingdom.

3. Pursuant to such agreement the plaintiff avers that the defendant contributed her shares in the company in cash and by giving land parcel KWALE/DIANI BEACH/BLOCK 1463 while another shareholder Manfred Josef Jasisch also contributed a parcel of land known as KWALE/KIANI BEACH BLOCK/1462 on the understanding that the two parcels of land be valued and transferred in favour of the plaintiff and the values thereof be entered into the plaintiffs books as the share capital contributed by respective shareholders. Pursuant to the said arrangement, the plaintiff is pleaded to have taken possession of KWALE/DIANI BEACH BLOCK 1463 and carried out investment thereon by building a shopping complex, 16 offices, kitchens, sports bar, food court, swimming pool and parking lot among others worth millions of shillings and that it was in the process of transferring the property to itself when the defendant forcefully took away the documents of title and subsequently refused to hand back the same to the plaintiff and has instead threatened to wind up the plaintiff for an alleged failure to pay a sum of Kshs.3,750,000/= being alleged arrears of rent. Due to the change of heart and breach by the defendant the plaintiff feared that the defendant would alienate or transfer the property to the detriment of the plaintiff hence the suit.

4. The plaintiff then proceeds and plead fraud and misrepresentation against the defendant particulars of which included a claim that the

defendant had led the plaintiff to believe that she would be a shareholder, would transfer the suit property as part of her capital contribution, would execute the Memorandum and Articles of Association for incorporation of the plaintiff and that the plaintiff would develop the suit land as if it was its own. Those representation were pleaded to have been made inferable by the fact of execution of the Memorandum and Articles of Association, handing over the title documents to the plaintiff and by statements made by the defendant in person and through Attorney to the other shareholders and therefore the defendant has become disentitled to the property and ought to transfer it to the plaintiff.

5. The plaintiff also filed three witness statements by John Bradley, Inayatali M. Bhajji and Manfred Jasisch and bundle of 5 documents being, Memorandum and Articles of Association, Audited accounts for the year 2007 correspondence exchange between the parties, copy of valuation report of suit property and a notice issued under Section 220 of the repealed Companies Act.

6. In the witness statements by Mr. John Bradley reiterates the averments in the plaint and the witness statement by Manfred Jasisch and add that the defendant was at all time entitled to participate in the affairs of the company and to assess the records. It is then added that the two parcels of land were not transferred because their green cards were found to be missing from the land registry and that later the defendant used the police to forcefully retrieve the title from the witness. The witness statement by Mr. Manfred Jasisch gives the detailed accounts of the dealings between the parties as directors of the company and confirmed that at incorporation each of the 4 directors of the plaintiff was allotted 25 shares.

7. To the witness, him and the defendant agreed to transfer their respective parcels of land Kwale/Diani Beach Block/1462 and 1463 to the company as part of share contributions and the titles to the properties were handed over to one John Bradley and consequently to the plaintiff took possession of the land and commenced construction. The plaintiff remained in possession of the property and its title till the 14/10/2008 when the police took away the title document from Mr. Bradley a fact the witness considers unjust and illegal. The witness expressed surprise that in 2009 the defendant demanded alleged arrears of rent when there was never any agreement to pay rent. To the witness the property is strategically located and that is the reason the plaintiff has used, well over 37,000,000/= to develop it.

8. Mr. INAYATALI M BHAIJI, auditor of the plaintiff, also made a statement and exhibited audited accounts for the years 2007 to 2015 as well as minutes generated at the alleged directors meetings, schedule of share contribution by the directors and a power of attorney donated by the defendant to one JINDKHAN AHMED RAHIMKHAN. The gist of the statement is that he was appointed to have the company incorporated and the same was done through an oral invitation and he became the auditor of the company todate.

9. At the time he was approached for the incorporation, the parties had started construction works upon the suit property. He exhibited the audited accounts and unsigned minutes he says were taken by him during a meeting of directors in his offices and that he was aware the two directors offered to transfer two parcels of land to the plaintiff which has not been done.

Pleadings by the defendant

10. The defendant filed a statement of defence dated 21/01/2010 and amended last on the 10/8/2015 supported by two witness statements by JABEEN MANAN ABDULWAHAB and ABDUL WAHAB HASSAN. There were also lists of documents dated 13/10/2011 and a supplementary list of documents dated 2/3/2015.

11. The statement of defense has a general traverse of the plaint denying all the paragraphs of the plaint save for paragraph 1 & 2 and put the plaintiff to very strict proof of the plaint. In specifics, the defendant pleaded that the entire agreement between the parties was contained in the memarts to the effect that each shareholder would contribute an equal sum in cash and be allocated 25 shares each and that contrary to the said agreement she did contribute Kshs.8,900,000/= which was applied towards the construction of the developments on the suit land and totally denied any agreement to contribute the suit land towards share capital while insisting that the agreement was from the beginning that the plaintiff would pay rent for the premises once it commenced operations.

12. Despite the said agreement, the defendant avered that the others directors/shareholders refused to make any contributions of share capital and went ahead to deny the defendant access and participation in the business of the company including the benefits flowing therefore and without making disclosures as to assets and profits and without making statutory returns. In conclusions the particulars of fraud and misrepresentation were all denied together with any oral agreement made in person or by an attorney with a final assertion that the surrender of the title to the suit land to Mr. John Bradley was done for purposes securing building approvals but not for transfer and that had there been intention to transfer, transfer from would have been signed by her.

13. The defendant also mounted a counter claim largely based on the fact that she is the registered proprietor of the suit property upon which the plaintiff has built a commercial premises and thereby a **resulting tenancy** has been constituted beginning 2007 at reasonable monthly sum based on value thereof and also for a declaration that she being a shareholder of the plaintiff is entitled to be part of its running and share its earnings from time to time and that the plaintiff has failed to pay to her the profits earned and failed to account for the share contributions. On those facts the defendant prayed that judgment be entered for her as prayed in the counter claim for rent since 2007, share of profits from 2007, and in the alternative a refund of cash contributions made to the plaintiff together with interest thereon at commercial rates from 2007 todate.

14. In the witness statement dated 29/2/2016 the defendant asserts that parties, the 4 shareholders, agreed that each contribute about Kshs,7,000,000/= to construct a restaurant and shopping complex and that the four did in fact contribute share capital as follows:-

- **John Bradley Kshs.14.6m**
- **Mrs. Hanan Jabeen Abdulsuhab Kshs.8.9m**
- **Mr. Abdulwahab Hassan Kshs.6.7m**

· **Mr. Manfred Jasisch Kshs.2.9m**

15. It is added that due to lack of capital to buy land it was agreed that the company builds upon the suit property which was then vacant on the understanding that upon commencement of business and generation of income, the company would pay to the defendant rent and that all the shareholder would participate in the running of the company and would share profit and dividends in the proportions of investment by each.

16. In her account the construction began and ended in 2007 and business commenced sometimes on 15/12/2007 under the management of Mr. Manfred Jasisch for 3 years then Mr. Bradley took over to date. However both are accused of having not availed to the defendant the status of the business affairs.

17. On surrender of the title the defendant asserts that it was done purposely to help with approval of plans by then local authority and never to facilitate a transfer to the plaintiff. She reiterated there having been no agreement to transfer the suit land and added that even Mr. Manfred also did not transfer his parcel of land to the company as much as he had surrendered title thereto Mr. Bradley. She in fact pointed out that Manfred's title was returned to him and had since been sold to a third party.

18. The second witness statement was by Mr. Abdul Wahab Manan who stated he was the husband to the defendant who represented the defendant at company meetings, reiterated and confirmed the statement by the defendant and repeated that the suit land belongs to the defendant and has never been transferred or conveyed whatsoever to the plaintiff. He prayed that the suit be dismissed and the counter claim allowed.

19. Among the documents filed by the defendant included, a letter by the defendant dated 8/6/2009, audit reports dated 31/2/2008, certificate of search of KWALE/DIANI BEACH BLOCK/1463, Certificate of title of the same, Memorandum and Articles of Association of the plaintiff, a Valuation Reports by Elite Africa Valuers Ltd. However, there was never exhibited the copy of valuations reports by Wyco Valuers even though it was listed in the list of documents.

Evidence tendered by the plaintiff

20. When the matter came up for hearing on 24/11/2016, parties agreed and it was by consent ordered that all the documents filed by the parties would be admitted as exhibits. For that reason the lists and supplementary lists of documents filed by both sides are deemed produced exhibits and part of the evidence tendered. Over and above the documents, parties also agreed that they would rely on the witness statements which makers thereof would adopt as evidence in chief and were thereafter to cross-examined and re-examined.

21. PW 1 besides adopting the witness statements and producing the documents added that the parties met and "Forty Thieves" restaurant and agreed that the defendant would contribute the land as part of share contribution and it was agreed that the land be assigned a value of Kshs.4,000,000/=. He added that the defendant even signed a transfer which was filed at the Land Registry in Kwale but was not registered because the green cards were found missing and the witness did not retain a copy.

22. Later the title was taken away. However the witness led evidence that he had the title all the while in his house till the police demanded that he hands it over despite explanation and it was indeed taken away by the OCS Diani. He stated that the document was given to him to facilitate transfer and obtain building approvals.

23. In cross examination, the witness agreed that the only document to evidence the agreements and dealings between the parties is the *memarts* because even the minutes of a meeting allegedly held at the company's accounts offices were never signed. To that extent he referred to the minutes of 1/3/2018 which were not signed as the only evidence of the agreement by the defendant to transfer the suit land. He admitted the absence of any document signed by the defendant to transfer the suit land for the plaintiff. When referred to the witness statement by Manfred, the witness confirmed that the statement is silent about the fact of that director having taken the transfers to Kwale for registration. Even in the Affidavit in support of the application for interim orders there was never a reference to the transfer at all. He however, confirmed that even the title of the land belonging to Manfred was handed over to Mr. Manfred who sold it because he was in financial difficulties.

24. He admitted having used the title to the suit land to procure building approvals and used the shareholders contribution to carry out construction. He confirmed having operated the bar and rented rest of the premises to other tenants who pay rent. He confirmed that the defendant wrote to the auditor and protested the inclusion of the suit property as an asset of the company on the basis that she never agreed to contribute the land as part of her share contribution. He said the defendant just made demand for rent by a letter of 3/3/2009 which letter the company did not respond to. He admitted the lack of any evidence that the defendant was called for any meeting of the company or evidence that she ever attended any of such meetings. In his estimation, the property as developed should attract annual rental income of about 500,000/= but the defendant has never been paid any rent for the period of 8 years the plaintiff has used the premises.

25. On whether he made any complaint or correspondence on the missing green cards, the witness said he followed up in 2011 and again on 2015 but he had no document to show that. He reiterated that he had no copy of any transfer from for both plots and confirmed that no consent to transfer was ever obtained from the land control board.

26. In re-examination the witness reiterated the understanding that the suit land was part of the defendants capital contribution, that he had made a capital contribution totaling Kshs.16,034,773/= but had withdrawn part of it leaving a balance of Kshs.14,537,211/= for his living expenses. The witness also reiterated there having been no agreement to pay rent to the defendant and that no rent had been paid since but denied that anybody had restrained the defendant from the operation and running of the plaintiff and that the defendant had never demanded to be allowed to withdraw from the company. He confirmed that since December 2007, the company has operated on the suit land and has rented it out to other tenants.

27. PW 2 INAYATALI MANSUR BHAIJI, the Company Accountant also adopted his witness statement as evidence in chief and produced the sets of audited reports from 2007 – 2015 in the supplementary list of documents as exhibits.

28. In cross examination by Mr. Njenga for the defendant, the witness said that he was appointed verbally to be the auditor and later on appointed by the minutes of 11/8/2008 which minutes are however not signed by any of the directors.

29. To the witness, he proceeded in his audit reports, from the point of view that the company owned the parcels of land being KWALE/DIANI BEACH BLOCK/1463 and 1462 whose ownership was inferred on the assumption that same would be transferred to the company.

30. He confirmed that the plaintiff had tenants upon the said premises although he did not have any documents to evidence same. He was not aware if the accounts, signed by only one director were ever circulated to the defendant and other directors to make them aware of the financial status of the company. He said that he became aware of the status of the two parcels of land as having been offered to the plaintiff from the meeting of 11.8.2008.

31. On re-examination the witness said that the documents used to come up with the audited accounts were availed to him by two directors, Bradley and Manfred and a Manager of the plaintiff. When asked a question by the court on share contributions by the shareholders, he clarified that the share capital of the company was fixed at 100,000/= and therefore any sums given by the directors over and above the share capital can only be treated as loans to the company. With the three witnesses the plaintiff closed its case.

Evidence by the defendant

32. The defendant relied on evidence by three witnesses; the defendant herself one ABDUL WAHAB MANAN husband to the defendant and a valuer, DW 3. PW 1, ABDUL WAHAB MANAN gave evidence to the effect that he wholly adopted his own statement and witness statement by the defendant to the effect that the suit property is registered in the name of the defendant and that there had been no agreement nor intention to transfer it to the plaintiff but that the plaintiff carried out developments on it on the understanding that it would pay rent to the defendant.

33. On cross examination he denied having been closely involved in the negotiations towards construction and even incorporation of the plaintiff but admitted attending the first meeting but said that no minutes were taken. He however confirmed having been present when the title to the suit land was given to Mr. Bradley in his house in Diani and that it was done in the presence of all the directors and that all negotiations were done orally with nothing in writing. He confirmed that then, and as at the date of giving evidence no specific sum had been agreed on as monthly rent. He confirmed that there had never any agreement on rent at Kshs.250,000/=.

34. He denied any meeting in Mr. Bhaiji office in 2008 but confirmed that he made a report to the police which culminated in the title being retrieved from Mr. Bradley. On the audited accounts by PW 3 the witness said that he had always been uncomfortable but had not objected in writing. On whether or not rent would be payable, the witness said that at the dinner meeting it was agreed that rent would be payable after the company started operating and that after the first accounts were prepared in 2008 his wife protested in writing, the inclusion of the suit property as an asset of the company.

35. In re-examination, the witness said that it was agreed that each shareholder contributes Kshs.7,000,000= towards construction but the defendant ended up giving Kshs.8,900,000/= after Mr. Bradley asked for more money from her. On demand for the return of the title the witness said that soon after the construction was completed, they demanded both the title and rent but Mr. Bradley then confronted them with an untrue assertion that the plot was a contribution by the defendant hence the resort to the police. On the allegation that the defendant attended the meeting of 11/8/2008, the witness said that would not have been possible because the defendant lost her father on 4/8/2008 and by the 11/8/2008 she was still mourning and it was not possible to attend the meeting although she was in Kenya.

36. The defendant gave evidence as DW 2 and adopted her witness statement as whole and relied on the list and copies of documents contained in the two lists of documents which were produced and marked Exh.D182. She stressed the fact that the suit land is hers and registered in her name. She confirmed that the valuation report in the supplementary list of documents said to be by WYCO Valuers Company was not exhibited and that she wished not to rely on it. She reiterated there having been no agreement on monthly rent at Kshs.250,000/= She denied the existent of any agreement to transfer the suit property to the company and that there was never any meeting at the "Forty thieves Bar and Restaurant". She confirmed donating a power of attorney to the father.

37. The witnesses said that the 4th shareholder of the company Mr. Abdul Wahab Hassan lives in the UK and that she took to him documents for the company which were returned to her but the same got burnt in her house.

38. On running of the company the witness said she was unable to participate because of lack of time. She confirmed that all the developments are on her land, the suit land and none in the land belonging to Mr. Manfred.

39. On re-examination, she denied ever signing any agreement for sale or transfer to the plaintiff over the suit property and that the title was given to Mr. Bradley to enable the building plans be approved but after the approvals the said Mr. Bradley refused to return the same to her hence the resort to police for help. She however said that between 2007 and 2014, she received no communication from the company and not even one was dropped into her house which is across the road from the suit premises. To her, it is the audited accounts which alerted her of the plaintiffs claim over the suit property.

40. When questioned by the court on the documents she handed over to Mr. Abdul Wahab Hassan, she said that the same were share certificates which Mr. Hassan did not signed and returned by post.

41. DW 3 was one Ephantus Waweru Rugathe, a registered and practicing valuer of 10 years standing. He was instructed to ascertain the

rental income of the property which he estimate at about Kshs.44,000/= per month and cumulative of Kshs.4,300,000/= as at 14.8.2014.

42. On cross examination, the witness told court that parties can agree on annual rental increment. He referred to comparable but did not identify any one of such comparable premises he had used as benchmarks.

43. On re-examination, the witness said the report was necessary to ascertain reasonable rent as there was no agreed rent between the parties. In conclusion he said that there was an acceptable industry practice to escalate rent at 10% per annum. With the three witnesses the defendant also closed her case and parties then sought time to file and exchange submissions and to attend court later to highlight such submissions.

Analysis, issues and determination

44. I have had a chance to read all the relevant the pleadings filed and the evidence tender on both sides as well as the written submissions as highlighted by the parties. I have also considered and reviewed the two sets of issues filed by the two parties; the plaintiff isolated 19 substantive issues while the defendant identified 9 only.

45. In my view and appreciation of the dispute, some of the issues are non- issues as same are not subject to dispute. I have in mind issues like the directorship of the plaintiff and the agreed shareholding, the question whether the plaintiff developed the suit property and if the title to the same properly was handed over to Mr. Bradly and later retrieved by use of the police. Also not in dispute is the sums contributed by the defendant, the fact that Manfred Jasisch failed to transfer his parcel no. KWALE/DIANI BEACH BLOCK/1462 and the lack of participation by the defendant in the running of the plaintiffs business and affairs. Accordingly therefore despite the isolation of the many issues by the partners, I do consider that the only substantive issues that isolate themselves for determination by the court are as follows:-

I. Whether there was any enforceable agreement between the parties that the defendant would transfer the suit property to the plaintiff?

II. What agreement between the directors of the plaintiff are contained in the Memorandum and Articles of Association (memarts)?

III. Whether the defendont was entitled to demand rent and what is the quantum of monthly rent reasonable for the premises if any be payable?

IV. Whether the defendant induced the plaintiff to develop the suit property by fraud or misrepresentation.

V. Is the plaintiff entitled to any of the orders sought in the plaint?

VI. Is the defendant entitled to the orders sought in the counterclaim?

VII. What orders should be made as to costs?

What agreement exist between the parties as contained in the Memorandum and Articles of Association?

46. It is a cardinal principal of law that parol evidence is never admissible to add, vary contrast substract, explain or amend a written contract or document. See *Bank of Australia vs Palner [1897] AC 540*.

47. It is equally a matter of basic learning that the purpose of Memorandum of Association is to give the aims and objects a company is incorporated to undertake while the Articles of Association is to regulate the relationship between the company and its shareholders and as between shareholders *qua* shareholders. One of the glaring undisputed and obvious agreement between the subscribers and shareholders of the company is that each shareholder was allotted and holds 25 shares.

48. A reading of the memarts in this matter show what exactly were the objects for which the plaintiff was incorporated and how the directors would relate with each other, conduct the affairs of the company and generally how the company would conduct its affairs. There is absolutely nothing in the document about the agreement that the defendant or indeed any other director including Mr. Manfred, would transfer any parcel of land to the company. For that reason no agreement on the suit land was capable of being incorporated in the memarts and none was ever so incorporated.

Whether there existed any enforceable agreement between the parties that the defendant would transfer the suit property to the plaintiff

49. The pleading by the plaintiff which are denied by the defendant is that there was both oral and written agreement for the transfer of the suit property to the plaintiff. The written agreement is said to be contained in the memorandum and Articles of Association; which I have held there isn't, the minutes of meetings held between the parties and the audited accounts while the oral agreements are also said to have been relied at meetings held prior to and after the incorporation of the company and to be inferred by the construction of the developments in the suit land.

50. While it is lawful that an agreement may be valid even where there

is no written memorandum, provided the terms can be inferred from the conduct of the parties, such is not true of agreements

concerning agreement to convey interests over land.

51. The starting point is the law of contract Act which provides at section 3(3) in the following words.

3(3) “No suit shall be brought upon a contract for the disposition of an interest in land unless –

(a) The contract upon which the suit is founded:-

(i) Is in writing

(ii) Is signed by all the parties thereto; and

(b) The signature of each party signing has been attested by a witness who is present when the contract was signed by such party:

Provided that this subsection shall not apply to a contract made in the course of a public auction by an auctioneer within the meaning of the Auctioneers Act, nor shall anything in it affect the creation of a resulting, implied or constructive trust”.

52. I have looked through the record of documents produced in this matter and I have totally been unable to lay my hands on any memorandum that talks about the disposal of any interest in the suit land, leave alone the transfer by the defendant to the plaintiff. The nearest one comes is the audited accounts which quote the two parcels of land KWALE/DIANI BEACH BLOCK/1462 & 1463 as assets of the company but that is the farthest it can go. Those audited accounts are themselves not signed by the defendant at all. The defendant contends that the first time the assertion of transfer and claim over the land was brought to her attention was by letter of 25/6/2009 referring to financial statements for the year ending 31/12/2007. She promptly protested and demanded the correction of that impression. What I make of the position is that the inclusion of the property in the financial statements was done devoid of any legal documents. In any event, the financial statement in my view does not qualify as a memorandum for disposition of an interest in land in that it is neither signed by the proprietor or indeed any other party to it nor has it been witnessed as the law dictates. Finally, the auditor himself said that he included the suit property and another in the report on assumption that they would be transferred to the plaintiff.

53. The other document that was relied upon to support the assertion that there was an agreement to transfer the suit property is the minutes of a meeting said to have been held at the company’s auditors office on the 11/8/2008. That document however is faced with monumental challenges. The first of the challenges is that the document has not been owned by persons said to have participated at the meeting by appending their signatures to it. To that extent I do not consider it valid minutes of the company. It is at most a draft which may only pass as a valid document once confirmed and approved in a subsequent meeting and signed upon such approval.

54. The second challenge, and which asks questions about its validity, is the evidence by the defendant and her witness, DW 1 to the effect that the defendant never attended that meeting. That position was never seriously challenged by the plaintiff both in evidence and upon cross examination of the two witnesses. The third and fatal challenge however is that it cannot qualify as a memorandum of disposition of an interest in land because of lack of execution as is mandatory under section 3(3) law of contract Act.

55. In short there is totally no an iota of evidence that there even existed my agreement for the transfer of the suit property by the defendant to the plaintiff. I therefore find, hold and determine that there was never, between the parties, any enforceable contract for the sale or transfer of disposal of the suit property, KWALE/DIANI BEACH BLOCK/1463.

Was the plaintiff induced into developing the suit property upon fraud or misrepresenting?

56. The particular of fraud and representation imputed against the defendant are particularized at paragraph 16 of the plaint. Of the 4 particulars given, the first and third are not in dispute at all. That the defendant subscribed to the memorandum and articles of Association is not in dispute but common ground to both sides. It is also common ground and not disputed that the defendant over and above subscribing to the memorandum and articles of Association paid to the company towards construction sums of Kshs.8,900,000/= which sum PW 3, the company accountant/auditor, said must be treated as a loan by directors to the company. It is therefore not in dispute that the defendant set out to be a promoter of the company, did take shares and even advanced money for the construction of the developments on the suit land. From those particulars and the facts sought to infer the intention of the parties, nothing is fraudulent or misrepresentative. I find then to be honest acts of engagement by her with the other directors and cannot be proof of neither fraud nor misrepresentation.

57. Even the particular that the defendant misled the other directors of the plaintiff that she would give her title to the company, is not borne out by evidence. I have hereto before held that there was never evidence of representation. I now find and hold that I do believe the defendants position and evidence that she offered the land for purposes of construction because the promoters of the company did not at that time have money to buy the land and that she infact had an expectation, legitimate one, that once the company takes off in its operations, she would be entitled to be compensated by way of rent or some other valuable consideration. The reason I am prepared to believe and do believe the defendant is the fact that both fraud and misrepresentation in civil law parlance connote ill-intention to let one act in a particular way to its detriment by exposing him to a loss or damage. It connotes ill motive and impropriety and fraud actually impute criminal intent. Accordingly even in civil proceeding the standard of proof is never on a balance of probabilities or preponderance but something beyond the ordinary burden of proof even if it would never beyond reasonable doubt. In *Central Bank of Kenya Ltd vs Trust Bank Ltd & 4 Others CACA (Nb) No. 215 of 1996*, the Court of Appeal said:-

“The Appellant has made vague and very general allegations of fraud against the Respondent. Fraud and conspiracy to defraud are very serious allegations. The onus of prima facie proof was much heavier on the appellant in this case than in an ordinary civil case”.

58. I may only add that the burden of proof in law always rests with the person alleging. In this case it was the plaintiff alleging that the defendant had led its directors to believe that she would transfer the property to the plaintiff. I am unable to find any evidence of misrepresentation of any material fact upon the defendant. The plaintiff here did nothing more than allege and offered no proof. Those allegations, were, merely thrown at the court with nothing more to support them in evidence.

59. But even if there had been any representation made such must have only been made to the two natural persons, namely John Bradley and Manfred Jasisch in persons. By the time it is alleged the parties met at Forty Thieves Bar and Restaurant, a fact denied by the defendant or at the house of the defendant, as asserted by the defendant herself, the plaintiff had not been incorporated and was thus non existant and could not be the object and target of any fraud or misrepresentation. Accordingly, even if it had been proved that there was any fraud or misrepresentation it was made to persons other than the plaintiff and the plaintiff cannot legally rely on such to prove its case against the defendant. The rights of Mr. Bradly and Manfred, even if they were the only directors of the company, must remain separate and distinct and not confused with those of the plaintiff. See *Salomon & Company Ltd vs Salomon [1897] AC 22 H.L.*

60. The other ground the court has been called upon to infer and establish fraud and misrepresentation is the fact the title to the suit land was handed over to Mr. Bradley. The handing over is not in dispute. The dispute is the purpose for which the handing over was effected. According to the plaintiff's witness it was for purposes of effecting a transfer while to the defendant it was for the purposes of procuring the building approvals for the structure what were ultimately erected on the property. Once again the court has to resort to the legal burdens of the parties.

61. Under section 107 of the Evidence Act the onus is upon him who desires that the court finds for him on the existence of a fact to prove such facts. Additionally, under section 108 of the same Act, the burden rests on him who would fail if no evidence at all is led on either side.

62. Here, there was no credible evidence to prove that the defendant handed over the title for purposes of transfer. This court takes notice that for one to effect a transfer of land one requires a transfer form duly executed and accompanied by other documents including the sellers identity card, PIN certificate and photographs. While PW 1 intimated that a transfer form was signed by the defendant and indeed, he lodged same at Kwale, he did not have any evidence of such nor did he allege that those other necessary documents were ever handed over to him. There was equally never any allegation that the transfer was ever assessed for stamp duty or duty paid before being lodged as is mandatory. The situation is the kind a court would say facts have been alleged in a plaint and thrown at the court with no attempt to prove those facts. I do find that the plaintiff has utterly failed to prove its case to the requisite standards.

63. Conversely, I also take notice that when seeking the development of building and approval by the local planning authority, it was necessary to have the title or atleast a copy. With such notice, I do agree that the account of the defendant is most probably what took place. But even then the defendant as far as the plaint was concerned held no onus at all to prove why the titles to the property was handed over. The burden was at all times with the plaintiff.

64. One other inference the court makes is that, if the two directors, Manfred and defendant contributed shares by way of the parcels of land, and there being the uncontested fact that Manfred withdrew his title and sold it, the defendant cannot be the only one to held to strict compliance with that under standing. This is because Mr. Bradley and Manfred, as the two persons running the Company at the time, agreed to resile from the understanding and thereby property belonging to Manfred and by inference released the defendant from any obligation to the understanding.

65. The upshot is that both fraud and misrepresentation have not been proved and the plaintiff has failed on its legal obligation and duty to prove hence the claim can only be seen to have not been proved and must therefore fail and be dismissed. I find in the ultimate that the plaintiff is not entitled to any of the remedies sought but instead that the suit is barred by the unequivocal words of section 3(3) Law of Succession Act. It is dismissed with costs to the defendant.

Is the defendant entitled to the orders or any of them as sought in the counter claim?

66. That the defendant, was and remains the registered proprietor of the suit land is not contested nor contestable. What must be determined, is whether the defendant has any justifiable claim to demand and receive rent and if so what is the quatum thereof. In the counter claim, the defendant has curiously sought that the court finds that there was a *resulting tenancy* created on the use by the plaintiff of the suit property. I must confess that the expression *resulting tenancy* is totally a new and unknown concept to me.

67. However, the fact that both side agree that the plaintiff took possession of the land in 2007, carried out development on it and commenced its operations thereon beginning 15/12/2007 todate and has been generating income therefrom by letting the premises to other persons for gain begs the question as to whether the plaintiff can in law and fairness be allowed to use the defendants premises at will and at no consideration without such not being viewed as an arbitrary deprivation of property and therefore a violation of a right under article 40 of the constitution. 68. In his evidence, PW 2, John Bradley confirmed that even though the company has never declared dividends, himself has been able to recover for himself a sum of some Kshs.1,497,563/= from his initial contribution of Kshs.16,034,773/= and as at 31/12/2011 his contribution had reduced and stood at Kshs.14,537,211. That withdrawal of contribution is however not shown in the company's books of accounts tendered. Additionally, there are no minutes authorizing such withdrawal by Mr. Bradley or payment to him by the company from the company's assets or earnings.

69. It however shows that the company has been making gains in its operations, which the defendant says he has not been party to due to lack of time. I do find that the plaintiff can only legally continue to use the premises if it offer consideration and that to allow it continue to use the premises at no consideration would be arbitrary deprivation.

70. That being my finding, I do find that the defendant being the registered proprietor of the suit land has a legitimate right to demand compensation for the use of the land from the plaintiff.

What is the quantum or formula for assessing such compensation?

71. I have considered the evidence by the plaintiffs witnesses in particular

Mr. Bradley when he said that:-

“In my own estimation considering the developments on it,

it would fetch a rental income of about Kshs.500,000/= per year.

... , we have other tenants on the premises without formal leases which include 21 masaai traders who sell goods and pay Kshs.1000/= per month”.

72. From that evidence by the plaintiffs own witness, it is possible to say that the property is capable of fetching Kshs.40,000/= to 42,000/= per month. That estimation is not so much at variance with what the expert, valuer, called by the defendant said:-

“I came by a figure of Kshs.4,300,000/= which is about

Kshs.44,00/= per month”.

73. I have taken these excerpts of the evidence from both side to show that both parties agreed that if rented commercially the property is capable of attracting rental income of atleast Kshs.42,000/= per month.

74. It being agreed that the defendant commenced operations on 15.12.2000, and defendant having given evidence that she would expect rent after the company commences operation. I consider that a reasonable commencement date to charge rent should not be earlier than that date. I fix the commencement date to be 1st January 2008.

75. Doing the best, I consider just in this case and having found that the defendant is entitled to be paid rent for use of the premises, I would adopt a monthly rent of Kshs.42,000/= effective the 1/1/2008 till the date of this judgment. That gives me a period of ten (10) years and four (4) months. The sum therefore the plaintiff ought to pay to the defendant on the counter claim thus calculates as follows:-

Kshs.42,000.00 vs 124 months = Kshs.5,208,000/=

76. I therefore do find for the defendant on prayer (a) of the counter claim in the sum of Kshs.5,208,000/= as at the date of this judgment which sum shall continue to grow at the rate of Kshs.42,000.00 per month as long as the plaintiff continues to operate on the premises.

77. However, I take notice that there is a winding up cause, No. 2 of 2011 against the company which the court ordered to be kept in abeyance pending the determination of this case. That fact when looked at as against the prayers (b) and (c) in the counter claim, I do find that those prayers can only be handled and dealt with in the winding up cause and not here. I therefore decline to consider those prayers and direct that they may be dealt with in the winding up cause if the defendant will be so minded as advised by counsel. I also decline to venture in ascertaining how the sums paid by each shareholder on development shall be treated. On such sums parties may sit at an Annual General Meeting and agree or just seek legal counsel.

Rendition

i.) The plaintiff suit against the defendant is dismissed with costs.

ii.) Judgment is entered for the defendant against the plaintiff on the counterclaim in the sum of Kshs.5,208,000/= being reasonable rental income for 1/1/2008 till end of April 2018 which sum shall continue to grow at Kshs.42,000/= per month beginning 1/5/2018 provided the plaintiff continues to occupy and use the premises.

iii.) The sum so awarded shall attract interest at court rates with effect from the 1/5/2018 till payment in full.

iv) I award costs of the counter claim to the defendant.

78. Now that this suit is concluded, parties may have the winding up cause prosecuted.

Dated and delivered at **Mombasa** this **20th** day of **April 2018**.

P.J.O. OTIENO

JUDGE