REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 9 OF 2011

1. **MOMBASA BRICKS & TILES LIMITED**
2. **SOJPAL JETHA LIMITED**
3. **DINESH KUMAR ZAVERCHAND JETHA**
4. **THE ESTATE OF ZAVERCHAND JETHA**
5. **ATEET DINESH JETHA**
6. **ZAVERCHAND SOJPAL JETHA HOLDING LTD…….…PLAINTIFFS**

VERSUS

1. **ARVIND SHAH**
2. **HASHABEN SHA**
3. **GOSRANI HOLDINGS LIMITED**
4. **COAST PROPERTIES LTD**
5. **COAST CLAY WORKS LTD**
6. **COAST MAIZE MILLER LTD**
7. **SPA MILLERS NAIROBI LTD**
8. **HIGHWAY CENTRE LTD…….……DEFENDANT**

BY COUNTERCLAIM

1. **ARVIND SHAH**
2. **GOSRANI HOLDINGS LIMITED**
3. **COAST PROPERTIES LTD**
4. **COAST CLAY WORKS LTD…….…….PLAINTIFFS**

VS

1. **ATEET DINESH JETHA**
2. **EXON INVESTMENTS LTD**

3. EXON PLASTICS LTD

4. DINESH ZAVERCHAND JETHA…….....……..DEFENDANTS

J U D G M E N T

1. In this suit the plaintiffs have shed the defendants seeking a raft of prayers all targeted and challenging the transactions and processes taken towards the incomposition of the 3rd to 8th defendants, the transfer of a property known as plot no. 500/VI/MN to the 4th defendant and the allocations of shares and the share structures in 4th, 5th, 6th & 7th defendants represent a lawful agreement between the plaintiffs one one side and the 1st, 2nd & 3rd defendants on the other hand.

2. The gist and foundation of the plaintiff suit is that sometimes in the year 2004, the family of the 3rd & 4th plaintiffs (hereinafter called the jethas) as promoters of 1st and 2nd plaintiffs, found itself in forehead difficulties due to heavy indebtedness incurred by the 1st plaintiff from the standard chartered bank and secured by that property known and Plot No. 500/VI/MN which was the valued at about Kshs.70,000,000/-. The 1st plaintiff was unable to pay the debt secured by the said property hence the bank, standard chartered bank ltd, had set in motion a process to sell the security to recover its debt. The plaintiff then plead that at that time, and owning to association between the 5th plaintiff and the 1st defendant, the 1st defendant offered to assist save the property from sale. The proposal was that there be incorporated two companies; the 6th plaintiff to be controlled or promoted by the Jetha family and the 3rd defendant to be controlled or promoted by the family of the 1st & 2nd defendants (henceforth the Shah family).

3. It was further agreed, in the words of the plaintiffs that upon incorporation the two companies would then incorporate and hold shares in other four companies, 4th to 7th defendant, ostensibly to hold the assets of the 1st defendant. It is then pleaded by the plaintiffs in the further Amended plaint and asserted in the witness statements filed that the parties agreed that the Shah family would pay to the Jetha family some Kshs.35,000,000.00 being 50% of the value of the property so that the two families have equal shareholding in the company to hold the property once it was saved from the auctioneer harmer. The process to save the company was then hurried to beat the sale already scheduled and it is pleaded, and reiterated in the witness statements that the incorporation and documentation including allocation of shares was done by the 1st defendant and the 5th plaintiff was asked to sign the same which he did while trusting the bonafides of the 1st defendant. The six companies were incorporated and shares allotted or assigned at incorporation as follows:-

6th plaintiff - wholly owned by the Jetha family

3rd defendant - wholy owned by the Shah family

4th, 5th, 6th & 7th defendant - Jetha family 490 shares and Shah family 510 shares

4. The plaintiffs maintain that there was an agreement that the property, Plot No. 500/VI/MN would be held by the 4th defendant purely for purposes of the salvage scheme and that the Shah family would pay to the stated sum to acquire their shares in the companies and by extension in the property to be transferred to the new companies to be incorporated.

5. Due to time constrains there could not be completed the incorporation process before a proposal could be made to the bank, standard chartered bank, hence it was agreed that a proposal be made to the bank to allow the sale of the property by Private treaty to Highway Centre Ltd and indeed a proposal was made by Mr. Shah and accepted by the bank on two conditions;

i) **The purchaser pay 10% deposit**

ii) **The purchaser procures an irrevocable bank guarantee for the balance.**

6. The plaintiff faults the defendants particularly the 1st & 3rd defendants for acquiring interests in the companies and therefore the assets of the 1st defendant at no consideration by failing to pay the sum the plaintiff alleges was agreed on, failing to concede to relinquish their shareholding in coast properties ltd and instead insisting wrongly that they hold the shares as of right. On those facts the plaintiff plead and pray that there be declared in their favour a resulting trust and for an order compelling transfer of interests and shares held by the 4th, 5th, 6th & 7th defendants to the first plaintiff or its nominee, in the alternative there are prayers for the defendants, save for the 2nd defendant to pay the plaintiffs the value of 50% of the market value of the plot no. 500/VI/MN, brick manufacturing machinery and every asset of the plaintiffs as at the date of actuall payment, a valuation and ascertainment of the value of the contribution by the plaintiffs 1st, 2nd & 3rd defendants towards the assets of the 4th, 5th, 6th & 7th defendants and the shares in the companies be made proportionate to such contributions.

7. By way of evidence, the plaintiff did file witness statements by the 3rd & 5th plaintiffs as well as by one RASHMIKANT ZAVERCHAND JETHA. There were also various lists of documents which were agreed by the parties as a case conference to be produced by consent.

8. After the defence was further amended filed with a counter claim, the plaintiffs did file a Reply to the further amended defence and counter claim and further supplementary list and bundle of documents.

9. On their side the defendants did file a joint defence and a counterclaim running into some 73 pages which was last amended on 9/12/2014. In that pleading, the defendants raise issues with the claim by the 5th & 6th plaintiffs on the basis that no summons were ever

issued on account of the said defendants and requiring the 4th, 5th, 6th & 7th defendants to enter appearance nor file a defence and it is then contended that the court lacks jurisdiction to entertain nor determine the suit. It is equally contended and pleaded that the 2nd, 5th & 6th plaintiffs having failed to file and serve witness statements rendered it impossible for the defendants to fully respond to their respective suits and the suit is then faulted for being incompetent on account of such failure.

10. On the merits the defendant denies each and every allegation against them by the plaintiffs, and in particular deny that the 1st defendant hold any shares in the 8th defendant. The defendants then contend, pleads and assert that it was agreed, mutually between the plaintiffs and the 2nd defendant that to enable salvage the 1st plaintiff from its financial doldrums, the parties would incorporate the six companies who would then acquire the assets of the debt ridden 1st plaintiff and to hold such assets in their own right as a consideration of financing and arranging financing by the 1st, 2nd, 3rd & 8th defendants for not only the payment of the debt owed to Standard Chartered Bank Ltd but also finances for the operation of the business of the 5th defendant once incorporated.

11. It is then added in the pleadings that the 1st defendant employed his own time, personal resources and networks to convince Giro commercial bank to issue an irrevocable bank guarantee in order that the auction be stopped and was indeed stopped after the 8th defendant had paid a deposit and given guarantees and other securities to Giro Commercial Bank . As a result of such resources and networks, the sale by Standard Chartered Bank was indeed curtailed when 10% of the purchase price was paid as the rest of the money was awaited for Giro Commercial Bank.

12. On the pleading by the plaintiffs that the shares held by the 1st & 3rd the same is denied absolutely and an alternative pleading advanced that the property was sold to the 8th defendant as the only consideration by the 1st plaintiff for the part played by the defendants to salvage the same and that in the absence of that consideration in the defendant acquiring interests in the company owing the property, there was no need to enter into the agreement the parties entered into which resulted in the same property being snatched from the jaws of an auctioneers hammer. The defendants then plead that representation was made to the 1st & 3rd defendant by the 3rd and 5th plaintiffs that once incorporated the 5th defendant would solely determine in whose favour the property would be transferred and that the 1st & 3rd defendants would participate in the affairs of the 4th to 7th defendants as majority shareholders, that the 4th to 7th defendants would own all the salvaged assets of the 1st defendant for the purposes of revival of the clay factory to enable the payment of the loan to Giro Commercial Bank Ltd.

13. As a result of the said representatives the 1st, 2nd, 3rd & 8th Defendants contend that they altered their positions and caused the 8th defendant to pay Kshs.2,700,000/= to enable the scheduled auction be postponed and took upon itself the responsibility to pay the balance of Kshs.24,300/= to Standard Chartered Bank. The 1, 2nd, 3rd and 8th defendant thereafter, and while relying on the plaintiffs representation, entered into commitments and arrangements including the incorporation of the 4th and 7th defendants which they would not have if not for the assurance that the sale of the property was valid for all purposes.

14. Besides the obligations of arranging finances and other financing arrangement and his own networks, the 1st defendant says he did employ personal time and resources to visit Uganda Clay Works, Kampala, Kenya Clay Works, Thika and also travelled Italy and India and wrote and received hundreds of email and placed several telephone calls and injected own funds and funds of the family for the benefit of the 5th defendant. In addition the 2nd defendant and her daughters with the prompting of the 1st defendant provided not only personal guarantees but also offered their share certificates for MUMIAS Sugar Co. Ltd valued at Kshs.10,000,000.00 to secure the borrowing of the 4th defendant and are yet to be released from such obligation. For that reasons the defendants plead the doctrine of estoppel and maintain that the plaintiff are estopped from alleging that the 1st and 3rd defendant are not proper and legitimate shareholders of the 4th to 7th defendant that they hold such shares in trust for any of the defendants.

15. As against the 4th plaintiff the defendant contend that its suit against the defendant is misconceived and does not lie on account of the fact that the forth plaintiff is not a legal person capable of suing or being sued and that even if it was such legal person, the administrators had not been appointed by the date the alleged cause of action accrued could not be subjected to the alleged moneys hence the suit ought to be struck out.

16. On allegation of lack of legal advice the defendant contend that there was always one James Sigh Gitau acting for the Jethas and thus it cannot be true that they lacked legal advice to be duped by the defendants or any of them.

17. On pricing the defendant deny that the propery sold to the 8th defendant has worth more than 70,000,000/= and are that it could not be more than the agreed price because before the sale to the 8th defendant there had been an agreement for sale of the same property to Ms. Exon Investments Ltd at Kshs.20,000,000/=. It was then denied that there was ever an agreement by the 1st defendant to pay Kshs.35,000,000/= towards the purchase of 51% shares in the 4th defendant as they had the opportunity to transfer the property directly to the 8th defendant as the purchaser.

18. On the 6th plaintiff's claim against the 4th – 7th defendants, the defendant plead that there is no derivative suit existing in law because the plaintiff sought leave to bring such action but was denied by the court.

19. On the plants and developments erected and being on the suit land the defendants plead that the brick factory has been closed for over 7 years without operation and had of the land had not been salvaged nothing else would have been salvaged. On the loans existing as at the date of salvage the defendant aver that none of the plaintiff has paid any of the debts which had always taken on the shoulders the 5 th defendants to pay the loans.

20. In totality the defendants deny that the plaintiffs or any of them and at all are suited against them and at all and the 1st, 3rd, 4th and 5th defendants mounted a counterclaim against the 2nd & 5th defendants and other two companies , not party to the original suit and seeking

largely that the four be compelled to release the share certificates of the counterclaimants in 4th to 7th defendants, mesne profits at Kshs.1,200,000/= per month from 1st May 2013 till the day they deliver up vacant possession. It is further sought that the 1st defendant to the counterclaim be restrained from ruling the affairs of the 3rd & 4th counterclaimants to the exclusion of the 1st and 2nd counterclaimants; an injunction restraining the 2nd,3rd 7 4th defendants to the counter-claim from carrying out any business in the suit premises and their eviction. Further, an Order that accounts be taken to ascertain the assets of the 3rd and 4th defendant illegally used by the defendants in the counter claim to conduct their business of making jiko and other clay products. Punitive and aggravated damages are also sought against the 4th defendant to the counterclaim for trespass and conversation of the shares belonging to the plaintiffs in the counterclaim, interest on all sums adjudged due to the counter claimants together with costs and interests on such costs.

21. After the plaintiff commenced giving evidence it emerged that the order of consolidation of all the suit between the parties made it difficult to isolate the issues and it would be difficult to take evidence and have the matter heard with expedition. It was the true directed by the court and consulted to by the parties that file No. 9 of 2011 would be dealt with first and a decision on it would help guide how the related files would be dealt with.

22. After several sessions of case conference, it was equally argued that the witness statements filed be adopted as evidence in chief without the need to call the witnesses for cross examination. It was equally agreed that the various statements of issues be abandoned and with the help of the court at case conference some 4 substantive issues were settled upon as the only issues for determination.

23. The said issues were crafted and agreed upon on the following terms:-

i. Whether the document dated 2/06/05 described as a Resolution by the 1st Plaintiff Company to sell land known as Subdivision Number No. 500 section VI Mainland North, is a lawful document or a document obtained by unlawful means?

ii. Whether the document dated 31/08/05 is a lawful Agreement of Sale of Subdivision Number No. 500 section VI Mainland North by the 1st Plaintiff to the 8th Defendant/Nominee or whether it was obtained by unlawful means.

iii. Whether the document described as a Transfer of Subdivision Number No. 500 section VI Mainland North from the 1st Defendant to the 4th Defendant is a lawful Transfer, whether the consideration was paid and whether it was obtained by unlawful means?

iv. Whether the share holding structure in the Memorandum and Articles of Association of the 4th, 5th, 6th and 7th Defendants embody a lawful Shareholders Agreement between the Plaintiffs and the 1st, 2nd and 3rd Defendants or whether that structure was procured by unlawful means?

v. All other issues in this suit and counterclaim shall abide the determination of these 4 (four) issues.

24. Even though the parties with assistance of the court settled on the 4 substantive issues, a relook at the matter reveal that the real dispute is the sale of that property known as Plot No. 500, Section VI Mainland North between the 1st plaintiff as vendor and the 8th defendant as the purchaser. I take the view that it is the crux of the dispute because on that property there is alleged to have been developments and machinery used for the operation of a maize mill and brick making factory and it is the ownership of the same property and the operation of the business carried thereon which informed the incorporation of the various companies after the date of the sale agreement. Accordingly if there be made a determination on the propriety of the sale or otherwise, the dispute on the shareholding will fall in place and follow that determination while the propriety of the minutes of the 1st plaintiff and even the validly of the instrument of transfer would largely depend on the determination on the validity of the sale agreement.

25. That application notwithstanding however, propose to deal with the form (4) issues as isolated in a section manner.

Validity of the resolution of the 1st plaintiff dated 2/6/2005

26. In his evidence on 8/11/2016 PW 2 the 5th plaintiff said:-

"I can see the resolution dated 2/6/2015 and confirm the signatures to be from the named people. It authorized that the property be sold. The property is section VIMN/500. All the signatories except to my father were my uncles, the 2nd plaintiff was the majority shareholder in the 1st plaintiff".

"The first time I saw the resolution of 2/6/2005 was when I received if from Mr. SHA for purposes of having it signed. I had it signed by directors and returned it to Mr. Shah".

27. Then the second witness, PW 2 and 3rd plaintiff on his part said on cross examination by Mr. Kinyua:-

"I confirm having several meetings with Mr. Arvind Shah at his premises in along Runyenjes road in Nairobi, we did sign the Resolution brought to us. I was able to read and understand English. Even my brothers could read and understand English".

28. Against such evidence, the plaintiff has made submissions that the said document headed Resolution is not valid for two reasons:-

i) That it was obtained by undue influence by the 1st defendant against the 3rd & 5th plaintiff by asking them to get the directions of the 1st plaintiff to execute the document needed to restructure the 1st plaintiff refinancing and ultimate salvage of the property which the plaintiffs contend was a misrepresentation.

ii) There was no meeting of directors called and conducted before the document contravened Articles 63 and 65 of the Company's Articles of Association which when read with section 133 of the Companies Act require a Notice of a Meeting of not less than 21 days.

29. On those grounds the plaintiffs contend that the resolution if not ultra vires, was also of no consequence .

30. The starting point is to look at the Articles and the law relied upon and said to make the resolution of no consequence. Article 63 of the Company's Articles of Association permit the calling of an extra ordinary general meeting and indeed permit a director or any two directors to convene such a meeting. The resolution dated 2/6/2005 is conspicuously identified to have resulted for an extra ordinary meeting. It is also not a full resolution but an extract. The document shows that a meeting was convened held and con-started on the 2/6/2005 at Mombasa and shown to have been signed by four persons. The four persons must be the same people identified by PW 1 as the directors of the company who are reported by both PW 1 & PW 2 to have been able to read and understand English.

31. In any event the same articles at 63, deems every resolution in writing and signed by all members entitled to receive notice and to attend and vote at a general meeting, to be as valid and effective as if the same had been passed at the general meeting of the company duly convened and held. I interpret that Article to suggest that any resolutions evidently signed by all persons entitled to participate at a general meeting to be valid even if no meeting is called and held. It means to me that parties can discuss different and by any medium and come to an agreement on the tenure and extent of a resolution, draft the same and have it signed by all the persons entitled without necessarily at a setting and at the same time. The drafter of the article must have thought in the future and foresaw prospects of a company holding a virtual meeting which I hold the view is not prohibited by any law taking into account the technological advancement in the area of communication and digitalization.

32. The article of the company clearly follows the letter and spirits of section 133 (2) of the companies Act, Cap 486 which provides:-

"Save in so far as the articles of a company make other provisions in that behalf (not being a provision avoided by sub-section (1)) then a meeting of the company (other than adjoined meeting) may be called by 21 days' notice in writing".

33. Going by the evidence of PW 1, the Company 1st plaintiff had four(4) directors in 2005 and all signed the Resolution. That to this court was in full compliance with the law and the Company's Articles of Association. This court is not convinced at all that the resolution dated 2/6/2016 can be faulted on any of the grounds advanced and at all but finds that the shareholders and persons entitled to receive Notices, attend meetings and vote at such meeting did agree on the resolution by appending there signature to it.

34. It does not matter to this court that the minutes could have been drafted by the 1st defendant as his agent as alleged. What matter is the fact that having been so drafted, they need, understood its terms and effect and appended their signature to it without proved coercion.

35. In the matter before me there is no coercion proved. The plaintiffs only alleged being subjected to undue influence. In law undue influence as to ……an act freely entered into must be in the nature of an improper influence exerted upon the innocent party by a person with some demonstrated control or standing in a judiciary resolution. The conduct complained of to amount to undue influence must be in the nature of persuasion, pressure or influence short of actual force but storage, then were advice that so overpowers the dominated party's free will or judgment that he or she cannot act intelligently and voluntarily but acts, instead subject to the will of the dominating party[1].

36. The facts disclose do not, to this court disclose undue influence. The 1st plaintiff being a company was not represented by an individual placed under some tight conner within constraints of time and given conditions to sign or some undesired consequence would follow, rather, the said directors are not demonstrated to have met the 1st Defendant or discuss with him at a meeting and venue so as to exert any dominating influence upon them. They were kept removed away from the 1st dependant in that only the 5th plaintiff had contact with the 1st defendant and I make the reference that where the document was prescribed to time they not only had the time and opportunity to discuss and consult but also to make an affirmed decision whether the document as crafted and drafted was in the best interest of the company.

37. I find the decision by the Privy Council in Alexander Burton vs Alexander Ewan Amstrong & Others [2] to be of great assistance in determining what amounts to undue influence. The court said:-

"…….in life, including the life of Commerce and Finance, may acts are done under pressure, sometimes overwhelming pressure so that one can say that the actor & had no choice but to act. Absence of choice in this sence does not negate consent in law: for this the pressure must be one of the kind which the law does not regard as legitimate". See also Pao on vs Lian Yiulong [1080] AC 614 at page 635".

38. It is common ground here that the 1st plaintiff was needed under pressure by the bank and not the 1st defendant or indeed any of the defendants. That pressure was created long before the 1st defendant or indeed any of the defendant came into the picture with the proposed to salvage the threatened property. It surely cannot be the kind of pressure attributed to the 1st defendant as to be deemed illeginate by the law. It was not. In any event it was an intervention what has proved beneficial to the Jetha family who today here a stake in the property which they would not have had the property be sold by the bank.

39. With the foregoing, I hold that the document dated 2/6/2005 and named a resolution by the 1st plaintiff is a valid resolution by the company and not amenable to disturbance. To disturb it would be what the two deems as unwarranted interference with the company's internal workings[3].

Whether the document dated 31/8/2005 is a lawful agreement of sale of plot no. 500, section VI Mainland North

40. The document is to be found at page 63 of the Defendants list and bundle of documents dated 8/6/2011 and filed in court on 10/6/2011. That agreement is faulted and challenged by the plaintiff on the grounds that, it was obtained by undue influence alleged as against the resolution dated 2/6/2005p that it was obtained by misrepresentation that it was not intended to create a legal relationship, it amounts to an unconscionable bargain; vitiated by lack of independent legal advice and lastly that it does not meet the requirements of section 3.3. of the law of Contract Act.

41. Those complaints have answers in the documents filed and produced as well as the written statements and oral evidence recorded in court. However the complaints of undue influence and misrepresentation are matters that go hand in hand and I consider fully addressed in any decision on the first issue regarding the validity of the resolution dated 2/6/2005.

42. However the agreement dated 31/8/2017 has been exhibited and extensively addressed by the parties no their evidence in the witness statements and that offered in court oral including cross examination. In the revised witness statement by the 5th plaintiff, PW 1, the execution by the document is not contested what is contested is the intention to set.

43. The law of evidence on when oral evidence can be admitted to explain or displace a written document is now well settled. The law is that where an agreement between the parties has been reduced into writing then no parol(oral) evidence is admissible to explain the terms thereof. In Prudential Assurance Company of Kenya Ltd vs Sukhwinder Singh Jutley & Another quoted met approval in Twiga Chemicals Industries Ltd vs Allan Stephen Reynolds [4]. The court reiterated the rule in the following terms:-

> **"It is a familiar rule of law that no perol evidence is admisable to contradict vary or alter the terms of the deed or written instrument. The rule applies as well as deeds as to contracts in writing. Although the rule is expressed to relate to parole evidence, it does in fact apply to all forms of extrinsic evidence".**

44. The challenge amounted against the agreement dated 31/8/2017 is basically a request to court to constraint the agreement and discern the intention of the parties.

45. At close 4 of the document the document exposes in fairly clear and unambiguous words the result the parties set out to achieve. It says:-

> **"The vendor has agreed to set the property and the purchaser has agreed to purchase the same at sum of Kenya Shillings Twenty Seven Million (Kshs.27,000,000/=) of what the sum of Kenya Two Million Six Hundred Thousand (Kshs.2,600,000/=) has been paid to the bank".**

46. To this court, the document answers to all the thresholds of a contract for sale of land. It discloses the parties thereto, the property to be sold, the price, mode of payment, timelines and even obligations and rights of the parties and is witnessed as expected of a contract for the sale of land under section 3(3) Law of Contract Act. It leave no doubt as to the intention of the parties. When the intention of the parties is explant on the document, there is no wander open to the court to tinker with such intention. The court has no liberty to rewrite the agreement or amend its laws for the parties. The courts only duly and obligation is to further what the parties intended and agreed upon in writing[5] .

47. The only exception is where there is proved a aviating factor like fraud, misrepresentation, undue influence or coercion. I have held earlier in this ruling that the plaintiffs voluntarily made a resolution to sell the property belonging to the 1st defendant and now added that they later on did receive an agreement for sale and had it executed property in accordance with the law. There is no evidence so far presented to me to vitiate the agreement for sale and/an contracted to do the only lawful and reasonable thing. Let the parties be bound by their bargains issue number 2, is resolved on terms that the document dated 31/8/2017 and described as an agreement for sale is a valid lawful and binding agreement for sale of land, Plot No. 5, Section VI Mainland North and did convey and confer to the purchaser a valid and good title to the land purchased.

48. Issue Number 3 questioning the legality and validity of the consequent transfer of the same property to the 6th Defendant, having shown from the resolution of 2/6/2005 and the sale agreement dated 31/8/2005 cannot in logical invite a determination different from that it was grounded on valid and lawful process and contract and is itself valid and lawful. The only consideration one need to interrogate is whether the transfer can be vitiated for lack or failure of consideration.

49. It is a fundamental requirement in the law of contract that for a contract to be binding there must be consideration passing for one side to the other. Where no consideration passes, or just fails the contract stands vitiated and unenforceable.

50. In this matter the documents exhibited show that the parties executed an agreement as well as a transfer for a consideration of Kshs.27,000,000/= that sum was paid to Standard Chartered Bank that was a charge who had moved to exercise its power of sale.

51. In the records of the plaintiffs, the arrangements were enforced into so as salvage the property sale and total loss. As a consequence of the arrangement the property was never sold and remains in the hands of the Jethas as Shareholders in the 6th defendant who intern holds shares in the 5th defendant. With the 1st and 3rd defendants, that the document of transfer was prepared in Nairobi and brought to the plaintiffs in Mombasa to execute suggest to me that the plaintiffs had sufficient time to consider interrogate the document and make a

determination on whether to seek independent legal advice. I am not persuaded that the plaintiffs were under some coercion to sign the transfer at a peril. This is even more critical when none is taken of the fact that Ms. Hamilton Harrison and Mathews had advised the 1st plaintiff on the need of an independent legal advice. In fact it is in the evidence of PW 1 AND PW 2 that it was PW 1 who delivered the documents to the directors of 1st plaintiff for signature. There is no contact established between any of the defendants of the advocates and the 1st plaintiff's directors. If any coercion or undue influence was to be inferred it can only be one induced by the 5th plaintiff.

How about alleged final defects on the document of transfer?

5. The plaintiff contend that the document at page 160 of the defendants bundle filed on 10/6/2011 is invalid incompetent and defective for failure to be attested by an advocate as mandated under section 3(3) of the law of contract act. It is equally faulted and attacked on the ground that it is not stamped under section 19 of the stamp duty Act and not dated.

6. I read the provisions of section 27 & 33 the Registration of Titles Act……to cure such defects once a document is received and registered and deens any document in substance conformity with the forms provided in the Act to be sufficient. On section 19, of the stamp duty Act, the law requires a registration to access any document attracting stamp duty and to it only upon payment of stamp duty. However where the duty is not collected upon registration or understated there is power on the Registrar to demand and collet the whole duty or the understated udty.

7. The document having been produced without protestation and having been made a point for determination, I hold the view that to reject it at this late moment will not be in the best interest of any of the parties to the suit.

Whether the share holding structure in the Memoranda and Articles of Association of the 4th, 5th, 6th & 7th defendants embody a lawful shareholders agreement:-

8. What is not in dispute but agreed between the parties is that the said companies were created out of the need and necessities. I have adverted to in tis ruling and held to have been a business decision made by the two families for the purposes of surcharging a property then belonging to the 1st defendant.

9. The shareholding structure exhibited in the Memoranda of Associations and Articles of Association (MEMARTS) have not undergone any alterations but remain what it was at the incorporation.

10. The plaintiffs attack the structure for being skewed and allegedly having been procured by undue influence. I have rendered myself in this judgment that nothing has been laid to prove the accusation of undue influence that would have been sufficient to dispose of the matter based on the evidence.

11. However, Companies being juristic person are created and fully governed by the law. Under section 22 of the Companies Act, Cap 486, now repealed, but was in force as at the time the parties decided to promote the incorporation of the companies, a registered MEMART bind the Company and the members thereof, as it the same were signed and sealed by each member and the company. I interpreted the provision to mean that once a memorandum and Articles of Association is registered, it binds the members there on all its terms including the objects of the company and its shareholding.

12. Being so bound, the members cannot unilaterally denounce any provision thereto or just resite from there. That binding nature of the Memorandum and Article takes effect inter se and the members have to options to tinker with their rights and obligations only by having the memorandum and articles amended.

13. However the dispute here must be seen for what it is. It can only properly identified if on interrogates the contributories and promotes of the four(4) companies; 4th, 5th, 6th & 7th defendants. My perusal of the material filed in the file reveal that the shareholding in the form companies is uniform in that;

> **1st defendant owns 20 shares in all the companies 3rd defendant hold 490 shares in all the companies 6th plaintiff holds 490 shares in all the companies**

14. Accordingly all the plaintiffs, save from the 6th have no direct shareholding in the 4th-7th defendants are IPSO facto have no *locus stadi* to seek to recover any shares allotted to the subscribers to the Memorandum of Articles of Association at incorporation.

15. In this suit, the plaintiff has sought only two substantive players being a declaration of a constructive trust as against in 4th, 5th, 6th and 7th defendants over land panel No. Plot 500/VI/MN and a mandatory injunction directed at the defendants to unconditionally transfer the title and interest on plot no. 500/VI/MN back to the 1st plaintiff or the plaintiffs and then nominees. Over and above the two prayers there are alternative and without prejudice prayers whose effect is to nullify the sale agreement dated 31/8/2005, a declaration that the 1st and 3rd defendants hold shares in 4th, 5th, 6th & 7th defendants in trust for the plaintiffs, an order that the 1st, 3rd, 4th, 5th, 6th & 7th defendants deploy to the plaintiff 50% of the market value of plot no. 500/VI/MN, an order for accounts for the determination of the contribution of shareholders of 4th, 5th, 6th & 7th defendants, valuation of the suit property and the brick making machinery upon it and values thereof be placed on a share premium account and lastly that the 4th, 5th, 6th and 7th defendants be ordered to increase their authorized capital and issue such as bonus shares to shareholders according to their due premium capital.

16. I have held hereinabove that on the material availed all the issues isolated have been determined against the plaintiffs for various reasons and on various grounds. Such determination lead to the conclusion that the plaintiffs case cannot succeed but must sail.

Reconciliation on the plaintiffs case:

i. Prayer a cannot succeed because this court has found and had that the sale of land to the 4th defendant was for valuance consideration and it would be a deprivation of property to Order a trust so as to defeat a constitutional right.

ii. Prayer (b) equally fails on the same basis and inaddition for grounds that every party is entitled to his bargain and the 3rd & 5th plaintiffs having confirmed that they sought to salvage the assets with the intercession and financial input by the 1st & 5th defendant, it would be not only unjust but also an action toward unjust enrichment for the 1st plaintiff to get back an asset it had sold and received a consideration

iii. Alternative prayer c equally cannot succeed because I have held and found that the sale agreement between the parties dated 31/8/2015 is indefeasivle and cannot be set aside nor notified on the grounds that forth.

iv. Alternative prayer a is untenable on the basis of section 119 of the Companies Act. The statute forbid any entry or receipt of a list in the Register. Effectively therefore even if this court were to grant such orders, it would be in futility and superfluity as much as it would be contrary to law and unlawful.

v. Further alternative prayer (i) different to grant on the face of the finding by the court that the parties bargained and agreed on their shareholding of the companies incorporated for the purpose of salvaging the suit property. Additionally by dint of section 22 of the Companies Act provide that the terms of Memorandum and Articles of Association bind the company and the members. In the matter PW 2 said at page 47 of the proceedings:

"In negotiating shareholding, I started at 70:30 in my favour and settled at 50:50% there were series of meetings before settlement was rendered at 51.49 but there was no agreement on 51:49%. I wanted the structure to be 50:50".

17. I consider the Memoranda and Articles of Associations of the subject companies to be the contract between the parties they freely negotiated and executed. They can only be bound by the terms and in court has no business in seeking to interference then with.

18. Having said that parties came together for a purpose, negotiated, relied agreements and coded those agreements into deeds, those deeds including the memoranda and Articles of Association create mechanisms and structures of variation and way forward. Those are the mechanism chosen by the parties and all are entitled to their choices. In this one may borrow the now famous political clinch that choices have consequences. This being the position, to grant to the plaintiffs further alternative prayers a, b & c would be to rewrite for the parties their bargains. That is not and should not the endeavor of any court of law.

The Counter Claim

19. Practicably the determination of the suit regarding the ……of the suit property, plot no. 500/VII/MN and the shareholding the 4th defendant determines the most of the claims by the counter claimants against the defendant's to the counter claim save for the claims against the 3rd & 4th defendants to the said counter-claim. The court deems it so because the natural consequence of upholding the ownership and shareholding structure is that the 4th defendant remains the registered document of the property while the shareholding in it remain disturbed and accordingly the its affairs must be run accordance with its Memorandum and Articles of Association and the law under the Companies Act. That being the position, the prayer a, b, & (i) in the counterclaim stand taken care of by the determination of the suit.

20. Prayer h in the counterclaim is equally determined in that by virtue of ownership of the suit property, the 4th defendant is entitled to the benefits flowing from such proprietorship to include the right to control user thereof and be entitled to convene for use user and on default there is a right to enforce such rights as by law permitted including recovery of rent or mere profits by distress or just eviction.

21. For reason, the court upholds the 4th defendant's rights as fundamental under Article 40 of the Constitution and direct that the space occupied by the 2nd and 3rd defendants in the suit premises be valued by a registered valuer to ascertain the current rent payable. Such valuer be appointed by the 5th and 1st defendants within 21days from today and he shall file his report in court within 21 days after appointment. In the event that the parties shall be unable to agree on a joint valuer, let side appoint own valuer on or before the 15/1/2018 and such valuers to file their separate reports in court before the 8/2/2018.

22. Once the rent is ascertained, let the 2nd & 3rd defendants to the counterclaim pay such rent calculated in the 1/5/2013 within 60 days for the date the report ascertaining the rent payable shall have been filed in court. It is further directed that the 2nd and 3rd defendant shall have the option to pay the rent ascertained or move out within 60 days and in default be evicted on account of the foregoing orders prayers K 7 L are of no useful purpose and are taken care of by the orders for payment of rent.

23. For prayers a in the counterclaim the parties are reminded of their relations leading to the incorporation of the Companies and in particular 4th defendant and the success achieved in salvaging the properly now owned by the 4th defendant to the suit. The court directs that the directors of the 4th defendant convene a meeting of the 4th defendant within 21 days from the date of this judgment so that the company meets its statutory obligations and duties so as to be in compliance with the law. For the furtherance of this order thus matter shall be mentioned in court on the 19/01.2018 for parties to report on the progress made.

24. I grant to the defendants/counterclaimants prayer 9 and direct that the share certificate held by the 5th defendant be released to the 1st and 2nd plaintiffs in the counterclaim forthwith and in any event not later than the 5/01/2018. I however declared to award any aggravated or punitive damages as against the 4th defendant in the counterclaim having considered that the parties have a relation by virtue of their interests

in the 3rd plaintiff to the counterclaim.

25. In effect the court considers that good faith and openness is demanded of the natural persons in thus litigation for the benefit of all and in particular the juristic persons involved.

26. The court encourages the parties to engage one another in good faith and find a working without which the financial health of the corporates can only plunge into uncertainty, with that in mind, I consider that the only just order to make on costs is not each party shall bear own costs as a way of helping parties repair their relationships.

27. It is so ordered.

Dated and delivered at **Mombasa** this **22nd** day of **December 2017**.

P.J.O. OTIENO

JUDGE

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[1] Blacks law Dictionary

[2] [1976]AC 104

[3] Foss vs Harbottle quoted in Murri vs Murri & K Boat Services Ltd [2000] eKLR

[4] [2014]eKLR

[5] National Bank of Kenya Ltd vs Pipleplastic Sankolit (K) Ltd [2002] EA 502