



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MAKUENI

ELC CASE NO. 141 OF 2017

MWANGI JAMES NGATIA.....1ST PLAINTIFF

SERAH WACUKA MWANGI.....2ND PLAINTIFF

-VERSUS-

AIMI MA KILUNGU LIMITED.....1ST DEFENDANT

DAVID MUTHOKA MUTANGILI.....2ND DEFENDANT

JOHN KING'OO MULANDI.....3RD DEFENDANT

DANIEL MUTUTHO NJENGA.....4TH DEFENDANT

JULIUS NGOLANIE KAKUI.....5TH DEFENDANT

JUDGMENT

1. This suit was commenced by way of a Plaint dated 23rd February, 2012 and filed in court on 25th February, 2012. It is supported by a verifying affidavit of even date. The Plaintiffs pray for judgment against the Defendants jointly and severally for:-

a) A declaration that the Defendants are liable to the Plaintiffs for misrepresentation and conspiracy to defraud the Plaintiffs and an order that the Defendants do compensate the Plaintiffs in damages for breach of their fiduciary duty and damages Kshs. 165,630,000/= for losses particularized at paragraph 34 of the plaint or alternatively that an order that the Defendants do deliver a transfer to the Plaintiffs of 2 agricultural parcels of land by measurement ten (10) acres each and 2 commercial parcels of land by measurement 50 ft by 100 ft each subdivision of Aimi Ma Kilungu Ranch, Mukaa, Makueni County particularized at paragraph 4 of the plaint and in addition damages for conspiracy and misrepresentation pleaded herein.

b) Interest on prayer (a) above at court rates.

c) The Honourable Court be pleased to make such further or other orders within its inherent jurisdiction.

d) Plaintiffs be awarded costs hereof.

2. The claim is opposed vide the 1st and 2nd Defendants' amended Statement of Defence filed in court on 10th July, 2012 wherein they pray that the Plaintiffs' suit be dismissed with costs. The 3rd Defendant filed a Statement of Defence on 27th April, 2012 wherein it was also prayed that the Plaintiffs' suit be dismissed with costs. Lastly, the 5th Defendant filed his Statement of Defence on 18th April, 2012 and it was prayed that the Plaintiffs' suit be dismissed with costs. The 4th Defendant did not enter appearance or file a Statement of Defence.

3. The matter came up for the hearing of the plaintiff's case on 13th November, 2017. In his examination in chief, the 1st Plaintiff, James Mwangi Ngatia stated that in 2011 together with his wife Serah Wachuka Mwangi, they came to a land investment decision on a land parcel around Konza Techno City. That they applied for and got a Kshs. 3,000,000/= loan from Kenya Commercial Bank. Afterwards, they identified a land broker one Mutisya Kamuya whom they tasked with scouting land for sale within the above locality. They later met a person who identified himself as Charles Njue, a land broker to Samuel Charles Mbinda, the supposed seller of the suit property. That the suit property was agricultural plot number 203 and commercial plot number 62. Much later, the Plaintiff came to know that Charles Njue was an alias to Daniel Mututho Njenga, the 4th Defendant herein.

4. The 1st Plaintiff further stated that using a ballot card copy, a copy of an allotment letter and a copy of an ownership certificate together

with a map given to him by Charles Njue, he visited the office of the 1st Defendant located at Gilfilan House, Room 604 to carry out a search of the property. There he met the 2nd Defendant, whom upon being shown copies of the documents given to him by the 4th Defendant, confirmed that he knew the seller of the above property and his wife. That a negotiated sale price of Kshs. 1,450,000/= was agreed on and the sale agreement executed before Anne Kiusya & Co. Advocates. That Kshs. 40,000/= was paid to the seller in cash while Kshs. 10,125/= was paid via Mpesa on a later date. The Plaintiffs further paid Kshs. 900,000/= and the final balance of Kshs. 500,000/= was paid on 12th September, 2011. That on 28th October, 2011 he got confirmation letters from the 2nd Defendant that the two plots had been transferred and that title deeds would be out in both him and his wife's name.

5. The 1st Plaintiff added that a second transaction was concluded between the same parties for two more plots which Samuel Charles Mbinda owned with his wife. These were Plot numbers 193 and 1319 the former being agricultural and the latter commercial. That an agreement was executed before the same Advocate on 27th September, 2011. That Kshs. 1,000,000/= was paid in cash to the vendors and the balance of Kshs. 300,000/= was collected by the 5th Defendant. That part of the payments made to the 5th Defendant in commissions were made via Mpesa. That he sold an $\frac{1}{8}$ of Plot number 1319 to Jesus Resurrection Church at Kshs. 300,000/= and the sale agreement was prepared by F.N. Wamalwa & Co. Advocates. That the sale was approved and receipts issued by the 2nd Defendant.

6. Soon afterwards, the 4th and 5th Defendants stopped picking his calls which prompted him to do some investigation. That it became clear to him and his wife had been conned. That the 2nd Defendant also confirmed that the ownership of the land he bought had been revoked insisting that he should pursue the common law for refund of his money. That 4th and 5th Defendants were arrested a while later. That they are facing criminal charges relating to the said fraud in Makadara Law Courts vide file number 5573/11 and the case is still pending full determination. The Plaintiff finally produced the bundle of documents filed in Court on 2nd May, 2013 in support of his claim.

7. While being cross-examined by Counsel for the 1st and 2nd Defendants, the 1st Plaintiff stated that in his first meeting with the 4th and 5th Defendants, the 2nd Defendant was not present. That the 4th and 5th Defendants never represented themselves as brokers for the 1st and 2nd Defendants. That when doing his due diligence for the properties, he would present copies of vendors' ownership documents to the 2nd Defendant for verification purposes. That he had placed heavy reliance on the information provided by the 2nd Defendant because despite saying that he personally knew the Mbindas, he confirmed with his records and the photos presented to him by the Plaintiffs that indeed they were the true owners. That he knew it was not mandatory for the vendors to present themselves before the 2nd Defendant as long as the ownership documents were in order. That the 2nd Defendant is an accused person in Criminal Case No. 5573/11. That the transfer fees totaling Kshs. 80,000/= paid to the 1st Defendant for the four plots have never been refunded.

8. Under cross-examination by Counsel for the 3rd Defendant, the 1st Plaintiff stated that no payments were made directly to the 3rd Defendant. That he did not know where the 3rd Defendant was working and only met him after he was arrested by the police. That the 3rd Defendant was not present when the sale agreements were executed before Anne Kiusya Advocate. Under further cross-examination by Counsel for the 5th Defendant, the 1st Plaintiff stated that he gave the 5th Defendant a commission of Kshs. 150,000/= in cash. That the 4th and 5th Defendants had two identification cards each when they were arrested. That both agreements were properly signed by all the parties and attested by Anne Kiusya Advocate.

9. In his re-examination, the 1st Plaintiff stated that the documents presented to the 2nd Defendant in order to complete the transactions were not forgeries. That the connection between the 2nd Defendant and the other Defendants came about through a forensic report that was done by the police. That the 2nd agreement was made on 27th September, 2011 and not 10th September, 2011.

10. The second plaintiffs' witness was Simon Ruto Kimaiyo (PW1), an Assistant Superintendent of Police attached at the Director of Criminal Investigations Headquarters. In his examination-in-chief, he stated that on 13th April, 2012 while at his office, he received exhibits from the DCIO Central Police Station, Nairobi through Exhibit memo 111/526/11. The exhibits comprised five mobile phones and the task required that his office extracts all the text messages received between 5th October, 2011 at 12.39 pm and 7th June, 2012 at 1.45 pm. That his office was able to extract 22 messages. That on 17th September, 2011, an Mpesa transaction of Kshs. 1,050/= being sent to James Mwangi of 0722778291. That there was another incoming message to the same number received on 25th September, 2011 at 10.21 am. That he signed the forensic report as the examining officer and summarized his findings which was attached in the Plaintiffs' bundle of documents.

11. In cross-examination by Counsel for the 1st and 2nd Defendants, the witness stated that he could not tell if the SIM cards were registered as that was not part of his assignment. In further cross-examination by Counsel for the 3rd and 5th Defendants, the witness stated that exhibit memo form was not part of his report since it is supposed to be kept in the police file.

12. The defence hearing started off with the 2nd Defendant, David Muthoka Mutangili, being the first witness to give his evidence. In his examination-in-chief, he adopted his statement filed in Court on 3rd May, 2012. He stated that in addition to being the Chairman of the 1st Defendant, he was also a businessman. That the 3rd Defendant was retired as an employee of the 1st Defendant in 2010 and later on employed on casual basis until 2011. That he met the Plaintiffs on 11th October, 2011 after they presented a sale agreement for Plot Nos. 203 and 62 having purchased from Samuel Charles Mbinda. That on 13th November, 2011, the Plaintiffs brought to him the sale agreement for Plot Nos. 193 and 1319 and other documents. That it was within his mandate to transfer and deal with complaints arising from the said plots of land in his capacity as Chairman. That the Plaintiffs paid the requisite transfer fees and from his position the transactions were complete.

13. He went on further to state that on 7th November, 2011 upon the Plaintiffs making a visit to Nunguni where they were to meet the Mbindas, he received a call from Mbinda's son who informed him that his parents had not sold any of their plots. That on 18th November, 2011, Mbinda's family paid a visit to his office and after brief discussions, they proceeded to Central Police Station to report the matter. That they came to a realization that the signatures on the allotment letters presented by the Plaintiffs were not theirs. That a forensic report was

prepared by a police officer by the name Mr. Mwangela revealing that their signatures had been forged. That the original allotment letter had been surrendered by the Samuel Mbinda to his office for cancellation and transfer to his son Samuel Mbinda Junior. That the information in the 1st Defendant's Nairobi office includes the names of shareholders, their membership numbers and the number of shares they have.

14. The 2nd Defendant further stated that the documents presented by the 1st Plaintiff to him were forgeries. That after discovery of the forgery, the 1st Defendant prepared an advert that was published in the Daily Nation on 8th December, 2011 advising prospective land buyers that they must be accompanied by the sellers. He continued to state that he was never charged with a criminal offence and that he was a witness in the Makadara criminal case. That he dealt with the 1st Plaintiff purely as an official of the 1st Defendant.

15. Under cross-examination by Counsel for the 3rd Defendant, the 2nd Defendant stated that the 3rd Defendant never kept allotment letters or membership cards or any other complete records of ownership. That it was the 1st Plaintiff who presented the seller's ownership documents to the 2nd Defendant. That the 3rd Defendant was never present in any of the transactions and that he never received any money from the Plaintiffs.

16. Under cross-examination by Counsel for the Plaintiffs, the 2nd Defendant stated that Samuel Mbinda had not completed shares for their land and therefore could not be issued with an allotment letter as at 2006. That there exists a procedure for the transfer of plots. It entails the production of an original letter of allotment, a transfer form, a share certificate and the membership card. After that, they print the name of the shareholder and the number of shares which are then taken to the Salama office where the ID card is produced. The seller and the buyer then sign documents. He further stated that the forensic officers did not collect Mbinda's original documents from the 1st Defendant's office.

17. The 2nd Defendant went on to say that Samuel Mbinda had earlier on filled a transfer form for the transfer of his property to his son. That the 1st Defendant had already transferred Plot Nos. 203 and 62 to Samuel Mbinda Junior by the time the 1st Plaintiff came with transfer forms. That the entry had not been made to the office by the time the matter was reported to the police. That he asked the 1st Plaintiff to come for the Kshs. 80,000/= paid as transfer fees but he failed to do so. That the said money is in the 1st Defendant's accounts. That he did not have the Board's resolution to cancel the transfers to the Plaintiffs and to refund transfer fees already paid.

18. In re-examination, the 2nd Defendant stated that there was no valid sale of land to the Plaintiffs and that is why the Board of the 1st Defendant cancelled the transfer. That he never had contact with the fake Mbindas and that he led the 1st Plaintiff to the real Mbindas when the issue of fraud was detected.

19. The 1st Defendant called one other witness, Chief Inspector Alex Mwangela (DW1). In his evidence in chief, he stated that he is a document examiner based at the Directorate of Criminal Investigations in Nairobi. That he received some exhibits for examination on 27th June, 2012 accompanied by the exhibit memo form forwarded by Corporal Peter Mutua. The exhibits had been marked A1 – A6 and they included letters of allotment and membership cards of Aimi ma Kilungu Ltd. That the said documents contained questioned print, seal impressions and signatures. That he also received an exhibit marked B which was the genuine allotment letter of the 1st Defendant containing the genuine seal impressions.

20. Following his assessment of the print and the seal impressions on the documents marked A1 – A6 and compared with the documents marked B, D1, D2 and C3, he was of the view that the documents were made using different instruments. Additionally, he was of the view that the signatures on documents A3 and A6 as compared to the signatures on documents marked H1 – H6 were not made by the same author. That he generated the report dated 28th June, 2012 which he wished to adopt and produce in his evidence in chief.

21. In cross-examination, the witness stated that he could not tell if the seal used in 1975 was still in use. That he did not know when the documents that were used to issue allotment letters to the Mbindas were made. That it was his opinion that the documents marked A1 – A6 were fake.

22. The last defence witness was John King'oo Mulandi, the 3rd Defendant. 26th April, 2012. He stated that he came to know the 1st Plaintiff after being arrested. That before that, he had never met the Plaintiffs. That he had never received any money from the Plaintiffs nor had he ever given him any document in relation to the transactions herein. That keeping ownership documents on behalf of the 1st Defendant was not part of his duties nor did he have access to them. That as an accounts clerk in charge of bookkeeping, he had no interaction with members of the 1st Defendant. That he did not know a Mr. Mbinda, his wife or any member of their family. That he never assured the Plaintiffs about the legitimacy of the papers referred to in paragraph 14 of the Plaintiff. That he had never made any engagements with the 2nd Defendant over the transactions herein and neither did he know the 4th and 5th Defendants. That he did not defraud the Plaintiffs Kshs. 2.7 million as pleaded in the Plaintiff. That he did not sign or witness any document and that he did not conspire to defraud the Plaintiffs.

23. In cross-examination, the 3rd Defendant stated that he did not handle the sale of land on behalf of the 1st Defendant, but he did sell farm produce from the 1st Defendant's properties.

24. The 4th and 5th Defendants' cases were closed, the former on account of default to enter appearance and or file his pleadings and the latter for non-attendance when the matter came for further defence hearing.

25. Parties duly filed their closing submissions beginning with the Plaintiffs who filed theirs on 26th August, 2021. It was argued that the Plaintiffs' cause of action was split up threefold as follows; fraud and misrepresentation against the Defendants jointly and severally, breach of fiduciary duty owed in equity by the 2nd Defendant to the shareholders, to the public and to the Plaintiffs and lastly breach of duty of care owed at common law by the 1st, 2nd and 3rd Defendants to the shareholders, to the public and to the Plaintiffs. It was submitted that to the extent that the 1st, 2nd and 3rd Defendants spoke of information in documents pertaining to responsibilities in their respective lines of duty

without filing documents in support thereof must be rejected by this Court as hearsay.

26. It was further argued that 2nd and 3rd Defendant are liable for breach of fiduciary duty for revealing Mr. and Mrs. Mbinda's information in relation to the allotment letters and membership numbers to the 4th and 5th Defendants. That the Plaintiffs' claim of Kshs. 165,000,000/= is a fair estimate of the Plaintiffs' expectant loss as an alternative to an order compelling specific performance of the contracts by the Defendants. The following cases were relied on: -

- i) **Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others [2015] eKLR;**
- ii) **Kenneth Nyaga Mwigie v Austin Kiguta & 2 others [2015] eKLR;**
- iii) **Pithon Waweru Maina v Thuka Mugiria [1983] eKLR;**
- iv) **Peter Ngome v Plantex Company Limited [1983] eKLR;**
- v) **Charterhouse Bank Limited (Under Statutory Management) v Frank N. Kamau [2016] eKLR;**
- vi) **Capital Fish Kenya Limited v The Kenya Power & Lighting Company Limited [2016] eKLR;**
- vii) **Mitchell Cotts (K) Ltd v Musa Freighters [2011] eKLR;**
- viii) **Caltex Oil (K) Limited v Rono Limited [2016] eKLR;**
- ix) **Emfil Limited v The Registrar of Titles Mombasa & 2 others [2014] eKLR;**
- x) **Central Kenya Limited v Trust Bank Limited & 4 others [1996] eKLR;** and
- xi) **Urmila W/O Mahendra Shah v Barclays Bank International Ltd & another [1979] eKLR**

27. The 5th Defendant filed his submissions on 20th September, 2021. It was argued that the 1st Plaintiff's testimony was riddled with inconsistencies. That the 1st Plaintiff's testimony cannot be relied on to form a conclusive determination that the 5th Defendant was indeed Daniel Kilonzi. That besides Kshs. 80,000/= paid to the 1st Defendant, the Plaintiffs did not prove that anyone else was paid any sums of money. That the Plaintiffs were required by law to establish the loss of a liquidated sum of money as claimed in the Plaintiff which they failed to do. That there was no evidence that the 5th Defendant made any representations to the Plaintiffs which led their consequent loss of money. That the claim for Kshs. 166 million as future loss by the Plaintiffs was not proved since no valuer's report was availed to substantiate the claim. That having failed to prove the liquidated claim in the Plaintiff, the suit must be dismissed with costs to the 5th Defendant.

28. The 3rd Defendant filed his submissions on 12th October, 2021. It was argued that the 3rd Defendant was sued herein by virtue of his name being mentioned in a text message which led to his arrest but his suspicion thereof did not link him to the alleged fraud. That the Plaintiffs had failed to demonstrate how the 3rd Defendant was involved in the fraudulent land transactions to the required standard of proof. It was prayed that the suit be dismissed with costs. The 3rd Defendant annexed the case of **Edward Githaka Kiandingu v Mary Muthoni Mwangi & another [2020] eKLR** to buttress his submissions.

29. The 1st and 2nd Defendants filed their submissions on 12th October, 2021. It was argued that the 4th and 5th Defendants were never presented to the 2nd Defendant and neither did the Plaintiffs rely on documents presented to them by the 2nd Defendant. That for the claim of misrepresentation to stand the Plaintiffs needed to prove that the representation was made knowingly; without belief in its truth; recklessly, carelessly with the intention of influencing the claimant and that the claimant relied on the information and as a consequence suffered material loss. That for the claim of conspiracy to defraud to stand, the Plaintiffs needed to prove the existence of an agreement and the intention to defraud the public. It was submitted further that loss of future earnings is special damage which must be strictly proved with cogent evidence. Lastly, it was submitted that the Plaintiffs did not prove their case to the required standard and it was prayed that the case be dismissed with costs. Reliance was placed on the following cases: -

- i) **Gladys Wanjiru Ngacha v Teresa Chepsaat & 4 others [2013] eKLR;**
- ii) **Kinyanjui Kamau v George Kamau Njoroge [2015] eKLR;** and
- iii) **Sachin Shaha v Jagat Mahendra Kumar Shah & another [2020] eKLR**

30. It is common ground that the Plaintiffs were the unfortunate victims of a shady land transaction in 2011. It is a transaction which ensnared the Defendants some of whom have pending criminal charges against them. The Plaintiffs did not get the land which they paid for. It is, therefore, not in dispute that the Plaintiffs were defrauded in what they had hoped would be a worthwhile investment. In my disposition, I have identified two issues for determination; who is liable for the fraud herein and to what extent are the Plaintiffs compensable.

31. **Order 2 Rule 10(1)** of the **Civil Procedure Rules, 2010** provides as follows: -

(1) Subject to subrule (2), every pleading shall contain the necessary particulars of any claim, defence or other matter pleaded including, without prejudice to the generality of the foregoing—

(a) particulars of any misrepresentation, fraud, breach of trust, wilful default or undue influence on which the party pleading relies; and...

32. In the case of **Bea Timber Co v Gill [1959] EA 463** Forbes VP stated as follows: -

“It is of course established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. Fraud however is a conclusion of law. If the facts alleged in the pleading are such as to create a fraud, it is not necessary to allege the fraudulent intent. The acts alleged to be fraudulent must be set out and then it should be stated that these acts were done fraudulently, but from the acts fraudulent intent may be inferred.”

33. In **Bullen & Leake & Jacob’s, Precedents of Pleadings 13th Edition** at pg 427, the authors outlined as follows: -

“Where fraud is intended to be charged, there must be a clear and distinct allegation of fraud upon the pleadings, and though it is not necessary that the word fraud should be used, the facts must be so stated as to show distinctly that fraud is charged (Wallingford -vs- Mutual Society (1880) 5 App. Cas.685 at 697, 701, 709, Garden Neptune -vs- Occidental [1989] 1 Lloyd’s Rep. 305,308). The statement of claim must contain precise and full allegations of facts and circumstances leading to the reasonable inference that the fraud was the cause of the loss complained of (see Lawrance -vs- Lord Norreys (1880) 15 App. Cas. 210 at 221). It is not allowable to leave fraud to be inferred from the facts pleaded and accordingly, fraudulent conduct must be distinctly alleged and as distinctly proved (Davy -vs- Garrett (1878) 7 ch.D. 473 at 489). “General allegations, however strong may be the words in which they are stated, are insufficient to amount to an averment of fraud of which any court ought to take notice”.

34. Re-examining the Complaint, I have noted the instances when various acts of fraud were alleged to have been committed. In paragraphs 10, 11, 12, 13 and 19 of the Complaint, the Plaintiffs particularized various claims including how the 4th and 5th Defendants introduced the imposter vendors, how the 4th and 5th Defendants represented to them that they had been commissioned to sell various plots of land, how the 4th and 5th Defendants concealed their true identities using fake identity cards and how the 4th and 5th Defendants used fake allotment letters, balloting cards and share certificates in order to actualize their fraudulent scheme.

35. In a recap of the evidence produced by the Plaintiffs vide the Bundle of documents filed on 2nd May, 2013, I came across the fake ownership documents issued in the names of Samwel Charles Mbinda (the Vendor) at pages 1-4. I have also seen the sale agreement for plot Nos. 62 and 203 at pages 5-10, the sale agreement for plot Nos. 193 and 1319 at pages 25-30 and some more ownership documents at pages 15,16,18,19,21,22,23,24,31 and 34 thereof. PW2, Simon Ruto Kimaiyo produced a Cell Phone Forensics Examination Report to corroborate the Plaintiffs’ evidence.

36. The 2nd Defendant stated in his evidence that the ownership documents presented by the Plaintiffs for verification did not emanate from the office of the 1st Defendant. He also stated that he had previously never met the 4th and 5th Defendants even though the details in the ownership documents tallied with those of the real Mbindas. The 3rd Defendant stated in his evidence that he didn’t keep a record of shareholders’/members’ ownership documents and that he met the 4th and 5th Defendants in police cells for the first time.

37. To defraud is to deprive by deceit. It is by deceit, to induce a man to act to his injury. More tersely and in context to the above, it is my finding that the Plaintiffs were induced to enter into the above transaction by the 4th and 5th Defendants. I do not think it is in question that the Plaintiffs were in direct contact with the 4th and 5th Defendants and it is, therefore, highly probable that the payments made at page 47 of the Plaintiffs’ bundle of documents and revealed by the Forensics Report, directly ties the 4th and 5th Defendant to the fraud herein. The 5th Defendant also witnessed the sale agreements and acknowledged receipt of various funds from the Plaintiffs. Again, it is not in doubt that at the time of their arrest, the 4th and 5th Defendants were found in the possession of separate national identity cards which aided in their conspiracy to defraud the Plaintiffs.

38. The evidence presented by the Plaintiffs did not link the 2nd and 3rd Defendants to any conspiracy to defraud them since at no point was there direct contact with the 4th and 5th Defendants. In those circumstances it seems to me inevitable that the Plaintiffs have not discharged their burden of proof required to condemn the 2nd and 3rd Defendant for fraud.

39. Despite service by the Plaintiffs, the 4th Defendant did not enter an appearance and neither was a Statement of Defence filed. On his part, the 5th Defendant filed his Statement of Defence but failed to attend hearing, albeit having the representation of his Advocate. **Order 12 Rule 5** of the **Civil Procedure Rules** mandates this Court to proceed with the suit in respect of the Defendants who have attended whereas judgment shall be issued against the Defendants who have not attended the hearing in such terms that are just. In my view, the justice of the case demanded that the 4th and 5th Defendants appear for hearing of their defence against the claims of fraud. It is largely suspect that the 5th Defendant would fail to attend hearing when grave fraudulent claims had been made against him. The inescapable finding is that the liability for fraud herein shall be against the 4th and 5th Defendants and in my view an award of kshs. 1,500,000/- being general damages would suffice under the circumstances.

40. Before I move on to the question of quantum, I must also discharge the 1st, 2nd and 3rd Defendants from claims made of fraudulent misrepresentation and breach of fiduciary duty. If a high standard of proof is to be required for a claim of fraud, it is because of the importance of a particular case to the parties and also to the general community. The **Black’s Law Dictionary 9th Edn** at **page 581** defines a

fiduciary duty as: -

“A duty of utmost good faith, trust, confidence, and candor owed by a fiduciary (such as a lawyer or corporate officer) to the beneficiary (such as a lawyer’s client or a shareholder); a duty to act with the highest degree of honesty and loyalty toward another person and in the best interests of the other person (such as the duty that one partner owes to another).”

41. In ***Ajay Shah v Deposit Protection Fund Board as Liquidator of Trust Bank Limited (In Liquidation) [2016] eKLR***, the Court of Appeal aptly stated as follows: -

“42. In Gower’s Principles of Modern Company Law, 4th ed. at page 571 it is stated:

“...To describe directors as trustees seems today to be neither strictly correct nor invariably helpful. (See City Equitable Fire Insurance Co. (1925) Ch 407 per Romer J. at p.426). In truth, directors are agents of the company rather than trustees of it or its property. But as agents, they stand in a fiduciary relationship to their principal, the company. The duty of good faith which this fiduciary relationship imposes are virtually identical with those imposed on trustees and to this extent, the description “trustee” still has validity. The duties of directors can conveniently be discussed under two heads: (a) fiduciary duties of loyalty and good faith (analogous to the duties of trustee’s stricto sensu) and (b) duties of care and skill.” (See “Fiduciary Relationships” (1962) C.L.J. 69 and 91963) C.L.J. 119 and “The Director as Trustee” (1967) C.L.J. 83.)”

42. Applying the above reasoning, a man is guilty of a breach of a fiduciary duty whenever he applies trust money or trust property to any purpose which is not warranted by the deed which creates the trust or his directorship with a company. Additionally, in order to prove fraudulent breach of fiduciary duty, the conduct of the trustee must have been either been blameable in a moral sense, against the wishes and without the knowledge of the persons to whom the money or property was due and last, there has to be a criminal aspect. In this case, the Plaintiffs were not shareholders of the 1st Defendant. The company did not owe them any duty of care since it did not have in its possession their property. The only property which the 1st Defendant owes the Plaintiffs is the Kshs. 80,000/= that was paid in all innocence as transfer fees for land that had been sold fraudulently.

43. I think dishonesty and unconscionable conduct are elements necessary to prove any breach of trust or fiduciary duty. The display of the 2nd Defendant’s conduct was that of an honest man right from the beginning. In his interaction with the 1st Plaintiff, he stated that he personally knew the real Mbindas. He directed the 1st Plaintiff to the real Mbindas’ home in Nunguni and even accompanied him to the police to report the crime when fraud was detected. Lastly, the 2nd Defendant put an advertisement in the Daily Nation of 8th December, 2011 to forewarn investors who went unaccompanied by true shareholders in future transactions. Lastly, there was only the remotest of allegations that the 3rd Defendant abetted the 4th and 5th Defendants in the fraud. From my inference of the evidence, I can hardly conceive any impropriety by the 2nd and 3rd Defendants in regards to their fiduciary duty to the 1st Defendant.

44. The Plaintiffs have claimed at paragraph 34 of the plaint Kshs. 165,630,000/= as damages for what is unquestionably, loss of profits for business they would have done with the land had valid transfer thereof materialized in their favour. As correctly pointed out by Counsel for the 1st and 2nd Defendants, damages for future loss are special damages which must be specifically pleaded and proved. In this instance, the Plaintiffs did not avail a valuation expert to substantiate their claim. To me, the amount claimed appears to be a figure plucked from the air.

45. The Court of Appeal in ***Kimani v Attorney-General [1969] EA 502*** nailed it when it held as follows: -

“A claim for loss of profits is clearly “special damages” though in certain circumstances it could be included within a claim for general damages. This claim, however, relates to a special loss of profits consequent on the loss of use of the article for a specific period prior to the date of the plaint which is clearly special damages which must be pleaded and proved. The reason for this rule is that a defendant must be given an opportunity of knowing precisely what specific claims are made and thus be in a position to call evidence to show that the claim in respect of the details is not correct.”

46. At any rate, no valid contract and or transfer of the suit property was concluded on account of the fraud. The case against the 1st, 2nd and 3rd Defendants is hereby dismissed with costs. Invariably, it was the Plaintiffs’ duty to conduct thorough due diligence including availing the vendors to the 1st Defendant and that could have averted so much distress. All the same and the upshot of this case is that judgment is hereby entered for the Plaintiffs against the 4th and 5th Defendants as hereunder stated: -

i) Kshs. 2,750,000/= being the amount paid by the Plaintiffs to the 4th and 5th Defendants in addition to their co-conspirators;

ii) Kshs. 1,500,000/= general damages for fraud;

iii) Interest on i) and ii) above at court rates;

iv) Costs of the suit.

47. It is so ordered.

SIGNED, DATED AND DELIVERED AT NAROK VIA EMAIL THIS 22ND DAY OF MARCH, 2022.

MBOGO C.G.

JUDGE

In the presence of:

CA:T.Chuma