



Barmao v Kenya Anti-Corruption Commission & 2 others (Civil Appeal 130 of 2018) [2024] KEHC 1282 (KLR) (16 February 2024) (Judgment)

Neutral citation: [2024] KEHC 1282 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CIVIL APPEAL 130 OF 2018
JRA WANANDA, J
FEBRUARY 16, 2024**

BETWEEN

NOAH BARMAO APPELLANT

AND

KENYA ANTI-CORRUPTION COMMISSION 1ST RESPONDENT

KIZITO CHESESIO 2ND RESPONDENT

PETER KIPRONO 3RD RESPONDENT

JUDGMENT

1. The 1st Respondent was at all material times a body corporate established under the *Anti-Corruption and Economic Crimes Act*, No. 3 of 2003. Its core mandate was to combat and prevent corruption and economic crime and promotion of standards and practices of integrity, ethics and anti-corruption. It has since been replaced by the Ethics and Anti-Corruption Commission (EACC), a public body established under the *Ethics and Anti-Corruption Commission Act*, 2011.
2. This Appeal is against the Judgment delivered on 21/09/2018 in Eldoret Chief Magistrate's Court Civil Case No. 1187 of 2016 in which Judgment was entered against the Defendants (Appellant, 2nd and 3rd Respondents) jointly and severally. In the suit, the Appellant herein was the 2nd Defendant, the 1st Respondent herein was the Plaintiff, the 2nd Respondent was the 1st Defendant and the 3rd Respondents was the 3rd Defendant. The suit was initially filed in the High Court as Eldoret High Court Civil Case No. 100 of 2007 but due to the lower pecuniary jurisdiction, was on 26/10/2016 transferred to the lower Court and assigned the said new case number.
3. The background of the matter is that by the Plaint filed on 24/05/2016, the 1st Respondent sued the Appellant and the 2nd and 3rd Respondents. The 1st Respondent pleaded that under Section 45 of the Constituency Development Fund Act, 2003, the Eldoret East Parliamentary Constituency opened and maintained a bank account at Co-operative Bank of Kenay Limited, Eldoret Branch, being Account



Number 0112086365800 (hereinafter referred to as “the Constituency Account”) through which the Constituency received its share or allocation of money from the Constituencies Development Fund (CDF), that at all times, the CDF was a fund into which was paid, at certain times, a percentage of the government local revenue collected in a particular financial year for disbursement, through the Constituency accounts, to Parliamentary constituencies in the Republic of Kenya to finance, support or facilitate development of diverse projects initiated in those respective constituencies, that at all material times, the 2nd Respondent was a member and the Secretary to Eldoret East Constituency Development Committee and one of the signatories to the Constituency Account, and that the District Accountant, Uasin Gishu District Treasury was at such material times a mandatory signatory to the Constituency account aforesaid.

4. The 1st Respondent pleaded further that one of the Constituency projects that could benefit from the CDF through the said Constituency Fund was Chembulet Health Centre in Moiben Division, that on or about 11/04/2005 the Defendants misrepresented themselves as the Chairman, Secretary and Treasurer of several constituency based projects including that of the said Chembulet Health Centre and in that capacity purported to open the bank account 011208635600 in the name of the project at the Co-operative Bank of Kenya, that the Defendants were the sole signatories to the account, that on or about 12/04/2005 and 15/03/2006 the Defendants received and cashed two cheques of the total of Kshs 800,000/- drawn on the Constituency account in favour of Chembulet Health Centre and through the said bank account that they had unlawfully opened. The 1st Respondent contended that the Defendant’s action was illegal, dishonest and fraudulent and that due the same, the CDF and in particular, the Eldoret East CDF suffered loss. It was pleaded further that as a result of the Defendant’s said actions, they were charged with the offence of stealing in Eldoret Chief Magistrate’s Court Criminal Case No. 8172 of 2006. In the end the 1st Respondent prayed for Judgment against the Defendants jointly and severally at the sum of Kshs 800,000/-.
5. The Appellant then filed his Statement of Defence on 5/03/2007 through Messrs Kiboi Tuwai & Co. Advocates while the 2nd Respondent filed his on 25/09/2007 through Messrs Arap Ng’eno & Co. Advocates. The both generally denied the allegations made in the Plaint. I have not however come across any Defence filed by the 3rd Respondent.
6. The suit then proceeded to full trial. The 1st Respondent (Plaintiff) presented 4 witnesses. On the part of the Defendants, only the Appellant (Noah Barmao) testified. The other Defendants (2nd and 3rd Respondents) did not participate in or attend the trial.

1st Respondent’s (Plaintiff) evidence before the trial Court

7. PW1 was one Gladys Chelagat. She stated that she was the Operations Manager at the Co-operative Bank, Nandi Hills Branch. She adopted her Witness Statement and testified that there was an account opened at the bank for Chembulet Health Centre. On being asked to produce account opening documents, the persons who opened the Account supplied a Certificate of Registration, Minutes of a meeting which named the Chairman as one Major Chessesoi, Treasurer as Noah Barmao and Secretary as Peter Kiprono, that the Applicants also supplied their passport photographs and copies of their National Identity Cards, they filled-in the account opening Forms and named the 3 of them, as officials, as the signatories, they also supplied a letter from the Ministry of Health authorizing opening of the bank account. She stated further that an amount was Kshs 500,000/- was later deposited into the account on 12/04/2005 through a cheque from the Eldoret East CDF account, that a further deposit of Kshs 300,000/- was made on 15/03/2006 and that there were 5 withdrawals made by Noah Barmao and Kizito Chesasio. In cross-examination she conceded that she only produced a copy of the cheque



for Kshs 300,000/- that she had not produced the one for Kshs 500,000/-. She also conceded that she did not have the withdrawal slips.

8. PW2 was one Michael Chepkonga. He stated that he is a committee member of Chembulet Health Centre and adopted his Witness Statement. He stated that the minutes produced by the Appellant were not genuine as no meeting to that effect was held. In cross-examination, he denied any knowledge of the said Peter Kiprono (3rd Respondent) referred to above, that he is not aware of withdrawal of the monies and that the said Peter Kiprono was not an official or signatory to the Centre's account.
9. PW3 was one Joash Odibo Ongati. He stated that he works with the Ministry of Finance as an Accountant and was formerly stationed at Eldoret as the District Accountant, Uasin Gishu. He adopted his Witness Statement. He then stated that he signed a cheque in favour of Chembulet Health Centre. In cross-examination, he stated that he did not have copies of the cheques and that they only remained with the Certificates. He then stated that the cheque was collected by Kizito Chesesoi (2nd Respondent).
10. PW4 was one Emmanuel Abuya. He stated that he works with the Ethics and Anti-Corruption Commission as an Investigator formerly based at Eldoret. He too adopted his Witness Statement. In cross-examination, he stated that there was misuse of funds, that they investigated the CDF Account and signatories thereto and ascertained that Barmao was not a signatory, that the amount was withdrawn and put in an account in the name of Chembulet Health Centre. He stated that he did not have details of the genuine account, and that the minutes of the alleged meeting were forged, that the Health Centre was registered by Social Service, that Mr. Chesesoi was the CDF Secretary and could not also therefore double up as the Secretary of the project at the same time, that funds were deposited into the account and that the funds were not disbursed for what it was intended.

Defendant's evidence before the trial Court

11. The Appellant (Noah Barmao) testified as DW1. He stated that he is a medical officer and adopted his Witness Statement. He stated that he was a clinical officer in charge of Chembulet Health Centre, that when he got there he found a committee, that Peter Kiprono was a member thereof, it was on 14/09/2004, the Chairman was Kizito Chesesoi, that he (Appellant) was the Secretary as head of the facility, that he opened an account as a requirement as per the minutes, he does not know of any other bank account, he never withdrew any money from the account, that a cheque would be generated and signed by any 2 signatories and one person could present it, that in the statement there is a misspelling, that it is not his name, he was given Kshs 15,000/- and not Kshs 55,000/-, that it refers to the name Noah Barno, that is not him, his name is Noah Kipkorir Barmao, that the money was used to buy items. He admitted that Mr. Michael Chepkonga (PW2) was a committee member.
12. In cross-examination, he stated that he was aware that Kshs 300,000/- was paid, it is the Chair who kept the cheque books, that Kshs 260,000/- was used to buy hospital beds, Kshs 200,000/- was paid to Kenya Power, the balance went for mackintosh mattresses and Placenta Pit and that he signed blank cheques which he gave to the Chairman. He conceded that Dumela Investments was linked to the Chairman and he could not confirm whether it provided any service. He also conceded that the bank statement indicates that a cheque was issued to him (Appellant). In Re-examination, he stated that he signed the cheques in good faith.



Trial Court's Judgment

13. As aforesaid, after the hearing, the trial Court was satisfied that the case against the Defendants (Appellant, 2nd Respondent and 3rd Respondent) had been proved on a balance of probabilities. Judgment was accordingly entered on 21/09/2018 as prayed in the Plaintiff.

Appeal

14. Aggrieved by the trial Court's decision, the Appellant filed this Appeal on 19/10/2018 vide the Memorandum of Appeal filed on the same date. An Amended version dated 22/11/2022 was subsequently filed on the same date. The Memorandum of Appeal is however unnecessarily lengthy and verbose and looked closely, is replete with needless repetitions and duplicity. It preferred the following 14 grounds:
 - 1A. That the learned trial Magistrate erred in law and fact in failing to find that the 1st Respondent had not proved its case on a balance of probabilities.
 2. That the learned trial Magistrate erred in law and fact in by shifting the burden of proof to the Appellant contrary to the established principles of law.
 3. That the Learned trial Magistrate erred in law and fact by failing to adequately address the evidence and submissions tendered by the Appellant.
 - 4A. That the Learned trial Magistrate erred in law and fact by overly relying upon the evidence of the Respondent's witnesses which was inconsistent and contradictory.
 - 5A. That the learned trial Magistrate erred in law and in fact in arriving at a decision in favour of the 1st Respondent's against the weight of evidence on record.
 - 6A. That the learned trial Magistrate erred in law and in fact in failing to dismiss the 1st Respondent's claim for want of proof as required by law.
 - 7A. That the Learned trial Magistrate erred in law and fact in failing to hold that the 1st Respondent had not proved its case against the Appellant.
 8. That the Learned trial Magistrate erred in law and fact by considering extraneous matters in arriving at his decision.
 9. That the Learned trial Magistrate erred in law and fact by applying inapplicable principles in arriving at his decision.
 - 10A. That the Learned trial Magistrate erred in law and fact by failing to hold that the particulars of fraud pleaded by the 1st Respondent had not been proved against the Appellant.
 11. That the Learned trial Magistrate erred in law and fact by lowering the threshold of proving fraud.
 12. That the Learned trial Magistrate erred in law and fact by failing to hold that the Appellant had never been found guilty of fraud in any criminal proceedings and thus the same could not suffice in a civil claim.
 13. That the Learned trial Magistrate erred in law and fact by entering Judgment against the Appellant for the sum of Kshs 800,000/- when the same had not been proved.



14. That the Learned trial Magistrate erred in law and fact by taking into account irrelevant factors and failing to take into account relevant factors thereby arriving at an erroneous judgment.
15. As it will now be apparent, the Memorandum of Appeal, besides the unnecessary verbosity and repetitions, also sounds like a cut-and-paste template since it is crafted in ambiguous general terms with no specificity at all.
16. Be that as it may, pursuant to directions given, the Appeal was canvassed by way of written submissions. The Appellant filed his Submissions on 6/03/2023 through Messrs A.K. Chepkonga & Advocates while the Respondent filed on 13/04/2023 through Meyner Ashitiva Advocate.

Appellant's Submissions

17. The Appellant's Counsel submitted that neither the legal nor the evidential burden of proof required in the suit was met to warrant a decision against the Appellant, that is a settled principle that the burden of proof in a suit lies on that person who will fail if no evidence at all were given on either side. He cited Section 107 and 108 of the *Evidence Act*, and also the case of *Miller v Minister of Pensions* [1942] 2 ALL ER 372.
18. Counsel submitted further that the suit was hinged on an allegation of fraud, that allegation of fraud is a serious allegation which raises the evidential burden in civil cases. He cited the case of *Emfil Ltd v Registrar of Titles Mombasa* [2014] eKLR and submitted that the evidential burden for proof of fraud in civil cases is higher than a balance of probabilities. He also cited the case of *Central Bank of Kenya Ltd v Trust Bank Ltd & 4 Others*, Civil Appeal No. 45 of 1996.
19. Counsel contended further that the Appellant was indeed an official of the Chembulet Health Centre Project Committee, that by virtue of being the in-charge of the Centre, he assumed the role of the Secretary to the Committee, that he therefore did not misrepresent himself as being an official of the project, that no evidence was brought forth to prove that the Appellant was not an official of the project, and that in his capacity as an official, he could open a bank account for the project.
20. It was Counsel's further contention that the Appellant did not receive any cheques drawn on the constituency account in the name of the Health Centre, that the Appellant was not a signatory to the account and had no authority to withdraw any funds, that the Appellant did not withdraw any funds from the account, that the evidence of PW1 was that the cheques were received by the 2nd Respondent, that the statement from the bank indicates that the moneys were drawn by a different person named "Noah Barno", and that this cannot be assumed to be an excusable typographical error to impute fraud on the part of the Appellant. He cited the case of *Vijay Morjaria v Nansing Madhusinth Darbar & Another* [2000] eKLR. He added that no withdrawal slips were produced to prove that it was the Appellant who withdrew the sums, and that burden thereof could not be shifted to the Appellant.
21. He argued further that although the Appellant conceded that on some occasions the Appellant signed blank cheques, he was categorical that he only did so in good faith and based on instructions from the 2nd Respondent who was his boss, that it was a season in time when there was pressure from work to meet some deadlines for completion of the project, that he therefore signed to facilitate fast and easy withdrawal of money by his counterparts, that his actions should not be construed to mean collusion on his part to embezzle money. He cited the case of *Paragon Finance PLC v DB Thakerar & Co.* (1999) 1 ALL ER 400 as quoted in the case of *Mariam Njeri Njoroge Another v June Wanjiku Ndegwa & Another* [2022]. According to Counsel, the only amount of money that the Appellant received was Kshs 20,000/- which he fully utilized for its intended purpose - buying of curtains, making of a sign



post and for expenses of purchasing refreshments for the commissioning ceremony for the facility - and that the Appellant did not in any way personally benefit from the funds.

Respondents' Submissions

22. On his part, Counsel for the 1st Respondent submitted that the 1st Respondent proved its case as it availed 4 witnesses and produced several documents including account opening documents, copies of cheques and bank statements for Chembulet Health Centre, that the witnesses gave a trail of how money was diverted from the Health Centre bank account, that from the bank opening documents, the Eldoret CDF main account was operational at Co-operative Bank, Eldoret Branch Account No. 0112086365800, the signatories of the said account were Raymond Chemweno, Kizito Chesusio, Evans Mutiso and the District Accountant (mandatory signatory), that from the bank statement of the main CDF Account, Kshs 800,000/- was channelled from the said Co-operative Bank account number 0112086365800 to Account No. 0112086835600 held at Co-operative Bank in the name of Chembulet Health Centre, that bank account No. 0112086835600 in the name of Chembulet Health Centre was opened on 8/04/2005 with the signatories being the 3 Defendants (Kizito Chesusio, Noah Barmao and Peter Kiprono), that Peter Kiprono was not an elected official or a member of Chembulet Health Centre project committee and was unknown to Michael Chepkonga (PW2) who was a committee member, that it is therefore unclear how Peter Kiprono became a treasurer to the committee and signatory to the account, and that the said Peter Kiprono never entered appearance nor did he defend the suit.
23. Counsel submitted further that the District Accountant testified that Kizito Chesusio was a member of the main CDF committee and signatory to its account and could not double up as a member and signatory to the project committee account as it was prohibited under the CDF Regulations, that it is not in dispute that Kshs 800,000/- was transferred to the Chembulet Health Centre Bank Account from the main Eldoret East Constituency CDF Account, that cheque number 0000001 for Kshs 500,000/- and cheque number 000000215 for Kshs 300,000/- were deposited in the account of Chembulet Health Centre at Co-operative Bank, and that Michael Chepkonga testified that the committee was not aware that Kshs 800,000/- was ever paid to Chembulet Health Centre by the Eldoret East CDF.
24. It was Counsel's further contention that from the bank statement, a sum of Kshs 200,000/- was withdrawn on 18/04/2005 by the Appellant, a further sum of Kshs 194,000/- was withdrawn on 22/04/2005 by Dumela Investments - an entity associated with the 2nd Respondent - that on 28/04/2005 and 16/04/2005 the Appellant withdrew sums of Kshs 15,000/- and Kshs 25,000/- respectively, and that on 5/05/2006 the 2nd Respondent withdrew Kshs 214,000/-. He added that the bank official testified that the bank opening Form provided that all 3 were to sign on withdrawals. He submitted further that the monies withdrawn were never used for the intended projects but were instead diverted by the 3 Defendants for personal gain.
25. On the allegation that the trial Magistrate shifted the burden of proof to the Appellant, Counsel cited the case of Bungoma Election Petition No. 4 of 2017, Levi Simiyu Makali vs Koyi John Waluke & 2 Others [2018] eKLR and submitted that the Appellant never discharged the evidential burden of proof. He also argued that although the Appellant testified that the money withdrawn was used to buy beds, mackintosh mattresses and to pay for electricity, he failed to produce any evidence to support these assertions. He added that the Defendants were signatories to Chembulet Health Centre Bank Account, that money deposited into the account could not be accounted for, that the Defendants failed to protect public funds, that the Appellant testified that he signed blank cheques pursuant to instructions from the 2nd Respondent, that such action connotes collusion and gross negligence on



the part of the Appellant and which facilitated loss of public funds, and that the admission to signing blank cheques cannot be a defence but an admission of guilt on his part.

26. Counsel further submitted that the investigating officer who visited the facility noted that the equipment bought was not purchased by CDF money. On the typographical error in the bank statement, Counsel observed that although the Appellant's name was spelt as "Noah Barno" instead of "Noah Barmao", the Appellant never sought clarification from the bank official (PW1), and that he instead raised the typographical error as an afterthought.

Analysis & determination

27. The duty of an appellate Court was set out in the case of *Abok James Odera t/a A.J Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates* [2013] eKLR, as follows:

"This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and re-analyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way."

28. Although, as aforesaid, the Memorandum is unnecessarily lengthy, the 14 grounds listed therein can be easily condensed into one broad issue, to wit, "whether the case against the Appellant was proved to the required standard".
29. In this matter, as the Plaintiff, the 1st Respondents case was that the 3 Defendants colluded to embezzle funds from the Eldoret East Constituency CDF Account by causing the money to be withdrawn from the CDF Account and to be fraudulently remitted to their own joint personal but fraudulent Bank Account. According to the 1st Respondent, the Defendants had opened the account purposely and intentionally for that very purpose of embezzling funds from the Constituency CDF Account and which Account they had, without authority, fraudulently opened in the name of the existing entity known as Chembulet Health Centre. To establish the truth of the said script, the 1st Respondent called 4 witnesses.
30. PW1, the Operations Manager at the Co-operative Bank, Nandi Hills Branch confirmed that an account was opened at the bank in the name of Chembulet Health Centre, that as account opening supporting documents, the persons who opened the account supplied a copy of the Health Centre's Certificate of Registration and also Minutes containing resolutions authorizing opening of the bank account, that the minutes named the 3 Defendants as the Chairman, Treasurer and Secretary, that the Applicants also supplied passport photographs and copies of their National Identity Cards, that they filled-in the account opening Forms and indicated the 3 Defendants as the signatories. As aforesaid, among the Defendants, only the Appellant participated in the trial and/or gave evidence. The Appellant did not deny, and in fact confirmed, that he is among the 3 people who opened the said account. Copies of the relevant account opening documents were also produced in evidence. The said testimony therefore establishes that indeed the said Account in the name of Chembulet Health Centre was opened by the 3 Defendants, among them the Appellant and that the 3 were named as the sole signatories to the account.
31. PW1 further testified that after opening of the bank account, amounts of Kshs 500,000/- and Kshs 300,000/- respectively, were later deposited into the account through cheques from the Eldoret East CDF account and that thereafter, 5 withdrawals were made by Noah Barmao (Appellant) and Kizito Chesusio (2nd Respondent). Documentary evidence of these withdrawals was also produced. The Appellant did not also deny the withdrawals save to pointing out that in the one allegedly attributed to



him, the name appearing therein is “Noah Barno” which is different from his name “Noah Barmao” and that therefore it was not him. On this issue of alleged difference in the name, I will revert in due course hereinbelow. What I however note is that this testimony establishes that cheques issued from the Eldoret East CDF account were indeed deposited into the bank account opened by the 3 Defendants, among them the Appellant, and that proceeds of the cheques were later withdrawn.

32. PW2 stated that he is a committee member of Chembulet Health Centre and that the minutes supplied by the Defendants purportedly authorizing opening of the bank account in the name of Chembulet Health Centre was a forgery since no such meeting ever took place. In cross-examination, he stated that he does not know the said Peter Kiprono stated to be among the people who opened the bank account and one of the Defendants, that the said Peter Kiprono was not an official or signatory to the Centre’s genuine account and that he is not aware of any withdrawal of monies from the account to be spent on Chembulet Health Centre. Technically, what PW2 stated is that, though a member of the Health Centre, he was not aware of any monies released by CDF to the Health Centre and neither was he aware of any CDF funds that were used to equip the Health Centre. This testimony established the suspicion that the account opened by the Defendants, among them the Appellant, in the name of Chembulet Health Centre was a false and fraudulent account. The testimony also established that the said Peter Kiprono – 3rd Respondent - who in conjunction with the Appellant and the 2nd Respondent, opened and operated the false and fraudulent account was a person unknown to Chembulet Health Centre and had no known connection to the Health Centre. This is therefore sufficient evidence that the Appellant and the 2nd Respondent knowingly “roped in” an impostor to assist them to fraudulently open the account. This testimony also indicates that the Appellant lied when he claimed that the CDF had released monies to the Health Centre to be utilized in equipping and providing some services to the Health Centre and that the money had indeed been used for such purpose.
33. PW3 stated that he works with the Ministry of Finance as an Accountant and was formerly stationed at Eldoret as the District Accountant, Uasin Gishu. He stated that he signed a cheque in favour of Chembulet Health Centre and that the same was collected by Kizito Chesosoi. This testimony therefore established that the cheque was collected by Kizito Chesosoi who, it will be recalled, is one of the people who, together with the Appellant, opened the bank account fraudulently operated in the name of Chembulet Health Centre.
34. PW4 stated that he works with the Ethics and Anti-Corruption Commission as an Investigator formerly based at Eldoret. He stated that Kizito Chesosio was the Eldoret East CDF Secretary and although he did not state the specific provision, he stated that under the CDF Regulations, Kizito Chesosio could not at the same time also serve as the Secretary of Chembulet Health Centre project. He confirmed that funds were deposited into the Chembulet Health Centre project bank account and that the funds were not disbursed for what it was intended. This testimony establishes that Kizito Chesosio, besides being a signatory to the false and fraudulent Account which he opened in conjunction with the Appellant and the 3rd Respondent in the name of Chembulet Health Centre, was also at the same time a signatory to the Eldoret East CDF bank Account. This testimony establishes another link between the said Kizitio Chesosio and the Appellant. This testimony also backs up the allegation that the amounts withdrawn from the said Chembulet Health Centre bank account were never used for the benefit of the Health Centre and disappeared into the Defendant’s “pockets”, among whom was the Appellant.
35. From the above analysis, it is evident that a prima facie case was established against the 3 Defendants, among them the Appellant. The witnesses clearly established the trail of how money was diverted from the Chembulet Health Centre bank account and presented strong evidence implicating the Defendants, among them the Appellant, to the “heist”. It was then therefore for the Defendants to controvert the evidence presented against them. To the extent that the Defendants were now called



upon by law to controvert the Plaintiff's (1st Respondent) evidence, it may be said that the evidential burden had shifted to the Defendants since, to escape Judgment, they needed to discharge the burden. Contrary to the assertions by the Appellant, there is absolutely nothing wrong with this since it is a recognized procedure under the law of evidence. On this point, I refer to the Court of Appeal case of *Mbuthia Macharia v Annah Mutua & Another* [2017] eKLR in which the following was stated:

(16) “The legal burden is discharged by way of evidence, with the opposing party having a corresponding duty of adducing evidence in rebuttal. This constitutes evidential burden. Therefore, while both the legal and evidential burdens initially rested upon the appellant, the evidential burden may shift in the course of trial, depending on the evidence adduced.

36. The above principle is also aptly captured in *The Halsbury's Laws of England*, 4th Edition, Volume 17, at paras 13 and 14 in the following terms:

“The legal burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party's case”

37. Did the Defendants, including the Appellant, controvert the damning evidence presented against them?

38. First, as already stated, the 2nd and 3rd Respondents, after filing Statements of Defence, never participated in or attended the trial. Only the Appellant chose to participate and testified. The 2nd and 3rd Respondents' story may therefore never be known.

39. I note that the Appellant admits receiving a portion of the money withdrawn from the proceeds of the monies deposited from the CDF account into the false and fraudulent bank account opened in the name of the Chembulet Health Centre. He did not disclose from whom he received the money. He however claimed that the money withdrawn was used to buy beds, mackintosh mattresses and to pay for electricity. Curiously, he did not produce any evidence whatsoever to support his said allegations. This allegation therefore remained just that - an allegation - meaning that the claim by the 1st Respondent that the money trail ended at the Appellant's “pockets” was never controverted.

40. The Appellant also claimed that he innocently signed blank cheques upon instructions from the 2nd Respondent. His Counsel submitted that “it was a season in time when there was pressure from work to meet some deadlines for completion of the project”, and that the Appellant therefore “signed to facilitate fast and easy withdrawal of money by his counterparts”. Considering the rest of the other strong, corroborative and uncontroverted evidence presented against the Appellant, I do not believe that he signed blank cheques as he alleges. Even if this allegation is true, I am still not convinced that signing of the blank cheques was “innocent” as he wanted the trial Court to believe. Further, if it is true that the Appellant indeed signed blank cheques, then I to agree with the 1st Respondent's Counsel that such action connoted collusion on the part of the Appellant or, at the least, gross and/or culpable negligence on his part. Considering that this is a civil suit in which, unlike in criminal trials, the standard of proof is on a balance of probabilities, the act of signing and handing-over blank cheques to a third party cannot be presumed to be a defence but it is a clear admission of culpability on the part of the Appellant. I find it to be amount to self-incriminating evidence.

41. The other issue raised by the Appellant is that the statement from the bank indicates that the moneys were withdrawn by a person by the name “Noah Barno”, that this name is different from the Appellant's – Noah Barmao – that this was therefore a different person and that the discrepancy cannot be assumed to be an excusable typographical error and be used to impute fraud on his part. In



my estimation, this allegation “falls flat on its face” since the signatories to the account and who were the only people who could withdraw funds were the 3 Defendants (Appellant, 2nd Respondent and 3rd Respondent). There is therefore no question of a 4th person withdrawing money from the account. I therefore accept the explanation that the discrepancy in the name was a mere typographical error.

42. Further, considering that it is the bank official (PW1) who testified that some of the withdrawals were made by the Appellant and even produced the bank statement, I again have to agree with the 1st Respondent’s Counsel’s that the Appellant’s Counsel, when he got the perfect opportunity to raise this issue with while cross-examining PW1, curiously chose not to touch on the issue nor did he put the question to PW1. Instead, he only raised the matter when leading the Appellant in his evidence-in-chief. If debunking the typographical error theory was so crucial to the Appellant’s defence, then why did Counsel decide not to touch on it during his cross-examination of PW1? Was he perhaps scared that PW1 would instead debunk the Appellant’s denial? I do not know. In the circumstances, I agree with the 1st Respondent’s submission that the issue of discrepancy in the names was raised as a pure afterthought. The discrepancy does not therefore assist the Appellant.
43. In view of the foregoing, I trust that I have said enough to leave no doubt that this Appeal cannot succeed.

Final Order

44. In the premises, this Appeal is dismissed with costs to the 1st Respondent.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 16TH DAY OF FEBRUARY 2024

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WANANDA J.R. ANURO

JUDGE

