



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CASE NO. 223 OF 2012

(ORIGINALLY HCCC NO 314 OF 2004)

PAN AFRICA INSURANCE HOLDINGS LIMITED.....1ST PLAINTIFF

MAE PROPERTIES LIMITED.....2ND PLAINTIFF

VERSUS

DICKSON NGATIA GACHUCHE.....DEFENANT

JUDGEMENT

1. By a plaint dated 15th June 2004 the Plaintiffs have filed this suit against the defendant seeking:-
2. It seeks orders:-
 1. *A declaration that the Defendant was a trustee for the Plaintiffs in respect of the Plaintiff's assets.*
 2. *Kshs.16,878, 969.86*
 3. *General damages.*
 4. *Punitive and /or aggravated damages.*
 5. *Costs of the suit.*
 6. *Interest on (b) an (c) at such rate as the court thinks fit in the circumstances from the date of filing suit until payment in full.*
3. Upon being served with copies of plaint and summons to enter appearance the defendant entered appearance on 7th October 2004 in person. On the 21st October 2004, he appointed the firm of M/S Kinoti Kibe & Co. Advocates to act for him. The said firm filed a statement of defence dated 21st October 2004.
4. On the 29th January 2013, the suit which was originally HCCC 314 of 2004 was transferred by consent to the Environment and Land Court and given a new number.
5. On the 25th March 2019, the court by the consent of the parties directed that the respective witness statements and bundle of documents be adopted as part of the evidence in this case. Parties were further directed to file written submissions within thirty (30) days.

The Plaintiffs' Submissions

6. They are dated 13th September 2019. The Defendant was a director of the 1st Plaintiff from 1993. These transactions took place between the years 1994 to 1997. The 1st Plaintiff's claim is that the Defendant was in breach of his duties including the duties imposed upon the directors under the Companies Act, Cap 486 Laws of Kenya (now repealed).

7. The Defendant purchased the following properties from the 2nd Plaintiff LR numbers 7785/654, 7785/655, 7785/657, 7785/902, 7785/903, 7785/904 and 7785/905. The Defendant in breach of his obligations as a trustee of the Plaintiffs' assets, placed his own interest above that of the Plaintiffs. He completely disregarded the conflict of interest that arose in the pricing and sale of the properties.

8. In paragraph 15 of the Plaintiff, the particulars of the Defendant's breach are particularized as:-

(a) The Defendant failed to declare to the directors of Pan Africa in accordance with regulation 84 (1) of the Table A Part I in the First Schedule to the Companies Act, the nature of his interest in the contract entered into by him with Mae Properties to purchase the purchased Runda Plots; and or;

(b) The Defendant failed to declare to the directors of Pan Africa, in accordance with Section 200 of the Companies Act, the nature of his interest in the contracts entered into by him with Mae Properties to purchase the purchased Runda Plots; and/or

(c) The Defendant entered into contracts with Mae Properties to acquire the purchased Runda Plots, at prices materially below prevailing market prices, and otherwise than at arm's length and on normal commercial terms.

9. They set out six (6) issues for determination. They are:-

(a) Whether the Defendant breached his fiduciary duties owed to the plaintiffs.

(b) Whether the Defendant declared to the directors of Pan Africa the nature of his interest in the contract entered by him with Mae Properties.

(c) Whether the Defendant could legally acquire the Plots.

(d) Whether the Plaintiffs are entitled to the damages sought.

(e) Whether the suit is statutorily time barred.

10. That by Board Paper No 4, the 2nd Plaintiff's general manager proposed that unattractive plots be offered for sale to the senior members of staff of the 1st Plaintiff, its directors as well as the directors of the 2nd Plaintiff and Runda Water Limited at the price of Kshs.500,000 per plot. The proposed sale of plots was tabled and discussed at the Annual General Meeting of the 1st Plaintiff on 1st July 1994 was approved. They were to purchase half an acre at Kshs.250,000/- or Kshs.400,000 for an acre and was allowed only once. The Defendant was in breach of the board resolution by purchasing more than one plot and at a discounted price at the time of purchase.

11. Between 1994 to 1997 the Defendant bought seven properties from the 2nd Plaintiff. Ms Emma Wachira, the Company Secretary and Chief Legal Officer in her witness statement exhibited documentary evidence from the plaintiff's records that show that the Defendant was entitled to purchase only one half acre or an acre plot from the 2nd plaintiff. There was no evidence by the Defendant as having made any prior disclosure of his interest to the Plaintiffs' board before the purchase of the plots.

12. Ms Bernadette Gitari a land valuer, who worked with Llyod Masika Limited from 1980 to 2005 confirmed that they received instructions from the Plaintiffs in January 2004, to carryout open market valuations of the properties including those purchased by the defendant. The valuation report was produced as exhibit in this case.

13. The Defendant informed the court that he was a director of the 1st Defendant from 1st September 1993. He stated that he bought the suit properties. The Defendant, as a director of the 1st Plaintiff, was a trustee in so far as the plaintiff's assets are concerned. They have put forward the case of **Regal (Hastings) Ltd vs Gulliver [1942] 1 ALL ER 387**. The powers to dispose of a company property must be exercised by the directors for the purposes and in the interests of the company directors owe a fiduciary duty in respect of this power and breach of those duties is treated as a breach of trust. They have put forward the case of **JJ Harrison (Properties) Ltd vs Harrison [2001] EWCA Civ 1467** a trust was defined as:-

“It follows, also from the principle that directors who dispose of the company's property in breach of their fiduciary duties are treated as having committed a breach of trust, that a director who is, himself, the recipient of the property holds it upon a trust for the company”.

14. By purchasing the Runda Plots at prices below the market value, the defendant was in breach of his duties. They have put forward the case of **Nyandarua Progressive Agencies Limited vs Cyrus Wahome Nduhiu & Another [2007] eKLR**.

The Defendant bought three plots in phase 3B for the prices of Kshs.2,400,000. These transactions were purely for the Defendant's benefit as he could only have been acting on his own interest in obtaining the lowest possible price at the expense of the plaintiffs. The Defendant's failure to take any steps to ensure the Plaintiffs obtained the market value of the properties was a breach of his fiduciary duties. They have relied on Section 117 of the Evidence Act, Cap 80 Laws of Kenya.

15. As fiduciaries, directors must not place themselves in a position where there is a conflict between their duties to the company and their personal interests. They have put forward the case of **Aberdeen Rly Co vs Blaike [1854] All E.R at page 249-256 WHERE Lord Cranworth LC** stated that:-

“....No one having such duties to discharge can be allowed to enter into engagements in which he has, or can have a personal interest which conflicts, or possibly may conflict, with the interest of the company.”

16. The duty imposed is supplemented by Section 200 of the Companies Act (Cap 486). The Plaintiffs' Article 84(1) incorporate table A of the Companies Act. For the defendant to fulfil his fiduciary obligations, he had to declare his interest at a duly convened board meeting of the 1st Plaintiff's, Board of Directors. The Defendant admitted that he did not make such disclosure. The transactions between the Plaintiffs and the Defendant were not at 'arm's length' within the accepted definition of the term. The Defendant was a director of the 1st Plaintiff which was the 2nd Plaintiff's holding company.

17. Limitation period does not apply to actions by a beneficiary (the Plaintiffs) to recover trust property. They have relied on Section 20 of the Limitation of Actions Act, Cap 22 Laws of Kenya and the case of **Stephens and Others vs Stephens and Another [1987] KLR 125**.

18. As a result of the Defendant's action the Plaintiffs have suffered injury. The properties were acquired by the Defendant for much less than their market value to the detriment of the Plaintiffs. They have put forward the case of **Meinhard vs Salmon 164 N. E. 545 (1928)** where Cardozo J held that:-

“Many forms of conduct permissible in a workday world for those at arm's length are forbidden to those bound by fiduciary duties. A trustee is held to something stricter than the morals of the market place”.

The Defendant's conduct falls well below this standard causing loss to the Plaintiffs. The courts should hold him to account.

19. The valuation report conducted by Ms Benadette Gitari was not challenged by the defendant. The Plaintiffs have proved that they suffered loss being the price differential paid by the Defendant and the marked price at the time of each sale as pleaded in paragraph 16 of the plaint.

20. The Plaintiffs are entitled to Kshs.5,700,000/= plus interest from the date of filing suit. The court ought to award general damages for breach of fiduciary duty as against an equitable compensation. This is where specific restitution of the trust property is not possible having been deliberately put beyond the Plaintiffs' reach during the pendency of the suit.

21. The Plaintiffs pray for payment of a sum representing the value of the properties as at the date the Defendant sold them. The question of awarding punitive or aggravated damages depends on the court's finding on the conduct of the defendant in the transaction. They have put forward the case of **Obongo vs Municipal Council of Kisumu [1971] EA 93**, where the Court of Appeal held that exemplary damages are appropriated where the conduct of the Defendant is calculated to make a profit for himself which may well exceed the compensation payable to the plaintiff. An assessment of damages in the sum of Kshs.2,500,000/- per property would be reasonable under this head, being the market value of similar plots as at 1999 as per the comparable attached to PW2's witness statement.

22. The 2nd Plaintiff is entitled to interest at 12% per annum from the date of filing this suit until payment in full. They pray that the court does award compound interest. They have put forward the case of **Wallersteiner vs Moir [1975] 1ALL ER 849**. They urge that the prayers in the plaint be granted.

23. In answer to the Defendant's Amended submissions the Plaintiffs filed a reply dated 17th June 2020. The Plaintiff's suit is for breach of fiduciary duties hence governed by Section 20 of the Limitation of Actions Act.

24. The 2nd Plaintiff was a subsidiary of the 1st Plaintiff. The Defendant was a director of the 1st Plaintiff and he bought the property from the 2nd Plaintiff. The Plaintiffs are not separate corporate entities.

25. The terms of the benefit permitted the purchase of either half an acre at Kshs.250,000 or an acre at Kshs.400,000 and was allowed only once. The Defendant had no right to purchase the properties in the manner that he did without full disclosure as required by law and his doing so was a breach of fiduciary duty.

26. The valuation captures the contemporaneous values of the relevant plots at the time they were sold. The Defendant did not challenge the expert witness. He did not provide any evidence to contradict the valuation report.

The Defendant's Submissions

27. They are dated 2nd March 2019. They raise nine (9) issues for determination. They are:-

(i) ***Is the Plaintiff's claim statute barred?***

(ii) ***Was Mae properties Limited Company separate and distinct from pan Africa Insurance Holdings Limited and was the Defendant a duly appointed director of Mae properties Limited; the 2nd Plaintiff?***

(iii) ***Was the Defendant in breach of trust or his statutory duty as alleged by the Plaintiff?***

(iv) ***Were the transactions between the Plaintiffs and the Defendant's at arm's length and duly sanctioned by the board of directors and the shareholders of the Plaintiffs as required by law? If yes, did the defendant acquire plots***

654,655,657,902.903,904,905 legally without breach of trust and duty of care and at prices approved by the Plaintiffs?

(v) Was plot Number 905 returned to the Plaintiff and if so was it included in the claim? Have the plaintiffs accounted to the court for this plot and how it was disposed of by the Plaintiffs after it was returned to them?

(vi) The effect of valuation and reasons as to why the valuation schedule was prepared 10 years after the properties were sold by the Plaintiffs to the Defendant and after the Plaintiffs had been taken over by new shareholders;

(vii) Have the plaintiffs suffered any loss or damage as claimed in the plaint?

(viii) Is the Plaintiff entitled to the reliefs it seeks in the plaint?

(ix) Costs of the suit.

28. The suit arises from agreement of sale of various plots. The transactions were purely contractual therefore the statute of Limitation of Actions applies. He relies on Section 19(4) of the Act. The Defendant purchased the suit plot in 1994 and 1997. The suit herein was filed in 2004, ten years later. The suit ought to have been filed within six (6) years.

29. On the issue of whether the 2nd Plaintiff was separate and distinct from the 1st Plaintiff he has relied on the case of **Salmon vs Salmon & Co. Ltd [1897] AC**. The Defendant herein was not a director of the 2nd Plaintiff. The 2nd Plaintiff had its own board of directors. There was no conflict in interest between the Defendant and the 2nd Plaintiff. He purchased the plots using his name as known and declared to the Plaintiffs. All the agreements for sale and transfer instruments were in his name and not a nominee.

30. The Defendant's duty of care and trust was owed to the shareholders of the 1st Plaintiff. The 1st Plaintiffs Board of Directors sought legal opinion from the firm of M/S Mohamed & Muigai Advocates who were the company lawyers at the time with respect to the intended sale of plots by the Plaintiffs to the directors and senior staff.

31. The Plaintiffs failed to furnish this honourable court with audited evidence that the Plaintiffs incurred loss from the sale of the specific plots sold to the Defendant during the period 1994 to 2003.

32. Shareholders of the 1st Plaintiff sanctioned the sale of the plots in the Annual General Meeting of 1st July 1994. There was no breach of either trust or fiduciary duty where the shareholders have authorized the transaction.

33. The Defendant acquired the plots legally and there was no conflict of interest hence no breach of trust and there was no breach of fiduciary duty. The transfer instruments were executed by the Plaintiffs in favour of the Defendant without fraud, deceit or concealment.

34. The Defendant purchased the plots in his own name. Some of the plots bought were of low quality, unattractive and unsellable. This is why the Plaintiff allowed them to be sold at a low price which also varied from phase to phase.

35. There were no valuations carried out by Ms Benedette Gitari during the period of sale of the plots to the Defendant, that is between 1994 and 1997 when the Defendant purchased the plots at discounted rates. Valuations are opinions and they vary. The values prepared by Ms Gitari were not independent and were carried out for the specific purpose of filing the subject suit not for sale purpose. They were carried out ten years after the Defendant purchased the plots.

36. The Plaintiffs suffered no loss as claimed and the suit must fail.

37. New shareholders having taken control of the Plaintiff after the facts should not act retroactively. The sale and purchase of the suit plots were on a willing seller, willing buyer basis and the defendant acted on the best practice having followed all the laid out procedures to acquire the said plots.

38. On the issue of claim being statute barred, the defendant submitted that the suit arises from agreement of sale of various plots purchased in 1994 and 1997 thus the transactions were contractual and fell within the timeline of six (6) years provided by Section 19(4) of the Limitation of Actions Act relating to mortgage money or proceeds of sale of land, and the matter is therefore statute barred for being filed in 2004, ten (10) years after the transactions were entered into. He prays that the Plaintiffs suit be dismissed with costs.

The Plaintiffs' Submissions in Reply

39. They are dated 17th July 2020. The Plaintiffs' submitted that it was irrelevant that the Plaintiffs are separate entities as there was no dispute that the 2nd Plaintiff was a subsidiary of the 1st Plaintiff and therefore the Defendant as trustee of the 2nd Plaintiff. On the issue regarding plot 905, the Plaintiffs submitted that they still had a claim in respect of the said plot since the Defendant had bought in breach of fiduciary duties to the Plaintiff by failing to disclose his interest. The valuation report filed by PW2 is not erroneous since the valuer as an expert used values from similar plots sold at the time as the Defendant's allegedly purchase.

Analysis and Determination

40. I have considered the pleadings, the evidence on record, the written submissions filed on behalf of the parties and the authorities cited. The issues for determination are:-

- (i) *Whether the Defendant breached his fiduciary duties owed to the Plaintiffs.*
- (ii) *Whether the Defendant could legally acquire the plots.*
- (iii) *Is the suit time barred?*
- (iv) *Are the Plaintiffs entitled to the reliefs sought?*
- (v) *Who should bear costs of the suit?*

41. Black's law dictionary 11th Edition at page 770 defines "**fiduciary**" as someone who is required to act for the benefit of another person on all matters within the scope of their relationship; one who owes to another duties of good faith, loyalty, due care and disclosure. It is also defined as someone who must exercise a high standard of care in managing another's money or property.

42. From the foregoing definition; a company director owes fiduciary duties to the shareholders of a company due to the nature of their relationship.

43. The Companies Act, 2015; provides for general duties of directors which are based on common law rules and equitable principles that apply in relation to directors and have effect in place of those rules and principles with respect to the duties owed to a company by a director. The Act does not provide for specific fiduciary duties of a director. They are provided for by common-law to be the duty of loyalty and good faith and duty of care and skill. In **Ajay Shah v Deposit Protection Fund Board as Liquidator of Trust Bank Limited (In Liquidation) [2016] eKLR**, The Court of Appeal cited 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."*

44. The duties of loyalty and good faith can be expounded to include the **duty not to profit from a position of trust which directors hold**. That duty has been extended to protect opportunities available to a company. Thus a director, even where he is a shareholder should not take any corporate opportunities for personal benefits. That was the finding in **Regal (Hastings) Ltd -v- Gulliver [1967] 2 AC 134**.

45. From those two wide duties also stems **the duty to avoid conflict of interest**. A director must avoid conflicts between their role and their personal interests, and must avoid situations in which they have, or could have, an interest that conflicts, or may conflict, with the interests of the company. This applies in particular to the exploitation of any opportunity, information or property.

46. The Wider duty of care and skill gives rise to the **duty to only act within the powers as granted by the Company's constitution**. **The Companies Act Chapter 486 Laws of Kenya** was repealed by **The Companies Act 2015**. The repealed Act had provisions prohibiting directors from dealing with assets of a company without full disclosure to the company and a resolution by the company. **Section 142** of the **2015 Act** codifies the equitable rule that a director must act in accordance with the company's constitution and must only exercise his powers for their proper purpose for the company. The liability is strict: if the director's substantial purpose was not the purpose for which the power was conferred, it will not matter if he exercised the power in good faith or in the belief that it would promote the success of the company for the benefit of the members as a whole.

47. It is clear from the evidence on record that the Defendant disregarded the Plaintiffs resolution and bought the suit properties from the 2nd Plaintiff at prices below the prevailing market price thereby acting *mala fide* and against the interests of the Plaintiffs. He failed to declare to the 1st Plaintiff the nature of his interest in the contracts entered into by him and the 2nd Plaintiff. This occasioned the 1st Plaintiff as the sole shareholder of the 2nd Plaintiff loss and damage. The difference between the market value at the time of purchase and the price paid by the Defendant amounts to the sum of Kshs.5,700,000/-. The 1st Plaintiff also claims damages for loss of use which is calculated at 12% of principal loss from the date of purchase to date of filing suit at Kshs11,178,069.86/-.

48. I find that the Defendant breached his fiduciary duties owed to the Plaintiffs. This therefore means he could not legally acquire the plots.

49. It is the Defendant's case that this suit is time barred. He admitted that he was a director of the 1st Plaintiff and dealt with the 2nd Plaintiff, in that capacity he was a trustee of the 1st and 2nd Plaintiffs assets. Section 20(1) of the Limitation of Actions Act, provides that:-

"20. (1) None of the periods of limitation prescribed by this Act apply to an action by a beneficiary under a trust, which is an action-

(a) in respect of a fraud or fraudulent breach of trust to which the trustee was a party or privy; or

(b) to recover from the trustee trust property or the proceeds thereof in which the possession of the trustee or previously received by the trustee and converted to his use."

50. In the case of **Mae Properties Ltd vs Joseph Kibe & Another HCCC 311 of 2004**, the court dismissed a preliminary objection on limitation based on the fact that the plaintiff satisfied the cause of action of fraudulent breach of trust, and if proved, fell within Section 20 (1)

of the Limitation of Actions Act.

51. In **Halsbury's Law of England 4th Edition Vol 28, paragraph 33**, it is stated that:-

“Exclusion from protection in certain cases No period of limitation prescribed by the Limitation of Actions Act 1939 applies to an action by a beneficiary under a trust, being an action in respect of any fraud or fraudulent breach of trust in which the trustee was a party or privy or to recover from the trustee trust property on the proceeds of it in the trustee's possession or previously received by trustee and converted to his use. It no longer makes any difference whether or not the trust is an express trust. If, however, the action is not one of these types, the mere fact that property is trust property does not prevent time from running”.

According to **Blacks' Laws Dictionary 9th Edition**, fraud is defined as:-

“A knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his or her detriment.....”.

Fraudulent act is defined as:-

“Conduct involving bad faith, dishonesty, a lack of integrity or moral amplitude”.

It is the Plaintiffs' case that the Defendant concealed the price the properties were sold, from the 2nd Plaintiff and the court. I find that this suit is not time barred.

52. From the foregoing, I find that the Plaintiffs' have proved their cases as against the Defendant in a balance of probabilities. They are entitled to the reliefs sought.

53. Accordingly judgment is entered for the Plaintiffs as against the Defendant on the following terms:-

- (a) ***That a declaration is hereby issued that the Defendant was a trustee for the Plaintiffs in respect of the Plaintiffs' assets.***
- (b) ***Kshs.16,878,969.86.***
- (c) ***General damages, Kshs.500,000/-***
- (d) ***Costs of the suit and interests.***

It is so ordered.

DATED, SIGNED AND DELIVERED IN NAIROBI ON THIS 30TH DAY OF SEPTEMBER 2021.

.....

L. KOMINGOI

JUDGE

IN THE PRESENCE OF:-

MS ONYANGO FOR MR. GACHUHI FOR THE PLAINTIFFS

MR. GITHUI FOR THE DEFENDANT.

STEVE - COURT ASSISTANT