



Gachungu & another (t/a Vinco Footwear) v Barclays Bank of Kenya Limited (Civil Suit 212 of 2015) [2023] KEHC 15 (KLR) (Commercial and Tax) (6 January 2023) (Judgment)

Neutral citation: [2023] KEHC 15 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL SUIT 212 OF 2015
A MABEYA, J
JANUARY 6, 2023**

BETWEEN

STANLEY MWANGI GACHUNGU 1ST PLAINTIFF

BILHA WARUGURU MWANGI 2ND PLAINTIFF

T/A VINCO FOOTWEAR

AND

BARCLAYS BANK OF KENYA LIMITED DEFENDANT

JUDGMENT

1. By a partial judgment delivered on October 4, 2019, this Court found in favor of the plaintiffs and issued a preliminary decree in the following terms: -
 - a. The defendant shall compensate the plaintiff for their share certificates fraudulently sold by the defendant which compensation shall be at the prevailing current market value of those shares. The plaintiff shall provide evidence of the current prevailing market value of the shares at a date which shall be fixed by the court.
 - b. The plaintiff is awarded costs of the suit.
2. At paragraph 24 of the judgment, the Court held that the prevailing market value could only be the value at the Nairobi Stock Exchange (NSE).
3. Vide an affidavit sworn by MMK Mukunya on November 28, 2019, the plaintiff produced as MMK3 a valuation report on shares dated November 27, 2019. MMK Mukunya was a Certified Public Accountant as per the Practicing Certificate produced as MM1.



4. He averred that he received instructions to give a valuation report on the plaintiff's shares that had been fraudulently sold by the defendant in line with the judgment of October 4, 2019. He received the bundle of documents marked as MMK2 which assisted him in coming up with the report. In his analysis, the net value (after tax) of all the shares according to the current market value as provided by the Nairobi Stock Exchange was Kshs 231,188,156/=. He produced copies of letters from NSE as MMK 4(a) & (b).
5. The defendant similarly filed a valuation dated August 23, 2020. The same was produced in the affidavit sworn by Michael Massawa on September 22, 2020. He was the legal counsel for the defendant. He averred that Deloitte Consulting Limited conducted an analysis and found that the cumulative prevailing market value for the plaintiff's share certificates as at July 3, 2020 was Kshs 3,585,353/=. The valuation report dated August 23, 2020 was produced as MM1.
6. The court directed the parties to file written submissions on the valuations. The plaintiff filed their submissions dated October 18, 2021 and January 28, 2022, respectively while the defendant's submissions were dated June 23, 2021 and November 18, 2021, respectively. The parties highlighted those submissions on February 10, 2022.
7. It was the plaintiff's case that prevailing market value means the published wholesale price in force in the market and where there is no such published wholesale price, the prevailing market price of any goods. That the prevailing market price of the plaintiff's shares was the prices at NSE as they were shares of listed companies. That the Court ought to consider that the shares were bought for investment purposes and not speculation.
8. The Court was urged to reject the defendant's literal approach of simply multiplying the shares bought with the current market values in the NSE and adopt a purposive approach as the shares bought in 1990/1991 would have increased in numbers and values.
9. It was further submitted that compensation was a remedy awarded to replace the loss caused by an injury and that there would be no true compensation, if the Court overlooked the corporate actions that have taken place between the period of share purchase to valuation such as dividends, bonus payments, rights issues and share splits. That for the plaintiffs to have been truly restituted to the position they would have been had the shares not been fraudulently sold, the Court ought to consider the historical events of corporate actions such as dividend payouts, share splits and bonuses which affect all shareholders, from which the plaintiffs would have automatically benefited from by virtue of being shareholders without making any other investment decisions.
10. It was therefore submitted that the valuation report produced as MMK3 had correctly considered the basic intrinsic value of all the rights of the plaintiffs based on the market value of the shares including; the dividend payouts, bonuses and stock dividends, and stock splits. That the documents obtained from the subject companies indicated corporate action and were enough proof, thus the corporate action was not speculative as claimed by the defendant. That the defendant's claim that the corporate action such as dividends and share splits were special damages and ought to have been pleaded was wrong as those components were part of the intrinsic value of shares and there was therefore no need to specifically plead them.
11. On the other hand, it was submitted for the defendant that applying the literal rule of interpretation of the Court's order, current prevailing market value meant, the trading prices of shares at NSE at the date of valuation multiplied by the number of shares. That the plaintiffs had not prayed for the Court to take into account corporate actions. Therefore, they were not subject to interrogation before Court and was not included in the Court's judgment. That it was farfetched to assume that if the shares were



still in the plaintiff's custody, they would have held on to them during the entire period for them to accrue the value of the share splits, rights issues, bonus issues and dividends.

12. It was further submitted that dividends earned from shares do not form part of the prevailing market values of the shares, and were only profits that a company pays out to its shareholders. That they were only an income earned by a shareholder from the investment and ought to have been pleaded and proved by the plaintiff. That profits were special damages and ought to have been pleaded and proved, and since no such claim was made, the Court was unable to ascertain whether dividends were paid, bonuses issued or any shares split. That the plaintiff's valuation also included DTB shares valued at Kshs 1,522,653/= but DTB's share certificates were not among those pleaded in the plaint. That at page 40 and 43 of the plaintiff's report, the specific number of shares in the computation of the value of shares had not been clearly indicated.
13. This Court has considered both the written and oral submissions. To my understanding, the issue is whether or not corporate actions form an intrinsic value of shares, such that they ought to be included in a share valuation.
14. The plaintiff wants the Court to take this approach and consider the historical events of the shares from the time of purchase to the time of valuation for fair compensation and restitution. On the other hand, the defendant would like the Court to find that the valuation could only take into account the number of shares multiplied by the prevailing price at the NSE. To the defendant, that is the only way to get the prevailing current market value of the shares.
15. From the record, the plaintiffs' shares that were fraudulently sold by the respondent are as follows: -
 - a. EABL – 385
 - b. KBL - 1,926
 - c. ICDC Investments - 74,091
 - d. ICDC Investments - 29,257
 - e. Barclays - 1,250
 - f. EAP&L Co - 595
 - g. Diamond Trust - 1,500
 - h. BAT - 700
 - i. STANCHART - 2,567TOTAL - 112,271
16. From the documents obtained from the said companies and produced by Mukunya, it would seem that due to share splits and corporate action by those companies over time, by October 2019 the said shares had increased to 4,066,604.
17. The first question to address is the meaning and purpose of compensation. *Black's Law Dictionary, 10th Edn*, defines compensation as 'payment of damages, or any other act that a court orders to be done by a person who has caused injury to another. In theory, compensation makes the injured person whole'. In other words, compensation seeks to place the injured person back to the position he would have been were it not for the injury.



18. It is not in dispute that in its judgment of October 4, 2019, the Court found that the defendant had fraudulently sold the plaintiff's shares and was ordered to compensate the plaintiffs for the same at the prevailing current market value.
19. There is no dispute as to what the term 'prevailing market value' means. The real question is, what was the intention of the Court when it ordered compensation? Was it a simple question of, hypothetically speaking, A had 50 shares in 1990, those shares are now worth 10 shillings each as per NSE price listing thus the value of shares is 50 times 10, or was it a question of how much the 50 shares had grown, how much profit would it have earned as at the time of valuation? The latter would take into consideration, the bonuses and dividends paid out and the share split plus all events that have taken place during the period the said shares were out of reach of the real owners together with the current price.
20. Having already found that the plaintiffs suffered injury from the fraudulent action of the defendants, to this Court's mind, compensation was ordered to make up for the injury suffered by the plaintiffs, such that the plaintiffs would be returned back to the position they would have been had the fraud not occurred.
21. When one is purchasing a share in a company, he gains several benefits including voting rights and gains. More often than not, it is the gains that will influence a share purchase. The 1st plaintiff testified that he purchased the shares as an investment for his old age and left the share certificates with the defendant as he believed they were in safe custody. That he could also rely on them for a future loan. He therefore expected to benefit from all the gains that ordinarily would come with shares including dividends, share splits, bonuses etc. Indeed, it is when the dividends stopped flowing in that the plaintiff realized that something was wrong. That alone informs the Court on the plaintiffs' intentions when they purchased the various shares.
22. Simply put, one cannot divorce a share from its benefits. When the plaintiffs purchased the shares, their expectation was that they would benefit from those shares as well as the goodies that are appurtenant to them. Dividends, bonuses, interest, share splits etc are the goodies that are appurtenant to shares held in a company.
23. It then means that the value given to shares is not only in the number of shares alone, but the whole intrinsic value carried by that one share. When the plaintiff came to Court to seek justice for their shares, they did not only look at recovering the actual number of shares lost, but those shares together with all the benefits that had been lost. The question is, would they not have earned dividends and bonuses from the performing companies? What of the share splits and interests? The answer is in the affirmative.
24. The defendant's submission that there is no way to ascertain that the plaintiff would have benefited from the corporate actions is far from the truth. A quick look at exhibit MMK2-4 reveals copies of letters/dividend notices from different companies confirming the dividends and share splits that the plaintiffs would have benefited from over time had their shares not been fraudulently sold.
25. It is therefore not speculative that the plaintiffs would have earned other benefits, there is solid evidence of what ought to have been earned between 1990 and 2019. The dividend notes also indicate the dividend rates, bonus rates, share splits rate and interest rate payable over time. The defendant's submission that the valuation is speculative is thus rejected.
26. From the foregoing, it is clear that the plaintiff would have benefited from all the gains that are intrinsically linked to their shares had the defendant not sold them fraudulently. The plaintiffs' victory of compensation cannot thus be limited only to the number of shares multiplied by the current value,



- as it was a victory for the intrinsic value of the share multiplied by the current market value listed by NSE.
27. This Court therefore rejects the defendant's submissions that the corporate action needed to have been specifically pleaded for. The shares which formed the subject of the claim were the shares and all the benefits that are ordinarily related to a share. Those benefits add greatly to the value of a share, such that a shareholder is a natural beneficiary of all those corporate actions such as dividends and bonuses. The plaintiffs, as shareholders in all those companies, had an automatic right to the total value of the shares.
 28. The simplistic or literal approach taken by the defendant in its valuation takes away the very purpose of investments in shares. To accept that approach would effectively deny the plaintiffs the full compensation ordered by the Court. Further, that approach would devalue the shares.
 29. From the plaintiffs' valuation, the companies whose shares they had purchased confirmed that they could have benefited from several corporate actions such as dividends and share splits. The rates are clearly provided for. It is therefore not true that this Court would not be able to decipher the dividend rates as they were not pleaded or proved. The Court agrees with the plaintiffs' submission that the valuation report is enough proof that the shares indeed attracted corporate action and the plaintiffs are deserving of what was denied of them due to the fraudulent acts of the defendant.
 30. The Court notes that, it was only that at the time of delivering the preliminary judgment that the Court could not ascertain the value of the shares. Once the valuation reports were filed, the Court is in a position to follow the financial reports and examine the historical events of the shares thereby ascertain the value.
 31. Going by the above, the conclusion is that the approach taken by the defendant's valuation does not amount to just compensation for the plaintiffs as it fails to consider the total value of the shares and the gains the plaintiff would have benefited from but for the fraudulent acts of the defendant. In the end, the Court finds that the plaintiffs' valuation is more acceptable for the interest of justice and promotion of the principle of just compensation.
 32. The defendant however claimed that the plaintiff's valuation included DTB shares valued at Kshs 1,522,653/=, but DTB's share certificates were not among those pleaded in the plaint. This Court has seen the plaintiff's pleadings, testimony in court and evidence. Though DTB was not specifically pleaded for in the amended plaint dated December 1, 2016, PW1 being Stanley Mwangi Gachugu laid a basis for it at paragraph 8 of his witness statement dated May 21, 2018 which was adopted as his evidence in chief.
 33. He testified that upon investigations, he established that the defendant had fraudulently sold his shares, and he managed to get copies of Shares Transfer Forms from ICDC and Diamond Trust Bank. He produced those forms in Court without any objection and they were admitted as evidence.
 34. The defendant cross-examined PW1 but did not challenge that evidence. The effect was that the claim on DTB shares and the documentary evidence in support of that claim was unchallenged and was properly placed before Court.
 35. Indeed, in its judgment, the Court made- reference to that testimony and the evidence produced in support thereof. In this regard, the plaintiffs thus established a case for DTB and produced evidence unchallenged. The defendant's submission is rejected.
 36. In the end, this Court allows the valuation dated November 27, 2019 and enters a final judgment in favor of the plaintiffs as follows: -



- a. The defendant shall compensate the plaintiff for their shares fraudulently sold by the defendant in the sum of Kshs 234,188,156/= being the prevailing current market value of those shares.
- b. Interest shall be applicable at Court rate from the date of this Judgement.
- c. The plaintiff is awarded costs of the suit.

It is so decreed.

DATED and **DELIVERED** at Nairobi this 6th day of January, 2023.

A. MABEYA, FCI Arb

JUDGE

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