Infinity Gemstones Limited v Sehra Engineering Limited & 3 others (Civil Suit 32 of 2008) [2023] KEHC 22726 (KLR) (20 September 2023) (Judgment)

Neutral citation: [2023] KEHC 22726 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CIVIL SUIT 32 OF 2008

DKN MAGARE, J

SEPTEMBER 20, 2023

BETWEEN

INFINITY GEMSTONES LIMITED ..... PLAINTIFF

AND

SEHRA ENGINEERING LIMITED ..... 1ST DEFENDANT

KENYA COACH INDUSTRIES LIMITED ..... 2ND DEFENDANT

KULDEEP S. SEHRA ..... 3RD DEFENDANT

NARAIN SINGH SOKHI ..... 4TH DEFENDANT

JUDGMENT

1. This matter has been in court since 2004. There is no real explanation for the delay. I look over the matter on 25/4/2023 when the matter was for hearing. Mr. Anada then informed me that they were not ready to proceed as they had not served. I decided to shoot the magic bullet. I reluctantly adjourned with a rider that the suit shall stand dismissed If it does not proceed on 31/5/2023. This worked magic. The parties were ready to proceed. The plaintiff and another witness testified. Sometimes I surprise myself.

2. The claim is set out in the Amended plaint filed on 10/7/2017. The original plaint was filed on 10/23/2005. After some amendments and applications the suit crystalized in the Amended plaint dated 6/7/2017.

3. As is usual in claims of this nature, the case was delayed to the maximum period possible or vain hope that interest and other claims continue to accrue. The claim gave in the plaint but not particularized in prayers.

4. The claim had hitherto been filed as a 2004 matter and subsequently transferred and given a 2008 number. In the Plaint dated 19th October 2004 and amended on 6th July 2012, the Plaintiff pleaded among others that:

   i. At all material times relevant to this suit, the 3rd and 4th Defendants were directors of the Plaintiff and also shareholders with share capital of 25% each.

   ii. The 3rd Defendant is also a director of the 1st Defendant and the 4th Defendant director of the 2nd Defendant.

   iii. The 3rd and 4th Defendants entered into a joint business venture together with one Nitin Shah also having a shareholding of 50% where they registered the Plaintiff company on 7th June 1996.

   iv. The Directors agreed for Nitin Shah to be the chairperson of the Plaintiff's Board of Directors and that the directors and shareholders would raise the company's operational costs in the ratio of the shares held.

   v. The Directors agreed to purchase an excavator registration number KAA 503M at Ksh. 2.5 Million on 9th September 1996 through financing arrangement with Bullion Bank.

   vi. The said excavator was rented to the 1st Defendant from January 1997 at the rate if Ksh. 170,000 per month.

   vii. In March 1998, more machinery and spare parts were bought at USD 33,537 on credit advanced by Abbeybarn Limited and further tax and clearance costs of Ksh. 575,523 and 678,566 respectively.

   viii. The 3rd Defendant received the machinery and spares on behalf of the Plaintiff in March 1998 in Makuki Ranch Taita Taveta.

   ix. The Plaintiff also had an array of working assets that would constitute its tools of trade which they Defendants continuously possessed and used while denying the Plaintiff the right to ownership and despite the fact the creditors for the goods were demanding loan payment from the Plaintiff.

   x. On 3rd November 19999 for instance, the Plaintiff was served with warrants of attachment and sale by Abbeybarn Limited to which it objected but later discovered that most of its items were fraudulently transferred by the 2rd and 4th Defendants who the Plaintiff learned had resigned as directors back in February 1999.

   xi. The Plaintiff pleaded that therefore the 3rd and 4th Defendants acted without authority on transferring the assets without a resolution and creating unauthorized debts to the detriment of the company and not in its interest thereby leading to losses particularized as:

      a. Rental from Sehra Engineering Ksh. 3,740,000

      b. Loss of user Ksh. 611,161,320

      c. Replacement of Assets Ksh. 25,090,390

      d. Interest due to Abbeybarn Limited Ksh. 18,598,747

      e. Loss of Investment Income Ksh. 456,216,624

      Total Ksh. 1,114,807,081

5. The Plaintiff thus prayed for the following reliefs.

   a. A restitution of the Plaintiff's assets art Market Value

   b. Damages for the loss of user from date of breach to date of judgment

   c. Rents for hire of excavator from 1st January 1997 to October 1998

   d. Compound interest of 12% on the supply of goods till restitution

   e. Damages for the loss of investments

   f. Cost of the suit.

6. It is important to know that special damages must not only be particularized and specifically proved, they must also be prayed for. It is not rebought to set them out in the plaint this is buttressed by the court of Appeal decision in the case of David Bagine Vs Martin Bundi [1997] eKLR, the court of Appeal stated as follows: -

> " It has been held time and again by this Court that special damages must be pleaded and strictly proved. We refer to the remarks by this Court in the case of Mariam Maghema Ali v. Jackson M. Nyambu t/a sisera store, Civil Appeal No. 5 of 1990 (unreported) and Idi Ayub Sahbani v. City Council of Nairobi (1982-88) IKAR 681 at page 684: "....special damages in addition to being pleaded, must be strictly proved as was stated by Lord Goddard C.J. in Bonham Carter vs. Hyde Park Hotel Limited [1948] 64 TLR 177 thus:
>
> "Plaintiffs must understand that if they bring actions for damages it is for them to prove damage, it is not enough to write down the particulars and, so to speak, throw them at the head of the court, saying, 'this is what I have lost, I ask you to give me these damages.' They have to prove it"

7. The claim is that the 3rd and 4th Respondents were directors of the plaintiff. Have 25% shares each. The 3rd defendant is a director of the 1st defendant while the 4th defendant is a director of the 2nd defendant. The 3rd and 4th Defendant entered with a joint business with Nitin Shah have 50% shareholders.

8. The directors agreed to buy the excavator KAA 505M Komatsu PC 220, for 2.5 million financed by Bullion Bank Ltd on 2/9/1996. The excavator was operational by October, 1996. It was being repaired at 170,0000 by the plaintiff.

9. The directors resolved to buy more machinery where the 23rd defendant was set to UK to buy machinery. They bought spares worth USD 33537 on credit form Abbeybarn Ltd and Ksh. 573,525, Ksh. 678,568 was paid in march 1998 various spares are listed in pages 2- 4 of the Amended plaint. Various machinery worth Ksh. 1,472,938 were stored.

10. There are items listed as having been lost. Most of these goods were proclaimed by Abbugu Ltd in Mombasa HCC 326 of 1999. The goods were reportedly fraudulently transferred to the Defendants.

11. Motor vehicle Excavator Komatsu PC 220 was reported transferred and other working assets. The particulars of fraud are listed in paragraph 23 of the Amended plaint.

12. The Defendants filed their Defence in which it was inter alia pleaded as follows:

    i. Sometimes in 1999, the Plaintiff's goods subject of this suit were attached pursuant to a judgment of court in HCCC Suit No. 326 of 1999.

ii. The 1st and 2nd Defendants filed a Notice of Objection to the attachment and the court upheld the Objection on 26th July 2006 and directed the Plaintiff and the Defendant in the matter to jointly return the Objector's goods.

iii. The impugned goods were lawfully transferred by the Plaintiff to the 1st and 2nd Defendants and there was no fraud, or loss of earnings and no rent or restitution payable to the Plaintiff.

13. At the hearing, the Plaintiff called two witnesses, PW1, Richard Otieno who testified in Court. He introduced himself as Accountant by profession. The witness relied on his witness report of June 2016. It was his case that the report had no date and was signed by Isika Maina and Associates to compute losses from 1st January 1997.

14. He also stated that he was not aware of the outcome of the objection proceedings. The Plaintiff also called, PW2, Nitin N. Shah who testified in Court. He relied on his witness statement dated 21st October 2022 and filed on the same date.

15. He relied too on the list of documents dated 3rd July 2018 and further list of documents dated 6th December 2019 both of which he produced in evidence.

16. In cross examination, it was his case that he was the Defendant in Mombasa HCCC No. 326 of 1999 and the 1st and 2nd Defendants were objectors and raised objection to the attachment of the goods.

17. He further testified that in that case the court ruled that the goods be returned to the Objectors. It was his further case that the court in Mombasa HCCC No. 326 of 1999 did not determine the issue of ownership of the goods and which was before this court for determination.

18. He further stated that it he had already filed this suit by the time the Ruling in Mombasa HCCC No. 326 of 1999 was delivered on 28th July 2006. He testified on cross examination that in the said Ruling had not beer set aside or reviewed.

19. In re-examination, it was his case that ownership of the goods has not been determined and that later he noticed that 2 Directors out of the 3 had resigned from the Plaintiff company. Further, he stated that the Plaintiff did not participate in any consent.

20. The Defendant called one witness. DW1, one Narain Singh Sokhi relied on his Witness Statement dated 12th April 2023 and List of Documents dated 5th April 2023 and testified in support of the Defendants' case.

21. In cross-examination, it was his case that they awarded the machinery in the Objection proceedings and the Plaintiff was under obligation to return the goods to the Objector.

Analysis

22. It is the duty of the court to analyze evidence, pleadings, the law and submissions with a view of coming up with a proper finding both on fact and law. I am aware of the duty placed on the trial court. It is the reverse of the 1st Appellate court. In The aspect of discretion was settled in Mbogo & Another vs. Shah [1968] E.A. 93 at page 96, where the legendary Sir Charles Newbold P elucidated the point in the most poignant way as hereunder: -

> " ...a Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole

that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been misjustice...."

23. In Fidelity & Commercial Bank Ltd V Kenya Grange Vehicle Industries Ltd (2017) eKLR, the Court of Appeal, Ouko, Kiage and Murgor JJA held as doth;

> " Courts adopt the objective theory of contract interpretation and profess to have overriding view sometimes called Four Corners of an Instrument, which insists that a documents meaning should be derived from the document itself, without reference to anything outside of the document, extrinsic reversed.

24. The trial court and this court will construct documents in a similar manner as there are no witnesses required to know the content of a document. I had the advantage of seeing the witnesses and reading the evidence tendered. Some were in form of documents. Such documents must be allowed, as they must to speak for themselves.

25. The issues for determination in this case are as stated below: -

    a. Who is entitled to the disputed goods herein

    b. Can this Court Order restitution of the goods in favour of the Plaintiff in the circumstances of this suit?

    c. Is the Plaintiff entitled to the damages and loss of rent as claimed in the Plaint?

    d. Whether the claim is time barred

26. The plaintiff thus prayed to have the goods restituted and payment of monies set out in paragraph 25A. The total claimed as loss is 1,114,807,081. The defendant filed its defence. They also filed an application to strike out the suit for: -

    a. Being vexatious.

    b. Being time barred.

27. The Court dismissed the application on 19/2/2023. The time barred was indicated as from 1999 here the suit was not time barred. The court noted that pleadings had not been amended read 1997.

    a. Who is entitled to the disputed goods herein

28. Whereas the Plaintiff's claim is, in a nut shell, that it is entitled as the legal ownership to the impugned goods and therefore damages for loss of user, loss of investment and loss of rents; the Defendants maintain that in the first place, the goods were lawfully possessed by the Defendants following the Ruling of Court which ordered the Plaintiff and the Defendant in Mombasa HCCC No. 326 of 1999 to return the goods to the Objectors in that case.

29. Further Plaintiff's case is that the 3rd and 4th Defendant fraudulently transferred the Plaintiff's assets to the Objectors to which the Defendants contend that the transfer was pursuant to the Ruling of Court.

30. I have had the opportunity to peruse the documents and averments rendered by the parties and note that it is important for this Court to analyze the effect of the Ruling of Court dated 28th July 2006 on this suit.

31. That Ruling was in respect of Mombasa HCCC No. 326 of 1999 in which I note the Plaintiff herein was the Defendant and Abbeybarn Limited, a company numerously mentioned herein though not a party, was the Defendant therein. The Objectors therein were the 1st and 2nd Defendants in this suit.

32. I note that a question of ownership is a one calling for factual proof and the Plaintiff has a duty the under the *Evidence Act* to prove ownership of the alleged goods.

33. The relevant Sections of the *Evidence Act* proffer as follows:

    a. 107. Burden of proof

        1. Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

        2. When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

    b. 108. Incidence of burden

        The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

    c. 109. Proof of particular fact

        The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

34. The Plaintiff pleaded that the machines and spare parts supplied by Abbeybarn Limited were on credit and the Plaintiff also had working assets as its tools of trade which the Defendants benefited from continuous use while denying the Plaintiff the right to ownership.

35. It is not in dispute that this Court directed the Plaintiff and Defendant in Mombasa HCCC No. 326 of 1999 to return the attached goods to the Objectors. The Plaintiff was the Defendant in that case. The ownership of the goods was not determined in the said Ruling and remains available to the Plaintiff to establish by way of evidence.

36. In any case, if the goods are not the same, then the plaintiff was under duty to prove ownership. For example, in respect to ownership of Motor vehicles, Section 8 of the *Traffic Act* provides thus:-

> " The person in whose name a vehicle is registered shall, unless the contrary is proved, be deemed to be the owner of the vehicle.

37. The Plaintiff has made allegations of ownership of an array of goods ranging from machinery and spare parts. However, this court notes that the machinery and spare parts claimed by the Plaintiff were chattels and proof of a chattel to the least ought to include by way of a certificate of ownership or log book, receipt or invoice with ETR slip.

38. In respect of the Komatsu Excavator PC 220, at least the Plaintiff attached an agreement of sale and payment cheque but I note these served as proof of an equitable as opposed to the legal title. The documents produced as Transfer of Ownership dated 9th September 1996 was merely an Application for the Transfer.

39. Whereas there are receipts, delivery notes and invoices for particular goods, the Plaintiff failed in not specifically pleading the items for which the receipts would proof and the effect of the Ruling of Court

that commanded the Plaintiff to return the goods to the Objectors who are the 1st and 2nd Defendants herein. Howsoever, invoices by themselves cannot prove title.

40. As state by the court in Randon S. A. Implementors Eparticipacoes v RT (East Africa) Limited; Jovan H. Kariuki (Applicant); Multiple Hauliers (E.A) Limited & another (Objectors) [2021] eKLR while making reference to the case of Arun C. Sharma v Ashana Raikundalia T/A A. Raikundalia & Co. Advocates & 4 Others where the court held that: -

> "I note also that the invoice from Hotpoint is not accompanied by an ETR receipt which is an important document ownership. One other thing; the judgment-debtors live in the house where the items were attached and in law as a general rule, ownership of the house does not necessarily extend to ownership of the domestic goods therein because they could as well belong to the tenant."
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> ...From the above cited authorities, I find that the law is clear on the probative value of invoices in as far as objections to proclaimed/attached properties are concerned and I do not intend to reinvent the wheel on the said subject. The 2nd objector listed at least 12 items supported by various invoices in its affidavit in support of the objection to the attachment of the said items. I am not satisfied that the invoices presented by the 2nd Objector constitute sufficient proof of legal/equitable interest in the attached goods save for the invoice at page 19 of the annexures that has an ETR receipt attached to the top left corner.

41. The documents that the Plaintiff produced in Court do not specifically proof ownership of the machinery and spare parts claimed and leaves this court in conjecture as to the legal title claimed by the Plaintiff.

42. The court in Duncan Kabui v Samuel Bede Igembo & Another [2014] eKLR faced with similar circumstances stated as follows:

> "It is my finding that the objector has not brought any evidence of any title or document of ownership to the motor vehicles that are the subject of the proclamation of attachment, and that she has not discharged her onus of proving her legal interest in the said motor vehicles. The sale agreement produced as evidence by the objector of the purchase of the said motor vehicles cannot on its own be evidence of any legal interest in the said motor vehicles. In addition, a sale agreement without any proof of consideration paid is only proof of an intention to sell and not of a binding contract.....an equitable interest in the said property can only arise upon proof of payment made pursuant to the said sale agreement, and the objector did not provide proof of any such payments made or consideration she had given pursuant to the said sale agreement."

43. During the hearing, the Plaintiff too did not link the particularized spares parts and machinery to any receipts as contained in the bundle of the documents produced in evidence. It would be expected that the Plaintiff identifies the specific machinery and spare parts, proves ownership to itself and proceeds to prove that the Defendants, without authority transferred or caused the transfer thereof. This was conspicuously lacking.

44. In the case of Bethwell Allan Omondi Okal v Telkom (K) Ltd (Founder) & 9 others [2017] eKLR, the Court of Appeal stated as follows in reference to pleadings:

> When a litigant moves to court, it must be clear from his pleadings what exactly his grievance is and what remedy he is seeking from the court. It is not for the court to second guess or imagine what the cause of action is and what relief a litigant expects from the court.
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> Pleadings are not just a formality; they are essential in order to frame issues for the determination by the court and to enable the parties know exactly what case they are expected to meet. This issue was aptly addressed in the time honoured English case of
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> Thorp v Holdsworth [1876] 3 Ch. D. 637 at 639 where the Court held that:
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> "The whole object of pleadings is to bring the parties to an issue, and the meaning of the rules...was to prevent the issue being enlarged, which would prevent either party from knowing when the cause came on for trial, what the real point to be discussed and decided was. In fact, the whole meaning of the system is to narrow the parties to define issues, and thereby diminish expense and delay, especially as regards the amount of testimony required on either side at the hearing.

45. The plaintiff did not prove ownership of the machinery and spare parts claimed.

(b) Can this Court Order restitution of the goods in favour of the Plaintiff

46. Restitution is an equitable relief that arises as a remedy for unjust enrichment.

47. The Defendants' case is that the Defendants rightly reclaimed the goods pursuant to the Ruling of Court that directed that the goods be returned to the Objectors. The Plaintiff did not specifically plead and its witnesses did not lay a foundation as to which particular assets it claimed needed to be restituted from the Defendants.

48. In the case of Madhupaper International Ltd & another v Kenya Commercial Bank Ltd & 2 others [2003] eKLR, the court stated that for unjust enrichment and therefore restitution to be established the following factors were crucial:

> ...In short, on the part of the plaintiff there must be found, in truth, factors which negative the voluntary character of the transfer of benefit to the defendant. The plaintiff must be found to have had a qualified or vitiated intent that the defendant should be enriched. On the side of the defendant, there must have been free acceptance of the transfer, in the sense that the defendant had a choice whether to accept or reject, and had sufficient knowledge of the facts to make that choice a real one. The defendant must know that a benefit is being offered to him non-gratuitously, and having the opportunity to reject, elects to accept.

49. Further, in the case of Chase International Investment Corporation and Another v Laxman Keshra and 3 others [1978] eKLR, the Court of Appeal stated as follows:

> According to Goff and Jones' Law of Restitution, the principle of unjust enrichment presupposes three things: (1) that the defendants has been enriched by the receipt of a benefit; (2) that he has been so enriched at the expense of the plaintiff; and (3) that it would be unjust to allow him to retain the benefit.

50. What appears to me is that for a claim for restitution to be established, the Plaintiff needs to established unjust enrichment on the part of the Defendant. The furthest the Plaintiff goes in this case was to plead

that the 3rd and 4th Defendants in their capacity as Directors of the Plaintiff did fraudulently transfer assets belonging to the Plaintiff company and the same ought to be restituted. What comes out is that the alleged transfer was not authorized by the Plaintiff and was to persons, corporate or individuals not sanctioned by the Plaintiff. This cannot found a claim for restitution.

(c) Is the Plaintiff entitled to the damages and loss of rent as claimed in the Plaint?

51. As a general rule, General damages are not recoverable in cases of alleged breach of contract as was stated by the Court of Appeal in Kenya Tourism Development Corporation Vs Sundowner Lodge Ltd 2018 eKLR.

52. The reason for the inapplicable of General Damages in breach of contract was explained by the court in the case of Consolata Anyango Ouma vs. South Nyanza Sugar Co. Ltd (2015) eKLR as follows:

> " The next question is whether the appellant was entitled to damages as a result of the breach. As a general principle, the purpose of damages for breach of contract is, subject to mitigation of loss, the claimant is to be put as far as possible in the same position he would have been if the breach complained of had not occurred. This is principle is encapsulated in the Latin phrase restitution in integrum (see Kenya Industrial Estates Ltd v Lee Enterprises Ltd NRB CA Civil Appeal No. 54 of 2004 [2009] eKLR, Kenya Breweries Ltd v Natex Distributors Ltd Milimani HCCC No. 704 of 2000 [2004]eKLR). The measure of damages is in accordance with the rule established in the case of Hadley v Baxendale (1854) 9. Exch. 341 that the measure of damages is such as may be fairly and reasonably be considered arising naturally from the breach itself or such as may be reasonably contemplated by the parties at the time the contract was made and a probable result of such breach (see Standard Chartered Bank Limited v Intercom Services Ltd & Others NRB CA Civil Appeal No. 37 of 2003 [2004] eKLR). Such damages are not damages at large or general damages but are in the nature of special damages and they must be pleaded and proved (see Coast Bus Service Ltd v Sisco Murunga Ndanyi & 2 others, NRB CA Civil Appeal No. 192 of 92 (UR) and Charles C. Sande v Kenya Co-operative Creameries Ltd, NRB CA Civil Appeal No. 154 of 1992 (UR))".

53. General damages are at large. They cannot be applied in a scenario obtaining herein.

54. There is also a claim for breach of breach of fiduciary duty on the part of the Defendants by fraudulently transferring the assets of the company while Directors and thereafter resigning.

55. In my view, unless the acts of the 3rd and 4th Defendants then as Directors of the Plaintiff are established to be fraudulent and untenable, they remain sacrosanct to the operations of the company at that time.

56. In the case of, Eveready East Africa Limited v Energizer Middle East and Africa Limited & another [2017] eKLR the court referred to the reasoning in the case of North-west Transportation Co. Ltd – v- Beatty [1887] 12 AC 589 (PC) where it was held that:

> " unless some provision to the contrary is to be found in the charter or other instrument by which the company is incorporated, the resolution of a majority of the shareholders, only covered, upon any question with which the company is legally competent to deal is binding upon the minority, and consequently upon the company, and every shareholder has a perfect right to vote upon any such question, although he may have a personal interest in the subject matter opposed to, or different from, the general or particular interests of the company. On the other hand a director of the company is precluded from dealing on behalf of the company with himself and from entering into engagements in which he has a personal

interest conflicting, or which possibly may conflict with interests of those whom he is bound by fiduciary duty to protect, and this rule is applicable to the case of one of several directors as to a managing or sole director".

57. The Plaintiff claimed that the 3rd and 4th Defendants had resigned as Directors way back in February 1999, which fact the Plaintiff discovered in November 1999. The Plaintiff is the company in which the 3rd and 4th Defendant said to have resigned were Directors. The Plaintiff's case is not that the resignation was ultra vires or void. In other words, the Plaintiff does not challenge the procedure of the resignation.

58. In fact, the Plaintiff's case is that the resignation was calculated in bad faith after having previously acted against the interest of the company by creating artificial debts and transferring the company assets without resolution.

59. Prima facie, the law presumes that those dealing with a company are assumed to have read the public documents of a company and need not inquire into the irregularity of internal proceedings.

60. The Court of Appeal in the case of East African Safari Air Limited –vs- Anthony Ambaka Kegode & Another [2011] eKLR stated as follows about the Rule:-

> "While persons dealing with a company are assumed to have read the public documents of the company and to have ascertained that the proposed transaction is not inconsistent therewith, they are not required to do more; they need not inquire into the regularity of the internal proceedings – what Lord Hatherley called "the indoor management" and may assume that all is being done regularly. This rule, which is based on the general presumption of law, is eminently practical, for business could not be carried on if a person dealing with the apparent agents of a company was compelled to call for evidence that all internal regulations had been duly observed. Thus, where the articles give power to borrow with sanction of an ordinary resolution of the general meeting, a lender who relies on this power need not inquire whether such sanction has in fact been obtained. He may assume that it has, and if he is acting bona fide he will, even though the sanction has not been obtained, stand in as good position as if it had been obtained." (emphasis added).
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> Gower's Principles of Modern Company Law has summarized the rule in Turquand's case as follows: -
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> "This rule was manifestly based on business convenience, for business could not be carried out if everybody who had dealings with a company had meticulously to examine its internal machinery in order to ensure that the officers with whom he dealt with had actual authority. Not only is it convenient, it is also just. The lot of creditors of a limited liability company is not a particularly happy one; it would be unhappier still if the company could escape liability by denying the authority of the officers to act on its behalf."

61. It then follows that whereas the Plaintiff alleges fraudulent transfer of the property of the Plaintiff company and resultant resignation of the 3rd and 4th Defendants directors, the particulars of fraud have not been specifically and proved.

62. In the case of Vijay Morjaria V Nansingh Madhusingh Darbar & Another, [2000] eKLR the Court of Appeal pronounced the following:

> "It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must of course be set out, and then it should be stated that these acts were done fraudulently. It

is also settled law that fraudulent conduct must be distinctly alleged and distinctly proved, and it is not allowable to leave fraud to be inferred from the facts...

63. Further, the Court of Appeal in the case of Gladys Wanjiru Ngacha V Treresa Chepsaat & 4 Others, [2013] eKLR stated thus:

> " .... Allegations of fraud must be strictly proved: although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required.
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> It is not enough for the appellant to have pleaded fraud; she ought to have tendered evidence that proved the particulars of fraud to the satisfaction of the trial court. In Mutsonga vs. Nyati (1984) KLR 425, at pg 439, this Court held: "Whether there is any evidence to support an allegation of fraud is a question of fact". We find that the appellant did not prove fraud on the part of the respondents..."

64. Therefore, in my view, the Plaintiff did not prove the alleged fraud on the part of the Defendants to the required threshold which calls for standard above the mere balance of probabilities.

65. Coupled with the presumption in company law as above stated, to the outside world, the decisions including to transfer, rent or lease the assets of the company; and proceedings leading to the resignation oif the directors were internal procedures which remained valid unless proved to have been unauthorized, in breach of the best interest of the company, ultra vires and in breach of the fiduciary duty on the part of the impugned directors.

66. The claim as pleaded arose on 1997. The suit was filed in 2004. It is a claim of fraud. By 1999, the said fraud was known. Section 4(2) of the *limitation of actions act*. The said section provides as follows: -

> " 4. Actions of contract and tort and certain other actions (1) The following actions may not be brought after the end of six years from the date on which the cause of action accrued— (a) actions founded on contract; (b) actions to enforce a recognizance; (c) actions to enforce an award; (d) actions to recover a sum recoverable by virtue of a written law, other than a penalty or forfeiture or sum by way of penalty or forfeiture; (e) actions, including actions claiming equitable relief, for which no other period of limitation is provided by this Act or by any other written law. (2) An action founded on tort may not be brought after the end of three years from the date on which the cause of action accrued:

67. There was no pleading related to factors extending time. Though the court had on application dismissed the claim for time bar. It was on basis the pleadings had not been amended.

68. In this case the plaintiff also it evidence gave a correct date. It is thereafter clear beyond peradventure that the claim was time barred.

Sale agreements

69. The claim can be seen from the 92 documents in the plaintiff's list of documents. They were filed on 13/7/2008. I have analyzed the bundles. I noted the following: -

    i. The cheque enclosed is by Bullion Banker. The letter of offer of 12/9/1996 is an offer for the tractor. It is undated at the port of signing. There is a payment of Kshs. 2,500,000 form Bullion Bank on 30/9/1996.

    ii. Documents 1 – 7 are not related to the claim herein.

iii. The VAT 3 forms are blank at page 43, the instructions came from Mr. Sebira of Sehra Engineering and Bullion Bank Ltd Mombasa to find a fair market value. As at 9/8/1996. The same was belonging to the 1st defendant

iv. The purported purchase is done on 9/9/96 this is a month after valuation by Sehra Engineering. It is a one-sided sale which is signed and amended by the buyer only.

70. I said enough to show that the three issues above formulated have all failed.

71. In the circumstances, the Plaintiff's suit is devoid of merit and is dismissed with costs of Ksh 250,000/ = to the defendants payable within 30 days.

DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 20TH DAY OF SEPTEMBER, 2023. JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of:-

Omwenga for the defendant

Mr. Amadi Benjamin for the Plaintiff