



REPUBLIC OF KENYA



KENYA LAW
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**Laisu & 2 others v Sharif & another (Civil Case 12 of 2019)
[2024] KEHC 15512 (KLR) (5 December 2024) (Judgment)**

Neutral citation: [2024] KEHC 15512 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
CIVIL CASE 12 OF 2019
SM GITHINJI, J
DECEMBER 5, 2024**

BETWEEN

WAN LAISU 1ST APPLICANT

WU JANHUI 2ND APPLICANT

OVERSEE BOAT AND FISHING SUPPLIER LIMITED 3RD APPLICANT

AND

AHMED MUSTAFA SHARIF 1ST DEFENDANT

MUDHHIR MUSTAFFA SHARIF 2ND DEFENDANT

JUDGMENT

1. By an amended plaint dated 12th July 2020, the Plaintiffs instituted this suit seeking the following orders;
 1. A declaration that the alteration of changes of the company structure by the 1st and 2nd Defendants on or about 13th March 2019 was fraudulent, unlawful and irregular.
 2. An order of mandatory injunction restraining the 1st and 2nd Defendants, their agents or any other person acting on their behalf from altering the original structure of the 3rd Plaintiff.
 3. A declaration that the 1st Defendant is in breach of trust and fiduciary duty owed to the 3rd Plaintiff.
 4. An order directing the 1st Defendant to fully declare the account for all the monies and properties received by himself on behalf of the 3rd Plaintiff whether from the Plaintiffs or receivables account.



5. An order of mandatory injunction restraining the 1st and 2nd Defendants, their agents or any other person acting on their behalf from disposing any property of the 3rd Plaintiff.
 6. A declaration that the 1st and 2nd Plaintiffs are entitled to reimbursement or refund of their financial contribution in the sum of USD 60, 528.94 to the 3rd Plaintiff or in the alternative an order of restitution by way of returning goods contained in the containers bill of lading number OOL210733010 and ONEYSZPVC8770400 respectively to the 1st and 2nd Plaintiffs.
 7. An order directing the 1st and 2nd Defendants to return the property of the 3rd Plaintiff in their possession.
 8. An order for general and exemplary damages against the 1st and 2nd Defendants for fraud.
 9. An order for general damages against the 1st Defendant for breach of fiduciary duty and trust owed to the 1st, 2nd and 3rd plaintiffs.
 10. An order directing the Registrar of Companies to strike out the name of the 1st Defendant as director of the 3rd Plaintiff from the register upon presentation of ordinary resolution of the 1st and 2nd plaintiffs.
 11. An order of permanent injunction restraining the 1st and 2nd Defendants, their agents or any other person acting on their behalf from interfering with the business affairs of the 3rd Plaintiff.
 12. An order of general damages against the 1st Defendant for mental anguish and distress caused on the Plaintiffs.
 13. Costs of this suit together with interest thereon at such rates and for such period as this court may deem fit to order.
 14. Any such and further relief as this Honourable court may deem appropriate.
2. The Plaintiffs' case is that at all material times to the suit, the 1st and 2nd Plaintiffs together with the 1st Defendants were directors of the 3rd Plaintiff in the following manner; 1st Plaintiff 350 ordinary shares, 2nd Plaintiff 350 ordinary shares and 300 ordinary shares for the 1st Defendant. It was averred that there was a further understanding that amongst all of them as co-directors would be required to provide financial contributions in respect of their shares for purposes of importing raw materials for the boat making process. It was averred that the said contributions were only made by the 1st and 2nd Plaintiffs whilst the 1st Defendant failed to make his contributions. In total, it was averred that the 1st and 2nd Plaintiffs contributed the sum of USD 22,500, goods on container no. OOLU2107363020 valued at USD 11, 255.94, goods on container no. ONEYSZPVC8770440 valued at USD 16,893, Motor Vehicle Registration No. KKCQ 479V valued at USD 8,900 and a Lenovo Laptop valued at USD 890.
 3. It was further averred that the 1st and 2nd Plaintiffs on or about August 2019 learnt that the 1st Defendant had altered the structuring of the company to include the 2nd Defendant as a director in blatant disregard of the articles of association and without prior authority of the 1st and 2nd plaintiffs. The particulars of fraud are as serialized in paragraph 14 of the amended plaint while the particulars of breach of trust are as set out in paragraph 15.
 4. In response, the 1st and 2nd Defendants filed a Counterclaim claiming the sum of Kshs. 848,075 as expenses incurred by the 1st and 2nd Defendants in pursuing the promotion of the 3rd Plaintiff.



Evidence at Trial

5. Pw1 Wan Liasu testified that he had a company called Oversee Boat and Fishing Suppliers Limited. He adopted his witness statement dated 20.04.21 as his evidence in chief. He added that he had met Mr. Ahmed Mustafa Shariff online who told him of business opportunities in Kenya which he mentioned to the 2nd Plaintiff. They then incorporated the company on 05.02.19. He produced a CR12 which shows the directorship and shareholding of the Plaintiffs and the 1st Defendant in the company. He added that the company was for making boats for sale and sell spare parts. That the 1st and 2nd Plaintiffs were in charge of supplying raw materials to Kenya and the 1st Defendant was to handle the goods in Kenya. He further stated the 1st and 2nd Plaintiffs contributed the sum of USD 60,000 while the 1st Defendant did not make any contribution. further, the 1st and 2nd Plaintiffs bought two containers, a car for the company, a camera and a laptop. He produced as exhibits the bill of lading and receipts for shipping fees. It is his testimony that the containers arrived in September 2019 which the 1st and 2nd Plaintiffs contributed to clear. The 1st Defendant took the 1st container to Malindi and the 2nd was stored in Mombasa.
6. It was further stated that the 1st Defendant reported the container missing and the 1st plaintiff was arrested and the container transported to Malindi. He stated that he had no relationship with the 2nd Defendant who is the 1st Defendant's brother. That there was no agreement for him to be made a director and no meeting had taken place.
7. On cross examination he stated that he was in Kenya when the car was purchased and it was for the company and not for an individual. Additionally, he attached evidence for purchase of goods.
8. On re-examination, he stated that he paid for the registration of the company and market survey visits.
9. Dw1 Ahmed Mustafa Shariff adopted his witness statement filed on 23.02.22 and produced as DEX documents as per the list of documents.
10. On cross examination he stated that the company was established by the three of them with the 1st and 2nd Plaintiff owning 350 shares each and 300 hundred shares for himself. That Mudhhir Mustaffa Sharrif came in March 2019 and was added then where the 1st and 2nd Plaintiffs each gave 50 shares. That they had a meeting, the three of them but cannot remember the date of the said meeting and there is also no written consent. Further, he admitted to having no evidence of contribution. He further stated that the motor vehicle was not bought for company business. Additionally, he did not have the receipts for the money counterclaimed. Further that the motor vehicle was his and he sold it.

Analysis and Determination

11. Parties filed written submissions. I have considered the rival pleadings as well as the written submissions and the authorities relied upon. The issues arising for determination are;
 1. Whether the 1st and 2nd Defendants fraudulently altered documents to include the 2nd Defendant as a director and shareholder of the 3rd Plaintiff?
 2. Whether the Plaintiffs are entitled to the reliefs sought.



12. Section 109 of the *Evidence Act*, Cap 80, Laws of Kenya, places the burden of proof on the Plaintiff herein. The Section provides that: -

“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 in a particular person.”

13. The need to prove and the burden of proof of such allegations of forgery, fraud, falsehood or dishonesty was elaborated by the court in Christopher Ndaru Kagina vs. Esther Mbandi Kagina & Another [2016] eKLR where the court stated that; -

“It is trite law that he who alleges fraud must prove fraud. Allegations of fraud must strictly be proved. Great care needs to be taken in pleading allegations of fraud or dishonesty. In particular, the pleader needs to be sure that there is sufficient evidence to justify the allegations. In the Case Central Bank of Kenya Ltd -Vs- Trust Bank Ltd & 4 Others [26] the Court of Appeal in considering the standard of proof required where fraud is alleged stated that fraud and conspiracy to defraud are very serious allegations. The onus of prima facie proof is much heavier on the person alleging than in an ordinary Civil Case. The burden of proof lies on the applicant in establishing the fraud that he alleges. In Belmont Finance Corporation Ltd. v. Williams Furniture Ltd [27] Buckley L.J. said:

“An allegation of dishonesty must be pleaded clearly and with particularity. That is laid down by the rules and it is a well-recognized rule of practice. This does not import that the word ‘fraud’ or the word ‘dishonesty’ must be necessarily used. The facts alleged may sufficiently demonstrate that dishonesty is allegedly involved, but where the facts are complicated this may not be so clear, and in such a case it is incumbent upon the pleader to make it clear when dishonesty is alleged. If he uses language which is equivocal, rendering it doubtful whether he is in fact relying on the alleged dishonesty of the transaction, this will be fatal; the allegation of its dishonest nature will not have been pleaded with sufficient clarity.

14. In *Armitage v Nurse* [28] Millett L.J. having cited this passage continued:

“In order to allege fraud it is not sufficient to sprinkle a pleading with words like “willfully” and “recklessly” (but not “fraudulently” or “dishonestly”). This may still leave it in doubt whether the words are being used in a technical sense or merely to give colour by way of pejorative emphasis to the complaint.” In *Paragon Finance plc v D B Thakerar & Co* the court stated that it is well established that fraud must be distinctly alleged and also distinctly proved, and that if the facts pleaded are consistent with innocence it is not open to the court to find fraud. The burden is always on the claimant to prove fraud on the part of the Respondent. The standard of proof where fraud is alleged is high. Though it is the same civil standard of proof on a balance of probabilities, it is certainly higher than the ordinary proof on a balance of probabilities but lower than proof beyond reasonable doubt. It all depends on the nature of the issue and its gravity. Evidence of especially high strength and quality is required to meet the civil standard of proof in fraud cases. It is more burdensome: (see also the cases of *Mpungu & Sons Transporters Ltd –v- Attorney General & another*. In *Jennifer Nyambura Kamau v Humphrey Nandi*, the Court of Appeal, Nyeri, emphasized that fraud must be proved as a fact by evidence; and, more importantly, that the standard of proof is beyond a balance of probabilities.’



15. Therefore, it is obvious that the burden of proof was on the Plaintiffs to prove the allegations of forgery. The Plaintiffs produced a Certificate of Incorporation dated 5th February 2019 that showed shareholding at 350 share for the 1st and 2nd Plaintiffs each, and 300 share for the 1st Defendant. In his testimony, the 1st Plaintiff testified that there had been no consensus amongst the three directors to alter the shareholding of the company to include the 2nd Defendant. The 1st Defendant in his testimony on cross examination admitted that there was no written consent to have the 2nd Defendant become a shareholder. He merely stated that the meeting was through a tele conversation. From the preceding, I am convinced that the Plaintiffs discharged the burden of proof that the 1st Defendant fraudulently altered the shareholding of the company.
16. On to the remedies available to the Plaintiffs, I have perused the inventory of the items bought by the Company. It is admitted by the parties herein in their pleadings that the ratio of contribution was according to the ratio of shareholding. The 1st and 2nd Plaintiff were able to prove their monetary contribution while the 1st Defendant had no documentary evidence to prove his contribution. There is a dispute as to the ownership of motor vehicle herein. The Plaintiffs averred that the same was a company car while the 1st Defendant averred the same belonged to him. From the sale agreement dated 15th June 2019, the first name of the buyer is indicated as Overseas Boat and Fishing Supplier Limited the 3rd plaintiff herein which I have referred to as the Company. In my view, there is sufficient evidence to infer that this was a company car. With these observations vis a vis the remedies sought by the Plaintiffs I find as follow:
1. That an order of mandatory injunction is hereby issued restraining the 1st and 2nd Defendants, their agents or any other person from disposing any property of the 3rd Plaintiff.
 2. That the 1st and 2nd Plaintiff's should be refunded by the 1st Respondent their financial contribution in sum of USD 60,528.94/= to the 3rd Plaintiff or in alternative the goods contained in the containers bill of landing number OOL210733010 and ONEYSZPVC8770400 respectively, be restored to them.
 3. The 1st and 2nd Defendants do return the property of the 3rd Plaintiff in their possession, and do refund the amount used to purchase the company motor vehicle of which they sold.
 4. The Registrar of Companies should strike out the name of the 1st Defendant as director of the 3rd Plaintiff from the register upon presentation of ordinary resolution of the 1st and 2nd Plaintiffs.
 5. Costs of the suit goes to the Plaintiffs.

JUDGMENT READ, SIGNED AND DELIVERED VIRTUALLY AT MALINDI THIS 5TH DAY OF DECEMBER, 2024.

S.M. GITHINJI

JUDGE

In the presence of; -

Ms Wambui holding brief for Mr Nduati for the Plaintiff.

Mr Okutu for the Defendants –(absent)

