



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 560 OF 2000

1. KULDIP SINGH SEHRA

2. NARAIN SINGH SEHRA.....PLAINTIFFS

VERSUS

1. BULLION BANK LIMITED

2. NITIN N. SHAH

3. INFINITY GEMSTONES LIMITED.....DEFENDANTS

JUDGMENT

1. The plaint in this case was filed on 15th November, 2000. Through a consent recorded in court on 1st April, 2003, the plaintiffs amended their plaint dated 24th February, 2002 which was deemed as duly filed and served. The said consent also allowed the defendants to amend their statements of defence if there was need to. The averments therein, *inter alia*, are to the effect that since August, 1996, the 3rd defendant maintained account No. [Particulars Withheld] at the 1st defendant's Mombasa branch pursuant to a written mandate authorizing the 1st defendant to pay cheques drawn by the 3rd defendant if signed by at least two of its Directors.

2. The plaintiffs are in the said amended plaint described as Directors and shareholders of the 3rd defendant with each having 25% shareholding. The 2nd defendant is described as a Director and a shareholder of the 3rd defendant with 50% shareholding.

3. The plaintiffs allege that between, in or about October, 1996 to 20th February, 2000, the 2nd defendant fraudulently drew various cheques on the 3rd defendant's bank account and presented the same to the 1st defendant's bank for payment and the effects were cleared.

4. The plaintiffs prayer is for Judgment to be entered against the 1st and 2nd defendants, jointly and severally for:-

(i) Kshs. 7,463,158/- to be paid to the 3rd defendant;

(ii) Interest on the above sum at the prevailing market rates from 31st July, 2000 until payment in full;

(iii) The plaintiffs' prayer against the 1st defendant is for general damages for breach of contract;

(iv) The plaintiffs' prayer against the 2nd defendant is for:-

(a) General damages for breach of trust;

(b) Costs of and incidental to this suit and interest thereon at court rates; and

(c) Such other further relief as this Honourable court will deem just to grant.

5. The 1st defendant filed its statement of defence on 30th November, 2000. The 2nd defendant filed an amended statement of defence on 24th April, 2003. The 3rd defendant filed its statement of defence and counterclaim on 20th December, 2000. The 3rd defendant sought orders for:-

- (i) The plaintiffs' suit to be dismissed with costs;
- (ii) The plaintiffs be restrained from retaining books of accounts and financial records pertaining and concerning the 3rd defendant;
- (iii) The plaintiffs be restrained either by themselves, their servants or agents or by anyone claiming under their title, from withholding any monies and/or assets of the 3rd Defendant to be found due and belonging to it; and
- (iv) The plaintiffs be compelled to surrender the said books, monies and/or assets to the 3rd defendant.

THE PLAINTIFFS' CASE

6. The plaintiffs' witness was Narain Singh Sokhi (2nd plaintiff) who testified as PW1. In describing the parties to the suit, he informed the court that he was a shareholder of the 3rd defendant, Infinity Gemstones Ltd and so was the 1st plaintiff, Kuldeep Singh Sehra. He stated that the 1st defendant was the 3rd defendant's banker, whereas the 2nd defendant, Nitin N. Shah was a Director and shareholder of the 3rd defendant.

7. He further stated that the initial Directors/Shareholders were 3 but the 1st plaintiff migrated to Canada in March, 2002. He gave PW1 the power of Attorney to represent him. PW1 testified that in August, 1996 the 3rd defendant's Directors resolved to open an account with the 1st defendant, Bullion Bank Ltd, in Mombasa. They signed a company resolution giving express instructions to the 1st defendant on the manner in which cheques were to be honoured, discount and other instruments. He gave evidence that the resolution stated that it constituted the 3rd defendant's mandate to the 1st defendant and it was to remain in force until revoked in writing in a resolution signed by the Chairman, Secretary and Director. PW1 stated that they never varied the resolution of the 3rd defendant, which was engaged in mining operations in Mwatate.

8. He testified that they filled account opening forms with the 1st defendant and that the instructions to the bank were dated 16th August, 1996. It was his evidence that in **part B** of the account opening forms, they gave specimen signatures of the signatories.

9. He indicated that the 1st plaintiff was based at the mine, the 2nd defendant was based in Mombasa and had custody of the cheque book. PW1 stated that he was based in Nairobi and was not actively involved in running of the company. PW1 further testified that the 1st plaintiff would sign blank cheques and the 2nd defendant would then append his signature thereon. He stated that the 1st defendant was a reputable bank and they expected it to safeguard their funds and account in strict adherence to the instructions as detailed in the resolution as per banking law and practice.

10. PW1's evidence indicated that they came to realize that some cheques had been signed by one Director when the 1st defendant went into financial difficulties and asked them for funds advanced to them as a loan. On the 1st defendant being told to offset the loan against the funds in the 3rd defendant's bank account, the plaintiffs were told there were insufficient funds. On making inquiries to the 1st defendant, no proper response was given thus they wrote to the Central Bank asking it to investigate. It was PW1's evidence that on investigation, it was found that 124 cheques amounting to Kshs. 6,627,287.45 had been signed by the 2nd defendant. He stated that they undertook a reconciliation of the cheques and bank statements as some cheques were not traced. PW1 indicated that the bank statements gave them the figure they are claiming. They issued demand letters to the 1st and 2nd defendants. He prayed for damages in the sum of Kshs. 7,463,158.00 plus interest. He also sought general damages as the 3rd defendant suffered due to the actions of the 1st and 2nd defendants.

THE DEFENDANTS' CASE

11. The 1st defendant did not call any witness. The 2nd and 3rd defendants called evidence through Nitin Nemchand Shah, the 2nd defendant, who testified as DW1. He informed the court that he deals with gemstones and the mining of the same. He testified that the 1st plaintiff used his services to sell gemstones and then they started a business together. The 1st plaintiff was unable to raise capital which led to him splitting his shares with the 2nd plaintiff at 25% each instead of the 50% that he and DW1 had agreed on.

12. DW1 further testified that they agreed that he would be in charge of marketing and the 1st plaintiff would be in charge of mining. DW1 stated that they formed the 3rd defendant company on 7th June, 1996. He put in Kshs.1,000,000/= and the plaintiffs contributed by availing mining equipment. He indicated that they asked for a loan facility of Kshs. 2.5 Million from the 1st defendant.

13. In making reference to bank account opening forms with the 1st defendant, he stated that the form indicates "**either to operate**". DW1 gave evidence that it was agreed that he and the 1st plaintiff would operate the bank account as the 2nd plaintiff said he was busy. DW1 stated that the words "**either to operate**" meant that either he or the 1st plaintiff could operate the bank account.

14. In making further reference to the bank opening form, he stated that the 1st signature on the form is his, the 2nd signature is the 1st plaintiff's and the third signature is for 2nd plaintiff. DW1 indicated that he is the one who filled the form and sent it to the 1st plaintiff and it was sent back to him with the 1st and 2nd plaintiffs' signatures.

15. DW1 made reference to **part B** of the said form that states in part that the 1st defendant was empowered to honour cheques, bills of exchange and promissory notes drawn, signed, accepted or made on behalf of the company by "**any two Directors**" he indicated that by the use of the said words, he did not mean that 2 Directors had to sign jointly, but meant that either he or the 1st plaintiff could sign the cheques. DW1 indicated that he wrote the said words before he sent the said forms to his co-directors to sign. He stated that he overlooked the conflict

between the words “**either to operate**” and “**any two Directors.**”

16. In making reference to page 26 of his bundle of documents, DW1 stated that in **part F** of the bank account opening form, it was written “**any one singly**”. He indicated that the said part in reference to the joint mandate refers to instructions in **part A** of the bank account opening form. DW1 admitted having signed some cheques singly but denied that it was meant to defraud the company. He added that other Directors also signed cheques singly. DW1 identified cheques in the plaintiffs' and defendants bundle of documents that were signed singly by the 1st plaintiff and others that he signed singly. He stated that the cheques signed singly by the 1st plaintiff were signed in the year 1997.

17. DW1 testified that the 1st plaintiff knew what was going on in the company and that the accounts for the year 1997 were signed by him and the 1st plaintiff and those for the year ended 31st December, 1998 were signed by him and Moses Mwangi, a co-Director of the 3rd defendant. He further testified that in the year 1998 he felt uncomfortable as the capital he was promised by the plaintiffs was not forthcoming and he was being provided with less and less gemstones. He offered to buy off their shares or they pay him off.

18. He indicated that the plaintiffs transferred the company assets to themselves without his knowledge. He stated that the 3rd defendant was taken to court by Abbey Barne Ltd, in Mombasa HCC No. 326 of 1999. He indicated that the dispute among them arose after the 3rd defendant was sued. He referred to a letter from Banking Fraud Investigation Department, of Central Bank of Kenya which stated that they had received a complaint from the 1st plaintiff, a Director of the 3rd defendant. The letter stated that the person who assisted in the opening of the bank account did not scrutinize the mix-up of the instructions given in the mandate form. The 1st plaintiff was advised to seek legal remedy against the 1st defendant.

19. DW1 testified that the 1st plaintiff resigned from the 3rd defendant and a letter thereof was sent to the Registrar General's office on 11th February, 1999. He became aware of their (plaintiffs) resignation in September, 1999 but the Company Secretary of the 3rd defendant did not receive their letters. DW1 denied owing the plaintiffs any money or using the company's money for his own benefit.

SUBMISSIONS

20. The plaintiffs filed their submissions on 17th August, 2012. The 1st defendant filed its submissions on 31st August, 2017. Counsel for the 2nd and 3rd defendants filed his on 14th September, 2017. The plaintiffs' Counsel thereafter filed a reply to the defendants' written submissions on 26th September, 2017.

21. In their written submissions, the plaintiffs contend that the evidence adduced, especially **part B** of the bank account opening form was very clear that the mandate given to the 1st defendant was that cheques presented to it for payment were to be signed by at least 2 Directors of the 3rd defendant. It was submitted that failure by the 1st defendant to call evidence left the plaintiffs' averments uncontroverted. In the view of Counsel for the Plaintiffs, there was negligence on the part of the 1st defendant when it:

- (i) Accepted and honoured cheques signed only by the 2nd defendant in total disregard of the express instructions of the 3rd defendant given when the account was opened;
- (ii) Failed to observe banking procedures;
- (iii) Failed to observe due care, skill and attention leading to the admitted mix up of the signing mandate;
- (iv) Debited the 3rd defendant's account with the amount of various cheques not signed in accordance with the express Board resolution and mandate given by the 3rd defendant; and
- (v) Ignored the 3rd defendant's express and written Board resolution/instructions given on 16th August, 1996.

22. The plaintiffs' Counsel relied on the Canadian case of **A and A Jewellers Limited vs Royal Bank of Canada** [2001] Can LII 24012 cited in **Kenya Grange Vehicle Industries Ltd. vs Sothern Credit Banking Corporation Ltd.** [2014] eKLR on the need for a bank to make reasonable inquiries of its customer regarding a possible breach of trust and that the bank will be found to be in constructive knowledge of the breach of trust if it fails to make the appropriate inquiries.

23. The plaintiffs therefore pray for the 1st defendant to be held liable for loss of monies by the 3rd defendant and loss of dividends by the plaintiffs as was held in the case of **Kenya Grange Vehicle Industries Ltd. vs Southern Credit Banking Corporation Ltd** (supra).

24. With regard to the claim against the 2nd defendant, it was submitted that he owed the plaintiffs an obligation as a Trustee of the assets of the 3rd defendant and breached the contract and trust bestowed upon him by:

- (i) Signing cheques solely and presenting them for payment in total disregard of the express instructions by the 3rd defendant to the 1st defendant;
- (ii) Conning the 1st defendant to flout the banking rules and procedures;
- (iii) Using his position and powers of control to deprive the 3rd defendant and by extension the plaintiffs of their monies;

- (iv) Generally acting unfaithfully while operating the said account;
- (v) Failing to act in good faith;
- (vi) Failing to act for the benefit of the 3rd defendant; and
- (vii) Breached the trust and obligations to the 3rd defendant.

25. Counsel for the plaintiffs relied on **In Forest of Dean Coal Company** [1879] 10 Ch D 450 and **Jetivia S.A. and Another v Bilta (UK) Limited (In Liquidation) and Others** [2015] UKSC 23 as quoted in the Court of Appeal decision of **Ajay Shah v Deposit Protection Fund Board as Liquidator of Trust Bank Limited (In Liquidation) and Another** [2016] eKLR, where it was observed that since directors are regarded as trustees of the company's property that has come or should have come under their control, the property may be recovered in *rem* from them and third parties who are not innocent purchasers for value in so far as it is traceable. In **Jetivia** (supra), the UK Supreme Court held that where directors committed a fraud which caused the company loss, they were liable.

26. It was further submitted that that in light of the breach of trust by the 1st and 2nd defendants, they ought to be jointly and severally held liable to pay the sum of Kshs. 7,463,158/= to the 3rd defendant together with interest at market rates from 1st January, 2000 to the date of full payment. The plaintiffs held the position that the 1st and 2nd defendants ought to be made to pay general damages for breach of contract and trust in the sum of Kshs.5,000,000/=.

27. The 1st defendant's written submissions were to the effect that the bank account opening forms for the 3rd defendant on page 3 **part F** stated - "*In connection with this account we request you to honour cheques or orders in favour of any or either of us thereon signed as per the instructions in part A.*" In reference to **part A**, Counsel submitted that it had instructions to the effect that "*either to operate*". It was stated that the said form was executed by the plaintiffs and the 2nd defendant who were Directors of the 3rd defendant and therefore the parties were bound by the contract they signed.

28. The 1st defendant's Counsel relied on the case of **Securicor Courier (K) Ltd vs Benson David Onyango and Another** [2008] eKLR where the court cited a decision by the House of Lords in **L'estrage vs Graucob Ltd** [1934] 2 KB 294. In the latter case, the court stated that when a document containing contractual terms is signed then in the absence of fraud and mis-representation, the party signing it is bound and it is wholly immaterial whether he has read the document or not.

29. The 1st defendant also relied on the case of **Curtis vs Chemical Cleaning and Dyeing Co. Ltd** [1951] 1 ALL ER, where Denning LJ held that when a document containing contractual terms is signed then in the absence of fraud and misrepresentation, the party signing it is bound and is wholly immaterial whether he has read the document or not.

30. It was further argued that the 1st plaintiff and the 2nd defendant had a meeting of the minds that "*either*" of the Directors was to operate the account thus a cheque signed by a single director was to be honoured and that this was evidenced by the fact that the 1st plaintiff and the 2nd defendant signed various cheques singly and presented them for payment to the 1st defendant which honoured the same.

31. It was stated that the cheques drawn and signed singly were for the purposes of the business of the 3rd defendant and none of the cheques are in the names of the Directors, thus there was no misappropriation of funds. It was submitted that there was no breach of the mandate by either the 1st plaintiff or the 2nd defendant and that Directors were supplied with monthly statements. Counsel for the 1st defendant argued that since the plaintiffs also signed some cheques singly, they have no locus to question the cheques signed by the 2nd defendant.

32. Counsel for the 1st defendant cited the case of **Siree Limited vs Lake Turkana El Molo Lodges** [2008] 2 EA 521 where the court stated that where damages can be calculated to a cent, then they cease to be general damages and must be claimed as special damages. It was therefore contended that since the claim herein of Kshs. 7,463,158 is fully computed, then it should have been particularly set out in the plaint and thereafter, specifically proved. Counsel also relied on the case of **National Social Security Fund Board of Trustees vs Sifa International Limited** [2016] on the need to specify particulars of special damages.

33. It was further submitted for the 1st defendant that the plaintiffs failed to meet the burden of proof as provided by the provisions of Sections 109 and 112 of the Evidence Act. In concluding his submissions, Mr. Wafula stated that the claim for general damages should not be granted as the same is not payable for breach of contract. He relied on the case of **Provincial Insurance Company (E.A) Limited vs Mordekai Mwanga Nandwa** (Kisumu CACA) 179 of 1995 to fortify the submissions that no general damages may be awarded for breach of contract.

34. The 2nd and 3rd defendants' Advocate's submissions were to the effect that although the 2nd plaintiff was granted the power of Attorney by the 1st plaintiff there were matters which he could not testify on, as they were within the knowledge of the 1st plaintiff. He relied on the case of **Simeon Nyachae vs Lazarus Ratemo Musa and Another** [2007] eKLR and **Interactive Gaming and Lotteries Ltd vs Flint East Africa Ltd and 2 Others** [2014] eKLR to support the above assertion. This court was therefore requested to completely disregard the evidence of PW1 tendered on behalf of the 1st plaintiff.

35. Like the submissions made by Counsel for the plaintiffs and for the 1st defendant, the 2nd and 3rd defendants' submissions take into

account the entries made by the 1st and 2nd plaintiffs as well as the 2nd defendant in the bank account opening forms as well as the Board resolution dated 16th August, 1996. In the view of Mr. Samir Inamdar, Counsel for the 2nd and 3rd defendants, the mandate to the 1st defendant showed that any Director could sign cheques, singly.

36. It was submitted that the audited accounts for the year 1997 were signed by the 2nd plaintiff and the 2nd defendant and the former confirmed that he never noticed anything untoward in the said accounts of the 3rd defendant. Counsel stated that both the 2nd plaintiff and the 2nd defendant signed cheques alternately until the 1st defendant requested for payment of a loan it had lent to the 3rd defendant and as such, the complaint by the plaintiffs was an attempt to evade their obligation to the 1st defendant.

37. Counsel argued that following a complaint made by the 1st plaintiff to the Banking fraud investigation unit, no Director was found culpable of fraud but it pointed to the bank's evident error in failing to spot the mistake in **part B** of the bank mandate form and the complainant was advised to seek redress by way of civil action. The 2nd and 3rd defendants relied on the duomatic principle as espoused in the case of **Re Duomatic** [1969] 1 ALL ER 161 and in the case of **EIC Services Ltd. vs Phipps** [2003] EWHC 1507 (Ch), where Neuberger J stated that the essence of the duomatic principle as he saw it was that where the articles of a company require a course to be approved by a group of shareholders at a general meeting, that requirement can be avoided if all members of the group, being aware of the relevant facts, either give their approval to that course, or so conduct themselves as to make it inequitable for them to deny that they have given their approval. Whether the approval is given in advance or after the event, whether it is characterized as agreement, ratification, waiver or estoppel, and whether members of the group give their consent in different ways at different times, does not matter.

38. It was submitted that the loss pleaded by the plaintiffs in the form of loss of dividends allegedly payable to them had the company not suffered any loss by cheques being paid out in breach of mandate, is in the nature of a shareholders' claim.

39. It was the argument by the 2nd and 3rd defendants' Counsel that each of the plaintiffs, whether as a Director or a Shareholder had implicitly approved the course of action that was followed in having cheques signed singly and thereby waived or were estopped from insisting on any rights they may have had for any breach of the Board resolution in **part B**. Thus the provisions of sections 107 (1), 109 and 112 of the Evidence Act were not met.

40. It was submitted that the allegation of fraud through connivance of the 1st and 2nd defendants was not proved. The Court of Appeal decision of **Kinyanjui Kamau vs. George Kamau Njoroge** [2015] eKLR was cited to show the prerequisites for proving allegations of fraud. The said court stated that it is trite law that any allegations of fraud must be pleaded and strictly proved.

41. The Counsel for the 2nd and 3rd respondents took issue with the manner in which the amount being claimed by the plaintiffs kept on oscillating from Kshs. 11,681,465.95 to Kshs. 10,654,809.95, then to Kshs. 7,463,158 and Kshs. 6,627,287.45, Kshs. 6,573,606.60 and a further Kshs. 973,006.15 by reference to additional cheques. It was further submitted that the claim by the plaintiffs is for special damages yet it was neither specifically pleaded nor strictly proved. He relied on the case of **Hahn vs Singh** [1985] eKLR and **Ryce Motors vs Elias Muroki** [1996] eKLR on the degree of certainty needed in a claim for special damages. The case of **Lalji vs. Toka** [1981] eKLR was also cited to show the necessity to specifically plead on loss of profits.

42. It was argued that breach of fiduciary duty and trust was not specifically pleaded and proved. Counsel relied on the case of **Benson Okwiri vs. Consolidated Bank of Kenya Ltd** [2015] eKLR and **Wilson Kenyange vs. Joel Ombwori** [2001] eKLR. With regard to the 3rd defendant it was stated that no cause of action was pleaded or any orders sought against it, thus the case cannot be regarded as a derivative action. Counsel prayed for costs for the 3rd defendant being dragged into this suit.

43. The 2nd and 3rd defendants prayed for costs on an indemnity basis as was held in the case of **Joseph King'ori Ndung'u vs Koskei Joel; Kipkurui and Others** [2017] eKLR.

44. In the plaintiffs' submissions in response to the defendants' written submissions, Mr. Omwenga indicated that the legal position is that a party should never be allowed to take advantage of his wrongs and/or omissions at the expense of the other party. He cited the case of **Al Ghussein Establishment vs Eton College** [1991] ALL ER 667 to support his assertion.

45. It was argued that the 1st defendant's duty was to ensure that cheques and other instruments emanating from the 3rd defendant complied with the express instructions contained in the bank account opening form and the Board resolution. The plaintiffs' Counsel stated that the claim for Kshs. 7,463,158/= was clearly tabulated in the plaintiffs' list and bundle of documents as well as copies of cheques for the same which were duly availed to the defendants. He relied on the case of **National Social Security Fund Board of Trustees vs Sifa International Limited** [2016] eKLR which stated that it is only when the particulars of special damages are pleaded in the plaint that a claimant will be allowed to strict proof of those particulars. Counsel asserted that the plaintiffs had not only specified the amounts lost but had particularized the same by producing cheques in support of the amount claimed.

46. It was submitted that the plaintiffs had discharged their burden of proof on a balance of probabilities and it was up to the defendants to rebut it. He relied on the case of **Mittchel Cotts (K) Ltd vs Musa Freighters** [2011] eKLR to support the above position.

47. In addition, Counsel indicated that although courts do not normally award damages for breach of contract, there were exceptions such as when the conduct of the defendant is shown to be oppressive, high handed, outrageous, insolvent or vindictive as was held in the case of **Marine Management Association & Another vs National Maritime Authority** [2012] 18 NWLR 504 cited in **Capital Fish Kenya Limited vs the Kenya Power Lighting Company** [2016] eKLR.

48. On the power of Attorney donated to the 2nd plaintiff by the 1st plaintiff, it was submitted that the former was empowered to institute and defend, and to proceed with any action or actions, suits and/or proceedings in any of the courts of the Republic of Kenya as may be

necessary. It was argued that since the 2nd plaintiff was a Director of the 3rd defendant, he was aware of its activities although he was not actively involved in the running of the company.

ANALYSIS AND DETERMINATION

49. In the writing of this Judgment, the court has considered the evidence tendered, the written submissions on record and authorities cited in support thereof. A statement of agreed issues was filed on 20th August, 2001 as per receipt No. 233896. The said list was however inadvertently not stamped by the registry staff. The list of agreed issues was signed by Counsel for the plaintiffs and the 2nd defendant. The other parties did not file their lists of issues. The court will therefore adopt the issues filed on 16th August, 2001. These are:-

- (1) If the 2nd defendant at all times material to this suit held 50% shares in the 3rd defendant;
- (2) If the 2nd defendant or the 2nd plaintiff was responsible for the management and running of the 3rd defendant's affairs;
- (3) Whether the 3rd defendant pursuant to a written mandate authorized the 1st defendant to pay the 3rd defendant's cheques if signed by at least two directors of the 3rd defendant;
- (4) If the 1st defendant owed the 3rd defendant a duty of care in the operation of the said account as pleaded in paragraph 7 of the plaint;
- (5) Whether the 2nd defendant drew various cheques between October, 1996 and February, 2000 in the sum of Kshs. 10,656,809.95 on the 3rd defendant's account No. 7730-01 and if he presented the same at the 1st defendant for payment;
- (6) If the plaintiffs are precluded from raising questions in relation to the way the 2nd defendant operated the said account during the period October 1996 and February, 2001;
- (7) Did the 1st defendant have reasonable grounds for believing that the 2nd defendant was operating the 3rd defendant's account wrongfully?
- (8) Was the 1st defendant in breach of its contract with the 3rd defendant by continuing to pay cheques signed by the 2nd defendant?
- (9) Was the 1st defendant negligent in honouring the cheques issued as alleged by the plaintiffs?
- (10) (i) Did the plaintiffs and the 3rd defendant suffer any loss and damage?
(ii) What is the extent of loss and damage suffered by the plaintiffs and 3rd defendant, If any?
(iii) Are the plaintiffs estopped from claiming any loss suffered by them from the 2nd defendant;
- (11) (i) Was the 2nd defendant a trustee of the 3rd defendant? If so, what obligations did he owe the 3rd defendant?
(ii) Was the 2nd defendant in breach of his obligations as pleaded in paragraph 12 of the plaint or at all?
- (12) Did the plaintiff by a letter dated 19th May, 2000 request the 2nd defendant to demand from the 1st defendant the amount it had irregularly paid?
- (13) Did the plaintiffs' Advocates send the said letter to the 3rd Defendant?
- (14) Did the plaintiff demand the payment of the sum of Kshs. 10,654,809.95 from the defendants?
- (15) Have the plaintiffs' shares and interest in the 3rd defendant been compromised as a result of the matters complained of?
- (16) Does the plaint disclose any reasonable cause of action?
- (17) Are the plaintiffs entitled to the prayers sought?
- (18) (a) What is the reason for the failure to audit the 3rd defendant's accounts for the years subsequent to 1997?
(b) Can the 3rd defendant's annual returns be submitted without the audited accounts?
(c) Whose duty was it to ensure the preparation of the 3rd defendant's Accounts for the years subsequent to 1997?

(19) Are the plaintiffs in possession of any information money and/or assets belonging to the 3rd defendant?

(20) Is the 3rd defendant entitled to the counterclaim sought? and;

(xix) What are the orders as to costs?

Issues No. 1 and 2

50. The evidence of PW1 confirmed that the 2nd defendant owned 50% of the shareholding in the 3rd defendant company. The plaintiffs herein owned 25% of the shares each in the said company. This is well indicated in the memorandum and articles of association produced by the 2nd and 3rd defendants. The said shares were subscribed on the 7th of May 1996.

51. According to the evidence of PW1 (the 2nd plaintiff), the 1st plaintiff was based at the mine at Mwatate and the 2nd defendant was based in Mombasa. The latter had custody of the cheque book. PW1 stated that he was based in Nairobi and was not actively involved in the running of the company. This was corroborated by DW1 (the 2nd defendant) who gave evidence that the 1st plaintiff was a miner and he was in charge of the mining side and he (DW1) was in charge of marketing. It was apparent from DW1's evidence that PW1 did not actively participate in the business of the 3rd defendant for he said that he was busy. It is therefore clear from the foregoing that the 2nd defendant was responsible for the management and day to day running of the 3rd defendant.

Issues No. 3 and 4

52. The main point of contestation in this matter lies in the interpretation of the mandate that was given to the bank by the 3rd defendant. The bank account opening forms from the 3rd defendant bear the date of 9th August, 1996. They were taken to the 1st defendant after a resolution arrived at a meeting of the Board of Directors held on 17th August, 1996 for the 3rd defendant to open a bank account with the said bank.

53. In **part A** of the bank account opening forms on the special instructions regarding operation of the account, the options given on who should operate the account are **"either, or survivor or jointly"**. It was the evidence of DW1 that he filled the form and sent it to the 1st plaintiff. The form was sent back to him with the 1st and 2nd plaintiffs' signatures. He stated that the words he inscribed thereon that **"either to operate"** meant that either him or the 1st plaintiff could operate the bank account. The court notes that **part A** of the bank account opening form was signed by the plaintiffs and the 2nd defendant.

54. **Part B** of the said form indicates that a resolution of the Board was passed at a meeting held on **16th August, 1996** and was duly recorded in the minute book of the company. The resolution was to the effect that an account for the 3rd defendant would be opened with the 1st defendant at Moi Avenue, Mombasa. The resolution further states that the 1st defendant was thereby empowered to honour cheques, bills of exchange and promissory notes, drawn, signed, accepted, or made on behalf of the company by **"any two Directors"**. Beneath the space inscribed with the said words are instructions that state- insert *'any two of the Directors and countersigned by the Secretary for the time being' or otherwise as required and to act on any instructions given by the persons so authorized with regard to any accounts whether in credit or overdrawn or any transactions of the company.* The printed inscriptions on the said form further stated that the resolutions as communicated to the 1st defendant shall constitute the company's mandate and would remain in force until revoked by notice in writing to the 1st defendant signed by the Chairman or any Director or the Secretary acting or purporting to act on behalf of the company and for that purpose any instruction varying or purporting to vary the mandate contained in the resolutions would be deemed a revocation. The said resolution was signed by the 2nd defendant.

55. **Part F** of the bank account opening forms contains the mandate for a joint account. It states as follows:-

"In connection with this account we request you to honour cheques or orders (including cheques or orders in favour of any or either of us) thereon signed as per instructions in part A...."

56. On the account opening form where the plaintiffs and the 2nd defendant wrote their names and specimen signatures, on the space provided for the name of the account, it bears the words **"Any one singly"**. Above the said words is the name of the account holder, Infinity Gemstones, the 3rd defendant.

57. Having perused the foregoing documents, this court noted that there was no Board resolution made on 16th August, 1996 with regard to operation of the bank account. The minutes produced in evidence by DW1 are of a meeting held on 17th August, 1996 in which the Directors agreed that an account would be opened at Bullion Bank. In the said minutes, there was no resolution arrived at as to the number of Directors that was authorized to sign cheques for the 3rd defendant. In the absence of a resolution on the same, it cannot be said that the words **"Any two Directors"**, or the words **"Any one singly"** or the words **"either to operate"** captured a meeting of minds of the Board of Directors of the 3rd defendant. In his evidence, DW1 did admit that he overlooked the conflict between the words **"either to operate"** and **"any two Directors"** in the instructions given to the 1st defendant.

58. Paget's Law of Banking at p.403 states as follows:-

"The mandate embodies an agreement which authorizes the bank to pay if given instructions in accordance with its terms. Typically a mandate will list the individuals who have authority to sign cheques or other payment orders and will specify which individuals (if more than one) must sign the order. A bank which acts in accordance with the mandate is duly authorized. But it does not follow that a bank which acts contrary to the mandate is bound to be unauthorized. This is illustrated by London

Intercontinental Trust Ltd vs Barclays Bank Ltd. [1980] 1 Lloyd's Law Reports 241 where the defendant bank had honoured the cheque bearing a sole signature in breach of mandate requiring two signatures. However, the sole signatory had had actual authority from the plaintiff's Board of Directors to order the transfer of the sum in question. Accordingly, the plaintiff's claim was dismissed.

59. In light of the evidence adduced, it is my finding that the instructions captured in the bank account opening forms were ambiguous due to the apparent conflict highlighted in the evidence of PW1 and DW1. In the face of the said ambiguity, the 1st defendant owed a duty of care to the 3rd defendant and should have sought clarity from its Directors with regard to the operation of the bank account.

Issues No. 5, 6, 7, 8 and 9

60. The evidence adduced by PW1 as well as the cheques produced in court clearly indicate that the 2nd defendant drew various cheques on the 3rd defendant's account and presented them for payment. The evidence adduced as to the amount withdrawn on the strength of the cheques is however at variance with the claim in the plaint. In the amended plaint, the claim is for the sum of Kshs.7,463,158.00. In the particulars provided by the plaintiffs, they gave a figure of Kshs. 6,500,000/= . On cross-examination, PW1 informed the court that he would have to add the figures in the cheques to get the correct amount. The foregoing is illustrative of plaintiffs who are not sure footed about the actual amount that they are claiming from the 1st and 2nd defendants.

61. Taking into account that the 2nd defendant was the custodian of the cheque book and was the one who managed the affairs of the 3rd defendant, the plaintiffs are not precluded from raising questions in relation to the manner in which he operated the 3rd defendant's bank account during the period in issue. The foregoing therefore made him amenable to questioning by his co-directors as to the manner in which he managed and operated the 3rd defendants bank account.

62. The 1st defendant did not call any evidence to indicate if it had any reasonable grounds for believing that the 2nd defendant was operating the 3rd defendant's account wrongfully.

63. This court has found that the instructions given to the bank by the plaintiffs and the 2nd defendant were ambiguous and conflicting and that the 1st defendant failed to seek clarity on the operation of the 3rd defendant's bank account. For the said reason, the 1st defendant was in breach of its contract with the 3rd defendant.

64. In honouring payment made through the cheques in issue, the 1st defendant acted negligently in face of the glaring inconsistencies in the instructions contained in the bank account opening forms. In the case cited by Mr. Omwenga for the plaintiffs, of **A and A Jewellers Limited vs Royal Bank of Canada** (supra) Moldaver JA., stated thus:-

“In cases such as this, where the Bank is under a duty to make inquiries of its customers regarding a possible breach of trust, the bank will be found to be in constructive knowledge of the breach of the trust if it ‘fails to make appropriate inquiries’. (See Citadel General Assurance Co., supra at P. 839). Whether the inquiries are appropriate or not will depend on the particular facts and circumstances of the case. No bright line test can be fashioned. What can be said is that the banker is not required to engage in an impractically extensive inquiry, nor is it to be held to a standard of perfection. All that is required of the Bank is that it acts reasonably in the circumstances. (See Gold vs Rosenberg [1997] 3 S.C.R 767, 152 D.L.R (4th) 385 per Sopinka J for the majority at p 802.) Although it is impossible to specify the types of inquiry that might be encompassed by the words “reasonable”, at a minimum, they surely must include steps and measures that are part of a Bank's obligation under the terms of the agreement governing the account, not to mention the Bank's policy. In other words, in assessing whether the inquiries made by a bank in a particular case are reasonable, it is proper to measure them against the terms and conditions of the agreement with the customer, as well as the Bank's policy. If the steps or measures taken do not accord with either, then absent of a valid explanation, I fail to see how the inquiries can pass the “reasonableness test.”

66. Similarly, in **Selangor United Rubber Estate Ltd v Cradock** (No. 3) [1968] 2 ALL ER 1073, it was held that:-

“A bank has a duty under its contract with its customer to exercise reasonable care and skill in carrying out its part with regard to operations within its contracts with its customers. The duty to exercise reasonable care and skill extends over the whole range of banking business within the contract with the customer. Thus the duty applies to interpreting, ascertaining and acting in accordance with the instructions of the customer.”

67. Apart from lack of clarity in bank account opening instructions, the court notes that the Board resolution that was submitted to the 1st defendant did not bear the seal of the 3rd defendant and as such, the 1st defendant was under duty to seek a well-executed Board resolution for purposes of opening the bank account in issue.

Issues No. 10 and 11

68. Although the plaintiffs allege that they and the 3rd defendant suffered loss and damage as a result of the cheques drawn by the 2nd defendant, a perusal of the cheques reveals that cash was withdrawn across the counter on the strength of some cheques while others were drawn in favour of the third parties. It is not possible to discern in whose favour some of the cheques were drawn due to poor photocopying of the cheques which also have on their faces superimpositions by way of numerous bank stamps. This leaves quite a number of the cheques illegible as to whom they were drawn in favour of.

69. The plaintiffs did not pin point which particular withdrawals out of the numerous cheques were suspect but lumped all the cheques signed by the 2nd defendant together.

70. A perusal of the cheques produced shows that apart from those that were signed singly by the 2nd defendant, a few cheques were signed singly by the 1st plaintiff. In his evidence in chief, DW1 pinpointed the cheques that were signed singly by the 1st plaintiff. Due to the acquiescence of the 3rd defendant of having cheques signed singly by either the 1st plaintiff or the 2nd defendant, the court cannot hold that the plaintiffs and 3rd defendant suffered any loss and damage in the hands of the 2nd defendant. As a result thereof, the plaintiffs are estopped from claiming loss and damage suffered by them from the 2nd defendant.

71. As a Director, the 2nd defendant had a duty to act in good faith and a fiduciary duty to act in the best interest of the 3rd defendant as one of its Trustees. The court's finding from the evidence adduced and from his conduct and that of the plaintiffs is that he was not in breach of his obligations as Director of the 3rd defendant.

72. The evidence adduced leaves no doubt in the mind of this court that the plaintiffs were not oblivious as to the manner in which the 3rd defendant was being managed. Things only came to a head when the 1st defendant called for payment of the loan that had been borrowed by the 3rd defendant and it turned out that there were insufficient funds in its bank account to settle the loan.

Issues Nos. 12, 13, 14 and 15

73. The plaintiffs' Advocates did write to the 2nd defendant on 19th of May, 2000 alleging that between the period of September, 1996 to 30th September, 1998 the 3rd defendant had lost Kshs. 11,681,465.95 due to issuance of cheques signed by one Director, instead of two, as should have been the case. The plaintiffs in the said letter demanded that the 2nd defendant should commence proceedings against the bank for the said breach of contract with a view of safeguarding and recovering the said funds.

74. A demand letter was thereafter written on 10th July, 2000 by the law firm of Timamy and Company Advocates where a demand was made by the plaintiffs for the sum of Kshs. 11,168,137.955 from the 2nd defendant.

75. Due to the plaintiffs' failure to prove that the transactions made by the 2nd defendant were fraudulent and went against a specific Board resolution, it is this court's finding that the plaintiffs' shares and interest in the 3rd defendant cannot be said to have been compromised. Therefore the evidence tendered does not disclose a reasonable cause of action against the 2nd defendant as prayed in the amended plaint.

Issues Nos. 18 and 19

76. Failure to audit the 3rd defendant's accounts in the years subsequent to 1997 was due to disharmony amongst Directors. It was their duty to ensure that the annual accounts for the 3rd defendant were prepared, duly signed and submitted to the office of the Registrar of Companies on an annual basis.

77. DW1 in his evidence stated that in the year 1998, the plaintiffs transferred all the companies assets to themselves without his knowledge. The foregoing issue was not elaborated on by DW1 and it is therefore left as an unresolved issue. The counterclaim by the 3rd defendant was not proved for the foregoing reason and for the fact that the 2nd defendant led no evidence to show that the plaintiffs are withholding and/or retaining books of accounts and financial records pertaining to and concerning the 3rd defendant. The counterclaim therefore fails.

78. Having analyzed the documentary evidence availed and the evidence adduced in court, it is my finding that the claim for the sum of Kshs. 7,463,158 against the 1st and 2nd defendants was not proved on a balance of probabilities. In the case cited by Mr. Samir Inamdar Counsel for the 2nd and 3rd defendants, of **Bonham Carter vs Hyde Park Hotel Ltd** [1948] 64 TLR 177, Lord Goddard stated as follows:-

"Plaintiffs must understand that, if they bring actions for damages, it is for them to prove their damage; it is not enough to write down 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 damages'. They must prove it."

79. A claim was made against the 1st defendant for breach of contract. The court has already found that the 1st defendant was negligent by not seeking clarity on the bank account operating instructions, it is however trite law that general damages cannot be awarded for breach of contract. In **U.R Chande and Others vs East Africa Airways Corporation** [1964] E.A 78, the court stated as follows:-

*"The general rule as to quantum of damages to be awarded for breach of contract was stated by Alderson, B in **Hadley Baxendale (1854) 9 EX 341(156 ER 145 at P. 151) in the following terms:-***

"Now we think a proper rule in such a case as the present is this; where two parties have made a contract which one of them has broken, the damages the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally i.e. according to the usual course of things from such a breach of contract itself or such as may be reasonably supposed to have been in the contemplation of both parties, at the time they made the contracts the probable result of the breach of it."

80. The court in **Habib Zurich Finance (K) Limited vs Muthoga and Another** [2002] 1 E.A. 81 at P. 88 cited with approval the decision of the Court of Appeal for Eastern Africa in the case of **Dharamsu vs Karsam** [1974] EA 4, where the court held as follows:-

***“This case has been accepted by this court as an authority for the proposition that general damages cannot be awarded for breach of contract and that proposition makes sense because damages arising from breach of contract are usually quantifiable and are not at large. Where damages can be quantified, they cease to be general*”**

81. In the present case, the plaintiffs did claim the sum of Kshs. 7,463,158/= in their amended plaint. That was a quantified amount. They could therefore not in the same breath lodge a claim for general damages for breach of contract. Going by the decided cases cited above, a claim for general damages for breach of contract cannot hold and is hereby disallowed.

82. In prayer (f) of the amended plaint, the plaintiffs seek further relief as this

Honourable court will deem just to grant. The court has found that the plaintiffs acquiesced in having cheques signed by a single director presented for payment by the 1st defendant. The said defendant however should have been more diligent to ensure instructions given to it by the Directors of the 3rd defendant on the bank account operating instructions were clear. The 1st defendant sought no such answers from the Directors of the 3rd defendant and as a result thereof this court finds it to have acted negligently. This court will therefore award nominal damages to the plaintiffs.

83. In **Kanji Naran Patel vs Noor Essa and Another** [1965] EA 4484 at P. 487, Grabbe J.A, in paragraphs G-I stated as follows:-

“Nominal damage is a technical phrase which means that you have negated anything like real damage, but that you are affirming by your nominal damages that there is an infraction of a legal right which, though it gives you no right to any real damages at all, yet gives you a right to the verdict or judgment because your legal right has been infringed. But the term nominal damage does not mean small damages. The extent to which a person has a right to recover what is called by the compendious phrase damages but may also be represented as compensation for the use of something that belongs to him, depends upon a variety of circumstances and it certainly does not in the smallest degree suggest that because they are small, they are necessarily nominal damages. In the earlier case of Beumont vs Great head [1846] 2 C.B. 494 at 499, Maule J., spoke of nominal damages as a sum that may be spoken of but that has not existence in point of quantity and as a mere peg on which to hang costs.”

84. In the circumstances of this case, I hereby award the plaintiffs nominal damages in the sum of Kshs. 800,000/= as against the 1st defendant together with interest at court rates until payment in full. Since the case involves company wrangles amongst Directors who fell out and due to the fact that the plaintiffs have only partially succeeded in their claim, I order that each party shall bear its own costs of the suit.

It is so ordered.

DATED and SIGNED at MOMBASA on this 6th day of June, 2018.

NJOKI MWANGI

JUDGE

DELIVERED, DATED and SIGNED at MOMBASA on this 7th day of June, 2018.

P. J. OTIENO

JUDGE

In the presence of:-

.....for the plaintiffs

.....for the 1st defendant

.....for the 2nd defendant & 3rd defendants

..... Court Assistant