REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 638 OF 2011

WANJE MASHA WANJE ….....……...……... PLAINTIFF

V E R S U S

ANDREW PETER NGIRICI ……..…….....……....…….. 1ST DEFENDANT

PURITY WANGUI KURIAH …….…….....…….…….2ND DEFENDANT

JUDGMENT

1. WANJE MASHA WANJE, the Plaintiff sued two Defendants **ANDREW PETER NGIRICI**, 1st Defendant, and **PURITY WANGUI KURIAH**. The Defendants are husband and wife.

THE CLAIM

2. The Plaintiff's claim is that the 1st Defendant fraudulently registered 5 motor vehicles, Plaintiff purchased in Dubai, in his and 2nd Defendant's name. Plaintiff pleaded that he and 1st Defendant incorporated a Company Tarasha Tours & Car Hire Limited and that it was agreed between them that the aforesaid cars were to be registered in the name of Tarasha. Plaintiff pleaded that 1st Defendant had unjustly enriched himself. In his final prayers in the Plaint the Plaintiff sought injunctive orders, order for Defendants to account, and an order the Defendant to pay to Plaintiff the value of the vehicles.

3. Defendants in their joint defence denied the Plaintiff's claim and specifically pleaded that the vehicles were purchased and imported into the county by 1st Defendant.

BACKGROUND

4. It is not denied that on or about 3rd June 2011 the Plaintiff and 1st Defendant incorporated the Company Tarasha. The Plaintiff alleges that the Directors shareholders of Tarasha, that is the Plaintiff and 1st Defendant, agreed that Tarasha should engage in car hire tour business. To that end he alleges that he and 1st Defendant agreed to purchase vehicles to be registered in the name of Tarasha. Further that since the 1st Defendant did not have money to contribute towards the purchase of those vehicles, that it was agreed he would buy them from his own resources. He said that he withdrew from his account Kshs. 2 million and later Kshs. 4 million towards that purchase. Further that he bore the air fare and accommodation costs for himself, the 1st Defendant and 1st Defendant's son for their travel to Dubai. He stated that he trusted 1st Defendant. He therefore claimed that the 1st Defendant acted fraudulently when

he registered the vehicle with Kenya Revenue Authority in his and 2nd Defendant's name.

5. The Defendant denied that there was an agreement to purchase the vehicles with a view to register them in the name of Tarasha. He alleged he was the one who purchased the vehicles with his funds; he relied on invoices which were in his name. He alleged that the Plaintiff lent him the money to pay customs to enable the vehicle to be cleared from the Mombasa Port.

6. There are three issues that present themselves for determination in this case-

i. **Is the Plaintiff's claim defeated by lack of authority from Tarasha Tours & Car Hire Limited;**

ii. **Who purchased the vehicle; and**

iii. **What order should the Court make.**

ISSUE NO. (i)

7. The Plaintiff by his Plaint pleaded that he and 1st Defendant incorporated the Company Tarasha and then resolved to purchase 5 cars to be used in the Company Transport business. The Plaintiff pleaded further thus-

> **"When the motor vehicles were bought from Dubai, the understanding between the Plaintiff and the 1st Defendant was that the motor vehicles would be registered in the name of the Company and would be used for the benefit and purposes of the Company contemplated at its incorporation."**

In Plaintiff's particulars of the fraud he alleged the Defendants committed fraud where stated the 1st Defendant registered the vehicles in his name which were meant for Tarasha; that 1st Defendant hired the vehicles to third parties without consulting the Plaintiff; that 1st Defendant concealed from Plaintiff profits of Tarasha; and that 1st Defendant prevented Plaintiff from accessing Tarasha's statutory books, amongst others.

8. On being cross examined by defence Learned Counsel Plaintiff stated that the resolution about the purchasing of the vehicle for the Company Tarasha was not in writing. Plaintiff did confirm that as at the date and time he gave as the date they resolved to buy the cars the Company Tarasha had not yet been incorporated.

9. The 1st Defendant did deny that there was any such resolution about purchasing vehicles for Tarasha.

10. Defendant's written submission after conclusion of the trial faulted Plaintiff's claim for failing to join Tarasha as a party in the case. Defendants relied on Section 16 of the Companies Act (Cap 486) which provides-

> **"16(2) From the date of incorporation mentioned in the certificate of incorporation, the subscribers to the memorandum together with any such other persons as may from time to time become members of the Company, shall be a body corporate by the name contained in the Memorandum Capable of exercising all the functions of an incorporated Company … having perpetual succession and a Common seal."**

11. In furtherance to that submission Defendants argued that Plaintiff cannot claim for the value of those vehicles while asserting that the vehicles belonged to Tarasha.

12. The Court in the case **EAST AFRICAN PORTLAND CEMENT LTD v CAPITAL MARKETS AUTHORITY & 4 OTHERS [2014]eKLR** considered how decisions of a company can be made and

stated-

> **"In Affordable Homes Africa Limited –Vs- Ian Henderson & 2 Others HCCC No. 524 of 2004, Njagi J observed that as an artificial body, a Company can take decisions only through the agency of its organs, the Board of Directors and the shareholders; and that where a Company's powers of management are, by the articles, vested in the Board of Directors, the general meeting cannot interfere in the exercise of those powers (see the decision of the Court in Automatic Self-Cleansing Filter Syndicate v. Cuninghame [1906] Ch. 34, CA.); that it was therefore necessary to examine a particular company's articles of association to ascertain wherein lies the power to manage the Company's affairs, for therein also lies the power to sanction the commencement of Court actions in the name of the Company. The Court (Njagi J) observed that it was common ground that there was no authority from the Board Directors to institute the suit, and consequently, he held as follows-**
>
> **'The upshot of these considerations is that in the absence of a board resolution sanctioning the commencement of this action by the Company, the company is not before the Court at all. For that reason, the Preliminary Objection succeeds and the action must be struck out with costs, such costs to be borne by the Advocates for the Plaintiff."**

13. Tarasha's Articles provide as provide as follows-

> **"Subject to the provision of the Act, a resolution in writing signed by all members for the time being entitled to receive notice of and to attend and vote at any General Meeting (or being corporations by the duly authorized representatives) shall be as valid and effective as if the same had been passed at a General Meeting of the Company duly convened and held."**

14. From the above it is clear that a resolution of Tarasha ought to have been in writing. The resolution referred to by the Plaintiff to buy cars for Tarasha was not in writing and the Plaintiff as much confirmed that.

15. Does the lack of that conformity with the Articles of Association of Tarasha nullify the Plaintiff's case?

16. In my view the answer is in the negative. The Plaintiff's use of the word **"resolved**" to buy the cars ought to be taken bearing in mind what he stated in paragraph 29 in his affidavit dated 14th December 2011 in support of his interlocutory application. He stated in that paragraph thus-

> **"THAT the 1st Defendant took an unfair advantage of my relative inexperience in commerce to defraud me and the Company."**

I emphasize on that paragraph of Plaintiff's admission that he was relatively inexperienced in commerce. With that in mind it is possible that what he meant by the 'resolved' was not the legal connotation it has in Company Law rather than he meant that a decision was made between him and the 1st Defendant to buy cars to be registered in the name of Tarasha. That can only be the logical interpretation since Defendant did not cross examine Plaintiff specifically on whether he meant corporate resolution or he meant an agreement between him and the 1st Defendant.

17. But perhaps more importantly is that the Company Tarasha neither claims nor did it provide the finances to buy the cars. The Plaintiff consistently has sought that either the vehicles be released to him or their value be paid to him because the intent they initially had to have them registered in the name of Tarasha did not materialize.

18. I do therefore find that Plaintiff's claim is not defeated by the lack of written resolution by the Company Tarasha because his claim is for his personal compensation for those cars.

ISSUE NO. (ii)

19. The 1st Defendant alleged he purchased the five vehicles and paid Kshs. 275,013.00 in respect of duty for the vehicle KBP 204Y but the Plaintiff lent him Kshs. 2,400,000/- which money he used to pay duty of the other vehicles.

20. Apart from that bare statement the 1st Defendant did not show his financial ability as at June 2011 to have enabled him to purchase those five vehicles. He had an obligation as provided under Section 107(1) (2) of the Evidence Act Cap 80, to show evidence of such ability in particular because the Plaintiff stated 1st Defendant did not have sufficient funds to purchase the cars. That Section provides-

> **"107(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."** (Emphasis added)

1st Defendant being cross examined said he paid for the vehicles from funds in his EU account. He did not produce such account in evidence.

21. I had opportunity to observe both the Plaintiff and the 1st Defendant as they testified. The Plaintiff impressed me as being honest and sincere witness. There was no guile about him.

22. The opposite, however, was the case in respect of 1st Defendant. He impressed me as an untruthful witness and indeed his evidence showed inconsistencies which brought out his lies.

23. In his Replying Affidavit undated but filed in Court on 22nd February 2012 the 1st Defendant stated at paragraph 14(i) that he paid duty for vehicle KBP 204Y of Kshs. 275,013.00. The Plaintiff at page 34 of his documents exhibited in evidence provided a copy of cheque deposit slip for that amount of Kshs. 275,013.00 made into the K.R.A account on 12th July 2011. The 1st Defendant did not produce evidence to show he made that payment. On being cross examined regarding that payment he stated contrary to his previous deposition that the money "**it came from the Plaintiff**."

24.Further in that same affidavit 1st Defendant stated thus-

"By an agreement dated 30th May 2011 entered into between the Plaintiff and myself I sold to the Plaintiff 500 ordinary shares in East African Coast Solutions Limited for a consideration of Kshs. 17,000,000/-. The Plaintiff has so far paid Kshs. 3,400,392/- leaving a balance of Kshs. 13,599,608/- which I claim from the Plaintiff. The said sum was paid as follows-

a. **On 19th July 2011 the Plaintiff obtained on my behalf 3 bankers cheque of Kshs. 800,130, Kshs. 800,130/- and Kshs. 800,130/- in the name of the Commissioner of Customs Services. Total sum of the 3 cheques = Kshs. 2,400,392/-.**

b. **On 11th August 2011 by direct transfer to account No. 016 8600755 = Kshs. 1,000,000/- Kshs. 3,400,392/-."**

25. That deposition in 1st Defendant affidavit, reproduced above, and his written statement though referring to the same payment is at complete variance.

26. On further being cross examined in respect of his testimony that Plaintiff paid for shares of East African Coast Solutions Ltd by making payment by three banker's cheques of Kshs. 800,130/- 1st Defendant stated that he did not have the Plaintiff's shares of that Company nor were those shares issued to Plaintiff.

27. In the end while being cross examined 1st Defendant confirmed that Plaintiff paid Kshs. 3.4 million and Kshs. 768,000/- towards the clearance of the vehicles. By so stating Plaintiff confirmed the evidence of the Plaintiff.

28. 1st Defendant did not submit credible evidence which can assist the Court determine that the vehicles were purchased by him. Moreover he accepted that one month prior to their travel with Plaintiff to Dubai he only had Kshs. 40,000/- in his Co-operative Bank. Although he did say that he had many other Bank accounts he did not produce them in evidence.

29. To the contrary to the impression I formed of the 1st Defendant the Plaintiff came across an honest witness. He repeatedly said that in carrying out the transaction he had put his trust in the 1st Defendant, which trust he said was breached. Indeed the Plaintiff's learned Counsel well summed up the Plaintiff's character when he stated in his written submissions that he-

> **"Acting in good faith and having swallowed the 1st Defendant's "car hire business" idea hook, line and sinker."**

30. The Plaintiff stated that he withdrew Kshs. 2 million towards the venture they had agreed with 1st Defendant; and later withdrew Kshs. 4 million. He produced his bank statements and cash withdrawal slip to prove the same. He also produced in evidence payment by way of Bankers cheques of custom duty for the vehicles. Since the Plaintiff was not knowledgeable in business or in importation of vehicles he seemed to have depended on the 1st Defendant knowledge whom he said defrauded him. Indeed the invoices of all the vehicles, the importation documents were all in 1st Defendant's name. Yet with those documents being in his name the 1st Defendant could not prove how he purchased the vehicles. Plaintiff has adequately proved his financial capability of purchasing the vehicles even his bank statement reveals that on 21st June 2011 he purchased airline ticket through Rwandaair at the offices of Rwandaair in Mombasa for Kshs. 229,174.65. This airline ticket represented the second trip of the Plaintiff and 1st Defendant to Dubai to purchase two more cars to make them total five cars.

31. I make a finding that it was the Plaintiff who purchased the motor vehicles KBQ 002A registered in 1st Defendant's name; KBP 203Y registered in 1st Defendant's name, but which was later registered in 2nd Defendant's name; KBP 204Y registered in 1st Defendant's name; KBP 205Y registered in 1st Defendant's name but later registered in 2nd Defendant's name; and KBQ 963H registered in 1st Defendant's name. The Plaintiff also proved that the 1st Defendant in registering those vehicles in his name and in 2nd Defendant's name committed fraud. The Court in the case **R. G. PATEL –Vs- LALJI MAKANJI [1957]E.A. 314** the Court held-

> **"…. 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."**

I am satisfied the Plaintiff has met this standard of proof. Plaintiff's claim is well supported by documentations.

ISSUE (iii)

32. The 1st Defendant has had the custody of those vehicles since the year 2011. That is now nearly four years ago. 1st Defendant stated that the vehicles except vehicle KBQ 002A the Range Rover had been sold by him to third parties. That Range Rover must now, four years, later have lost the value it had. Having found that all the vehicles were purchased by the Plaintiff there is no doubt that the 1st Defendant unjustly enriched himself. The Court in the case **MADHUPAPER INTERNATIONAL LTD & ANOTHER –Vs- KENYA COMMERCIALK BANK LTD & 2 OTHERS [2003]eKLR** had this to say on unjust enrichment-

"Forming the foundation of quasi-contractual claims, such as actions for money had and received, and for money paid to a third party from which the Defendant has derived a benefit, and equitable relief from undue influence and catching bargains, amongst other restitutionary claims, the idea of unjust enrichment or unjust benefit is intended to prevent a person from retaining money or some benefit derived from another which it is against conscience that he should keep it, and he should, in justice, restore it to the Plaintiff. The gist is that a Defendant, upon the circumstances of the case is obliged by the ties of natural justice and equity to make restitution. As Lord Goff of Chieveley and Professor Gareth Jones state in their monumental treatise, The Law of Restitution, 5th edn (1998), at pp 11-12:

"Most mature systems of law have found it necessary to provide, outside the fields of contract and civil wrongs, for the restoration of benefits on grounds of unjust enrichment."

33. The 1st Defendant ought to restore to the Plaintiff the money withdrawn by him for the failed venture. The Plaintiff proved to have withdrawn Kshs. 4,000,000; to have expended Kshs. 768,328 and Kshs. 2,400,390; and as correctly stated 1st Defendant admitted receiving from Plaintiff in his written statement Kshs. 1,000,000/-. These amounts should be refunded to Plaintiff.

CONCLUSION

34. Accordingly the judgment of the Court is as follows:-

a. **There shall be judgment for the Plaintiff against the 1st Defendant for Kshs. 8,203,098 plus interest at Court rate from 3rd June 2011 until payment in full.**

b. **The Plaintiff is awarded costs of the suit to be paid by 1st Defendant.**

c. **The case against 2nd Defendant is dismissed with no orders as to costs.**

d. **The Plaintiff shall before the Decree in this matter is extracted pay extra filing fees for the amount of this judgment.**

e. **This file shall hence forth be a 'Lock and Key file.'**

DATED and DELIVERED at MOMBASA this 5TH day of MARCH, 2015.

MARY KASANGO

JUDGE