REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC SUIT NO. 1246 OF 2014

SCANDVIKEN CONSULTANTS & TRADE (K) LTD..... PLAINTIFF

=VERSUS=

DANIEL ONYANGO NYAGWARA.....1ST DEFENDANT

ELDERMA HOLDINGS LIMITED.....2ND DEFENDANT

JUDGMENT

The plaintiff is a limited liability company incorporated in Kenya. At all material times, the plaintiff had four (4) directors and shareholders three (3) of whom were foreigners. From the time of its incorporation in 2007, the plaintiff was under the management of its Kenyan director and shareholder, Daniel Onyango Nyagwara, the 1st defendant herein. The directors and shareholders of the plaintiff appear to have been brought together by a religious bond. They shared common religious beliefs before they decided to incorporate the plaintiff. The 1st defendant was a minority shareholder in the plaintiff. He held 10% of the plaintiff's issued shares while the remaining 90% of the shares were held by the foreign directors and shareholders of the plaintiff.

On or about 30th April, 2007, the plaintiff entered into a tenancy agreement with the 2nd defendant in respect of an open space measuring 100 feet by 50 feet situated in all that parcel of land known as L.R No. 12715/611. The said open space is hereinafter referred to only as "the suit property". The suit property was at all material times registered in the name of Gurcharan Singh Bahra (hereinafter referred to only as "Gurcharan Singh"). It is not clear why the tenancy agreement was made between the plaintiff and the 2nd defendant and not with Gurcharan Singh Bahra who was the registered owner of the suit property. The tenancy was for a period of 5 years and 3 months with effect from 1st May, 2007 with an option to renew on the same terms and conditions subject to rent review. The tenancy was to expire on 31st August, 2012.

On 30th July, 2008, the plaintiff entered into an agreement with Gurcharan Singh under which Gurcharan Singh permitted the plaintiff to construct on the suit property a go-down measuring 140 feet by 60 feet for its own use. It was agreed between the parties that the plaintiff would use the said go-down for a period of 10 years to enable it recover its investment. It was agreed further that after the expiry of the said 10 years, the go-down would be owned by Gurcharan Singh. The position of the 2nd defendant with which the plaintiff had entered into a tenancy agreement in respect of the suit property was not made clear in this new agreement between the plaintiff and Gurcharan Singh. It was also not made clear in this agreement how the tenancy agreement between the plaintiff and the 2nd defendant was going to fit into this new arrangement between the plaintiff and Gurcharan Singh.

Pursuant to the said agreement between the plaintiff and Gurcharan Singh, the plaintiff constructed a go-down on the suit property. It is not clear from the evidence on record and other material before the court as to when the construction of the said go-down commenced and when it was completed. The plaintiff has contended that it constructed the said go-down at a cost of Kshs. 17,977,498/=. The plaintiff has contended further that prior to the construction of the said go-down, it had entered into an agreement with Gurcharan Singh on what was to happen upon the termination of the tenancy agreement (hereinafter referred to only as "the lease") between the plaintiff and the 2nd defendant in respect of the suit property. The plaintiff has contended that it was agreed between the plaintiff and Gurcharan Singh that if the said lease was not renewed, the 2nd defendant was to have an option to purchase the said go-down, the floors thereof and the associated infrastructure at a price to be determined through a valuation that was to be carried out at the end of the lease or termination thereof. This agreement that the plaintiff is said to have entered into with Guracharan Singh on the fate of the go-down on the termination of the lease between the plaintiff and the 2nd defendant was not produced by the plaintiff at the trial.

Before the lease came to an end in August, 2012, the plaintiff approached the 2nd defendant on 17th February, 2012 for the extension of the lease for a further term of 5 years and 3 months. The plaintiff's letter requesting for extension of the lease was not responded to by the 2nd defendant but by another entity owned by Gurcharan Singh known as Soham Oils Kenya. In a letter dated 28th February, 2012 signed on its behalf by Gurcharan Singh, Soham Oils Kenya agreed to extend the plaintiff's lease provided that the new lease would be with Soham Oils Kenya and the rent would be Kshs. 174,000/= per month inclusive of 16% VAT subject to 15% yearly increment. The parties failed to agree on the terms of the new lease and as such the plaintiff's lease was not renewed upon its expiry in August, 2012.

The plaintiff thereafter engaged the 2nd defendant in negotiations to sell the go-down to it. As part of these negotiations, Gurcharan Singh engaged valuers who valued the go-down at Kshs. 10,000,000/= on 14th June, 2012. On instructions from the plaintiff, the same valuers valued the said go-down at Kshs. 25,000,000/= on 11th July, 2012. On 6th October, 2012, the 1st defendant acting on behalf of the plaintiff offered the said go-down for sale to the 2nd defendant at Kshs. 4,000,000/=. The offer was accepted by the 2nd defendant which paid the full purchase price to the plaintiff through the 1st defendant. The 1st defendant acknowledged receipt of the said payment. The 2nd defendant thereafter took possession of the go-down.

The dispute before the court:

The plaintiff's case;

The plaintiff brought the suit on 23rd September, 2014 against the defendants seeking several reliefs. In its plaint dated 15th August, 2014, the plaintiff blamed the 1st defendant for the plaintiff's failure to have its lease with the 2nd defendant renewed. The plaintiff averred that the 1st defendant who was the General Manager of the plaintiff failed to engage an advocate to assist in the lease renewal negotiations with the 2nd defendant even after being instructed by the plaintiff's board of directors to do so and also being put in funds for that purpose. The plaintiff averred that due to the 1st defendant's mismanagement of the affairs of the plaintiff, the plaintiff decided to suspend its operations and to surrender the suit property to the 2nd defendant. The plaintiff averred that after making that decision, it decided to exercise its option to sell the go-down that it had constructed on the suit property (hereinafter referred to only as "the go-down") to the 2nd defendant. The plaintiff averred that, that move was made pursuant to an agreement that the plaintiff had reached with the 2nd defendant under which the 2nd defendant was given an option to purchase the go-down together with the associated infrastructure at the end of or on termination of the plaintiff's lease.

The plaintiff averred that following a meeting between the plaintiff's officers and the 2nd defendant's director, it was agreed that the go-down be valued to ascertain its market value to inform the negotiations on the sale thereof. The plaintiff averred that the first valuation which was based on the depreciated value of the go-down as at 11th April, 2007 gave the value of the go-down as Kshs. 10,000,000/= while a second valuation which was based on the market value gave the value of the go-down as Kshs. 25,000,000/=. The plaintiff averred that it offered to sell the go-down to the 2nd defendant at Kshs. 25,000,000/= on 18th July, 2012 and that the 2nd defendant did not respond to the offer.

The plaintiff averred that its director held a meeting with the 2nd defendant's director on 15th August, 2013 to discuss the issue further when the plaintiff's said director was informed by the 2nd defendant's director that the 2nd defendant had purchased the go-down a year earlier and that it was in possession thereof. The plaintiff averred that it was surprised by this turn of events because its directors had always been in touch with both the defendants and had never been informed of the sale of the go-down and of any payment made on that account to the plaintiff. The plaintiff averred that even after secretly and fraudulently selling the go-down to the 2nd defendant, the 1st defendant continued in subsequent communication with the plaintiff's other directors to make the plaintiff believe that he was still in negotiations with the 2nd defendant to either have the lease renewed or the go-down sold to the 2nd defendant. The plaintiff averred that it did not enter into an agreement with the 2nd defendant to sell to the 2nd defendant the said go-down at Kshs. 3,000,000/= or at any amount less than the market price of the said property. The plaintiff averred that neither the said sum of Kshs. 3,000,000/= nor any other amount was remitted to the plaintiff as purchase price for the said go-down. The plaintiff averred that the said actions by the defendants amounted to collusion aimed at defrauding the plaintiff of the payment that was rightfully due to it from the said go-down.

The plaintiff averred that after being confronted by the plaintiff's other directors, the 1st defendant admitted the said acts of fraud, apologized to the plaintiff and sought forgiveness. The plaintiff averred that it was entitled to; Kshs.22,000,000/= from the defendants being the difference between the value of the go-down and the sum of Kshs.3,000,000/= that was allegedly paid by the 2nd defendant for the property; Kshs.3,000,000/= from the 1st defendant being the amount that was paid to the 1st defendant by the 2nd defendant which the 1st defendant diverted to his personal use and a sum of Kshs.2,100,000/= being the interest that accrued on a loan of 1,000,000/= Norwegian Crowns (NOK) that the directors of the plaintiff borrowed and hoped to settle using the proceeds of sale of the go-down a foresaid.

At the trial, the plaintiff called two (2) witnesses. The plaintiff's first witness was its director, Olav Harald Vardal (PW1). PW1 reiterated the contents of the plaintiff's plaint that I have summarized above. He stated as follows: He was a Norwegian living in Norway. With two of his colleagues, they established the plaintiff company in which they were directors and shareholders. They employed the 1st defendant as the plaintiff's General Manager. The plaintiff leased the 2nd defendant's premises to set up a go-down for a business they wished to run in Kenya. The plaintiff put up a go-down at a cost of about Kshs. 17,000,000/= on the property that the plaintiff leased from the 2nd defendant. The business started well but fell on hard times towards the end of the lease. The plaintiff attempted to renew the lease with the 2nd defendant. While negotiations were still going on for the renewal of the lease, he learnt that the go-down had already been sold to Gurcharan Singh without the approval of the board of directors of the plaintiff. The plaintiff was claiming the market value of the go-down which had been assessed at Kshs. 25,000,000/=.

PW1 stated further that the 1st defendant was aware that the plaintiff was going to sell the go-down at the end of the lease at market value. He stated that the plaintiff was dissatisfied with the first valuation that gave the value of the suit property as Kshs. 10,000,000/= and that is why the plaintiff called for a second valuation that gave the go-down a value of Kshs. 25,000,000/=. He stated that the plaintiff did not ratify the sale of the go-down to the 2nd defendant at Kshs. 4,000,000/= and that the plaintiff did not receive the said sum of Kshs. 4,000,000/=. He stated further that the plaintiff was also not aware that the go-down had been offered for sale to the 2nd defendant at Kshs. 4,000,000/=. He stated that when he arranged to have a meeting with Gurcharan Singh in 2013, he was not aware that the go-down had been sold. He stated that neither the 1st defendant nor the 2nd defendant had informed him of this fact even though the 1st defendant accompanied him to Gurcharan Singh's office for the meeting but remained in the car. He stated that it was at the meeting he had with Gurchan Singh that he learnt of the sale of the go-down. He stated that the plaintiff never owned Motor Vehicle Registration No. KBU 533A that was allegedly sold for Kshs. 3,000,000/=. He stated that there was no evidence that the said amount was remitted to Winston Grimes the alleged owner of

the said vehicle as claimed by the 1st defendant. He stated that Winston Grimes had denied receiving any payment from the 1st defendant. He stated that there was no evidence that a sum of Kshs. 4,000,000/= was paid to the plaintiff by the 2nd defendant for the go-down. He stated that the 1st defendant admitted wrongdoing and asked for forgiveness. He urged the court to grant the reliefs sought in the plaint. PW1 produced the plaintiff's bundle of documents dated 20th August, 2014 as an exhibit. The plaintiff's second witness was Remmintone Mulwa Musau (PW2). PW2 produced in evidence the valuation reports dated 14th June, 2012 and 11th July, 2012 that were prepared by Kenya Valuers and Estate Agents Limited in respect of the go-down that the plaintiff had constructed on the suit property as exhibits.

The 1st defendant's case:

The 1st defendant filed his statement of defence on 18th December, 2015. The 1st defendant averred that he was a shareholder and a director of the plaintiff and that he was in charge of the day to day operations of the plaintiff. The 1st defendant denied that the plaintiff had spent Kshs. 17,977,498/= in the construction of the go-down that it had put up on the suit property. The 1st defendant contended that the cost of constructing the said go-down did not exceed Kshs. 4,000,000/=. The 1st defendant denied that the plaintiff had an option to sell the said go-down at the end of the lease. The 1st defendant denied that he was the general manager of the Plaintiff. He averred that he was at all material times a director of the plaintiff overseeing the day to day running of the company. The 1st defendant averred that the plaintiff's directors did not pass a resolution to borrow money and that if any loan was taken by some of the directors of the company, the same was taken by them in their private capacities and not on behalf of and for the benefit of the plaintiff.

The 1st defendant denied that he was to blame for the refusal by the 2nd defendant to renew the plaintiff's lease and contended that the decision to close down the operations of the plaintiff was made due to poor returns and decision making by the plaintiff's directors and shareholders who were residing out of the country. The 1st defendant admitted that the go-down was sold at Kshs. 4,000,000/= which he contended was the best option available to the plaintiff since the plaintiff had been served with a notice to vacate the leased premises. The 1st defendant averred that the sum of Kshs. 3,000,000/= that was paid to the plaintiff was not part of the purchase price for the go-down. The 1st defendant averred that the said payment was received from one, Stephen Ochieng Roberts as a purchase price for Motor Vehicle KBU 533A that belonged to one, Winston Grimes but was registered in the name of the plaintiff. The 1st defendant averred that the said payment was remitted to Winston Grimes.

The 1st defendant averred further that the plaintiff offered to sell the go-down to the 2nd defendant at Kshs. 4,000,000/= which offer was accepted. The 1st defendant denied any wrongdoing in the sale of the go-down and averred that he consulted the other directors of the plaintiff while making the decision. The 1st defendant averred that the decision to sell the said go-down was ratified by the plaintiff. The 1st defendant averred further that no resolution was passed by the plaintiff to institute this suit.

At the trial, the 1st defendant adopted his witness statement dated 7th March, 2017 as his evidence in chief. He reiterated that no resolution was passed to file this suit and that the go-down that the plaintiff had erected on the suit property was put up at a cost of Kshs. 4,000,000/=. The 1st defendant stated that the plaintiff's lease was not renewed because PW1 failed to agree with the 2nd defendant on the terms of renewal until the lease expired. He stated that the go-down was sold at Kshs. 4,000,000/= which was gratuitous. He stated that as at the time the said amount was being paid to the plaintiff, the lease had expired and the plaintiff had been given an ultimatum to vacate the suit property. He stated that the said sum of Kshs. 4,000,000/= was paid to the plaintiff although not at once. He reiterated that the sum of Kshs. 3,000,000/= which PW1 claimed to have been part of the said sum of Kshs. 4,000,000/= was not paid for the go-down but were proceeds of car sale to one, Nobert Ochieng. He stated that the said car belonged to Winston Grimes to whom he remitted the said sum of Kshs. 3,000,000/=. He denied that he admitted wrong doing in the sale of the go-down and asked for forgiveness. He reiterated that the plaintiff did not pass a resolution to borrow money. He urged the court to dismiss the suit.

The 2nd defendant's case:

The 2nd defendant filed a statement of defence on 27th November, 2014. The 2nd defendant contended that the suit did not disclose a cause of action against it. The 2nd defendant averred that L.R No. 12715/611 was owned by Gurcharan Singh and that the 2nd defendant was a managing agent of the property. The 2nd defendant admitted that it leased to the plaintiff a portion of L.R No. 12715/611 measuring 100 feet by 50 feet (the suit property) for a period of 5 years and 3 months on terms and conditions that were contained in the tenancy agreement between the parties made on or about 30th April, 2007. The 2nd defendant admitted further that the lease between the 2nd defendant and the plaintiff had a renewal clause. The 2nd defendant averred further that on 30th July, 2008, the plaintiff and Gurcharan Singh entered into a novation agreement in respect of the lease under which Gurcharan Singh allowed the plaintiff to put up a go-down on the suit property at its own cost for its use for a period of 10 years after which the go-down was to be owned by Gurcharan Singh.

The 2nd defendant averred that, at all material times, the 2nd defendant was dealing with the 1st defendant who had been introduced to it as the Managing Director of the plaintiff. The 2nd defendant denied that it was a term of the lease between it and the plaintiff that it will purchase the go-down from the plaintiff at the end of or on the termination of the plaintiff's lease. The 2nd defendant averred that the 10-year period that the plaintiff was to occupy the go-down depended on the renewal of its lease. The 2nd defendant averred that before the expiry of the lease, Gurcharan Singh offered to renew the same but the plaintiff did not respond to the offer until the lease expired. The 2nd defendant averred that despite the terms of the novation agreement, Gurcharan Singh offered to compensate the plaintiff for its investment in the said go-down. The 2nd defendant averred that in order to ascertain the value of the go-down so as to inform the compensation payable, Gurcharan Singh agreed to have the property valued. The 2nd defendant averred that the go-down was valued by Kenya Valuers & Estate Agents Ltd. at Kshs. 10,000,000/=. The 2nd defendant denied that the said valuation was influenced by Gurcharan Singh and that Gurcharan Singh was liable to pay the market value of the go-down. The 2nd defendant averred that on 6th June, 2012 the plaintiff wrote to the 2nd defendant offering to sell the go-down to the 2nd defendant at Kshs. 4,000,000/= which offer was accepted and the full purchase price paid to the plaintiff. The 2nd defendant denied that it fraudulently colluded with the 1st defendant to deny the plaintiff the real value of the go-down.

The 2nd defendant denied that the plaintiff was entitled to the reliefs sought in the plaint.

At the trial, Gurcharan Singh Bahra (DW2) gave evidence for the 2nd defendant. DW2 reiterated the contents of the 2nd defendant's defence that I have highlighted above. It is not necessary to repeat the same here. DW2 told the court that the business that the plaintiff wished to carry out on the suit property did not take off as a result of which the plaintiff offered to sell to the 2nd defendant its go-down at Kshs. 4,000,000/= which offer was accepted by the 2nd defendant. He stated that the 2nd defendant paid to the plaintiff the said sum of Kshs. 4,000,000/= by cheques made out in favour of plaintiff. DW2 stated that the only representative of the plaintiff who was known to the 2nd defendant was the 1st defendant. He stated that the 2nd defendant had no obligation to purchase the plaintiff's go-down and that the said sum of Kshs. 4,000,000/= was only paid by the 2nd defendant as a show of good faith. DW2 stated that if the plaintiff was not happy with the said payment, the plaintiff was at liberty to refund the same with interest after which the plaintiff could remove its go-down from his land. DW2 produced the 2nd defendant's bundle of documents as an exhibit.

Submissions:

After the end of evidence, the parties made closing submissions in writing. The plaintiff filed its submissions on 30th January, 2020 while the 1st defendant filed his submissions on 20th February, 2020. The 2nd defendant did not file submissions even after time was extended for it to do so.

Analysis of the issues raised and the determination thereof:

The parties did not file a statement of agreed issues. From the pleadings, the following in my view are the issues arising for determination in this suit;

1. Whether the 1st and 2nd defendants colluded to fraudulently sell the plaintiff's go-down on L.R No. 12715/611 at undervalue.

2. Whether the plaintiff is entitled to the reliefs sought in the plaint.

3. Who is liable for the costs of the suit?

Whether the 1st and 2nd defendants colluded to fraudulently sell the plaintiff's go-down on L.R No. 12715/611 at undervalue.

In Blacks' Law Dictionary, 10th Edition collusion is defined as:

> **"An agreement to defraud another or to do or obtain something forbidden by law."**

In the same dictionary, fraud is defined as:

> **"1. A knowing misrepresentation or knowing concealment of a material fact made to induce another to act to his or her detriment.**
>
> **2. A reckless misrepresentation made without justified belief in its truth to induce another person to act.**
>
> **3. A tort arising from a knowing or reckless misrepresentation or concealment of material facts made to induce another to act to his or her detriment.**
>
> **4. Unconscionable dealing; esp., in contract law, the unfair use of the power arising out of the parties' relative positions and resulting in an unconscionable bargain."**

The burden was upon the plaintiff to prove collusion between the 1st and 2nd defendant and fraud. In Kurshed Begum Mirza *v* Jackson Kaibunga [2017] eKLR, the court stated as follows:

> **"[16] Turning to the second issue; according to section 107 of the Evidence Act, the burden of proof in any case lies with the party who desires any court to give judgment as to any legal right or liability. It is for that party to show that the facts which he alleges his case depends upon exist. This is known as the legal burden.**
>
> ***The Halsbury's Laws of England, 4th Edition, Volume 17, at paras 13 and 14: describes it thus:***
>
> ***"13. The legal burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party's case. If at the conclusion of the trial he has failed to establish these to the appropriate standard, he will lose.***
>
> ***14. The legal burden of proof normally rests upon the party desiring the court to take action; thus a claimant must satisfy the court or tribunal that the conditions which entitle him to an award have been satisfied. In respect of a particular allegation, the burden lies upon the party for whom substantiation of that particular allegation is an essential of his case. There may therefore***

be separate burdens in a case with separate issues." *(emphasis added)*"

In Ratilal Gordhanbhai Patel *v* Lalji Makanji [1957] E.A 314, the court stated as follows at page 317:

> **"Allegation 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."**

In Virani t/a Kisumu Beach Resort *v* Phoenix of East Africa Assurance Co. Ltd [2004] 2 E.A KLR 269, the court held that:

> "**Fraud is a serious quasi-criminal imputation and it requires more than proof on a balance of probability though not beyond reasonable doubt**".

I am not satisfied from the evidence before the court that the plaintiff has discharged the burden of proof that was upon it. From the evidence on record, the relationship between the plaintiff and the 2nd defendant was that of a lessee and a lessor. The 1st defendant on the other hand was a shareholder and a director of the plaintiff. The 1st defendant was the one in charge of the day to day activities of the plaintiff. From the evidence before the court, it was common ground that the plaintiff resolved to cease business operations in Kenya and to surrender the leased premises back to the 2nd defendant. This decision was reached after the plaintiff failed to agree with the 2nd defendant on the terms for the renewal of the lease. To determine whether there was collusion between the 1st and 2nd defendants to defraud the plaintiff in the sale of the plaintiff's go-down, it is necessary to examine the rights that the plaintiff had over the said go-down on the termination of its lease. The lease or tenancy agreement that the plaintiff entered into with the 2nd defendant did not mention the go-down. What was leased to the plaintiff was an open space or "empty space" according to the wording of the tenancy agreement. The rights and obligations of the parties in relation to the go-down were therefore not provided for in the tenancy agreement.

From the evidence before the court, the only document that referred to the go-down was an agreement that the plaintiff entered into with Gurcharan Singh on 30th July, 2008 the terms of which were as follows:

> **"1. The above two parties herein and by this date do agree to the following mutual investment agreement.**
>
> **2. That Mr. Singh allows Scandviken Consultants & Trade Co. Limited to put up a building in his premises at their own cost; a go-down measuring 140ft by 60 ft according to the existing standards and drawings.**
>
> **3. That Scandviken shall use the property for its own purpose for the next ten years after which the property becomes a Mr. Singh's property during this period it shall have recovered the cost of its investment on the property.**
>
> **4. That Scandviken shall have a full authority over the building to make changes, insertions and alterations provided that this does not interfere with the peaceful co-existence of other tenants in the area.**
>
> **Signed below by the above parties;**
>
> **Gurcharan Singh Bahra …….30/7/2008**
>
> **Sign**
>
> **Daniel Onyango Nyagwara ……. …….30/7/2008**
>
> **Sign**
>
> **For,**
>
> **Scandviken Consultants & Trade Co. Limited"**

I have commented earlier in this judgment on the correlation between this agreement and the tenancy agreement (lease). This agreement did not make any reference to the tenancy agreement. Whereas the tenancy agreement was for 5 years and 3 months with effect from 1st May, 2007, this agreement gave the plaintiff a right to occupy the leased premises for 10 years. The agreement did not provide for the commencement date for this 10 years' period; whether it was from the date of the completion of construction of the go-down or from the time when the lease commenced. It did not also provide for what was to happen in case the tenancy agreement that was for the open space was not renewed beyond 5 years and 3 months or was terminated by notice before its expiry. In his evidence PW1 maintained that the agreement between the plaintiff and the 2nd defendant provided that if the lease was not renewed the 2nd defendant would have the option of purchasing the go-down at market price. As I have already observed earlier, the agreement referred to here by PW1 was not produced in evidence. The 1st and 2nd defendants denied the existence of such agreement and maintained that the only agreement between the parties regarding the go-down was the one dated 30th July, 2008 that I have referred to. Although PW1 claimed that he was not aware of the agreement dated 30th July, 2008 (DExh.1), the agreement was signed on the plaintiff's behalf by the 1st defendant who also stamped and sealed it. I find the existence of any other agreement regarding the go-down apart from the one dated 30th July, 2008 not proved. In the absence of an agreement between the plaintiff and the 2nd defendant on what was to happen to the go-down in the event that the lease was not renewed or was terminated before its expiry date, the plaintiff was at the mercy of the 2nd defendant and its director Gurcharan Singh. I

am of the view that all these challenges that confronted the plaintiff would have been avoided if the plaintiff had taken legal advice when entering into the tenancy agreement and before embarking on the construction of the go-down. The plaintiff having made a decision to surrender the leased premises and there being no obligation on the part of the 2nd defendant or Gurcharan Singh to buy the go-down, I can see no reason why the 2nd defendant would have colluded with the 1st defendant to purchase the go-down at undervalue. The 2nd defendant had no obligation to purchase the go-down and if it did not purchase it, the only other alternative that was left for the plaintiff was to demolish the same. It was common ground that valuations were carried out to ascertain the value of the go-down. No evidence was however placed before the court showing that either the 2nd defendant or Gurcharan Singh had agreed to pay the market price for the go-down or any other amount.

From the e-mail exchanges between PW1 and the 1st defendant, it is apparent that the 1st defendant kept a lot of information regarding the running of the plaintiff to himself and that PW1 was not aware of the sale of the go-down to the 2nd defendant. The e-mails portray the 1st defendant as a dishonest employee and business partner. There is no evidence that the plaintiff's board of directors had agreed to sell the go-down to the 2nd defendant at Kshs. 4,000,000/=. That said, the 1st defendant's unilateral decision to sell the go-down to the 2nd defendant at Kshs. 4,000,000/= was in my view a breach of his fiduciary duty as a general manager and director of the plaintiff. The 1st defendant's act of not disclosing the sale of the go-down to PW1 was evidence of the fact that he was aware that he had engaged in wrongdoing. I am unable however to find the 2nd defendant's fault in the transaction. The evidence before the court shows that the 1st defendant was the face of the plaintiff in the plaintiff's dealings with the 2nd defendant and Gurchran Singh. He was a director and a shareholder of the plaintiff. He was also the one in charge of the day to day running of the plaintiff's affairs. The 1st defendant made a written offer to the 2nd defendant to purchase the go-down at Kshs. 4,000,000/=. The offer was accepted by the 2nd defendant. The 2nd defendant paid the purchase price in full and took possession of the go-down. The 1st defendant admitted that he was paid Kshs. 4,000,000/= by the 2nd defendant. I have found no evidence showing that the 2nd defendant colluded with the 1st defendant to defraud the plaintiff. The go-down could have fetched Kshs. 25,000,000/= in the open market as claimed by the plaintiff. The 2nd defendant had however not agreed to pay that amount. The go-down could also not be sold in the open market as it was standing on premises whose lease had expired and which had to be surrendered back to the 2nd defendant. The only potential purchasers of the go-down were the 2nd defendant and Gurcharan Singh. As I have stated earlier, the plaintiff was at their mercy.

Due to the foregoing, it is my finding that the plaintiff has failed to prove that the 1st and 2nd defendants colluded to defraud the plaintiff and that the sale of the go-down at Kshs. 4,000,000/= was fraudulent. I have however found that the 1st defendant was dishonest and that he breached his fiduciary duty by failing to disclose to his co-directors in the plaintiff of the sale of the go-down. On the evidence before me however, I am not satisfied that he acted fraudulently. When he offered the go-down for sale to the 2nd defendant on 6th October, 2012, the plaintiff's lease had expired and the plaintiff was to either remove its go-down from the 2nd defendant's premises or it be taken by the 2nd defendant/Gurcharan Singh free of charge. The 1st defendant told the court that he chose the option of selling the go-down at Kshs. 4,000,000/= to the 2nd defendant instead of demolishing the same. Whether the 1st defendant made the correct business decision is not for this court to determine. My take is that he was a director of the plaintiff and had power to make the decision. His failure to consult his colleagues was an internal management affair and could not affect the legality of the transaction. My answer to the first issue is in the negative.

Whether the plaintiff is entitled to the reliefs sought in the plaint.

The plaintiff sought several reliefs that I have mentioned earlier in the judgment. The first prayer sought by the plaintiff is payment of Kshs. 22,000,000/= being the difference between the actual market value of the go-down less the amount that was deposited in the plaintiff's account. For the reasons that I have given above, I am not persuaded that the plaintiff is entitled to this relief. The plaintiff did not prove that it was entitled to be paid the market value or price of the go-down by the 2nd defendant or that it could sell the go-down in the open market at Kshs. 25,000,000/=. I wish to add that the valuation report dated 11th July, 2012 that gave the market value of the go-down as Kshs. 25,000,000/= was not signed by the valuers who prepared the same. As rightly submitted by the defendants, unsigned valuation report has no evidential value. In the circumstances, the plaintiff's claim for Kshs. 22,000,000/= from the defendants has no basis.

The plaintiff had also claimed Kshs. 3,000,000/= from the 1st defendant being the payment that he received from the 2nd defendant as the purchase price for the go-down. I am of the view that the 1st defendant had a fiduciary duty to the plaintiff and the other directors of the plaintiff to account for any payment received by him on behalf of the plaintiff. The 1st defendant admitted having received Kshs. 4,000,000/= from the 2nd defendant as the purchase price of the go-down. The 1st defendant did not however give a satisfactory answer or an account as to what happened to the said sum of Kshs. 4,000,000/=. The 1st defendant is liable to pay the said sum of Kshs. 4,000,000/= to the plaintiff having admitted receipt of the payment but failed to account for the same. Since the plaintiff has only claimed Kshs. 3,000,000/=, I find the 1st defendant liable to pay the same. The 1st defendant had contended that the suit was incompetent as against him for want of a resolution by the plaintiff's directors to bring the same. In his evidence, PW1 told the court that the plaintiff had passed a resolution to bring this suit against the defendants. I do not think that the 1st defendant who was one of the persons to be sued for what the plaintiff termed as fraud against it could have been part of the resolution to bring this suit. I am of the view that any of the directors of the plaintiff could instruct the plaintiff's advocates on record to file this suit. In Arthi Highway Developers Limited *v* West End Butchery Limited & 6 others [2015] eKLR where the same issued was raised the Court of Appeal stated as follows:

> **"44. The submission that there ought to have been a resolution to authorize the filing of the suit in the name of the company appears to have emanated from a decision of the Uganda High Court which has been followed and applied in this country for a long time; Bugerere Coffee Growers Ltd v Sebaduka & Anor (1970) 1 EA 147. The court in that case held:-**
>
> **"When companies authorize the commencement of legal proceedings, a resolution or resolutions have to be passed either at a company or Board of Directors' meeting and recorded in the minutes, but no resolution had been passed authorizing the proceedings in this case. Where an advocate has brought legal proceedings without authority of the purported plaintiff the**

applicant becomes personally liable to the defendants for the costs of the action."

45. To their credit, the appellant's Advocates have cited another authority from the Supreme Court of Uganda decided in April 2002, confirming that the principle enunciated in the Bugerere case has since been overruled by the Uganda Supreme court. The authority is Tatu Naiga & Emporium vs. Virjee Brothers Ltd Civil Appeal No 8 of 2000.

The Uganda Supreme Court endorsed the decision of the Court of Appeal that the decision in the *Bugerere case* was no longer good law as it had been overturned in the case of United Assurance Co. Ltd v Attorney General: SCCA NO.1 of 1998. The latter case restated the law as follows:-

"…. it was now settled, as the law, that, it does not require a board of directors, or even the general meeting of members, to sit and resolve to instruct Counsel to file proceedings on behalf and in the names of the Company. Any director, who is authorized to act on behalf of the company, unless the contrary is shown, has the powers of the board to act on behalf of that Company."

The decision has since been applied in Kenyan courts, for example, in Fubeco China Fushun v Naiposha Company Limited & 11 others [2014] eKLR.

46. It was also asserted before us by Mr. Newton Mwangi, and it was not strongly rebutted, that the procedural issue was unsuccessfully raised before Mbogholi-Msagha J. before the hearing of the suit in the High Court and there was no interlocutory appeal against the decision of that court. We have indeed seen the relevant Ruling of the High court made on 3rd July 2009. The Attorney General for his part made submissions on other procedural defects which appear nowhere in the Memorandum of appeal and are therefore contrary to *Rule 104* of the Court of Appeal Rules 2010. We decline to consider those submissions.

For the above reasons we find no merit in the procedural challenge and accordingly reject that ground of appeal."

I similarly find no merit in the 1st defendant's objection to the suit herein on the ground that a resolution was not passed by the company to bring the same.

The other claim by the plaintiff was for a sum of Kshs. 2,100,000/= being the interest that accrued on the loan that the plaintiff is said to have borrowed to finance its business. This claim was not proved. There was no evidence placed before the court showing that the plaintiff took a loan for its business. The amount of interest claimed was also not proved. The plaintiff did not also establish that the defendants were liable for the interest claimed.

Who is liable for the costs of the suit?

Cost is awarded at the discretion of the court. As a general rule, costs follow the event. In the circumstances of this case, I am of the view that as between the plaintiff and the 1st defendant, the 1st defendant should pay the costs of the plaintiff while as between the plaintiff and the 2nd defendant, each party should bear its own costs.

Conclusion:

In conclusion, I hereby make the following orders:

1. Judgment is entered for the plaintiff against the 1st defendant for Kshs. 3,000,000/= together with interest at court rates from the date hereof until payment in full.

2. The 1st defendant shall pay to the plaintiff the costs of the suit as against the 1st defendant.

3. The suit against the 2nd defendant is dismissed with each party bearing its own costs.

Dated and Delivered this 15th day of October 2020

S. OKONG'O

JUDGE

Judgement delivered through Microsoft Teams Video Conferencing Platform in the presence of:

Mr. Maondo for the Plaintiff

Mr. Kiplangat for the 1st defendant

Mr. Wepoh h/b for Mr. Bwire for the 2nd defendant

Ms. C. Nyokabi-Court Assistant