



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT OF KENYA

AT MOMBASA

ELC NO. 434 OF 2001

HABIBA MOHAMED AL-AMIN1ST PLAINTIFF

LAMU MARINE & ALLIED PRODUCTS LIMITED 2ND PLAINTIFF

VERSUS

STANDARD CHARTERED BANK OF KENYA LIMITED1ST DEFENDANT

JANMOHAMED HASSANALI VERJEE 2ND DEFENDANT

KARIM ABDUL VERJEE3RD DEFENDANT

NAZIR JANMOHAMED VERJEE.....4TH DEFENDANT

ZAIN ABUBAKAR MOHAMED ALZUBIDI..... 5TH DEFENDANT

B.K.S REGISTRARS LIMITED6TH DEFENDANT

R.S. SAINI 7TH DEFENDANT

KENSEC SERVICES8TH DEFENDANT

SAMAKI (TWO THOUSAND) LIMITED9TH DEFENDANT

JUDGMENT

(Suit by plaintiffs claiming that land held by the 2nd plaintiff company was irregularly used as security to secure monies advanced by the 1st defendant bank to a third party company; Memorandum and Articles of Association of the company amended to allow the company be able to secure third party liabilities; amendment to the Memorandum and Articles of Association done by three persons who only held less than 0.1% of the shareholding of the company; the charge and guarantee being executed by the same persons holding less than 0.1% of the company's shares; whether persons holding such a percentage of the company could be able to amend the Memorandum and Articles of Association of the Company; Rule that change of Memorandum and Articles of Association requires at least 75% of the shareholding of the company violated; no notice that the majority shareholders were ever called to the meeting; meetings also called by a person who was not company secretary; charge drawn by the bank itself; whether such charge is lawful given the provisions of the Advocates Act; law declaring such instrument to be null and void; no proper charge registered against the suit property; whether bank can be protected by the Rule in Turquand's case; held that there was sufficient material to put the bank into inquiry hence bank not protected; property sold to a person who later sold it to another party who is now in possession; protection of title of an innocent purchaser in possession; held that remedy is to compensate the 2nd plaintiff company; bank also liable in exemplary damages owing to its conduct)

INTRODUCTION AND PLEADINGS

1. This is now an old suit which was commenced through a plaint filed on 28 August 2001 in the High Court of Mombasa. It was transferred to the Environment and Land Court upon its creation following the Constitution of Kenya, 2010. The original plaint had Abubakar Mohamed Habib as 1st plaintiff with Halima Mohamed Al-Amin, his wife, as 2nd plaintiff, and Lamu Marine & Allied Products Limited as 3rd plaintiff. Abubakar Mohamed Habib (Mr. Habib) died sometimes in the year 2007 and his case abated. The plaint was subsequently amended, inter alia to remove his name from the proceedings, meaning that there are now only two plaintiffs, that is Halima Mohamed Al-Amin and Lamu

Marine & Allied Products Limited. The amended plaint was filed on 13 July 2010 and it also added five new defendants, who are the 5th – 9th defendants.

2. It is the case of the plaintiffs that Mr. Habib (the deceased) and Halima Mohamed Al-Amin, being man and wife, were the majority shareholders of Lamu Marine & Allied Products Limited (hereinafter simply referred to as Lamu Marine Ltd or the company) respectively holding 10,500 shares and 4,500 shares, with the 2nd, 3rd, and 4th defendants (Janmohamed Hassanali Verjee, Karim Abdul Verjee and Nazir Janmohamed Verjee) having one share each. It is averred that the company was not authorised or empowered under its Memorandum of Association to enter into any guarantee, contract of indemnity, or suretyship, on account of any third party. It is pleaded that on 10 May 1995, the 2nd, 3rd, 4th, 7th and 8th defendants (7th & 8th defendants offering company secretarial services), sitting in a Board of Directors meeting of the company (now 2nd plaintiff) without any notice to the 1st plaintiff and the deceased, unlawfully, fraudulently and illegally, purported to amend the Articles of Association of the company so as to give the company power to guarantee payment of money and to enter into a contract of indemnity. The following particulars of illegality are pleaded :-

(a) *Convening a Board of Directors meeting of the company without notice to the 1st plaintiff and the deceased.*

(b) *Purporting to pass a resolution to amend the Articles of Association without the approval of the majority shareholders.*

(c) *Acting contrary to the Articles and Memorandum of Association and contrary to the provisions of the Companies Act.*

3. It is pleaded that the 2nd, 3rd, 4th, 7th and 8th defendants drew up and registered with the Registrar of Companies a special/ordinary resolution of the company purporting that an Extra Ordinary General Meeting of the company was held on 10 May 1995, which resolved to amend the Articles and Memorandum of Association of the company, by adding an Article 11A, to authorise the company to enter into a contract of guarantee/indemnity. It is contended that the 2nd, 3rd, 4th, 7th and 8th defendants knew that the said resolution was fraudulent inter alia because :-

(i) *The meeting purporting to have been held on 10 May 1995 was not an extra-ordinary general meeting of the members of the company but a meeting of only 3 members of the company's Board of Directors without notice to the 1st plaintiff and to the deceased.*

(ii) *A resolution passed at a Board of Directors' meeting does not constitute a resolution passed by members or shareholders of the company.*

(iii) *The resolution purported to have been passed on 10 May 1995 by the 2nd, 3rd, 4th, 7th, and 8th defendants touched on the Articles of Association of the company and not on the Memorandum of Association of the company.*

(iv) *The company's objects are not contained in the company's Articles of Association and any amendment of those Articles could not confer any power upon the company that was not conferred by the company's Memorandum of Association.*

(v) *The 7th and/or 8th defendants were not Directors of the company and ought not to have sat in the company's Board of Directors to pass any resolution.*

(vi) *The 7th and/or 8th defendants were not the company's Secretaries and had no capacity to act as such.*

4. It is thus the contention of the plaintiffs that the purported amendment of the Articles of Association was null and void in law.

5. It is further pleaded that by a charge dated 17 May 1995, and a further charge dated 20 November 1996, and a Guarantee and Indemnity dated 8 January 1997 (hereinafter referred to as the security documents), the 2nd, 3rd, 4th, 7th, and 8th defendants purported to charge the land parcel Mombasa/Block XV/143 (hereinafter referred to as the suit property) to the 1st defendant, to secure borrowing of the sum of KShs. 8,100,000/=, Ksh. 3,450,000/= and KShs. 11,550,000/= respectively for the 2nd plaintiff and for a company known as Samaki Industries (Nairobi) Limited. It is the contention of the plaintiff that the security documents are illegal, fraudulent, null and void, and did not dispose any interest in the suit property. The following particulars of fraud and illegality are pleaded :-

(i) *The documents purporting to be the Charge and Further Charge were drawn by the 1st defendant. The 1st defendant is not an Advocate of the High Court of Kenya, and was not an Advocate of this Court at the material time or at all.*

(ii) *The said Charge and Further Charge are null and void under Sections 34 and 35 of the Advocates Act.*

(iii) *The company's seal was purportedly affixed on those documents in the presence of the 8th defendant. As the 7th and/or 8th defendants were not the company's Secretaries they had no capacity to affix the company's seal.*

(iv) *The company did not receive any consideration under the said security documents.*

(v) *The 2nd, 3rd, and 4th defendants abused their fiduciary duty to the company by encumbering the company's property for the benefit of a third party, Samaki Industries (N) Limited, in which they had interest.*

6. The plaintiff avers that the 1st defendant knew or ought to have known that the 7th and 8th defendants were not the Secretaries of Lamu

Marine Ltd. The following particulars of knowledge are pleaded :-

(i) *The 1st defendant ought to have established from a search at the Registrar of Companies in exercise of due diligence that the 7th and 8th defendants were not the company's Secretaries.*

(ii) *The 8th defendant did not exist at the material time and could not therefore execute or participate in the execution of any document creating any liability against the company.*

7. It is further pleaded that by documents dated 30 March 2000, being a "Deed of Agreement" and "Purchase Agreement", entered into between Samaki Industries (N) Limited (in receivership), the 1st defendant, Samaki (Two Thousand) Limited, Polyculture Kenya Limited, Kayahwe Property Acquisition and Developers (K) Limited, Lamu Marine Ltd, the 2nd, 3rd and 4th defendants, and one Roshan Verjee, the suit property was purportedly sold to Samaki (Two Thousand) Limited. It is contended that this sale is null and void as the security documents were a nullity.

8. On 7 June 2006, the property was sold to the 5th defendant. The plaintiffs assert that the transfer of the property to the 5th defendant was null and void and that it was achieved by means of collusion and connivance, involving the 1st, 2nd, 3rd, 4th, 6th, 7th, 8th and 9th defendants, inter alia because the 9th defendant had common shareholders and/or directors and/or Secretary with Samaki Industries (N) Limited; the 2nd, 3rd, and 4th defendants were directors, shareholders, or were otherwise closely related to Samaki Industries (N) Limited, and the 9th defendant; the 8th defendant did not exist in 2000 or at any other material time; and that the said documents were executed by the 7th and 8th defendants on behalf of Lamu Marine Ltd, Kayahwe Property Acquisition and Developers (K) Limited and Polyculture Kenya Limited. The plaintiffs plead that the 6th defendant is not a Certified Public Secretary, within the meaning of the Certified Public Secretaries Act, Cap 534, and could not therefore offer secretarial services. They add that the 8th defendant, not having been registered in the year 2000, or at any material time, could not offer any secretarial services.

9. In the suit, the plaintiffs ask for the following orders (slightly paraphrased for brevity) :-

(a) *A declaration that the resolution to amend the company's Articles of Association was illegal, fraudulent, and null and void.*

(b) *A declaration that the Charge dated 17 May 1995 and a Further Charge dated 20 November 1996 over the suit land and the Guarantee and Indemnity dated 8 January 1997 were null and void.*

(c) *A declaration that what the 2nd, 3rd, 4th and 7th defendants passed at the purported Board of Directors meeting of the company on 10 May 1995 was, if lawful, a Board of Directors Resolution and not a resolution passed by the members/shareholders of the company at an Extra Ordinary General Meeting.*

(d) *A declaration that the document purporting to be a Resolution of the company passed at an Extra Ordinary General Meeting of the members of the company on 10 May 1995 is a forgery and was incapable of effecting any amendment to the company's Articles.*

(e) *A declaration that the resolution purporting to have been passed on 10 May 1995 did not affect or amend the company's Memorandum of Association to give any power to the company to guarantee liabilities of third parties.*

(f) *A declaration that the documents purporting to be a Deed of Agreement and Purchase Agreement dated 30 March 2000 were null and void.*

(g) *A perpetual injunction to restrain the 5th defendant from selling or disposing the suit property.*

(h) *A declaration that the purported sale and transfer of the suit property to the 5th defendant was null and void and did not pass any title to the 9th defendant or subsequently to the 5th defendant.*

(i) *An order of rectification to cancel all entries relating to the Charge and Further Charge of the suit property to the 1st defendant and the transfer of the suit land to the 9th defendant and subsequently to the 5th defendant and restoring the suit land and the title deed to the company.*

(j) *Punitive damages against all the defendants except the 5th defendant.*

(k) *Costs.*

(l) *Any further relief as the Court may deem fit.*

10. The 1st defendant filed defence which was amended after the plaintiff filed the amended plaint. The 1st defendant pleaded inter alia that it was not aware of the particulars of the shareholding and directorship of the company, save that the deceased and the 1st plaintiff, and the 2nd, 3rd and 4th defendants, were shareholders. It admitted that the suit property is charged to it. It denied that there was anything unlawful with the resolution pursuant to which the guarantee and indemnity were executed. It pleaded that the resolution, pursuant to which the guarantee and indemnity were executed by the company, is lawful, and averred that the same was properly signed and accepted by the 1st defendant in good faith. It pleaded that the monies under the charge and guarantee instruments was properly advanced to Samaki Industries

(N) Limited and that its securities were valid. It denied all particulars of fraud and illegality. It pleaded that the resolution for amendment of the Articles of Association were accepted by the 1st defendant in good faith and are valid. It further pleaded that the suit property was sold pursuant to a purchase agreement dated 30 March 2000 which the company sanctioned under a Deed of Agreement of the same date. It pleaded that the *Rule in Turquand's* case applies and the plaintiffs are not entitled to the orders sought.

11. The 2nd, 3rd and 4th defendants filed a joint statement of defence on 29 January 2002 which they also amended. They did not deny the plaintiffs' pleading on the shareholding of the company and did not deny that the company held the property Mombasa/Block XV/143. They however averred that the charge and further charge over the suit property were created with the full knowledge, approval and consent of the plaintiffs. They pleaded that the loan in issue, which was advanced to Samaki Industries (Nairobi) Limited (also described herein simply as "Samaki Industries"), was primarily used to salvage the company which was under receivership at the material time, a position said to be well known to the plaintiffs. They denied that in 1995 they unlawfully amended the Memorandum and Articles of Association of the company so as to give the company power to guarantee money and provide indemnity. They denied all the allegations of illegality as pleaded by the plaintiffs. They pleaded that the amendment to the Articles and Memorandum of Association of Lamu Marine Ltd was carried out in May 1995 to enable the 1st plaintiff (though I believe they meant 2nd plaintiff) to borrow money for payment of the Receiver Manager. It is averred that the amendment was lawfully done in accordance with the provisions of the Companies Act and the Articles and Memorandum of Association. It is pleaded that if any illegality was committed, the same was committed with the consent, connivance, and or full participation of the plaintiffs. It is pleaded that the plaintiffs were informed in 1999 of the intention of the 1st defendant to realise the security, and if they were indeed aggrieved, they should have moved the court at that time but they failed to do so. They denied all particulars of fraud and illegality.

12. On the part of the 9th defendant, Samaki (Two Thousand) Limited (hereinafter Samaki (2000) Ltd), it was pleaded that the suit land was sold and transferred to it pursuant to a purchase agreement dated 30 March 2000 and a Deed of Agreement of the same date. It pleaded that it purchased the property for consideration, in good faith, and without notice of any defect in the 1st defendant's securities, or its right to sell the same. It averred that if any damages or costs are ordered against it, it will seek full indemnity from the 1st defendant, from whom it purchased the property. It pleaded that in the Deed of Agreement, Lamu Marine Ltd expressly consented to the purchase of the suit property by the 9th defendant. It is pleaded that in the Deed of Agreement, Lamu Marine Ltd and the 2nd and 4th defendants, undertook to indemnify the 9th defendant against any claims, and thus, the 9th defendant is entitled to indemnity from Lamu Marine Ltd and the 2nd and 4th defendants. It further pleaded that it had sold the property to the 5th defendant and that the sale was done in good faith for valuable consideration. It denied the allegations of fraud and illegality. The 9th defendant duly filed a notice of indemnity against Lamu Marine Ltd and the 1st defendant pursuant to Order 1 Rule 24.

13. The 5th defendant in his defence denied that the amendment of the Articles of Association of Lamu Marine Ltd was unlawful as claimed. He denied all the particulars of fraud and illegality. He stated that he purchased the suit property for value (from the 9th defendant) and without notice of any defect in title.

14. The 6th, 7th, and 8th defendants filed a Joint Statement of Defence. In it, the 7th defendant (Mr. Saini) averred that there are no entities registered in Kenya as BKS Registrars Limited and Kensec Services (sued as the 6th and 8th defendants respectively) and thus their defence was filed under protest. It is further pleaded that if at all Kensec Services exists (which existence was denied) then it would be a business name with no capacity to sue or to be sued in the said name and any suit against it would be null and void. It was denied that the meeting of 10 May 1995 was held without any notice to the 1st plaintiff and the deceased. The 7th defendant denied being a party to any unlawful, fraudulent, or illegal amendments of the Articles of Association of the company. It is pleaded that if any such amendment took place, it was properly and lawfully done, with the full knowledge and consent of the plaintiffs. The 7th and 8th defendants denied drawing or registering with the Registrar of Companies any special or ordinary resolutions. The 7th defendant averred that if he attended a meeting of 10 May 1995, then he did so purely in his capacity as the company's secretary, and in exercise of his professional duty, and thus cannot be held liable for any acts. The 7th defendant pleaded to have been a company secretary of the company up to the year 2000, and that on 15 May 2008, two men called at his offices and using trickery, managed to steal the secretarial file of the company. They further pleaded that any claim is time barred.

EVIDENCE OF THE PARTIES

15. PW- 1 was Halima Mohamed Al-Amin. She is the 1st plaintiff. She testified that she is a shareholder and director of Lamu Marine Ltd from inception. She mentioned that she holds 4,496 shares and that her late husband, Mr. Habib, held 10,500 shares. She adopted her witness statement as her evidence in Chief. In it she stated as follows :- That the Memorandum of Association of Lamu Marine Ltd has not been amended since the company was incorporated and it is this which contains the objects of the company and spells out what the company may do. That as a director and major shareholder of the company, she was not given any notice of any meeting in which a proposal to amend the Articles of Association was made. That she did not attend or vote in any meeting resolving to amend the Articles of Association. That she did not know and was not involved in any resolution that the company should guarantee the debts of a third party. She did not know and was not involved in any resolution to charge the suit property. Neither was she involved in any discussion or resolution to sell or transfer the suit property. She testified that neither was her late husband, who held the majority shares, involved. They were not invited and they did not attend the Board of Director's meeting of the company held on 10 May 1995 with the agenda of amending the Articles of Association. She pointed out that the minutes show that they were indeed absent. At that time, she and her husband held 99.98% shares taken up in the company. She added that the Articles of Association could not be amended in a Director's meeting and could not be amended without the knowledge and participation of those who held 99.98% of the shares. She added that neither could they be amended without a special resolution requiring support of persons holding at least 75% of the nominal shares of the company and that no notice to pass a special resolution was ever given. She asserted that the resolution of 10 May 1995 was thus a nullity. She stated that she and her late husband did not receive any notice of a meeting held on 12 April 1995 and 18 April 1995 and they did not attend such meetings. She stated that under no circumstances would she and the deceased have agreed to charge the suit property. She further stated that she was not aware of any decision of the Board of Directors to appoint the 7th defendant as the company's Secretary and that there are no minutes of such a resolution. She added that at no time did the company appoint the 6th or 7th defendants as its Secretary. She stated that the Guarantee, the Charge and Further charge, complained of, were drawn by the 1st defendant who was not an Advocate and the documents are thus a nullity.

16. She testified that she and her husband were the majority shareholders and the others (2nd, 3rd and 4th defendants) only held one share each. She stated that she does not know R.S Saini, the 7th defendant. She testified that the 2nd defendant was making ice and selling and storing Nile Perch in the suit property but currently there is a new house on it. She never gave consent to the suit property to be used as security to guarantee a loan. She was never involved in any sale of the suit property.

17. Cross-examined by Mr. Chege, learned counsel for the 1st defendant, she reiterated that the 2nd, 3rd and 4th defendants held one share each and were the other directors. She was shown minutes of a meeting held on 8 April 1988 (which resolved to appoint Karim Verjee as director) and she stated that she was not in the said meeting. Her husband was the one who attended meetings and he would update her. Cross-examined by Mr. Mwangi, learned counsel for the 6th – 8th defendants, she testified that she has not been attending company meetings and she only attended one. She testified that the company only had one Secretary, a Mr. Aboo. She did not know when the company was registered. The shares she held were given to her by her husband. Her religious beliefs did not allow her to attend company meetings. She was questioned at length by Mr. Sarvia, learned counsel for the 9th defendant, on how she came to hold shares in the company as she is not among the original subscribers. She did not know that the company was under receivership and was not aware that it had financial difficulties. The Secretary she knew was Mr. Aboo. She did not know the persons appointed as auditors. Her husband would bring to her documents and she would sign. She denied that she signed documents to amend the Articles of Association. She was not aware that the company borrowed money from the bank. Cross-examined by Mr. Kibara, learned counsel for the 5th defendant, she stated that she did not know how the suit property was sold and did not know for how much. She was not aware of any agreement to sell. She stated that the 2nd – 4th defendants were given a share to assist the company as they were in the fish industry. Re-examined, she testified inter alia that the godown on the suit property was demolished, the property fenced off, and the buyer built a new house.

18. PW-2 was Mohamed Aboubakar Mohamed Habib. He is son to the 1st plaintiff and the late Mr. Habib. He now holds one share in the company. He also relied on his witness statement as his evidence in chief. In it, he stated that it was his late father who held the majority shares. He (PW-2) was not a shareholder, nor a director, when this suit was filed and he based his evidence on documents that he came across and his own investigations. He stated that upon collecting the case file from the plaintiffs' former advocates, he established that the secretarial file was with Mr. Saini (the 7th defendant) in Nairobi. He went and collected the file from his office. From it he established that Kensec Services (the 8th defendant) which purported to act as Secretary of the company, was not registered and did not in fact exist. So too BKS Registrars (the 6th defendant). He testified that Mr. Saini acting for Kensec Services, and the 2nd, 3rd and 4th defendants, met in a Board of Directors meeting on 10 May 1995 without any notice to the other shareholders who held 99.98% of the shares, and they purported to amend the Articles of Association. They then signed a resolution that the company had in an extra ordinary meeting of the members amended the Articles. He stated that a special resolution was needed, passed at a special meeting called for that purpose, and needed support of 75% of the shareholders. He stated that the defendants, except the 5th defendant, colluded to sell the property. He pointed out that Mr. Saini sat in the meeting of 10 May 1995 yet at no time was he a director. He reiterated that Kensec Services was never appointed as Secretary yet they signed as Secretary of the company. He stated further that the 2nd, 3rd and 4th defendants were directors, shareholders or otherwise closely related to Samaki Industries (N) Limited and were thus in breach of their fiduciary duty to Lamu Marine Ltd. He testified that he became director in the year 2010/2011. He was in school in Manchester in the years 2000/2001. He took over the affairs of the company after the death of his father in the year 2007. Before that, he did not attend any of the company's meetings. He did not contest some minutes of 1988 where the 2nd and 4th defendants were appointed to manage the company but he stated that this did not give them authority to borrow.

19. With the above evidence, the plaintiffs closed their case.

20. DW-1 was Josephine Warutere, an Accounts Manager with the 1st defendant. She also relied on her witness statement. In it, she stated that the 2nd plaintiff guaranteed banking facilities offered to Samaki Industries (N) Ltd (Samaki Industries) in the sum of KShs. 11, 500,000/=. Samaki Industries fell into arrears prompting the 1st defendant to recall the debt. She stated that receivers appointed by the 1st defendant sold the assets of Samaki Industries. The 1st defendant did not exercise its statutory power of sale over the suit property. She stated that it was privately sold through a Deed of Agreement dated 30 March 2000. In her evidence in court, she referred to the charge and further charge and a Guarantee and Indemnity Form signed on behalf of Lamu Marine Ltd. The charge is drawn by the 1st defendant. She also referred to minutes of the company where resolutions were passed touching on the subject matter. She did state that from a comparison of the signatures, the Deed of Agreement was signed by the 2nd and 4th defendants.

21. Cross-examined by counsel for the plaintiffs, she stated that she did not have the minutes of the meeting which resulted in the resolution to amend the Articles of Association. She did not know if the bank asked for the minutes. She was not aware that for the resolution to pass, it needed support of at least 75% shareholding of the company. She was shown the original Memorandum and Articles of Association and conceded that they made provision for borrowing powers. She did not know if the bank asked for the Memorandum and Articles of Association though she said that it is bank practice to do so. She did not know if the bank verifies whether a person signing as Secretary has been duly appointed. The bank has a legal department. She is not a lawyer and what she holds is a Bachelors Degree in Education, Business and Mathematics. She did testify that Samaki Industries was indebted to the bank in the sum of KShs. 394, 787,302.90/=. The bank then appointed receivers and eventually properties of Samaki Industries were sold for the sum of KShs. 105,000,000/=. This included the suit land. She did not know for how much the suit property was sold though documents indicated KShs. 5,000,000/=. She did not know if a valuation was done before the sale. The bank was a signatory to the sale agreement. She did not know if the Directors of Samaki Industries (in receivership) were the same as the directors of Lamu Marine Ltd.

22. The 9th defendant's witness was Mr. Jahangir Tejani. He is a director of the 9th defendant, Samaki (2000) Limited. He relied on his witness statement. He stated that Samaki (2000) Limited was a special purpose vehicle created to purchase Samaki Industries (Nairobi) Ltd (Samaki Industries). He himself was in the same business that Samaki Industries engaged in, which was the export of Nile Perch. He had dealt with the 1st defendant (the bank) before. He was aware that Samaki Industries was in financial problems. He got into negotiations aimed at purchasing it as it had complied with export regulations which he himself did not have. He purchased the whole of Samaki Industries as a going concern using Samaki (2000) Limited. He paid the sum of KShs. 105,000,000/=. Among the assets purchased was the suit land. He stated that the 2nd and 4th defendants were directors of Samaki Industries. He retained them as directors of Samaki (2000) Limited for purposes of EU licencing and standardisation of which they were experts. He denied that he colluded with them to acquire the

suit property. According to him, this was the least valuable asset as he was more interested in the business. He did not live in Mombasa and he had no interest in the suit property. It was then sold to the 5th defendant. He was not aware of any issue over the suit property. Cross-examined, he stated that the Deed of Agreement was not signed by him but by his nominee. He had an advocate to advise on the purchase and he left everything to him for him to deal. He did mention that the 2nd defendant (Janmohamed) is now deceased. He was the father of Nazir (4th defendant). They both became directors of the new company Samaki (2000) Limited. He understood that Lamu Marine Ltd acted as guarantor. No valuation was carried out in respect of the suit property before purchase. He did not pay anything to Lamu Marine Ltd.

23. Mr. Ali Abubakar Mohamed testified on behalf of the 5th defendant. He is the brother of the 5th defendant and he holds a power of attorney donated by the 5th defendant. He also relied on his witness statement. He stated that he was personally involved in the transaction between his brother and Samaki (2000) Limited. He knew Mr. Tejani, and his brother (5th defendant) agreed to purchase the suit property for KShs. 6,000,000/=. A transfer was then effected and the 5th defendant was issued with title. Cross-examined, he stated that he had not seen the resolutions of the 2nd plaintiff under challenge.

24. It emerged that the 7th defendant was too ill to attend court. I directed that he gives his evidence vide an affidavit through the utility of the provisions of Order 19 Rule 1 of the Civil Procedure Rules, and questions to be sent to him and for him to respond through a deposition. This was done. I have gone through the affidavits. In his affidavit, comprising his evidence in chief, the 7th defendant stated inter alia that he is a Certified Public Secretary practising as such in the name and style of Kensec Services which is a partnership registered under the Registration of Business Name Act, Cap 499, Laws of Kenya. His CPS number is 369. His named partner in the business, one Avtar Singh Bassan, died in the year 2014. He stated that between the years 1990 and 2000, he rendered secretarial services to Lamu Marine Ltd having been duly appointed on 14 November 1990. He availed minutes of the company's Board of Directors of even date. He was never a director or shareholder of the company and all documents that he signed on behalf of the company were signed in his professional capacity as the Company Secretary. His attendance in meetings was also in the same capacity. Referring to the meeting held on 10 May 1995, he stated that he appeared in the meeting as Company Secretary as a representative of Kensec Services. According to him, the meeting was properly convened and had the requisite quorum, and the decisions made therein were lawful and binding on the company. To his knowledge, all shareholders of the company had an equal number of votes in any decision irrespective of the number of shares one held. He stated that at the time he served as Secretary, the 1st plaintiff never took an active role in the running of the company, but the late Mr. Habib was an active participant. He stated that he (Mr. Habib) was fully briefed of the decisions made by his co-directors even when he missed meetings. He stated that the physical title document to the suit property was in the custody of the deceased and he voluntarily handed it over to his co-directors when the same was needed by the bank during the registration of the charge. He denied being party to the purchase agreement and Deed of Agreement of 30 March 2000. He stated that his participation in the Deed of Agreement was merely to witness the sealing of the agreement by Lamu Marine Ltd, at its request, as its duly appointed secretary. He claimed that by use of trickery, two men came to his office on 15 May 2008 and stole the office file and the same has never been returned. He thought the suit is time barred. He stated that the 8th defendant, not being a corporate body is wrongly enjoined in these proceedings.

25. In response to the questions asked by counsel for the plaintiff, he did state that he was aware that the 2nd, 3rd and 4th defendants held less than 1% of the shares of the 2nd plaintiff. He did not know that Directors of the company had no powers to amend the Memorandum or Articles of Association. He was aware that an alteration to the Memorandum of Association required a special resolution. He was not aware that an extra ordinary meeting required a 28 days notice unless 95% of all shareholders agreed in writing to a notice of 21 days. He stated that he personally served the notice upon the late Mr. Habib and the 1st plaintiff, to attend the meeting held on 10 May 1995. He was aware that a meeting of the Directors could not pass resolutions reserved or vested in the members in a General Meeting. He stated that the Memorandum of Association of the 2nd plaintiff was amended on 10 May 1995 to enable it enter into contracts of guarantee. He was not aware that for a special resolution to pass, the same had to be supported by not less than 75% of the shareholding of the company. He was aware that the 2nd, 3rd and 4th defendants served as directors of Samaki Industries. He was not aware that a limited liability company could not carry out the duties of Company Secretary. He stated that he was a shareholder and director of BKS Registrars Limited (BKS Registrars) and that BKS Registrars was appointed as company secretary of Lamu Marine Ltd. He stated that there was a resolution appointing Kensec Services (Kensec) as Secretary of the company. He asserted that he wrote to the 1st plaintiff and to the late Mr. Habib about the passing of the Director's Resolution held on 10 May 1995. He lodged the Amended Articles of Association with the Registrar of Companies. He could not recall a resolution which removed the 6th defendant (BKS Registrars) as Secretary of Lamu Marine Ltd. He was not aware that a Charge needed to be drawn by an Advocate. He did mention that the company passed a resolution authorising him to affix the company's company seal to the Charge and Further Charge. He did not use Kensec Services and BKS Registrars Limited interchangeable as the Secretary of the 2nd plaintiff. He denied that Kensec and BKS Registrars were offering company secretarial services to the 2nd plaintiff at the same time. He is not the one who drew minutes of 14 November 1990. He however drew the resolution of the Board of Directors in the meeting of 10 May 1995. He could not recall whether he drew the resolution of the Board of Directors meeting held on 5 November 1996. He is not the one who instructed the presentation of Form 214 dated 19 May 1995. He did not take any personal effort to satisfy himself that Samaki Industries had the ability to repay the sum of KShs. 11,550,000/= advanced. The 2nd, 3rd, and 4th defendants never disclosed to him that they were directors of Samaki Industries. He came to know this from the late Mr. Habib.

26. The 2nd – 4th defendants did not participate at the hearing and their case was closed without them calling any evidence. I note that their previously appointed advocate ceased to act and they are now in person. It was mentioned in the course of the proceedings that the 2nd defendant is long deceased and the case against him has abated.

27. I invited counsel to file submissions which they did. I have taken note of these submissions.

ANALYSIS AND DECISION

28. The issues that precipitated this dispute took place in the years 1990 and certainly before 2006 when the suit property was eventually transferred to the 5th defendant who remains the registered proprietor to date. The applicable law is therefore the Companies Act, Cap 486 (repealed in 2015 by the Companies Act, Act No. 17 of 2015) and the Registered Land Act, Cap 300, Laws of Kenya (repealed in 2012 by the Land Registration Act, Act No. 3 of 2012). References to the Companies Act will thus be reference to the repealed Companies Act. It is

also important that we understand at this early stage the nature of the company before this court. From the evidence before me, Lamu Marine & Allied Products Limited (Lamu Marine Ltd) is a company limited by shares which was incorporated on 8 August 1983. The original shareholders were Bwana Abdulkadir (4,500 shares), Abubakar Mohamed (6,000 shares) and Naftali Kitonga (4,500 shares). The shareholding of the company changed in the course of time, and at the time that the events that led to this dispute occurred, its shareholding was as follows :- Abubakar Mohamed Habib (deceased) 10,500 shares; Halima Mohamed Al-Amin (the 1st plaintiff) 4,500 shares; and the 2nd, 3rd and 4th defendants each held one share. In terms of percentage shareholding, and this would be significant as will be seen shortly, the deceased and the 1st plaintiff held 99.980004% of the issued shares whereas the 2nd, 3rd and 4th defendants combined, held 0.01999 shares, which we can round off to 99.98% and 0.02%. The shareholding of the 2nd, 3rd and 4th defendants did not even reach 0.1% of the issued shares and was thus very nominal whichever way one wants to look at it. Nonetheless, all the shareholders were directors of the company. The company's objects were contained in the Memorandum of Association (MoA) and its affairs guided by the Articles of Association (AoA), the later of which also incorporated the articles at Table A of the Companies Act, in addition to the articles that it specifically listed.

29. The borrowing powers were contained in the MoA at Clause 3 (m) (7), drawn as follows :-

To borrow money or receive money on deposit either without security or secured by debentures, debenture stock (perpetual or terminable) mortgage or other security charged on the undertaking or on all or any of the assets of the Company including uncalled capital.

30. The AoA on its part had two clauses under the heading borrowing, which are clauses 8 and 9 drawn as follows :-

8. The Directors may from time to time at their discretion borrow and secure the payment of any sum of sums of moneys for the purpose of the Company.

9. The Directors may secure the repayment of such moneys in such manner and upon such terms and conditions in all respects as they think fit and in particular subject to Article No. 2 hereof by the issue of debentures or debenture stock of the company charged upon all or any part of the property of the Company (both present and future) including its uncalled capital for the time being.

31. The other issue that I need to address at the outset is who was the company secretary for Lamu Marine Ltd at the material time. It is apparent from the evidence that the firm of A.M Aboo Associates Limited acted as Secretary of the company from the time it was incorporated. From the record before me, there was appointment of BKS Registrars Ltd (6th defendant) to act as Company Secretary. I have gathered this from a resolution of the Board of Directors held on 14 November 1990 which was attended by all five shareholders and directors. On that same day, the firm of Bassan, Khanna & Saini was appointed as the company's auditors. I have no evidence before me of any appointment of Kensec Services (8th defendant) as the secretary of the company, nor the appointment of Mr. Saini (7th defendant), in his individual capacity, as secretary.

32. At this juncture, it needs to be recalled that in the joint statement of defence of the 6th, 7th and 8th defendants, it was averred that BKS Registrars Limited and Kensec Services do not exist. In his evidence, though, Mr. Saini did state that he is a shareholder of BKS Registrars Limited and that BKS Registrars Limited was appointed as company secretary by Lamu Marine Ltd (paragraphs 15 and 16 of his affidavit). He also did state that there was a resolution appointing Kensec Services as secretary of the company (paragraph 23 of this affidavit). He however denied that BKS Registrars, Kensec, and himself, offered any secretarial services to the company (paragraph 26 of his affidavit). He also denied that he was using Kensec Services and BKS Registrars Limited interchangeably. He agreed that he is the one who drew the resolution of the Board of Directors meeting of the company held on 10 May 1995. This evidence is of course rather jumbled up and in contradiction with the pleadings.

33. The plaintiff's contention is that BKS Registrars Limited and Kensec Services do not exist. I actually have no evidence of the existence of these two entities. Their existence or otherwise would intimately be within the knowledge of Mr. Saini, but he has offered absolutely no evidence of their existence, and indeed, in his pleadings, he has averred that they do not exist. I agree with the submissions of Mr. Kinyua, learned counsel for the plaintiffs, that Section 112 of the Evidence Act, Cap 80, applies. It is drawn as follows :-

S. 12 - In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.

34. In our case, the knowledge of the existence of BKS Registrars Limited and Kensec Services is with Mr. Saini and he has offered no evidence of the existence of these two entities. That, coupled with the pleadings in the defence, that the two entities do not exist, make me come to the conclusion that they actually never existed, and do not exist. I will therefore proceed on the basis that BKS Registrars Limited and Kensec Services do not exist and have never existed. What this means is that BKS Registrars Limited and Kensec Services could not have acted as secretary of the company. Mr. Saini, in his personal capacity, also never acted as secretary of the company, and this indeed is his evidence. What this means is that the company either did not have a company secretary, or Mr. Aboo, legally, continued to be its company secretary, but certainly not the 6th, 7th or 8th defendants.

35. Having put away this background, I will next determine the legality of the amendments of the company's MoA and AoA.

36. The amendment of the MoA and AoA of a company were governed by the Companies Act. In so far as amendments to the objects of the company were concerned, these were covered by Section 8 of the Act which was drawn as follows :-

8 (1) A company may, by special resolution, alter the provisions of its memorandum with respect to the objects of the company..."

For alterations to the AoA, Section 13 (1) of the Act applied, and it provided as follows :-

13. (1) Subject to the provisions of this Act and to the conditions contained in its memorandum, a company may by special resolution alter or add to its articles.

37. It will thus be seen that amendments to both the MoA and AoA required special resolutions. But one may ask, “what is a special resolution ?” This was defined in Section 141 of the Companies Act, which was drawn as follows :-

141. Special resolutions

(1) A resolution shall be a special resolution when it has been passed by a majority of not less than three-fourths of such members as being entitled to do so, vote in person or, where proxies are allowed, by proxy, at a general meeting of which notice specifying the intention to propose the resolution as a special resolution has been duly given :-

Provided that , if it is so agreed by a majority in number of the members having the right to attend and vote, at any such meeting, being a majority together holding not less than ninety-five percent in nominal value of the shares giving that right, or, in the case of a company not having a share capital, together representing not less than ninety-five percent of the total voting rights at that meeting of all the members, a resolution may be proposed and passed as a special resolution at a meeting of which less than twenty-one days’ notice has been given.

38. You therefore required at least three-fourths of the members entitled to vote in order to pass a special resolution. This phrase “members entitled to vote” needs to be understood that it is in accordance with the shares held. That is why, under Section 141 above, 95% of the majority can propose and pass a special resolution without attending to the 21 days notice that is required. I have mentioned notice, and I think this is an appropriate stage to address the issue of notices required of a company in order to pass a special resolution.

39. First, we need to understand the nature of meetings of the members of a company. We have the “annual general meeting” which is a statutory requirement and must be held once a year, and then we have the “extraordinary general meeting” which is the other type of meeting of members. Every general meeting (that is a meeting of members) is required to be called by a 21 days notice (Article 50 Table A and Section 133 of the repealed Companies Act). Indeed, Section 133 is emphatic that any provision in the company’s articles making provision for the calling of a meeting of the company through a notice of less than 21 days shall be void. The requirement is only waivable, if, in an annual general meeting, all members entitled to attend do so attend, and in an extraordinary general meeting, a majority together holding at least 95% of the nominal value of the shares attend.

40. The manner of issuance of the notice of the general meetings was set out in Section 134 of the Act, which provided that a notice of the meeting of a company shall be served on every member of the company. The power to call extra ordinary general meetings was vested in directors (Article 49 Table A) or by requisition pursuant to Section 132 of the Act. If the meeting is by requisition, then you needed at least one tenth of the members of the paid up capital to be able to do so.

41. With these provisions, in mind, let us now look at the manner in which the MoA and AoA of the company were amended.

42. The amendment was purported to be pursuant to a meeting held on 10 May 1995. What I have is titled “Minutes of Extraordinary Meeting of Directors of Lamu Marine and Allied Products Limited held on 10th May, 1995.” Those present are as follows :-

1. Janmohamed Hassanali Verjee
2. Nazir Janmohamed Verjee
3. Karim Abdul Verjee
4. R.S. Saini of Kensec Services

Absent

1. Abubaker Mohamed Habib
2. Halima Mohamed Al-Amin.

AGENDA

Amendment of the Articles of Association.

It was resolved that a security clause be added in the Articles of Association as follows –

“To enter into any guarantee, contract of indemnity or suretyship and in particular (without prejudice to the generality of the foregoing) to guarantee the payment of any principal moneys, premiums, interest and other moneys secured by or payable under any obligations or securities and the payment of dividends and premiums on, and the repayment of the capital of, stocks and shares of all kinds and descriptions.”

Same clause to be added as No.11(A) in the Articles of Association.”

43. There is a document titled “*Special/Ordinary Resolution of Lamu Marine and Allied Products Limited*” of the same date. It states as follows :-

“*At an extraordinary general meeting of the members of the said company duly convened and held at Nairobi in the Province of Nairobi on the 10th day of May 1995... a special resolution was duly passed :-*

That the Articles and Memorandum of the Company be amended by adding No. 11(A) as follows :-

To enter into any guarantee contract of indemnity or suretyship and in particular (without prejudice to the generality of the foregoing) to guarantee the payment of any principal moneys, premiums, interest and other moneys secured by or payable under any obligations or securities and the payment of dividend and premiums on, and the repayment of the capital of, stocks and shares of all kinds and descriptions.”

44. The above amendment would be legal if :-

- (i) there was the 21 days notice to the members and
- (ii) the resolution was passed by 75% of the members in a general meeting of members.

45. On these two elements, I have no evidence of any 21 days notice, or indeed, any notice to the members of the company, calling for an extraordinary general meeting in order to pass the resolutions to amend the MoA or AoA of the company. In his evidence, Mr. Saini stated that he did issue a notice to the deceased, and to the 2nd plaintiff, but there is no proof of any notice issued or served upon either or both of them. The minutes of directors, and even the resolution, do not state that there was any notice. The only conclusion I can reach is that there was no such notice. There are also no minutes of any general meeting of the members. The minutes that exist are minutes of the directors, not the members. I therefore have no evidence of any meeting of the members, that is, no evidence of any general meeting.

46. Assuming that there was any such general meeting of members, and clearly there was not (save probably for a meeting of directors), was the resolution passed by 75% of the members? Certainly not. Even if we take it that the meeting was one of members and not directors, those present were only Janmohamed Verjee, Nazir Verjee, and Karim Verjee. They held only 3 shares. Mr. and Mrs. Habib did not attend the meeting. The resolution to amend the Memorandum or Articles of Association could not therefore pass. In his submissions, Mr. Mwangi, learned counsel for the 6th – 8th defendants, did make submissions that Section 141 of the Act only provides for $\frac{3}{4}$ of the members eligible to vote and the shareholding is not material. This is not my interpretation of Section 141 of the Act, but let us assume that it is. The company had five shareholders. Those who attended were three of five shareholders. It means that in terms of percentage, those who attended were only 3 of 5 which is 60%. It still will not reach the 75% threshold required to amend, even assuming that the requirement to amend is not tied to the amount of shareholding but to the number of members.

47. It is clear to me that the amendment of the Memorandum and Articles of Association, so that the company can guarantee money issued to another entity, was unlawful. It follows that such amendment was null and void and of no effect and cannot bind the company. With that, any contract of guarantee, or any charge to secure moneys to another entity was also unlawful, null and void.

48. The 1st defendant has of course argued that it is protected by the *Rule in Turquand's Case* put forth in the case of *Royal British Bank vs Turquand (1856) 6 E & B 327*, and indeed, Mr. Chege, learned counsel for the 1st defendant, in his submissions, dwelt at length on this Rule. The general proposition put forth in *Turquand's case* is that a third party dealing with a company is not bound to ensure that all the internal regulations of the company have in fact been complied with (See generally, *Gower, The Principles of Modern Company Law, 3rd Edition* at pages 151 to 167). The *Rule in Turquand's Case* however has exceptions. One is that anyone dealing with a company is deemed to have notice of its public documents. Hence, any act which is clearly contrary to these documents will not bind the company, unless subsequently ratified by the company acting through its appropriate organ. The *Rule in Turquand's case* will also only protect an outsider “unless he has knowledge to the contrary or there are suspicious circumstances putting him on inquiry.” (See Rule 2 at *Gower* page 154 *supra*).

49. In our case, the 1st defendant (the bank) will only be protected if there was nothing to put it on inquiry. The bank does acknowledge that it received a special resolution dated 10 May 1995 and a copy of the Articles of Association duly amended as provided in the special resolution. The bank must therefore have been aware, that initially, the MoA and AoA did not avail to the company the power to guarantee monies given to another entity. The bank must also have been aware, or was deemed to be aware of the provision of the law, which required that a MoA and AoA can only be amended through a special resolution of the general meeting of the company. There was sufficient material to warrant putting the bank into inquiry as to whether there was a meeting and whether resolutions were passed in the meeting. Due diligence would have required the bank to call for the minutes of the meeting where these resolutions were passed. I am not sure whether the bank did so, as the bank's witness was not privy to the transactions in issue, and she indeed testified that she herself does not know if the bank asked for the minutes of the meeting. There is certainly no evidence that the bank did so. There also ought to have been reasonable inquiry as to why the majority shareholders/directors of the company have not signed any of the minutes and resolutions passed. I am of opinion that the bank failed, in the circumstances of this case, to undertake prudent inquiry, and to call for critical documents, before allowing the company to proceed to charge the suit property in order to secure monies to be issued to Samaki Industries. I do not expect that anyone can proceed to advance significant amounts of money without making sure that the company guaranteeing the money was properly empowered to do so. The bank also ought to have known, and this would have been visible from the company's public documents, that Kensec Services were not the secretary of the company. There was thus material to put them into inquiry and I am not therefore of the view that the bank is protected by the *Rule in Turquand's Case*.

50. It follows that I am not persuaded that the company was empowered by its instruments to enter into the guarantee that it did, and not persuaded that the company could proceed to charge the suit property in order to benefit Samaki Industries. The charge and guarantee instruments are for these reasons null and void and the company cannot be bound by them.

51. Apart from the above, the plaintiff has also attacked the instrument of the charge for not being drawn by a person who is competent to draw the same. The charge in issue is dated 17 May 1995 and the further charge is dated 20 November 1996. They are both drawn by Standard Chartered Bank Kenya Limited. Mr. Kinyua, learned counsel for the plaintiffs, in his submissions, argued that Standard Chartered Bank Kenya Limited is not qualified to draw such instruments, and referred me to Sections 34 and 35 of the Advocates Act, CAP 16, Laws of Kenya. He also referred me to the Supreme Court decision in the case of *National Bank of Kenya Limited vs Anaj Warehousing Limited, Petition No. 36 of 2014 (2015) eKLR*. The central question in the said case was whether an instrument, in the instance of the suit, a charge, which was drawn by an advocate who had not taken out a practising certificate, was to be construed as an instrument drawn by an unqualified person, and thus null and void. The holding of the Supreme Court was that such instrument would not be void for the sole reason that the Advocate had not taken out a practising certificate. However, the court held that instruments drawn by other categories of persons such as non-advocates would be null and void. The court indeed stated as follows :-

[68] The facts of this case, and its clear merits, lead us to a finding and the proper direction in law, that, no instrument or document of conveyance becomes invalid under Section 34(1)(a) of the Advocates Act, only by dint of its having been prepared by an advocate who at the time was not holding a current practising certificate. The contrary effect is that documents prepared by other categories of unqualified persons, such as non-advocates, or advocates whose names have been struck off the roll of advocates, shall be void for all purposes (emphasis mine).

52. So that we can be on the same page, Section 34 of the Advocates Act, provides as follows :-

34. Unqualified persons not to prepare certain documents or instruments

(1) No unqualified person shall, either directly or indirectly, take instructions or draw or prepare any document or instrument –

(a) relating to the conveyance of property; or

(b) for, or in relation to, the formation of any limited liability company, whether private or public; or

(c) for, or in relation to, an agreement of partnership or the dissolution thereof; or

(d) for the purpose of filing or opposing a grant of probate or letters of administration; or

(e) for which a fee is prescribed by any order made by the Chief Justice under Section 44; or

(f) relating to any other legal proceedings,

Nor shall any such person accept or receive, directly or indirectly, any fee, gain or reward for the taking of any such instruction or for the drawing or preparation of any such document or instrument :

Provided that this subsection shall not apply to –

(i) any public officer drawing or preparing documents or instruments in the course of his duty; or

(ii) any person employed by an advocate and acting within the scope of that employment; or

(iii) any person employed merely to engross any document or instrument.

(2) Any money received by an unqualified person in contravention of this section may be recovered by the person by whom the same was paid as a civil debt recoverable summarily.

(3) Any person who contravenes subsection (1) shall be guilty of an offence.

(4) This section shall not apply to –

(a) a will or other testamentary instrument; or

(b) a transfer of stock or shares containing no trust or limitation thereof.

53. The above provision is clear. Standard Chartered Bank Kenya Limited is certainly not an advocate. Neither is it a public officer. The instrument in issue is a charge and further charge which is not exempted by Section 34 (4) above. Standard Chartered Bank Kenya Limited had no business drawing a charge and in fact committed a criminal offence in doing so. Mr. Chege, learned counsel for the bank, was rather subdued in his submissions on this point, and understandably so, for I do not see what he would have said in the face of these clear provisions of the law. He only submitted that the charge was in the form approved by the Chief Land Registrar but he was clearly clutching at straws. The form of instruments under the Registered Land Act is in Section 108 of the said Act, but the issue of the form of the instrument, and the question of who is qualified to draw the instrument, are two different things. Mr. Chege in fact did not address himself to the provisions of Section 34 of the Advocates Act, nor address himself on the Supreme Court decision in *National Bank vs Anaj Warehousing*, but as I have mentioned, I cannot fault him, for there really would have been little, if anything, to say. I am bound by that Supreme Court decision and pursuant thereto, I hold that the charge and further charge, dated 17 May 1995 and 20 November 1996 respectively, are void for all purposes. They cannot confer any rights to any person including the bank. Ideally, the nullification would affect

the downstream purchasers, but there is a complication, which I will address later in this judgment.

54. Apart from Section 34 of the Advocates Act, I would still have queried whether the bank could sell the suit property for failure to abide by Section 65 of the Registered Land Act. That provision stated as follows :-

(1) A proprietor may, by instrument in the prescribed form, charge his land, lease or charge to secure the payment of an existing or a future or a contingent debt or other money or money's worth or the fulfilment of a condition, and the instrument shall, except where section 74 has by the instrument been expressly excluded, contain a special acknowledgment that the chargor understands the effect of that section, and the acknowledgment shall be signed by the chargor or, where the chargor is a corporation, by one of the persons attesting the affixation of the common seal.

55. There is nowhere in the said instruments which abide by the requirements of Section 65 (1) above, meaning that the bank could not avail itself of the rights under Section 74 of the Registered Land Act, including the right to sell the property, as chargee.

56. I cannot also hold Lamu Marine Ltd liable under the instrument of guarantee. First, I have already established that the company did not properly alter its MoA and AoA, to enable it guarantee the debts of another entity. With that, the guarantee is also null and void. Secondly, the guarantee instrument is inter alia signed by Kensec Services, who never served as secretary of the company. Kensec Services had no capacity to affix the company seal on the instrument in order to bind the company. The guarantee instrument is null and void. With that finding, it follows that Lamu Marine Ltd could not be held liable for the debts of Samaki Industries. Any sale made in order to bail out Samaki Industries would be null and void and that is the fate of the purported "purchase agreement" and "deed of agreement" dated 30 August 2000. These two instruments would not have been prepared if there was no charge instrument in the first place or the guarantee instrument which I have declared null and void. It therefore doesn't help the defendants, and in my view, it would indeed be a splitting of hairs, to hear the defendants say that this was a voluntary sale by the company, and not a sale owing to the fact that the suit property was encumbered by the charge instrument. There was nothing voluntary about the sale, for the company never benefitted by the purchase price going into its coffers. The money went to pay the debt to Samaki Industries and did not in any way benefit the company. Let us not forget that I have held that the company could not properly guarantee the debt to Samaki Industries and that the charge is null and void. The purported sale, in so far as it roped in Lamu Marine Ltd, is null and void. In any event, I have not seen any resolution by the company, where a resolution was passed allowing the company to sell this prized asset and neither was the sale sanctioned by its majority shareholders. Such asset could not be disposed of by the directors without a resolution to do so. It cannot be argued, as Mr. Sarvia, learned counsel for the 9th defendant did, that Lamu Marine Ltd was a willing party and participant to the deed of agreement. It was not. It was the three Verjees who were literally giving away the property of the company. The above aside, there are other problems with the sale. For example, if the sale was being done in good faith, was there a valuation of it? How was the price of KShs. 5,000,000/= arrived at? There are too many questions that remain unanswered.

57. The only issue that I need to address is whether the property should revert back to Lamu Marine Ltd as proprietor and this is where the complication that I earlier hinted comes in.

58. Mr. Kibara, learned counsel for the 5th defendant, was forceful in his argument that his client is an innocent purchaser for value. I am in agreement and here we need to look at the provisions of Section 143 of the Registered Land Act. It provided as follows :-

143. Rectification by Court

(1) Subject to subsection (2), the Court may order rectification of the register by directing that any registration be cancelled or amended where it is satisfied that any registration (other than a first registration) has been obtained, made or omitted by fraud or mistake.

(2) The register shall not be rectified so as to affect the title of a proprietor who is in possession and who acquired the land, lease or charge for valuable consideration, unless such proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by his act, neglect or default.

59. It will be seen from the above that the court can proceed to rectify the register where title is obtained through fraud or mistake. However, under subsection (2), the rectification ought not take place, if the proprietor acquired the land innocently and is in possession. That appears to be the scenario in our case. In her evidence, PW-1 testified that the godown on the land was flattened and the new owners developed a house on the land. It is therefore apparent to me that possession is with the 5th defendant, and although it did not come out very clearly (for the 5th defendant's witness was never questioned on the user and possession of the land) it is probable that the user of the land is now no longer industrial but residential given the evidence of PW-1. The plaintiffs were certainly not in possession when the land was transferred from the 9th to the 5th defendant. I am persuaded that the 5th defendant purchased the property innocently, without being aware of the fraud that had earlier taken place. He is thus innocent and in possession, and thus Section 143 of the Registered Land Act bars the court from rectifying the register to his detriment.

60. It is because of Section 143 that I am unable to order that the title be rectified in order to have Lamu Marine Ltd reinstated as proprietor. What I will need to order, in lieu thereof, is compensation to Lamu Marine Ltd for the current value of the property, as an industrial, and not residential property, for that is what the company used the suit property as. If it was not for the illegal instruments herein, Lamu Marine Ltd would still be the proprietor of the suit property and would be enjoying whatever current value it has as an industrial plot. It follows therefore, that Lamu Marine Ltd must be compensated to the tune of the current value of the property. The compensation must come from the Bank, for it is the bank which benefitted from the sale of the suit property, by receiving the KShs 5,000,000/= out of the purchase agreements which went to defray the outlay to Samaki Industries, and it is also the bank which illegally prepared the charge and further charge which ultimately led to the suit property being sold. I will thus make an order for the suit property to be valued by the Government Valuer in charge of Mombasa District, on the assumption that it is an industrial plot, so as to make specific the compensation due to the 2nd plaintiff. The costs of the valuation will have to be shouldered by the 1st defendant, and if the 2nd plaintiff proceeds to make payment so that the valuation may

be conducted, then she will have to be compensated by the 1st defendant.

61. There is the small remnant of the issue of indemnity, raised by the 9th defendant, but I do not see the need of addressing it, since I have already held that the end result is for the bank to compensate Lamu Marine Ltd for the current value of the property. It is not therefore necessary to address Mr. Sarvia's, learned counsel for the 9th defendant's submissions, which argued for indemnity on behalf of his client as there is no obligation that I have imposed upon his client.

62. I will however address two minor issues before I close. There were arguments that the 1st plaintiff cannot benefit from this suit and this was raised by both Mr. Sarvia for the 9th, and Mr. Mwangi for the 6th - 8th defendants. I agree. Indeed, it was probably not necessary to have the 1st plaintiff as plaintiff in this suit, for the presence of Lamu Marine Ltd was sufficient. It is indeed Lamu Marine Ltd which is the directly aggrieved party. The benefit of the judgment is therefore to Lamu Marine Ltd but I cannot hold the suit to have been incompetent because the 1st plaintiff was included as plaintiff. The other issue that I will address is limitation of time. It was argued, especially by Mr. Mwangi, that the suit is time barred. I do not think so. The issues herein arose in the year 1995 or thereabout. This suit was filed in the year 2001. It is within the 12 year time period prescribed in Section 7 of the Limitation of Actions Act, Cap 22, Laws of Kenya, for an action to recover land. I need not say much on that.

63. In the prayers in the plaint, there was a prayer for punitive damages. By proceeding to draw instruments that the law makes illegal to do so, the 1st defendant essentially committed an offence, and has caused hardship to the 2nd plaintiff. I am of the view that an award for punitive damages is merited. In my discretion, I will award the sum of KShs. 2,500,000/= (read Kenya Shillings Two Million Five Hundred Thousand) as punitive damages payable by the 1st defendant to the Lamu Marine Ltd the said money to attract interest at court rates from the date of this judgment. There was no prayer for mesne profits, but if there was, and proof provided, I would have readily made an award for it, for the 2nd plaintiff has been deprived of the use of this property for a considerable period of time. I will leave it at that.

64. The final issue is costs. The persons who caused the problem herein are the 1st, 2nd, 3rd, 4th and 7th defendants. Save for those who are deceased and their suits abated, the rest will jointly and/or severally bear the plaintiffs' costs of this suit. They have also caused the 5th and 9th defendants to incur costs to protect what they acquired. They will thus also shoulder the costs of the 5th and 9th defendants.

65. I believe that I have dealt with all issues and now make the following final orders :-

(a) That it is hereby declared that the resolution to amend the company's Memorandum and Articles of Association to add a clause 11A was illegal, fraudulent, and null and void.

(b) That the proper Memorandum and Articles of Association of Lamu Marine & Allied Products Limited be construed without the inclusion of Clause 11A impugned above and this order be served upon the Registrar of Companies for him to give it effect.

(c) That it is hereby declared that the Charge dated 17 May 1995 and the Further Charge dated 20 November 1996 over the land parcel Mombasa/Block XV/143 are null and void.

(d) That it is hereby declared that the Guarantee instrument entered into by Lamu Marine & Allied Products Limited to guarantee the liabilities of Samaki Industries (Nairobi) Limited to Standard Chartered Bank Limited is null and void.

(e) That it is hereby declared that the documents purporting to be a Deed of Agreement and Purchase Agreement dated 30 March 2000 are null and void.

(f) That for reason that the title of the 5th defendant cannot be adversely affected by dint of the provisions of Section 143 of the Registered Land Act, Cap 300 (repealed), and the title cannot therefore revert to the ownership of Lamu Marine & Allied Products Limited, the 1st defendant do compensate Lamu Marine & Allied Products Limited the current value of the land parcel Mombasa/Block XV/143 as at the date of this judgment, the valuation be done assuming that the property was of industrial user. Judgment is therefore entered for the 2nd plaintiff against the 1st defendant in accordance with such valuation and the said sum to attract interest from the date of this judgment till payment in full.

(g) That the said land parcel Mombasa/Block XV/143 be valued by the Mombasa District Government Valuer for purposes of making certain the amount of compensation due to Lamu Marine & Allied Products Limited. The costs of the valuation be borne by the 1st defendant, and if the 2nd plaintiff proceeds to make payment for the valuation, she be indemnified by the 1st defendant.

(h) There shall be an award of KShs. 2,500,000/= to the 2nd plaintiff as punitive damages payable by the 1st defendant.

(i) The costs of the plaintiffs and of the 5th and 9th defendants be borne jointly and/or severally by the 1st, 2nd, 3rd, and 4th, and 7th defendants

66. Judgment accordingly.

DATED AND DELIVERED THIS 10 DAY OF NOVEMBER 2020

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT OF KENYA

AT MOMBASA