



Kenya Sunny Industries Company Ltd v Ocharo & 2 others (Land Case E002 of 2023) [2024] KEELC 39 (KLR) (18 January 2024) (Judgment)

Neutral citation: [2024] KEELC 39 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT VIHIGA
LAND CASE E002 OF 2023
E ASATI, J
JANUARY 18, 2024
IN THE MATTER OF: LAND PARCEL KAKAMEGA /
MBALE /328 & KAKAMEGA/ MASANA /1182**

BETWEEN

KENYA SUNNY INDUSTRIES COMPANY LTD PLAINTIFF

AND

MICHAEL OMOLE OCHARO 1ST DEFENDANT

KITIGU RESOURCES LTD 2ND DEFENDANT

LAND REGISTRAR- VIHIGA COUNTY 3RD DEFENDANT

JUDGMENT

Introduction

1. Vide the plaint dated 14th February 2023 Kenya Sunny Industries Limited the plaintiff herein sued the Defendants jointly and severally for the following relief;
 - a. An order of injunction restraining the 1st and 2nd Defendants from dealing in, interfering with, using transferring and/or otherwise disposing of the suit parcel Kakamega/mbale and Kakamega/masana/1182 except with the authority of the Plaintiff.
 - b. An order of cancellation of the register in respect of the parcels Kakamega/mbale/328 and Kakamega/masana/1182 and have the same restored into the name of Michael Omole Ocharo but to be held in trust for the Kenya Sunny Industries Companies Limited for a period not more than ninety-nine (99) years.
 - c. An order of cancellation of the register in respect of parcels Kakamega/mbale/328 and Kakamega/masana/1182 and have the same registered into the names of a Kenyan company proposed by Kenya Sunny Industries Companies Limited.



- d. That Michael Omole Ocharo and Kitigu Resources Limited to compensate Kenya Sunny Industries Companies Limited for the loss of use and business plus interest thereon to date.
 - e. That Michael Omole Ocharo do compensate Kenya Sunny Industries Companies Limited for money he had received and attendant interest thereon to date.
 - f. General damages.
 - g. Costs of the suit.
2. The 1st Defendant, Michael Omole Ocharo, denied the Plaintiff's claim vide the 1st Defendant's Statement of Defence dated 1st May 2023.
 3. Similarly, the 2nd Defendant vide the 2nd Defendant's Defence dated 12th May 2023 denied the Plaintiff's claim.
 4. The 3rd Defendant did not respond to the plaint.

The Plaintiff's Case

5. The Plaintiff's case is that it is a limited liability company registered under Cap 486 of the Laws of Kenya and licenced to deal in mineral prospecting specially in Kisumu, Vihiga and Kitui Counties. That the Plaintiff operated prospecting tunnels/shafts at Kakamega/mbale/328 and a processing plant at Kakamega/masana/1182. That the Plaintiff through its director Ren Zhijian agreed with the 1st Defendant on the basis of trust that they would conduct business privately, whereby the plaintiff through its director Ren Zhijian funded the business idea fully after which from the proceeds the 1st Defendant would deduct his investment cost then the parties would share the proceeds, on half - half basis. That the 1st Defendant was entrusted with the purchase of parcels of land that could be used for prospecting and since it was not possible for the plaintiff who is a foreigner to own land in Kenya, it was decided that Ren Zhijian on behalf of the Plaintiff sends money to the 1st Defendant to buy land and register in his (1st Defendant) name.
6. That the 1st Defendant misused the trust which the Plaintiff had in him as he fraudulently obtained Kshs 65,093,709/= from the Plaintiff under the pretext of business development through which he misled him to have the property that he bought on behalf of Ren for the Plaintiff, to be registered in his names and has since converted the same being mining site into his own private and beneficial use through Rio Kavirondo Limited in Migori County and in Vihiga County through Kitigu Resources Limited, the 2nd Defendant herein.
7. That the trust that the Plaintiff had in the 1st Defendant to register lands bought in his name is not strange as it was the usual way of doing things based on trust as a custom of trade in Chinese dealings. That the Defendants breached the trust by conspiring to have the land parcels transferred into the name of the 2nd Defendant denying the Plaintiff use of the said lands and by investing resources of the Plaintiff for the benefit of the 2nd Defendant. The plaintiff hence sought the intervention of the court to allow the claim.

1st Defendant's Case

8. The 1st Defendant's case as contained in the 1st Defendant's Statement of Defence dated 12th May 2023 is that he was the previous registered owner of the suit lands. That he entered into a Memorandum of Agreement dated 26th April 2022 with the 2nd Defendant for the sale of the suit lands and consequently



the suit lands have since been transferred in favour of the 2nd Defendant as a bona fide purchaser for value

9. The 1st Defendant contended that the Plaintiff's allegations that it sent him (1st Defendant) over Kshs 65,000,000/= towards the purchase of the suit lands are false as the value of the suit lands could not have amounted to Kshs 65,500,000/=. That he (1st Defendant) has previously worked with the Director of the Plaintiff, a Mr Ren Zhijian, as his personal Advocate but he has never worked as an advocate and/or agent of Kenya Sunny Industries Company Limited, the Plaintiff.
10. The 1st Defendant averred that he has not been charged before any court for fraud and that due process of the law was observed between him and the 2nd Defendant in the sale of the suit lands. He prayed that the suit be dismissed.

2nd Defendant's Case

11. The 2nd Defendant's case as contained in the 2nd Defendant's defence dated 12th May 2023 is that it legally and fairly purchased the suit lands from the 1st Defendant paid the consideration and had the land transferred in his favour. That the applicable law in this case is Kenyan law and not Chinese law or cultural practices. The 2nd Defendant prayed that the suit be dismissed as it was frivolous and premature and does not disclose any cause of action.

The Evidence

12. The Plaintiff's evidence comprised of the testimonies of PW1, Walter Ochieng Odingo and PW2, Ren Zhijian and the documents they produced as exhibits.
13. On behalf of the 1st Defendant, the 1st Defendant testified.
14. And on behalf of the 2nd Defendant one Yao Yaomin testified and produced exhibits.

Submissions

15. At the close of the evidence written submissions were filed by Counsel for each of the parties in support of their respective client's case.
16. Written submissions dated 17th July 2023 were filed by the firm of Amondi and Company Advocates on behalf of the Plaintiff. Similarly, written submissions dated 17th August, 2023 were filed by the firm of Zablon Mokuia and Company Advocates on behalf of the 1st Defendant and 8th August 2023 by the firm of Osoro Onyiego and Manyara Advocates on behalf of the 2nd Defendant.
17. No evidence was adduced or submissions filed on behalf of the 3rd Defendant.

Issues for Determination

18. In its written submissions, the Plaintiff framed 7 issues for determination namely;
 - a. Whether the Plaintiff has exclusive mineral rights over the suit land parcels of Kakamega/mbale/328 and Kakamega/masana/1182
 - b. Whether the entitlement of exclusive mineral right over Kakamega/mbale/328 and Kakamega/masana/1182 qualifies the Plaintiff to loss of use and business and/or otherwise compensation for the period from 5/5/2022 to date of delivery of the judgment



- c. Whether the court should order cancellation of the register in respect of the suit parcel Kakamega/Mbale/328 and Kakamega/masana/1182 and have the same registered in favour of the plaintiff/its trustees or persons holding the same in trust and to their benefit.
 - d. Whether the 2nd Defendant being a foreign company has the capacity to own freehold land in Kenya.
 - e. Whether the 1st Defendant actually received Kshs 65,093,709/= from the Plaintiff and if the former is liable to compensation for money had and received
 - f. Whether the Plaintiff has established trust as a custom or method of trade usage that has gained notoriety in the mining/precious metals/gold industry.
 - g. Whether the Plaintiff is entitled to cost of the suit
19. The 1st Defendant framed only 2 issues for determination;
- a. Whether the Plaintiff is entitled to the orders prayed for in the Plaint.
 - b. Who should bear the costs of the suit
20. The 2nd Defendant identified 3 issues for determination namely;
- a. Whether the suit property Kakamega/mbale/328 and Kakamega/masana/1182 are the property of the 2nd Defendant
 - b. Whether the Plaintiff has exclusive rights to mine on the suit property
 - c. Whether the plaintiff has established a prima facie case
21. For purposes of determination of the dispute herein, the court adopts the issues as framed by the Plaintiff as the points for determination in this suit as the same encompasses the issues for determination framed by the 1st and 2nd Defendants.

Analysis & Determination

22. Order 21 Rule 4 *Civil Procedure Rules* requires that judgment in defended suits consist of, inter alia, the issues for determination, the decision on each issue and the reasons for the decision.
23. The first point for determination is whether or not the Plaintiff had exclusive mineral rights over the suit lands. The plaintiff pleaded in paragraph 7 of the plaint that it is licensed to deal in mineral prospecting specifically covering Kisumu, Vihiga and Kitui Counties and that it was on that basis that it operated the prospecting tunnels/shafts at Kakamega/Mbale/328 and a prospecting plant at Kakamega/Masana/1182 as captured in the Prospecting License Registration no PL 2017/0029 by the Ministry of Petroleum and Mining.
24. PW1 testified on behalf of the Plaintiff vide his witness statements which were adopted as his evidence-in-chief that the Plaintiff is licensed to deal in mining and that it operated mining tunnels/shafts on land parcel no Kakamega/mbale/328 and a processing plant at Kakamega/Masana/1182. He stated further in his further witness statement filed in court on 8/5/2023 that he was aware that the Plaintiff's prospecting license No. PL/2017/0029 was due for expiry sometime about 7/10/2021. That they did an application for renewal and paid Kshs. 50,000/= for the same. That unfortunately, the payment for renewal was credited in favour of Aurum Utalium Mining Company Limited a sister company to the Plaintiff instead of the Plaintiff.



25. PW1 produced documents as exhibits including the Prospecting License Registration Number PL/2017/009. The same shows that it was for a term of three (3) years commencing on 8th October 2018 and ending on the 7th October 2021. It further showed that the holder of the License No PL/2017/0029 was the Plaintiff whose registered office is in Kenya at P.o Box 35329 Nairobi. That the holder of the license is granted the exclusive right to prospect for Gold and Precious Metals within and over the mineral right area in Annex 1 of the License. Annex 1 consists of the map of the prospecting area and is indicated to cover an area of approximately 273.213 km² (1271 CBS) whose extent covers Kisumu, Vihiga and Kitui Counties.
26. PW1 further produced a letter dated 28th April 2023 addressed “To whom it may concern” to the effect that the Plaintiff had applied for renewal of the license on 7th May 2021 and that on strength of the provision of section 81(5) of the *Mining Act* the company can continue with its prospecting operations as the renewal application was being processed. PW1 also produced 3 Receipts No. 2086709 dated 5th October 2021 in favour of Aurum Utalium Company Limited for Kshs 50,000/= being payment for renewal of applications PL/2018/1017. The second receipt was No. 0209774 dated 17th January 2022 in favour of Auruim Utalium Company Limited for Kshs 50,000/= on account of Renewal of prospecting License. The third receipt is No 5178605 dated 2nd May 2023 in favour of the Plaintiff for Kshs 50,000/= on account of Renewal of Prospecting Licence (PL/2017/0029). PW1 also produced a letter dated 18th January 2022 from the Plaintiff to Director Ministry of Petroleum and Mining asking the Ministry to rectify receipt dated 5th October 2021 and have the funds credited in favour of the Plaintiff.
27. It was submitted on behalf of the Plaintiff on this point that the prospecting licence allows large scale prospecting operations and gives the plaintiff mineral rights over the prospecting tunnels/shafts at Kakamega/Mbale/328 and the prospecting of plant at Kakamega/Masana/1182 both of which are in Vihiga County which is classified as the Plaintiff’s license area pursuant to section 4 of the *Mining Act* No 12 of 2016. Counsel relied on section 42, 44 and 77(b), (c) and (d) of the *Mining Act* on the obligations and rights of the Plaintiff as the license holder over the mining area. Counsel submitted that the said obligations subsist even upon the expiry of the prospecting license and while awaiting renewal of the license as captured under section 81(5) of the *Mining Act*. Counsel urged the court to find and hold that the Plaintiff is the mineral rights owner in respect of the suit lands and the processing plant thereon. That the court being a state organ bound by the provisions of article 10(2)(a) of *the Constitution* must stamp its authority.
28. The 1st Defendant denied the Plaintiff’s claim that it had exclusive mineral rights over the suit land. DW1, the 1st Defendant, testified that the suit property belonged to him before he sold them to the 2nd Defendant lawfully.
29. The 2nd Defendant similarly denied the Plaintiff’s claim and averred that it legally and fairly purchased the suit lands. It was submitted on behalf of the 2nd Defendant that section 108 of the *Mining Act* provides for the rights conferred by a mining license namely that:

“ the holder of a mining license shall enjoy the exclusive right to carry out mining operations in respect of the mining of mineral deposits specified in the license within the area specified subject to the provisions of this *Act* and the terms and conditions set out in the license.

It was further submitted on behalf of the 2nd Defendant that although the plaintiff had the exclusive rights to mine gold and precious metals on the suit property, the same expired when the Plaintiff’s license expired on 7th October 2021. That one of the conditions for obtaining a mining license is to



seek consent of the owners of the property. That under section 37 of the *Mining Act* a prospecting and mining license shall not be granted with respect to private land without the express consent of the registered owner. That the suit lands are private lands. That the suit land belongs to it (2nd Defendant) and that for the Plaintiff to renew its Mining License it needs the consent of the 2nd Defendant. Counsel submitted that the Plaintiff does not have exclusive rights to mine the 2nd Defendant's property.

30. I have considered the pleadings, the evidence adduced and the submissions on this point. It is not in dispute that the prospecting licence No PL/2017/0029 produced by the Plaintiff dated 8th October 2018 expired on 7th October 2021. The law allows the plaintiff to continue enjoying the exclusive rights provided by the licence if the plaintiff has applied for renewal of the licence in accordance with the provisions of the *Mining Act*. Section 81 of the *Act* makes provision for renewal of prospecting license as follows: -

- “(1) The holder of a prospecting licence may apply to the Cabinet Secretary for the renewal of the prospecting licence in respect of an area of land that forms part of the prospecting area.
- (2) An application under this section shall be made in the prescribed form and shall be accompanied by the prescribed fee.
- (3) An application for renewal of a prospecting licence shall be made three months before the expiry of the term of the current prospecting licence.
- (4) The Cabinet Secretary, on the recommendation of the Mineral Rights Board, shall respond to an application for renewal of a prospecting licence within sixty days of receipt of the application.
- (5) Where an application has been made and the Cabinet Secretary fails to respond before the expiry of the prospecting operations until the application is determined.”

31. In order to rely on the protection provided by section 81 (5) of the *Mining Act*, the Plaintiff needs to prove that it applied for renewal of the licence at least 3 months before the expiry of the license then held. No copy of the application for renewal in the prescribed form was produced. No receipt for payment of the renewal fees was produced bearing a date at least three months before expiry of the licence to show that the application was accompanied with renewal fees as required by law.

32. I have analysed the documents produced by the plaintiff to prove that it had applied for renewal of the licence. I have noted that as at the time of filing the suit, the plaintiff made no mention of renewal of the licence. The plaintiff relied solely and exclusively on the prospecting licence dated 8/10/2018. It was much later in the course of the proceedings that the plaintiff introduced the receipts and letters produced by PW1 as exhibits. The receipt dated 5/10/2021 was specific that it was in respect of renewal of a different license namely license No. PL/2018/1017. The receipt for renewal of the plaintiff's prospecting license was dated 2/5/2023 which was long after expiry of the licence and much later after the suit had been filed. Further, under section 37 of the *Act*, the Plaintiff needed consent of the registered owner of the land in order to apply for renewal. There is no evidence that consent of the previous registered owner or of the 2nd Defendant as the current registered owner was sought and obtained for the renewal of the licence.

33. Having taken all these matters into account, I find that the Plaintiff has not demonstrated that it had as at the time of filing suit a valid prospecting licence which would guarantee it exclusive mining rights over the suit lands.



34. The next issue for determination is whether the entitlement to exclusive mineral rights over the suit lands qualifies the plaintiff to loss of user and business and/or otherwise compensation for the period from 5/5/2022 to the date of delivery of judgement. Having found that the plaintiff did not have exclusive mineral rights over the suit lands, my considered view is that the plaintiff will therefore not be entitled to loss of user and business or compensation for the period claimed.
35. The third issue for determination is whether the court should order cancellation of the register in respect of the suit land and have the same registered in favour of the Plaintiff/its trustees or persons holding the same in trust and to their benefit.
- It was the Plaintiff's case as pleaded in paragraph 11 of the plaint that the 1st Defendant was entrusted with the purchase of parcels of land that could be used for prospecting in which case the 1st Defendant appropriately advised that it was not possible for a Chinese Citizen to own land in Kenya in which case it was decided that Ren Zhijian (on behalf of the Plaintiff) send the 1st Defendant money and he registers the land in question into his name in respect of the purchase of the land parcels Kakamega/mbale/328 and Kakamega/masana/1182.
36. In paragraph 16 of the plaint, the Plaintiff pleaded that the suit lands were transferred on 5th May 2022 by the 1st Defendant to the 2nd Defendant without the consent and/or authority of the Plaintiff. The Plaintiff further pleaded in paragraph 25 of the plaint that the 1st Defendant breached the trust bestowed upon him by conspiring to have the suit lands transferred into the name of the 2nd Defendant while knowing the Plaintiff's interest in the property.
37. The Plaintiff therefore sought for an order for cancellation of the register in respect of the suit lands and have the same restored into the names of the 1st Defendant but to be held in trust for the Plaintiff for a period of not more than 99years.
38. The evidence of the Plaintiff on this point as adduced by PW1 and PW2, was that the 1st Defendant bought the suit land on behalf of the Plaintiff but in breach of the trust bestowed upon him unlawfully transferred the suit lands to the 2nd Defendant. The documentary evidence produced in support of this point was exhibits P. 6(a), (b) and (c) which were stated to be screenshots of communication between Ren (PW2) and the 1st Defendant. The other exhibit was exhibit P. 7(a) and (b) which were stated to be a bundle of bank statements and cash/cheque deposits evidencing the payment of Kshs 65,093,709/= to the 1st Defendant
39. It was submitted on behalf of the Plaintiff that the evidence adduced has established the existence of a relationship of trust and confidence between Ren Zhijian (as the Managing Director of the Plaintiff) and the 1st Plaintiff that gave rise to the fiduciary duty imposed on the 1st Defendant to disclose or abstain from actions that would prejudice the Plaintiff's business. Counsel relied on the case of *Jutetabi African Adventure Limited and Another vs Christopher Michael Lockely* [2017] eKLR where it was held that;

“It is settled that the onus lies on a party relying on the existence of a trust to prove it through evidence. That is because; the law never implies, the court never presumes a trust, but in case of absolute necessity. The courts will not imply a trust save in order to give effect to the intention of the parties. The intention of the parties to create a trust must be clearly determined before a trust will be implied.

Counsel also relied on the case of Eldoret Court of Appeal, Appeal No 216 of 2016 *Mary Njambi Gitinji vs Christine Wambui Mwaura*. Counsel submitted that imposition of a constructive trust is meant to guard against unjust enrichment



40. The Defendants denied the Plaintiff's claim.
41. The burden of proof to prove on a balance of probabilities that the suit lands were indeed its property that the same were bought and registered in the name of the 1st Defendant in trust for the Plaintiff lay with the Plaintiff (see sections 107 to 109 of the *Evidence Act*). No land sale agreement was produced to show how and when the suit lands were bought by the 1st Defendant. The certificate of official search and green card produced by the Plaintiff as exhibits P9 (a) to (d) show that both the suit lands were registered in the name of the 2nd Defendant on 5th May 2022 and the name of the 1st Defendant on 5th February 2018 and 12th March 2019. There is no evidence connecting the Plaintiff and the suit lands. Parcel no Kakamega/mbale/328 was registered in the name of the 1st Defendant on 5th February before the Plaintiff obtained the prospecting license on 8th October 2018.
42. In addition, the Plaintiff has the burden of proof to prove that transfer of the suit land in favour of the 2nd Defendant was unlawful and in breach of the trust. I have read exhibit P. 6 (a), (b) and (c), the screenshots. The same were not authenticated as true communication between the parties by either calling evidence from the service provider or otherwise. I do not find any evidence in the said exhibits that the Plaintiff Company bought land in the name of the 1st Plaintiff. I find that there is no sufficient evidence to prove this point. The Plaintiff claims that the 1st Defendant fraudulently and in breach of the trust transferred the suit lands to the 2nd Defendant. The standard of proof for fraud is higher than proof on a balance of probabilities as was held in *Koinange & 13 others vs Charles Karuga Koinange* 1986 KLR at page 23 where the court held that:
- “When fraud is alleged by the Plaintiffs the onus is on the Plaintiffs to discharge the burden of proof. Allegations of fraud must be strictly proved, although the standard of proof may not be so heavy as to require proof beyond a reasonable doubt, something more than a balance of probabilities is required.”
43. Similarly, in the case of *Kinyanjui Kamau vs George Kamau* [2015] eKLR the court dismissed the appeal as it was not demonstrated that the appellants had proved fraud to the required degree and stated that:
- “It is trite law that any allegations of fraud must be pleaded and strictly proved. see *Ndolo vs Ndolo* (2008)1KLR (G & F) 742 wherein the court stated that “.. we start by saying that it was the Respondent who was alleging that the will was a forgery and the burden to prove the allegation lay squarely on him. Since the Respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely; proof upon a balance of probabilities; but the burden of proof on the Respondent was certainly not one beyond a reasonable doubt as in criminal cases.” In case where fraud is alleged it is not enough to simply infer fraud from the facts.
44. The case of PW 2 in essence is that he was trying to go around the constitutional provisions on ownership of land by non-citizens by having the suit lands registered in the name of the 1st Defendant.
45. The law on cancellation of title to land is found *inter alia* in section 80 of the *Land Registration Act*. In order for the court to order cancellation, there has to be evidence that the registration was obtained or made by fraud or mistake. No such evidence has been placed before court.
46. The next issue for determination is whether the 2nd Defendant being a foreign company has the capacity to own freehold land in Kenya. It was submitted on behalf of the plaintiff that it was the Plaintiff's case that the Land Registrar Vihiga irregularly transferred land parcels Kakamega/mbale/328 and



- Kakamega/masana/1182 to the 2nd Defendant notwithstanding that the latter is a foreign owned company which is constitutionally and statutorily barred from owning freehold land except with the consent of the President. That the Chinese Directors of the Company own 98% of the company and that to that extent its ownership of freehold agricultural land is affected by the provisions of section 9 as read with section 6 of the Land Control Act. That there was no evidence that the 2nd Defendant sought or obtained exemption by the President.
47. In response, the 2nd Defendant relied on the case of Ali Wanje Ziro vs Abdulbasit Abeid Said and Another [2022] eKLR to submit that under sections 24 and 26 of the Land Registration Act, the law is clear that certificate of title issued by the Land Registrar upon registration shall be taken by all courts as *prima facie* evidence that the person named as proprietor of the land is the absolute and indefeasible owner. That the 2nd Defendant is the owner of the suit lands as shown by the sale agreement between the 2nd and 1st Defendant, a copy of Bank Statements showing that Kshs 13,000,000/= was paid as consideration and copies of title deed produced.
48. The Plaintiff produced, as exhibit, a certificate showing the directors of the 2nd Defendant as exhibit P3 it shows that the 2nd Defendant company has 4 Directors, three of whom are Chinese and 1 Kenyan. That the Kenyan holds 20 ordinary shares where the total shares held by the 3 Directors of Chinese nationality are 980 which is an equivalent of 98%.
49. Article 65 of the Constitution makes provision on land holding by non-citizens; It provides;
- “(1) A person who is not a citizen may hold land on the basis of leasehold tenure only and any such lease, however granted shall not exceed ninety-nine years.
- (2) If a provision of any agreement, deed, conveyance or document of whatever nature purports to confer on a person who is not a citizen an interest in land greater than a ninety-nine year lease the provision shall be regarded as conferring on the person a ninety-nine-year lease interest and no more.
- (3) For purposes of this Act –
- a. a body corporate shall be regarded as a citizen only if the body corporate is wholly owned by one or more citizens and
- b. property held in trust shall be regarded as being held by a citizen even if all the beneficial interest of the trust is held by persons who are citizens
- (4) Parliament may enact legislation to make further provision for the operation of this article.
50. The import of article 65 of the Constitution is that any interest in land held by a non-citizen that is greater than 99 years would be converted to 99-year leasehold. Section 107(3) of the Land Registration Act provides that any lease granted to a non-citizen shall not exceed 99 years.
51. By reason of the provisions of article 65 (2) of the constitution I find that the interest held by the 2nd Defendant in the suit lands is deemed to be a lease hold of not more than 99 years which it has capacity to hold.
52. The next issue for determination is whether the 1st Defendant actually received Kshs 65,093,709/= from the Plaintiff and if the plaintiff is liable to compensation for money had and received. The



Plaintiff's case is that it had deposited a total of Kshs 65,093,709/= with the 1st Defendant being cash transfers and cheques deposited from Ren Zhijian's DTB Account Number 034440xxxx to the 1st Defendants' DTB Account No 008107xxxx and KCB Account No 112477xxxxxx. That the Plaintiff through Ren Zhijian reached into a business arrangement with the 1st Defendant whereby they would conduct business privately in that the Plaintiff through its Principal Director Ren Zhijian funded the business idea fully after which from the proceeds the later would remove his investment cost then parties would share the proceeds on half-half basis. The Plaintiff's position was that the arrangement was based on trust as a business practice of Chinese.

53. The 1st Defendant in his testimony vide his witness statement dated 12th May 2023 stated that the allegation that the Plaintiff paid him Kshs 65,093,709/= towards the purchase of the suit property was a falsehood to try and hoodwink the court to grant the Plaintiff the orders sought. That value of the suit lands could not have amounted to Kshs 65,000,000/=. The 1st Defendant further averred that his dealings were with Ren Zhijian as an individual for whom he worked as personal Advocate and that he has never worked as advocate or agent for Kenya Sunny Industries Company Limited, the Plaintiff herein
54. From the bank statement produced as exhibits the dealing were between Ren Zhijian and the 1st Defendant. The Account number 034440xxxx DTB Lavington Branch – 054 from which the funds were sent belonged to Ren Zhijian. The name of the Plaintiff does not appear anywhere on the statements. There is no evidence to show that the source of this money was the Plaintiff Company. The purpose for which the money was disbursed does not show on the bank statements or at all. The same applies to the pay-in-slips. The handwritten slips show that the 1st Defendant had received the amount of money indicated in the said payn-in slips from Ren Zhijian for the Vihiga project. The project is not specified. The handwritten document dated 30th June 2020 shows that the 1st Defendant had received Kshs 4,000,000/= as a friendly loan to be repaid.
55. There is no evidence that Ren Zhijian was making the payments on behalf of the Plaintiff or that the Plaintiff had authorized him to undertake the transactions referred to in the plaint on its behalf. The Plaintiff is a separate legal entity distinct from PW2. In the absence of express authority, the actions, obligations and claims of PW2 cannot be said to be the actions or obligations of the Plaintiff.
56. Although there is evidence of transmission of monies from PW2, Ren Zhijian, to the 1st Defendant, I do not find a basis for an order for compensation for money had and received in favour of the Plaintiff. The Plaintiff as a body corporate has not proved that it gave Kshs 65,093,709 to the 1st Defendant for which it is entitled as money had and received.
57. The next issue is whether or not the Plaintiff has established trust as a custom or method of trade usage that has gained notoriety in the mining/precious metals/gold industry. It was submitted on behalf of the Plaintiff that trust formed the basis of the business transaction between the Plaintiff and the 1st Defendant. That in Nairobi HCC 106 of 2015 *China Wu Yi Company Limited vs China Africa Total Logistics Company Limited* trade usage or custom was defined. That the essence of trust as a social capital in business cannot be down played and has been identified by scholars as one of the key pillars of economic growth and development. The Defendants denied the existence of any trust.
58. It was submitted on behalf of the 2nd Defendant that trust among Chinese in business is not an excuse to ignore the law and procedure laid down.
59. Having analysed the evidence produced, I find no evidence that the parties and particularly the 1st Defendant and the Plaintiff chose to rely on trust as the basis of the business dealings between them. The totality of the evidence shows that there were dealings between Ren Zhijian and the 1st Defendant



involving money. No nexus has been established between the Plaintiff and any of the defendants as far as the claim herein is concerned.

60. On costs, though the law in section 27 of the Civil Procedure Act is that costs follow the event, in the circumstances of this case I consider it expedient and just that each party bear its own costs of the suit.

61. The upshot is that I find that the Plaintiff has not proved its case against the defendants on a balance of probabilities. The suit is hereby dismissed. Each party to bear own costs.

Orders accordingly.

JUDGEMENT DATED, SIGNED AND DELIVERED AT VIHIGA THIS 18TH DAY OF JANUARY, 2024 VIRTUALLY THROUGH MICROSOFT TEAMS ONLINE APPLICATION.

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E. ASATI,

JUDGE.

In the presence of:

Patricia: Court Assistant.

Nyambeki for the Plaintiff.

Karanja for the 1st Defendant

Kori for the 2nd Defendant.

No appearance for the 3rd Defendant.

