



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC NO. 312 OF 2004

MAE PROPERTIES LTD.....PLAINTIFF

VERSUS

MARY WACEKE MUIGAI.....DEFENDANT

JUDGEMENT

1. The Plaintiff is a limited liability company carrying on business in Kenya. It was wholly owned by Pan Africa Insurance Limited. One of the objects of the Plaintiff was to purchase and acquire for investment and management land, dwelling houses, flats, offices, workshops, buildings and other premises; and to sell and deal in land generally. Its other object was to develop the resources and turn to account the lands, buildings and rights by laying out and preparing land for building purposes. The company was also established to sell, let, lease, mortgage or otherwise dispose of movable or immovable property owned by it.
2. The Defendant was appointed a director of the Plaintiff and served as director from 1994 to 2001.
3. Pursuant to its objects under its Memorandum of Association, the Plaintiff bought and developed different phases of land in Runda, Nairobi, into what are known as serviced vacant plots. The Plaintiff sold most of the developed plots except for a few which were either in low lying marshy areas, or swampy places.
4. The Defendant entered into agreements with the Plaintiff for the purchase of five parcels of land. These were L.R. Numbers 7785/970 and 7785/971 bought for Kshs. 1.2 million shillings each on 24/10/1995; while L.R. Numbers 7785/1062, 7785/1063 and 7785/1064 were each sold to her at Kshs. 1.5 million on 19/10/1998.
5. The Plaintiff's claim against the Defendant is that while being a director of Pan Africa Insurance Company Ltd and the Plaintiff, the Defendant entered into a contract with the Plaintiff to purchase the above mentioned five plots from the Plaintiff at prices materially below the market value.
6. The Plaintiff claims that the Defendant acted *mala fides* and against the interests of the Plaintiff and that she was in breach of trust and her obligations as trustee in respect of the assets of the Plaintiff. The Plaintiff claims that the Defendant failed to declare to its directors the nature of her interest in the contracts that she entered into to purchase the 5 plots from the Plaintiff and thereby contravened Section 200 of the Companies Act.
7. The Plaintiff seeks the difference between the fair market value and the prices at which the Defendant purchased the 5 plots together with damages, costs and interests in the plaint dated 16/6/2004.
8. The Defendant avers in her defence filed in court on 26/7/2004, that the Plaintiff's claim is statute barred. She admits purchasing the plots but denies buying them at prices below the market price. She contends that the Plaintiff repossessed plot number 7785/1062 in 2003 and therefore any claim in respect of this plot is misconceived.
9. The Defendant maintains that the sale transactions over the Suit Properties were regular and duly sanctioned by the Plaintiff; and that they were done at arm's length in accordance with the relevant law. The Defendant denies that the Plaintiff is entitled to any of the reliefs it seeks in the plaint.
10. The matter proceeded for hearing on 25/4/2017 when both parties called witnesses to testify. Parties relied on the consolidated bundle of documents filed by the Plaintiff's Advocates on 30/3/2017. The Plaintiff called its company secretary and a valuer who gave evidence on its behalf while the Defendant testified.

11. The issues for determination can be summarised as follows: -

i. Is the Plaintiff's claim statute barred?

ii. Was the Defendant in breach of trust or her statutory duty as alleged by the Plaintiff?

iii. Were the transactions between the Plaintiff and the Defendant at arm's length and duly sanctioned by the board of directors as required by law?

iv. Did the Plaintiff repossess plot number 7785/1062 for the Defendant? Does the Plaintiff have a claim in respect of this plot?

v. Did the Plaintiff suffer any loss or damage as claimed in the plaint?

vi. Is the Plaintiff entitled to the reliefs it seeks in the plaint?

23. The Plaintiff contends that the board approved the sale of plots at the minimum price of Kshs. 1.5 and a maximum of Kshs. 2.5 in Phase VI while tasking its management to seek better prices. The Plaintiff contends that management sold 33 plots for prices between Kshs. 2 million and 2.7 million yet the Defendant bought 2 plots in the same place and locality for the minimum price of 1.5.

24. The Plaintiff contends that in light of the existing circumstances, the Defendant could not have reasonably believed that the transactions were for the benefit of the Plaintiff and that she was acting in her own interest in obtaining the lowest possible price at the Plaintiff's expense.

25. For the Plaintiff, it is immaterial that the Defendant paid the lowest prices authorised by the Board since it argues that as a fiduciary she had a duty to act in the best interest of the Plaintiff. The Plaintiff submits that by failing to take steps to ensure that the Plaintiff obtained the market value of the properties, the Defendant was in breach of her fiduciary duties.

26. The Plaintiff contends that under Section 117 of the Evidence Act the Defendant has the burden of proving the good faith of the transaction since she was in a position of active confidence.

27. The origin of the duty to avoid conflict of interest dates back to the speech of Lord Cranworth L C where he stated in **Aberdeen Railway Company Ltd V. Blaikie** [1854] 1 M A C Q 461 at 471 to 472 that no one having such duties to discharge shall be allowed to enter into engagements in which he has or can have a personal interest conflicting or which may possibly conflict with the interest of those with whom he is required to protect. The Plaintiff urges that pursuant to this duty imposed by Section 200 of the Companies Act, the Plaintiff was required to declare the nature of her interest at the meeting of directors. The Plaintiff also relies on Article 84 [1] of Table A of the Companies Act on the requirement to declare the nature of interest. The Plaintiff maintains that the duty to declare to the board is mandatory and that it is irrelevant whether that interest is obvious.

28. The Plaintiff relies on the case of **Neptune (Vehicle Washing Equipment) v Fitzgerald** [1996] Ch 274 in which the court discussed the benefits of disclosure as follows: -

“Where a director is interested in a contract, the section ensures that three things happen at a directors' meeting: first, all the directors would know or be reminded of the interest; secondly, the making of the declaration should be the occasion for a statutory pause for thought about the existence of the conflict of interest and of the duty to prefer the interests of the company to their own; third, the disclosure or reminder must be a distinct happening at the meeting which therefore must be recorded in the minutes of the meeting under section 382 [of the Companies Act 1985] and clause 86 of Table A, Reg 86.....”

29. The Defendant admitted that she did not make any such disclosure. She relied on Board paper number 7 where her name appeared showing that she was buying plot numbers 528 and 529. The Plaintiff argues that this is not the statutory disclosure contemplated by Section 200 of the Companies Act. In any event the Plaintiff contends that board number 7 listed properties that had already been sold.

30. The Plaintiff also contends that the transactions between the Plaintiff and the Defendant were not at “arm's length”. The Plaintiff argues that the arm's length principle cannot apply where prices range from a minimum to a maximum and the purchasing party accepts the minimum price where the selling party was under the control and direction of the purchasing party.

31. The Plaintiff admits that it never transferred plot number 7785/1062 to the Defendant after it discovered the various breaches of fiduciary duty by the Defendant. The Defendant accepted the decision and took the refund of the purchase price. The Plaintiff maintains that it has a claim over this plot since the Plaintiff failed to disclose her interest and signed the sale agreement of this property. The Plaintiff seeks damages and has computed this in the total sum it seeks against the Defendant.

32. The Plaintiff contends that as a result of the Defendant's actions, it suffered injury when the Defendant acquired the suit properties for much less than their market value. The Plaintiff relies on the valuation conducted by its witness and submits that it suffered loss being the price difference between what was paid by the Defendant and the market price at the time of each sale.

33. The Plaintiff urges the court to consider the effects of the breaches by the Defendant with a view to putting the parties in the position they should have been and compensating the Plaintiff for the injury occasioned by the Defendant's conduct.

34. The Plaintiff seeks a declaration that the Defendant was its trustee in respect of the plots she purchased from the Plaintiff. The Plaintiff claims the sum of Kshs. 8,422,827.40 as the price difference plus interest from the date of filing suit. The Plaintiff also seeks general damages for breach of fiduciary duty in the sum of Kshs. 10 million for the 4 plots; punitive damages of Kshs. 1 million; costs of the suit and interest on the damages.

35. The Plaintiff also seeks compound interest at the rate of 12% per annum from the date of filing suit until payment in full as it argues that it has been deprived of its assets and money by the Defendant's breach of fiduciary duty which it could have used in its business for over 20 years.

36. The Plaintiff contends that specific restriction of the suit property was not possible since the property was put beyond the Plaintiff's reach during the pendency of this suit. As observed in this judgement, the Plaintiff ought to have sought the remedy of injunction to restrain dealings in the Suit Properties until the matter was heard and determined.

37. The Plaintiff relied on the case of **Wallersteiner V. Moir (No. 2)** [1975] 1 All E.R.849 in which Lord Denning stated that a person in a fiduciary position is not allowed to make a profit out of his trust and if he does he is liable to account for that profit or

interest in lieu of it. In addition, in equity interest is awarded whenever a wrong doer deprives a company of money which it needs for use in its business. The company should be compensated by an award of interest since a mere replacement of money years later is not adequate compensation.

38. The Defendant does not deny that she owed fiduciary duties to the Plaintiff as its director. She however, denies that she was in breach of her fiduciary duties. It is her case that she legally acquired the Suit Properties without breaching her duties towards the Plaintiff. She argues that the steps that the Plaintiff's second witness alluded to were adhered to in her acquisition of the Plaintiff's properties.

39. The Defendant stated that the Plaintiff over the years resolved to sell some of its plots which were both attractive and unattractive. When it was unable to sell some of the unattractive plots, the company management suggested that these plots could be sold to members of its staff instead of being disposed at a throw away price. This is reflected in Board Paper Number 4 of 10/6/1993.

40. The Board Paper states that efforts to sell the unattractive plots in Phase 1 and 2 had not been successful since the plots were either in low lying marshy areas; in swampy places; had papyrus growing on them; had clay soils; had no services; were next to the slum or were in isolated and lonely places.

41. The Board Paper opined that the move to sell the unattractive plots to senior members of staff would boost their morale and assist them cope with the erosion of their salaries due to ravages of inflation. The Plaintiff's management further recommended that senior members of staff and directors who were unable to pay the full price for the plots be given a loan by the Plaintiff.

42. When that Board Paper was discussed, it was agreed that a legal opinion with regard to the sale of plots to members of staff should first be sought. Messrs Mohammed and Muigai advocates gave an opinion which the Plaintiff's General Manager used to prepare Board Paper Number 2 of 7/7/1992.

43. From the minutes of the meeting held on 8/7/1993, it is clear that it was agreed that based on the legal opinion of Messrs Mohammed and Muigai Advocates, no special policy would be formulated with regard to the sale of plots whether or not they were non attractive, unsellable or good to directors of either Pan Africa Insurance Limited or the Plaintiff as that would be tantamount to payment of emoluments to directors which required the approval of shareholders or it would raise ethical or probity issues.

44. The legal opinion also stated that the sale of plots to directors needed the approval of the Board of Pan Africa Insurance Limited after which an extra ordinary general meeting of the Plaintiff would be held to approve the proposal. At the meeting held on 8/7/1993, it was discussed and resolved that although Pan African Insurance Company Ltd owned the Plaintiff, the two companies were distinct companies and the Plaintiff's board could not take decisions on behalf of Pan Africa Insurance Company.

45. From the minutes of the meeting of the Board of Directors held on 24/2/1994, it was discussed that the sale of plots should be extended to directors and appropriate recommendations made for approval at the next annual general meeting. It was resolved that the Plaintiff could sell serviced plots to certain cadres of senior members of staff at the cost of Kshs. 250,000/= for half an acre and Kshs. 400,000/= per acre. The Defendant argues that this did not apply to her since she was a director and not a senior member of staff.

46. The Defendant argues that the procedure above was followed before she legally acquired the suit property and that the Plaintiff has not challenged that these steps were followed.

47. The Plaintiff's witness also confirmed that the Defendant was entitled to purchase plots from Mae Properties Ltd as discussed and evidenced by the minutes of the AGM held on 1/7/1994 when the Defendant was elected director. The other benefits the directors were entitled to included personal accident policy, medical scheme, insurance cover and good mortgage protection policy. It is noteworthy that in those minutes the chairman thanked the directors, shareholders and policy holders for their good will and support which had enabled the company to continue growing and making profits.

48. The witness also confirmed that the Defendant stopped being the director in 2003 when she resigned. Another Board took over. She confirmed that suits were filed against former directors arising out of the sale of these plots. On cross examination, she stated that she was not aware that plot number 1062 was never transferred to the Defendant.

49. The Plaintiff does not challenge the fact the Defendant was allowed to acquire the Suit Properties. It is only challenging the cost at which the Defendant bought the Suit Properties by asserting that she should have paid much more than the minimum prices set for the plots. The Court finds that from the minutes of the meetings of the Board together with the Board Papers, the Defendant and other directors were eligible to purchase the plots from the Plaintiff.

50. The decision to sell non-attractive plots left over from previous phases to directors and senior members of staff of the Plaintiff and Pan Africa Insurance Company Limited was taken because the Plaintiff was unable to sell some of its plots.

51. Board Paper Number 7 stated that plots in Phase V would be sold at the minimum price of Kshs. 1.2 million per plot unless management was able to obtain far much better price than this. The Board Paper listed plots sold as at that date. The court notes that other parties who were not directors also purchased plots at the minimum price of Kshs. 1.2 million set by the Board. The Board Paper notes at the bottom that the 29 listed plots remained unsold because they were in the ditch. The company had received very low offers of Kshs. 600,000/= even though the management was confident that the plots would fetch far much

better prices in due course.

52. Board Paper Number 1 prepared by the General Manager on 6/2/1996, states that the sale of plots in Phase V was proceeding well and 80 plots had been sold by that date. It also stated that when all the plots were sold, the Plaintiff was expected to receive over Kshs. 170 million as gross sale proceeds from the plots.

53. Board Paper Number 10 of 10/6/1998 gave a list of individuals who had bought plots in Phase VI. The minimum was Kshs. 1.5 million while the maximum price was Kshs. 2.2 million. The Board Paper made reference to the sale of non-prime plots in Phase VI stating that the plots on a high elevation were sold at premium prices which were above maximum price set by the Board. Those plots were sold for Kshs. 2.7 million each. The Board Paper stated that the plots situated on both sides of the valley which were less attractive and not of high demand would be sold by the company at prices below those the prime plots fetched.

54. The other plots that were described as unattractive included the plots at the bottom of the valley, those with irregular shapes, those with storm water drainage pipes on their boundaries, those with high tension electricity cables, plots with very long drives, on low lying areas, on marshy grounds or black soil. The General Manager recommended that the policy of selling the plots at lower prices than the prime plots had worked very well for the company and management recommended the continuation of that policy.

55. The resolution to sell the plots to directors and members of the Plaintiff was arrived at after the company was unable to sell unattractive plots to members of the public. The plots the Plaintiffs sold were previously utilised for coffee farming which was no longer viable for the company hence it subdivided the plots and sold. The management makes reference to the severe recession being experienced in the country at the time when the Plaintiff was selling its plots.

56. The Plaintiff did not lead evidence to controvert the Defendant's assertion that the plots she bought were unattractive with low demand. The Defendant argues that she acted in the best interest of the company by paying the minimum price set by the Board for the unattractive plots which would otherwise have had to sell the plots at throw away prices to members of the public.

57. The Plaintiff's witness conceded that plot numbers 1062, 1063 and 1064, which are some of the suit properties in this case, had to be of lesser value since they were in a marshy area.

58. The Defendant also asserted that the company used to determine the price for each plot and Phase based on the development it had done; then add a mark-up price for the plot. The Defendant argues that had the Plaintiff relied on the market price at the time it sold the Suit Properties to her, then it would have fetched amounts way less than what the Defendants paid.

59. The Defendant argues that the values presented by the Plaintiff's witness were based on the secondary market and not the primary market. The primary market being the initial sale which takes various considerations into account such as development costs, the state of the market at the time, proprietary interests of the seller, negotiations with the buyer and the mark-up considerations by the seller. The secondary market only looks at estimation based on sale agreements of similar properties without taking into account the unique elements intrinsic to the initial sale. The defence argue that the valuation handbook referred to by the Plaintiff states that in a poor or falling market where there are few willing sellers most transactions on the market are not truly representative of the open market.

60. The Defendant maintains that since the Plaintiff's directors knew that offering concessionary prices for the directors would raise ethical and probity issues only members of staff were offered concessionary prices.

61. The Defendant maintains that the Plaintiff was aware that she was the director of the company. A resolution had been passed for directors to purchase plots from the company. The Defendant bought the plots in her name and the Board Papers were eventually presented to the Board for discussion and approval. The Defendant submits that she did not breach her duty to avoid conflict of interest. She maintains that there was no secrecy in the dealings, everything was done above board and that the transactions were done at arm's length.

62. The Defendant contends that this suit was brought against her out of malice. There was a hostile directorship takeover during her final days in the company. She resigned as director in 2001 when there was a new board which wanted to take over control of the company after buying it. She avers that the malice is exhibited through the fact that other directors were also sued after the takeover of the company.

63. The Defendant took up the issue of there being no resolution authorising the company to file suit in the submissions. This issue was never raised in her pleadings. Parties are bound by their pleadings. The court will not consider this objection since it should have been taken up earlier as a preliminary point and the Plaintiff given notice to respond.

64. The court has considered the pleadings, evidence adduced and documents produced as well as the submissions of counsel.

65. Was the Defendant in breach of trust or her statutory duty as alleged by the Plaintiff? The court thinks not. The plots the Defendant bought were unattractive at the time they were being sold. The company took the decision to sell them to its directors and senior staff instead of selling them at throwaway prices to the public. The more attractive plots were purchased at prices higher than those set by the company. Of the 24 properties sold at Kshs. 1.2 million, 11 were bought by directors of the Plaintiffs including the Defendant. The fact that other people who were not directors bought 13 of those plots at the minimum price of Kshs. Kshs. 1.2 million shows that the Defendant did not act against the interest of the company.

66. The board papers, minutes and other company documents relied on by the Plaintiff show that the decision to sell the plots to the Plaintiff's directors and senior staff was taken prior to the takeover by the new board by the Plaintiff's board acting within its mandate. Based on the facts set out above, the court finds that the transactions between the Plaintiff and the Defendant were at arm's length and duly sanctioned by the board of directors as required by law.

67. Having repossessed plot number 7785/1062 from the Defendant, the court is of the view that the Plaintiff's claim in respect of this plot has no basis and must fail.

68. Having found that the sale of the plots to the directors including the defendant was sanctioned by the Plaintiff's board, there is no loss or damage that was suffered by the Plaintiff. The upshot of this is that the Plaintiff has failed to prove its case on a balance of probabilities. The suit is dismissed with costs to the Defendant.

Dated and delivered at Nairobi this 14th day of December 2017.

K. BOR

JUDGE

In the presence of: -

Mr. Kahura for the Plaintiff

Mr. Kigera for the Defendant

Mr. V. Owuor- Court Assistant