



**Haria v Dodhia & 2 others (Civil Appeal 351 of 2017)
[2024] KECA 277 (KLR) (8 March 2024) (Judgment)**

Neutral citation: [2024] KECA 277 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL 351 OF 2017
DK MUSINGA, HM OKWENGU & J MOHAMMED, JJA
MARCH 8, 2024**

BETWEEN

PRABHULAL TEJPAL HARIA APPELLANT

AND

PRAVINCHANDRA MEGHJI DODHIA 1ST RESPONDENT

REKHA PRAVINCHANDRA DODHIA 2ND RESPONDENT

BHAVISHA PROPERTIES LIMITED 3RD RESPONDENT

*(Being an appeal from the judgment of the High Court of Kenya at Nairobi
(O. Sewe, J.) delivered on 17th March, 2017 in H.C.C.C. No. 317 of 2007)*

JUDGMENT

Judgment of Jamila Mohammed, J.A.

Background

1. This is an appeal arising from the judgment and decree of the High Court (O. Sewe J.) delivered on 17th March, 2017 at the High Court of Kenya (Commercial and Admiralty Division) in Nairobi.
2. A short background will help place this appeal in perspective. Prabhulal Tejpal Haria (the appellant) together with his wife, Manju Prambhulal Haria, (who died on 28th December, 2013) filed a suit by way of plaint on 21st June, 2007 against Pravinchandra Meghji Dodhia, Rekha Pravinchandra Dodhia and the Company, Bhavisha Properties Limited, (the 1st to 3rd respondents respectively), claiming, inter alia, that the respondents filed with the Registrar of Companies a fraudulent notification of change of directors in which they falsely claimed that the appellant and his deceased wife had sold their 25 shares in the 3rd respondent company to the 2nd respondent. The effect of that transfer was that the



appellant and his deceased wife had lost ownership of maisonette no.8 (the suit property) erected on L.R No.1870/III/324.

3. In the suit, the appellants prayed, inter alia, for a declaration that the purported removal by the respondents of the name of the appellant and his deceased wife from the register of members of the 3rd respondent as owners of 25 shares in the 3rd respondent company and the suit property, and the insertion of the name of the 2nd respondent as owner of the same, was fraudulent and a breach of the Articles of Association of the 3rd respondent and was null and void; a declaration that the 2nd respondent holds the 25 shares in the 3rd respondent which entitle the owner thereof to the suit property, upon trust for the appellant; a declaration that the 2nd respondent has committed trespass on the suit property since 1996; and an order that the 2nd respondent accounts to the appellant for all the rent received from the suit property since 1998 together with interest at bank rates. Further, that as an alternative to the above, the 2nd respondent pays to the appellant mesne profits of Kshs.21,387,350/= as at of 30th June, 2015 and an additional rent of Kshs.115,000/= per month thereafter until payment in full; an order that the 3rd respondent rectifies the register of members by substituting the name of the appellant for that of the 2nd respondent as holder of 25 shares, and as an alternative to the above, the register of members be rectified by striking out the names of the 2nd respondent as the holder of 25 shares in the 3rd respondent purporting to entitle her to own 25 shares which entitle her to the suit property; an order that the 2nd respondent gives vacant possession of the suit property forthwith; an order that the 3rd respondent do grant to the appellant a lease of 99 years from 1st June, 1981 in respect of the suit property; and costs of the suit.
4. The respondents filed their respective memoranda of appearance and statements of defence. The 1st and 2nd respondents stated that they purchased the 25 shares from Bullion Finance Limited (Bullion) at a consideration of Kshs.2,500,000/=. They denied stealing blank share transfer forms from Bullion, having forged any entries or committed the tort of trespass.
5. The 1st and 2nd respondents further stated that the changes at the Companies Registry were to reflect the new change in ownership of the shares previously owned by the appellant and his deceased wife. They denied the allegations of fraud and stated that the 1st and 2nd respondents were innocent purchasers for value of the shares previously owned by the appellant. They stated that they bought the shares from Bullion and not the appellant.
6. The 3rd respondent stated that the appellant's name and that of his deceased wife were duly removed from the 3rd respondent's list of shareholders once they divested themselves of their interest; that the 3rd respondent denied that the appellant and his deceased wife ever rented out the suit property or that the rental income accruing therefrom was to be credited into the appellant's account. The 3rd respondent further stated that the changes in the Companies Registry were to reflect the new change in ownership of the shares previously owned by the appellant and his deceased wife. The 3rd respondent denied that the appellant is entitled to the reliefs sought.
7. During the hearing at the High Court, the appellant testified that by virtue of Article 10 of the 3rd respondent's Articles of Association, every shareholder of the 3rd respondent was entitled to a maisonette by virtue of holding 25 shares in the 3rd respondent, and that the 1st and 2nd respondents as well as Manilal Rajpal Shah (Mr. Shah) and Majula Manilal Shah (Mrs. Shah) acquired 25 shares in the 3rd respondent and consequently a maisonette on L.R No.1870/III/324. The appellant testified that he and his deceased wife bought the suit property from Mr. and Mrs. Shah and obtained vacant possession together with a transfer of shares. That thereafter they were issued with a Share Certificate,



and upon becoming shareholders, their names appeared as members in the 3rd respondent's annual returns for the period between 1985 and 1991.

8. The appellant further testified that he and his deceased wife got an opportunity to purchase another property, being L.R No.209/3428 (the Parklands Property), which was being sold by Tanuj Gulabchand Raja, the Chairman of Bullion.
9. The appellant testified that since he had Kshs. 2.5 million, Bullion loaned him and his deceased wife Kshs. 1.5 million and as security thereof, they signed a blank share transfer of their shares to the 3rd respondent, which Bullion would hold until the loan was fully repaid. The appellant further testified that in addition, the appellant and his deceased wife agreed to lease the suit property to the employees of Bullion.
10. In his supporting affidavit, the appellant stated that he and his deceased wife fully repaid the loan to Bullion on or about January, 1994, whereupon Bullion released the title document in respect of the Parklands Property, but indicated that it could not locate the blank Share transfer form in respect of the suit property, promising to release the same as soon as it was found. The appellant further testified that the blank share transfer form was never found.
11. The appellant further testified that it was not until 1996 that he learnt that the respondents together with Tanuj Gulabchand Raja had perpetrated a fraud that had the effect of dispossessing the appellant and his deceased wife of their 25 shares in the 3rd respondent together with the suit property and the rent that was collected in respect of the suit property.
12. The appellant further testified that he learnt that on 27th May, 1996, that the respondents filed with the Registrar of Companies a fraudulent Notification of Change of Directors and Secretaries purporting that he and his deceased wife had on 20th November, 1992 sold their 25 shares in the 3rd respondent to the 2nd respondent for Kshs.2,500,000. The appellant denied that he sold his shares and those of his deceased wife in the 3rd respondent to the 2nd respondent as alleged or to one Tanuj Gulabchand Raja or at all, nor did he and his deceased wife resign as directors/ shareholders of the 3rd respondent.
13. On their part, the 1st and 2nd respondents testified that the suit property was sold to the 1st and 2nd respondents when the appellant and his deceased wife bought the Parklands Property and therefore ceased their shareholding in the 3rd respondent. The respondents contended that the removal of the appellant's name and that of his deceased wife from the register of members in the 3rd respondent was lawful.
14. The 1st respondent testified that the appellant and his deceased wife were not good neighbours as a result of which many altercations ensued, some of which were reported to the police. Further, that the appellant's lawyer wrote a letter dated 10th May, 1991 to the 3rd respondent offering to sell the suit property at Kshs.2,200,000/=, whereupon the 3rd respondent made a counter-offer of Kshs.1,200,000/=.
15. The 1st respondent further testified that Gulabchand Raja had informed him that the appellant and his deceased wife had agreed to transfer their shares in the 3rd respondent company for a consideration of Kshs.2,500,000/= and obtain a loan of Kshs.1,500,000/= to raise the purchase price of Kshs. 4,000,000/= for the Parklands Property. It was his evidence that Gulabchand Raja sought to know whether the 1st respondent was interested in purchasing the suit property. The 1st respondent testified that they agreed on the purchase price of Kshs.2,500,000/= which was to be paid to Bullion in the names of Jitesh Prabhulal Haria and Milan Prabhulal Haria (the appellant's sons). The 1st respondent further testified that he made the payment and took possession of the suit property. From the record,



Gulabchand Raja passed away in 1996 and his son, Tanuj Gulabchand Raja took over as Chairman of Bullion.

16. It was the 1st respondent's further testimony that the appellant and his deceased wife were well aware that they had divested themselves of the shares and any interest in the 3rd respondent, which explains why the appellant and his deceased wife had neither made any payments for electricity and telephone, nor attended any shareholders' meetings since.

Further, that this was the reason why the appellant and his deceased wife had not collected any rent or visited the suit property to ascertain its status as would be expected of a landlord.
17. The 1st respondent further testified that the appellants had failed to show the source of the KShs.2,500,000/= which he and his deceased wife had allegedly paid for the Parklands Property.
18. Having considered the pleadings and evidence adduced, the learned Judge found that the appellant and his deceased wife had failed to make out their case against the respondents and were therefore not entitled to the reliefs sought. The learned Judge proceeded to dismiss the appellant's suit with costs to the respondents.
19. Aggrieved by the learned Judges' finding, the appellant proffered the instant appeal by filing a memorandum of appeal dated 13th October, 2017. The grounds of appeal may be condensed to that the learned Judge erred: in failing to hold that the 2nd respondent holds 25 shares in the 3rd respondent which entitle her to the suit property upon trust for the appellant; in failing to hold that the 1st and 2nd respondents who were the directors of the 3rd respondent breached their fiduciary duties by removing the name of the appellant and his deceased wife from the register of members of the 3rd respondent and as owner of 25 shares in the 3rd respondent which entitled the owner of the said shares to the suit property; in ignoring the overwhelming evidence on record indicating that the 1st and 2nd respondents purported to buy the shares of the appellant and his deceased wife from Gulabchand Raja who was not the registered owner of 25 shares in the 3rd respondent; in failing to hold that there was no privity of contract between the appellant and his deceased wife and the 2nd respondent in relation to the alleged purchase from Gulabchand Raja of the appellant's shares in the 3rd respondent; in considering criminal proceedings which had no relation with the suit before it; in failing to hold that the appellant and his deceased wife were wrongfully and fraudulently dispossessed of the suit property and 25 shares in the 3rd respondent company; and in failing to hold that the 2nd respondent's possession of the appellant's 25 shares in the 3rd respondent and the suit property constituted trespass to chattels and land respectively from 1994.
20. Further, that the learned Judge erred in failing to award the appellant mesne profits in the sum of KShs.21,387,350/= and an additional rent at KShs.115,000/= per month from 30th June, 2015; in failing to order the 2nd respondent to account to the appellant all the rent received from the suit property from 1994; in failing to grant to the appellant vacant possession of the suit property; and in failing to order the 3rd respondent to grant to the appellant a lease for 99 years from 1st June, 1981 in respect of the suit property.
21. The appellant prayed for the appeal to be allowed and that the judgment of the High Court be set aside and substituted with an order allowing the appellant's claim as set out in the plaint.

Submissions by Counsel.

22. The appeal was heard by way of written submissions which were orally highlighted by counsel at the hearing. Learned Senior Counsel, Dr. Kamau Kuria represented the appellant, learned counsel, Mr.



Victor Mailu, represented the 1st and 2nd respondents, while learned counsel, Mr. Thatcher represented the 3rd respondent.

23. Learned Senior Counsel, Dr. Kamau Kuria, submitted that the appellant's claim is based on four (4) causes of action namely:
- a. the right, under Section 118 of the [Companies Act](#), of a shareholder to seek rectification of the members' register and be restored into it where the membership has been removed illegally; since the appellant's name was illegally removed from the register of members kept under Section 112 of the [Companies Act](#), he was entitled to an order of rectification;
 - b. The right in the law of Equity, to have declared a constructive trustee, and order that the trustee transfers the property to the lawful owner, and further that the trustee accounts to the lawful owner the moneys which have come to his hands through a breach of trust; the appellant's case is that the 2nd respondent was fraudulently registered as shareholder of the appellant's 25 shares in the register of members kept by the 3rd respondent under Section 112 of the Repealed [Companies Act](#); that in the 1993 return which was filed in 1996 as shown by the purported notification of change of directors, the 2nd respondent is described as a shareholder; this is despite the fact that neither the appellant nor his deceased wife ever entered into a contract of sale of the same to the 2nd respondent;
 - c. the right, in land law, to exclusive possession of immovable property arising from ownership of the same; that the Memorandum and Articles of Association constitutes the terms of a contract which the shareholder enters with other shareholders and bind him/her; and
 - d. the right to mesne profits as the respondents committed trespass to land in 1994 and purported to let it to tenants and have continued to do so since then.
24. Senior Counsel submitted that the learned Judge erred in failing to find that the 1st and 2nd respondents acquired the shares illegally. Further, that Section 118 of the Repealed [Companies Act](#) gave the court the power to rectify that register by ordering restoration into the register the names of the shareholders who have been illegally removed from the same. Counsel asserted that the registration of the 2nd respondent as a shareholder was illegal as she did not follow the procedure set out in the Memorandum and Articles of Association of the 3rd respondent.
25. Counsel further submitted that the appellant and his deceased wife did not, at any given time give notice to transfer their shares in the 3rd respondent as required by Article 15 (c) of the 3rd respondent's Articles of Association. Counsel emphasized that the Articles of Association are a company's constitution, which constitute a contract between one shareholder and another and that no action which is done in contravention of the Articles of Association can be valid. Counsel asserted that it therefore follows that any purported transfer of the appellant's 25 shares in the 3rd respondent was fraudulent and without his approval and, therefore, null and void.
26. Counsel submitted that upon the unlawful transfer of the appellant's shares in the 3rd respondent to the 2nd respondent, the 2nd respondent became a constructive trustee and the appellant is entitled to recover the shares from the 2nd respondent. Counsel relied on the authority of Parker & Mellows, 9th Edition at page 442 which stated the law in the following terms:

“From its earliest days, equity has always been prepared to grant relief against fraudulent and unconscionable conduct and one aspect of this relief is the imposition of a constructive trust on any person who has obtained an advantage as a result of such conduct.”



27. Counsel emphasized that as a result of the fraudulent transfer of shares to the 1st and 2nd respondents, the appellant was dispossessed and deprived of the occupation or the opportunity to collect rent from the suit property in view of the trespass to land committed by the 1st and 2nd respondents. Counsel submitted that the learned Judge ought to have found that the respondents had trespassed on the suit property and award the appellant damages for trespass and mesne profits.
28. Counsel relied on the authority of *Kenya Hotel Properties Ltd vs Willesden Investments Limited* [2009] eKLR where this Court considered the measure of damages where trespass is committed to land which earns the owner an income. This Court held that in such a case, the damages for trespass or mesne profits is the reasonable rent which could have been fetched by the registered owner of the suit property.
29. Counsel relied on *Salmond on Tort*, 17th Edition where the law on mesne profits was stated as follows:
- “Any person wrongfully dispossessed of land has in addition to a right of action for recovery of the land, a right of action for damages in respect of the loss suffered by him during the period of dispossession. Such an action is termed an action for mesne profits ... in an action for mesne profits (notwithstanding the name of the action) the Plaintiff is not limited to a claim for the profits which the Defendant has received from the land or those which he may have lost. The Plaintiff recovers all the loss which has resulted from dispossession.”
30. Counsel further relied on the persuasive decision of the High Court in *Wamwea v Catholic Diocese of Murang’a Registered Trustees* [2003] KLR, 389 which stated as follows:
- “Once a party acquires legal title over a parcel of land, such a party is not only entitled to possession but also to the occupation of that land...A party who refuses to give vacant possession becomes a trespasser...”
31. Counsel further submitted that the acts of the 1st and 2nd respondents entering and remaining in the suit property without the consent of the appellant amount to trespass to land. The appellant being the absolute and indefeasible owner of the suit property is entitled to take proceedings in trespass. Counsel relied on the authority of *Waas Enterprises Limited vs. City Council of Nairobi & Another* [2014] eKLR where the High Court (Mary M. Gitumbi, J.) held that:
- “It therefore, follows from the above that only the plaintiff is entitled to enjoy the proprietary rights over the suit land. The 2nd defendant had no right to the suit land. She, must, therefore, vacate the suit land and hand over possession to the plaintiff. It is my opinion that the 1st defendant should ensure that the 2nd defendant has vacated the suit land and hands over vacant possession of the suit land to the Plaintiff within a period of 30 days from the date hereof.”
32. On the issue of costs, counsel submitted that the appellant having proved his claim against the respondents, the learned Judge ought to have awarded him costs of the suit. The principles that the learned Judge ought to have considered in awarding costs are as stated in the persuasive authority by the High Court (Odunga, J.) (as he then was) in *Republic vs. Communication Authority of Kenya and another ex parte Legal Advice Centre aka Kituo Cha Sheria* [2015] eKLR where it was held that:
- “In determining the issue of costs, the Court is entitled to look at the conduct of the parties, the subject of litigation and the circumstances which led to the institution of the legal proceedings and the events which eventually led to their termination. In other words, the



court may not only consider the conduct of the party in the actual litigation, but the matters which led up to the litigation. See: Hussein Janmohamed & Sons vs. Twentsche Overseas Trading Co. Ltd [1967] EA 287 Mulla (12th Edn) P. 150. Counsel urged us to exercise our discretion in favour of the appellant and grant him the costs of the suit and the appeal.”

Counsel urged us to allow the appeal.

33. Learned counsel for the 1st and 2nd respondents filed written submissions and emphasized that the appellant’s counsel contended that the shares in the 3rd respondent were dealt with illegally and contrary to the provisions of the 3rd respondent’s Articles of Association and that no notice to transfer the shares was given. Counsel submitted that this was not the correct position as the appellant’s shares were offered to the existing shareholders of the 3rd respondent, failing which the property would be offered to a purchaser of the appellant’s choice. Counsel emphasized that there were no takers for the offer, resulting in the appellant offering the blank share transfer form to Gulabchand Raja. Further, that this was consistent with Article 15 (g) of the 3rd respondent’s Articles of Association which allow a shareholder “to sell the shares to any person and at any price.” Further, that in turn, Gulabchand Raja transferred the shares to the 1st and 2nd respondents.
34. Counsel asserted that the issue of the respondents acting in breach of the Articles of Association does not arise as the evidence points to the appellant and his deceased wife divesting themselves of the shares; that the shares the 1st and 2nd respondents acquired and transferred in their name were those that the appellant and his deceased wife handed over to Gulabchand Raja; that the vacant possession and rights of ownership to the suit property were in accordance with Clause 10(c) of the Articles of Association; that the 1st and 2nd respondents as existing shareholders of the 3rd respondent could acquire additional shares in the 3rd respondent as clearly provided in Clause 15(a) of the Articles of Association; and that no evidence was tendered to show that the respondents acted in concert with Bullion or with Gulabchand Raja. Further, that the 1st and 2nd respondents registered the shares in their capacity as the only directors of the 3rd respondent which was in accordance with Articles 25, 35 and 40 of the Memorandum and Articles of Association of the 3rd respondent.
35. On the question whether the 1st and 2nd respondents breached their fiduciary duties to the appellant, counsel asserted that a fiduciary duty is an obligation to act in the best interest of another party. Counsel asserted that the 1st and 2nd respondents could not have been in breach of any fiduciary duties to the appellant and his deceased wife as they had divested themselves of any interest in the 3rd respondent. On the relationship between a member of a company and the company itself, counsel relied on the authority of *Hickman v Kent* [1915] where Asbury J. observed as follows:

“...no article can constitute a contract between a company and a third person; no right merely purporting to be given by an article to a person, whether a member or not, in a capacity other than a member (for instance as solicitor, promoter or director), can be enforced against the company; and, articles regulating rights and obligations of the members as such do create rights and obligations between them and the company respectively.”
36. Counsel asserted that persons who are not members of the 3rd respondent cannot sue to enforce rights that accrue to them under the Articles of Association, since they are outsiders or third parties to a contractual agreement. Further, that there was nothing to preclude the 1st and 2nd respondents, who were also shareholders of the 3rd respondent from acquiring additional shares.



37. Counsel further asserted that as the only directors of the 3rd respondent, only the 1st and 2nd respondents could effect the transfer of shares that they acquired. Further, that in effecting the transfer, the 1st and 2nd respondents were discharging their mandate as directors.
38. Counsel for the 3rd respondent submitted that the instant appeal is pegged on the alleged creation of a constructive trust, yet the facts of this case do not create a trust. Counsel relied on Black's Law Dictionary, 7th Edition at page 1513 in support of the proposition that for a trust to arise it must involve specific property, reflect the settler's intent and be created for a specific purpose. Counsel submitted that a trust comprises three elements:
- i. A trustee who holds the property and is subject to equitable duties to deal with the property for the benefit of another;
 - ii. A beneficiary to whom the Trustee owes equitable duties to deal with the trust property for his benefit;
 - iii. The trust property, which is held by the Trustee for the beneficiary.
39. Counsel asserted that the suit property was sold to the 2nd respondent as purchaser from a third party. The 2nd respondent was therefore a purchaser for value and the appellant has not attributed any wrong doing to the 1st and 2nd respondents. Further, that the appellant's case is founded on an alleged transfer of shares, yet all the evidence adduced points to an acquisition of shares. Counsel asserted that once the appellant and his deceased wife divested themselves of the shares, they ceased to have an interest therein and there was therefore no property on which a trust could be created.
40. Counsel relied on the authority of *Ayoub vs Standard Bank of S.A.* [1963] EA 619, where the Privy Council stated at page 623, Paragraph A:-
- “the court will not imply a trust save in order to give effect to the intention of parties. The intention of the parties to create a trust must be clearly determined before a trust will be implied.”
41. Further, counsel relied on the decision of *Cook vs. Fountain* [1976] ER 984 at page 987, where the Privy Council adopted the general rule which was stated as follows:
- “the law never implies, the court never presumes a trust, but in case of absolute necessity.”
- This Court approved the above 2 authorities in *Mwangi v Mbothu & 9 others vs. Gachira & 9 others* [1986] KLR where it was stated that:
- “the law never implies, the court never presumes a trust, but in case of absolute necessity. The court 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. *Cook vs. Fountain* [1979], (supra), *Marie Ayoub & 3 Others vs. Standard Bank of S.A. Ltd & Another* (1963) EA 619, 622 (PC-K): *Joseph Kamau vs Ndungu Kiiru CAEA Civil Appeal 43 of 1976.*”
42. In a brief joinder, Senior Counsel submitted that counsel for the 1st, 2nd and 3rd respondents had admitted the appellant's case. That both counsel told the Court that the appellant allegedly sold the shares to the 2nd respondent, which share transfer form they had given to Bullion.



43. Counsel further submitted that vide its letter of 12th January, 1994, Bullion wrote to Jitesh P. Haria and Milan P. Haria informing them that the loan account No. 8273 had been fully adjusted and that the documents in respect of the Parklands Property would be forwarded to them. Counsel emphasized that no sale agreement was entered into between the appellant, his deceased wife on one hand and the 2nd respondent on the other hand. Further, that the appellant seeks the rectification of the register under Section 118 of the repealed *Companies Act*.
44. Senior counsel submitted that the 1st and 2nd respondents are custodians of the 3rd respondent's register and arbitrarily changed the record. Counsel further submitted that this is a suitable case for the Court to hold that under Companies law, no one should be deprived of shares unless there is proof that they have signed the share transfer forms. Counsel urged us to allow the appeal with costs of the suit and the appeal.

Determination

45. This being a first appeal, our duty as stipulated under rule 31 (1) (a) of the Court of Appeal Rules, 2022 is to re-evaluate and consider afresh the evidence tendered before the trial court and come to our own conclusion one way or another. This duty was reiterated in *Abok James Odera t/a A. J. Odera & Associates v. John Patrick Machira t/a Machira & Co. Advocates* [2013] eKLR, where this Court pronounced itself as follows:
- “This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re- assess and re-analyse the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way. See the case of *Kenya Ports Authority vs Kustron (Kenya) Limited* 2000 2EA 212.”
46. From a careful perusal of the record of appeal, parties' submissions and the authorities, the issues arising for determination can be discerned as:
- i. Whether the learned Judge misdirected herself in failing to hold that the appellant and his deceased wife were wrongfully and fraudulently dispossessed of the suit property and 25 shares in the 3rd respondent;
 - ii. Whether the learned judge misdirected herself in failing to award the appellant and his deceased wife the sum of Kshs.21,387,350= and additional rent at Kshs.115,000/= per month from 30th June, 2015; and
 - iii. Whether the learned judge misdirected herself in failing to hold that the 1st and 2nd respondents who were the directors of the 3rd respondent breached their fiduciary duties by removing the name of the appellant and his deceased wife from the register of members of the 3rd respondent and as owner of 25 shares in the 3rd respondent which entitled the owner of the said shares to own the suit property.
47. On the question whether the learned Judge misdirected herself in failing to hold that the appellant and his deceased wife were wrongfully and fraudulently dispossessed of the suit property and 25 shares in the 3rd respondent company, it was important for the appellant to prove that the 25 shares in the 3rd respondent company were only pledged as security. It was equally important for the appellant to avail proof of the source of the sum of Kshs.2,500,000/= that was used to purchase the Parklands Property.



48. Sections 109 and 112 of the *Evidence Act* provide that:
- 109 The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.
112. 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.” [Emphasis supplied].
49. The law is clear as buttressed in *Vijay Morjaria vs Nansingh Madhusingh Darbar & Another* [2000] eKLR, where Tunoi, JA. (as he then was) stated as follows:
- “It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must, of course, be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.” [Emphasis supplied].
50. As regards the standard of proof, this Court in *Kinyanjui Kamau vs George Kamau* [2015] eKLR expressed itself as follows: -
- “...It is trite law that any allegations of fraud must be pleaded and strictly proved. See *Ndolo vs Ndolo* (2008) 1 KLR (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 that 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; In cases where fraud is alleged, it is not enough to simply infer fraud from the facts.” [Emphasis supplied].
51. The onus was therefore on the appellant to prove to the court that he and his deceased wife were wrongfully and fraudulently dispossessed of the suit property and 25 shares in the 3rd respondent company by the 1st and 2nd respondents. The appellant claimed that neither he nor his deceased wife signed an agreement with the 1st and 2nd respondents for the sale their shares which entitled them to the suit property.
52. Firstly, I take note of the fact that the appellant did not provide any document as proof that the blank share transfer form was required by Bullion as additional security. The question that arises here is why then did the appellant give the blank share transfer form to Bullion?
53. In his testimony, the appellant informed the trial court that the Parklands Property was worth Kshs.4,000,000/=; and that he borrowed the sum of Kshs.2,500,000/= from his sister, D.V Shah, and Kshs.1,500,000/= from Bullion. He further testified that the sum of Kshs.2,500,000/= was delivered in cash to Gulabchand Raja. It is instructive to note that in his witness statement dated 19th July, 2012, the appellant at paragraph 16 stated as follows:
- “the purchase price for the said LR No. 209/3428 [the Parklands Property] was Kshs 4,000,000/-. Of the said Kshs. 4 million, Kshs 2.5 million came from our savings whilst Kshs. 1.5 million was a loan which we were granted by Bullion Finance Ltd under a loan agreement.” [Emphasis supplied].



54. The appellant did not call his said sister as a witness, nor did he avail any proof to show that indeed he made this payment. Surprisingly, when the appellant's son, Jitesh Haria, (Jitesh) took the stand he emphatically contradicted his father and testified that his aunt is a housewife and could not have lent his father that sum of money. Jitesh testified as follows:

“I have an aunt in Kisumu. Her name is Moniben Shah. She is a housewife. She is my father's sister. She did not give money to my father. I did not approach her to put a deposit for the purchase of the house.”

55. I agree with the learned Judge that failure by the appellant to call his sister as a witness was fatal to his case. Ultimately, there was no proof that he paid Gulabchand Raja the sum of Kshs.2,500,000/= for the purchase of the Parklands Property.

56. I have also perused the letter dated 10th May, 1991 from the appellant's advocates to the 3rd respondent. The appellant had offered to sell the suit property to other existing members at a sum of Kshs. 2,200,000/=. The appellant was informed of a counter offer of Kshs. 1.2 million. Like the learned Judge, I arrive at the inescapable conclusion that the only reason why the appellant could not avail proof of the source of the sum of Kshs.2,500,000/= is that following the refusal by members of the 3rd respondent to purchase the suit property at his asking price of Kshs. 2.5 million, the appellant approached Gulabchand Raja for help and he handed over the blank share transfer and keys to the suit property.

57. It is also notable that the appellant did not take any action from 1996 when he discovered the alleged fraud. The appellant only filed suit in 2007. It is also questionable why the appellant did not raise a complaint against Gulabchand Raja about the issue of the shares at any one point since 1994.

58. I am inclined to agree with the learned Judge's conclusion that: -

“It cannot be said that the allegations of fraud have been proved. It cannot be gainsaid that the allegations of fraud are serious allegations which must be strictly proved.”

59. On the question whether the learned Judge misdirected herself in not awarding the appellant the sum of Kshs.21,387,350/= and additional rent at Kshs.115,000/= per month from 30th June, 2015, the appellant stated that he had let the suit property to Bullion for purposes of collecting rent to reduce the loan payable.

60. Is it possible that for 4 years the appellant never collected any rent in respect of the suit property and never raised any complaint as a landlord? The appellant also failed to avail a tenancy agreement to prove that indeed the suit property had been rented out.

61. In his own words, in cross-examination, the appellant testified in part as follows:

“I gave my shares of Bhavisha Properties Ltd as security to Bullion Finance and Tanuj Raja. We orally agreed that once I paid all the monies, Tanuj Raja would give me my house. My security was sufficient to the bank but they asked for additional security because Central Bank of Kenya had demanded that such security be given... When I moved out, Tanuj Raja offered to take a lease in respect of Maisonette No. 8. He told me he would deduct the rent and pay towards the loan. We did not agree how much was to be paid as the tenants were family members. I was only happy when I got the money in the bank. I do not know if the rent was agreed at Kshs. 40,000/-. I never received a single shilling. Tanuj Raja never paid any



money to Bullion Account. He told me we would discuss the issue later but Bullion Finance collapsed. Until 1994, the bank was operational but I never received any money.”

62. It was also the evidence of the 1st respondent that from 1991 the appellant never visited the suit property. The only logical conclusion is that the appellant handed over the suit property in return for Kshs.2,500,000/=.
63. In view of the foregoing, I find that the 1st and 2nd respondents who were the directors of the 3rd respondent did not breach their fiduciary duties by removing the name of the appellant and his deceased wife from the register of members of the 3rd respondent company since the evidence at hand leads to the inescapable conclusion that the appellant handed over the blank transfer form together with vacant possession of the suit property in exchange of the sum of Kshs.2,500,000/= for the purchase of the Parklands Property.
64. Ultimately, I find no grounds on which I can fault the learned Judge. I come to the conclusion that the appeal lacks merit and dismiss it with costs to the respondents.

Concurring Judgment of D. K. Musinga, (P).

1. I have had the benefit of reading, in draft, the opinion of J. Mohammed, J.A. I am in full agreement with the reasoning and the conclusion arrived at by the learned judge.
2. As Okwengu, J.A. also agrees, the final orders of the Court shall be as proposed by J. Mohammed, J.A.

Judgment of Hannah Okwengu, J.A.

1. I have had the opportunity of reading in draft the judgment of my sister Judge Jamila Mohammed, JA, and I am entirely in agreement with the arguments therein and the conclusion arrived at. I have nothing useful to add.

DATED AND DELIVERED AT NAIROBI THIS 8TH DAY OF MARCH, 2024.

JAMILA MOHAMMED

.....

JUDGE OF APPEAL

D.K. MUSINGA, (P)

.....

HANNAH OKWENGU, JA

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

