Standard Chartered Bank of Kenya Limited v Al-Amin & 9 others (Civil Appeal E029 of 2021) [2023] KECA 1059 (KLR) (22 September 2023) (Judgment)

Neutral citation: [2023] KECA 1059 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MOMBASA

CIVIL APPEAL E029 OF 2021

SG KAIRU, P NYAMWEYA & JW LESSIT, JJA

SEPTEMBER 22, 2023

BETWEEN

STANDARD CHARTERED BANK OF KENYA LIMITED ..... APPELLANT

AND

HABIBA MOHAMED AL-AMIN ..... 1ST RESPONDENT

LAMU MARINE AND ALLIED PRODUCTS LTD ..... 2ND RESPONDENT

JANMOHAMED HASSANALI VERJEE ..... 3RD RESPONDENT

KARIM ABDUL VERJEE ..... 4TH RESPONDENT

NAZIR JANMOHAMED VERJEE ..... 5TH RESPONDENT

ZAIN ABUBAKAR MOHAMED ALZUBIDI ..... 6TH RESPONDENT

B.K.S. REGISTRARS LIMITED ..... 7TH RESPONDENT

R.S. SAINI ..... 8TH RESPONDENT

KENESEC SERVICES ..... 9TH RESPONDENT

SAMAKI (TWO THOUSAND) LIMITED ..... 10TH RESPONDENT

(An appeal from the judgment/decree of the Environment and Land Court at Mombasa (Munyao Sila, J.) delivered on 10th November 2020 in ELC Case No 434 of 2001)

JUDGMENT

1. The appellant, Standard Chartered Bank of Kenya Limited, (the Bank) has in this appeal challenged the judgment delivered by the Environment and Land Court at Mombasa (Munyao Sila, J) (ELC) on November 10, 2020 in ELC Case No 434 of 2001. In that judgment, the ELC made orders that a resolution to amend the Memorandum and Articles of Association of Lamu Marine & Allied

Products Limited, the 2nd respondent (the Company), to add a clause 11A empowering the Company to guarantee payment of money was illegal, fraudulent, and null and void; that the Memorandum and Articles of Association of the Company be construed without the inclusion of Clause 11A; and that the court order be served upon the Registrar of Companies for for purpose of giving it effect.

2. The ELC also declared in that judgment, that the Legal Charge dated 17 May 1995 and the Further Charge dated 20 November 1996 in favour of the Bank over land parcel known as Mombasa/Block XV/143 (the suit property) are null and void; that the Guarantee instrument entered into by the Company to guarantee the payment of liabilities of Samaki Industries (Nairobi) Limited to the Bank is null and void; and that the documents purporting to be a Deed of Agreement and Purchase Agreement dated 30 March 2000 are null and void.

3. The ELC further ordered that for reason that the title of Zain Abubakar Mohamed Alzubidi, the 6th respondent, to the suit property cannot be adversely affected by dint of the provisions of Section 143 of the *Registered Land Act*, Cap 300 (repealed), and the title to the suit property cannot therefore revert to the ownership of the Company, the Bank do compensate the Company the current value of the suit property as at the date of the judgment; that valuation of the property at the Bank's expense be done by the Mombasa District Government Valuer assuming industrial user; that judgment be entered for the Company against the Bank in accordance with such valuation and the said sum to attract interest from the date of the judgment till payment in full. The ELC went on in the same judgment to award the Company punitive damages of Kshs 2,500,000.00 payable by the Bank. The Bank, alongside the 3rd to 5th and the 8th respondents were condemned to pay cost of the suit.

Background

4. Based on their Amended Plaint, the claim by Halima Mohamed Al-Amin and the Company who were the plaintiffs before the ELC, was that on May 10, 1995, the 3rd, 4th, 5th, 8th, and 9th respondents sitting in a board meeting of the Company fraudulently and illegally purported to amend the Articles of Association of the Company in the absence of the deceased and his wife who were the majority shareholders; that the 3rd, 4th, 5th, 8th, and 9th respondents illegally and fraudulently drew up and registered a special/ordinary resolution with the Registrar of Companies purporting that the Memorandum and Articles of Association of the Company had been amended to authorize the Company to enter into guarantees; that by a Charge dated May 17, 1995, Further Charge dated November 20, 1996, and Guarantee and Indemnity dated January 8, 1997, the 3rd, 4th, 5th, 8th, and 9th respondents purported to illegally and fraudulently charge the suit property to secure borrowings by the Company and by Samaki Industries (Nairobi) Limited.

5. It was pleaded further that the Charge and Further Charge were drawn by the Bank and not by an advocate and the same were therefore null and void under Sections 34 and 35 of the *Advocates Act*.

6. It was averred further that the Bank knew or ought to have known that the 8th and 9th respondents were not the Company's secretaries and that the 9th respondent did not exist at the material time and could not execute or participate in executing any documents creating liability against the Company.

7. It was the case by the Company and Halima Mohamed Al- Amin that they received notice from the Bank of its intention to sell the suit property to recover debt owed to it by its customer; and a Deed of Agreement dated March 30, 2000 and a Deed of Purchase of the same date purporting to sell the suit property to 6th respondent and the subsequent sale of the same to the 10th respondent was null and void.

8. Based on those pleas, the Company and Halima Mohamed Al-Amin prayed for judgment for declarations for nullification of the resolution to amend the Articles of Association of the Company;

the Charge, Further Charge and Guarantee and Indemnity in favour of the Bank; the Deeds of Agreement and Purchase; the Transfers of the property to the 6th and 10th respondents; and rectification of

the register to restore the property to the Company. They also sought punitive and aggravated damages.

9. In its Amended defence, the Bank denied the allegations of illegality and fraud or that it had any knowledge of the same; it averred that the resolution of the Company pursuant to which the Guarantee and Indemnity was executed was lawful and accepted by the Bank in good faith; that the facilities secured by the Guarantee and the Charge over the property were advanced to Samaki Industries (Nairobi) Limited and the securities were valid; that the suit property had already been sold pursuant to the Deeds of Agreement and Purchase; that in any event the Rule in the *Turquand* case applied.

10. A consent order was recorded before the trial court on September 20, 2018 that "the parties documents contained in the various lists filed in court are admitted in evidence."

11. At the hearing Halima Mohamed Al-Amin (PW1) stated that she and her deceased husband who died on June 18, 2007 were majority shareholders and directors of the Company from inception. She adopted her witness statement dated April 5, 2011 in which she stated that the Memorandum of Association of the Company had never been amended since incorporation; that she and the deceased were never given notice of any meeting at which any proposal to amend the Articles of Association of the Company was made and neither did she attend or vote at any such meeting; that she and her husband were not involved in any discussion or resolution for purposes of charging the suit property to the Bank or for selling or transferring the suit property to either the 6th or 10th respondents; that the Articles of Association of the Company could not be amended without a special resolution or without their participation as holders of 99.98% shares of the Company; that the suit property was sold as a result of the fraud and ought to be returned to the Company by cancelling all entries relating to the Charge, Further Charge and subsequent transfers. She stated further that the Company never appointed either the 7th or the 9th respondents as the Company Secretary and neither did the 7th respondent exist and neither was it capable of offering secretarial services under the *Certified Public Secretaries of Kenya Act*.

12. Under cross examination, PW1 stated that the 3rd, 4th and 5th respondents were directors of the Company and holders of one share each; that although she produced the minutes of the meeting of May 10, 1995, she was not present at that meeting; that she attended only one meeting of the Company in her house and did not attend other Company meetings because her "religion does not allow"; that at the one meeting in her house, those present in addition to her were Jan Mohamed and Nazir but she did not know the agenda of that meeting as she "did not sit with them". She went on to say that "the Company had only one secretary,

> ie, Aboo; that she never attended any of the shareholders or directors meeting and her husband would bring papers for her to sign and she would sign; that she could not remember seeing notice of any meeting and sometimes saw minutes; she did not know the Company was in receivership. She stated the Company was running because her husband was there, and he would tell her if he was invited and that "when there was a fraud my husband told me."; that her testimony was based on what the husband told her.

13. Mohamed Abubakar Habib (PW2), the son of PW1 and the deceased, took over the affairs of the Company after his father, the deceased, died in 2007. Before that, he was not involved in the Company. He stated that he investigated the affairs of the Company and collected the secretarial file of the Company from the 8th respondent from which he noted that Kensec Services, the 9th respondent and

BKS Registrars, the 7th respondent, nonexistent entities, were indicated to have acted as secretary to the Company; that at no time did the Company appoint those entities to act as secretary of the Company. He stated that the meeting of the Company held on May 10, 1995 at which the 8th respondent was present and at which it was purportedly resolved to amend the Articles of Association of the Company was held without notice to his parents who were directors and held over 99% of the shares in the Company; that such resolution required 75% of the shareholders to pass a special resolution.

14. Under cross examination, PW2 stated that he became a director of the Company around 2010-2011; that in the period 2000-2001 when the suit was instituted, he was a student overseas and that he was not involved in the affairs of the Company when the claim arose; that he "took over directorship/ administration from the death" of his father in 2007; that he did not attend any company meetings and could only tell what happened in earlier meetings from the documents; that in 1995, he was 15 years old and could not tell whether his parents had any notice of the meeting of held on May 10, 1995; that while 3rd and 6th respondents were authorized to manage the Company, they did not have authority to borrow. He reiterated that he got the documents he was relying upon from Mr Saini, the 9th respondent; that if the resolution signed by chairman and secretary were filed at the Companies registry, "they would represent the true affairs of the company" and that he recognized his father's signature in some of the documents.

15. With that the 1st and 2nd respondents closed the plaintiffs' case. Munyao Sila, J then took over the conduct of the trial from A. Omollo, J, and heard the defence case.

16. Josephine Warutere, an Accounts Manager of the Bank testified as DW1. Her evidence was that the Company guaranteed banking facilities and financial accommodation in the amount of Kshs 11,500,000.00 granted to the Samaki Industries (Nairobi) Limited, principal debtor, which then defaulted in repayment; that upon default the Bank recalled the entire debt from the principal debtor and from the Company which had guaranteed payment; that "the

only statutory power of sale exercised by the bank was in respect of the purchase agreement dated March 30, 2000 where the receivers duly appointed" by the Bank sold the assets of Samaki Industries (Nairobi) Limited (under receivership) and that it did not at any time exercise statutory power of sale over the suit property which "was privately sold via a Deed of Agreement dated 30th March 2000" and the Company "executed the said agreement"

17. DW1 stated further that under the Deed of Agreement, directors of the Company together with 3rd and 5th respondents sanctioned the purchase agreement and indemnified the Bank and receivers from any liability arising from the purchase agreement. She referred to a meeting of the Company held on 8th January 1997 and a resolution of the Company dated 9th April 1997 as well as to the instrument of Guarantee and Indemnity and the Legal Charge and Further Charge over the suit property which she stated were drawn by the Bank.

18. Under cross examination, the DW1 maintained that the sale of the suit property was no pursuant to exercise of statutory power of sale but through the receiver manager; that the resolution of the Company in question as well as the Guarantee and Indemnity were signed by the chairman and two directors of the Company; that she was not aware of any requirement that a special resolution should have been passed; and that the Bank did appoint receivers and managers over Samaki Industries (Nairobi) Limited on

account of default. She denied that the Bank colluded with the Verjees to sell the suit property.

19. Jahangir Tejani, a director of Samaki (Two Thousand) Limited, the 10th respondent, stated in his evidence that on 30th March 2000, his company Samaki (Two Thousand) Limited, entered into

Purchase agreement with the Bank and Samaki Industries (Nairobi) Limited under which the 10th respondent agreed to purchase several properties and assets including the suit property for Kshs 105,000,000.00; that on the same date, the 10th respondent entered into a Deed of Agreement with Samaki Industries (Nairobi) Limited, the Company and the Verjees; that the suit property had been charged to the Bank under a Charge and Further Charge; that the Company consented to the purchase of the property by the 10th respondent; that the 10th respondent paid the purchase price and received the transfer of the property duly executed by the Company alongside the Discharge of Charge and Further Charge executed by the Bank; that subsequently, the 10th respondent sold and transferred the suit property to the 6th respondent.

20. Tejani testified that he was aware that Samaki Industries (Nairobi) Limited was in problems and that he negotiated to purchase its undertaking and formed the 10th respondent, a special purpose vehicle, through which to acquire the assets of Samaki Industries (Nairobi) Limited which had the European Union Regulations requirements in place and retained the Verjees as directors of the 10th respondent for

one and half year for purpose of EU licensing; that eventually the 10th respondent took over everything from Samaki Industries (Nairobi) Limited including the factory, vehicles, landing sites in Kisumu, equipment and machinery. He stated that he was not resident in Mombasa and had no interest in the suit property which was part of the properties for which he paid a global amount of Kshs 105,000,000.00 to the Bank and hence sold it to the 6th respondent, stating that no valuation was done in respect of the suit property.

21. During the trial, it emerged that Ragbir Singh Saini, 8th respondent was unwell and could not attend court to testify in person. The trial court allowed his affidavit evidence. Counsel was directed by the trial court to submit written questions in the form of interrogatories to the witness which were to be considered as questions in cross examination. He responded to those questions in affidavit form. His evidence was that he is a certified public secretary (C.P.S. No 369) practicing as such in the name of Kensec Services, a partnership under the *Registration of Business Names Act*; that his partner in the firm, one Avtar Singh Bassan was since deceased; that between 1990 and 2000, he rendered secretarial services to the Company having been duly appointed at the Company's board meeting held on 14th November 1990, minutes of which he exhibited; that at a meeting of the Company held on May 10, 1995, his presence was purely as the Company Secretary as a representative of Kensec Services; that to his knowledge,

> " the meeting of May 10, 1995 was properly convened and had the requisite quorum" and the decisions made were lawful and binding on the Company; that to his knowledge, under the Company's Memorandum and Articles of Association, all shareholders had an equal number of votes in any decision irrespective of the number of shares one held.

22. The 8th respondent explained further that during the period when he served as the Company Secretary of the Company, PW1 "never took any active role in the running of the Company" and he could not recall her ever attending any meeting of the Company; that on the other hand, the deceased "was an active participant in the meetings and decision making" of the Company and was fully briefed and up to date on all decisions made by his co-directors even when he missed to attend a meeting. He stated that prior to the meeting held on May 10, 1995, the title document in respect of the suit property was in the physical custody of the deceased and he voluntarily handed it to the co- directors when it was required by the Bank for purposes of registration of the Charge. He testified further that on or about 15th May 2008, two men using trickery and deceit stole the Company's secretarial file from his office and never returned it.

23. He stated further that he was aware that the Verjees shareholding in the Company constituted less that 1% of the shares in the Company; that he did not know that directors

had no power to alter or amend the Companies Memorandum or Articles of Association; that such amendment or alteration required a special resolution; that he is the one who convened the meeting of directors of May 10, 1995 on instructions from the Board; that the Memorandum of Association was amended on 10th May 1995 to enable the Company enter into a contract of guarantee; that he was aware that the Verjees were directors of the Company when he fixed the Company seal to the purchase agreements and Deed of Agreement; that he is the one who drew the resolution of the meeting held on May 10, 1995 and wrote to the deceased and PW1 informing them of the resolution of May 10, 1995.

24. Testimony on behalf of Zain Abubakar Mohamed Alzubidi, the 6th respondent, was given by his brother Ali Abubakar Mohamed. He stated that he was known to Jahangir Tejani, the director of Samaki (Two Thousand) Limited, the 10th respondent with whom he negotiated the purchase of the suit property which was agreed at Kshs 6,000,000.00; that the transaction was concluded through the lawyers and the property transferred from the 10th respondent to the 6th respondent. A transfer having been effected, the 6th respondent was issued with title.

25. That, in summary, was the evidence before the trial court. Having considered the same and submissions, the learned trial Judge delivered the impugned judgment granting the reliefs to which we have already referred.

26. The appellant prays in this appeal that the judgment of the ELC be set aside in its entirety on grounds that the learned Judge erred in declaring the resolution of the Company to amend its Memorandum and Articles of Association void; in declaring the Guarantee instrument by the Company, the Legal Charge and Further Charge over the property, the Deed of Agreement and the Purchase Agreement void; in ordering the appellant to compensate the company and awarding punitive damages; in interfering with the contract without cause; and in failing to uphold the indoor management rule in the case of *Royal British Bank vs. Turquand* (1856) 6 E &B 327.

Submissions

27. During the hearing of the appeal on 28th February 2023 some of the parties were represented by learned counsel as follows: Mr Paul Chege appeared for the Bank. Mr Kinyua Kamundi appeared for the 1st and 2nd respondents. Mr Kenneth Kibara appeared for the 6th respondent. Miss. Ndeto Muulu held brief for Mr Sarvia for the 10th respondent. Mr Chege for the Bank applied, and there being no objection, was granted leave to withdraw the appeal against the Verjees, the 3rd, 4th, and 5th respondents. Although the firm of Swaleh Mwangi Advocates for the 7th, 8th and 9th respondents was served with notice of hearing, there was no appearance for those parties.

28. In his written and oral submissions on behalf of the appellant, Mr Chege urged that the learned trial Judge erred in faulting the legality of the resolution of the Company to amend its Memorandum and Articles of Association on the face of the resolution of the Company evidenced by the minutes of the extra ordinary meeting of directors of the Company held on May 10, 1995; that in accepting that resolution, the Bank was entitled, on the strength of the Rule in Turquand's case, *Royal British Bank vs. Turquand* (1856)119 ER, to assume that the Company had complied with its internal rules and regulations.

29. Regarding the Deed of Agreement and the Purchase Agreement dated March 30, 2000, counsel submitted that the Judge erred in nullifying it as it involved numerous parties and properties and when all the parties to it were not privy to the suit; that entities not party to the suit are affected by the order

of nullification; that the agreement was validly executed by the 3rd, 4th and 5th respondents (the Verjees) who were indisputably directors of the Company having been duly appointed at a meeting chaired by the deceased held on April 8, 1988. It was submitted that no evidence of fraud on the part of the Bank was tendered to support the finding of nullification.

30. Counsel urged that assuming the learned Judge was right in nullifying the Deed of Agreement and the Purchase Agreement dated March 30, 2000, it would follow that all subsequent transactions founded on those documents including the transfer of the suit property to the 6th respondent would be a nullity.

31. It was submitted further that trial Judge erred in granting reliefs, namely the order for valuation of the suit property and for compensation, that were not pleaded. Counsel concluded by submitting that the order for punitive damages was erroneous and that no evidence was tendered to suggest fraud on the part of the Bank.

32. Mr Kibara for the 6th respondent, in supporting the appeal and buttressing the arguments in support of the Rule in *Turquand's* case urged that persons dealing with a company, bona fide, are not required to inquire whether the company has complied with its internal regulations unless they have actual or constructive notice of irregularities; that the learned Judge ignored that principle which has statutory foundation under Section 33 and 34 of the *Companies Act*.

33. Miss. Ndeto Muulu for the 10th respondent stated that the 10th respondent would abide by whatever decision this Court makes.

34. In opposing the appeal, Mr Kinyua his written and oral submissions on behalf of the 1st respondent and the Company submitted the Verjees hatched a scheme for the Company to guarantee banking facilities extended to their

company, Samaki Industries (Nairobi) Limited, and to that end passed an incompetent, illegal and fraudulent resolution, among other resolutions, to amend the Articles of Association of the Company and to sign guarantees and indemnity and executed the Charge and Further Charge over the suit property; that the Bank in purported exercise of its statutory power of sale colluded with the Verjees and the other respondents (with exception of the 6th respondent) to sell and transfer the suit property.

35. It was submitted that the resolution in question was passed by members of the Company who held less than 0.1% of the shares; that "this fraud was schemed and executed by the three directors/shareholders holding 3 shares out of 15,003 shares with the collusion of the appellant"; that in any event only members, and not directors, had power to amend the Memorandum and Articles; that under Section 141 of the repealed *Companies Act*, a special resolution must be passed supported by a majority of members holding at least 75% of the shares and that the Bank knew that the resolution to amend the Memorandum and Articles was passed in the absence of the 1st respondent and the deceased. It was submitted that the Rule in *Turquand's* case has no application in the circumstances of this case; and that Sections 33 and 34 of the *Companies Act, 2015* relied upon by Mr Kibara do not apply.

36. It was submitted that contrary to the claim by the Bank that it did not sell the suit property in exercise its statutory

power of sale, the Purchase Agreement and the Deed of Agreement indicated otherwise.

37. Urging the Court to follow the decision of the Supreme Court in the case of National Bank of Kenya vs. Anaj Warehousing Limited [2015] eKLR, counsel submitted that the Bank had no statutory power of sale as the Charge and Further Charge were null and void under Section 34 and 35 of the *Advocates Act* not having been drawn by an Advocate and neither did those documents contain a certificate under Section 65 of the *Registered Land Act*.

38. As to the complaint that the Deed of Agreement and Purchase Agreement involved other parties who were not privy to the suit, it was submitted that the Bank is not appealing on behalf of such parties; that the learned Judge did not intend to nullify those agreements in so far as they relate to third parties but nullification was restricted and did not affect any rights of other parties.

39. It was submitted that the learned Judge correctly found that the 6th respondent was an innocent purchaser for value without notice and was protected under Section 143 of the repealed *Registered Land Act*; that whilst "a nullity remains a nullity" the Judge could not nullify the transfer of the 6th respondent without violating Section 143 aforesaid. It was urged that the Judge was right in ordering that the property remains with the 6th respondent and in ordering the Bank to compensate the Company.

40. Counsel urged that in any event, this Court can remit the matter back to the High Court to look at the matter of restoration of title or can order the cancellation of the transfer to the 10th respondent and all subsequent transfers.

41. It was submitted that the order for valuation and compensation accords with the expanded and enhanced jurisdiction of the court under Article 10 of the *Constitution* on national values and principles; that the order on punitive damages was also justified as the Bank was aware the Memorandum and Articles did not permit the Company to guarantee third party liabilities; that the Bank knew that there was no resolution by the Company to amend its Memorandum and Articles; that the Bank also knew that the Verjees encumbered the suit property for their own purposes.

42. Counsel concluded by urging that while the judgment of the High Court may not be perfect, this Court should dismiss the appeal or partially allow it by setting aside the orders for compensation and by ordering cancellation of the transfers.

43. In brief rejoinder, counsel for the appellant submitted that without a cross appeal by the 1st respondent and the Company, this Court can only allow or dismiss the appeal.

44. We have considered the appeal and submissions in keeping with our mandate on a first appeal. See *Selle & another vs. Associated Motor Boat Co. Ltd & others* [1968] EA123. Although in its memorandum of appeal the Bank has raised 14 complaints against the impugned judgment, the main grievance is that the Judge erred in failing to uphold the Rule in *Turquand's* case with the result that he erred in declaring that the instrument of Guarantee and Indemnity, the Charge and Further Charge over the suit property purportedly entered into by the Company in favour of the Bank invalid, null and void. As a corollary to that is the question of validity of the Deed of Agreement and the Purchase Agreement. There is also the question of validity of the Guarantee and Indemnity, the Charge and Further Charge on account of the same having been prepared in violation of the provisions of Sections 34 and 35 of the *Advocates Act*.

45. We begin with the question whether the Judge erred in failing to uphold the Rule in *Turquand's* case. The capacity of a company is restricted to the carrying on of the objects specified in its memorandum of association and those dealing with it may be deemed to have notice of its public documents including its memorandum and articles of association which prescribe its objects and powers. However, even if a third party has read and understood the memorandum and articles of association, he will not necessarily know whether those who are purporting to act on behalf of the company have authority to do so. That raises the question, to which the Rule in the Rule in *Turquand's* case speaks, whether a third party dealing with the company is bound to ensure that all internal regulations of the company have in fact been complied with as regards the exercise of authority. (See *Gower's Principles of Modern Company Law*, 4th edition, L.C.B. Gower (chapter 9).

46. The essence of that rule is that so long as everything appears to be in order so far as this can be checked from the public documents, a person dealing with a company is entitled to assume that all internal regulations of the company have been complied with unless he knew that they had not; or there were suspicious circumstances putting him on enquiry; or his position in the company is such that in relation to that transaction he ought to have known that they had not. In that regard, the learned Judge of the High Court expressed as follows:

> " The general preposition put forth in *Turquand's* case is that a third party dealing with a company is not bound to ensure that all the internal regulations of the company have in fact been complied with (See generally, Gower, *The Principles of Modern Company Law*, 3rd Edition at pages 151 to 167). The Rule in *Turquand's* Case however has exceptions. One is that anyone dealing with a company is deemed to have notice of its public documents. Hence, any act which is clearly contrary to these documents will not bind the company, unless subsequently ratified by the company acting through its appropriate organ. The Rule in *Turquand's* case will also only protect an outsider "unless he has knowledge to the contrary or there are suspicious circumstances putting him on inquiry."

47. The learned Judge held that the amendment of the memorandum and articles of association of the Company to clothe it with power to guarantee finances extended to another party was unlawful, null and void and could not bind the Company and for the same reason any contract of guarantee or any charge to secure moneys to another entity was also unlawful, null and void. According to the Judge, the Bank knew, or ought to have known that the amendment to the memorandum and articles of association of the Company was unlawful, and that the Company did not therefore have power to give the Guarantee and Indemnity or to charge its property, the suit property, to the Bank and the Bank could not therefore be protected under the Rule in *Turquand's* case.

48. In that regard, the Judge stated:

> " In our case, the 1st defendant (the bank) will only be protected if there was nothing to put it on inquiry. The bank does acknowledge that it received a special resolution dated 10 May 1995 and a copy of the Articles of Association duly amended as provided in the special resolution. The bank must therefore have been aware, that initially, the MoA and AoA did not avail to the company the power to guarantee monies given to another entity. The bank must also have been aware, or was deemed to be aware of the provision of the law, which required that a MoA and AoA can only be amended through a special resolution of the general meeting of the company. There was sufficient material to warrant putting the bank into inquiry as to whether there was a meeting and whether resolutions were passed in the meeting. Due diligence would have required the bank to call for the minutes of the meeting where these resolutions were passed. I am not sure whether the bank did so, as the bank's witness was not privy to the transactions in issue, and she indeed testified that she herself does not know if the bank asked for the minutes of the meeting. There is certainly no evidence that the bank did so."

49. The learned Judge stated further follows:

> " There also ought to have been reasonable inquiry as to why the majority shareholders/ directors of the company have not signed any of the minutes and resolutions passed. I am of opinion that the bank failed, in the circumstances of this case, to undertake prudent inquiry, and to call for critical documents, before allowing the company to proceed to charge the suit

property in order to secure monies to be issued to Samaki Industries. I do not expect that anyone can proceed to advance significant amounts of money without making sure that the company guaranteeing the money was properly empowered to do so. The bank also ought to have known, and this would have been visible from the company's public documents, that Kensec Services were not the secretary of the company. There was thus material to put them into inquiry and I am not therefore of the view that the bank is protected by the Rule in *Turquand's* Case." [Emphasis added]

50. What then does the evidence presented before the trial court in that regard show? As already stated, the documents presented by the parties before the trial court were produced by consent. Amongst them is the certificate of incorporation of the Company; its memorandum and articles of association; annual returns of the Company for the years 1998 and 2000 filed by Kensec Services in which the deceased, PW1 and the Verjees are indicated to be directors as well as shareholders, with the three Verjees holding one share each while the deceased held 10,500 shares and PW1 held 4,500 shares; the Charge and Further Charge in favour of the Bank respect of the suit property with the common seal of the Company affixed in the presence of directors and Kensec Services; Special/Ordinary Resolution on a standard form document completed thus:

> "Special/Ordinary Resolution of Lamu Marine and Allied Products Limited" of the same date. It states as follows:-
>
> > "At an extraordinary general meeting of the members of the said company duly convened and held at Nairobi in the Province of Nairobi on the 10th day of May 1995... a special resolution was duly passed:-
> >
> > > That the Articles and Memorandum of the Company be amended by adding No 11(A) as follows:-
> > >
> > > > To enter into any guarantee contract of indemnity or suretyship and in particular (without prejudice to the generality of the foregoing) to guarantee the payment of any principal moneys, premiums, interest and other moneys secured by or payable under any obligations or securities and the payment of dividend and premiums on, and the repayment of the capital of, stocks and shares of all kinds and descriptions."

51. The learned Judge faulted that resolution on grounds that there was no evidence that members of the company received 21 days' notice convening the meeting at which that resolution was passed; that whereas Mr Saini stated that he issued notice to the deceased and to PW1, there was no proof; and further that the minutes backing that resolution related to a meeting of directors and not a meeting of members of the Company; that in any event the resolution was not passed by 75% of the members.

52. In our view, the factors which the learned Judge considered in reaching his decision in that regard relate to the internal workings of the Company. They are not matters which a third party, such as the Bank, would be privy to in dealing with the Company. In our view, the Bank was entitled to proceed based on the special resolution, filed as it was, at the Companies Registry. Moreover, it is not clear why the learned Judge disregarded the unchallenged evidence of the 8th respondent, R. S. Saini, that the meeting

of May 10, 1995 at which that resolution was passed was duly convened. According to the Judge, the 7th, 8th, and 9th respondent never existed. In his words:

> " In our case, the knowledge of the existence of BKS Registrars Limited and Kensec Services is with Mr Saini and he has offered no evidence of the existence of these two entities. That, coupled with the pleadings in the defence, that the two entities do not exist, make me come to the conclusion that they actually never existed, and do not exist. I will therefore proceed on the basis that BKS Registrars Limited and Kensec Services do not exist and have never existed. What this means is that BKS Registrars Limited and Kensec Services could not have acted as secretary of the company. Mr Saini, in his personal capacity, also never acted as secretary of the company, and this indeed is his evidence."

53. With respect to the learned Judge the evidence shows otherwise. For a start, there are minutes of the board of directors of the Company held on 14th November 1990 which was chaired by the deceased at which, in addition to the resolution to increase the authorized capital of the Company and to issue shares it was resolved "to appoint BKS Registrars Ltd as Company Secretary" and "to appoint Bassan, Khanna & Saini as Company's Auditors." In his witness statement and affidavits, R. S. Saini stated that since he started practice, he worked in partnership with different persons under different names, that:

> " ...for instance, I have worked under the name of BKS Secretarial & Management Limited; BKS Registrars Limited; Kensec Services and Kensec Registrars. Between 1990 and 2000, I rendered secretarial services to the 2nd plaintiff (the Company) having been duly appointed as the 2nd plaintiff's company secretary."

54. Saini explained further in his affidavit that in May 2008, two men called into his offices and using trickery "stole the entire secretarial file" of the Company. That accords with the evidence of DW2, the son of the deceased, who got involved in the affairs of the Company after the deceased died in 2007 who stated that as he was investigating the matter, he collected the secretarial file from Mr Saini. Considering the totality of the evidence, it is difficult to conclude, as the Judge did, that "BKS Registrars Limited and Kensec Services do not exist and have never existed" and that Mr Saini, never acted as secretary of the Company. In effect, the 1st respondent and the Company were purporting to incredibly disown the very person, who was the custodian of the records of the Company. Moreover, it is not clear why the learned Judge preferred the evidence of PW1 and that of her son who admittedly had little, if any involvement in the affairs of the Company at the material time, to that of Mr Saini who had firsthand knowledge of the deliberations of the Company. We are, in the circumstances, of the view that in reaching the decision that he did, the learned Judge failed to consider relevant evidence.

55. In the end we echo the words of this Court in *East African Safari Air Limited vs. Anthony Ambaka Kegode & another* [2011] eKLR where, in holding that an advocate need not go beyond a search carried out at the Registry of Companies to ascertain whether a director giving instructions had authority to do so provided he obtains the relevant company resolution under seal, stated:

> " We agree with Mr Gachuhi that the Rule in *Turquand's* Case (*supra*) applies in this situation. The rule says:
>
> > "While persons dealing with a company are assumed to have read the public documents of the company and to have ascertained that the proposed transaction is not inconsistent therewith, they are not required to do more; they need not inquire into the regularity of the internal proceedings – what Lord Hatherley called "the indoor management" and may assume that all is being done regularly.

> This rule, which is based on the general presumption of law, is eminently practical, for business could not be carried on if a person dealing with the apparent agents of a company was compelled to call for evidence that all internal regulations had been duly observed. Thus, where the articles give power to borrow with sanction of an ordinary resolution of the general meeting, a lender who relies on this power need not inquire whether such sanction has in fact been obtained. He may assume that it has, and if he is acting bona fide he will, even though the sanction has not been obtained, stand in as good position as if it had been obtained." (Emphasis added).

Gower's Principles of Modern Company Law has summarized the rule in *Turquand's* case as follows:-

> " This rule was manifestly based on business convenience, for business could not be carried out if everybody who had dealings with a company had meticulously to examine its internal machinery in order to ensure that the officers with whom he dealt with had actual authority. Not only is it convenient, it is also just. The lot of creditors of a limited liability company is not a particularly happy one; it would be unhappier still if the company could escape liability by denying the authority of the officers to act on its behalf." (Emphasis added).

56. For those reasons, we uphold the Bank's complaint that the learned Judge erred in failing to uphold the indoor management rule in *Turquand's* case.

57. We turn next to what Mr Kinyua referred to as "the elephant in the room." In agreeing with complaints by the 1st respondent and the Company, the trial court held that the Charge and Legal Charge in favour of the Bank were drawn by unqualified person in violation of Section 34 of the *Advocates Act* and following the decision of the Supreme Court of Kenya in the case of *National Bank of Kenya Limited vs Anaj Warehousing Limited*, Petition No 36 of 2014 (2015) eKLR pronounced:

> " I hold that the charge and further charge, dated 17 May 1995 and 20 November 1996 respectively, are void for all purposes. They cannot confer any rights to any person including the bank."

58. Although the Bank intimated in its memorandum of appeal that its present appeal is against the whole decision of the High Court, there is nothing in the grounds of appeal challenging that holding. Perhaps for the same reason, counsel for the Bank did not in his submissions before us address the matter perhaps on account of the pronouncement by the Supreme Court in *National Bank of Kenya Limited vs Anaj Warehousing Limited* (above) that documents prepared by unqualified persons, such as the Bank, "shall be void for all purposes." The decision by the learned Judge nullifying the legal charge and further charge on that basis cannot therefore be faulted and we uphold the same.

59. The result of having nullified the Charge and Further Charge is that every step taken based on those documents, including the Purchase Agreement and the Deed of Agreement had no foundation. In *Macfoy vs. United Africa Co. Ltd* [1961] 3 All ER. 1169 Lord Denning delivering the opinion of the Privy Council at page 1172 (1) said;

> " If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the Court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the Court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse."

60. The subsequent transfers of the suit property in favour of the 10th respondent and thereon to the 6th respondent cannot in law amount to anything. Consequently, the order that would naturally have followed, as had been prayed in the amended plaint, was to order rectification of the register for the suit property to revert to the Company. In the result, the orders for valuation of the suit property and for the Bank to compensate the Company for the value of the suit property had no legal basis quite apart from the fact that there were no pleadings in that regard and no such reliefs had been sought. We accordingly set aside those orders.

61. As regard the award of punitive damages the learned Judge stated:

> " In the prayers in the plaint, there was a prayer for punitive damages. By proceeding to draw instruments that the law makes illegal to do so, the 1st defendant essentially committed an offence, and has caused hardship to the 2nd plaintiff. I am of the view that an award for punitive damages is merited. In my discretion, I will award the sum of Kshs 2,500,000/= (read Kenya Shillings Two Million Five Hundred Thousand) as punitive damages payable by the 1st defendant to the Lamu Marine Ltd the said money to attract interest at court rates from the date of this judgment."

62. Punitive or exemplary damages are awardable where the defendant's action was calculated to procure him some benefit, not necessarily financial, at the expense of the plaintiff or where there is oppressive, arbitrary, or unconstitutional action by the servants of the government. See *Rookes vs. Barnard & others* [1964] AC 1129; *Bank of Baroda (Kenya) Limited vs. Timwood Products Ltd* Civil Appeal No 132 of 2001; *Obongo & Another vs. Municipal Council of Kisumu* [1971] EA 91 and *PN Mashru Ltd v Ojenge* (Civil Appeal 64 of 2020) [2023] KECA 473 (KLR) (28 April 2023). With those principles in mind, there is no evidence that the Bank was motivated by considerations other than recovery of what it considered to be its secured debt. There was in our view no valid justification to penalize the Bank with an award for punitive damages.

63. In the result, the appeal partially succeeds. We make the following orders:

a. The Declaration that the resolution to amend the Company's memorandum and articles of association to add a clause 11A was illegal, fraudulent, and null and void is hereby set aside.

b. The Declaration that memorandum and articles of association of the Company be construed without inclusion of Clause 11A is set aside.

c. The Declaration that the Guarantee instrument entered into by the Company to guarantee liabilities of Samaki Industries (Nairobi) Limited to the Bank is null and void is hereby set aside.

d. The order that the title of the 6th respondent cannot be adversely affected and cannot revert to the ownership of the Company is set aside.

e. The orders that the suit property be valued and that the Bank do compensate the Company with the current value of the same is set aside.

f. The award in favour of the Company against the Bank for punitive damages of Kshs 2,500,000.00 is set aside.

g. We uphold the declarations by the ELC that the charge dated May 17, 1995 and the further charge dated November 20, 1996 over the suit property and the Deed of Agreement and the Purchase Agreement dated March 30, 2000 to the extent that the same are premised on the said Charge and Further Charge are null and void.

h. We order rectification of the register to cancel all entries relating to the Charge and Further Charge over the suit property to the Bank and all subsequent transfers and entries so as to restore the title of the property to the Company.

64. As the Bank has partially succeeded in the appeal, it will have half the costs of the appeal and each party will bear own costs of the ELC.

DATED AND DELIVERED AT MOMBASA THIS 22ND DAY OF SEPTEMBER 2023

GATEMBU KAIRU, FCIArb

.....

JUDGE OF APPEAL

P. NYAMWEYA

.....

JUDGE OF APPEAL

J LESIIT

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR