IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: VISRAM, KARANJA & KOOME, JJ.A)

CIVIL APPEAL NO. 117 OF 2018

BETWEEN

MOMBASA BRICKS & TILES LTD.....1ST APPELLANT

DINESH KUMAR ZAVERCHAND JETHA.....2ND APPELLANT

ATEET DINESH JETHA.....3RD APPELLANT

ZAVERCHAND SOJPAL JETHA HOLDINGS LTD.....4TH APPELLANT

EXON INVESTMENTS LTD.....5TH APPELLANT

EXON PLASTIC LTD.....6TH APPELLANT

AND

ARVIND SHAH.....1ST RESPONDENT

HARSHABEN SHAH.....2ND RESPONDENT

GORSANI HOLDINGS LTD.....3RD RESPONDENT

COAST PROPERTIES LTD.....4TH RESPONDENT

COAST CLAY WORKS LTD.....5TH RESPONDENT

COAST MAIZE MILLERS LTD.....6TH RESPONDENT

SPA MILLERS NAIROBI LTD.....7TH RESPONDENT

HIGHWAY CENTRE LTD.....8TH RESPONDENT

(An appeal from the Judgment of the High Court of Kenya at Mombasa (Otieno, J.) dated 22nd December, 2017 ***in H.C.C.C No. 9 of 2011.*****)**

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JUDGMENT OF THE COURT

1. The law of contract recognizes and respects the freedom of parties to enter into agreements setting out the parameters within which they are to be governed. That being so, as this Court rightly observed in ***Abdul Jalil Yafai vs. Farid Jalil Mohammed*** **[2015] eKLR**, the law equally places a high value on ensuring parties have truly consented to the terms that bind them. At the heart of this appeal lies the determination of, amongst other issues, whether the agreement(s) executed by the parties herein reflected their true intention or in other words, their consent to be bound by the terms thereunder.

2. The dispute that has pitted the appellants against the respondents revolves around the proprietorship of Subdivision No. 500 /Section VI /Mainland North (suit land) initially registered in favour of the 1st appellant together with a brick making plant, maize milling factory and other developments therein which were subsequently transferred and/or assigned to the 4th -7th respondents.

3. It is common ground that sometime in the year 2005 the 1st appellant, whose shareholding and directorship comprised of Dinesh Kumar Zaverchand Jetha (2nd appellant) (Dinesh) and his brothers, found itself in a financial crisis. Apparently, the 1st appellant had obtained financial facilities and/or guaranteed loans granted to related companies on the security of the suit land. For one reason or the other, the 1st appellant failed to meet its obligation towards Standard Chartered Bank (the chargee) who in turn jump started its statutory power of sale culminating in a notice for sale of the suit land through a public auction scheduled for 15th June, 2005 being published in the Nation Newspaper.

4. In an effort to save the suit land, as well as the developments thereon, the 1st appellant through Dinesh and Ateet Dinesh Jetha (Dinesh's son), the 3rd appellant, who at the time was tasked with the running of the 1st appellant, sought the assistance of Arvind Shah (the 1st respondent) (Arvind). Arvind was a close and trusted friend of the Jetha family and his assistance was sought on the basis that he was perceived to be an experienced and successful businessman with numerous profitable companies under his belt.

5. A series of meetings were held mostly between Ateet and Arvind but at times Dinesh would also be in attendance, with the objective of coming up with a solution to the 1st appellant's predicament. In general, Arvind's recommendation entailed restructuring of the 1st appellant through the incorporation of new entities and the transfer of its assets to the said entities. The overall goal being to secure financing to meet the outstanding debt to Standard Chartered Bank. The proposal was accepted by the 1st appellant, though the scope and ultimate effect of the restructuring is a point in contention between the parties.

6. The process involved the incorporation of the 4th appellant and 3rd respondent companies which were in exclusive control of the Jetha and Shah families respectively. The 4th appellant's shareholding comprises of Ateet, his mother, Ramilla Jetha, and brother, Riteet Jetha; while the 3rd respondent constitutes of Arvind, his wife, Harshaben Shah (the 2nd respondent), and his daughter, Poonum Shah. After which the 4th appellant and 3rd respondent were to incorporate other companies, that is, 4th -7th respondents, who would hold the 1st appellant's assets.

7. Before the incorporation of the aforementioned companies was completed, a resolution to sell the suit land was passed by the 1st appellant on 2nd June, 2005 which read in part as follows:

> ***"It is NOTED that there was some interest in purchase of Land and Buildings on L.R No. 500, Section VI Mainland North Mombasa.***
>
> ***The matter was discussed at length and it was resolved that the directors be and are authorized to sell the land and buildings… on as is basis to the prospective buyers…***
>
> ***It is further resolved that the sale of land and buildings is binding on all directors as the decision has been jointly taken for the benefit of the company."***

On the strength of the resolution, a sale agreement between the 1st appellant and 8th respondent, whose shareholding and directorship is made up of Arvind's wife and daughter, was drawn. The agreement was to the effect that the suit land would be sold for a consideration of Kshs. 27,000,000, which amount though not expressly indicated in the agreement, was the outstanding loan amount owing to Standard Chartered Bank.

8. Thereafter, Arvind approached Standard Bank with the resolution and the sale agreement in hand, and convinced it to halt the auction on the ground that the outstanding debt would be paid upon registration of the title to the suit land in favour of the 8th respondent or its nominee. Standard Chartered Bank acceded on the condition that 10% of the purchase price being Kshs.2,700,000 would be paid upfront as a nonrefundable deposit and a guarantee for payment of the balance thereof would be given by a reputable bank. Coincidentally, Arvind had also approached Giro Commercial Bank Ltd. (Giro Bank) who had agreed to offer a loan facility on the security of the suit land.

9. Eventually, on 13th June, 2005 the deposit as well as a bank guarantee from Giro Bank was delivered to Standard Chartered and the title to the suit land was released to 8th respondent's advocates, Hamilton Harrison & Mathews (HHM), who also doubled up as Giro Bank's advocates. Later on, a discharge of the charge in favour of Standard Chartered was registered.

10. Meanwhile, the incorporation of the aforementioned companies was completed and the shareholding in the 4th- 7th respondents companies was made up of Arvind, the 4th appellant and 3rd respondent each holding 20, 490 and 490 shares respectively. At the time the directors of the said companies were Ateet (managing director) and Arvind. Subsequently, the 8th respondent nominated the 4th respondent to be registered as the proprietor of the suit land which was done. In addition, the brick making plant and maize milling factory on the suit land and in Nairobi were assigned to the 5th, 6th and 7th respondents respectively.

11. Afterwards, the 4th respondent applied for a loan and overdraft facility of Kshs.50, 000,000 which was approved by Giro Bank on 11th August, 2005. The purpose of the facility was indicated to be financing of the purchase of the suit land and the 4th respondent's working capital. A fresh charge over the suit land was registered in favour of Giro Bank and the balance of the outstanding loan was released to Standard Chartered.

12. It would appear that further financing was obtained and injected into the 5th, 6th and 7th respondents who carried out business operations smoothly until underlying issues concerning the shareholding and controlling interest therein rose to the surface in or about the year 2009. Consequently, a number of suits were filed by the parties and of relevance is .H.C.C.C No. 9 of 2011 wherein the 1st -4th appellants in conjunction with Sojpal Jetha Limited and the Estate of Zaverchand Sojpal Jetha sued the respondents. It is instructive to note that pursuant to a court order issued in the said suit on 26th July, 2012 all those suits relating to the dispute herein were consolidated with H.C.C.C No. 9 of 2011 being the lead suit.

13. The appellants' cause of action was premised on the grounds that Arvind had misrepresented his true intention in offering his advice to the 1st appellant. To them, Arvind's assistance through his nominees, that is, the 3rd and 8th respondents was merely on paper and solely for the salvation of the suit properties. In particular, at all material times, Arvind had led the 2nd and 3rd appellants to believe that the shareholding and controlling interest in the companies to be incorporated, would be on paper as it pertained to shares held by himself and 3rd respondent. In the real sense, the shares held by himself and 3rd respondent would be held in trust for the 1st appellant

14. Nonetheless, Arvind failed to honour the terms of their agreement and instead, resorted to using the paper majority shareholding in the 4th- 7th respondents to exert controlling interest over the 1st appellant's assets without any colour of right. Moreover, Arvind and the 3rd respondent refused to pay 50% of the market price of the 1st appellant's assets so as to be in joint partnership with the 1st appellant or surrender their shares to the 1st appellant. The net effect is that they were benefiting from the assets and the shareholding in the 4th -7th respondents without making any share contribution.

15. Undue influence was also imputed against Arvind who the appellants alleged took advantage of the 1st appellant's vulnerable situation and Ateet's inexperience to induce the 1st appellant to enter into the arrangement it did. Further, the 1st – 4th appellants contended that the sale of the suit land to the 8th respondent was unconscionable since the amount of Kshs. 27,000,000 allegedly paid as consideration was nowhere near the value of the land which at the time was around Kshs.150,000,000.

16. Furthermore, that Arvind was using the shareholding majority to bring the 4th respondent's to its knees by failing to counter-sign cheques for payment of salaries, creditors, tax and other statutory outgoings. His motive being to force the 4th respondent into liquidation hence benefit from the assets in respect of which neither he nor his nominees made any contribution. It was also the appellants' contention that in further exploitation of the paper majority shareholding, Arvind had passed a resolution to bring on board the 2nd respondent as the third director for the 4th -7th respondents despite a court order restraining the alteration of the status of the respondents.

17. Towards that end, the 1st - 4th appellants sought a host of orders in their further amended plaint ranging from a declaration that the 4th - 7th respondents held the suit properties in trust for the 1st appellant; declaration that the shares held by 1st and 3rd respondents in the 4th -7th respondents are for the benefit of the 1st appellant; setting aside or nullification of the sale agreement and transfer of the suit land, to a mandatory injunction compelling the respondents to unconditionally transfer the title and the interest on the suit land to the 1st appellant or its nominee(s). They also sought in the alternative, an order compelling the 1st, 3rd -7th respondents to pay the 1st appellant 50% of the market value of the assets in issue and ascertaining of respective contribution, if any, made to the 4th - 7th respondents by the 1st- 4th appellants, on one hand, and 1st, 2nd and 3rd respondents, on the other.

18. The suit was strenuously opposed by the respondents through their 73 page amended defence and counter-claim. On their part, they denied the appellants allegations and averred that the 1st appellant's resolution, sale agreement and transfer of the suit land spoke for themselves. According to Arvind, when he set out to offer his assistance/advice he did not do so on a philanthropic or charitable basis. He did so as a business venture expecting returns and benefits for his effort. It is on that basis that he mobilized not only his resources but those of his family members and companies associated with them to salvage the assets in question.

19. He went to great lengths to halt the auction and obtain the requisite financing from Giro Bank to pay off the outstanding debt to Standard Chartered Bank. According to Arvind, he utilized his resources for reviving the businesses therein by putting in working capital and even went as far as embarking on a benchmarking exercise within and out of the country to establish the best way to turn the brick making plant into a going concern. Besides, the loans and financial facilities obtained for the purchase of the suit land and working capital for the businesses were at the expense of Arvind and/or companies affiliated with him. On average Arvind, the 2nd respondent, 8th respondents as well as related companies had availed Kshs.35,513,455 to the 4th and 5th respondents' disposal. None of the appellants were repaying the loan facilities leaving it solely to Arvind and 8th respondent.

20. The 1st and 3rd respondents' position was that the 1st- 4th appellants had represented that in exchange for Arvind's assistance that he and 3rd respondent would hold controlling interest in the 4th- 7th respondents. As such, they were estopped from reneging on that representation. Arvind denied exerting any undue influence or making any misrepresentation with respect to his intention of getting involved with the appellants. As far as the respondents were concerned, this was simply a case of the appellants seeing no more use for the 1st , 3rd and 8th respondents after the bulk of the loan amounts had been repaid and the businesses were up and running. Their scheme if allowed to succeed would amount to unjust enrichment taking into account the investment made by the said respondents into the suit land and businesses thereon.

21. As per Arvind, it was Ateet who was misappropriating funds of the 4th and 5th respondents by diverting the same to his own personal or family members' use. He had totally refused to disclose the statement of accounts of the 4th - 7th respondents to Arvind; and to release the 1st and 3rd respondents share certificates in respect of the 4th- 7th respondents. Sometime in the year 2012, while the suit was pending, Arvind and 3rd respondent came to learn that Ateet had allowed the 5th and 6th appellants into the suit land without the 4th respondent's consent. In addition, that the said appellants were carrying on competing businesses of making jikos and plastics using raw material and resources of the 4th and 5th respondents.

22. The foregoing state of affairs instigated the 1st, 3rd, 4th and 5th respondents to file a counter-claim against the 2nd, 3rd, 5th and 6th appellants seeking *inter alia*, dismissal of the suits instituted at the instance of the appellants; an order directing the 5th and 6th appellants to pay *mesne* profits at the rate of Kshs.1,200,000 per month effective from 1st May, 2013 up until they gave vacant possession or their eviction; a mandatory injunction compelling the 3rd appellant to release the 1st and 3rd respondents share certificates; an order directing accounts to be taken to ascertain the value of the 4th and 5th respondents assets illegally converted for use in the 5th and 6th appellants businesses; and an injunction restraining the 3rd appellant from entering into any agreement relating to the 4th and 5th respondents assets without a proper resolution of the said companies or otherwise running the 4th - 7th respondents without the involvement of the 1st respondent.

23. At the trial, the appellant called two witnesses, namely, Ateet and Dinesh while the respondents availed Arvind and Harshaben. They gave evidence in support of the parties' respective positions.

24. In the end, the learned Judge (Otieno, J.) vide a judgment dated 22nd December, 2017 dismissed the appellants suit and in doing so, he stated in his own words that:

> ***"Having said that parties came together for a purpose, negotiated, reached agreements and coded those agreements into deeds, those deeds including the Memoranda and Articles of Association create mechanisms and structures of variation and way forward. Those are the mechanism chosen by the parties and all are entitled to their choices. In this case one may borrow the now famous political clinch that choices have consequences."***

25. The learned Judge went on to partially allow the counter-claim and issued the an array of orders, most of which we will set out in *extenso* for purposes of placing the appeal in context:

> ***a. Practicably the determination of the suit regarding the ……of the suit property, plot no. 500/VII/MN and the shareholding the 4th defendant (4th respondent herein) determines the (sic) most of the claims by the counter- claimants against the defendants to the counter claim save for the claims against the 3rd & 4th defendants to the said counter-claim. The court deems it so because the natural consequence of upholding the ownership and shareholding structure is that the 4th defendant remains the registered owner of the property while the shareholding in it remain undisturbed and accordingly therefore its affairs must be run in accordance with its Memorandum and Articles of Association and the law under the Companies Act. Those being the findings and outcome of the judgment in the suit, prayer a, b, & (i) in the counter-claim stand taken care of by the determination of the suit.***
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> ***b. Prayer (h) in the counterclaim is equally determined in that, by virtue of ownership of the suit property, the 4th defendant is entitled to the benefits flowing from such proprietorship to include the right to control user thereof and be entitled to income from such user and on default there is a right to enforce such rights as by law permitted including recovery of rent or mere (sic) profits by distress or just eviction.***
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> ***c. For those reasons, the court upholds the 4th defendant's rights as fundamental under Article 40 of the Constitution and direct that the space occupied by the 2nd and 3rd defendants, to the counter-claim, in the suit premises be valued by a registered valuer to ascertain the current rent payable. Such valuer be appointed by the 6th plaintiff on one side and the 3rd defendant on the other side within 21days from today. Once appointed the valuer shall file his report in court within 21 days after appointment. In the event that the parties shall be unable to agree on a joint valuer, let each side, the 6th plaintiff and the 1st and 3rd defendants, appoint (sic) own valuer on or before the 15/1/2018 and such valuers to file their separate reports in court before the 8/2/2018.***
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> ***d. Once the rent is ascertained, let the 2nd & 3rd defendants to the counter-claim pay such monthly rent as ascertained, calculated from the 1/5/2013, within 60 days from the date the report ascertaining the rent payable shall have been filed in court. It is further directed that the 2nd and 3rd defendant (sic) to the counter-claim shall have the option to pay the rent ascertained or move out within 60 days and in default be evicted. In all events however the rent so ascertained shall be recoverable by the 4th respondent as a liquidated sum whether or not the 2nd and 3rd defendants shall opt to remain as tenants or choose to vacate…***
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> ***e. For prayer (g) and (i) in the counter-claim, it is not in dispute that the 5th plaintiff (the 3rd appellant herein) has been running the affairs of the 4th defendant alone despite court order issued to the contrary… Now that I have upheld the shareholding by the 1st and 3rd defendants (1st & 3rd respondents) in the 4th defendant, fidelity to the law and norms of fairness dictate that it be ascertained how much income was generated during the period the 5th plaintiff was in such sole control. That will be achieved by an audit being carried out by an expert properly registered and licensed. It is therefore ordered that the 6th plaintiff in consultation with the 1st and 3rd defendants do appoint a registered accountant within 21days from the date hereof to undertake the audit of the book of the 4th defendant to the suit as well as those of the 2nd and 3rd defendants (5th and 6th appellants) to the counter-claim and to file a report within 21days of the appointment….***
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> ***For avoidance of doubt prayer (i) in the counter-claim is allowed as prayed and all decisions touching on the 3rd plaintiff to the counter-claim must be taken in participation of all the subscribers to the Memorandum and Article of Association.***
>
> ***f. …***
>
> ***g. I grant to the defendants/counterclaimants prayer (q) and direct that the share certificate held by the 5th defendant (sic) be released to the 1st and 2nd plaintiffs in the counter-claim forthwith and in any event not later than the 5/01/2018. I however***

decline to award any aggravated or punitive damages as against the 4th defendant in the counterclaim having considered that the parties have a relation by virtue of their interests in the 3rd plaintiff to the counter-claim.

h. …

i. The court encourages the parties to engage one another in good faith and find a working formula without which the financial health of the corporates can only plunge into uncertainty. With that in mind, I consider that the only just order to make on costs is not (sic) each party shall bear own costs as a way of helping parties repair their relationships.

26. The decision did not go down well with the appellants and respondents hence the appeal and cross appeal challenging the same. The appellants set out 30 grounds in their appeal which can be aptly summarized as, the learned Judge erred by-

a) Failing to appreciate the nature of the dispute before him.

b) Failing to lift the corporate veil of the parties.

c) Misconstruing and misapplying the doctrine of undue influence.

d) Failing to appreciate that the 1st respondent had breached his fiduciary duty to the 1st, 2nd, and 3rd appellants by failing to ensure they obtained independent legal advice with respect to the strategy he had proposed before the implementation of the same.

e) Failing to appreciate that the purported transactions which culminated in the 1st, 2nd, 3rd, 4th and 8th respondents acquiring the suit properties amounted to unconscionable bargain.

f) Failing to appreciate that the restructuring and refinancing engineered by the 1st respondent as a financial advisor resulted in the 1st and 3rd respondents unduly acquiring the majority/ controlling interest of the 1st -4th appellants' assets.

g) Holding that the shareholding structure in the 4th -7th respondents which resulted from breach of fiduciary duties was binding on all promoters, members and contributors of the said respondents.

h) Failing to declare that the 1st, 2nd, and 3rd respondents hold shares in the 4-7th respondents in trust for the 1st -4th appellants.

i) Holding the resolution, sale agreement and transfer were valid and binding upon the appellants.

j) Penalizing the 5th and 6th appellants to pay mesne profits without finding any wrong doing on their part.

k) Directing the audit of the 5th and 6th appellants without any legal basis.

l) Delegating his judicial function of assessing the income generated by the 4th respondent and quantum of mesne profits payable by the 5th and 6th appellants.

m) Failing to appreciate that following the delivery of the impugned judgment the trial court became functus officio hence could not entertain further proceedings with respect to the audit and assessment reports which he directed to be availed thereafter.

27. The respondents, on their part, complained that the learned Judge erred by-

a) Failing to award costs to the respondents with regard to suits determined in their favour.

b) Failing to appoint an inspector to inspect the 5th respondent's affairs under Section 165 of the Companies Act as had been sought by the 1st and 3rd respondents in Misc. Cause No. 4 of 2009.

c) Giving the 5th and 6th appellants an option to stay on the suit land yet the 4th respondent had sought their eviction.

d) Declining to issue an injunction restraining the 3rd appellant from running the affairs of the 4-7th respondent companies without the involvement of the 1st and 3rd respondents.

e) Failing to grant interest on the mesne profits and amounts misappropriated by the 3rd appellant.

28. At the plenary hearing, learned counsel, Mr. Ndegwa appeared for the appellants while learned counsel, Mr. Kinyua appeared for the respondents. Counsel relied on the written submissions filed on behalf of the parties and made oral highlights as well.

29. Mr. Ndegwa, began by stating that the learned Judge misapprehended the case before him thus arrived at the wrong conclusion. In his opinion, at the center of the dispute was whether a fiduciary, or a person in the position of trust, could purchase or take property of a person

who it offers financial advice. He submitted the learned Judge had failed to address his mind on the nature of the relationship between Arvind (the 1st respondent), on one hand, and the 1st, 2nd and 3rd appellants, on the other; and the effect of such a relationship on the resulting transactions. He asserted that the 1st respondent was a financial adviser to the 1st, 2nd and 3rd appellants, a fact he conceded to. By way of illustration, counsel emphasized that the respondents, in their further amended defence, averred that, from the onset the 1st respondent made it clear to the 2nd and 3rd appellants that the only way the suit land could be salvaged was if they complied with his direction and advice to the letter.

30. Counsel went on to state that as a financial adviser, the 1st respondent acted in a fiduciary capacity. In that regard, the English case of **Lloyds Bank Ltd vs. Bundy [1974] 3 All ER 757** was cited. Therefore, the 1st respondent owed a duty of care to the 1st, 2nd, and 3rd appellants and was required to act in good faith. To begin with he should not have placed himself in a positon which was in conflict with his fiduciary duty by purporting to be a purchaser of the 1st appellant's property. Buttressing that proposition, he relied on ***Hanbury & Martin on Modern Equity, 16th Edition pg. 606***.

31. Likewise, the 1st respondent could not act through a nominee, as he did through his family members, to purchase the suit land. Drawing support from the House of Lords decision in **CIBC Mortgages plc vs. Pitt & Another [1993] 4 ALL ER 433**, Mr. Ndegwa further contended that it was immaterial whether the 1st respondent paid consideration for the suit land; even if he did, which was denied, such a transaction on account of his fiduciary duty should be set aside as a matter of right.

32. Counsel took issue with the learned Judge's finding that the appellants had not proved undue influence on the part of the 1st, 2nd and 3rd respondents with respect to execution of the resolution, sale agreement, Memorandum and Articles of Association (MEMARTS) of the 4th - 7th respondents and transfer of the suit land. In his view, the evidence on record clearly demonstrated the manner in which the 1st respondent exploited his position as an adviser to the 1st, 2nd and 3rd appellants. Undue influence was also demonstrated by the fact that the 1st respondent, who is a self-proclaimed experienced and successful business man, was at the time 50 years old, while the 3rd appellant, who was acting on behalf of the appellants, was 25 years old and inexperienced.

33. He added that in any event, where a fiduciary relationship exists between parties, such as in this case, a presumption of undue influence arises. To bolster that line of argument, counsel relied on ***Trietel on the Law of Contracts 13th Edition, pg. 450***. Making reference to the persuasive case of the **Burrell vs. Burrell [1991] 106 N.S.R. (2d)**, Mr. Ndegwa stated that the burden of rebutting such a presumption lay with the fiduciary.

34. He claimed that to rebut the said presumption, a fiduciary has to demonstrate that the other party to a transaction obtained independent professional advice and exercised his/her free will. Towards that end, the 1st respondent had a duty to insist and ensure that the 1st, 2nd and 3rd appellants obtained independent professional advice before execution of the documents. Besides, the 1st respondent was at all material times alive to the 1st, 2nd and 3rd appellants' vulnerability owing to the 1st appellant's financial difficulties.

35. In other words, as counsel put it, it was not for the 1st, 2nd and 3rd appellants to prove that they did not understand the nature or consequence of the documents they executed. All in all, the 1st respondent did not rebut the presumption to the required standard because apart from alleging that the 1st appellant was represented by Singh Gitau Advocates, no evidence was tendered to substantiate the same.

36. Asserting that the 1st respondent was also guilty of misrepresentation, Mr. Ndegwa submitted that, firstly, he had brainwashed the 2nd and 3rd appellants into believing that their creditworthiness was ruined and incapable of redemption. Secondly, the 1st respondent also misled the 1st, 2nd and 3rd appellants to believe that his objective was to help them salvage the suit land. It was on the basis of the foregoing misrepresentation that the 1st respondent influenced the 1st, 2nd and 3rd appellants to execute the resolution, agreement for sale, transfer of the suit land and the MEMARTS.

37. Challenging the authenticity of the aforementioned documents, counsel argued that the resolution contained false statements, that an extra ordinary general meeting was held by the 1st appellant on 2nd June, 2005 while none was held. It purported to be an extract of the minutes of the said meeting yet no minutes of the alleged meeting, if any, were produced. The 1st, 2nd and 3rd appellants never participated in the incorporation of the 4th - 7th respondents or the preparation of their respective MEMARTS. In addition, the 1st respondent pressurized the 3rd appellant, his younger brother and mother to execute the said MEMARTS in a hurry denying them the opportunity of reading and understanding the contents thereof.

38. Further, the appellants alleged that the 1st respondent had convinced the 1st, 2nd and 3rd appellants that the sale agreement was purely part of the process of salvaging the suit land and the purchase price therein only reflected the amount owing at the time to Standard Chartered Bank. For all intents and purposes, the sale agreement was merely on paper and did not reflect the appellants' intention to sell the suit land in the terms thereunder.

39. Similarly, the 1st respondent duped the 1st, 2nd and 3rd appellants into believing that the transfer of the suit land to the 4th respondent was purely for purposes of restructuring so as to obtain refinancing and ultimately, saving the suit land. The transfer in question was also not dated, stamped or attested as required under the law.

40. According to Mr. Ndegwa, the learned Judge failed to appreciate that the transactions in issue were unconscionable. Elaborating further, he submitted that at the time the 1st respondent stepped in to help the appellants, he was aware that the value of the suit land was over Kshs.100,000,000 as disclosed in the notification of sale by Standard Chartered Bank. Additionally, the 1st and 8th respondents in a letter dated 21st July, 2005, wherein they were requesting a loan and overdraft facility aggregating to Kshs.50,000,000 from Giro Bank Ltd., indicated the value of the suit land to be over Kshs.150,000,000. Consequently, it was beyond logic and commercial sense to sell such a

property at a gross undervalue of Kshs.27,000,000 as alluded to by the 1st, 2nd and 8th respondents. To him, that by itself evidenced that the transaction was unconscionable.

41. Mr. Ndegwa also claimed that there was no legal basis for the 1st, 2nd and 3rd respondents to lay claim to the brick making plant and machinery which was assigned to the 5th respondent. Their purported claim was based on the 5th respondent's MEMARTS which was executed by the 3rd appellant, his brother and mother, who were not owners of the brick making plant. The undisputed owner of the said plant was the 1st appellant. Nevertheless, there was no evidence that the 1st, 2nd, 3rd and 8th respondents made any capital contribution to the 5th respondent; which is a reflection of the unjustified financial advantage obtained by the said respondents over the 1st appellant's property. The same applied in equal measure to the maize milling plants assigned to the 6th and 7th respondents.

42. The learned Judge was criticized for disregarding the evidence with respect to the events which led up to the execution of the documents in issue on the ground that the same amounted to parole evidence and could not displace the otherwise clear intent of the written documents. Mr. Ndegwa was steadfast that the evidence of the surrounding circumstances established that the documents in question were executed in a fraudulent manner rendering them susceptible to invalidation. Therefore, he urged that the learned Judge should have considered the propriety of the documents in light of the proviso to ***Section 98*** of the ***Evidence Act***, which allows for oral evidence to be tendered in instances where a party seeks to establish, that written agreements have been vitiated on account of an illegality, or the existence of a separate oral agreement.

43. Counsel posited that the learned Judge misread the evidence before him by finding that the 1st, 2nd, 3rd respondents had given adequate consideration for holding shares in the 4th – 7th respondent companies on account of Kshs.27 million allegedly paid to Standard Chartered Bank. Conversely, there was ample evidence to the effect that the 1st, 2nd and 3rd respondents did not pay such an amount to Standard Chartered Bank. Be that as it may, the sum of Kshs.2,600,000 which was paid by the 8th respondent to the said bank was a loan and the same was repaid vide a cheque drawn in favour of Simpoo Investments Limited, a company affiliated with and under the control of the 1st and 2nd respondents.

44. Mr. Ndegwa argued that taking into account the surrounding circumstances of the dispute, the learned Judge should have lifted the corporate veil in the respondent companies. In his view, the 1st respondent was hiding his unlawful/illegal acts under the corporate veil; and it is only upon lifting of the veil that the 1st respondent can be held accountable for breach of his fiduciary duty. We were urged to treat the 1st, 2nd, 3rd and 8th respondents as one economic entity since the 3rd and 8th respondents are companies fully controlled by the 1st and 2nd respondents. In support of that suggestion, the case of **D.H.N. Food Products Ltd. vs. Tower Hamlets London Borough Council [1976] 1 ALL E.R 852** was cited.

45. Mr. Ndegwa told the Court that he was at a loss as to why the learned Judge, despite not finding any wrong doing on the part of the 5th and 6th appellants, directed their accounts to be audited. Quoting this Court's decision in ***Attorney General vs. Law Society of Kenya and another*** **[2017] eKLR**, counsel urged that the said orders went against the principle that there can be no legal liability without fault. Similarly, counsel stated that the learned Judge did not find that the 5th and 6th respondents were trespassers hence the imposition of payment of *mesne* profits was unjustified.

46. The learned Judge was also faulted for what the appellants deemed to be delegation of his judicial function of assessing, income generated by the 4th respondent at the time the 3rd appellant was supposedly in sole control and rent payable by the 5th and 6th appellants. According to counsel, the foregoing was in the nature of assessment of damages thus lay squarely within the court's mandate. In that respect, reliance was placed on the case of ***Telkom Kenya Limited vs. John Ochanda*** **[2014] eKLR**.

47. Lastly, citing the case of ***Justus Mutiga & 2 others vs. Law Society of Kenya & another*** **[2018] eKLR**, Mr. Ndegwa submitted that once the trial court delivered its judgment it became *functus officio*. As such, the learned Judge could not entertain further proceedings or re-open the case, as he intended to do, by considering reports by valuers or auditors, so as to issue further orders in the same matter. Counsel implored us to allow the appeal on the aforementioned grounds.

48. Rising to his feet, Mr. Kinyua challenged the standing of the parties in the suit and the appeal herein. His argument was to the effect that the 1st appellant has two shareholders namely, Solpal Jetha Ltd. and the Estate of the late Zaverchand sojpal Jetha, who were plaintiffs in the High Court suit. None of those shareholders are parties to the appeal giving rise to the question, on whose authorization was the appeal as it pertains to the 1st appellant filed?

49. He continued by stating that the 4th appellant was incorporated in the year 2005 and at that time it did not hold any assets or dispose of any assets to the respondents hence, there was no basis for its claim against the respondents. Similarly, both the 1st, 2nd and 3rd respondents did not purchase any assets from the appellants or the 4th -7th respondent companies or owe any money to them; therefore, the appellants did not have any cause of action against the said respondents. Besides, the transfer and registration of the suit land in favour of the 4th respondent was not subject to challenge by virtue of ***Section 23*** of the ***Registration of Titles Act (repealed).***

50. Counsel argued that the relationship between the 1st appellant and 8th respondent was that of a willing vendor and purchaser. At no time did the 8th respondent act as the 1st appellant's agent. The sale and transfer of the suit land to the 8th respondent's nominee, the 4th respondent, was above board. It was preceded by the 1st appellant's resolution to sell the suit land which was executed by its directors in line with Article 127 of its MEMARTS. Consequently, the 1st, 2nd and 3rd appellants having represented to the 1st, 3rd and 8th respondents that the 1st appellant was selling the suit land in terms of the sale agreement were estopped under ***Section 120*** of the ***Evidence Act*** from claiming otherwise.

51. Mr. Kinyua further claimed that the 1st and 3rd respondents' shareholding in the 4th -7th respondents was proportionate to the funds pumped into the said respondents by the 1st, 2nd and 8th respondents or by companies affiliated to them. The totality of the evidence did not disclose a trust as alleged by the appellants.

52. Counsel went on to argue that the 1st respondent did not make any misrepresentation let alone coerce the 1st, 2nd and 3rd appellants when he offered his advice on how to salvage the suit land. In point of fact, prior to approaching the 1st respondent, the 1st, 2nd and 3rd appellants, conscious of the 1st appellant's dire financial straits, had already come up with a strategy of restructuring the 1st appellant through the incorporation of a new entity, that is, the 5th appellant in the year 2001; and subsequent transfer of the 1st appellant's assets to the 5th appellant. He stated that the appellants' strategy did not materialize for the simple reason that they were unable to find a financial institution willing to finance the 5th appellant to pay off the debt owing to Standard Chartered Bank.

53. Mr. Kinyua reiterated that the 1st respondent never stood in any fiduciary capacity with regard to the 1st, 2nd and 3rd appellants and that the same was not an issue which fell for determination before the trial court. Contrary to the appellants' contention, they obtained independent legal advice from Messrs Singh Gitau regarding the transaction as evidenced in the sale agreement. Furthermore, the learned Judge rightly dismissed the appellants' allegation that the sale or disposal of the suit land was subject to an oral agreement. This is because ***Section 3(3)*** of the ***Law of Contract Act*** is clear that no suit with respect to disposition of land can be maintained on the basis of an oral contract.

54. As to whether the consideration of Kshs.27,000,000 paid by the 8th respondent to Standard Chartered Bank was sufficient, counsel urged that it was. His positon was predicated on an earlier sale agreement of the suit land between the 1st and 5th appellants wherein the purchase price was disclosed as Kshs.20,000,000.

55. To the respondents, setting aside of the sale and transfer of the suit land, or allowing the appeal, as sought by the appellants, would not only have an adverse ripple effect on persons who are not parties to the suit or appeal but would also occasion irreversible losses. For instance, Standard Chartered Bank will have to reimburse the sum of Kshs.27,000,000 plus interest paid to discharge the charge it held over the suit land; the collector of stamp duty will have to refund the stamp duty paid over the transaction; advocates will have to give back legal fees paid in respect of the transaction; and the charge over the suit land in favour of Giro Bank Ltd for the loan facility of Kshs.65,000,000 will have to be reversed.

56. As far as Mr. Kinyua was concerned, it was the 3rd appellant who had breached his fiduciary duty to the 4th respondent. Expounding on that line of argument, he submitted that the 3rd appellant being a director of the 5th and 6th appellants, drew cheques for rent in favour of the 4th respondent, who is registered proprietor of the suit land. However, after such cheques matured, the appellant, who also happens to be the managing director of the 4th respondent, issued cheques of similar amounts reimbursing the 5th and 6th appellants. On top of that, the 3rd appellant had misappropriated more than Kshs.1 billion from the 5th and 6th respondents.

57. Therefore, in counsel's view, the learned Judge did not err in directing the examination of the accounts held by the 5th & 6th appellants and 4th respondent or the assessment of the *mesne* profits payable by the 5th and 6th appellants in the manner he did. Be that as it may, counsel urged that the learned Judge should have granted the prayer in Misc. Applic. No. 4 of 2009, filed at the instance of the 1st and 3rd respondents, seeking the appointment of an inspector, under ***Section 165*** of the repealed ***Companies Act***, to inspect the affairs of the 5th respondent as opposed to directing an audit by auditors appointed by the parties.

58. On the cross appeal, Mr. Kinyua took issue with the learned Judge for not granting costs to the respondents. He argued that the learned Judge had no reason for deviating from the general rule that costs should follow the event. Counsel also submitted that having found that the 4th respondent was the legitimate proprietor of the suit land, the learned Judge should not have imposed the 5th and 6th appellants as its tenants. Rather he should have left it to the discretion of the 4th respondent to determine whether to allow the said appellants to continue in possession.

59. Counsel argued that the learned Judge should have granted an injunction restraining the 3rd appellant from running the affairs of the 4th and 5th respondents without the involvement of the 1st respondent. This is because, as per Mr. Kinyua, there was cogent evidence that the 3rd appellant was defrauding the 4th and 5th respondents.

60. In conclusion, Mr. Kinyua contended that the learned Judge should have imposed interest at court rates on the *mesne* profits due to the 4th respondent and monies found to have been misappropriated by the 3rd appellant.

61. In brief response to Mr. Kinyua's submissions, Mr. Ndegwa reiterated that the 1st appellant had no intention of selling the suit land. According to him, such an intention could not be inferred from the fact that there was an early agreement for sale between the 1st and 5th appellants. For the simple reason that the shareholders and directors of the two companies were from the Jetha family, thus the suit land was not being sold to an outsider.

62. In his view, the issue was not that the documents in question were executed but the trial court was required to look at the circumstances leading to the execution to determine whether the requisite intention to sell the suit land was formed on the part of the 1st appellant. Mr. Kinyua also refuted that the issue of whether the 1st respondent was a fiduciary was being raised for the first time in this appeal. He claimed that it had been raised in the High Court.

63. This being a first appeal, the Court is enjoined to reconsider the evidence, evaluate it and draw its own conclusions. Nevertheless, we ought to give due deference to the findings of the trial court unless they fall foul of proper evaluation in line with the evidence on record or

the trial Judge is shown demonstrably to have acted on wrong principles in reaching the findings he did. See ***J. S. M. vs. E. N. B.*** **[2015] eKLR**.

64. Having appraised the evidence within the confines of our jurisdiction, we find that apart from the principal issue we set out in the opening paragraph of this judgment, the other concomitant issues, some of which are dependent on the outcome of the main issue, arising from the appeal and cross appeal are:

i. Whether the parties herein were proper parties to the suit.

ii. Whether the shares held by the 1st and 3rd respondents are held in trust for the 1st appellant or its nominees.

iii. Whether the 4th respondent holds the suit land in trust for the 1st appellant or its nominees.

iv. Whether the sale agreement and transfer of the suit land should be nullified.

v. Whether the circumstances surrounding the dispute called for lifting of the corporate veil of the concerned companies.

vi. Whether the imposition of payment of mesne profits on the 5th and 6th appellants was proper.

vii. Whether there was legal basis for directing the audit of the accounts held by the 5th and 6th appellants.

viii. Whether an inspector should have been appointed under Section 165 of the Companies Act to inspect the 5th respondent's affairs.

ix. Whether the learned Judge erred in not granting costs to the respondents or imposing interest on the mesne profits and misappropriated funds.

65. This Court in ***Alfred Njau & 5 others vs. City Council of Nairobi*** **[1983] eKLR** expressed itself on the issue of standing of a party in a suit as follows:

> ***"The term locus standi means a right to appear in Court and, conversely, as is stated in Jowitt's Dictionary of English Law, to say that a person has no locus standi means that he has no right to appear or be heard in such and such a proceeding."*** *[Emphasis added]*

It is equally settled that a party is deemed to be properly joined in a suit if his/her presence is necessary for the determination of the real issue(s) in controversy. ***Black's Law Dictionary 19th Edition pg.1232*** defines a necessary party on more or less similar terms as:

> ***"A party who, being closely connected to a lawsuit, should be included in the case …"***

66. Based on the foregoing coupled with the circumstances surrounding the dispute herein, we find that the parties herein were well suited for purposes of the determination of the dispute in issue. In our view, each party played one role or the other. With respect to the 1st appellant, the law recognizes a company as a distinct legal personality capable of suing or being sued in its name. It is for that reason that it is not necessary for a company's directors or shareholders to be enjoined in a suit which the company is a party to. In any event, there is no complaint advanced by any of the 1st appellant's shareholders or directors that the appeal was instituted without the requisite authorization.

67. It is not in dispute that the 1st appellant's directors executed the resolution to sell the suit land, the sale agreement and ultimately, Ateet, his mother and brother, as directors of the 4th appellant, executed the MEMARTS relating to the 4th -7th respondents. Equally, it is not in dispute that the aforesaid documents as well as the transfer of the suit land are what led to the arrangement that the parties find themselves in. The appellants challenge the validity of those documents on a number of grounds, including that Arvind duped the 1st, 2nd and 3rd appellants into his deception that the resulting transactions and shareholding in the 4th - 7th respondents was merely on paper. On our part, the issue as we see it is whether a purchaser (and specifically a person held in trust) can indeed purchase your land by charging your own land and assets and the owner of the land does not benefit in any way. Is that a legitimate purchase?

68. Secondly, the appellants imputed that the transactions had been vitiated by undue influence exerted by Arvind over the 1st, 2nd and 3rd appellants. Lord Nicholls in **Royal Bank of Scotland vs. Etridge (No.2) [2002] A.C. 773** defined undue influence as ***'the taking of unfair advantage, misuse of influence, abuse of trust and confidence and a connotation of impropriety.'*** The foregoing suggests that undue influence entails the misuse of one person's position of influence he/she has over another to induce the other to enter into a transaction which is substantially not to his interest or benefit.

69. It is for that reason that the rationale behind the doctrine of undue influence is to ensure that the influence of one person over another is not abused. See ***Chitty on Contracts, 31st Edition, Vol. 1 at para 7-058.*** To put it another way, the doctrine is concerned with the manner in which the intention and/or consent of a person to enter into any given transaction was obtained. In his own words, Lord Nicholls in the ***Royal Bank of Scotland case*** succinctly set out the essence of the doctrine as follows:

> ***"The law will investigate the manner in which the intention to enter into the transaction was secured: 'how the intention was***

produced', in the oft repeated words of Lord Eldon LC, from as long ago as 1807 (Huguenin v Basely (1807) 14 Ves Jun 273 at 300, [1803–13] All ER Rep 1 at 13). If the intention was produced by an unacceptable means, the law will not permit the transaction to stand. The means used is regarded as an exercise of improper or 'undue' influence, and hence unacceptable, whenever the consent thus procured ought not fairly to be treated as the expression of a person's free will."

70. However, it is not possible to explicitly set out the criterion of determining instances and circumstances when a person can be said to have exerted undue influence over another. This is because from the very definition given by Lord Nicholls it is clear that undue influence can take many forms. Likewise, circumstances under which one person acquires influence over another and the manner in which the influence may be abused may vary from one case to another.

71. Nonetheless, undue influence can either be through overt acts of improper pressure or coercion or can be inferred from the circumstances of the relationship between the parties as discussed by Lord Nicholls in the ***Royal Bank of Scotland case***:

"The second form arises out of a relationship between two persons where one has acquired over another a measure of influence, or ascendancy, of which the ascendant person then takes unfair advantage.

In cases of this latter nature the influence one person has over another provides scope for misuse without any specific overt acts of persuasion. …Typically this occurs when one person places trust in another to look after his affairs and interests, and the latter betrays this trust by preferring his own interests. He abuses the influence he has acquired."

See also **Allcard vs. Skinner (1887) L.R 36 CH D 145.**

72. Whether or not a transaction is the end result of undue influence is a matter of fact. The general rule is that he who asserts the wrong, in this case the appellants, bear the burden of proving the same. Did they do so?

73. It is common ground that the 1st, 2nd and 3rd appellants sought Arvind's advice based firstly, on his perceived expertise, and secondly, on account of their close and trusted family relationship that he would help the 1st appellant out of its dire circumstances. The trust and confidence is evidenced by the fact that the proposals he made to the appellants' were accepted. Our position is reinforced by the following sentiments by Lord Nicholls in the ***Royal Bank of Scotland case:***

"The relationship between two individuals may be such that, without more, one of them is disposed to agree a course of action proposed by the other."

We also concur with the observation of Sir Guenter Treitel QC that of relevance is whether one party has reposed sufficient trust and confidence in the other, rather than whether the relationship between the parties belongs to a particular type of relationship. ***See Treitel, The Law of Contract, 10th Edition pg. 380–381***.

74. Looking closely at the transactions, we cannot help but note that all these transactions were spearheaded by Arvind. He did not deny that the resolution which was executed by the 1st appellant's directors emanated from him. Despite the respondents contending that the 1st appellant was represented by Messrs Singh Gitau Advocates in the sale agreement, it is rather strange that save for the sale agreement indicating as much, we could not find any correspondence from the said advocates with respect to the transaction on record. Most importantly, it is clear that it was the 8th respondent through a letter dated 18th August, 2005 under the hand of Arvind, who forwarded the duly executed sale agreement to HHM. If indeed Messrs Singh Gitau acted for the 1st appellant, why was the 8th respondent forwarding the executed sale agreement? This scenario, in our view, gave credence to the 2nd and 3rd appellants' evidence that it was Arvind who delivered the sale agreement to the 3rd appellant for execution by the 1st appellant's directors.

75. Of concern, is that it is common ground that the 4th -7th respondents had no assets to their name upon their incorporation nor did the 1st - 3rd respondents transfer any assets to the said companies. Rather, the assets they hold came from the 1st appellant namely, the suit land, brick making plant and maize milling factory, following the sale of the suit land to the 8th respondent. The purchase price of the said assets was Kshs.27,000,000 as per the sale agreement. While we are cognizant that a court is not concerned with the adequacy of consideration, when it comes to the question of enforceability of a contract, there is glaring question which cannot escape our minds. Why would the 1st appellant agree to the said purchase price while all evidence points to the fact that the estimated value of the suit land was substantially over and above the said price.

76. We do not agree with the respondents' contention that the suit land was valued at Kshs.27,000,000; nor are we impressed with the arithmetical formula set out in the their submissions with a bid to convince us otherwise. It is given that the parties do not agree on the value of the suit land but the evidence on record corroborates that it was around Kshs.150,000,000.

77. For instance, when the 8th respondent initially made an application for a loan on 21st July, 2005 to purchase the suit land to Giro bank, before the incorporation of the 4th respondent, it disclosed the estimated value as over Kshs.150,000,000. The 4th respondent in a letter dated 21st November, 2008 to Giro Bank also disclosed as much. It read in part as follows:

"…

OVERVIEW OF COAST PROPERTIES LIMITED

A loan of Kshs.40 Million and Kshs.10 Million was sanctioned total is Kshs.50Million.

SECURITY: Buildings and land of Coast Properties Limited ….

VALUATION: Originally it was valued at Kshs.100 Million plus prices of land have gone up tremendously and in nearby 1 acre of land is sold at Kshs.20Million and we expect the buildings of over 100,000 sq. ft. and land are presently valued in excess of Kshs.250 Million …."*[Emphasis added]*

What is more, there is a letter dated 18th October, 2005 from HHM calling for payment of further stamp duty by the 8th respondent on account that the property had been valued at higher value than what was reflected in the transfer. In any event, was it ever within the contemplation of the parties that the suit land should be sold for a paltry Kshs.27,000,000 and that Arvind would become one half owner? We do not think so.

78. In as much as the 1st, 2nd, 3rd and 8th respondents are adamant that they sourced financial facilities for the purchase of the suit land and working capital for the 4-7th respondents on the security of their own resources and/or resources of related companies and even went ahead to repay the facilities, the record bears otherwise. In particular, the letter of offer dated 11th August, 2005 of the aforementioned loan by Giro Bank to the 4th respondent which was accepted sets out the security of the said facility at clause 7 as follows:-

a) Acceptance of the letter of offer.

b) Resolution by the Board of Directors of the Borrower authorizing this borrowing …

c) First legal charge for Kshs. 50,000,000 over property LR. No. MN/VI/500.

d) Personal guarantee for Kshs.50,000,000 by each of the directors namely

i. A.V Shah

ii. Ateet Jetha

….

79. We also cannot help but note that despite a loan of Kshs.10,000,000 being taken out by the 8th respondent in favour of the 6th respondent, the same was not being paid by the 1st, 3rd or 8th respondents but by the 5th and 6th respondents. Our position is bolstered by a letter dated 10th April, 2007 from the 8th respondent to Giro Bank which stated in part as follows:

"OVERDRAFT ACCOUNT

We confirm we are sending Kshs.10,000,000 to Coast Maize Millers Limited … from the overdraft account.

We confirm we will service monthly interest on the same. We confirm on 10th October, 2007 we will make full payment of Kshs.10,000,000. Meanwhile we will receive two cheques on Monday for Kshs.1,300,000 from Coast Clayworks Limited and Kshs.200,000 from Coast Maize Millers Limited which we authorize you to reduce the loan account."

80. There is also a letter dated 21st November, 2008 addressed to Giro Bank confirming the sale of milling plant assigned to the 6th respondent and the utilization of the proceeds therein as follows:

"OVERVIEW OF COAST MAIZE MILLERS

We confirm no debenture or facilities were created.

…

MAIZE MILLING PLANT: We confirm we sold the milling plant to Mombasa Maize Millers Limited in May, 2008 at a value of Kshs.45Million. Proceeds from the sale fully utilized in reduction of group exposure…"*[Emphasis added]*

81. All in all, the bulk of the evidence on record shows that financial facilities extended to the 4th -7th respondents were substantially secured by the suit land, brick making plant or the maize milling plant. We cannot take away from the 1st, 2nd and 8th respondents that in certain instances they supplemented the securities in question by giving shares held by the 2nd respondent and her daughter in Mumias Sugar with respect to Kshs.50 Million loan, personal and corporate guarantees, and in the case of Kshs.10 Million loan to the 6th respondent, a charge over the 8th respondent property.

But that is as far as they went as we can discern from the record.

82. Repayment of those facilities, as we have set out to demonstrate herein above, was met by the 4th- 7th respondents out of the proceeds of the businesses they conducted. A further confirmation that this was the mode of operation is a letter dated 25th May, 2008 by the 4th respondent to Giro Bank which read in part:

> ***"…***
>
> ***KSHS. 17.5 BANKING***
>
> ***Further to telephone discussion with Mr. Anurag, we apologize we had not given clear instructions at time of deposit.***
>
> ***As expressed earlier Kshs.7.5 Million will go under loan repayment account and Kshs. 10 Million will go in overdraft account.***
>
> ***…***
>
> ***We will continue servicing the loan account and expect further major reduction in July 2008."***

Once again, we cannot stop ourselves from thinking, what was the 1st and 3rd respondents' contribution towards the shareholding in the 4th - 7th respondents? As the record shows Arvind paid the deposit of Kshs.2,600,000 towards the purchase price of Kshs.27,000,000. However, the same was refunded to him by the appellants by cheque made out to Simpoo Investments, a company associated with Arvind. The balance of the purchase price was paid by a loan secured by Arvind from Giro Bank using the 1st appellant's property and land.

83. Taking into account the foregoing, we, unlike the learned Judge, are satisfied that the appellants did establish that they had placed their trust in Arvind to salvage the suit properties. In addition, the transactions and the arrangement that resulted from his proposal gave rise to more questions than answers. Consequently, we find that the circumstances gave rise to a presumption of undue influence on the part of Arvind as set out in the ***Royal Bank of Scotland case*** thus:-

> ***"Proof that the complainant placed trust and confidence in the other party in relation to the management of the complainant's financial affairs, coupled with a transaction which calls for explanation, will normally be sufficient, failing satisfactory evidence to the contrary, to discharge the burden of proof. On proof of these two matters the stage is set for the court to infer that, in the absence of a satisfactory explanation, the transaction can only have been procured by undue influence. In other words, proof of these two facts is prima facie evidence that the defendant abused the influence he acquired in the parties' relationship. He preferred his own interests. He did not behave fairly to the other. So the evidential burden then shifts to him. It is for him to produce evidence to counter the inference which otherwise should be drawn."***

The net effect is that the documents which gave rise to the arrangement the parties found themselves in did not reflect the true and independent consent of the 1st to the 4th appellants.

84. We also find that the aforementioned transactions meet the criteria of being regarded as unconscionable bargains as discussed at ***Para 7-133 of Chitty on Contracts (supra):***

> ***"For the doctrine to be applicable three elements must be established; first that the bargain must be oppressive to the complainant in overall terms; second that it may only apply when the complainant was suffering from certain types of bargaining weakness; and third that the other party must have acted unconscionably in the sense of having knowingly taken advantage of the complainant."***

85. What is the consequence of our finding taking into account that transactions in question resulted in the suit properties in question being vested in corporate entities which were distinct in law from Arvind? The answer lies in ***para 90 of Halsbury's Laws of England 4th Edition Volume 7 (1)***:

> ***"90. Piercing the corporate veil.***
>
> ***Notwithstanding the effect of a company's incorporation, in some cases the court will 'pierce the corporate veil' in order to enable it to do justice by treating a particular company, for the purpose of the litigation before it, as identical with the person or persons who control that company. This will be done not only where there is fraud or improper conduct but in all cases where the character of the company, or the nature of the persons who control it, is a relevant feature. In such case the court will go behind the mere status of the company as a separate legal entity distinct from its shareholders, and will consider who are the persons, as shareholders or even as agents, directing and controlling the activities of the company."*** *[Emphasis added]*

86. In our view, Arvind was the main actor behind the veil of the 3rd and 8th respondent companies all of whom were party to the transactions which we have found were tainted by undue influence. It is evident from the record that he treated the said companies as an extension of himself or as this Court put it in ***Stephen Njoroge Gikera & another vs. Econite Mining Company Limited & 7 others*** **[2018] eKLR**:

> ***"A company may in many ways be likened to a human body. They have a brain and a nerve centre which controls what they do. They also have hands which hold tools and act in accordance with directions from the centre. Some of the people in the company are mere servants and agents who are nothing more than hands to do the work, and cannot be said to represent the mind or will.***

Others are directors and managers who represent the directing mind and will of the company, and control what they do. The state of mind of these managers is the state of mind of the company and is treated by law as such." *[Emphasis added]*

87. As such, neither Arvind or the 3rd and 8th respondents can hide behind the veil of incorporation more so, since it is apparent it was used for covering Arvind's improper conduct. Therefore, we lift the corporate veil of the said companies and deem them to be one and the same with respect to the transactions in issue.

88. Having done so, we find that not only do the 1st and 3rd respondents hold the shareholding in the 4th -7th respondent companies in trust for the 1st appellant but that the 4th respondent holds the suit land in trust for the 1st appellant as well. Our finding is supported by ***Twalib Hatayan Twalib Hatayan & Anor vs. Said Saggar Ahmed Al-Heidy & Others*** **[2015] eKLR** wherein this Court expressed:-

"In the absence of an express trust, we have trusts created by operation of the law. These fall within two categories; constructive and resulting trusts…

A constructive trust is an equitable remedy imposed by the court against one who has acquired property by wrong doing. … It arises where the intention of the parties cannot be ascertained. If the circumstances of the case are such as would demand that equity treats the legal owner as a trustee, the law will impose a trust. A constructive trust will thus automatically arise where a person who is already a trustee takes advantage of his position for his own benefit (see Halsbury's Laws of England supra at para1453). As earlier stated, with constructive trusts, proof of parties' intention is immaterial; for the trust will nonetheless be imposed by the law for the benefit of the settlor. Imposition of a constructive trust is thus meant to guard against unjust enrichment." *[Emphasis added]*

89. Further, we hold that notwithstanding the fact that the 4th respondent's title was registered under ***Section 23*** of the repealed ***Registration of Title Act*** the same was impeachable in the circumstances stated herein above. To that extent, we concur with Waki, J.A in ***Kenya National Highway Authority vs. Shalien Masood Mughal & 5 others*** **[2017] eKLR** wherein he quoted with approval the sentiments of the High Court in ***Chemei Investments Limited vs The Attorney General & Others*** **- Nairobi Petition No. 94 of 2005** to the effect that:-

"The Constitution protects a higher value, that of integrity and the rule of law. These values cannot be side stepped by imposing legal blinders based on indefeasibility. I therefore adopt the sentiments of the court in the case of Milan Kumar Shah & 2 Others vs. City Council of Nairobi & Another (supra) where the Court stated as follows, "We hold that the registration of title to land is absolute and indefeasible to the extent, firstly, that the creation of such title was in accordance with the applicable law and secondly, where it is demonstrated to a degree higher than the balance of probability that such registration was procured through persons or body which claims and relies on that principle has not himself or itself been part of a cartel which schemed to disregard the applicable law and the public interest."

90. As we conclude, we reiterate that the core elements that persuade us to find for the appellants are:

1) First, as we have pointed out earlier, there was indeed a relationship of trust between the appellants and Arvind who was a very close family friend. He offered to help the appellants reorganize and restructure their businesses out of their financial quagmire. Instead of using his positon strictly as a trustee, Arvind set out in a scheme to purchase the property at a paltry Kshs.27,000,000 thus unjustly enriching himself. He was clearly conflicted between his duties as a trustee and his scheme to purchase the property.

2) In any event, and notwithstanding the trust relationship, Arvind's purchase of the property smacks of deceit and misrepresentation. Indeed he did not utilize any of his personal funds to purchase the property. What in fact he did was to approach the Standard Chartered Bank which was owed Kshs.27,000,000 in debts to say that he indeed had a sale agreement with the appellants to purchase the assets for Kshs.27,000,000; that he would remit the same to the bank in exchange for a discharge of the charge. Standard Chartered Bank agreed and asked for a deposit of Kshs. 2,700,000. Arvind indeed paid them the deposit of Kshs.2,600,000 (not Kshs.2,700,000) then approached Giro Bank for a loan of Kshs.50,000,000 against the security of the appellants land and utilized part of the same to repay Standard Chartered Bank. Meanwhile, the Kshs.2,600,000 deposit Arvind paid was reimbursed to him by the appellants by a payment made to Simpoo Investments, a company associated with Arvind. That effectively means that Arvind paid almost nothing towards the purchase of this property. Quite simply, a purchaser cannot buy your property by charging the same property to obtain a loan to buy it from you and then leave you as chargor with the obligation to repay the terms of the loan without undue influence and unjust enrichment.

3) Arvind's actions were clearly irregular, deceitful, in breach of his trust obligations and resulted in his unjust enrichment.

91. Having expressed ourselves as herein above, it follows that the 1st appellant remains the true and beneficial proprietor of the suit land and as such, only the 1st appellant could maintain a suit for trespass against the 5th and 6th appellants. Accordingly, we find that the imposition of payment of mesne profits by the 5th and 6th appellants was unwarranted. Similarly, the order directing assessment of the rent payable had no basis.

92. Not forgetting the other suits which were consolidated with H.C.C.C No. 9 of 2011, we make the following orders:

a) H.C.C.C No. 2 of 2009 relating to the shareholding in the 4th -7th respondents' herein is determined in the terms of this judgment.

b) H.C.C.C No. Misc. Cause No. 4 of 2009- wherein the 1st and 3rd respondent sought the appointment of an inspector to inspect the affairs of the 5th respondent has no merit and is hereby dismissed.

c) H.C.C.C Nos. 21,22,23& 24 of 2009- Also related to the issue of shareholding is determined in the terms of this judgment.

93. Accordingly, we find that the appeal herein succeeds while the cross- appeal lacks merit and is hereby dismissed. For purposes of clarity, we hereby set aside the High Court's judgment dated 22nd December, 2017 and the orders therein and substitute the same with the following orders in respect of the issues we had set out in the preceding paragraphs:

a) A declaration that the shares held by the 1st and 3rd respondents in the 4th -7th respondents are held in trust for the 1st appellant or its nominees.

b) A declaration that the suit land is held in trust for the 1st appellant or its nominees.

c) An order nullifying the sale agreement dated 31st August, 2005 and the transfer of the suit land to the 4th respondent.

d) We direct that the transfer of the suit land to the 1st appellant or nominees is subject to the existing encumbrances on the title thereto.

e) Parties are directed to meet their obligations towards repayment of any existing loans.

f) We find that the circumstances surrounding the dispute called for lifting of the corporate veil of the 3rd and 8th respondent companies.

g) In light of the afore stated reasons there was no basis:

i. for the imposition of payment of mesne profits on the 5th and 6th appellants.

ii. for the audit of the accounts held by the 5th and 6th appellants.

iii. for appointment of an inspector under Section 165 of the Companies Act.

94. As costs follow the event, we award the same to the appellants both at the High Court and here.

Dated and delivered at Mombasa this 4th day of April, 2019.

ALNASHIR VISRAM

JUDGE OF APPEAL

W. KARANJA

JUDGE OF APPEAL

M. K. KOOME

JUDGE OF APPEAL

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

DEPUTY REGISTRAR