



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OUKO (P), GATEMBU & KANTAL, J.J.A.)

CIVIL APPEAL NO. 16 OF 2015

BETWEEN

TRUST BANK LIMITED.....APPELLANT

AND

AJAY SHAH.....1ST RESPONDENT

NITIN CHANDARIA.....2ND RESPONDENT

VINOD PATEL.....3RD RESPONDENT

JIGNESH DESAI.....4TH RESPONDENT

(An appeal against the Judgment and Decree of the High Court at Nairobi (F. Azangalala, J.) (as he then was) dated 22nd November 2001

in

H.C.C.C No. 875 of 2001

JUDGMENT OF THE COURT

Trust Bank Limited, the appellant is a company incorporated in Kenya to conduct business as a bank while the respondents were its employees. The 1st respondent was its Executive Chairman, 2nd respondent the Executive Director in charge of International Division, the 3rd respondent was the Manager, Correspondent Banking and the 4th respondent the Personal Assistant to the 1st respondent.

By an amended plaint dated 16th July, 2001 the appellant sought to recover the sum of USD 2,693,258 and Kshs. 266,888,741 plus compound interest, general damages and costs from the respondents for allegedly embezzling those sums through fraudulent schemes; that the respondents in breach of their statutory duties as trustees of the appellant's property, conceived the idea of obtaining money by fraud from the appellant using their positions of employment; that on 11th May, 1998, in the implementation of the said fraudulent scheme, the 1st and 2nd respondents contacted four overseas banks with which the appellant had established correspondent banking relationships and falsely misrepresented to them that the appellant required a loan facility of USD 2,250,000 as pre-export finance for its customer known as Trust Agencies Limited; that the 3rd respondent on the same day wrote to the overseas banks and falsely misrepresented the fact that the Kenyan Exchange Control Regulations applicable to the said financing had been complied with; that acting on these false misrepresentations, the overseas banks disbursed the said funds in terms of the mandate given by the respondents to the appellant's overseas account at First Union National Bank in Charlotte USA; that further on 14th May, 1998 the respondents caused three fictitious and valueless Fixed Deposit Receipts (FDR) to be opened in the name of Trust Agencies Limited totaling Kshs. 124,885,000 which they later transferred to third parties; that the respondents created false book entries and failed to record entries of cash movements in the customer's accounts; and that by reason of the alleged fraud, the appellant suffered loss and damage in the sums claimed in its amended plaint. The appellant insisted that Trust Agencies Limited was a non-trading company owned or controlled by the 1st and 4th respondents; and that at the material time it was not licensed to carry on such business.

The respondents rejected those allegations and maintained that the transactions in question were normal banking undertakings between the appellant and its customer, Trust Agencies Limited. As a result, they denied personal liability and instead blamed Trust Agencies Limited

which in their view had admitted liability and even partly settled the appellant's claim.

This evidence was placed before Azangalala, J (as he then was) who identified and determined a single issue in the dispute; whether the appellant was entitled to the orders sought. Accordingly, he said, the burden of proving that Trust Agencies Limited was a fictitious decoy created by the respondents to siphon funds from the appellant rested on the appellant as required by **section 107** of the Evidence Act. In order to answer the sole question, he had posed, the learned Judge considered various aspects of the dispute and found as a fact, for instance that Trust Agencies Limited had a long standing relationship with the appellant; that Trust Agencies Limited owned property which it had charged to the appellant in respect of the transaction in contention; that it was a separate legal entity; and that there was no evidence from the Registrar of Companies confirming the contrary. With that he rejected the assertion that Trust Agencies Limited was a fictitious entity. The Judge wondered why the appellant did not apply to lift the corporate veil if it wanted to apportion liability to the directors of the said company.

With regard to the second part of the claim, where it was alleged that respondents had caused three fictitious Fixed Deposit Receipts (FDR) to be opened in the name of Trust Agencies Limited in the sum of Kshs. 124,885,000, the Judge found no proof that Kshs. 124,885,000 was misappropriated by the respondents, in the absence of the original Fixed Deposit Receipts (FDR) and the relevant ledgers which contained details of the FDR transactions. The failure of the appellant to join Trust Agencies Limited in the proceedings was, according to the Judge fatal. For these reasons the appellant's claim was dismissed. Parties were to bear their own costs of the suit.

Aggrieved by this decision, the appellant has lodged this appeal on 11 lengthy grounds, contending that the learned Judge erred: by dismissing the case on the ground of non-joinder of Trust Agencies Limited contrary to the provisions of the repealed **Order 1 Rule 9** of the Civil Procedure Rules; by not appreciating that the appellant could not sue or join Trust Agencies Limited in the proceedings as it had no cause of action against Trust Agencies Limited because the respondents merely used the name of Trust Agencies Limited; by failing to apply the correct law and appreciate the cause of action pleaded against the respondents; by failing to appreciate that the appellant's burden of proof was to demonstrate that the respondents committed fraud and statutory breaches which resulted in loss; and therefore by making these fundamental errors the Judge misdirected himself, erred in his assessment of evidence and came to a wrong conclusion.

Before us learned counsel, Mr. Oyatsi for the appellant reiterated that the respondents as officers of the appellant through their actions contributed to the financial loss the appellant suffered for which the Court was urged to find them liable; that by the 3rd respondent failing to appear in court to state his case and having admitted to have approved the loan to Trust Agencies Limited together with one Jitul Shah, it followed that the appellant's claim against him was proved; similarly that the 4th respondent also admitted to being a director of Trust Agencies Limited but did not appear to prove that Trust Agencies Limited applied for the loan facilities in question; that contrary to what the learned Judge found, the appellant did not plead that Trust Agencies Limited was a non-existent company. For these reasons it was urged that the appeal be allowed.

The combined effect of the response by Mr. Ngaca learned counsel for the 1st and 4th respondents and Mr. Singh for the 3rd respondent, both of whom agreed with the learned Judge was that the non-joinder of Trust Agencies Limited was fatal since from the onset the appellant maintained that there was no loan granted to Trust Agencies Limited; that contrary to the appellant's assertion its own managing officers as well as Trust Agencies Limited itself acknowledged the loan in writing; that the facility granted to Trust Agencies Limited by the appellant was fully secured through a legal charge over properties L.R No. 12715/258 and L.R No.209/11822; that when the account went into default, both the appellant and Trust Agencies Limited negotiated a settlement which resulted in the appellant accepting Kshs. 150,000,000 by way of assignment of deposits and a cash payment of Kshs. 25,000,000 as full and final settlement and to discharge the debt. The evidence presented revealed that the sum of USD 2,250,000 allegedly siphoned and stolen by the respondents was in fact remitted to the appellant. It was finally argued that the jurisdiction of this Court was not properly invoked as the notice of appeal was served on M/s Singh Gitau Advocates as opposed to the 3rd respondent's advocates, M/s Mukite Musangi & Company Advocates in violation of **Rule 77(1)** of the Court of Appeal Rules (repealed).

We confirm here that the 2nd respondent did not take part in the proceedings in the court below and before this Court. It was explained that he relocated from the jurisdiction after the institution of the action in the court below.

This is a first appeal and as has been stated time and time again, this Court's primary role is to re-evaluate, re-assess and re-analyse the evidence on record and then to determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way. (See; **Abok James Odera & Associates V. John Patrick Machira t/a Machira & Co. Advocates**, Civil Appeal No. 161 of 1999).

In our estimation the appeal requires determination on the questions of jurisdiction, non-joinder of Trust Agencies Limited and liability of the respondents.

Starting with the easier one, an appeal to this Court is commenced only upon the filing and serving of the notice of appeal. It is indeed the notice of appeal that gives the Court the jurisdiction. According to Mr. Singh the Court's jurisdiction was not properly invoked as the notice of appeal was served on him yet he was not on record for the 3rd respondents; that the firm of M/s Mukite Musangi & Company Advocates being on record for the 3rd respondent ought to have been served.

While **Rule 76(1)** of the Court of Appeal Rules, (repealed) which has the same provision word for word as the present Rules under **Rule 77(1)** imposes a mandatory duty on the appellant to serve a notice of appeal on all persons affected, and whereas it is settled that jurisdiction is everything and that without it a court must down its tools, it is equally trite that the party challenging the validity of a notice of appeal must do so timeously as illustrated in **Rule 77** of the Court's present rules, that:

“77. (1) An intended appellant shall, before or within seven days after lodging notice of appeal, serve copies thereof on all persons directly affected by the appeal” Rule 80, of the repealed rules on the other hand (which has the same provision as the present **Rule 84**) required that;

“A person affected by an appeal may at any time, either before or after the institution of the appeal, apply to the Court to strike out the notice or the appeal, as the case may be, on the ground that no appeal lies or that some essential step in the proceedings has not been taken or has not been taken within the prescribed time:

Provided that an application to strike out a notice of appeal or an appeal shall not be brought after the expiry of thirty (30) days from the date of service of the record of appeal on the respondent.” (Our Emphasis)

The Court reiterated in **Joyce Bochere Nyamweya V. Jemima Nyaboke Nyamweya & another**, Civil Application No. 22 of 2015, that parties are bound by the mandatory nature of the proviso to **Rule 80**, and that failure to apply for striking out within 30 days is itself an infraction since time is of essence.

Essentially, we are being invited at this point to strike out the notice of appeal on the ground that it was not properly served. The invitation has come in the 3rd respondent’s submissions filed ten years after the notice of appeal was filed and served, albeit to a wrong firm of advocates. In any case, the 3rd respondent has suffered no prejudice as he has throughout in this appeal been represented by the firm of Mukite Musangi & Company Advocates.

Turning to the issue of non-joinder of Trust Agencies Limited to the proceedings, it was the appellant’s position that it had no cause of action against Trust Agencies Limited; that the claim was against the respondents who perpetrated the embezzlement of funds using the name of Trust Agencies Limited.

Order 1 Rule 3 of the Civil Procedure Rules provides that;

“(3). All persons may be joined as defendants against whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative, where, if separate suits were brought against such persons any common question of law or fact would arise”.

Rules 9 and 10, however remind us that a suit cannot be defeated merely by reason of the misjoinder or non-joinder of parties, and that the court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it; and that the court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any person whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.

The question to be considered is whether Trust Agencies Limited was a necessary party whose presence before the court was essential for the effectual and complete adjudication upon and settlement of all questions involved in the suit. Differently stated, was Trust Agencies Limited an entity against whom any right to relief in respect of the transaction in question was alleged to exist.

The amended plaint makes mention of Trust Agencies Limited no less than five times. It was all along the appellant’s case that the respondents, using their positions in the appellant’s bank, hatched a scheme to defraud the appellant. To be used in this plot was Trust Agencies Limited. The appellant then pleaded in the following paragraphs of its amended plaint how the scheme was to be actualized;

“7. On 11th May, 1998 or thereabout and pursuant to the said fraudulent scheme or in the implementation thereof, the First and Second Defendants contacted four separate overseas banks with which the Plaintiff had established correspondent banking relationship and falsely misrepresented to them that the Plaintiff required a loan facility of US\$. 2,250,000.00 as a pre export finance for its customer known as Trust Agencies Limited.

8. The Defendants knew that the said information was false as the said Trust Agencies Limited, a local company owned or controlled jointly or severally by the Fourth and First Defendants, was a non-trading Company which at the material time was not licenced to carry on any such business and in any event had not applied for or been granted such facility by the Plaintiff. The Fourth Defendant owned shares in the said company in his own right and/or as a proxy of the First Defendant.” (Our emphasis).

The appellant further claimed that the four overseas banks disbursed the sum of USD 2, 250, 000 into the appellant’s overseas account with First Union National Bank, Charlotte, USA; that the respondents then embezzled the funds for their personal benefit and failed to remit the funds to the appellant for further disbursement to its said customer, Trust Agencies Limited, as they had led the overseas lenders and the appellant to believe.

The appellant also charged that the respondents created three fictitious Fixed Deposit Receipts (FDR) of Kshs. 124,885,000 to create a false impression that a sum of USD 2,250,000 had been remitted in the name of Trust Agencies Limited.

Based on all this the learned Judge in his judgment understood the appellant to be saying that Trust Agencies Limited was **“a phony, dummy and conduit”** company that was incorporated by the respondents to commit a fraud on the appellant. With respect, we agree with the learned Judge that that is the picture painted by the appellant. The so-called scheme to defraud the appellant centered around that company. It was the reason given for the loan facility; that it required USD 2,250,000 as pre-export finance. It was also alleged that Trust Agencies Limited had not applied for the facility as it was not licenced to carry on the business of export; that it was a non-trading company and that the appellant had not granted to it any financial facility. How then, with this, can one say that there was no cause of action against Trust Agencies Limited? It is as strange as it is perplexing that the appellant would claim that the cause of action was not against Trust Agencies yet all the alleged fraudulent transactions were said to have been carried out under the name of Trust Agencies Limited. With respect we are in agreement with the conclusion reached by the learned Judge on this question that:

“If the plaintiff had ascertained the directors of Trust Agencies and believed they had committed any improprieties, I see no reason why the plaintiff would not request that its veil of incorporation be lifted and proceedings be commenced against the directors.

As matters stand now, Trust Agencies has a life of its own independent of the defendants. The plaintiff has made various allegations against it. The allegations are grave and involve huge sums, yet the plaintiff has sought no orders against it and no orders can be made against it unless it is joined to these proceedings.”

There cannot be any explanation or justification for failure to join Trust Agencies Limited to the suit to answer to the allegations of fraud said to have been undertaken in its name. We note that the appellant filed a notice requiring the 4th respondent to produce documents, *inter alia* the memorandum and articles of association, the certificate of incorporation and annual returns from inception up to 2001 for Trust Agencies Limited. Since these documents belong to Trust Agencies Limited, by applying for their production the appellant was in effect acknowledging the central role of the company in the alleged fraud.

There was, therefore every reason for the company to be part of the proceedings as its presence before the court was necessary for the effectual and complete adjudication upon and settlement of all questions involved in the suit.

The transaction, as we see it, was between two companies, the appellant and Trust Agencies Limited. This leads us to the next question. Were the respondents liable to indemnify the appellant for the alleged loss in the sums of USD 2,693,538 and Kshs. 266,888,741.50?

In answering this question, we bear in mind that the onus was on the appellant to demonstrate that Trust Agencies Limited was fraudulently used as a conduit to siphon funds to the respondents. Allegations of fraud are by their nature serious as they carry with them penal consequences that may further infringe on a person’s right to liberty hence the insistence that fraud ought to be specifically pleaded, with particulars thereof, and proved on a higher standard than on a balance of probabilities. See **Bruce Joseph Bockle V. Coquero Ltd**, Civil Appeal No. 41 of 2013. In **Nancy Kahoya Amadiva V. Expert Credit Limited & Another**, Civil Appeal No. 133 of 2006, this Court expressed itself as follows on the standard and burden of proving fraud.

“We have previously held that in cases where fraud and/or misrepresentation is alleged, it is not enough to simply infer fraud from the facts.

As they are serious allegations, the onus is on the party alleging fraud to provide evidence to the court that rises to the standard of proof which was underscored by this Court in Central Bank of Kenya Limited v Trust Bank Limited & 4 Others [1996] eKLR as being beyond that of a balance of probabilities.....In this case, to succeed in the claim for fraud, the appellant needed to not only plead and particularize it, but also lay a basis by way of evidence, upon which the court would make a finding.”

For the appellant to discharge this burden it had to demonstrate that the respondents, who being in control of Trust Agencies Limited, initiated and carried out the transactions in question.

To begin with, Trust Agencies Limited was a limited liability company with full attributes of such a company. Those attributes are old hat; that a company is a separate legal person from its shareholders and directors. See **Salomon V. Salomon Company Limited** [1895-99] All ER 33, where the law was laid thus;

“The company is at law a different person altogether from the subscribers to the memorandum; and, though it may be that after incorporation the business is precisely the same as it was before, and the same persons are managers, and the same hands receive the profits, the company is not in law the agent of the subscribers or trustee for them. Nor are the subscribers as members liable, in any shape or form, except to the extent and in the manner provided by the Act.” (Our emphasis).

Apart from the 4th respondent who, as common factor, was a director of Trust Agencies Limited, there was nothing to link the rest of the respondents to Trust Agencies Limited. For example, the 1st respondent expressly denied being a director or shareholder of the company or that a third party was holding shares in the company as his proxy. As for the 3rd respondent, it is only alleged that as an employee of the appellant and in breach of his statutory duty as a trustee of the former’s property, he together with the other respondents fraudulently obtained the funds in question. Whereas the application for the dollar facility was co-signed by both the 3rd respondent and one Jitu Shah, the latter was not sued. The 1st and 3rd respondents were categorical that there was no fraud in the transaction; and that the loan was obtained procedurally and received by the appellant. Therefore, the respondents, save for the 4th respondent, are not associated with Trust Agencies Limited. And even for the 4th respondent, no proof of impropriety on his part was presented. Likewise, no proof was availed as to how all the respondents breached any of their duties as employees of the appellant or how they benefited from the transaction. They satisfactorily explained their roles as employees of the appellant who, in the course of their work, did what they are being accused of, innocently and honestly.

Because a director has a fiduciary duty to act in the best interests of the company, its shareholders, its employees and its creditors, in the matter before us in order to hold the directors of Trust Agencies Limited personally liable for the debts of Trust Agencies Limited it has to be shown, after lifting or piercing the corporate veil that they engaged in wrongful trading when the company was insolvent, or that they had signed a personal guarantee, or they had been involved in deceit and fraud.

See **Githunguri Dairy Farmers Co-operative Society v Ernie Campbell & Co. Ltd & another**, Civil Appeal No. 123 of 2011 where this Court stated:

“... Further, the law is that courts will disregard the veil of incorporation where it is apparent that the device of

incorporation is used for some illegal, fraudulent or improper purpose. See *Mugenyi & Company Advocate v The Attorney General* (1999) 2 EA 199.”

According to *Gower’s Principles of Modern Company Law* 4th Edition at pages 136 to 138 the corporate identity of a company can be pierced in the interest of the company’s creditors where it is suspected that the company has violated the law or where a company has traded fraudulently.

A similar observation is made in *Halsbury’s Laws of England* 4th Edition Volume 7 (1) where it is posited that the law is prepared to recognize a company as an alias of its members when corporate personality is being blatantly used as a cloak for fraud or improper conduct. The way this ought to have been done in the matter before us was by piercing the corporate veil to prove that the respondents were transacting under the name of Trust Agencies Limited and that the company was in fact a mere shell. Paragraph 90 of the *Halsbury’s Laws of England 4th Edition Volume 7 (1)* describes the instances of piercing the corporate veil as follows:

“90. 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. However, where this is not the position, even though an individual’s connection with a company may cause a transaction with that company to be subjected to strict scrutiny, the corporate veil will not be pierced”:

In *VTB Capital PLC V. Nutritek International Corp & Another & 3 Others* (2012) EWCA Civ 808, the Court of Appeal (UK) observed that;

“...if the corporate veil is to be pierced, “the true facts” must mean that, in reality, it is the person behind the company, rather than the company, which is the relevant actor or recipient (as the case may be).”

For the corporate veil to be pierced, the company in question should be party to the proceedings.

Enough on the law.

The truth of the matter from the evidence obtaining on record is that Trust Agencies Limited was a customer of the appellant, operating account number 0181390001 in the appellant’s Moi Avenue Branch since 30th October, 1993 and had previously been granted a loan by the appellant. Beyond any debate, it was established that the directors of the company were the 4th respondent and one Azim Desai. The latter was not joined in the proceedings. The letters seeking funding from the four overseas banks were submitted by the appellant and not any of the respondents on behalf of Trust Agencies Limited. We entertain no doubt that the loan was indeed disbursed to Trust Agencies Limited upon approval by the appellant’s Credit Department. The loan was duly secured by legal charge over two properties, LR. Nos. 12715/258 situated in Athi River and LR. NO. 209/11822 situated in Nairobi, registered in the name of Trust Agencies Limited. Trust Agencies Limited admitted its indebtedness to the appellant and even made part payment.

It is equally true that out of the funds sourced from overseas banks USD 750,000.00 and USD 1,500,000.00, respectively were sold to Citi Bank, Nairobi through the appellant’s corresponding bank, First National Bank Charlotte, USA, while on diverse dates the sums of Kshs. 46,687,500.00, 62,350,000.00 and Kshs. 31,410,000.00, (a total of Kshs. 140,447,500.00) were credited in the appellant’s account at the Central Bank of Kenya. In other words, it is common factor that funds received from foreign banks were credited in the appellant’s corresponding bank, the First Union National Bank Charlotte, in the United States of America. Those funds were exchanged and the equivalent value in Kenya Shillings credited in the appellant’s account with Central Bank of Kenya. This fact was confirmed by Chief Inspector Carey Nyaminda of the Banking Fraud Investigations Unit, who investigated the alleged fraud.

When the appellant was placed under statutory management and upon this dispute arising, it is on record that Trust Agencies Limited and the appellant entered into a settlement to pay the sum of Kshs. 175,000,000.00 divided into Kshs. 150,000,000.00 by assignment and cash payment of Kshs. 25,000,000.00 in full and final settlement of the loan. It was further agreed that in default of the terms of the proposal, **“the whole debt would become recoverable and the appellant would be at liberty to cancel the arrangement of assignment”**. Indeed, pursuant to this arrangement Kshs. 140,400,000.00 had been paid by the time the matter went to court, leaving a balance of balance of Ksh. 9,600,000.00. We may pose: What is the appellant’s loss or damage in those circumstances? In case Trust Agencies Limited defaulted the appellant was at liberty to recover the balance from it (Trust Agencies Limited), and no one else, least of all the respondents. There was no suggestion that Trust Agencies Limited was unwilling or unable to settle the balance save for the dispute on interest on the deposits.

Although the appellant purported in its amended plaint to rescind the payment arrangement on the ground that it had entered into it by a **“genuine mistake”**, that declaration was unilateral and had no effect because the appellant, for its part has refused to refund Kshs. 140,400,000.00 paid to it as part payment.

When sued by the 1st respondent in HCCC No. 589 of 2002, ***Ajay Shah V. Trust Bank Limited & The Deposit Protection Fund Board***, the appellant expressly admitted in its statement of defence at pages 17 and 18 paragraphs 14 and 18 that;

- i. ..the allegation that a sum of U.S Dollars 2,225,000.00 had been embezzled or not remitted to Kenya were incorrect but believed to be correct when made**
- ii. ..a part of the evidence placed before the High Court in HCCC No. 875 of 2001 was inaccurate but was believed to be**

correct when made”.

To our mind therefore the loan was procedurally applied for and obtained. It was properly disbursed and applied.

On the claim that Fixed Deposit Receipt (FDR) Numbers 7324, 7327, 7333 amounting to Kshs. 124,885,000 were fictitious, there is on record evidence that the appellant’s International Division issued instructions to its Moi Avenue Branch to issue a Fixed Deposit Receipt (FDR) in the name of Trust Agencies Limited pursuant to which an account in that company’s name was opened and the amount in question credited. The burden under **Sections 107 and 119** of the Evidence Act was on the appellant to show that the deposits were fictitious. When served with notice to produce the statements, originals of the FDRs in question and the particulars of the relevant accounts, the appellant failed to do so.

The report of the Banking Fraud Investigations demonstrated that after the sale of the dollars the equivalent in Kenya shillings was credited into the account for Trust Agencies Limited and held in the form of FDRs and security provided and acknowledged.

Most significantly the evidence of the appellant’s own witness, PW 2, Rose Detho, confirmed that the advance granted to Trust Agencies Limited was a normal debt and that the company maintained an active account.

All these said we are unable to find any material in this appeal to persuade us to upset the conclusions of the learned Judge. With respect we agree with his determination and reiterate that Trust Agencies Limited was a necessary party whose presence before the court was essential for the effectual and complete adjudication of the dispute.

No proof was rendered to show that the respondents, using their positions in the appellant and using Trust Agencies Limited as a conduit hatched a scheme to defraud the appellant. Similarly, there was no evidence that upon the four overseas banks disbursing the funds the respondents embezzled the funds for their personal benefit and failed to remit the funds to the appellant for further disbursement to Trust Agencies Limited. The so-called fictitious fixed deposit accounts were sufficiently explained.

The appeal is bereft of any merit. We accordingly dismiss it with costs to the 1st, 3rd and 4th respondents.

Dated and delivered at Nairobi this 27th day of September, 2019.

W. OUKO, (P)

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCI Arb

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR