IN THE COURT OF APPEAL

AT NAIROBI

[CORAM: GITHINJI, NAMBUYE & MAKHANDIA, JJA]

CIVIL APPEAL NO. 39 OF 2011

BETWEEN

ELIUD MUYA KARIUKI.....1ST APPELLANT/APPLICANT

AVTAR SING CHAUHAN.....2ND APPELLANT/APPLICANT

GURCHARAN SINGH KAUR.....3RD APELLANT/APPLICANT

AND

MARY WANJIRU NJENGA.....1ST RESPONDENT

MARGARET WANJIRU MAINA.....2ND RESPONDENT

WARIGI GATHURI.....3RD RESPONDENT

PAUL MANGANGA MUTERO.....4TH RESPONDENT

GATONGU FARMERS CO. LIMITED

(NOW GATTONGUH FARMERS (1999)

COMPANY LIMITED.....5TH RESPONDENT

(Being an appeal from the judgment of the High Court of Kenya at Nakuru dated and delivered at Nairobi (Luka Kimaru on 9th April, 2010)in

NAKURU HC CIVIL CASE NO. 368 OF 1997 CONSOLIDATED WITH NAKUR H.C. CIVIL SUIT NO. 123 OF 1998

****

JUDGMENT OF THE COURT

This is a first appeal arising from the judgment of the High Court of Kenya at Nakuru, **Luka Kimaru**, **J d**ated **9th April, 2010**.

The appeal arises from a determination of two consolidated suits (the suits) namely, **Nakuru HCC No.368 of 1997 and Nakuru HCCC No. 123 of 1998.** In **Nakuru HCCC NO. 368 of 1997** by the plaint dated 15th August, 1997, the 2nd and 3rd appellants sued the respondents, claiming that they were the lawful and legitimate registered owners of land parcel numbers Kabazi/Kabazi/Block 1/433 (Gathongu) and Kabazi/Kabazi/Block 1/441 (Gathogu) "the suit properties". The cause of action arose in 1997 from the respondents conduct of demanding rent from the 2nd and 3rd appellants and wantonly destroying the 2nd and 3rd appellants properties situate on the suit properties. The 2nd and 3rd appellants therefore sought an injunction to restrain the respondents by themselves, their servants, and or agents from interfering with the 2nd and 3rd appellants' enjoyment and development of the suit properties by way of demanding "rent" from the appellants together with an attendant order for costs.

The respondents filed a joint defence as Directors of Gathongu Farmers Company Limited, the rightful owner of the suit properties; that any

registration granted in favour of the 2nd and 3rd appellants was obtained illegally and fraudulently and gave particulars of fraud as conspiring with people who were not directors of the Company to have the suit properties transferred to them. That they were entitled to demand rent as of right from the 2nd and 3rd appellants on behalf of the company, the rightful owner of the suit properties; that they had filed Nakuru CMCC No. 588 of 1997 filed on 7th March, 1997 to enforce the recovery of the suit property from the 2nd and 3rd appellants who had all along been paying rent to the company as tenants. On that account the respondents prayed for the 2nd and 3rd appellants' suit against them to be dismissed with costs.

In Nakuru HCCC No. 123 of 1998, dated 6th April, 1998, Gatongu Farmers Company Ltd (the Company) sued the appellants and **James Muigai**, **Kimani Njoroge** and **Beatrice Njeri Kimani** contending that the Company was the lawful and legitimate owner of the suit properties together with all premises erected thereon; that by an agreement dated 22nd day of august, 1996, the 1st appellant and **James Muigai Njora** and **Beatrice Njeri Kimani** purporting to represent the Company fraudulently sold the suit properties to the 2nd appellant who subsequently caused the same to be registered in the 2nd and 3rd appellants names. The particulars of fraud were given as unlawfully disposing off the Company's properties through illegal use of the Company seal, obtaining the land Control board Consent to transfer the suit properties through misrepresentation; pretending that they had the Company's consent to transfer the suit properties; transferring the suit properties without following the correct procedures, obtaining and or transferring the suit properties without any written agreement or Land Control Board Consent; entering into an illegal and oppressive agreement to the detriment of the Company and transferring the company's properties to strangers.

It was further averred that the first appellant and **James Muigai Njora** who were former directors of the Company were voted out in 1986 and that the 2nd appellant had rented school premises from the company. They denied ever receiving any proceeds of sale of its properties and that titles to the suit properties were unlawfully and fraudulently obtained by the 2nd and 3rd appellants on 9th October, 1996 and 20th November, 1996 respectively.

The Company therefore sought a declaration that the Company solely owned the suit properties; that the purported agreement dated 22nd day of August, 1996 between the Company and the 2nd appellant was null and void and prayed for the cancellation of the title documents registered in the names of the 2nd and 3rd appellants over the suit properties and have both of these titles re-registered in the Company's name. They also sought a permanent injunction restraining the 2nd and 3rd appellants from developing or in any other way interfering with the suit properties together with properties erected thereon and an order for costs of the suit.

The 1st appellant, **James Muigai Njora** and **Beatrice Njeri Kimani** filed a joint defence to the respondents' claim dated 25th May, 1998, contending *inter alia* that they were the directors of the Company, and that the suit properties and all the premises erected and being thereon belonged to the Company until they were legally disposed of to the 2nd and 3rd appellants. They denied all particulars of fraud attributed to them. They admitted receiving the purchase/sell proceeds of the suit properties in full from the buyer and also contended that they acted within their powers as Directors of the Company when they disposed of the suit parcels to the 2nd and 3rd appellants; and lastly, that the correct procedures were followed when disposing of the suit properties. On that account they prayed for the Companys' suit against them to be dismissed with costs.

The two suits were consolidated and heard together pursuant to a consent order of the respective parties endorsed on 18th May, 2004. They were canvassed by way of oral testimonies of witnesses tendered by the respective parties and written submissions.

At the conclusion of the trial, the trial court evaluated the evidence and made observations thereon as follows: On the change in the Directorship of the company, the trial court made observations that, in the year 1988, the shareholders convened a meeting intending to elect new Directors; that the 1st appellant and his Co. Directors who were in office then filed Nakuru HCCC No. 10 of 1988, intending to block the meeting from being held but the court dismissed that suit paving the way for the Directors elections to be held as scheduled as borne out by the content of the minutes of the meeting held on 7th January, 1988. It was also the trial court's view, that proof that elections were held in 1998 and new Directors elected was borne out by the fact that from 1988 for a period of close to six (6) years, the 2nd appellant was paying rent to the group of Directors who were allied to DW1 **Mary Wanjiru Njenga** and who were elected to office in 1988.

On the status of the Company as at 1991, it was the trial court's observation that on 18th October, 1991, the Company was dissolved by the Registrar of Companies through a Kenya gazette Notice of the same date giving ninety (90) days of its written intention to do so and that it was the new Directors all allied to DW1 who filed Nakuru HC Mic. Application No. 113 of 1991 to revive the Company. Second, that if it was true as contended by the 1st appellant and his group that they were directors of the Company at the time, then they should have been themselves moved the court to revive the Company.

On the transfer of the suit properties from the Company to the 2nd and 3rd appellants, the trial court made observations that contrary to the assertions advanced by the 1st appellant and his group that the Company sanctioned the sale of the suit properties to the 2nd and 3rd appellants in meetings held in June, 1996 and 8th August, 1996 respectively, they had failed to tender evidence of notices convening those meetings and the list of the Company shareholders who attended those mestings and sanctioned the sale and transfer.

On the validity of the claim laid by the 2nd and 3rd appellants against the Company, the court observed that these were not genuine claims as against the Company because; first, they were skewed in favour of the 2nd and 3rd appellants as payments were not made in line with the time lines set in the agreement of sale. Second, the payments were made to the 1st appellant who had not tendered any evidence to show that those funds were either paid into the Company's account or alternatively, applied for the benefit of the Company, especially when the 1st appellant admitted that it was only him and **James Kagiri Njora** who were the signatories to the said Company. Third, if it was true as contended by the appellants that the Company and its shareholders sanctioned the sale and transfer of the suit properties to the 2nd and 3rd appellants as asserted by the appellants, the shareholders would not have turned around and demanded rent from the 2nd and 3rd appellants and

on failing to get the same is when they turned to destroy the properties on the suit properties and prevented the 2nd and 3rd appellants from carrying out any further developments on the suit properties. Fourth, the 2nd appellant did not dispute paying rent to the company through Directors allied to DW1 **Mary Njeri.**

On the totality of the above assessment, observations and reasoning on the evidence on the record, the trial court made findings thereon that the first appellant and his group were ousted from the office by ordinary farmers who were not fully conversant with the intricacies of filing of documents and returns at the Company's Registry, a position exploited by the first appellant who took advantage and exploited his knowledge for filing Company's returns to the detriment of the new Directors. Second, that upon being ousted from office, the 1st appellant refused to hand over the Company's files and seal on the basis of which the first appellant and one **Joseph Kagiri** fraudulently transferred the suit properties to the 2nd and 3rd appellants. Third, that from the overwhelming evidence on the record, the conspiracy to defraud the Company and the shares of the suit properties was hatched by the 1st and 2nd appellants.

Fourth, that in view of the findings made above, the 2nd and 3rd appellants cannot in law be said to be innocent purchasers of the suit properties for value without notice. Fifth, that from the moment the Company and shareholders came to learn of the fraudulent transfer of the suit properties from the Company to the 2nd and 3rd appellants by the 1st appellant and his group, they had been relentless in the fight to recover the suit properties. Sixth, that in its assessment of the 1st appellant's demeanor, it formed the impression that the 1st appellant was a dishonest and sly person manifest not only in forging statutory returns but also in execution of the transfer in favour of the 2nd and 3rd appellants and which action he did for personal gain as he failed to tender any evidence to show that the proceeds of sale of the suit properties to the 2nd and 3rd appellants went to the benefit of the Company and its shareholders.

On account of the above findings, the trial court dismissed the 2nd and 3rd appellants case in Nakuru HCCC No. 368 of 1997 with costs to the respondent.

Turning to the Company's claim in Nakuru HCCC No. 123 of 1998, which had been treated as a Counter-Claim to the 2nd and 3rd appellants' claim in HCCC Number 368 of 1997 and based on the same assessment and reasoning on the evidence on the record as already highlighted above, the trial court found that the company established to the required standard of proof highier than on a balance of probabilities that it was the legal owner of the suit properties and on that account issued a declaration that the company was the lawful owner of the suit properties; that the agreement dated 22nd August, 1996, entered into between the 2nd and 3rd appellants and other persons who were strangers to the Company and who had no authority whatsoever to transact any business for or on behalf of the Company was null and void; and on that account directed the that the title deed issued to the 2nd and 3rd appellants respectively on 9th October, 1996 in respect of Land Registration No. Kabazi/Kabazi Block 1/441 (Gathongu) and on 20th November 199 in respect of Land Registration No. Kabazi/Kabazi Block 1/433 (Gathongu) to be cancelled. The District Land Registrar, Nakuru was ordered and directed to re-register the suit properties in the names of the Company. The court also issued a permanent injunction to permanently restrain the 2nd and 3rd appellants from interfering with the Company's ownership, possession and occupation of the suit properties with costs.

The appellants were aggrieved and filed this appeal raising ten (10) grounds of appeal in a Memorandum of Appeal subsequently amended on 6th December, 2018 pursuant to a court order granted on 3rd December, 2018. The ten (10) grounds of appeal were subsequently condensed into three thematic issues in the appellants' written submissions dated 14th February, 2019. These read as follow:

> ***(a) Whether the respondents proved the case of fraud regarding the transfer of the suit premises by virtue of the judgment in Nakuru Chief Magistrate's***
>
> ***Court Criminal Case No. 3045 of 2005,***
>
> ***(b) Whether the learned judge properly exercised his mandate as required by law to evaluate the evidence and then rule; on the matter according to the evidence and the law,***
>
> ***(c) Whether the appellants discharged the legal burden for proof of their claim?***

The appeal was canvased by way of written submissions adopted and orally highlighted by learned counsel for the respective parties. Learned counsel **Mr. Naeku T. T** appeared for the appellants, while learned counsel **Mr. Waiganjo Mwngi** appeared for the respondents.

Supporting grounds 1 of the appeal, **Mr. Naeku** relied on the case of **Maithene Malindi Enterprises Limited versus Kaniki Karisa Kaniki & 2 others [2018] eKLR**, and faulted the trial court for erroneously imputing fraud against the 1st appellant and his group in the absence of cogent evidence tendered through PW3 that the Company records at the Company's Registry had been tampered with by the 1st appellant and secondly, that the respondent filed any notice of change of directors or annual returns with the Registrar of Companies covering the period they assumed office.

In support of ground 2 of the appeal, **Mr. Naeku** faulted the trial court for the failure to properly appreciate and give adequate weight to the evidence of PW5, a resident and a shareholder of the Company who was categorical that the respondents were not directors of the Company and that the shareholders of the Company including himself resolved to sell the suit properties to the 2nd and 3rd appellants.

On documentary evidence, **Mr. Naeku** faulted the trial court for the failure to properly appreciate the content, intent and purport of the letters dated 9th August, 1996 by Hyrax High School to the Chairman of the Company applying to buy the suit properties; dated 15th August, 1996 from Kamau & Co. Advocates addressed to the 2nd appellant in which the Company offered to sell the suit properties to the 2nd appellant; dated 9th September, 1996 from the Company addressed to the District Officer Bahati in which the Company confirmed that the Company

had deliberated the 2nd appellant's offer to purchase the suit properties and approved the offer; minutes of the Director's meeting held on 7th September, 1996 in which the Company passed a resolution to sell the suit properties to the 2nd appellant; and which evidence in **Mr. Naeku's** view all went to demonstrate that the transfer of the suit properties from the Company to the 2nd and 3rd appellants was done within the knowledge and consent of the Company's shareholders. It was therefore erroneous for the trial court to hold that the 2nd and 3rd appellants had not established to the required threshold that they were lawfully registered as owners of the suit properties.

On the documentary evidence on the directorship of the Company, **Mr. Naeku**, submitted that as at the time the suit properties were sold to the 2nd and 3rd appellants, the Directors who were in office included the 1st appellant and his group elected in 1978, and that no further elections were held thereafter until a probe committee was appointed in 1988 to look into the affairs of the Company. That is why in a general meeting held on 4th June, 1996, the 1st appellant and his group were referred to as officials of the Company. It was therefore erroneous for the trial court to hold as it did that the 1st appellant and his group were removed from the directorship of the Company in elections held in 1988.

On the sale of the suit properties to 2nd and 3rd appellant, **Mr. Naeku** submitted that documentary evidence proved that a general meeting of the Company was held on 8th August, 1996 in which the sale of the suit properties was discussed and sanctioned, following which a sale agreement was duly executed and payment of the sale proceeds was largely by cheque made out in the names of the Company and receipts issued by the Company to the 2nd and 3rd appellants.

On the fraud imputed against the 2nd and 3rd appellants, **Mr. Naeku** relied on the definition of fraud as set out in **Blacks Law Dictionary**, 8th Edition and the case of **Katanda versus Haridas and Company Ltd [2008] 2EA173**, and faulted the trial court on its finding that the sale of the suit properties to the 2nd and 3rd appellants was fraudulent. According to **Mr. Naeku,** there was no evidence led by the Respondents to demonstrate that the appellants knowingly misrepresented the truth or concealed any material facts that induced the Company to act to the detriment of its shareholders. Neither was there any evidence adduced to show that the appellants unfairly used their power as contracting parties' resulting in an unquestionable bargain in favour of the appellants especially, when no evidence to prove that the documents relied upon by the 2nd and 3rd appellants in support of their case were forgeries.

Relying on the case of **Kinyanjui Kamau versus George Kamau Njoroge [2015] eKLR and Bruce Joseph Bockle versus COQUERO Ltd [2014) eKLR,**

Mr. Naeku faulted the trial court for relying on the evidence of the existence of criminal cases as basis for vitiating the 2nd and 3rd appellants' claim when these cases were not before him for assessment

On the discharge of the burden of proof by the 2nd and 3rd appellants in regard to their claim against the respondents, **Mr. Naeku**, submitted that these appellants had demonstrated through both oral and documentary evidence that they were *bonafide* purchasers of the suit properties for value by demonstrating that they paid the purchase price to the Company in full, took possession of the suit properties and obtained the requisite consent of the Land Control Board to the said transactions.

On the respondents assertion that they were Directors of the company, **Mr. Naeku** submitted that the respondents failed to produce any Company resolution or any returns filed by them with the Registrar of Companies to demonstrate that the Company had effected any changes in its Directorship since 1988. The trial court therefore misdirected itself when it held erroneously that the agreement for the sale of the suit properties was entered into by the 2nd and 3rd appellants and the Company through persons who were strangers to the Company.

On the meetings alleged held on 7th January, the trial court was faulted for the failure to properly appreciate that the minutes of 7th January, 1988 failed to indicate where the said meeting had been held, who recorded the minutes, whether a resolution was passed to hold elections and the names of persons who offered themselves for election, especially when the respondents failed to call the Area Chief who chaired the meeting as a witness to confirm that such a meeting ever took place. Second, no notice of change of Directors was ever exhibited or filed with the Registry of Company's.

On the minutes of the meetings of 8th August, 1996 and 7th September, 1996, **Mr. Naeku** submitted that the minutes were not forgeries but authentic minutes as they indicated clearly where the meetings were held, who recorded the minutes and the presence of the Directors; that correspondences exchanged between the 2nd and 3rd appellants and M/s Kamau & Co. Advocates on behalf of the Company and which were not impugned demonstrated clearly that the appellants entered into a bona fide sale/purchase transaction with the Company over the suit properties; following the sanctioning of the transaction by the members of the company passed in the meeting held on 8th August, 1996 in which a resolution to sell the suit properties to the 2nd and 3rd appellant was passed.

On the evidence of DW1 **Mary Wanjiru Njenga, Mr. Naeku** faulted the trial court for the failure to appreciate that she had no document to show that any notice was issued for the meeting held on 7th January 1988; that the agenda of the said meeting included elections of Directors; that there was rivalry between a group led by **Wilson Kaburu Ng'ang'a** and the group led by the first appellant; that although she denied the signature and the reports attributed to her alleging forgery, no report was made by her to the police. Neither did she call any expert witness to confirm that it was a forgery. There was therefore no basis upon which the trial court could have used the evidence of DW1 to discount the evidence tendered through the first appellant as corroborated by the testimony of PW5, to hold that there was no Company's resolution sanctioning the sale of the suit properties by the company to the 2nd and 3rd appellant capable of enforcement.

On the evaluation of evidence tendered through PW3, ***Charles Mutuku Nzau***, the trial court was faulted for the failure to appreciate PW3's statement that the respondents were not directors of the company as at the time the suit properties were sold to the 2nd and 3rd appellants as the only application for change of directors traced in the company file at the Registrar of Companies' Registry was the one filed in 2006.

Mr. Naeku relied on the case of **Shah versus Mbogo & Another [1967] E.A. 116** and urged us to allow the appeal, reverse the impugned judgment and allow the 2nd and 3rd appellant's claim against the respondents and dismiss the respondents' counterclaim against the appellants.

Opposing the appeal, **Mr. Waiganjo Mwangi** condensed the appellant's grounds of appeal into two as follows:

> (i) whether the trial judge shifted the burden of proof and failed to consider the issues as raised by the parties in the pleadings and exhibits produced in court;
>
> (ii) whether the title sought to be altered was not produced in court thus nullifying the decision of the trial court;

On the 2nd and 3rd appellants claim against the company, **Mr. Mwangi** submitted that the respondents' opposition to the 2nd and 3rd appellants' claim against them was based on fraud, pleaded at paragraph 4 in their defence to the appellants claim in HCC No. 368 of 1997 and subsequently particularized in their suit in HCC No. 123 of 1998, treated as a counterclaim to the 2nd and 3rd appellants' claim.

On the evidence, **Mr. Mwangi** submitted that:

> "The 2nd appellant admitted that when he took over the school in 1991 from the initial owners, he found an existing lease between the initial owners and the Company effective 10th January, 1987; that he was a rent paying tenant of the Company and paid rent to the probe committee which included D.W. 1 from 1991 upto March 1996 and used to be issued with a receipt by the said committee in the name of the Company. At no time during that period did the 2nd appellant mention that he ever paid any rent to the 1st appellant and his group from 1991 upto March, 1996 in their capacity as directors of the Company."

On documentary evidence, **Mr. Mwangi** submitted that payments receipt dated 22nd August, 1996 for Kshs 80,000.00 meant for the purchase of Kabazi/Kabazi block 1/441 and 443 **Gathongu**, while the agreement dated 22nd August, 1996 purportedly pursuant to which the payment reflected in the receipt dated 22nd

August 1996 was supposed to be was in respect of property referenced to as Kabazi/Kabazi Block 1/274 and 433. Secondly, if the Board of Directors of the Company resolved to sell the suit properties to the 2nd appellant based on a meeting held on 7th September, 1996 and as supported by the minutes dated 10th September, 1996, then as at 22nd August, 1996 when the 2nd appellant purportedly purchased the suit properties, there was no Company resolution sanctioning the sale of the suit properties to the 2nd appellant; thirdly, Kabazi/Kabazi Block 1/274 was subdivided after 27th September, 1996 as per the contents of the mutation form exhibited on the record; fourthly, the 2nd appellant admitted that although they produced receipts issued to him bearing the name of the Company as proof of payment of the purchase price for the suit properties, all the said payments were made to the 1st appellant and **Joseph Kimani Kagiri**; fifthly, that although the 1st appellant admitted in evidence that he received money paid by the 2nd appellant towards the purchase of the suit properties, he failed to account for the said monies or to demonstrate that it was applied for the benefit of the Company and its shareholders, especially when he conceded on oath that him and **Joseph Kimani Kagiri** were the only signatories to the account into which the proceeds of the sale of the suit properties were deposited.

On the evidence relating to Company matters, **Mr. Mwangi** submitted that the receipts issued by the 1st appellant to the 2nd appellant were from a receipt book bearing the name of the Company under the hand of the 1st appellant which confirmed the respondent's assertions that the 1st appellant and his group when they were shown the door, left with the Company seal and other properties including receipt books; that since the 2nd appellant admitted in evidence that issues between him and the Company started after he stopped paying rent that was sufficient demonstration that both the Company and the shareholders were not involved in the sale of the suit properties; that, the 2nd appellant was categorical in his evidence on oath, that it is the 1st appellant who pressurized him either to purchase the suit properties or surrender the lease, which evidence was neither challenged nor controverted by the 1st appellant; that the 2nd appellant offered no explanation as to why he never contacted the members of the probe committee to whom he had been paying rent before the property purchases especially when there was no evidence that he had prior to the sale transaction ever dealt with the 1st appellant and his group before being pressurized to enter into the agreement for the purchases of the suit properties. He cannot therefore in the circumstances claim to be an innocent purchaser for value without notice because according to **Mr. Mwangi**, had he exercised due diligence when purchasing the suit properties, he would have arrived at the only logical conclusion that the suit properties belonged to the Company.

Turning to the evidence on the transferees of the suit properties from the company, **Mr. Mwangi** submitted that the sale agreements for the suit properties only bear the names of the 2nd appellant while the transfers were effected in the names of both the 2nd and 3rd appellants without demonstration from any other supportive evidence that they were joint purchasers.

On the authenticity of the sale transactions, **Mr. Mwangi** submitted that there was no demonstration by the 1st appellant and his group that they were still officials of the Company and authorized to transact business on behalf of the Company as at the time they sold the suit properties to the 2nd appellant, especially when the 1st appellant admitted in evidence on oath that he still had the Seal of the Company with him even as at the time he gave his testimony in court and yet he had admitted that he was no longer a director of the Company at the time.

On the trial court's appreciation, appraisal of both the evidence and application of the law to those facts, **Mr. Mwangi** submitted that the trial court properly appreciated that the 1st appellant and his group unsuccessfully challenged their ouster from the Company leadership in Nakuru HCC No. 10 of 1988 which paved the way for elections of new Company leadership. The 1st appellant and his group were therefore not officials of the Company as at the time they executed the sale agreement between them and the 2nd appellant and did not therefore have any authority to transact any business on behalf of the Company. Second, the trial court properly appreciated and took into consideration the

testimony of D.W.2, who confirmed that him and the 1st appellant used to be directors of the Company before they were ousted in a meeting held in 1988 and that at no time were they ever re- elected as company officials. Third, the 1st appellant's reliance on the documents from the Company registry was properly discounted by the trial court on the basis of PW3's evidence who testified that the records held at the Company's registry with regard to the affairs of the company appeared to have been tampered with, especially when the 1st appellant who alleged to have been frequenting the Company registry to file documents, was not even aware that at one time, the Company was deregistered and it took the efforts of the respondents to have it revived.

Fourth, the 1st appellant's reliance on the minutes of the meeting allegedly held on 4th June, 1996 and 8th August, 1996 as a basis for sanctioning the sale of the suit properties to the 2nd appellant was properly discounted by the trial court for P.W.5's failure to state the date on which the said meetings were held notwithstanding lack of demonstration in the said witness' evidence as whether when the mandate was given to the 1st appellant and **Joseph Kimani Kagiri** to exercise authority to sell the suit properties on behalf of the Company especially when D.W.1 whom the 1st appellant alleged was present in the said meetings disowned them. Fifth, the 1st appellant was unable to produce any evidence to show that the majority of the shareholders of the Company were in favour of the sale of the suit properties to the 2nd appellant.

With regard to the 2nd issue, **Mr. Mwangi** submitted that since the 2nd and 3rd appellants had produced title to the suit properties, it was not necessary for the respondents to tender a similar title in support of their case. The trial court was therefore entitled to use the title document tendered in evidence by the appellants as basis for the orders issued.

On the totality of the above submissions, **Mr. Mwangi** urged for the dismissal of the appeal and affirm the impugned decision as the same was well founded both on the facts and the law.

In reply to the respondent's submissions, **Mr. Naeku** submitted that the appellants sued the respondents in their personal capacities and that the Company changed its name much later.

This being a first appeal our duty is as was aptly stated in the case of **Selle versus Associated Motor Boat Co. [1968] EA 123** as follows:

> **"An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that is has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this Court is not bound necessarily to follow the trial Judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif vs. Ali Mohamed Sholan (1955), 22 E.A.C.A 270."**

This court further stated in **Jabane –vrs- Olenja [1986] KLR 664**, thus:

> ***"More recently, however, this Court has held that it will not lightly differ from the findings of fact of a trial judge who had had the benefit of seeing and hearing all the witnesses and will only interfere with them if they are based on no evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching the findings he did – see in particular Ephantus Mwangi – vrs- Duncan Mwangi Wambugu [1982-88] 1 KAR 278 and Mwanaso Koni –rs-Kenya Bus Services [1982-88] 1 KAr 870".***

We have considered the record in light of the rival submissions, principles of law relied upon by the respective parties in support of their opposing positions and our mandate as highlighted above. The issues that fall for our determination are as follows:

(1) whether the trial court properly discharged its mandate as was expected of it in law.

(2) Whether the 1st appellant and his group were Directors of the Company as at the time the suit properties were disposed of.

(3) Whether the 2nd and 3rd appellants discharged the burden of proof that they were *bonafide* purchasers of the suit properties for value and without notice.

(4) Whether the respondent discharged the burden of proof of fraud against the appellants.

(5) Whether it was erroneous for the trial court to order cancellation of title over the suit properties registered in favour of the 2nd and 3rd appellants, in the absence of the respondents exhibiting the titles sought to be cancelled.

On the mandate of the trial court. **Order 21, rule 4** of the Civil Procedure Rules (CPR) on the content of the Judgement provides as follows:

> ***"Judgements in defended suits, shall contain a concise statement of the case, the points for determination thereon and the reason for such decision."***

The above position was reiterated by the Court in the case of **Wamutu versus Kiarie [1982] KLR 481**, when the Court held *inter alia*, that in defended suits, Judgement shall contain a concise statement of the case, points of determination, the decision thereon and the reason for such a decision as required by **Order XX, rule 4** of the CPR (as it was then) and now **order 21 rule 4**.

Applying the above threshold to the record it is our finding that the impugned judgement complied with the above prerequisite. This is borne out by the fact that the trial Judge summarized the facts of the 2nd and 3rd appellants' case in Nakuru HCCC No. 368 of 1997 first, identified issues for determination in the said suit, made observations on the evidence in the reasoning on the issues identified for determination, made findings thereon before drawing out a conclusion that the same had not been proved and dismissed it.

Turning to the respondents' claim in Nakuru HCC No. 123 of 1998, treated as a counterclaim to Nakuru HCCC No. 368 of 1997, the same pattern was followed. In light of the above, we are satisfied that the trial court discharged his mandate properly in compliance with the principles of law that guide crafting of a judgements.

On the 2nd issue, the record is explicit that the 1st appellant and his group were at one time elected as Directors of the Company. According to the testimony of the 1st appellant, elections were held in 1978 bestowing on them, the position of the Directorship on him and his group that no other elections were ever held thereafter and that they were still vested with the said mantle of directorship as at the time the transactions precipitating the litigation resulting in this appeal arose. When confronted with evidence that there was a change in the directorship in 1988, the 1st appellant asserted that what was put in place at that time was a probe committee to probe the affairs of the Company. In contrast, evidence was adduced through DW1 that in 1988 the shareholders called a meeting with a view to conducting elections, a move the 1st appellant and his group moved to forestall when they filed a case in Nakuru High Court, but which was dismissed paving the way for new Directors of the Company to be elected.

The trial Judge weighed the two versions and rejected the version of the 1st appellant as supported by PW5 in favour of the version of DW1 and DW2 and gave reasons that;the 1st appellant did not dispute the filing of the Nakuru Misc. Application to forestall the matter then slated to be held in 1988. Second, relied upon evidence related to court proceedings they found authentic. Third, if indeed, the 1st appellant and his group were in office continuously, then they ought to have known that the Company was deregistered at one time and it took the efforts of the respondents' to have it re-registered. In the Judge's view, if the 1st appellant had been in office continuously, then nothing prevented him and his group from knowing that the Company had been deregistered, it should have been them to take action to remedy the anomaly.

Lastly, the Judge also stated that he could not overlook the fact that it was not in dispute that, as at the time of the trial, the directorship of the Company had changed a position admitted by the 1st appellant and yet the 1st appellant admitted that he still had the company seal with him which in the Judge's view, confirmed the respondents' assertions that the 1st appellant and his group refused to surrender the Companies property, and subsequently used these to defraud the Company of the suit properties.

In light of the above undisputed position on the evidence on the record, we find no reason to fault the trial Judge for arriving at the conclusion that the 1st appellant and his group were ousted from office in 1988, but failed to hand over the Company seal and other Company properties, that is why, the 1st appellant admitted on oath that he still had the Company seal which was undisputably Company property and yet he was no longer a director of the Company as at the material time. The trial Judge's finding that it is this failure on the part of the 1st appellant to surrender the Company property upon his ouster from leadership that created an opportunity for them to use the Company property, masquerade as its Directors and facilitate the fraud committed against them with regard to the loss of the suit properties. Lack of any documentation in the Companies' Registry on the incoming Directors was sufficiently explained by PW3, that the Company file in the Company's Registry appears to have been in sequential.

On the claim of the 2nd and 3rd appellants, it is not disputed that the suit property together with development therein, namely, a school belonged to the appellant. They had initially been leased to a 3rd party from whom the 2nd appellant acquired the school. As at the time the 2nd appellant acquired the school from the previous proprietor, there was an existing lease and which he took over and continued with it for a period of six (6) years. He was paying rent for the premises and throughout that period to the group allied to DW1. This is the group that asserted, and the trial Judge upheld that assertion, that, at no time during the six (6) years when the 2nd appellant dealt with DW1 and her group did he ever pay any rent to the 1st appellant. Likewise, at no time did the 1st appellant ever contend that he ever received any rent from the 2nd appellant. There was therefore basis for the trial court to fault the 2nd appellant's conduct of availing or even seeking clarification from the person he had been dealing with for that length of period before entering into a sale agreement with the 1st appellant and his group.

Turning to the evidence on the sale and purchases transaction of the suit properties, it is not disputed that the respondents disowned the transaction on behalf of the Company. The 1st appellant and his group in their defence to the respondents' claim, admitted that they are the ones who executed the transactions on behalf of the Company and received the sale proceeds on its behalf. Being Company property, the proper procedure to be followed for the disposal of the suit properties should have been as was set out in the case of **Bugere Coffee Growers Ltd versus Sebadika and Another [1970] 147,** that is by way of a resolution of either the Company or the Board of Directors. It is on record that the 1st appellant and his group relied on minutes exhibited on record. The trial Judge discounted them, firstly, because, he had already ruled earlier on that the 1st appellant and his group were ousted from the Company leadership in the meeting held on 7th January, 1988 and whose minutes indicates clearly that elections for Directors were held.

They therefore had no mandate to transact any business on behalf of the Company. That is why the Judge used the phrase "masquerading".Secondly, if indeed the 1st appellant and his group were officials of the Company at the material time, then they should have been the ones receiving rent from the 2nd appellant. The 2nd appellant gave evidence on oath and admitted that he had been pressurized into purchasing the property. Third, the 2nd appellant gave no plausible explanation as to why he skirted the respondents, the persons he had paid rent to for six (6) years. Fourth, the minutes relied upon by the 1st appellant and his group did not indicate where those meetings had been held and the list of the shareholders present. Fifth, if it was correct as contended by the appellants that the sale and transfer of the suit properties had been sanctioned by the Company and its shareholders, there was no justification for the same Company and its shareholders to relentlessly demand rent from the 2nd appellant and when he rejected to remit the same, they set on wanton destruction of his properties on the suit properties and prevented him from developing the same precipitating the suit in which he sought an injunction to restrain them from further destroying without pleading that they were actively reneging on their consent. Sixth, the 1st appellant and his group failed to demonstrate that the proceeds of sale were remitted to the Company and or applied for the benefit of the Company, which in the

circumstances was entitled to assert its rights over the suit properties

In light of the above assessment and reasoning, we find no fault in the reasons the trial Judge gave for rejecting the 2nd and 3rd appellants' claims over the suit properties. The transactions were explicitly tainted with illegality and were rightly vitiated.

Turning to the respondents' claim, it is not disputed that the same was anchored on fraud pleaded in their defences to the 2nd and 3rd appellants' claims and in their own claim. Fraud is defined in **Black's law Dictionary**, 9th Edition 2009 **Thomson Revters** pg. 731 as follows:

> **"A knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his or her detriment, a misrepresentation recklessly without belief in its truth to induce another person to act …..unconsionable decision."**

The position in law on the mode of pleading and burden of proof was aptly put by the court in the case of **Vijay Morjaria versus Nan Singh Madhu Singh Darbar & another [2000] eKLR**, wherein it was stated *inter alia* as follows:

(i) Fraud must be specifically pleaded.

(ii) Particulars of fraud alleged must be stated on the face of the pleadings.

(iii) The acts alleged to be fraudulent must also be set out and stated specified that those acts were done fraudulently.

(iv) Fraudulent conduct must also was alleged and proved.

(v) Fraud should not be left to be inferrered from the fact.

The appellants raised no complaint about the mode of pleading fraud both in the defence to the 2nd and 3rd appellants' case and in their own claim. We have also revisited those pleadings and are satisfied that they meet the threshold for pleading fraud as set out in the **Morjoria case** (supra).

What the appellants complained about is that, the same had not been proved to the required threshold. The trial court found for the Company on its claim based

on fraud for the following reasons: first, the suit property belonged to the Company and sale and transfer of the same could only be sanctioned by either a resolution of the board of Directors or its sharesholders. Second, the suit properties were sold and the proceeds received by the 1st appellant and his group which they admitted so in their defence to the Company's claim. Third, that the 1st appellant and his group were not authorized to transact any business on behalf of the Company.

We adopt the reasoning advanced by the trial Judge and affirmed by us when we sustained the findings that the 1st appellant and his group were not the directors of the Company as at the time the sale/transfer transactions of the suit properties were executed and therefore affirm the trial Judge's finding that the 2nd appellant who had all along been dealing with DW1 and his group for six years had no basis transacting with the 1st appellant and his group. His conduct was therefore tainted, and that the Company and its shareholders expressed explicitly by their conduct of demanding rent from the 2nd appellant and interfering with the 2nd and 3rd appellants' development of the suit properties which would never have been the case if they had sanctioned the sale. It was therefore then correctly held that they were never party to the said transactions especially when they were not confronted with any evidence to show how that they were reneging on their consent.

In light of the above assessment and reasoning, we find no basis for us to fault the trial court for allowing the Company's claims.

Lastly, on the issue of failure by the respondents to exhibit the title they intended to have cancelled, it is correct that the respondents exhibited none. However, as explained, since the 2nd and 3rd appellants had already exhibited one which would have contained the same particulars as the one that the respondents ought to have exhibited, no prejudice was suffered by the appellants for the respondents' failure to annex to their claims, especially when it is on record that the respondents' claim was treated as a counterclaim to the 2nd and 3rd appellants claim and was not a stand-alone claim.

The upshot of the above assessment and reasoning is that the appeal has no merit. It is accordingly dismissed with costs to the respondents.

Dated and delivered at Nairobi this 20th day of December, 2019.

E.M. GITHINJI

.....

JUDGE OF APPEAL

R.N. NAMBUYE

.....

JUDGE OF APPEAL

ASIKE MAKHANDIA

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR