IN THE COURT OF APPEAL

AT MOMBASA

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

CIVIL APPEAL NO. 60 OF 2018

BETWEEN

USHAGO DIANI INVESTMENT LIMITED.....APPELLANT

AND

JABEEN MANAN ABDULWAHAB.....RESPONDENT

(An appeal from the Judgment of the High Court of Kenya at Mombasa (Otieno, J.) dated 20th April, 2018 ***in H.C.C.C No. 157 of 2009.)***

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JUDGMENT OF THE COURT

1. Sometime in the year 2007 four friends namely, Manfred Janisch, Hassan Adulwahab, John Bradley and **Jabeen Manan Adulwahab** (the respondent), agreed to invest in the coastal area more particularly, in Diani by putting up a restaurant and shopping complex. The vehicle through which the investment was carried out that is, **Ushago Diani Investment Limited** (the appellant), was incorporated on 11th July, 2007. It was common ground that each of them would hold 25 shares in the company. However, the manner and the extent each of the shareholders would contribute towards the company's capital was a point in contention.

2. According to the appellant, it was agreed that the four shareholders would contribute towards the capital through cash and property. Both the respondent and Manfred opted that in addition to a cash contribution to transfer their parcels of land, **Kwale/Diani Beach Block/1463** (the suit land) and 1462 respectively. On account of the foregoing the value of the parcels were treated as part of the shareholders capital contribution.

3. Thereafter, both Manfred and the respondent gave the titles thereto to John for purposes of effecting the transfer in favour of the appellant. It was on that basis that the appellant embarked on an extensive development of the suit land running in excess of Kshs.40,000,000.

4. The business began running in December, 2007 without any glitch until the respondent forcefully took back the title to the suit land using the police. Apparently, on 14th October, 2008 John was summoned by the OCS of Ukunda to appear at the police station with the title and the respondent took it back. Thereafter, the respondent started demanding a monthly rent of Kshs.250,000 from the appellant. Ultimately, she served the appellant with a notice of her intention to wind up the appellant for failure to pay alleged rental arrears of Kshs.3,750,000.

5. Faced with the aforementioned state of affairs the appellant filed suit against the respondent in the High Court. The appellant's claimed that the respondent had by her conduct misled the appellant into carrying out the extensive developments on the suit land. She was guilty of fraud as well as misrepresentation. Towards that end, the appellant sought the following orders:

> **a. A permanent injunction restraining the Defendant by herself, her agents and/or servants from selling, transferring, charging, leasing, alienating or in any way whatsoever and howsoever interfering with or dealing with the property known as Kwale/Diani Beach Block/1463.**
>
> **b. A declaration that the Defendant's action of refusing to transfer parcel no. Kwale/Diani Beach Block/1463 to the Plaintiff is a breach of her obligation as a shareholder of the Plaintiff and of its agreement with its co-shareholders in the Plaintiff.**
>
> **c. A declaration that the parcel of land known as Kwale Diani Beach Block/1463 is liable to be transferred to the Plaintiff.**
>
> **d. An order directing the Defendant to effect transfer of the parcel of land known as Kwale/Diani Beach Block/1463 to the**

Plaintiff and in default the Deputy Registrar of this Honourable court be authorized to execute all documents on her behalf to effect the said transfer.

e. Damages for fraud and/or misrepresentation.

f. Costs of this suit and interest thereon.

6. Conversely, the respondent maintains that she had never agreed let alone proposed the suit land to be transferred to the appellant as part of her capital contribution. It was the shareholders agreement that they would each contribute an amount of Kshs.7,000,000 towards capital and she contributed Kshs.8,900,000 which was over and above the agreed amount. It was the capital contribution which was applied towards erecting the business premises.

7. During the initial stages of coming up with the investment venture, the shareholders agreed that since there were no funds to purchase land that she would avail the suit land which was then vacant for the said business premises to be erected thereon. She released the title of the suit land for purposes of obtaining the necessary building approvals. There was a further understating that once the appellant was up and running it would start paying rent to the respondent. The arrangement gave rise to what she referred to as a resulting tenancy on a month to month basis.

8. She sought the assistance of the police once it became apparent that the appellant through her co-shareholders were bent on unlawfully appropriating the suit land. Besides, she had been locked out by the said shareholders from participating in the running of the business. She was totally in the dark with respect to the profit and income of the appellant. Apart from filing a defence to that effect she also lodged a counter-claim seeking:

a. The rent accrued from the year 2007 to the date of filing the counter claim.

b. The defendant's share of the plaintiff's profits from the year 2007 to date.

c. In the alternative, a refund of the defendant's cash contribution to the plaintiff together with interest at commercial rates from the year 2007.

9. The trial court (**Otieno, J**.) in a judgment dated 20th April, 2018 agreed with the respondent and dismissed the appellant's suit with costs. He went ahead to allow the respondent's counter-claim with respect to payment of rental arrears which he assessed at Kshs.5,208,000 and fixed the monthly rental income at Kshs.42,000. It is this decision that is the subject of this appeal wherein the appellant complains that the learned Judge, failed to adhere to the doctrine of *stare decisis*; misconstrued the terms of the agreement between the parties; failed to appreciate that a constructive trust had arisen in favour of the appellant; and erred by finding that the respondent was entitled to rent from the appellant.

10. Mr. Mogaka, learned counsel for appellant, submitted that the trial court had failed to apply decisions of this Court which were not only binding upon the court but were also relevant to the dispute in issue. He asserted that the doctrine of precedent and *stare decisis* ensures stability, certainty, predictability and consistency in judicial decision making process.

11. Expounding on what the doctrine entails reference was made to the definition given to *stare decisis* in the ***Black's Law Dictionary, 9th Ed***. thus:

"The doctrine of precedent, under which a court must follow earlier judicial decisions when the same point arises again in litigation."

Reliance was also placed on the definition given to 'precedence' thereunder:

"… the making of law by a court in recognizing and applying new rules while administering justice… A decided case that furnishes the basis for determining later cases involving similar facts."

He added that the doctrine has since received recognition under ***Article 163(7)*** of the ***Constitution***.

12. The learned Judge was faulted for re-writing the terms of the agreement between the parties. The appellant was categorical that there was no agreement with respect to payment of rent over the suit premises a fact that was admitted by the respondent. Therefore, there was no basis for the learned Judge to find that a landlord/tenant relationship existed between the parties and direct the appellant to pay rent over the suit premises.

13. According to counsel, the learned Judge delved into unpleaded issues contrary to the established principle that issues for determination in a suit flow from the pleadings. By way of illustration, he quoted the following sentiments by the learned Judge:

"… begs the question as to whether the plaintiff (appellant herein) can in law and fairness be allowed to use the defendant's premises at will and at no consideration without such not being viewed as an arbitrary deprivation of property the same being viewed as an arbitrary deprivation of property…"

Support for this line of argument was found in this Court's decision in ***Galaxy Paints Co. Ltd vs. Falcon Guards Ltd [2000] 2 EA 385***.

14. Laying emphasis that the respondent had been estopped by her conduct from alleging that the suit land did not belong to the appellant, Mr. Mogaka referred to the case of ***Moorgate Mercantile Co Ltd vs. Twitchings*** ***[1975] 3 WLR 286*** where **Lord Denning** in commenting on the effect of estoppel on the true owner of land stated:

> **"His own title to the property, be it land or goods, has been held to be limited or extinguished, and new rights and interests have been created therein. And this operates by reason of his conduct – what he has led the other to believe – even though he never intended it. The new rights and interests so created by estoppel, in or over land, will be protected by the courts and in this way give rise to a cause of action."**

15. Mr. Mogaka went on to state that a constructive trust had arisen in favour of the appellant who had expended colossal sums to develop the suit premises with the sanction of the respondent. In that regard, reliance was placed in the case of ***Macharia Mwangi Maina & 87 Others vs. Davidson Mwangi Kagiri*** ***[2014] eKLR*** wherein this Court while quoting with approval ***Yaxley vs. Gotts & Another*** ***[2000] Ch 162***, stated:

> **"… it was held that an oral agreement for sale of property created an interest in the property even though void and unenforceable as a contract; but the oral agreement was still enforceable on the basis of a constructive trust or proprietary estoppel. In the instant case, it was the respondent who put the appellants in possession of the suit property not as licensees but with the intention that he was to transfer individual plots purchased by them. The respondent went ahead and received the purchase price. We are of the considered view that the doctrines of proprietary estoppel and constructive trust are applicable and the respondent cannot renege."**

16. From the onset, Mr. Kongere, learned counsel for the respondent, urged that the appeal was devoid of merit and otherwise an abuse of the court process. Whilst agreeing on the import of the doctrine of precedent and *stare decisis* counsel argued that the appellant did not specify which particular decision(s) the learned Judge had failed to apply in the impugned judgment.

17. In his view, the learned Judge's finding to the effect that there was no agreement for transfer of the suit land was sound and based on the evidence on record. There was no express agreement to that effect and an oral agreement as alleged by the appellant could not suffice in light of ***Section 3(3)*** of the ***Law of Contract*** which requires agreements for disposition of land to be in writing.

18. Similarly, the respondent had not made any representation to the appellant that she would transfer the suit land to her. He reiterated that the sole purpose of the respondent giving out the title document to the suit land was for facilitation of building approvals and nothing more. Moreover, in the absence of compliance with the statutory requirements with respect to disposal of land the doctrine of estoppel does not arise. Towards that end, we were referred to the case of ***Henry Muthee Kathurima vs. Commissioner of Lands*** ***[2015] eKLR*** and more specifically, to the following observation made by this Court:

> **"The appellant relied on the doctrine of estoppel urging that the Commissioner of Lands is estopped from denying that he has a good title. It is our view that estoppel cannot be used as shield to protect unlawfully acquired property; estoppel cannot be used to circumvent Constitutional provisions and estoppel cannot override express statutory procedures; there can be no estoppel against a statute."**

19. In addition, Mr. Kongere opined that the issue of a constructive trust does not arise since the ***Land Control Act*** expressly prohibits resulting trust in a controlled transaction and the appellant never raised the same in the trial court.

20. As far as counsel was concerned, the learned Judge's finding on rent payable was a live issue based on the respondent's amended defence and counter claim. In that, she had pleaded that a resulting tenancy on a month to month basis had arisen on account of the appellant's conduct of erecting structures on the suit land and utilizing the same for commercial purposes.

21.Besides, there is no requirement that a tenancy agreement should be in writing it can be inferred from the circumstances of the parties' relationship. ***Section 57(2)*** of the ***Land Act, 2012*** recognizes a tenancy which is not reduced in writing. Furthermore, this Court in ***WJ Blakeman Ltd Associated Hotel Management Services Ltd*** ***[1985] eKLR*** expressed itself on this issue as follows:

> **"What is it that the law requires to impute a monthly tenancy? It should be such an action on the part of the intending lessee, that illustrates that the parties must be taken to have intended that the lessee wishes to take the property, and the intending lessor to give him the property on payment of rent, so that a tenancy can arise. The outstanding features are possession and payment of rent."**

22. In this case, the learned Judge awarded the respondent accrued rent and not damages for deprivation of property as alluded to by the appellant. He urged us not to disturb the award on rent arrears because the appellant had neither challenged the mode of assessment nor the quantum of rent awarded to the respondent.

23. We have considered the record, rival submissions by the parties' respective counsel and the law. Pursuant to our role as the first appellate court in the matter before us, we are bound to revisit the evidence on record, evaluate it and reach our own conclusion in the matter. In doing so, we appreciate that as an appellate court we would not ordinarily interfere with findings of fact by the trial court unless they are based on no evidence, or on a misapprehension of it or the trial court is shown demonstrably to have acted on wrong principles in reaching the findings. We also take into account that we did not have the privilege of seeing the witnesses testify as the trial court. See ***Kenya Ports Authority vs. Kuston (Kenya) Limited*** ***[2009] 2EA 212***.

24. In our view, the appeal herein turns on two main issues *to wit*, whether there was an agreement between the parties that the respondent would transfer the suit land to the appellant and whether the respondent was entitled to rent over the suit premises. The determination of both

issues revolves around ascertaining the intention of the parties' right from the time of incorporating the appellant as a limited liability company.

25. As per the appellant, the parties intention in regard to their intention to transfer the suit land was contained both in written and oral agreements. Her position was that the written agreement was set out in the Memorandum and Articles of Association or what the trial court referred to as the MEMARTS while the oral agreements were concluded from the various meetings held by the shareholders.

26. Consequently, the trial court was obligated to ascertain and enforce the intention of the parties as reflected in the said agreements and no more. A court's role in interpretation and enforcement of a contract was succinctly set out in ***Abdul Jalil Yafai vs. Farid Jalil Mohammed [2015] eKLR*** where this Court held:

> "**A contract being a voluntary obligation the law places a high value on ensuring parties have truly consented to the terms that bind them. The law also grants parties broad freedom to agree on the content of the agreement whose terms are incorporated through express promises. Those terms, in case of a disagreement are interpreted by the courts to seek out the true intention of the parties, from the perspective of an objective observer and, in the context of the parties' bargaining environment.**"

27. Having perused the MEMARTS we find that the learned Judge properly carried out the aforementioned role in holding that there was no agreement or term thereunder with respect to the transfer of the suit land. He also appreciated and rightly so, that there was no evidence of an oral agreement to that effect. Our position, like the trial court, is reinforced by the fact that despite Inayatali Mansur Bhaiji, the appellant's auditor, testifying that a meeting was held in his office on 11th August, 2008 where all the shareholders were in attendance and that the respondent indicated she had given the suit land as part of her capital contribution, the minutes thereof were not executed by any of the shareholders to verify the correctness of the contents therein. Therefore, such minutes could not be counted as evidence of the alleged agreement for transfer of the suit land.

28. Furthermore, both Manfred and John testified that Manfred took back the parcel he had allegedly given out as part of his capital contribution. The evidence was to the effect that Manfred took back the parcel since he was undergoing financial difficulties. This raises doubt as to whether both the respondent and Manfred had agreed to transfer their parcels as part of their capital contribution. If that was the case, why was Manfred allowed to take back the parcel? Why was there differential treatment between Manfred and the respondent? Why did the appellant seek for specific performance of the alleged agreement as against the respondent and not Manfred?

29. The appellant also imputed fraud and misrepresentation against the respondent. Basically, the appellant's contention was that the respondent had fraudulently misrepresented that she had given the suit land to the appellant as her capital contribution. Owing to that representation the appellant made extensive developments thereon.

30. It is trite that it is not enough for a litigant to plead elements of fraud but he/she is required to strictly prove the same. This much was reiterated in ***Vijay Morjaria vs. Nansingh Madhusingh Darbar & Another [2000] eKLR*** wherein **Tunoi, JA.** (as he then was) expressed:

> **"It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must of course be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and as distinctly proved, and it is not allowable to leave fraud to be inferred from the facts."** *[Emphasis added].*

31. Did the appellant establish those allegations of fraud? We concur with the learned Judge that the appellant did not prove fraud as against the respondent. We say so because the respondent's position that she had not given her land to the appellant as part of her contribution was corroborated by the letter she wrote on 8th June, 2009 to Inayatali. The said letter was in response to the auditor's letter dated 5th June, 2009 it read in part:

> **"RE: Audit 31.12.2008**
>
> ***U*shago Diani Investment Limited**
>
> **Thank you for your letter dated 5th June, 2009 addressed to the directors of Ushago Diani Investment Ltd.**
>
> **With regards to note II of your letter, I would advise you that my contribution of land valued at 4,000,000 Shs in respect of plot 1463 was never agreed or confirmed by myself or any other director and does not form part of my contribution. Neither do I have any intention of transferring the land to the company.**
>
> **I note the land was incorporated into the financial statements for the period ending 31st December, 2007 which is incorrect.**
>
> **Would you therefore please correct this error in the accounts for the year end** (sic) **31st December, 2008 by removing plot number 1463 from the company** (sic) **fixed assets."**

32. It was also the respondent's evidence that prior to the said letter she had no idea that the suit land was treated as part and parcel of the appellant's assets. Taking into account that Inayatali testified that he was not able to tell if the appellant's audited accounts were circulated to all the shareholders, we cannot fault the learned Judge for giving the respondent the benefit of doubt in that regard.

33. As for the issues of *estoppel* and constructive trust, we cannot help but note that they were neither pleaded nor raised at the trial court. As such, they are being raised for the first time in this appeal. We find that considering the same would cause prejudice to the respondent who did not have an opportunity to tender evidence to counter those allegations at the trial court. Moreover, the trial court was not given an opportunity to address its mind on the same. Our position is fortified by the case of ***Sarah Jelangat Siele vs. Attorney General & 3 Others [2018] eKLR*** where we held:

> **"It is trite that parties are bound by their pleadings and the issues for determination in a suit generally flow from the pleadings. A court can only pronounce judgment on the issues arising from the pleadings or such issues as the parties have framed for the court's determination. See this Court's decision in Galaxy Paints Co. Ltd. vs. Falcon Guards Ltd. (2000)2 EA 385. However, a court may base its decision on an unpleaded issue if in the course of the trial the issue has been left for the decision of the court. An issue is deemed to have been left for the court's decision when a party addresses the court and leads evidence on the issue. See Vyas Industries v Diocese of Meru [1976] eKLR."**

34. It is clear in our minds that the totality of the above evidence was that the respondent never represented that she would transfer the suit land to the appellant. We also find that the appellant did not demonstrate that the learned Judge had disregarded the doctrine of precedent and *stare decisis*.

35. Nevertheless, we part company with the learned Judge with respect to the issue of rent. The learned Judge addressed his mind in the following manner;

> **"From that evidence by the plaintiffs own witness, it is possible to say that the property is capable of fetching Kshs.40,000/= to 42,000/= per month. That estimation is not so much at variance with what the expert, valuer, called by the defendant said…**
>
> **I have taken these excerpts of the evidence from both sides to show that both parties agreed that if rented commercially the property is capable of attracting rental income of at least Kshs.42,000/= per month.**
>
> **It being agreed that the defendant commenced options on 15.12.2000, and defendant having given evidence that she would expect rent after the company commences operation. I consider that a reasonable commencement date to charge rent should not be earlier than that date. I fix the commencement date to be 1st January 2008.**
>
> **Doing the best, I consider just in this case and having found that the defendant is entitled to be paid rent for use of the premises, I would adopt a monthly rent of Kshs.42,000/= effective the 1/1/2008 till the date of this judgment. That gives me a period of ten (10) years and four (4) months. The sum therefore the plaintiff ought to pay to the defendant on the counter claim thus calculates as follows:-**
>
> **Kshs.42,000.00 vs 124 months = Kshs.5,208,000/=."**

36. To begin with the learned Judge's role in this respect was also restricted to ascertaining whether there was an agreement on payment of rent and enforcing the same. There was no room for him to cross over to other considerations like if it was fair for the appellant to occupy the suit land without paying rent; whether the same would amount to depravation of the respondent of her property. Certainly, he had no basis of going as far as he did in evaluating the rent he deemed as reasonable.

37. It was not in dispute that there was no written agreement on rent and the respondent in her own evidence admitted as much. Perhaps this was the reason why she sought for the trial court to infer a resulting tenancy. We find that there was no basis for the learned Judge to make such an inference even if he thought it would be unfair if he did not. His role was simply to enforce the terms, if any, on payment of rent. Lord Hoffman in ***Attorney General of Belize vs. Belize Telecom Ltd [2009] UKPC 10*** best put it:

> **"The court has no power to improve upon the instrument which it is called upon to construe, whether it be a contract, a statute, or articles of association. It cannot introduce terms to make it fairer or more reasonable. It is concerned only to discover what the instrument means …"**

Therefore, the learned Judge erred in assessing and granting the award on rent.

38. Accordingly, we find that the appeal herein partially succeeds to the extent of the award granted with respect to rent. We hereby set aside the High Court's judgment dated 20th April, 2018 in regard to rent payable and substitute the same with an order dismissing both the appellant's suit and the respondent's counter-claim with no orders as to costs. For the purposes of clarity, we hereby declare that the respondent is and was at times the owner of the suit property, but was not entitled to rent in accordance with the agreement of the parties. Due to the partial success of the appeal we direct each party to bear its own costs.

Dated and delivered at Mombasa this 11th day October, 2018

ALNASHIR VISRAM

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

M.K. KOOME

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR