IN THE COURT OF APPEAL

AT NYERI

(SITTING AT NAKURU)

(CORAM: NAMBUYE G.B.M KARIUKI & KIAGE, JJ.A)

CIVIL APPEAL NO. 273 OF 2010

BETWEEN

WANYORORO FARMERS CO. LTD.....APPELLANT

AND

NAKURU KIAMUNYEKI CO. LTD.....RESPONDENT

(An appeal from the judgment and decree of the High Court

of Kenya at Nakuru (Emukule, J) dated 23rd July, 2010

in

H.C.C.C. NO. 201 OF 2007)

****

JUDGMENT OF THE COURT

The respondent, Nakuru Kiamunyeki Co. Ltd, filed Nakuru HCCC No. 201 of 2007, vide a plaint dated the 7th day of September, 2007 against the appellant Wanyororo Farmers Co. Ltd, seeking a half share of LR No. 4149, 5249 and 10458 (the suit parcels) allegedly jointly purchased by it and the appellant from Mugwathi Farms limited (Mugwathi). The sale was exempted from the operation of the Land Control Act Cap. 302 vide legal Notice No. 69 of 1978 contained in the Kenya Gazette of 28th April, 1978 in favour of both companies as subsequently clarified by a corrigendum contained in the Kenya Gazette of 7th July, 1978. The suit parcels were physically subdivided into two portions of 750 acres each and shared between the two Companies in the year 1978, with the suit property being shared out to the respondent.

The appellant received its respective share, settled its share holders and even issued them with title deeds. The respondent's move to proceed likewise was interrupted by the appellant's advertisement in the Daily Nation Newspaper of 16th July, 2007 of a **"caveat emptor"** against the intended subdivision of the suit property and issuance of titles to its share holders to the exclusion of the respondent's shareholders. This prompted the respondent to carry out a search which revealed that the suit property was in fact registered in the appellant's sole name, a registration the respondent contended was fraudulent. The particulars whereof were specified in the plaint; and which registration the respondent also contended was unlawful,

illegal, null and void. The respondent sought a declaration that the appellant held title to the suit property in trust for the respondent; an order for the transfer of the suit property to the Respondent; and a perpetual injunction restraining the appellant by itself, its agents, shareholders, directors and or servants from entering, trespassing, subdividing , charging, selling, alienating or in any other manner interfering with the respondent and its shareholders' quiet and peaceful occupation, enjoyment and use of the suit property, or, in the alternative, a declaration that the appellant's interest in the suit property was subject to the respondent's overriding interest.

The appellant filed a defence and counterclaim dated the 30th day of October 2007 denying the alleged joint purchase of the suit parcels with the respondent; the joint exemption of the sale transaction from the provisions of the Land Control Board Act; and the joint sharing out and/or subdivision of the suit parcels into equal portions with the respondent. The appellant also maintained that it was the sole legal registered proprietor and holder of an indeafisible title to the suit property, and that its rights override any asserted by the respondent. Further, the appellant denied acting fraudulently and or in breach of trust and/or immorally, and counterclaimed for a declaration that it was the sole legal and registered proprietor of the suit property, and sought an order for the eviction of the respondent and its shareholders. To all these, the respondent joined issue.

The evidence for the respondent was tendered through **Mathew King'ori Gigahi, PW1 (Mathew), Michael Njenga Waweru, PW2 (Michael)** and **Jeremiah Mukururo Mucheru, PW3, (Jeremiah)** while that for the appellant was tendered through **Eliud Ndungu Thuo (Eliud).**

Mathew, Michael and **Jeremiah** reiterated the averments in the plaint that the two companies were incorporated in the year 1971 and 1973 respectively, but each with its own memorandum and Article of Association. On the 20th day of January 1973 the directors of the appellant resolved to purchase the Mugwathi Farms at an agreed purchase price of **Kshs**. **1,200,000.00,** and on the 21st day of July, 1973 the common directors of both companies resolved to pool resources to purchase the said farms on a **50:50** basis with each party contributing towards the purchase price which was fully paid. The transaction received presidential exemption from the provisions of the Land Control Act Cap 302 Laws of Kenya, in favour of both companies.

After the purchase, the suit parcels were divided into two equal portions of 750 acres each leaving a balance of 55 acres to be utilized towards the road networks and public utility facilities with each company settling its shareholders on its portion. The appellant issued title deeds to its share holders on its respective portion, but the respondent did not do likewise as it was beset by wrangles and litigation involving its share holders and the directors, and when it moved to do so, the appellant published **'a caveat emptor'** notice over the suit property thereby triggering the litigation resulting in this appeal.

In rebuttal of the respondent's evidence, **Eliud** testified that the documents he tendered in evidence as exhibits, all went to demonstrate that on the 20th January 1973 the appellant on its own resolved to purchase the suit parcels; that it raised Ksh.1,200,000.00 on its own; that it executed the sale agreement alone; that it received presidential exemption from the provisions of the Land Control Board (supra) in its sole name, obtained transfers of the suit parcels from the vendor in its sole name and then settled its share holders thereon.

The learned trial Judge, **M. J. Anyara Emukule, J.,** in the impugned judgment dated the 23rd day of July, 2010 assessed and analyzed the competing pleadings and evidence and allowed the respondent's claim and dismissed the appellant's defence and counterclaim, triggering this appeal. The appellant has raised seven grounds of appeal, namely, that, the learned judge erred in law and in fact:-

> *1.* ***in finding that the appellant and the respondent purchased LR. No. 4149, 5249 and 10458 jointly.***
>
> *2.* ***in finding that Mugwathi Farms Company Limited executed a transfer to Nakuru Kiamunyeki Company Limited in respect of LR. No. 4149 and LR. 5244.***

3. ***in finding that there were no objections to the registration of transfer to the respondent.***

4. ***in finding that the appellant and the respondent agreed to share the suit Land into equal parts***

5. ***in finding that the registration of the appellant as the proprietor of the suit Land was fraudulent.***

6. ***in finding that the appellant held title number Dundori/Mugwathi block 1/2198 in trust for the Respondent and its share holders.***

7. ***In disregarding the clear documentary evidence tabled before him by the appellant in favour of oral evidence by the respondent.***

Learned counsel **Mr. Mugambi Nguthari** submitted that the appellant in its resolution dated the 20th January, 1973 resolved to purchase the suit parcels from Mugwathi, without the participation of the respondent; that the purported joint venture agreement of the 21st day of July, 1973 was a mere intention which never materialized in favour of the respondent which is why its name never featured either in the sale agreement or in the initial presidential exemption from the provisions of the Land Control Act (supra). He maintained that no consideration passed from the respondent to **Mugwathi** for the purchase of the suit parcels but conceded that the correspondence from the firm of **Kamere & Co Advocates** to the Deputy Official Receiver, and the corrigenda gazette notice, tend to suggest that there was a joint purchase of the suit parcels by both companies. In his view, these did not oust the appellant's assertion that the appellant was the sole purchaser of the suit parcels. When probed by the Court as to whether he challenged the letter from the **Kamere & Co. Advocates** and the corrigendum in any way and at any stage of the proceeding, he responded that the appellant never contested the said documents because they were never brought to its attention for scrutiny and action before the onset of the litigation.

In response to the appellant's submissions, learned counsel **Mr. Kahiga Waitindi** submitted that the respondent proved to the required threshhold the joint purchase of the suit parcels through the common directors, joint resolution of 21st July, 1973 and the unchallenged evidence of **Mathew, Michael and Jeremiah** which went to confirm that the purchase price was jointly paid by both companies as corroborated by the letter from **Kamere & Company Advocates** to the Deputy Official Receiver dated the 4th May, 1978 and the corrigenda gazette notice and the existence of maps showing the separate physical occupational arrangements for each company's share holders.

Mr. Mugambi reiterated his earlier submission in reply to the respondent's submission.

This being a first appeal, our duty is as was put more appropriately in the case of **Selle versus Associated Motor Boat Co. [1968] EA 123,** thus:

> **"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 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 vs. 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 vs. Duncan Mwangi Wambugu (1982-88) 1 KAR 278 and Mwanasokoni vs. Kenya Bus Services (1982-88)1KAR 870."

We have considered the totality of the record in the light of the impugned judgment and the rival submissions set out above. In our view, the following issues fall for our determination:-

1. Was there a joint agreement between the appellant and the respondent to purchase and sub-divide the original suit parcels on a 50:50 ratio?

2. What was the nature of the directorship of the appellant and the respondent companies; and what effect if any did that arrangement have on the disputed sale transaction?

3. Was the appellant culpable for fraud or breach of trust as alleged by the respondent in its plaint?

4. Did the respondent prove its claim to the required thresh hold?

5. Should the judgment of the trial court be upheld or reversed?

At the trial, seven issues were agreed upon for determination, which the learned judge compressed into four. In response to the first issue, the learned Judge made findings that on the basis of the record before him, it was evident that after the appellant's directors negotiated for the purchase of the suit parcels, a joint meeting of the common directors of the 21st day of July, 1973 unanimously resolved to purchase the suit parcels at **Kshs. 1,200,000.00** with each side contributing **Kshs. 600,000.00**, a position confirmed by the letter dated 4th May, 1978 from the firm of **Kamere and Co. Advocates,** to the Deputy Official Receiver; that the appellant's Annual General Meeting held on the 15th day of December, 1974 approved the joint purchase and acknowledged the respondent's contribution of **Kshs. 600,000.00** towards the said joint purchase; that the Legal Notice Number 67 of 1978 which omitted the name of the respondent from the presidential exemption of the provisions of the Land Control Board Act (Supra) with regard to the said sale transaction was corrected by a corrigenda gazette notice published in the Kenya Gazette supplement No. 42 of 7th July, 1978 supplement number 28 which added both companies as joint purchasers of the suit parcels; that this position was confirmed by the unchallenged evidence of **Mathew, Michael** and **Jeremiah,** who were the joint founding Directors as well as shareholders and who were therefore conversant with the history of the joint purchase transaction. On the basis of the foregoing, the learned Judge concluded that a joint purchase of the suit parcels had been proved.

On issue number 2, the learned Judge made findings that there was sufficient evidence that Mugwathi executed a transfer in favour of the respondent for the suit property giving effect to the **50:50** sharing ratio of the suit parcels between the two companies, and that is why the respondent caused the preparations of an RIM map for the physical subdivision of the suit property and the settling of its share holders thereon.

Turning to issue number 3 on fraud, it was the learned judge's finding that since the parties jointly purchased the suit parcels and had them shared physically on the ground on a **50:50 ratio**; that each side settled its share holders on their respective portions, and that the appellant had in fact issued titles to its share holders, while the respondent had not on account of litigation and wrangles between its shareholders and directors that the appellant's move to cause the registration of the suit property in its sole name to the exclusion of the respondent and its share holders amounted to fraud and breach of trust and could not be allowed to stand.

As for issue numbers 4&5, the learned Judge relied on **Mwangi –Vs-Mwangi [1986] KLR 358** for the holding that:

"Registration of title is a creation of the law and one must take into consideration circumstances surrounding the registration; Halisbury's Laws of England. 3rd Edition Vol.38 Para.145 for the

definition of a resulting trust thus:-

"***A resulting Trust is a trust arising by operation of Law where inter alia the property is purchased in the name of or placed in the possession of a person without any intimation that he is to hold in trust, and the retention of the beneficial interest of the purchaser or disposer is presumed and is held to be equitable";*** the case of **Kanyi Versus Muthiora [1954] K.L.R. 712** for the holding inter alai that:

"registered Land as per section 163 of the Registered Land Act is subject to the law of England as modified by equity which brings in the doctrines of implied constructive and resulting trust….A proprietor by first registration or any subsequent registration is not relieved by anything in section 28 from any duty or obligation to which he is subject as trustee"; the case of **Arumba Vs. Mbega & Another [1988] KLR 121** for the holding *inter alia* that:-

"If persons contributed the purchase money of property in equal shares whether the property is purchased in the name of one or in their joint names, there is a tenancy in common."; and, lastly; the case of **Muthuita Vs. Wande [1942] K.L.R.166** for the holding *inter alia* that:

"the absence of reference of a trust in the instrument of acquisition of land does not affect the enforceability of a trust existing on the land;

Applying those principles, the learned judge found that, the registration of the suit property in the sole name of the appellant, at the instance of the directors of the appellant company, who succeeded the founding fathers of the company, whether in ignorance or in defiance of the available information, did not in any way destroy the respondent's equitable interest in the suit property; that although the appellant was the prima facie holder of the title to the suit property, the same stood impugned on the ground of fraud; and lastly, that, irrespective of whether the **50:50** sharing of the suit property had been partially or fully effected on the ground, the appellant held the suit property in trust for the respondent and its share holders.

It is the above findings that the appellant has invited us to upset while the respondent has invited us to affirm.

In response to issue number one (1), it is our finding that it is not disputed that the two meetings namely; that of 20th January 1973 and that of 21st July, 1973 are critical to the determination as to whether or not the appellant and the respondent jointly purchased the suit parcels. The minutes of the former meeting were reduced into a duly signed resolution authorizing the purchase of the '**Mugwathi Farms'** at a consideration of **Ksh 1, 200,000;** while the salient features which emerge from the meeting of 21st July, 1973 included *inter alia*,

(i) A decision by the respondent's directors to send those of the appellant to approach those of Mugwathi Farm (the vendor) and inform them that the duo would pay a deposit of Ksh 1, 000,000/= comprised of Ksh 600,000/= from the respondent; and Ksh 400,000/= from the appellant; (ii) ***authorization from the respondent's directors to have the sum of Ksh 600,000/= paid to the vendor's directors of choice; and, lastly;*** *(iii)* ***joint signing of the minutes by both the appellant's directors and those of the respondent.***

This in tandem with the unchallenged testimonies of **Mathew, Michael** and **Jeremiah** that the appellant and the respondent agreed to jointly purchase the suit parcels; that the meeting of 21st July, 1973 was necessitated by the alleged financial situation the appellant then faced hence its decision to approach the respondent company with a view to obtaining additional funding for the purchase of the suit parcels. The minutes of the Annual General Meeting (A.G.M.) of the appellant's shareholders held on the 15th December, 1974 corroborated the respondent's assertions that the amounts contributed by the appellant and the respondent companies towards the initial payment for the suit parcels were **Ksh 400,000** by the appellant and **Ksh 600,000** by the respondent.

Legal Notice No 69 of 1978 published in the Kenya Gazette of **28th April, 1978** and its subsequent corrigenda published in the Kenya Gazette Supplement of **7th July, 1978** also manifest the joint agreement between the appellant and the respondent to purchase the suit parcels.

It has been argued by the appellant that, in the joint resolution of the meeting of 21st July, 1973, both companies resolved to jointly purchase the suit parcels; that the corrigenda gazette notice that included the respondent in the exemption from the provisions of the Land Control Act (supra) as well as the correspondence from the firm of **Kamere & Co, Advocates** of 4th May, 1978 which tended to demonstrate existence of a joint purchase arrangement between the two companies were sufficiently rebutted by the appellant's sole resolution of 20th January, 1973 vide which it resolved to purchase the suit parcels alone, and the sale agreement executed by the appellant in its sole name and the Official Receiver.

Section 85 of the **Evidence Act-Cap 80** provides as follows:-

> **"The production of a copy of any written law, or of a copy of the Gazette containing any written law or any notice purporting to be made in pursuance of a written law, where such law or notice (as the case may be) purports to be printed by the Government Printer, shall be prima facie evidence in all courts and for all purposes whatsoever of the due making and tenor of such written law or notice".**

In the light of the above provision, it is our finding that these documents were disclosed by the respondent during discovery before the trial and then subsequently tendered in evidence as exhibits. We have not traced on the record any challenge raised by the appellant with a view to impugning the validity, authenticity, tenor or any other material aspect of the said documents. It therefore follows, in our view, that, the resolution contained in the minutes of the joint meeting of 21st July, 1973; the corrigendum notice and the correspondence from the firm of **Kamere & Co. Advocates** dated 4th May, 1978 which were all authentic reflected the fulfillment of the intent of the appellant and the respondent to undertake a joint venture to purchase the suit parcels which culminated in equal contribution towards the purchase by the parties hereto.

As for issue number two (2), the unchallenged evidence of Mathew**, Michael** and **Jeremiah** who were founder directors and shareholders in both companies and were therefore conversant with the history as to how the two companies conducted their affairs, notwithstanding that each respective company had its own Memorandum and Articles of Association, was that the directorship and shareholding of the two companies was common. It is therefore our view that it is this common directorship and management of both companies that accounted for the ease with which the purchase agreement and sub-division on a **50:50 ratio** basis were reached. There is therefore overwhelming evidence to support the learned Judge's finding that the appellant and the respondent acted jointly both in the acquisition and subdivision of the suit parcels on **a 50:50 ratio** thereby ousting the appellant's assertion of being the exclusive beneficiary to the sale/purchase transaction. Secondly, the undisputed joint directorship which subsisted between the appellant and the respondent had the effect of blurring the identities of the respective companies as the individual directors could participate in the matters of either company at will. Accordingly, we affirm the learned judge's finding that the appellant was unjustified in claiming that it was the sole beneficiary of the sale transaction between it and Mugwathi to the exclusion of the respondent merely by virtue of holding title to the suit property in its sole name.

Turning to fraud, the Court in **Arthi Highway Developers Limited Vs. West End Butchery Limited & 6 Others. Nai. CA No. 246 of 2013** had this to say on what does or does not amount to fraud:

> "*Fraud consists of some deceitful practice or willful device, resorted to with intent to deprive another of his right, or in some manner to do him an injury. As distinguished from negligence, it is always positive, intentional. As applied to contracts, it is the cause of an error bearing on a material part of the contract created or continued by artifice, with design to obtain some unjust advantage to the one party, or to cause an inconvenience or loss to the other. Fraud, in the sense of*

a court of equity, properly includes all acts, omissions, and concealments which involve a breach of legal or equitable duty, trust, or confidence justly reposed and are injurious to another, or by which an undue and unconscientious advantage is taken of another".

Section 2 of RTA also defines "fraud" as follows:-

Fraud shall on the part of a person obtaining registration include a proved knowledge of the existence of an unregistered interest on the part of some other person, whose interest he knowingly and wrongfully defeats by that registration."

It is common ground that fraud is a serious accusation which procedurally has to be pleaded and proved to a standard above a balance of probabilities but not beyond reasonable doubt. One of the authorities produced before us has this Bullen & Leake & Jacobs Precedent of pleadings 13th Edition at page 427:

"*Where fraud is intended to be charged, there must be a clear and distinct allegation of fraud upon the pleadings, and though it is not necessary that the word fraud should be used, the facts must be so stated as to show distinctly that fraud is charged (Wallingford V. Mutual Society (1880) 5 App. Cas. 685 at 697,701,709, Garden Neptune V. Occident [1989] 1 Lloyd's Rep. 305, 308)*

The statement of claim must contain precise and full allegations of facts and circumstances leading to the reasonable inference that the fraud was the cause of the loss complained of (see Lawrence V. Lord Norreys (1880) 15 App. Cas. 210 at 221). It is not allowable to leave fraud to be inferred from the facts pleaded and accordingly, fraudulent conduct must be distinctly alleged and as distinctly proved (Davy V Garrett (1878) 7 ch.D. 473 at 489). "General allegations, however strong may be the words in which they are stated, are insufficient to amount on an averment of fraud of which any court ought to take notice".

See **Insurance Company of East Africa Vs. The Attorney General & 3 Others HCCC 135 of 1998.**

"Whether there was fraud is, however, a matter of evidence."

In **Vivo Energy Kenya Limited Vs. Maloba Petrol Station Limited & 3 Others [2015] eKLR** the court went on to add *inter that* that:-

"Where fraud is alleged, it must be specially pleaded and particulars thereof given.

……..……..

Even where a plaintiff has properly pleaded fraud, he or she is required in addition to prove it beyond a mere balance of probabilities. In R.G. Patel Vs. Lalji Makanji [1957] EA 314, at page 317 the former Court of Appeal for Eastern Africa stated that:-

"allegations of fraud must be strictly proved; although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required:

And in Richard Akwesera Onditi Vs. Kenya Commercial Finance Co. Ltd CA No. 329 of 2009 this Court expressed itself on the issue as follows:-

"needless to say fraud and collusion are serious accusations and require a very high standard of proof, certainly above mere balance of probability, ……."

It is our finding that the respondent complied with the prerequisites set by the above principles by pleading and particularizing fraud. What is now left for us to determine is whether there was any basis for the learned judge's finding that on the facts before him, the appellant was culpable for fraud, in so far

as it caused the suit property to be registered in its sole name.

The learned judge found that in so far as the appellant caused the registration of the suit property in its sole name to the exclusion of the respondent, in defiance of the various facts we have set out herein, the resulting title was not immune from challenge by the respondent, as all those factors went to form anchor for an overriding beneficial interest in favour of the respondent against the said title, first, by reason of the joint purchase agreement already proved above; and second, by reason of the fact that the appellant had already received its 50% share of the suit parcels, settled its share holders thereon and issued them with title deeds.

To the learned judge, it mattered not that the respondent's interest was not noted on the face of the said title, and since registration of title was a matter of law, the court was entitled to inquire into the circumstances surrounding its registration in the appellant's name, which the court had in fact done, and come to the conclusion, which, we affirm, that there was sufficient evidence to demonstrate that the suit property was the respondent's share of the joint purchase. The appellant's registration as sole proprietor of the suit property to the exclusion of the respondent was fraudulent as it amounted to stealing a march on the respondent. The appellant therefore held the suit property in trust for and for the benefit of the respondent and a declaration to that effect shall issue the absence of any reference of a trust in the instrument of acquisition of the suit property notwithstanding.

We therefore find no error in the learned Judge's finding that on the facts before him, the respondent's claim had been proved to the required threshold. We find no reason to interfere with the judgment and it is accordingly affirmed. The appeal is without merit and is dismissed in its entirety with costs to the respondent.

Dated and delivered at Nakuru this 23rd day of February, 2017.

R. N. NAMBUYE

.....

JUDGE OF APPEAL

G. B. M. KARIUKI

.....

JUDGE OF APPEAL

P. O. KIAGE

.....

JUDGE OF APPEAL