



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: VISRAM, SICHALE & J. MOHAMMED, J.J.A.)**

**CIVIL APPEAL NO. 270 OF 2011**

**BETWEEN**

**SURAJ PLAZA LIMITED.....1ST APPELLANT**

**MANJI SHANJI HALAI.....2ND APPELLANT**

**KANTILAL DHANJI HALAI.....3RD APPELLANT**

**KILYAN DHANJI HALAI.....4TH APPELLANT**

**AND**

**TABITHA WANGECI NDERITU.....RESPONDENT**

*(Being an appeal from a judgment and/or decree of*

*High Court of Kenya at Nairobi (Abida Ali Aroni J.)*

*dated 30th August 2011*

*in*

*H.C.C.C. No. 414 of 2003 Consolidated with H.C.C.C. 1261 of 2002*

\*\*\*\*\*

**JUDGMENT OF THE COURT**

This is an appeal against the judgment of Abida Ali Aroni, J. rendered on 30th August, 2011.

A brief background to this appeal is that on the 28th July, 2002 **TABITHA WANGECI NDERITU** the then plaintiff (suing as guardian *ad litem* to **SIMON NDERITU KARIUKI**) and the respondent herein filed a plaint dated 26th July, 2002 in Nairobi HCCC No. 1262 of 2002. **SURAJ PLAZA LIMITED**, the 1st appellant herein was named as the 1st defendant whilst **SURAJ DHANJI** was named as the 2nd defendant. On 6th May, 2003 the respondent, again suing as guardian *ad litem* to **SIMON NDERITU**

**KARIUKI** (and the then plaintiff) filed Nairobi **HCCC No. 414 OF 2003** and

**SURAJ PLAZA LIMITED, MANJI DHANJI HALAI, KANTILAL DHANJI HALAI and KILYAN DHANJI HALAI** (the appellants herein) were named as the 1st, 2nd, 3rd and 4th defendants respectively.

In **Nairobi HCCC No. 1262 of 2002**, the respondent's contention was that **SIMON NDERITU KARIUKI (SIMON)** was the lawful owner of property known as **LR. NO. 209/1240** in Nairobi (hereinafter the suit property) and that on or about the month of September 2001, the appellant and **SURAJ** fraudulently caused the suit property to be transferred to the 1st appellant. It was the respondent's further averment that Simon had been incapable of managing his affairs from the year 1998 on account of ill-health, and hence could not have transferred the suit property in the year 2001. The respondent sought the following orders, inter alia –

- “a) A declaration that the conveyance of title No. LR. 209/1240 to SURAJ PLAZA is a forgery.**
- b) An order that the said conveyance be cancelled and title reverted to SIMON NDERITU the owner....”**

On the 29th August, 2002 the 1st appellant and **SURAJ DHANJI** filed a joint statement of defence and a counter-claim by the 1st appellant dated 26th August, 2002 in respect of Nairobi HCCC No. 1262 of 2002 in which they denied the allegation of forgery in the transfer of suit property to the 1st appellant. The duo averred that the suit property **“...was legally transferred...vide an indenture of assignment registered at the Government Land Registry at Nairobi in Volume No 19 Folio 364/24”**

In paragraph 5 thereof the 1st appellant and **SURAJ DHANJI** further averred that –

- “a) The 1st defendant bought the suit property from Simon for the sum of Kshs.4,000,000/- which sum Simon acknowledged receipt on 7th January 1998.**
- b) Negotiations for the purchase by the 1st defendant of the suit property started way back in February, 1997 and the transaction and documentation were handled by V.M. Patel, Advocate (Now deceased).**
- c) The 1st defendant assumed responsibility of the suit property and has been paying Land rent and council rates from 1997.**
- d) Simon's signature to the indenture of Assignment was witnessed by V.M. Patel, Advocate.**
- e) During the transfer of the suit property to the 1st defendant, Simon surrendered all the original title documents in respect of the property which are kept by and are in the possession of the 1st defendant.**
- f) The Indenture of Assignment could not be registered immediately and had to wait until September 2001 because the suit property was encumbered by a Notification of Charge dated 8th October, 1987 by the Commissioner of Income Tax claiming Kshs.900,000/-from Simon. This charge was not removed until sometime in 2001.**
- g) Upon receipt of the purchase price, Simon handed over to the 1st defendant the suit property and in 1998 the 1st defendant entered the property, fenced it off and demolished the old structure then erected thereon.”**

In the counter-claim the 1st appellant contended that in 1998 the 1st appellant allowed the respondent to construct a **“Makuti”** structure for a bar business on the understanding that the respondent would vacate

the suit premises when the appellant needed to use the suit property. The 1st appellant sought an order for.

**“a) vacant possession of the suit property or in the alternative an order of eviction.**

**b) Damages for trespass.**

**c) Mesne Profits**

**d) Costs of the counter claim”.**

On 10th September, 2002 the respondent filed a reply to the defence and counter-claim by the 1st appellant and denied all the averments therein. In paragraph 6 she stated:-

**“The plaintiff is aware that her husband Simon Nderitu Kariuki had entered into some arrangement with the 2nd defendant for developing LR No. 209/1241 which led to the formation of 1st defendant but avers that the transfer of LR No. 209/1240 to the 1st defendant and subsequent transfer of the shares of Simon Nderitu Kariuki in the 1st defendant are acts of fraud.”**

And in paragraph 7 she stated -

**“The Plaintiff denies she was allowed to construct a make (sic) structure on the suit premises by the 1st defendant and avers that she and her family put up the structure as of right, and openly and the defendants have never raised a finger knowing fully well that the property belongs to Simon Nderitu Kariuki”**

On 10th September, 2002 the respondent filed an amended plaint in Nairobi HCCC No. 1262 of 2002 in which she pleaded her position as a co-owner of the suit property by virtue of a court order dated 30th June, 1988 issued in Civil Appeal No. 203 of 1997. Save for the amendment stating that the respondent was a co-owner of the property and substitution of SURAJ DHANJI with DHANJI NANJI KARSAN as the 2nd defendant thereon, the averments in the plaint dated 28th July, 2002 remained unchanged. On 25th September, 2002 the appellant and DHANJI NANJI KARSAN filed an amended statement of defence and counter-claim by the 1st appellant and denied the respondent’s allegation of being a co-owner of the suit property. Further, the two contended that Civil Appeal No. 203 of 1997 did not make the respondent a co-owner of the suit property. A reply to defence and defence to counterclaim was also filed by the respondent. For now, that is as so much as relates to Nairobi HCCC No. 1262 of 2002.

As indicated above the respondent filed a second suit, namely Nairobi HCCC No. 414 of 2003 in which she averred that Simon was a director/shareholder of the 1st appellant and that on or about 3rd March, 1998, the appellants (who were named as the 1st, 2nd, 3rd & 4th defendants) fraudulently transferred Simon’s shares unto themselves. The respondent particularized the fraud as follows:

**“a) Forging Simon Nderitu Kariuki’s signature on the transfer deed and resolution.**

**b) Causing themselves and/or others to purport (sic) witness to Simon Nderitu Kariuki’s signature.**

**c) Causing the said transfer deed containing Simon Nderitu Kariuki’s forged signature to be registered at the Registrar of companies.**

**d) Forging Simon Nderitu Kariuki’s signature on the resolution and on form 203 A”**

The respondent sought an order for, inter alia **“restoration of her husband’s shares”** The appellants in joint statement of defence dated 17th June, 2003 denied having fraudulently transferred Simon’s shares unto themselves. The appellants averred that on or about 3rd March, 1998, Simon voluntarily and for

value divested his shares to the 2nd, 3rd and 4th appellants upon approval by a resolution of the shareholders.

On 15th February 2008, following a chamber summons application dated 8th March, 2007 filed by the respondent, an order was made consolidating Nairobi HCCC No. 1262 of 2002 with Nairobi HCCC No. 414 of 2003. Pursuant to the consolidation the trial commenced before Abida Ali Aroni, J. on the 4th June, 2009. PW1 TABITHA WANGECHI NDERITU (the respondent) told the trial court that in 1998 her husband, Simon suffered a stroke which impaired his sense of hearing and speaking. It was her evidence that as the appellant **“... used to build for us they used to offset rent from services rendered.”** It was her evidence that the appellants occupied Simon’s house at Eastleigh Nairobi and that when she demanded rent which the appellants used to collect on behalf of Simon, the appellants said they were owed 1.5 million. According to her, the appellants owed Simon Ksh.2M. It was her further evidence that on 11th July, 2009 she carried out a search at the land’s office and found that the suit property had been transferred to the 1st appellant vide an indenture lodged on 7th September, 2001. The sale price on the indenture was given as Ksh.4 million. She contended that the indenture which was registered on 11th September, 2001 was a fraud as Simon had been incapacitated by the stroke suffered in 1998. It was her evidence that she occupied the suit property and has constructed a one storeyed building. Apart from her assertion that the purported transfer of the suit property was fraudulent, it was her contention that the transfer of Simon’s 45% shares in the 1st appellant to the 2nd, 3rd and 4th appellants was fraught with fraud.

PW2 ANTHONY MAINA NDERITU, a son to Simon and the respondent, told the trial court that he assisted his father (Simon) in the latter’s business dealings and that he is the one who delivered the title of the suit property to Mr. Kanji **“.. for change of user. The user was residential and they wanted to make it commercial.”**

PW3 MACKENZIE MWAU a handwriting expert examined Simon’s known as well as questioned signatures. He also examined V.M. Patel’s known signature as well as his questioned signature. He compiled a report dated 18th September 2002 detailing his findings. In particular, he made a finding that the signature of both V.M. Patel and Simon on the indenture dated 7th .....2001 were not similar to their known signatures.

PW4 KENNEDY MUSOTI the then assistant Registrar of Companies testified that from the records held at the Companies Registry, the 1st appellant was registered on 3rd January, 1997 and its shareholding was as follows.

1. **SIMON NDERITU KARIUKI .....45 SHARES**
2. **MANJI DHANJI HALAI.....10 SHARES**
3. **KANTILAL DHANJI HALAI.....10 SHARES**
4. **DHANJI NANJI HALAI.....35 SHARES**

According to him a notification of change is-

**“...accompanied with a resignation in writing by the person ceasing to be a director and minutes of a meeting where the matter was minuted and special resolution to such change....”.**

Again from the records held by the registry, it was his evidence that **“the company registry was not notified of any sale of shares.”** However, he conceded that the documents held by him were not from the original file and that it was possible that there may be other documents in the original file which at the time could not be traced at the registry as they were in the process of computerization.

PW5 CHARLES KIPKURUI NGETICH was the then Registrar of Titles based at Ardhi House. His

testimony was to the effect **“the documents dated 7th January, 1998 was booked on 11th September, 2001-daily booking No. 417 at about 1600 hours. Duty paid is 8,000 4% of 4 million, no penalty was paid. It seems a penalty of £34,000 ought to have been paid.... The second instrument of 7th 2001 with no month was booked on 11th September, 2001 day book No. 417 at 1653 hours. Stamp duty reflected is £8,000 4 % of 4 Million. No penalty is payable as document as document (sic) booked on he (sic) right documents”**

In their defence the appellants called ANTIPUS NYANJW'A (PW1) a forensic document examiner from the Criminal Investigations Department. PW1 examined the signatures on the indenture dated 7th January, 1998 with the known signature of the author and came to the conclusion that they were made by the same hand.

DW2 KANTILAL SHANJI HALAI, is one of the directors of the 1st appellant. He testified that his late father, DHANJI MANJI HALAI who died in 2010 sold his property in Eastleigh to Simon. In spite of the sale, they remained on the property as tenants. He attested of close business relations between the two families; that the 1st appellant purchased plot No. 1241 on Limuru Road from SIMON & 4 others; that Simon's shares in the 1st appellant was 45. He stated-

**“My father bought 1241 in cash for company and Mr. Simon was to bring 1240 to the company as his contribution to the company. The time (sic) properties were to be put together and a project started.”**

DW2 further told the trial court that later Simon opted out of the company and asked to be paid Ksh.4 million for Plot No. 1240 (the suit property) which was his contribution to the company. The sum of Ksh.4 million was paid to SIMON by V.M. PATEL advocate and Simon acknowledged receipt of the 4M vide a receipt dated 7th January, 1998. Unfortunately the suit property could not be transferred as there was a caveat imposed by the Commissioner of Income Tax, hence the delay in registration of the indenture in 2001. Later, he and his two brothers purchased SIMON's 45% shares in SURAJ LTD. The transfer of shares deed was processed by the Company Secretary, namely Jane & associates. On 26th June, 2009 he caused a search to be done at the Lands Registry, before the file at the Lands Office went missing. In cross examination, he denied having submitted an indenture dated 7th September, 2001. He stated-

**“I do not know where the assignment dated 7th September, 2001 came from. As far as we are aware of the assignment was dated 7th January, 1998. I do not know about the one of 7th September, 2001”**

As for the purchase price it was his evidence that it -

**“...was credited to V.M. Patel bit by bit”** and that he had no -

**“... evidence to show payments to V.M. Patel Advocate. Mr. Nderitu was paid in cash and gave a receipt....”**

Upon completion of registration of the suit property, DW2 said that they discovered that the date on the registered indenture was different from the folio copy and they duly notified the Commissioner of Lands. As a family, they had allowed the respondent to use part of the suit property, which she initially built a temporary structure and later a permanent structure to wit, a one storeyed building.

DW3 BETTY ATIENO FANUEL, a Registrar of Titles issued the search details of 10th July, 2009 and another search of 11th August, 2009 showing an assignment dated 7th January, 1998 and registered on 11th September, 2001.

Upon conclusion of the evidence, the court retired to write its judgment and in a judgment dated 30th day of August, 2011 found in favour of the respondent in respect of the suit property as well as for the 45% shares in the company. The appellants were dissatisfied with the outcome of the suit and filed a Notice of

Appeal dated 6th September, 2011. Subsequently, in a memorandum of appeal dated 15th December, 2011, the appellants filed no less than 12 grounds of appeal. These grounds were urged by way of oral and written submissions when the appeal came before us for hearing on 22nd February, 2017. The appellants filed their written submissions on 27th October, 2016, the respondents on 25th November, 2016, and the appellant's response to the respondents submissions were filed on 8th December 2016 and finally, the appellant's digest of authorities and its authorities were filed on 16th January, 2017. Mr. A.B. Shah teaming up with K Mubea urged the appeal whilst Mr. Mwangi Kigotho for the respondents opposed the appeal.

In urging the appeal Mr. A.B. Shah faulted the judgment of the trial court in finding in favour of the respondent in the absence of adequate evidence. He contended that Simon signed the transfer dated 7th January, 1998 in presence of V.M. Patel Advocate (now deceased); that the consideration for the sale/purchase of the suit property was Ksh.4 million which was duly paid and acknowledged; that the delay in registering the indenture in 2001 was caused by a caveat placed by the Commissioner of Income Tax; that at the time Simon (who was then estranged from his wife, the respondent) executed the indenture, he was in good health; that although the first page of the indenture dated 7th...2001(without the month) was a forgery, no fraud could be attributed to the appellants; that on 3rd March, 1998 Simon transferred his 45% shares vide a deed of transfer which was signed by Simon and the 3 transferees. Secondly, the appellants contended that the learned Judge erred in both law and fact by awarding orders not sought as the respondent had not sought an order for **“a declaration that any transfer of Simon Nderitu's shares to the 1st appellant was irregular.”** Thirdly, the appellants contended that the learned judge erred when she made a finding that **“none of the two parties were able to produce an original indentures (sic) ...”** yet the 4th appellant produced the original document in court and finally that the learned trial judge erred in finding that there was no agreement and/or memorandum in writing for the purchase of the suit property. It was the appellants' contention that the indenture of 7th January, 1998 made between Simon and the 1st appellant amounted to a written agreement envisaged under section 3(3) (a) of the Law of Contract Act.

In opposing the appeal, Mr. Kigotho for the respondent urged us to find that Simon having suffered a stroke that incapacitated him in the year 1998, there was no way he could have signed the assignment dated 7th September,2001 transferring the suit property to the appellant as evidenced by entry No. 24 on the indenture held by the Land's office; that on 11th July, 2002 the respondent applied for a copy of a search in respect of the suit property and she was supplied with a copy of an indenture made on the 7th (no month) 2001 and purportedly registered on 11th September, 2001; that the appellants search of 26th June, 2009 showed that the indenture was dated 7th January, 1998 and registered on 11th September, 2001; that there was no evidence of payment of penalty for the registration and/or waiver of penalty if indeed the indenture was signed on 7th January, 1998 and registered on 11th September, 2001; that there was no company resolution for purchase of the suit property by the 1st appellant; that there was no evidence that the appellants deposited Ksh.4 million with V.M. PATEL Advocates; that the receipt purportedly acknowledging payment of the Ksh.4 million was made out to “SURAJ LTD” and not to the payee V.M. Patel advocate (if at all); that the issue of the transfer of 45% of Simon's shares in the company was fraught with irregularities; that the witnesses on the purported deed of transfer of shares was a brother of the transferees in an office belonging to the Company Secretary in Westlands who was not called as a witness; that the purported transfer of shares was not supported by minutes of the company and neither was stamp duty paid for the transfer of shares.

In a brief rejoinder Mr. Shah submitted that the burden of proof which lay on the respondents was not discharged.

We have considered the record in its entirety, the written and oral submissions made before us, the authorities cited as well as the law and it would be remiss on our part if we do not acknowledge that this appeal has caused us considerable anxiety. Be that as it may, as a first appellate court we remind ourselves of our primary role of re-analyzing and re-evaluating the evidence tendered in the trial. However, in re-analyzing and re-evaluating the evidence, we should always bear in mind that we did not have the benefit of hearing and observing the demeanour of the witnesses.

In the celebrated case of Selle v Associates Motor Boat Company [1968] EA, 123, it was held:

**“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 it 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 demeanour of a witness is inconsistent with the evidence in the case generally.**

*(Abdul Hameed Saif vs. Mohamed Sholan (1955), 22 E.A.C.A 270.”*

We also remind ourselves that this Court will not be in haste to interfere with a finding of fact by a trial court, unless such a finding is based on no evidence or the judge is shown demonstrably to have acted on wrong principles in reaching the findings he/she did. See **EPHANTUS MWANGI & ANOTHER V. DUNCAN MWANGI [1982-99] 1 KAR 278**.

The appellants first ground of appeal faulted the learned trial judge in finding in favour of the respondent. It was contended by the appellant that there was **“no sufficient and/or adequate evidence”** to justify her finding in favour of the respondent. Suffice to state that the dispute herein being a civil claim, the standard of proof is on a balance of probabilities. In **PALACE INVESTMENTS LTD VS GEOFFREY KARIUKI MWENDA & ANOTHER [2007] eKLR**, this court adopted the decision of **Denning J. in MILLER VS MINISTER OF PENSIONS [1947]2 ALL ER 372** where he held as follows:

**“The degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that a tribunal can say: “we think it more probable than not; the burden is discharged, but, if the probabilities are equal it is not.**

**Thus, proof on a balance or preponderance of probabilities means a win however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept where both parties’ explanations are equally (un) convincing, the party which bears the burden of proof will lose because the requisite standard will not have been attained.”**

See also **DT DOBIE & COMPANY (K) LTD. VS WANYONYI WAFULA [2014] eKLR**.

Mr. A.B Shah rightly submitted that the onus of proof lies on the one who alleges, in this case the respondent. S. 107 of the Evidence Act attests to this as it provides that-

**“107 (1) whoever desires any court to give judgment as to any legal right or inability dependent on the existence of facts which he asserts must prove that those facts exist.**

**2. when a person is bound to prove the existence of any fact or is said that the burden of proof lies in that person.”**

For a start it is not in dispute that SURAJ LIMITED was incorporated on 3rd January, 1997. The shareholding of at the time of incorporation were as follows:

- a) SIMON NDERITU KARIUKI .....45 SHARES
- b) MANJI DHANJI HALAI.....10 SHARES
- c) KANTILAL DHANJI HALAI.....10 SHARES

d) DHANJI MANJI HALAI.....35 SHARES

It is also not in dispute that Simon and his co-shareholders had cordial family and business relationship. In fact PW2 described his father's co-directors as family friends. It is also common ground that Simon and 4 others owned property known as LR. No. 209/1241 (abutting the suit property) which property was sold to the 1st appellant, SURAJ LIMITED. Further it is also not disputed that Simon purchased a property in Eastleigh from the 2nd appellant. However the 2nd appellant in Nairobi HCCC No. 1262 of 2002 and his family members continued to occupy the said property but without paying rent as this was to be offset from money owed by Simon in respect of construction work done by the appellants. It is also not disputed that for some time the respondent did not live with Simon having been separated and the respondent came back to take care of Simon after he suffered a stroke in 1998.

However, what is contested and the cause of a bitter dispute between the two families that had hitherto been friends was whether Simon sold the suit property to SURAJ LIMITED for a consideration of Ksh.4million and whether Simon transferred his 45 shares in SURAJ LIMITED to the 2nd and 3rd and 4th respondents.

The appellants' contention was that the two families had the intention of developing property known as LR.209/1241 which had already been purchased and transferred to SURAJ LIMITED vide an indenture dated 24th April, 1997. The suit property abutted LR No. 209/1241. The appellants contended that Simon's contribution was the divesting of the suit property to SURAJ LIMITED, DW2's father having fully paid a sum of Ksh. 4 million towards purchase of LR No. 209/1241. According to DW2, SIMON later changed his mind and wanted to be paid Ksh.4 million for the suit property as he did not wish to continue being a shareholder in SURAJ LIMITED. The appellants duly paid him Ksh.4 million and Simon acknowledged the payment by issuing a receipt dated 7th January 1998. However, the receipt acknowledging payment indicated that the payment was from SURAJ LTD and not the payee, V.M. Patel Advocate. The appellants maintained that V.M. PATEL advocate paid the Ksh.4 million on their behalf as they paid V.M. PATEL a total of Ksh.4 million in instalments. However, the appellants did not produce any receipts from the firm of V.M. PATEL Advocate as evidence of the alleged payments. The matter is further complicated by the fact the V.M. PATEL Advocate died in the year 2000. According to the appellant, although SURAJ LIMITED purchased the suit property in 1998, the same was not transferred to SURAJ LIMITED as there was a caveat placed on the title by the Commissioner of Income Tax and that the indenture signed by SIMON and witnessed by V.M. PATEL Advocate in 1998 was registered on 11th September, 2001. The appellants denied any knowledge of the indenture allegedly dated 7th September 2001 and another dated 7th...2001 (without the month), and that they were at a loss to understand how page 1 of the indenture dated 7th day of January 1998 was substituted with the page 1 of the indenture dated 7th day of 2001. S.M. MWAU a handwriting expert testified as PW3 while ANTIPUS NYANJW'A a forensic document examiner testified as DW1. Their expert evidence was at variance to the extent that the court did not know who out of the two experts to believe as Mwau's testimony was that the signature on the indenture dated 7th January, 1998 was not made by SIMON and neither was it witnessed by V.M. PATEL Advocate. On the other hand Mr. NYANJW'A contradicted the above evidence. The trial court felt exasperated by the divergent opinion of the two experts. It expressed its frustration thus:

**“Both sides called experts on the subject of signature and registration of indentures. The expert witnesses PW3 Mr. Mackenzie Mwau and DW1 Mr. Antipus Nyanjwa holders of impressive professional credentials did not in the least assist the court. Their evidence was at cross-roads each disappointingly siding with their respective clients, thus leaving the question of authenticity or otherwise or the signatures unanswered.”**

There was also evidence from the two Land Registrars namely CHARLES KIPKURUI NGETICH (PW5) and BETTY ATIENO FANUEL (DW3) whose evidence exposed the confusion in respect of records of the suit property. Indeed, both the register and Deed file of the suit property was inaccessible and the two had to make do with scanty documents. A search carried out by the respondent on 11th July, 2002 (after which the file disappeared) gave different results of a search carried out by the appellants on 10th July, 2010. The fact of the matter is that there were 3 different indentures in respect of the suit property. They

are dated:-

- i. 7th ....2001 (no month)
- ii. 7 September, 2001 (registered on 11th September 2001)
- iii. 7th January, 1998

The appellants disowned the indenture dated 7th September, 2001. However, the fact of the matter is that entry No. 24 on the title of the suit property is an **“Assignment dated 7th September, 2001 to SURAJ LIMITED.”**

PW5 told the trial court that the indenture dated 7th January, 1998 and 7th...2001 were both booked on 11th September, 2001 (Day Book Number 417) and stamp duty of Ksh.8,000/- was assessed. However, no penalty was charged in respect of the indenture dated 7th January, 1998 inspite of late registration. Both indentures were registered on 11th September, 2001 at 16.55 hours. In his further testimony he stated –

**“I do not know why the month of September appears on the folio” and further “in our record the document dated 7th January, 1998 is not available”**

In considering the totality of the above evidence and given the fact that entry No. 24 on the title indicated that the indenture being registered is that dated 7th September 2001, and given the fact that although the appellants insist that the indenture that was registered was dated 7th January, 1998, and further given that no penalty was paid if indeed the indenture dated 7th January, 1998 was the one that was registered, and given the fact that it is not plausible that the respondent is the one who caused the indenture of 7th September, 2001 to be registered and given the fact that no explanation was given as to the fate of the caveat placed by the Commissioner of Domestic Tax, we are inclined to believe that the indenture dated 7th September, 2001 was presented by the appellant for registration and this is the indenture that conveyed the suit property to the 1st appellant. This explains why they did not have to pay penalty on late registration as the indenture did not attract any penalty. As stated above V.M. PATEL Advocate died in December, 2001 and Simon became incapacitated in 1998. Therefore, none of them signed the indenture dated 7th September, 2001 which caused the transfer of the suit property to SURAJ LIMITED. It is also important to note that the receipt allegedly acknowledging payment of Ksh. 4 Million by Simon has the same date as the indenture dated 7th January, 1998 which the appellants allege they presented for registration.

The learned Judge concluded her findings as follows-

**“...based on the various irregularities...including nonpayment of the requisite payment, the erasure in the folio and indeed the disappearance of the original file in the land’s registry the plaintiff has succeeded in proving that the registration of the indenture purportedly dated 7th September, 1998 was not only irregular but unlawful and fraudulent. She indeed proved beyond a balance of probabilities that no sale or lawful transfer took place.”**

We too are in agreement with the learned trial judge’s summation of the evidence and her conclusion that the indenture dated 7th September, 2001 was fraudulent and that the appellants presented this indenture so as to avoid payment of penalty on late registration. If indeed, the appellants presented the indenture that bore the same date as the receipt acknowledging receipt of Ksh.4 M on 7th January, 1998 why was there no penalty payment on stamp duty?

Our above conclusion is fortified by the letters exchanged on behalf of SURAJ LIMITED and the respondent. On 27th February 2001 MARTHA KARUA ADVOCATE, acting on behalf of the respondent wrote two letters to SURAJ DHANJI, SURAJ CONSTRUCTION and stated-

**“...You are unlawfully detaining our client’s title on the unsubstantiated allegations that you are owed money.... If indeed you are owed money you should follow the laid legal channels to prove and recover the same”**

In the second letter in respect of Tenancy on LR. No. 36/VII/384 the respondent demanded rent for the flat occupied by “SURAJ DHANJI **“...and for the other four flats from which you receive rent on account.”** Then there is the letter of 4th April, 2001 from Riunga Raiji & Co Advocates on behalf of SURAJ CONSTRUCTION CO. LTD. Its contents are as follows:

**“To all Tenants**

**L.R. No. 36/VII/384**

**Dear Sirs,**

**RE:L.R. NO. 36/VII/384**

**We act on the instructions of M/s Suraj Construction Limited who have been managing the above property on behalf of Mr. Simon Nderitu Kariuki.**

**We refer to a letter dated 21.3.2001 addressed to you by M/s Martha Karua & Company Advocates and another letter addressed to you by M/s Manclem Management & Valuers Ltd.**

**As you are aware, the above property has always been managed by M/s Suraj Construction Limited pursuant to an agreement between M/s Suraj Construction Limited and the registered proprietor Mr. Symon Ndiritu Kariuki.**

**As far as our client is concerned, this agreement has not been terminated by Mr. Kariuki.**

**We are accordingly instructed to notify you that you will continue to pay rent to M/s Suraj Construction Limited as before.**

**Yours faithfully**

**RIUNGA RAIJI & COMPANY**

**cc. 1. M/s Suraj Construction Co. Ltd**

**2. M/s Martha Karua & Co. Advocates**

**3. Manclem Management & Valuers Ltd.**

**Your Ref. MAN: AB/TT/SNK/KS/01”**

Then there is the letter of 3rd April, 2001 addressed to Martha Karua & Co. by Riunga Raiji & Co. Advocates it states:

**“M/s Martha Karua & Co.**

**Advocates**

**Standard building**

**3rd Floor**

**P.O. Box 9021**

**NAIROBI.**

**Dear Sirs,**

**RE: L.R. NO. 36/VII/384 – SIMON NDEIRITU KARIUKI**

**We act for M/s Suraj construction Ltd. And we refer to your letter of 27.3.2001 and ours of 1.3.2001. We also refer to a letter dated**

**26.3.2001 written by M/s Manclem Management & Valuers Limited presumably on your instructions.**

**Our instructions are that the property in question is owned by one SYMON NDIRITU KARIUKI.**

**Mr. Kariuki owes our client a large amount of money in respect of inter alia materials and other services supplied to him by our client when he (Mr. Kariuki) was constructing his house at Tigoni.**

**In order to repay the said debt, Mr. Kariuki agreed with our client that our client will occupy two flats and collect rent from the other flats until the full debt was repaid. (emphasis ours)**

**As far as our client is aware, Mr. Kariuki, the registered proprietor of this property has not terminated this agreement. Mr. Kariuki can, if he chooses, terminate this agreement by paying the outstanding balance of Kshs.1,542,057.60 and our client will then vacate the premises and cease collection of rent. until the above amount is paid, our client will continue to collect the rent and apply the same towards repayment of the money due to him from Mr Kariuki in accordance with the existing agreement.**

Then there are two letters that are crucial for determination of this dispute. Firstly there is the letter dated 20th April, 2001 from Riunga Raiji to M/s Manclem Management & Valuers Limited. The letter is in respect of “LR NO 30/VII/384-SIMON NDERITU KARIUKI.” In the penultimate part it stated-

**“It is clear that you are attempting to dispute the right of the landlord’s agent (M/s Suraj Construction Ltd.) to collect the rent apparently because you are eager to start collecting rent from the tenants”**

The 2nd letter of the same date (20th April 2001) is addressed to M/s Martha Karua & Co Advocates by Riunga Raiji and it states-

**“We refer to your letter of 17.4.2001.**

**We have made a search of the title of the property and your client’s interest is not noted on the title. We also have no evidence that your client has been appointed as the Landlord’s guardian ad litem.**

**Assuming that your client has in fact been appointed as Mr. Kariuki’s guardian ad litem as alleged, she will surely be aware of the existing arrangements between Suraj construction Limited and Mr. Kariuki. Our clients will willingly stop collecting the rent if they are paid the outstanding amount of Kshs.1,542,057.60 which is due from Mr. Kariuki.**

**The entire family of Mr. Kariuki knows very well that our client is owed a substantial amount of money and that is why Mr. Kariuki agreed to appoint our clients to collect the rent, and recover the amount due to them. Mr. Kariuki’s family cannot feign ignorance now that Mr. Kariuki is temporary incapacitated!**

**The dispute as to who is entitled to collect rent cannot be used to harass the tenants once the tenants have paid rent. It is up to those who claim to act for the Landlord (Mr. Kariuki) to sort out the issue with his appointed rent collector (Suraj construction Ltd).**

**Yours faithfully,**

**RIUNGA RAIJI & COMPANY**

**L RIUNGA RAIJI**

**Cc M/s Suraj Construction Ltd”**

On our part, we note that these letters from Riunga Raiji for the 1st appellant and from Martha Karua for the respondent touched on the collection of rent on behalf of Simon. To be specific, the letter from Riunga Raiji of 20th April, 2001 it indicated that the 1st appellant was owed Ksh.1,542,057.60 and in the letter the appellant stated that it was willing to stop collecting rent on behalf of Simon if it was paid this amount. It is instructive to note that in none of these letters did the appellant allege that it had purchased the suit property. Additionally, if as at 20th April, 2001 the appellant was owed Ksh.1,542,057.60, what became of this money? Why was it not counter claimed by the appellant? We further note that the respondent constructed a one-storeyed building on the suit property without the appellants raising a finger. It may be true that the appellants had the title to the suit property and they paid land rent and rates on behalf of Simon. Again, it is possible that this was the position as they were Simon’s agents for purposes of collecting rent from his various properties.

Then there is the issue of shares. The evidence of PW4 KENNEDY MUSOTI from the company’s registry was that SURAJ LIMITED was incorporated on 3rd January 1997. At the time of incorporation the shareholding was as follows -

- a) **SIMON NDERITU KARIUKI .....45 SHARES**
- c) **MANJI DHANJI HALAI.....10 SHARES**
- c) **KANTILAL DHANJI HALAI.....10 SHARES**
- d) **DHANJI MANJI HALAI.....35 SHARES**

According to DW2 the shareholders met at the offices of the company secretary in Westlands on 3rd March, 1998 and SIMON signed off his shares. The signatures of the transferees were witnessed by one of the other brothers namely ASHOK DHANJI HALAI. It is noteworthy to state that the said company secretary was not called as a witness and neither did she append her signature on the transfer deed. PW4 confirmed that the file in the Companies Registry was missing but from the available records, no resignation by SIMON was filed. Indeed DW2 admitted that no notice in writing of the intention to sell the shares was given contrary to the Articles and Memorandum of Association of SURAJ LIMITED which provided as follows-

**“9 (a) Any share may be transferred at any time by a member to any other member or to a child or other issue, son-in-law, husband, wife, nephew or niece of such member and any share of a deceased member may be transferred by his legal representative to any other child, relative of the deceased member or any relative to whom the deceased member may have specifically bequeathed the same.**

**(b) Except where the transfer is made pursuant to the last preceding Article the member proposing to transfer any share shall give notice in writing (emphasis ours) to the company that he desires to transfer the same. Such notice shall specify the sum he or she fixes as the fair value and shall constitute the company his or her agent for the sale to any member of the company at the price so fixed or at the option or the purchase to be fixed by the auditor...”**

Again, no letter of resignation by Simon was filed at the Companies Registry and no payment of stamp duty for the transfer of shares was paid. There was also no notice of the intended resignation. On our part we are satisfied that the respondent was able to demonstrate to the required standard that Simon never transferred his 45 shares.

The upshot of the above is that we find no merit in this appeal. It is dismissed with costs.

***Dated and delivered at Nairobi this 29th day of September, 2017.***

***ALNASHIR VISRAM***

.....

***JUDGE OF APPEAL***

***F. SICHALE***

.....

***JUDGE OF APPEAL***

***J. MOHAMMED***

.....

***JUDGE OF APPEAL***

*I certify that this is a*

*true copy of the original.*

***DEPUTY REGISTRAR***