



IN THE COURT OF APPEAL

AT NYERI

(SITTING IN NAKURU)

(CORAM: G.B.M. KARIUKI, SICHALE & KANTAI, JJ.A.)

CIVIL APPEAL NO. 213 OF 2013

BETWEEN

NYANDARUA PROGRESSIVE AGENCIES LIMITED.....APPELLANT

VERSUS

CYRUS WAHOME NDUHIU.....1ST RESPONDENT

PETER WANJOHI.....2ND RESPONDENT

(An appeal from the judgment of the High Court of Kenya

at Nakuru (Kimaru, J.) delivered on 9th April, 2010

in

H.C.C.C. No. 767 of 1992)

JUDGMENT OF THE COURT

The appellant, **Nyandarua Progressive Agencies Limited**, a limited liability company whose sole purpose was to buy land for its members was incorporated in 1974. The respondents, **Cyrus Wahome Nduhiu** and **Peter Wanjohi** were shareholders as was **John Kihara Wamburi** who died in the course of the proceedings before the High Court.

The respondents and the deceased filed at the High Court of Kenya at Nakuru **Civil Suit No. 767 of 1992** against the appellant where they claimed amongst other things that they were lawful shareholders and former directors of the appellant. They claimed that the appellant in 1976 purchased a parcel of land known as **Milreed Farm** in Nakuru in the then Nakuru District measuring about 7000 acres and that each of them was allocated six acres representing two shares for each. They further claimed that between 1976 and 1985 they were offered by the appellant more shares. It was further claimed that between the years 1984 and 1985 the farm was surveyed and divided into plots of 4 acres per share and that the respondents were allocated plots that were set out in the plaint. Further, that on the 27th September, 1986 the then District Commissioner, Nakuru, was elected the Chairman of Board of Directors of the appellant to run

the affairs of the appellant after some problems had beset the management of the appellant. Further, that a probe committee was appointed to probe the affairs of the company which probe committee recommended that the respondents and the deceased be dispossessed of part of their plots which had been allocated to them. Various reliefs were sought including a declaration that the respondents and the deceased were lawful owners of parcels of land set out in the plaint and that a perpetual injunction be issued restraining the appellant from interfering with management of the said plots of land.

The appellant delivered a defence which generally denied the claim. It was alleged in the defence that the respondents had not been lawfully allocated the plots of land that they claimed. It was further stated in the defence that the respondents who were former directors of the appellant had unlawfully allocated to themselves plots of land by abusing their positions as directors of the appellant.

The suit was heard by **Kimaru, J.** who in a judgment delivered on 9th April, 2010 found that the respondents had lawfully acquired the parcels of land; that the respondents were entitled to ownership of the same and in the event the learned Judge issued a declaration that the respondents were lawful allottees of parcels of land set out in the judgment. The learned Judge therefore issued perpetual injunction restraining the appellant from interfering with ownership and occupation of the suit parcels of land finding that the respondents had established that they were rightful owners of parcels of land. Those are the orders that provoked this appeal.

There are 14 grounds set out in the Memorandum of Appeal drawn on behalf of the appellant by its advocates. In essence the grounds fault the learned judge on his finding on what constituted rejected plots; for finding that the respondents had rightfully purchased shares entitling them to the suit lands; for not finding that the respondents had abused their office as directors to allocate themselves shares without the legal authority to do so amongst other grounds related to this.

This is a first appeal from the judgment of the High Court and it is our duty to re-evaluate the evidence, reanalyze the same so as to reach our own conclusions and drawing our own inferences of facts. We do so conscious that we have not had the advantage the trial Judge had of hearing and observing the witnesses as they testified. We must therefore give the learned Judge's conclusions a measure of respect but are at liberty to depart from the findings of the learned Judge if the evidence on the whole compels us to reach a different conclusion – See Rule 29 of the Court of Appeal Rules. For a judicial enunciation of the duties of a first appellate court the principles were well set out in the oft-cited case of **Selle v Associated Motor Boat Company Limited and Others [1968] E.A. 123.**

The respondents testified before the learned judge. The evidence was that they were shareholders of the appellant and that they had been elected directors of the appellant for the period 1979 to 1986. The respondents denied that they had abused their office to allocate themselves shares entitling them to land. They claimed that there were plots that were rejected by members because of their terrain and that the appellant had resolved that members could purchase rejected plots different from entitlement as members. They admitted that they had acquired shares which translated into parcels of land of 28 acres each.

The appellant's witness **Mr. Francis Elias Wainaina Mugo** was the Chairman of the Board of the appellant at the time of the hearing before the learned Judge. He testified amongst other things that the respondents had abused their positions as directors and had acquired plots for themselves or for their friends or families without a resolution of the appellant. He produced a report of a probe committee chaired by the then District Commissioner Nakuru. That report found that the respondents and colleague directors had abused their office by allocating themselves land which they were not entitled to. It recommended that titles to the parcels of land be revoked and the lands be returned to the appellant. It also recommended that the respondents and their colleague directors be charged with various criminal offences.

We have perused that report and have also seen in the record a letter by the Senior Deputy Registrar of Companies dated 18th July, 1988 addressed to the said probe committee that was looking into the affairs of the appellant. The said letter states, *inter alia*, that the appellant was one of the land buying companies

whose affairs had been conducted in a manner that left much to be desired and ignored laws of the land. That letter stated also that the directors of the appellant had committed breaches of the provisions of the Companies Act and had committed criminal offences for which the Director of Criminal Investigations should institute criminal proceedings.

This appeal came up for hearing before us on 20th June, 2017 when **Mr. Lawrence Karanja** appeared for the appellant while **Mr. J.G. Kaguchia** appeared for the respondents. Mr. Karanja gave us a history of the matter before the High Court and submitted that the appellant at an annual general meeting had resolved that plots irregularly acquired by the respondents be repossessed which led to the suit in the High Court. Learned counsel submitted that the respondents as directors of the appellant had fiduciary duties as directors and should not have used their office to buy property of the company as that was against the law. According to learned counsel the respondents had engaged in fraud against the appellant. Learned counsel submitted that once there was breach of a fiduciary duty by a director the act committed was voidable at the instance of the company. This allowed for avoidance of a conflict of interest by a director. Learned counsel therefore faulted the learned Judge who found that there was no breach of fiduciary duty by the respondents when they allocated themselves shares.

Mr. Kaguchia in opposing the appeal submitted that the learned Judge had correctly analysed the evidence and reached the correct decision. Mr. Kaguchia was of the view that the respondents had occupied their parcels of land for a long time and that they should not be dispossessed of the lands.

We have considered the record of appeal, the submissions made and the law and this is what we think of this appeal.

It was common ground that the respondents, who were shareholders of the appellant, were elected as directors of the appellant and served as such from 1979 to 1986. It was also common ground that when the former Milreed Farm was surveyed for allocation to members part of the land was not arable and was rocky and was rejected by some members who preferred to have parcels of land that were arable and with better terrain. According to the respondents those “rejected” parcels became available for allocation and they acquired the same lawfully through purchase and were entitled to the same.

The learned trial Judge evaluated the evidence before him and found that:

“.....it was clear to the court that the then directors of the defendant, including the plaintiffs, were not specifically barred from acquiring further shares in the defendant company provided they had the financial capability to do so. The court was unable to find anything illegal in the plaintiffs acquiring further shares from the company while they were directors of the company.....”

The Companies Act Chapter 486 Laws of Kenya was repealed by **The Companies Act 2015**. The repealed Act had provisions prohibiting directors from dealing with assets of a company without full disclosure to the company and a resolution by the company. The new Act is more robust and has expanded the scope thereof but has not changed the substance of the provision of the repealed Act in as far as duties of directors is concerned. **Section 142** of the **2015 Act** codifies the equitable rule that a director must act in accordance with the company’s constitution and must only exercise his powers for their proper purpose for the company. The liability is strict: if the director’s substantial purpose was not the purpose for which the power was conferred, it will not matter if he exercised the power in good faith or in the belief that it would promote the success of the company for the benefit of the members as a whole.

In the case of **Ajay Shah v Deposit Protection Fund Board as Liquidator of Trust Bank Limited (in liquidation)** (2016) eKLR, this Court cited with approval the case of **Jetivia S.A. & Anor v Bilta (UK) Limited (in liq) & Ors** (2015) UKSC 23 where the court expressed itself as follows:

“The UK Supreme Court held that where the directors of a company committed a fraud which caused the company loss, the directors were liable. In dealing with the concept of separate legal

identity between a company and directors, the UK Supreme Court observed that there are cases where the minds of the company is not the mind of the directors; “that where a company is making a claim against its directors, the situation is different. Directors owe certain duties to the companies which they serve and in the context of those duties, the acts, knowledge and state of mind of a company must be considered separate from those of its directors. The duties exist for the protection of a company against its directors, so in this context the conduct of the directors must be separated from that of the company.”

In the AJAY case (supra) this Court cited with approval Gower’s Principles of Modern Company Law, 4 ed. at page 571 where it is stated:

“....to describe directors as trustees seems today to be neither strictly correct nor invariably helpful. (See City Equitable Fire Insurance Co. (1925) Ch 407 per Romer J. at p.426. in truth, directors are agents of the company rather than trustee of it or its property. But as agents, they stand in fiduciary relationship to their principal, the company. The duty of good faith which this fiduciary relationship imposes is virtually identical with those imposed on trustees and to this extent the description “trustee” still has validity. The duties of directors can conveniently be discussed under two heads: (a) fiduciary duties of loyalty and good faith (analogous to the duties of trustee’s stricto sensu) and (b) duties of care and skills.” (See “Fiduciary Relationships” (1962) C.L.J. 69 and 91963) C.L.J. 119 and “The Director as Trustee” (1967) C.L.J. 83.)”

Section 143 provides that a director must act in the way he considers, in good faith, would most likely to promote the success of the company for the benefits of its members as a whole.

Section 145 of the said **Act** provides that a director must exercise the care, skill and diligence which would be exercised by a reasonably diligent person with both the general knowledge, skill and experience that may reasonably be expected of a person carrying out the functions carried out by the director in relation to the company (the “objective” test); and the general knowledge, skill and experience that the director actually has (the “subjective” test).

Section 146 of the **Act** provides that a director must not, without the company’s consent, place himself in a position where there is a conflict, or possible conflict, between the duties he owes the company and either his personal interests or other duties he owes to a third party. The duty applies, in particular, to the exploitation of property, information or opportunity, and whether or not the company could take advantage of the property, information or opportunity.

It is further provided at **Section 158** of the said **Act** that a company may not enter into an arrangement where a director of a company or a person connected to him where the director or that other person acquires a substantial non-cash asset of the company or the company acquires from such directors or that other person a substantial non-cash asset unless that arrangement has been approved by a resolution of the members of the company.

We need not get into other provisions of the Act for purposes of this judgment.

The respondents and their colleague directors upon being elected as directors of the appellant in 1979 entered into contracts or arrangements that enabled them to acquire lands belonging to the appellant without knowledge of the members of the appellant and without a resolution of the members of the appellant to authorize them to do so.

A Probe Committee appointed to probe the affairs of the appellant found that the respondents had abused and misused their positions to acquire land belonging to the appellant and the Probe Committee recommended that the lands should be repossessed and the respondents and their colleague directors be charged with criminal offences for breaches of the provisions of the Companies Act and the Penal Code.

The learned trial Judge examined that Probe Committee report and dismissed it holding that the District Commissioner, Nakuru, acted *ultra vires* in probing the affairs of the appellant when he was not a

member of the appellant. The learned Judge went as far as taking judicial notice that the government of Kenya at the material time interfered with affairs of land buying companies. Having perused the record we are of the respectful opinion that the learned Judge erred in taking that position. The issue was not before him at all and the parties in the suit did not address the learned Judge on it. It was wrong to make a definitive and substantial holding on an issue that was not before him and where the parties had not addressed the court at all.

The main issue that was before the trial Judge was whether the respondents, in acquiring the appellant's lands while serving as directors of the appellant had abused their office. There was overwhelming evidence as supported by the said probe report that the respondents acquired the lands while serving as directors of the appellant and that there was no approval by members or a resolution entitling the respondents to acquire the lands. There was even controversy on whether the respondents had made any consideration to purchase the lands as part of the evidence produced before the learned Judge seemed to show that some payments were made way after the said acquisitions.

Having found that the respondents abused their offices as directors of the appellant to acquire the lands set out in the plaint, we agree with submissions of the appellant that the learned Judge erred in allowing the suit before him. The respondents were not entitled to the suit lands that they acquired while serving as directors of the appellant. The suit in the High Court should have been dismissed. We so find and hold.

This appeal succeeds and the appellant will have costs here and below.

Dated and delivered at Nakuru this 27th day of September, 2017.

G. B. M. KARIUKI

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

S. ole KANTAI

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR