



IN THE COURT OF APPEAL

AT MOMBASA

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

CIVIL APPEAL NO. 75 OF 2016

BETWEEN

JULETABI AFRICAN ADVENTURE LIMITED....1ST APPELLANT

DANIEL OJWANG ACHOKA.....2ND APPELLANT

AND

CHRISTOPHER MICHAEL LOCKLEY.....RESPONDENT

(An appeal from the judgment of the High Court at Mombasa (Kasango, J.) dated 21st August, 2015

in

H.C.C No. 152 of 2012)

JUDGMENT OF THE COURT

1. Sometime in the year 2006 while **Christopher Michael Lockley** (the respondent) was on holiday at Diani in Kenya where he met **Daniel Ojwang Achoka** (the 2nd appellant) who was his tour driver at the time. The two struck a friendship which culminated in the incorporation of **Juletabi African Adventure Limited** (the 1st appellant) on 28th June, 2006, a limited liability company principally engaged with tour and travel business. The respondent held 60% of the shareholding while the 2nd appellant held 40%. Since the respondent ordinarily resided in Dubai the two agreed that the 2nd appellant would take charge of the business operations as well as management of the 1st appellant. It was further agreed that the respondent would provide the initial capital of running the company which he did by depositing the amount into the 2nd appellant's wife, Nzilani John Kithokoi's bank account. It was the respondent's evidence that his engagements with the 2nd appellant who had portrayed himself as a pastor was based on mutual trust.

2. In the year 2007, the 2nd appellant informed the respondent that the 1st appellant was in need of a four wheel drive vehicle in order to conduct its business properly. In good faith the respondent mortgaged his home situated in the United Kingdom and on 20th February, 2007 credited £15,500 into the 1st appellant's account at Imperial Bank Limited for the said purchase. According to him, the said sum was advanced to the 1st appellant and it was agreed that it would be offset by the 1st appellant paying him 50% of its profits until the same is paid in full. It is pursuant to the said advance that motor vehicle registration number KAM 634J was purchased and registered in the 1st appellant's name. Nevertheless, no payments were ever made to the respondent.

3. Eager to purchase a parcel of land in Diani, the respondent requested the 2nd appellant to help him identify a suitable property. Towards that end, the respondent settled for a parcel described as Kwale/Diani S.S/2371 which he deemed appropriate for constructing a cottage for use as a holiday home by his family. Thereafter, the respondent made substantial deposits into the 1st appellant's account for that purpose and requested the 2nd appellant to undertake the transaction on his behalf. However, when the purchase was completed the 2nd appellant registered the parcel in favour of the 1st appellant instead of the respondent. Upon inquiry, the 2nd appellant misrepresented to the respondent that he could not hold title as a foreigner.

4. Thereafter, the respondent learnt that the 2nd appellant and his wife had opened a parallel competing company known as Safari Talk Agency. To make matters worse the vehicle which had been purchased for the 1st appellant's purposes had been converted to the said

competing business to the detriment of the 1st appellant. This marked the beginning of disintegration of the 2nd appellant and respondent's relationship. In the end, the respondent requested the 2nd appellant to release the logbook of the vehicle and the title deed of the parcel with a view of facilitating the transfer of the said properties to him. Despite the 2nd appellant agreeing to do so he failed and/or refused to honour his word.

5. Perturbed by the 2nd appellant's actions coupled with suspicion that the appellants were taking steps to dispose of the properties, the respondent filed a suit in the High Court claiming that the 1st appellant was holding the properties in trust for him. In particular he sought *inter alia*: -

a) A declaration that the 1st defendant (1st appellant) holds motor vehicle registration No. KAM 634J Toyota Station Wagon and the parcel of land comprised in Plot No. Kwale/Diani S.S/2371 in trust for the plaintiff;

b) A mandatory injunction to compel the defendants by themselves, their servants or agents or otherwise howsoever to forthwith and unconditionally release and handover the possession of the motor vehicle registration No. KAM 634J make Toyota Station Wagon to the plaintiff.

c) A mandatory injunction to compel the defendants by themselves, their servants or agents or otherwise howsoever to release to the plaintiff-

i. The original Log Book for the motor vehicle registration No. KAM 634J and a duly executed motor vehicle transfer form and all the other necessary documents for the transfer process in favour of the plaintiff.

ii. The original title deed for parcel of land comprised in Plot No. Kwale/Diani S.S/ 2371 and a duly executed land transfer form with all the necessary documents for the transfer of title in favour of the plaintiff; and

iii. The plaintiff's original PIN certificate and any other material documents belonging to the plaintiff placed in the custody of the defendants and/or held by the defendants in trust for the plaintiff.

6. In response, the appellants averred that both the motor vehicle and the parcel in question were purchased by the 1st appellant for its benefit thus there was no trust created in favour of the respondent. In any event, the respondent lacked the requisite *locus* to institute the suit against the appellants. They maintained that the amounts used to purchase the properties were advanced as a loan and the respondent could only recover the same as a debt and not through trust.

7. The trial Judge (Kasango, J.) after weighing the evidence on record in a judgment dated 21st August, 2015 allowed the respondent's suit and issued the following orders: -

a) A declaration is hereby made that the 1st defendant holds the motor vehicle KAM 634J Toyota Station Wagon and parcel of land being Plot No. Kwale/Diani S.S/2371 in trust for the plaintiff.

b) That trust is hereby dissolved and an order is made that the motor vehicle registration No. KAM 634J and parcel No. Kwale/Diani S.S/2371 be transferred from the name of Juletabi African Adventure Limited into the name of Christopher Michael Lockley.

c) Daniel Ojwang Achoka shall release to the plaintiff within 14 days from today's date the plaintiff's original PIN certificate and any other documents necessary to put into effect this judgment.

d) The Deputy Registrar of this court is hereby authorised where necessary to sign any documents required to ensure the transfers order under this judgment are realized, to that end the Registrar of motor vehicles and the Land Registrar shall accept such documents signed by the Deputy Registrar as being sufficient to effect the transfer.

e) The 2nd defendant shall pay plaintiff's costs of this suit.

8. It is that decision that has provoked the appeal before us which is premised on the grounds that the learned Judge erred in law and fact by:-

i. Creating a non-existence trust and directing the 1st appellant to transfer its properties to the respondent without regard to the rights of the 2nd appellant.

ii. Considering matters not canvassed in the pleadings.

iii. Failing to find that the respondent lacked the requisite *locus standi* to institute the suit.

iv. Failing to hold that the respondent had not pleaded particulars of trust contrary to Order 2 Rule 10 of the Civil Procedure Rules.

v. Holding that the money remitted to the 1st appellant was not a loan but that it was held in trust for the respondent.

vi. Failing to appreciate the memorandum and articles of association of the 1st appellant.

9. Mr. Odhiambo, learned counsel for the appellants, submitted that the learned Judge erred in finding that a trust had been created between the 1st appellant and the respondent. To him, the evidence adduced was clear that the amount advanced by the respondent to the 1st appellant to purchase the vehicle and the parcel of land was a loan. The respondent in his own evidence confirmed as much. There was no evidence to support the allegation that a trust in favour of the respondent had been created. Butressing that line of argument counsel relied on *Peter Ndungu Njenga vs. Sophia Watiri Ndungu [2000] eKLR* where this Court held,

“The concept of trust is not new. In case of absolute necessity, but only in case of absolute necessity, the court may presume a trust. But such presumption is not to be arrived at easily. The courts will not imply a trust save in order to give effect to the intention of the parties. The intention of the parties to create a trust must be clearly determined before a trust is implied.”
Emphasis added.

10. He went on to state that in light of *Article 65(1)* of the *Constitution* which provides: -

“Any person who is not a citizen may hold land on the basis of leasehold tenure only, and any such lease, however granted, shall not exceed ninety-nine years.”

The respondent had no intention of having the parcel of land registered in his favour. Besides, the evidence adduced by the respondent alluded to a trust between the respondent and the 2nd appellant and not the 1st appellant. The 1st appellant being a distinct entity from its directors could not be compelled to transfer its properties in favour of one of the directors.

11. Mr. Odhiambo argued that from the pleadings to the evidence led by the respondent the allegation of breach of trust was in respect of the 2nd appellant as against the 1st appellant. Therefore, the suit was in the nature of a derivative suit hence the respondent ought to have sought leave before instituting the same. In that regard reliance was placed on *Amin Akberali Manji & 2 others vs. Altaf Abdulrasul Dadani & Another [2015] eKLR* wherein this Court quoted with approval the sentiments of Jenkins L.J in *Edwards vs. Halliwell [1950] ALL ER 1064* that:-

“The rule in Foss-v-Harbottle, as I understand it, comes to no more than this. First, the proper Plaintiff in an action in respect of a wrong alleged to be done to a company or association of persons is prima facie the company or the association of persons itself. Secondly, where the alleged wrong is a transaction which might be made binding on the company or association and on all its members by a simple majority of the members, no individual member of the company is allowed to maintain an action in respect of that matter for the simple reason that if a mere majority of the members of the company or association is in favour of what has been done, then cadit quaestio; or if the simple majority challenges the transaction, there is no valid reason why the company should not sue.”

Accordingly, by failing to seek leave the respondent lacked *locus standi* of instituting the suit.

12. Mr. Odhiambo contended that the respondent had not pleaded particulars of trust contrary to *Order 2 Rule 10 (1)* of the *Civil Procedure Rules* which is couched in mandatory terms. Therefore, there was no basis for the learned Judge to hold that a trust had been created. Lastly, that the learned Judge considered extraneous matters not pleaded, that is, by finding that the 2nd appellant was guilty of deceit. He urged us to allow the appeal on those grounds.

13. Mr. Nyange, learned counsel for the respondent, in opposing the appeal, urged that the rule in *Foss vs. Harbottle* only arises where relief is sought against members or directors of a company or a third party for wrong(s) committed to a company. He referred the Court to *Moir vs. Wallerstainer [1975] 1 All ER 849* wherein Lord Denning MR. articulated as follows: -

“It is a fundamental principle of our law that a company is a legal person, with its own corporate identity, separate and distinct from the directors or shareholders, and with its own property rights and interests to which alone it is entitled. If it is defrauded by a wrongdoer, the company itself is the person to sue for the damage. Such is the rule in Foss vs. Harbottle. The rule is easy enough to apply when a company is defrauded by outsiders. The company itself is the only person who can sue. Likewise, when it is defrauded by insiders of a minor kind, once again the company is the only person who can sue. But suppose it is defrauded by insiders who control its affairs-by directors who hold a majority of the shares-who then can sue for damages? Those directors are themselves the wrongdoers. If a board meeting is held, they will not authorise proceedings to be taken by the company against themselves. If a general meeting is called, they will vote down any suggestions that the company should sue them. Yet the company is the one person who is damnified. It is the one person who should sue. In one way or another some means must be found for the company to sue. Otherwise the law would fail in its purpose. Injustice would be done without redress. In Foss vs. Harbottle Wigram V.C saw the problem and suggested a solution. He thought that the company could sue ‘in the name of someone whom the law has appointed to be its representative.’ A suit could be brought-

‘by individual corporators in their private characters, and asking in such character the protection of those rights to which in their corporate character they were entitled.’

Thus, the trial Judge correctly appreciated that the said principle wasn't applicable in the case at hand. This is because the wrongs were committed and/or perpetrated by or through the company. In real sense, the 2nd appellant was hiding behind the 1st appellant to fraudulently deny the respondent his properties.

14. On trust, the respondent's uncontroverted evidence was that his relationship with the 2nd appellant was based from the beginning on mutual trust. As such, an implied trust could arise where one person, such as in this case, purchases property but the same is conveyed in the name of another other than the purchaser. Maintaining that the circumstances surrounding the case had established a resulting trust in favour of the respondent he relied on **Dyer vs. Dyer [1788] 2 Cox Eq. 92**. According to him, the respondent was unequivocal that his intention was to purchase the land for his benefit and he sent the money for that purpose. Furthermore, no resolution was tendered by the appellants to the effect that the 1st appellant had purchased the properties.

15. Mr. Nyange contended that the pleadings as drawn clearly set out the particulars of trust relied on by the respondent. Nonetheless, a Court is bound by **Article 159(2)** of the **Constitution** not to give undue regard to procedural technicalities such as suggested by the appellants.

16. We have considered the record, submissions by counsel and the law. Our primary role as a first appellate court is namely, to re-evaluate, re-assess and re-analyze the evidence before the trial court and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way. In **Kenya Ports Authority vs. Kuston (Kenya) Limited [2009] 2EA 212** this Court held that:-

“On a first appeal from the High Court, the Court of Appeal should 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 that respect. Secondly, that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence”

17. In our view, the appeal stands or falls on two issues: - Firstly, whether the respondent had *locus* to file the suit; was the suit derivative in nature? Was leave required before institution of the suit? Secondly, if the respondent had the requisite standing did the High Court act judiciously in issuing the orders it did?

18. It is imperative to first deal with the issue of the respondent's standing which has far-reaching implication on the determination of the appeal herein. *Locus standi* is defined in **Black's Law Dictionary, 9th Edition at page 1026** as-

“The right to bring an action or to be heard in a given forum”.

This Court in **Alfred Njau & 5 others vs. City Council of Nairobi [1983] eKLR** put it in the following terms:-

“The term *locus standi* means a right to appear in Court and, conversely, as is stated in Jowitt's Dictionary of English Law, to say that a person has no *locus standi* means that he has no right to appear or be heard in such and such a proceeding.”

19. Whether or not the respondent had the requisite standing turns on the nature of the claim before the trial court. The appellants' position is that the respondent had filed the suit on behalf of the 1st appellant allegedly for wrongs committed against it.

20. By dint of **Foss vs. Harbottle (1843) 67 ER 189** popularly referred to in company law as “*the rule in Foss vs. Harbottle*” there is no argument that the proper plaintiff in any proceedings or action in respect of a wrong done to a company is the company itself. This is based on the principle that a company is a legal personality distinct from its directors and shareholders. However, there are exceptions to the rule which allow a person to sue on behalf of the company.

21. In **Grace Wanjiru Munyinyi & Another vs. Gedion Waweru Githunguri & 5 Others [2011] eKLR**, this Court while discussing the exceptions where such a suit is termed as a derivative action expressed:-

“There is also another remedy arising from the leading English legal precedent on Corporate Law which continues to apply in Kenya more than 160 years since it was decided: Foss v Harbottle (supra). As stated earlier, in any action in which a wrong is alleged to have been done to a company, the proper claimant is the company itself. This is the rule in Foss v Harbottle. But there are four exceptions to that rule which appear in the leading case itself but also in subsequent decisions on the subject. Firstly, where the directors or a shareholding majority use their control of the company to paper over actions which would be ultra vires the company or illegal. Secondly, if some special voting procedure would be necessary under the Company's constitution or under the companies Act, it would defeat both if they could be sidestepped by ordinary resolutions of a simple majority, and no redress for aggrieved minorities were to be allowed (Edwards v Halliwell [1950] 2 ALL ER 1064. Thirdly, where there is invasion of individual rights, such as voting rights (Pender v Lushington (1877) 6 Ch D 70. Fourthly, where a fraud on the minority is being committed. In all those cases, a “derivative action” could be brought before the court on behalf of the company where the wrongdoer is in control of the company or by the individual shareholder where his personal right is violated.”

22. Restating the prerequisites of filing suit on behalf of a company this Court in **Amin Akberali Manji & 2 Others vs. Altaf Abdulrasul Dadani & Another [2015] eKLR** observed:-

“It is our view that at whatever stage leave is sought, the crucial requirement is for the applicant to establish a prima facie case demonstrating that he has *locus standi* to institute such action, the company is entitled to the intended relief and that the action falls within any of the exceptions to the rule in Foss vs. Harbottle.

...

Secondly, on the question whether the suit was a derivative one, we find it was. The company was in the peculiar and unique

position of having only two members who were equal in power and glory in relation to the company. There was no majority or minority shareholder. The two shareholders/directors had reached a stalemate until one left the directorship as the other migrated to Canada while the company was sinking into extinction. Proof of a stalemate in the boardroom was that there are no resolutions of the Board exhibited in the record on the matters complained of. On the face of it, the property of the company was disappearing or being taken over by a third party but the company was doing nothing about it. Did any of all this fit anywhere in the exceptions to the rule in Foss vs. Harbottle? The trial court found it did and we think it was right.”

23. We think we have said enough, on the basis of those decisions to demonstrate that a derivative suit is basically brought on behalf of a company for wrongs committed against it or in other words for the benefit of the company. Was the nature of the suit instituted by the respondent derivative? We think not. Like the trial court, we find that the respondent did not institute the suit on behalf or for the benefit of the 1st appellant for perceived wrong(s) against it. Rather, he filed the suit for his own benefit for wrongs committed against him by the appellants, to wit, breach of trust. Consequently, we concur with the trial court that he did not require leave before instituting the suit.

24. With regard to the particulars of trust we note from the record that the respondent did set out the said particulars albeit not in the traditional format. Consequently, we concur with the trial court’s sentiments thus,

“What I believe led the defendants to submit that the plaintiff’s claim does not have particulars as required under Rule 10 Order 2 is because the plaintiff did not draw out the plaint as traditionally done by practitioners, where certain paragraphs are clustered together under the heading ‘particulars’. That practice had indeed become the norm form of usage but it does not mean that if one does not draw his claim in that manner his claim fails. The defendants’ submissions on that basis is rejected.”

25. It is settled that the onus lies on a party relying on the existence of a trust to prove it through evidence. That is because:-

“The law never implies, the Court never presumes, a trust, but in case of absolute necessity. The Courts will not imply a trust save in order to give effect to the intentions of the parties. The intention of the parties to create a trust must be clearly determined before a trust will be implied.”

See *Gichuki vs. Gichuki [1982] KLR 285* and *Mbothu & 8 Others vs. Waitimu & 11 Others [1986] KLR 171*.

26. Our perusal of the record clearly indicates that the respondent who the trial court found to be an honest witness gave a detailed account and paper trail of the funds he had transferred to the 1st appellant’s account in respect of the motor vehicle and parcel of land. Equally, it is clear that his intention with respect to the funds transferred for the car was that the same was to be paid back by the 1st appellant. However, the 1st appellant failed to do so and as a result it held the vehicle in trust for the respondent. On the parcel of land, the respondent was explicit that he had purchased the same for his own benefit. The fact that it was later registered in favour of the 1st appellant didn’t divest him of his interest thereon.

27. In *Twalib Hatayan Twalib Hatayan & Anor vs. Said Saggar Ahmed Al-Heidy & Others [2015] eKLR*, this Court examined and stated the law on trusts as follows:-

“According to the Black’s Law Dictionary, 9th Edition; a trust is defined as

“1. The right, enforceable solely in equity, to the beneficial enjoyment of property to which another holds legal title; a property interest held by one person (trustee) at the request of another (settlor) for the benefit of a third party (beneficiary).”

Under the Trustee Act, “... the expressions “trust” and “trustee” extend to implied and constructive trust, and cases where the trustee has a beneficial interest in the trust property...”

In the absence of an express trust, we have trusts created by operation of the law. These fall within two categories; constructive and resulting trusts. Given that the two are closely interlinked, it is perhaps pertinent to look at each of them in relation to the matter at hand. A constructive trust is an equitable remedy imposed by the court against one who has acquired property by wrong doing. ... It arises where the intention of the parties cannot be ascertained. If the circumstances of the case are such as would demand that equity treats the legal owner as a trustee, the law will impose a trust. A constructive trust will thus automatically arise where a person who is already a trustee takes advantage of his position for his own benefit (see Halsbury’s Laws of England supra at para 1453). As earlier stated, with constructive trusts, proof of parties’ intention is immaterial; for the trust will nonetheless be imposed by the law for the benefit of the settlor. Imposition of a constructive trust is thus meant to guard against unjust enrichment. ...

A resulting trust is a remedy imposed by equity where property is transferred under circumstances which suggest that the transferor did not intend to confer a beneficial interest upon the transferee ... This trust may arise either upon the unexpressed but presumed intention of the settlor or upon his informally expressed intention. (See Snell’s Equity 29th Edn, Sweet & Maxwell p.175). Therefore, unlike constructive trusts where unknown intentions maybe left unexplored, with resulting trusts, courts will readily look at the circumstances of the case and presume or infer the transferor’s intention. Most importantly, the general rule here is that a resulting trust will automatically arise in favour of the person who advances the purchase money. Whether or not the property is registered in his name or that of another, is immaterial (see Snell’s Equity at p.177) (supra).” Emphasis added

28. Applying the emphasized principles to the case before us, all indications are that a resulting trust arose as between the respondent and the 1st appellant. As stated in the authority above, a resulting trust will automatically arise in favour of the person who advances the purchase money. Whether or not the property is registered in his name or that of another, is immaterial. It is common ground that all the purchase

money for both the vehicle and the parcel was advanced by the respondent. The parcel and vehicle were therefore held in trust for the respondent by the 1st appellant. See also Charles K. Kandie vs. Mary Kimoi Sang [2017] eKLR.

29. Having expressed ourselves as herein above, we find that the appeal lacks merit and is hereby dismissed with costs.

Dated and delivered at Mombasa this 23rd day of November, 2017.

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