



IN THE COURT OF APPEAL

AT MALINDI

CORAM: MAKHANDIA, OUKO & M'INOTI, J.J.A.

CIVIL APPEAL NO. 125 OF 2012

BETWEEN

BONTEMPI LUIGI.....1<sup>ST</sup> APPELLANT

BRUNO TURATO.....2<sup>ND</sup> APPELLANT

ELIZABETH A. NGEGE.....3<sup>RD</sup> APPELLANT

AND

SHARIFF MOHAMMED A. OMAR.....1<sup>ST</sup> RESPONDENT

BOUGAINVILLEA COTTAGES LTD.....2<sup>ND</sup> RESPONDENT

(Appeal from the judgment and decree of the Court of Kenya

at Mombasa (Sergon J.) dated 26<sup>th</sup> July 2007

in

HCCC No. 255 of 1995)

\*\*\*\*\*

**JUDGMENT OF THE COURT**

By a plaint dated 5<sup>th</sup> April 1995, the 1<sup>st</sup> respondent, *Mohammed A. Omar (Omar)* sued the 1<sup>st</sup> appellant, *Bontempi Luigi (Luigi)* and the 2<sup>nd</sup> appellant, *Bougainvillea Cottages Limited (the company)* seeking various orders, a declaration and an injunction. Contending to be a director and the holder of 150 shares in the company together with Luigi and another, who held 25 shares each, Omar prayed for an order directing Luigi to account for moneys had and received by him on behalf of the company; an order for payment of his proportionate share of the profits of the company; a declaration that Plot Nos. **3074** and **3104** in Malindi were purchased with funds of the company and were therefore held in trust for the company; and an injunction to prohibit transfer or dealing with the said plots.

That plaint was subsequently amended four times. Through those amendments, the company joined Omar as a co-plaintiff and the 2<sup>nd</sup> appellant, *Bruno Turato (Turato)* and the 4<sup>th</sup> appellant, *Elizabeth Ngege*

(**Ngege**), who both claimed interests in Plot Nos. 3074 and 3104 respectively, were joined in the suit. Luigi, Turato and Ngege vigorously contested the suit.

Luigi contended that to satisfy an alleged legal requirement making restrictions on shareholding by foreigners, he had allowed Omar to hold shares in the company at no consideration. Accordingly he prayed for a declaration that Omar held the shares in trust to him and at his will, and an order for the transfer of those shares back to himself. On his part, Turato lodged a counterclaim for the registration of Plot No. 3074 in his name as a *bona fide* purchaser for value, or in the alternative refund by Luigi and the company, of the purchase price of the plot. Not to be left behind, Ngege, who at all material times was Luigi's wife, claimed to have purchased Plot No. 3104 from her own funds.

The case by Omar and the company that Luigi was indebted to them was built around three main facts. Firstly it was pleaded that in 1989 the company was contracted by one **Luciano Kwaja** to construct a hotel variously called **Temple Point Hotel** or **Salama Beach Hotel** in **Watamu**. The company was to be paid 12.5% of the construction costs as its fees. For that project, Luigi was the supervisor and was independently paid Kshs 70,000 per month. It was contended that the fees of **Kshs 17.5 million** was ultimately paid to Luigi for and on behalf of the company, which he converted to his own use and failed to account to the company.

Secondly, it was pleaded that in 1991, the company was contracted by **Aspain Properties** to develop **Plot No. 430** at **Watamu** at a cost of **Kshs 22.3 million**. In consideration of the development, the company was to be paid in kind by transfer to it of a plot of land in **Watamu**. It was argued that Luigi transferred that plot to himself and subsequently sold it for Kshs 2.3 million without accounting to the company.

Lastly it was pleaded that in the same 1991 the company leased its cottages to **Giani Graziozi Ltd** for a period of 5 years and one month with effect from 1<sup>st</sup> October 1991. The agreed rent was Kshs 60,000 per month with an annual increment of Kshs 10,000 for the remainder of the term. It was contended that Luigi received the rent, converted it to his own use and once again failed to account to the company.

Regarding Plots No. 3074 and 3104, it was pleaded that Luigi had purchased the same using money from the company. Subsequently he sold Plot No. 3074 for Kshs 275,000 to Turato and transferred Plot No. 3104 to his wife, Ngege. It was Omar and the company's contention therefore that Turato and Ngege held the plots in trust for the company.

The suit was heard in the High Court by at least three judges in succession, each time the parties agreeing by consent to proceed from where the previous judge had left. **Sergon, J.** was the last judge to hear the matter. Luigi, Ngege and Omar testified on their behalf and called other witnesses. Turato never testified, but his wife, **Rosella Pontiggia Turato**, who held a power of attorney from him, gave evidence in support of his case.

By a judgment dated 26<sup>th</sup> July 2007, **Sergon, J.** found for Omar and the company and granted the orders they had prayed for. Aggrieved by the judgment, Luigi, Ngege and Turato lodged the present appeal.

At the hearing of the appeal, the Court was informed that Turato had died and that his appeal had abated under **rule 99(2)** of the Court of Appeal Rules. Accordingly it was only Luigi and Ngege, both represented by **Dr. John Khaminwa**, learned Senior Counsel, who pursued the appeal. **Ms. Moolraj**, learned counsel appeared for Omar and the company. By consent of the parties the appeal was heard by written submissions, with limited oral summation.

In their written submissions the parties veered off the grounds of appeal and purported to address issues that were never raised in the appeal as grounds for impeaching the judgment of the High Court. The grounds of appeal were very focused and precise and we have declined to be drawn into side issues in this appeal. Shorn of all semantics, the appeal is premised on five grounds of appeal, two of which raise the same issue and one, which relates to the abated appeal. At the heart of the grounds of appeal is the contention that the learned trial judge erred by:

- i. Holding that the suit before the High Court was competent notwithstanding lack of a resolution by the company authorizing its participation in the suit;*
- ii. finding that Ngege held Plot No. 3104 in trust for the company;*
- iii. rejecting the evidence of a document examiner; and*
- iv. finding that Turato was not a bona fide purchaser for value of Plot No. 3074.*

Those are the only issues that call for our determination in this appeal. To the extent that ground (iv) relates to Turato's claim in respect of which the appeal has abated, we shall not dwell on the same. That leaves only three grounds of appeal for consideration.

As regards the 1<sup>st</sup> ground, it was Dr. Khaminwa's submission that the suit before the High Court was incompetent because no organ of the company had met and passed a resolution to institute the suit. On the authority of *FOSS V. HARBOTTLE [1843] 2 HARE 461*, the ruling of the High Court in *DADANI V. MANJI & 3 OTHERS [2004] 1 KLR 95*, and the judgment of the High Court in *KABUNDU HOLDINGS LTD & ANOTHER V. PATRICK MUKIRI KABUNDU & 3 OTHERS, HCCC NO 649 OF 1996* Senior Counsel submitted that it is for the company, and not for the individual shareholders, to enforce the company's right of action. In his view, since Omar had initiated the suit purportedly to enforce the rights of the company, the suit was a non-starter and ought to have been struck out.

For Omar and the company, Ms. Moolraj submitted that after the amendment of the plaint, the company became a party to the suit on its own right, independent of Omar. In addition it was contended that none of the parties had raised the issue of lack of the company's resolution in their pleadings and therefore it was too late in the day to raise the issue in this appeal. Lastly it was argued that the company became a plaintiff in the suit pursuant to an order of the court made on 30<sup>th</sup> October 2002 and therefore the question of a resolution to make it a party to the suit did not arise.

On the second ground of appeal, Dr. Khaminwa submitted that the learned trial judge had erred by holding that Ngege held Plot No. 3104 in trust for the company while there was overwhelming evidence that the plot was purchased, not by funds of the company, but by proceeds from Ngege's florist business. It was also contended that even if Luigi had provided the purchase price for the plot, the same must be treated as a gift that cannot be taken away by the company. Dr. Khaminwa rested this ground by submitting that upon registration as proprietor of the plot, Ngege's title thereto could not be questioned in the absence of fraud proved to the required standard. We were accordingly urged to reverse the High Court and hold that Plot No. 3104, where Ngege had her matrimonial home, is her property.

In rebuttal, Ms. Moolraj submitted that the evidence on record was consistent that Plot No. 3104 was paid for by funds of the company vide a cheque for Kshs 100,000 issued and signed by Luigi. Moreover, it was contended, the evidence on record showed that at the material time Ngege was virtually unemployed and incapable of raising the purchase price for the plot. Her income, it was contended, was only Kshs 100 to 200 per month and that the trial court had correctly found that she could not have paid for the plot as she had claimed.

The third and last ground of appeal relates to the evidence of a private document examiner called as a witness by Luigi. Omar had claimed that to induce him to remove a caveat from the Plot No. 3074, Luigi had given him a cheque for Kshs 10 million, which was never banked due to lack of funds. To discount that claim Luigi had called Makonze Mweu, a document examiner, who testified that the writing on the cheque was not Luigi's. The learned judge however did not rely on the evidence of the witness after he found that Luigi had admitted signing the cheque in question. It was Dr. Khaminwa's contention that the learned judge had erred by ignoring the evidence of the witness, which discounted the possibility of the cheque having been written by Luigi.

For her part Ms. Moolraj submitted that the trial judge had properly ignored the evidence of the document examiner because the issue before the court was not whether Luigi wrote the cheque, but whether he had

signed it. With Luigi having admitted that he had signed the cheque, it was submitted that the evidence of the document examiner was irrelevant and the court was right in refusing to act on it.

We have duly considered the record, the judgment of the High Court, the written and oral submissions by respective counsel, the authorities relied upon and the law.

This, being a first appeal from the High Court in the exercise of its original jurisdiction, we are obliged to consider both issues of fact and issues of law. As regards issues of fact, we are also required to re-evaluate and reappraise the evidence on record and come to our own independent conclusions. (See **GEOFFREY KIHUNYU WANJURA V. GICHUHI KIGUTA & ANOTHER CA NO. 67 OF 1997**). In that regard, we shall be slow to interfere with the findings of the trial court, unless we are satisfied that there was no evidence to support its findings or that its conclusions were otherwise plainly wrong. (See **EPHANTUS MWANGI AND ANOTHER V. DUNCAN MWANGI WAMBUGU [1982-88] 1 KAR 278**).

The first issue in this appeal is whether the trial judge erred by declining to hold that the suit was incompetent due to lack of a resolution of the company authorizing the institution of the suit. It is worth reiterating that initially Omar had filed the suit, in his own name, against Luigi and the company purporting to enforce the rights of the company. In our view, at that stage, the objection could well have been taken that it was not for Omar, in his own name, to enforce rights, which properly belonged to the company, a separate and distinct legal personality. The proper plaintiff for wrongs committed against the company is the company, which acts through the majority of its shareholders. (See **FOSS V. HARBOTTLE (supra)**).

Subsequently however matters changed fundamentally through amendment of pleadings duly sanctioned by the Court. The company henceforth became a plaintiff in the suit in its own name and of its own right. At the end of the day, before the High Court, Omar had his own claim while the Company, separately and in its own name, was pursuing its own claims against Luigi, Turato and Ngege.

It should also not be forgotten that the court found as a fact that Omar was the majority shareholder in the Company, being the holder of 150 shares, representing 75%. In that respect the trial judge expressed himself thus:

***“In the end I believe the evidence of the 1<sup>st</sup> plaintiff (Omar) that he held 150 shares out of the 200 shares of Bougainvillea Cottages Ltd (the company)...I am convinced that the 1<sup>st</sup> plaintiff was a paid up majority shareholder and not just a nominal shareholder by name.”***

This therefore was not a case of a minority shareholder purporting to enforce the rights of the company. It was a proper case in which the company was acting through the majority shareholder. As ***Jenkins LJ*** stated in **EDWARDS V. HALLIWELL [1950] 2 ALL ER 1064**, the will of the majority as against that of the minority is really the will of the company and to say that the company is the proper plaintiff in actions concerning its affairs is another way of saying that the majority, within the limits of their power to ratify decisions, have the sole right to determine whether or not a dispute ought to be brought to court. We do not think that there was any merit in the objection and the trial court did not err by overruling the same.

The foregoing notwithstanding, the record also shows that by an application dated 3<sup>rd</sup> October 2002, Omar applied to the High Court under the then ***Order 1 Rule 10(2)*** of the ***Civil Procedure Rules*** for leave to amend the plaint and substitute the company as a plaintiff rather than a defendant. That provision empowered the High Court, on its own motion or upon application, to remove, add or substitute parties to a suit. The application was opposed and fully argued. In a considered ruling dated 30<sup>th</sup> October 2002, ***Onyancha, J.*** granted the application and directed that the company to be substituted as a plaintiff in lieu of a defendant. None of the parties appealed or otherwise challenged that decision. In our view, it is too late in the day to revive the issue.

The second ground raises the question whether the learned judge erred by finding that Ngege held Plot No. 3104 in trust for the company. In arriving at his decision on this point, the learned judge stated as

follows:

***“At some stage the 4<sup>th</sup> defendant (Ngege) admitted she had some difficulty in raising funds and that she was at times rescued by the 1<sup>st</sup> defendant (Luigi) who is her husband. My conclusion in this matter is that from the evidence on record the 4<sup>th</sup> defendant was not in a position to raise the amount to purchase plot No. 3104. I believe the 1<sup>st</sup> defendant issued the 2<sup>nd</sup> plaintiff’s (the company’s) cheque to settle the purchase price. Consequently I am satisfied that a resulting [trust] can be declared in favour of the 2<sup>nd</sup> plaintiff hence the 4<sup>th</sup> defendant is holding plot No. 3104 in trust for the 2<sup>nd</sup> plaintiff.”***

We have carefully perused the evidence on record as relates to this issue. At the material time, Luigi, Ngege’s husband, was responsible for the day-to-day running of the company. He had in his possession the company’s seal, cheque books and other properties. The cheque for Kshs 100,000 that paid for Plot No. 3104 was from the company and was signed by Luigi. Ngege claimed to have paid for the plot from proceeds of her florist business. Her entire evidence was rather scanty and sketchy. There were no details about her alleged income from the florist business. What was more intriguing, if not outrightly contradictory, was her admission that she had been employed as a tea maker at ADC Kimwa, earning a paltry Kshs 100 to Kshs 200. She also admitted that she had neither savings, nor a bank account. How could she then raise the Kshs 100,000 for the plot? She did not explain that beyond the bare assertion that she had a florist business. In view of the clear evidence that the purchase price for the plot came from the company vide a cheque issued and signed by Luigi, the trial court did not err by finding that Ngege did not purchase the plot from her own funds. The uncontroverted evidence is simply too compelling.

A constructive trust is implied by a court of equity where circumstances warrant, regardless of the intention of the owner of the property. Where such circumstances result in property of one person being vested in another as a result of fraud, wrongdoing or other unconscionable conduct, so that the person who has obtained the property ought not, in good conscience, to be allowed to keep it,

equity treats that person as a constructive trustee of the beneficial owner. (See ***PHILIP H. PETTIT, EQUITY AND THE LAW OF TRUSTS, 4<sup>th</sup> Ed, Butterworths, 1979 Chapter 2.*** In ***HUSSEY V. PALMER [1972] 3 ALL ER 744, Lord Denning*** articulate the essence of a constructive trust thus:

***“It is a trust imposed by law whenever justice or good conscience requires it. It is an equitable remedy by which the court can enable an aggrieved party to obtain restitution.”***

We are satisfied that taken in totality and in context, the evidence on record demonstrates systematic misappropriation of the company’s funds by Luigi. Consequently, the use of those funds to purchase and transfer Plot No. 3104 to his wife Ngege, gives rise to a constructive trust by which she holds the said Plot in trust to the company. This ground of appeal equally lacks merit and must also fail.

The last issue is whether the learned judge erred by not acting upon the evidence of the document examiner whom Luigi had called as a witness. In our view, nothing much turns on that issue in this appeal. Luigi admitted to having signed the cheque in question. The evidence of the document examiner that the handwriting on the cheque was not Luigi’s could not override Luigi’s own admission that he had signed that cheque, particularly when the cheque’s value of Kshs 10 million was not in dispute. In other words, the document examiner’s evidence would have been relevant only if there was a dispute on the amount reflected in the cheque and the person who wrote that amount. There was no such dispute. Accordingly, even on this issue, we are satisfied that the trial judge did not err by accepting Luigi’s evidence that he was the one who signed the cheque and rejecting the evidence of the document examiner that it was not Luigi who wrote the cheque.

Ultimately, we are satisfied that on the basis of the evidence on record, the conclusions by the High Court are unimpeachable. Accordingly we have no option but to dismiss this appeal as lacking in merit. We award costs of the appeal to Omar and the Company. It is so ordered.

Dated and delivered at Mombasa this 19<sup>th</sup> day of June, 2015

**ASIKE-MAKHANDIA**

.....

**JUDGE OF APPEAL**

**W. OUKO**

.....

**JUDGE OF APPEAL**

**K. M'INOTI**

.....

**JUDGE OF APPEAL**

I certify that this is a true copy of the original

**DEPUTY REGISTRAR.**