



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: SICHALE, ODEK & KANTAI, JJ.A.)

CIVIL APPEAL NO. 9 OF 2007

BETWEEN

DR. VIJAY KUMAR SAIDHA 1ST APPELLANT

DR. UMA SAIDHA 2ND APPELLANT

AND

TRIBHUVAN GORDHAN BARKRANIA 1ST RESPONDENT

MAHMUD RANA 2ND RESPONDENT

ALNASHIR VISRAM 3RD RESPONDENT

(Being an appeal from the Ruling and Decree of the High Court of Kenya at Nairobi (Ransley, J.) dated 6th October, 2005)

in

HCCC. No. 538 of 1999 (O.S.)

JUDGMENT OF THE COURT

Being desirous of selling their parcel of land known as **L.R. No. 13644** situate in Sotik in present day Bomet County **Dr. Vijay Kumar Saidha** and his wife **Dr. Uma Saidha** (the appellants) approached the law firm of **Veljee Devshi and Bakrania** advocates (the firm) and an agreement for sale was drawn by that firm. The purchaser was identified in the agreement as **Venture Technologies Limited** and the consideration was stated to be **Kshs.18,000,000/=**. The completion date was stated to be 30th September, 1998. That sum of money was duly paid and transfer documents exchanged and the matter would have had a good and happy ending had it so remained. But the road from there gets rather rough and bumpy as was found by the learned trial judge and as the following events will show.

By an Originating Summons brought under the then **Order LII, rule 4(1) (b) (it is today numbered in a friendlier way - Order 52) Civil Procedure Rules** filed on 17th March, 1999 at the High Court of Kenya at Nairobi the appellants sued the respondents **Tribhuvan Gordhan Barkrania, (1st respondent),**

Mahmud Rana (2nd respondent) and Alnashir Visram (3rd respondent) where orders sought were that the respondents jointly and severally do pay to the appellants the sum of Kshs.14,167,080/= and interest thereon at 20% per annum from 7th October, 1998 until payment in full and that such further or consequential order be made and that costs of the suit be awarded to the appellants.

The originating summons was supported by an affidavit of the 1st appellant who deponed *inter alia* that he had instructed the firm to act for him and his wife in the sale of the said land; that instructions were accepted and an agreement was drawn by the said firm; that the transaction was completed and purchase price paid to the said firm; that on 30th October, 1998 the firm drew its bill of costs, debited its fees for the transaction from the sale proceeds and on 2nd November, 1998 gave the appellants a cheque for the balance of the sum claimed in the summons; that on presentation to the bank for payment the said cheque was returned unpaid with remarks “refer to drawer”; that on 10th November, 1998 the firm wrote to the appellant stating that it would pay to them interest on the sale proceeds at 20% per annum from 7th October, 1998 until actual payment; that on 8th December, 1998 the firm through the 1st respondent arranged a part payment of sterling pounds 20,000 which was equivalent to Kshs.2,000,000 and; that deposite demand made the firm had failed to pay the said balance. There were various documents attached to the affidavit in support of the summons.

The 2nd and 3rd respondents resisted the suit by entering appearance under protest and filing replying affidavits. As the 1st respondent had not resisted the suit judgment was entered against him and a decree drawn for the full sum with interest and costs. The decree stated *inter alia* that the claim against the 2nd and 3rd respondents be stood over generally. The 1st respondent later filed an affidavit in reply to the summons sworn on 29th February, 2000. He averred as follows in the relevant parts of that affidavit:

“

3. ***THAT although the firm of Veljee Devshi & Barkania is registered as a “firm” under the Registration of Business Names Act, Cap 499, the firm is actually a sole proprietorship with me owning the assets, capital and good will of the firm.***
4. ***THAT the relationship between myself and the second and third Defendants is governed by a Partnership Deed that stipulates that the second and third Defendants are partners only in the “sharing of profits” (if any). The equity and capital of the firm belonged to me, and I also enjoyed a veto power over all decisions of the practice of my firm. Annexed hereto and marked exhibit “TGB1” is a true copy of the Partnership Deed referred to herein.***
5. ***THAT the third Defendant (hereinafter “Visram”) resigned as a “partner” on 1st August 1998, and both the second Defendant (hereinafter “Rana”) and I accepted his resignation and released him from all obligations and benefits of the “partnership” as of that date. However, Visram’s formal notice of resignation could not be filed and registered with the Registrar of Business Names Act until 1st November, 1998 as the file relating to the firm of Veljee Devshi & Barkania could not be found at the Registry at that time.***
6. ***THAT Rana resigned as a “partner” on 1st June 1999.***
7. ***THAT the property and conveyancing department of my firm was headed by me, and only I handled conveyancing matters, Rana and Visram were not engaged in conveyancing practice, and were completely unaware of the Plaintiff’s transaction.***
8. ***THAT the first Plaintiff (hereinafter “Saidha”) is; and has been, a very close personal friend of mine for some twenty (20) years. In or about September 1998 Saidha approached me and asked if I could act for him in the sale of his property in Sotik. I agreed to do so, and proceeded to draw up the agreement for sale.***

9. ***THAT in or about October, 1998 when the sale transaction had gone through, and the purchaser's Advocates were ready to release the sale proceeds to my firm, Saidha approached me and asked the name of my firm's Bank where the firm's client account was kept. I informed Saidha that the firm of Veljee Devshi & Barkania banked with Fidelity Commercial Bank Limited at the I.P.S. Building and that the firm's only account was with the said Fidelity Bank.***
10. ***THAT Saidha expressed concern about "small banks" going under liquidation or Statutory Management, and cited the examples of Trust Bank of Kenya and City Finance Bank. He said he would not allow his funds to be placed in the Fidelity Bank as it was a "small bank" that he could not trust.***
11. ***THAT after giving it some thought Saidha told me that he wanted his funds placed only with the Bank of India, "and no other bank". I informed Saidha that the firm of Veljee Devshi & Barkania did not have an account with the Bank of India. However, I informed Saidha that I had a personal account with the Bank of India and he willingly agreed and authorized me to deposit his sale proceeds in my account at the Bank of India.***
12. ***THAT subsequently, Saidha arranged for the cheque of Kshs.18 million representing the sale proceeds to be sent to me. The cheque was made payable to "the Bank of India". As I had an old personal account with the Bank of India and as per my agreement with Saidha, I deposited the same with the Bank of India.***
13. ***THAT upon receipt of the funds, the Bank of India appropriated and applied the same in paying off my personal debt with the said Bank.***
14. ***THAT I have done, and continue to do, my best to recover the said funds from the Bank of India.***
15. ***THAT I admit that it is my personal responsibility to pay Saidha; that I have every intention to do so; that I have since paid Kshs.2 Million to Saidha from my personal resources; and that I have consented to Judgment being entered against me personally and Judgment has indeed been entered against me personally.***
16. ***THAT I admit that Rana and Visram had absolutely no knowledge of this transaction or of the receipt of Saidha's funds, and of its subsequent deposit by me with the Bank of India. They could not have possibly known of this receipt because it was not recorded in the books of account of the firm, as it was a personal transaction between me and Saidha. Rana and Visram had not authorized me to deposit the funds with the Bank of India, and are completely innocent.***
17. ***THAT I reiterate that I am personally liable to Saidha, and that I pray for some time to complete full payment to him.***
18. ***THAT Judgment having already been entered against me personally, I pray that the Plaintiff's application against Rana and Visram be dismissed with costs.***

.....”

The affidavit of the 3rd respondent confirmed the averments in the said affidavit of the 1st respondent and denied any liability to the appellants. The affidavit of the 2nd respondent merely confirms the averments by the 3rd respondent.

For completion of the record there were affidavits in reply by the appellants.

The matter proceeded before the trial judge by way of affidavit evidence only and the oral submissions of counsel.

The suit was heard by Justice P.J. Ransley who in a 'ruling' delivered on 6th October, 2005 dismissed the suit against the 2nd and 3rd respondents. The learned judge found as fact that the 3rd respondent had resigned from the firm on 1st August, 1998 and was not a partner at the time of the transaction. The learned judge also found that the transaction was not conducted in the ordinary cause of business of the firm and that liability attached personally against the 1st respondent.

Those are the findings that have provoked this appeal.

Seventeen grounds of appeal are taken by the appellants in the memorandum of appeal drawn by their counsel. The complaint taken in the first ground is that the learned judge erred in law in dismissing the appellants' suit while there were sufficient grounds and evidence to warrant an order granting the orders sought in the originating summons. In the second ground the learned judge is faulted for not finding that the appellants had proved their case on a balance of probabilities. In the next ground the complaint is that the learned judge erred and misdirected his mind when he found that the deposit of the purchase price was paid into the personal account of the 1st respondent at the 1st appellant's request while that finding was not founded on the evidence presented before the court. In the next ground it is said that the judge erred by finding that the appellant varied the terms of the agreement when such a finding was extraneous to the evidence presented. The next ground is a complaint on the finding that the cheque presented to the appellant and which did not elicit any payment was issued against the personal account of the 1st respondent when the evidence presented would have led to a different finding. In the next ground the learned judge erred when he found that the undertaking and promise to pay by the 1st respondent was not binding on the other partners when to the appellants such finding was not appropriate. Next the judge erred in finding that there was a variation in the agreement regarding deposit of the purchase price while the 2nd and 3rd respondents were unable to present any evidence in support of that contention. In the next ground the court erred in law in finding that the transaction between the appellants and the 1st respondent was personal and therefore not binding on the 2nd and 3rd respondents while on a proper consideration of the law such a finding would not have been arrived at. In the next ground the court erred in law in finding that the nature of the transaction giving rise to the cause of action was an act conducted in the usual way of business in the partnership and therefore binding on the partners as per the tenets of the partnership law. Next the learned judge erred in law in not finding that the transaction was conducted in the ordinary cause of the firm's business and therefore binding on all the partners. Next the learned judge erred in law in finding that the 3rd respondent had resigned from the partnership while the alleged resignation was not proved and the evidence tendered in support of the allegation was full of contradictions and was not credible. Next, that the court erred in not finding that the 2nd and 3rd respondents had not proved that they were not bound by the acts of the 1st respondent. Next, that the court erred in not finding that the respondents were not able to rebut the presumption that they were apparent and actual partners and parties to the transaction that gave rise to the cause of action. Next that the judge erred in law in concluding that the 3rd respondent had resigned on 1st August, 1998 when there was no proper basis for the finding and when such a holding was inconsistent with the partnership deed and the evidence presented in court. In the fifteenth ground the appellants fault the learned judge for shifting the burden of proof to the appellants to prove matters that could only be within the knowledge of the respondents and when the 2nd and 3rd respondents had failed in adducing sufficient evidence to de-link them from the transaction giving rise to the cause of action. In the penultimate ground the High Court erred in law in not finding that the advocate's fees for the transaction was paid by the appellants to the firm in which the 2nd and 3rd respondents were partners. Finally, that the learned judge erred in law in disregarding the evidence presented before him and determined the case on the basis of conclusions not premised on the material before the court.

As can be seen most of these grounds are inter-linked and related.

That is probably why **Mr. Kahiga Waitindi** learned counsel for the appellants in submissions before us when this appeal came up for hearing on 22nd October, 2015 condensed the grounds into five broad categories. The 1st and 2nd respondents were not represented and we were informed by **Mr. A. A. K.**

Ismael learned counsel for the 3rd respondent that the 1st and 2nd respondents had died and the appeal against them had abated. Learned counsel for the appellants complained that the learned judge of the High Court had misdirected himself by shifting the burden of proof to the appellants to prove certain aspects of the case and that the judge had overlooked certain aspects of the evidence. Counsel referred to the agreement for sale and submitted that the terms of the same were known because they were in the agreement. Counsel wondered why the learned judge had not made reference to the agreement in considering the matter before him. Learned counsel faulted the learned judge for finding that the purchase price for the suit land was paid to the 1st respondent's personal account thus not binding on the firm when according to counsel there was no request by the appellants to deposit money in the 1st respondent's personal account. Counsel referred to the appellant's affidavit where the appellant denies that he had dealt with the 1st respondent personally and denies that there was a personal relationship. Learned counsel referred us to **Section 15** of the **Partnership Act** which dictates that the acts of one partner acting within the scope of apparent authority binds all the partners. Counsel therefore thought that the 1st respondent while acting as a partner of the firm in the conveyance was acting within the scope of his authority and his actions bound the firm and its partners. Counsel also referred us to **Section 19** of the said **Act** in support of his proposition that because the 1st respondent and the appellants entered into consent judgment that consent and admission bound the firm and all the partners. Learned counsel wondered how the appellants would have known which account the cheque in respect of purchase price was to be deposited.

On the issue relating to resignation from the firm of the 3rd respondent learned counsel submitted that the notice of change showing that the 3rd respondent had resigned from the firm on 1st August, 1998 was a forgery because it had been backdated from what learned counsel thought was its actual date 10th November, 1998. Because the agreement for sale was made on 15th September, 1998 learned counsel submitted that the 3rd respondent was still a partner. Learned counsel cited the case of **Car & General v Marende t/a Marende & Co. Advocates & Another [2003] Vol. 2 E.A. 384** in support of the proposition that every partner in a firm is liable jointly with the other partners for all debts and obligations of the firm incurred while he is a partner. In the **Car & General** case reliance was laid from a reading of Halsbury's Laws of England (4th edition) (re-issue) volume 35 where it is also stated that partners are jointly and severally liable for the wrongful acts or omissions of any of them which cause loss or damage to third persons if such acts are either done by a partner in the ordinary course of the firm's business or with the authority of his co-partners. Learned counsel also cited the case of **Rambhai & Co. (Uganda) Ltd. v Lalji Ratna & Another [1970] E.A. 106** where the plaintiff sued the defendants as partners in a firm for goods sold and delivered in 1967. The plaintiff produced its books of account, evidence of their correctness and dishonored cheques given by the 2nd defendant. The 2nd defendant had retired from the partnership on 1st January, 1967 but notice of this was not gazetted nor was the retirement notified to the Registrar of Business Names for 10 months thereafter. The 2nd defendant contended that he was not sued as a partner and that the sale and delivery had not been proved and that he was not liable for debts incurred after he left the partnership. It was held by the High Court of Uganda that as the 2nd defendant had been introduced to the plaintiff as a partner in the firm express notice of his withdrawal was necessary and as this was never given the 2nd defendant was liable.

We were also referred to **Nderitu & Another v Waweru [1975] E.A. 308** (a decision of this Court) and **Owino Okeyo & Co. v Fuelex Kenya Limited [2006] eKLR** in further support of the said propositions on the binding nature of actions of a partner that binds the other partners. For all these we are asked to allow the appeal.

Mr. Ismael learned counsel for the 3rd respondent opposed the appeal. He referred us to written submissions which he had filed in Court on 17th February, 2015 and by way of a highlight of the same learned counsel reminded us that the suit was instituted through an originating summons supported by affidavits. Counsel submitted that the motion, originating summons and the affidavits were the only pleadings available to court going by the procedure that the appellants had elected to approach the court and all issues in contention must be identified from those pleadings. Counsel submitted that the 1st

respondent had sworn an elaborate affidavit where he set out the history of the transaction. Counsel particularly referred to that part of the affidavit where the 1st respondent had explained what had happened to the purchase price. According to counsel there was no reply to those depositions. Learned counsel therefore thought that the learned judge was right to find that proceeds of the purchase price had been banked at the 1st respondent's bank account at the request of the appellant. Counsel also submitted that the agreement for sale was not between the partnership firm and any person but was between the appellants and a purchaser. Also that the agreement for sale provided for how the purchase price was to be handled. Also that the learned judge had found that the dishonored cheque was drawn and signed by the 1st respondent and an accountant of the firm. Learned counsel submitted that the purchase price was handled by the 1st respondent in his personal capacity and not in the ordinary course of business because the money did not go to the firm's bank account. Counsel submitted further that the firm had never taken control of the purchase price and the partners could not be bound. In any event, contended counsel, there was no misappropriation or stealing of the money by any partner but the money was instead appropriated by the Bank of India to settle a debt owed to it by the 1st respondent. According to counsel in the absence of cross-examination of any of the respondents on depositions in the affidavits the facts deponed to remained unchallenged.

We have considered the record of appeal in its entirety, the submissions of learned counsel, the authorities cited and the law and having done so we have taken the following view of the matter.

The gravamen of the appeal will therefore fall on a consideration whether the law firm of Veljee Devshi and Bakrania, Advocates, received instructions from the appellants to represent them in the conveyancing transaction and if the answer to that is "yes", then whether each of the three partners were bound in accordance with the provisions of the Partnerships Act to meet obligations due to the appellants. Tied to this is a consideration of the issue on whether the 3rd respondent had resigned hitherto the transaction or was still a partner of the firm when the transaction was made.

The Originating Summons was taken out by the appellants under the then **Order LII Civil Procedure Rules (now numbered Order 52)** which provides at **rule 4(1)**:

"4. (1) Where the relationship of advocate and client exists or has existed the court may, on the application of the client or his legal personal representative, make an order for-

- a. the delivery by the advocate of a cash account;***
- b. the payment or delivery up by the advocate of money or securities;***
- c. the delivery to the applicant of a list of the money or securities which the advocate has in his possession or control on behalf of the applicant;***
- d. the payment into or lodging in court of any such money or securities;***
- e. the delivery up of papers and documents to which the client is entitled."***

The appellants' intention expressed in the prayers sought in the summons was essentially that the respondents do jointly and severally pay to them the sum of Kshs.14,167,080/= which was the net balance due to the appellants after deduction of advocates fees, agreed disbursements and a sum of Kshs.2,000,000/= which the appellants acknowledged as having received from the 1st respondent before the suit was commenced.

What was the nature of the partnership that was carried out by the three respondents?

A Partnership Deed dated 16th January, 1997 was produced into the evidence through the affidavit in reply sworn by the 1st respondent on 29th February, 2000. That Deed was, of course, made by the three

respondents. It identified the 1st respondent as “existing partner” who was a sole proprietor carrying on the practice of an advocate under the name of the firm and further identified the 2nd and 3rd respondents as “the new partners”. The Deed was valid for one year with effect from 1st January, 1997 subject to renewal and further provided in the material part:

“

5(a) The New Partners will bring no capital into the partnership.

- b. All the capital and assets including furniture fixtures and books paper deeds and all documents and files belonging to the practice and the goodwill thereof as at the date of this new partnership shall belong to the existing partner absolutely.**
- c. The new partnership shall have the unrestricted use of the assets including the furniture fixture books files papers deeds and documents provided always that all the cost and expense of maintaining and insuring these shall be borne and paid out of the profits of this partnership.**
- d. Any further capital from time to time required for the purposes of the partnership shall be contributed by and belong to the partners hereto in the shares in which they are for the time being entitled to the net profits of this partnership.**

.....

9 (a) the bankers of the partnership shall be Fidelity Commercial Bank Limited, Nairobi or such other bankers as the partners may from time to time agree;

- b. All partnership monies not required for current expenses and all cheques shall be paid promptly into the partnership bank account;**
- c. All moneys held or received on behalf of any client or third person shall be paid promptly into a separate clients’ account with the partnership bankers;**
- d. All cheques shall be drawn in the name of the partnership and shall be so drawn by any two of the authorized signatories.**

.....

12 (a) Show the utmost good faith to the other partners or partner in all matters relating to the partnership;

- b. conduct himself in a manner becoming an advocate and in a proper and responsible manner and use his best skill and endeavours to promote the partnership business;**
- c. keep proper records of all business transacted by him on behalf of the partnership;**
- d. comply with all Acts Orders Regulations and other instruments (including the Advocates’ Accounts Rules) for the time being having the force of law and applicable for advocates;**
- e. duly and punctually pay and discharge his separate and private debts and liabilities and keep the partnership property and the other partners or partner and their/his respective estates and effects indemnified against the same and against all actions proceedings costs claims and demands in respect thereof;**
- f. devote his whole time and attention to the partnership business.**

.....
14. The partnership shall be determined upon the expiry of not less than three (3) months' notice of determination given in writing by the existing partner to the new partners or by new partners to the existing partner.

.....”

The case for the respondents was encapsulated through their various affidavits but particularly in the affidavit sworn on 29th February, 2000 by the 1st respondent. We have in this Judgment set out in full various paragraphs of that affidavit. The 1st respondent avers, for instance, that the firm of Veljee Devshi and Bakrania was actually a sole proprietorship where he owned all assets, capital and goodwill; that the 2nd and 3rd respondents were partners only in sharing of profits; that he enjoyed a veto power over all decisions of the practice of the firm. The 1st respondent further deponed that the 3rd respondent had resigned as a partner of the firm on 1st August, 1998 and that he and the 2nd respondent had accepted that resignation and released the 3rd respondent from all obligations and benefits of the partnership but that formal Notice of Change to show the 3rd respondent's resignation could not be formally filed with the relevant Registrar until 1st November, 1998 as the file relating to the firm had been missing at the Registry of Business Names; that it was he who headed the conveyancing department of the firm and handled all matters thereat solely. The 1st respondent also deposed that when the transaction involving the appellants and the purchaser was about to be completed the 1st appellant approached him and directed him not to bank the proceeds of the cheque at the firm's "small bank" but to specifically deposit the cheque at the Bank of India.

When the 1st respondent informed the 1st appellant that the firm had no account at the Bank of India the 1st appellant:

“.....he willingly agreed and authorized me to deposit his sale proceeds in my account at the Bank of India.”

That the 1st appellant then arranged for the purchase price cheque of Kshs.18,000,000/= representing the sale proceeds to be sent to the 1st respondent and that the cheque was made payable to "the Bank of India".

The 1st respondent stated that he therefore deposited that cheque in his personal account at that bank but that bank appropriated the same applying it to pay off the 1st respondent's personal debt with the said bank. In the event, and in his own words:

“..... I admit that it is my personal responsibility to pay Saidha; that I have every intention to do so; that I have since paid Kshs.2 million to Saidha from my personal resources; and I have consented to Judgment being entered against me personally and Judgment has indeed been entered against me personally.....”

And:

“..... I admit that Rana and Visram had absolutely no knowledge of this transaction or of the receipt of Saidha's funds, and of its subsequent deposit by me with the Bank of India. They could not have possibly known of this receipt because it was not recorded in the books of account of the firm, as it was a personal transaction between me and Saidha. Rana and Visram had not authorized me to deposit the funds with the Bank of India, and are completely innocent”

Those averments are repeated by the 2nd and 3rd respondents but it is not necessary now to go into those affidavits. Partnerships in Kenya are governed by the **Partnerships Act, No. 16 of 2012** which repealed

and replaced the **Partnership Act, Cap 29 Laws of Kenya**. The matters relevant to this appeal took place during the currency of the repealed Act.

To determine whether liability in a partnership will be on all the partners in a firm or on a single partner independent of others, one has to take into consideration whether the exercise of authority of a partner binds the firm. If such exercise of authority binds the firm then any liability arising from the exercise of that authority will be binding on all the partners in the firm. However, if the exercise of such authority does not bind the firm, then it will not bind all the partners in the firm.

In common law the authority of a partner to bind the firm is founded on the principle of agency. This authority whether expressed or implied is subject to the ordinary course of business of the firm. The authority can only be limited by restrictions that may be placed to bind the firm.

Halsbury's Laws of England, 4th Edition, Volume 35 at par. 46

speaks to the issue of implied authority as follows:

“Extent of implied authority will not extend to anything done otherwise than in the usual course of business and in the way in which it would usually be done in business of that kind.”

On limitation of such authority, the same volume of **Halsbury's Laws of England, at par. 45** has the following commentary:

“Limitation on Authority- If it has been agreed between the partners that any restriction is to be placed on the power of any one or more of them to bind the firm, no act done in contravention of the agreement is binding on the firm in respect to persons having notice of the agreement.”

Kenya adopted these partnership principles in the Partnership Act, now contained in the new Act of 2012. **Section 7** of that repealed **Act** provided that every partner being an agent of the firm was bound by the acts of other partners performed in the ordinary course of business that was carried on by the firm. The exception was that the partners would not be bound if the partner so acting had in fact no authority to act for the firm in the particular matter and the person he was dealing with knew or did not know that he had no such authority or believed him to be a partner.

Further, **Sections 14, 15, and 16** of that **Act** provided that every partner was jointly liable with his co-partners for actions, omissions done by a partner in course of ordinary business that may result in the loss or injury of a third party or for the misapplication of money or property received for or in the custody of the firm.

Ernest H. Scammell and RC Ianson Banks in **Lindley on Law of Partnership, 14th Edition, published by Sweet and Maxwell in 1979 at p. 165** elaborates on the principle of agency and the power of the partner to bind the firm. They explain that such liability to bind the firm would not arise if the partner has no authority to bind the firm and if the act done was not done for carrying on the business of the firm in the ordinary way.

Another useful discussion on the liability of partners will also be found in **Halsbury's Laws of England 4th Edition Volume 35 at par. 56** where it is stated:

“General liability in tort. Where, by any wrongful act or omission of any partner acting in the ordinary course of the business of the firm, or with the authority of his co-partners, loss or injury is caused to any person not being a partner in the firm, or any penalty is incurred, the firm is liable to the same extent as the partner so acting or omitting to act and where one partner acting within the scope of his apparent authority receives the money or property of a third person and misapplies it, or where a firm in the course of its business receives money or property of a third person, and the money or property so received is misapplied by one or more of the partners while it is in the custody of the firm, the firm is liable to make good the loss.”

Macduff, J in **Lal Chand Sharma trading as Regal Provision Stores v Bush Mills** [1957] EA 404 at p. 406 quoted Lindley on Partnership (11th Edition) at p. 185 and 186 where the following observation was made:

“It will be observed that what is done in carrying on the partnership business in the usual way in which businesses of a like kind are carried on, is made the test of authority where no actual authority or ratification can be proved. This probably means the same thing as saying that what is necessary to carry on the partnership business in the usual way is the test of a partner’s implied authority to bind the firm.”

“The question whether a given act can or cannot be said to be done in carrying on a business in the way in which it is usually carried on must evidently be determined by the nature of the business, and by the practice of persons engaged in it. Evidence on both of these points is therefore necessarily admissible, and, as may readily be conceived, an act which is common in the prosecution of one kind of business in the ordinary way may not be required for carrying on another business of a different character. Consequently no answer of any value can be given to the abstract question – Can one partner bind his firm by such and such an act? unless, having regard to what is usual in business, it can be predicated of the act in question either that it is one without which no business can be carried on, or that it is one which is not necessary for carrying on business whatever.”

From the foregoing, the test of authority and liability lies in establishing the course of ordinary business in the firm. The test for the ordinary course of business is whether the act or omission done was necessary to carry on the partnership business in the ordinary course or the usual way.

In the case before the High Court there was a clear admission by the 1st respondent that he handled the appellants’ transaction on his own without informing or involving the 2nd or 3rd respondents at all. And according to the 1st respondent, it was the 1st appellant who specifically instructed him to deposit the transaction cheque at the Bank of India but not at the firm’s account which was at Fidelity Bank, a bank the 1st appellant believed to be a “small bank”. It was established through the affidavit evidence presented before the learned judge that the firm did not hold an account at the Bank of India but that it was the 1st respondent who held a personal account there. When he (the 1st respondent) presented the cheque and deposited it into his personal account the proceeds thereof were appropriated by that bank to offset a loan the 1st respondent owed to that bank.

In the English case of **Geoffrey Silver & Drake v Thomas Anthony Baines** [1971] 1 All ER 473 the facts were that:

“The defendant was the only partner in a firm of solicitors and employed B, an admitted solicitor, to carry out much of the firm’s work.

In March 1969, B asked the plaintiff, a partner in another firm of solicitors, to advance £4,000 for a client of the defendant’s firm. The plaintiff advanced the money and in an undertaking written on the defendant’s professionally headed notepaper, dated 21st March, 1969, addressed to the plaintiff, and signed by B on behalf of the defendant’s firm, it was stated that in consideration of you handing to me the sum of £4,000, we hereby undertake to repay the sum to you together with interest at 2% a month on the 21st day of May 1969. The defendant knew nothing about the loan. It was not repaid by 21st May, 1969, and when the plaintiff demanded payment the defendant said that he knew nothing about the loan and he repudiated any liability under the written undertaking.

It was held:

(i) (Per Lord Denning MR and Widgery LJ) Assuming that the written undertaking was given by him in his capacity as a solicitor, even though the money was for the benefit of a client but was given in his personal capacity, for in regard to money an undertaking given by a person in his capacity as a solicitor was usually one to pay money which he held in trust or an undertaking to

apply money in a particular way; accordingly, the first requirement for the exercise of the court's summary jurisdiction over solicitors for breach of an undertaking was absent (see p 475 j to 476 c and p 477 b to d, post).

- ii. *In any event, the court's summary jurisdiction over solicitors should be exercised only in a clear case which the present case was not since the issue of B's implied or ostensible authority to give the undertaking was arguable; accordingly, the case was not an appropriate one for summary procedure and the plaintiff must bring an action at law for the money; the appeal would therefore be allowed. Per Denning, MR (at page 475)*

*“The first question in the present case is whether the solicitor gave the undertaking in his capacity as a solicitor. This is difficult to define. But I think it will usually be found, in regard to money, that it is an undertaking to pay money which he has in his hands on trust, or on an undertaking that he will apply it in a particular way. Thus, if a solicitor is acting for a client on the sale of land, and gives an undertaking to a bank that he will pay over so much of the money, when received, to the bank, the undertaking is given ‘in his capacity as solicitor.’ So also, if a solicitor gives an undertaking that he will hold a sum of money in his hands pending the conclusion of negotiations, that too is given in his capacity as a solicitor, as in *United Mining and Finance Coprn Ltd vs Becher*. But this case is very different from either of those cases. The solicitor here was not holding money in his hands at all. All that happened was that Mr. Batts received money and paid it over to a client, Mr. Izzet, and promised to repay it to Mr. Silver. It was an undertaking to repay money. The money may have been for the benefit of a client. But that undertaking was to repay money lent. That is not an undertaking ‘in his capacity as a solicitor’. In any case, however, this is not a case in which the court should exercise its summary jurisdiction. The court has a discretion which it will only exercise in a clear case. This is not a clear case.”*

In the other English case of **British Hoes Assurance Corporation v Patterson** [1902] 2 Ch. 404 the facts are summarized as follows:

“Where A. has a contract with B., and B. takes C. into partnership and gives A. notice, A. has an option whether he will abide by his contract with B. alone or accept the liability of the partnership. If he elect to abide by his contract with B., C. is not liable for a fraud committed by B. against A. in respect of the contract, though B. was acting within the scope of the partnership business.

The plaintiff's appointed B. their solicitor, and instructed him to act for them in a mortgage transaction. While the business was pending, B. took the defendant into partnership, and gave the plaintiffs notice in writing. The plaintiffs paid no attention to the notice, continued to correspond with B. in his own name, and finally sent him the money to advance on the mortgage by cheque made payable to his order, and accepted his receipt in his own name. B. paid the money into his own account and misappropriated it: -

Held, that the plaintiffs had elected to continue to employ B. alone, and the defendant was not liable for B.'s fraud.”

From Canada we have **Frances Mcdonic & Others v John R. Hetherington & Others** reported in Ontario Court of Justice No. 93 – CU – 72151 where it was held that if the funds are not deposited in the partnership account, and other partners have no control over it, the partners cannot be liable.

Was the 1st respondent acting within the ordinary course of the business of a law firm when he deposited the cheque handed to him by the 1st appellant into his personal account at the Bank of India?

The firm was in the business of providing professional legal services in Kenya. The legal profession in Kenya is regulated by statute and subsidiary regulations made thereunder. Therefore, the ordinary course of business of partners in an advocate's firm in this country can be construed from the **Advocate's Act, Cap 16, Laws of Kenya**, and its subsidiary regulations. In particular, **the Advocates (Accounts) Rules, 1966** provide how an advocate or a firm of advocates should handle sums that are received from clients

especially as stakeholders. The sum in contention in this matter is referred to as client's money. **Rule 2** of the **Advocates (Accounts) Rules, 1966** defines client's money as follows:

“Client's money” means money held or received by an advocate on account of a person for whom he is acting in relation to the holding or receipt of such money either as an advocate or, in connexion with his practice as an advocate as agent, bailee, trustee, stakeholder or in any other capacity , and includes-

- a. *money held or received by an advocate by way of deposit against fees to be earned or disbursement to be incurred; and*
- b. *money held or received as or on account of a trustee whether or not the advocate is sole trustee or trustee with others, but does not include-*
 - i. *money to which the only person entitled is the advocate himself, or in the case of a firm of advocates, one or more of the partners in the firm; nor*
 - ii. *money held or received by an advocate in payment of or on account of an agreed fee in any matter.”*

Rule 4 to 8 of the said rules require that the ordinary course of business of a practicing advocate handling client's money is to deposit the money into a client's account rather than a personal account. The partnership deed on the record, in respect of the partnership in issue, conforms to these rules in its requirement that client's money must be deposited into the client's account rather than a partner's personal account. These rules as set out as follows:

“4. Subject to rule 8, an advocate shall without delay pay into a client account all client's money held or received by him.

5. *There may be paid into a client account-*
 - a. *trust money*
 - b. *such money belonging to the advocate as may be necessary for the purpose of maintaining the account;*
 - c. *money to replace any sum drawn from the account in contravention of these Rules; and*
 - d. *a cheque or draft received by the advocate which under rule 6 he is entitled to split but which he does not split.*
 1. *Where an advocate holds or receives a cheque or draft which includes client's money*
 - a. *he may where practicable split such cheque or draft and, if he does so, he shall deal with each part thereof as if he had received a separate cheque or draft in respect of that part; or*
 - b. *If he does not split the cheque or draft, he shall pay the cheque or draft into a client account.*
 2. *Money which is not client's money but which is paid into a client account rather than under rule 5(b) shall be paid out as soon as reasonably possible.*
7. *No money other than money which under these Rules an advocate is required or permitted to pay into a client account shall be paid into a client account.*
8. *An Advocate need not pay into a client account client's money held or received by him which-*

- a. *is received by him in the form of cash and is without delay paid in cash in the ordinary course of business to the client or to a third party; or*
- b. *he pays in, without delay, to the credit of a separate account opened or to be opened in the name of a client, trust or estate or of some person nominated by the client; or*
- c. *is received by him in the form of a cheque or draft and is without delay, endorsed over and delivered in the ordinary course of business to the client or to a third party for on behalf of to the use of the client and is not cashed or passed through a bank account by the advocate.”*

These are the facts and the law that the learned trial judge was confronted with. Having considered the same he held that by depositing the sale proceeds into the 1st respondent's personal account was a variation of the terms of the agreement for sale. He found that:

“By varying the agreement the Plaintiffs were no longer looking to the firm to pay them the money. This is not a case where a partner has misapplied funds it is a case where parties have agreed to variation of an agreement so that the receipt of the money and payment thereof was no longer a matter for the firm but a personal agreement between the Plaintiff and Mr. Bakrania. It appears that the Plaintiff trusted Mr. Bakrania in preference to the money being paid to the firm.

In the result this was not a transaction which was in the ordinary course of business of the firm and as such I find that neither the 2nd nor 3rd defendants have any liability in the matter to repay the sums claimed by the plaintiffs. The personal nature of the transaction is reinforced by the fact that Mr. Bakrania personally repaid to the plaintiffs a sum of £20,000.

The fact that Mr. Bakrania deducted the firm's fees from the proceeds of sale does not alter the essential nature of the transaction which was personal, between the Plaintiffs and Mr. Bakrania.”

Having reevaluated the matter we cannot fault the learned judge on how he handled the proceedings and the findings which he reached. The 1st respondent readily admitted in affidavits in court that he handled the transaction personally but not on behalf of the firm. The suit was filed through an Originating Summons and the other pleadings were affidavits by the various parties. The appellants did not cross-examine either the 1st respondent or the other respondents on depositions in their affidavits and Mr. Esmail, learned counsel for the 3rd respondent, is right in his submission that those depositions remained unchallenged. The appellants chose to approach the court through a summary procedure under Order 52 Civil Procedure Rules. We find, as Lord Denning did in **Geoffrey Silver** (supra), that the case was not a clear one where such summary procedure could be employed at all.

Then there is the issue of whether or not the 3rd respondent had resigned from the partnership by the time the transaction involving the appellants was entered. This issue would appear moot in view of our finding that the 1st respondent acted alone but not on behalf of the firm. But if we must spend any time on this the 3rd respondent in the affidavit in reply sworn on 18th February, 2005 states at paragraph 5 thereof that he had joined the law firm of Veljee Devshi and Bakrania advocates on 1st January, 1996 but had resigned from that firm on 1st August, 1998. Attached to that affidavit is a hand-written note by the 3rd respondent where the 3rd respondent tenders his resignation from the firm. That note is counter-signed by the 1st and 2nd respondents on 31st July, 1998 and it says that resignation of the 3rd respondent was to take effect on 1st August, 1998.

The 1st respondent in the affidavit sworn on 29th February, 2000 confirms what the 3rd respondent has deponed on the issue of resignation of the 3rd respondent.

Mr. Kahinga Waitindi, learned counsel for the appellants, in submissions before us on this issue, stated that the Notice of Change document giving notice of the 3rd respondent's resignation was backdated and

was a forgery.

As we have earlier observed, the appellants did not find it appropriate to subject the respondents' depositions in the various affidavits to cross-examination. And if, indeed, the said Notice of Change was forged – did the appellants not have a duty to challenge the document through a forensic or other examination? Allegations of fraud by any party in civil proceedings are serious and should not be made without appropriate evidence being preferred. And such evidence cannot be the submission of counsel from the bar without tendering any evidence at all. So the submission on that issue by learned counsel for the appellants is a statement from the bar which the learned trial judge was right to ignore.

The repealed Partnership Act provides for retirement of a partner rather than resignation. **Section 30** of that **Act** provided that retirement, in the absence of a fixed duration of partnership, could be at any time by a reasonable notice. Where the partnership was by deed the notice had to be given in writing to all the other partners:

“30. Retirement from partnership at will

- 1. Where no fixed term has been agreed upon for the duration of the partnership, any partner may determine the partnership at any time on giving reasonable notice of his intention to do so to all the other partners.***
- 2. Where the partnership has originally been constituted by deed, a notice in writing, signed by the partner giving it, shall be sufficient for this purpose.”***

Therefore, it is the date given, upon reasonable notice to the partners that is the effective date of resignation. What is reasonable notice is a question of fact which the courts determine.

It has been the practice in Kenya that upon resignation a partner in a law firm would cause a Notice of Change of Particulars of the partnership to be filed with the Registrar's office requesting that the name of the partner be removed immediately from the partnership. However, the removal of the partner's name from the Registrar's records does not make the resignation effective. (See the case of **Hantilal Khimji Shah v. Thakorbaai Nanalal Patel & 2 Others [1986] eKLR** and **Velji Narshi Jetha Shah v. Kantilal Narshi Shah & Another [2011] eKLR**.)

Partnerships Act, No. 16 of 2012, Laws of Kenya provides for the resignation of a partner rather than retirement. This Act has crystallized the notice period rather than subjecting it to the determination of the court.

Section 28 of the **Act** provides that resignation of a partner will take effect three months after a notice of intention to resign has been served on other partners.

The resignation of the 3rd respondent was given on 31st July, 2008 to take effect the next day 1st August, 2008.

In view of our findings on the main issue that the 1st respondent in collecting and depositing a cheque from the appellants to his personal account at the Bank of India acted alone but not on behalf of the firm we do not need to go further on the issue of resignation of the 3rd respondent.

The learned judge did not err in any way in his findings and our re-evaluation of all the material placed before the learned judge would lead us to reach the same findings that he did. In the event this appeal has no merit and we accordingly dismiss it with costs to the 3rd respondent.

Dated and Delivered at Nairobi this 4th day of December, 2015.

F. SICHALE

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JUDGE OF APPEAL

J. OTIENO-ODEK

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR