



THE SUPREME COURT OF KENYA

ARVIND SHAH & 7 OTHERS V MOMBASA BRICKS & TILES LIMITED & 5 OTHERS

PETITION NO. 18 (E020) OF 2022

DATE OF JUDGMENT: 28TH DECEMBER, 2023

MEDIA SUMMARY

The following explanatory note is provided to assist the media in reporting this case and is not binding on the Supreme Court or any member of the Court.

Order: The petition of appeal is dismissed with each party bearing their own costs

This appeal was limited to two issues which the Court certified as involving issues of general public importance. These are - *whether a constructive trust can be imported into a land sale agreement to defeat a registered title therefrom; and whether a constructive trust can be imported into a shareholding of a company as to disentitle a registered holder of shares in a company obtained for valuable consideration.*

The respondents experienced some financial challenges as a result of debts incurred by the 1st respondent, Mombasa Bricks & Tiles Limited and which debts were secured by a charge over Plot No.500/VI/Mainland North (Title CR No. 4226) (the suit property). The suit property housed a brick factory, a maize mill factory, a coconut extracting factory, a go-down, office blocks, a workshop, a residential house, ancillary buildings and included various machines and equipment. The suit property was however threatened with sale by the financier, Standard Chartered Bank Ltd, to recover the monies secured by it. In an effort to save the property, Dinesh and Ateet Jetha, the 2nd and 3rd respondents at the time tasked with the running of the 1st respondent, sought the assistance of the 1st appellant, Arvind Shah, a close and trusted friend perceived to be an experienced and successful businessman running numerous profitable companies. The 1st appellant recommended the restructuring of the 1st respondent. This involved the incorporation of a series of holding companies to hold various assets of the 1st respondent and redeem the assets from the charge held by Standard Chartered Bank Kenya Ltd. Thereafter, the 4th appellant applied for a loan and an overdraft facility from Giro Commercial Bank to finance the purchase of the suit property and its working capital.

The respondents filed suit in the High Court seeking that Arvind Shah be found to have misrepresented his true intention in offering his advice to the 1st respondent, took advantage of the 1st respondent's vulnerable situation and Ateet Jetha's inexperience to induce the 1st respondent to enter into the arrangements it did. Furthermore, the respondents contended that the sale of the suit property to the 8th appellant was unconscionable and the price was a gross undervalue.

In a judgment made on 22nd December 2017, the High Court affirmed the transactions holding that they were made voluntarily and freely for the purpose of salvaging the suit property. That court upheld the sale agreement as being valid, lawful and binding as to confer good title to the land purchased.

Aggrieved, the respondents appealed to the Court of Appeal and the appellants filed a cross appeal. In its judgment delivered on 4th April, 2019, the Court of Appeal allowed the appeal and dismissed the cross appeal. It held that there was a relationship of trust between the respondents and the 1st appellant, who offered to reorganize and restructure the respondents' business in order to salvage the suit property. Instead of using his position as a trustee, the 1st appellant set out a scheme to purchase the property, unjustly enriching himself and was conflicted between his duties as a trustee and his scheme to purchase the property. The court held that the companies were used to cover the 1st appellant's improper conduct. It found that the 1st and 3rd appellants hold the shareholding in the 4th to the 7th appellant companies in trust for the 1st respondent or its nominees, and the 4th appellant holds the suit land in trust for the 1st respondent. Whereas the 4th appellant's title is registered under the repealed Registration of Titles Act, it is impeachable. The court nullified the sale agreement dated 31st August, 2005 and the transfer of the suit property to the 4th appellant.

The appeal before the Supreme Court was limited to only two issues as indicated above. The 1st to 4th respondents challenged the Court's jurisdiction to determine this matter on the grounds that it is defective for not complying with the Rules of the Court and for raising questions of fact beyond those which were certified as involving general public importance. The issues that arose for determination before this Court are:

- i. *Whether the Petition satisfies the jurisdictional threshold under Article 163(4)(b) as read with Section 15 of the Supreme Court Act;*
- ii. *Whether a constructive trust can be imported into a land sale agreement to defeat a registered title therefrom; and*
- iii. *Whether a constructive trust can be imported into a shareholding of a company as to disentitle a registered holder of shares in a company obtained for valuable consideration.*

Upon consideration, the Supreme Court determined the issues as follows:

In answer to issue no. 1, the Supreme Court found that it has jurisdiction to hear this matter because the non-conformity with the rules was already determined by the Court in its previous ruling. The Court also noted that it retains discretion on which facts to consider including the extent beyond the issues already certified.

On issue no. 2, the Supreme Court noted that the question before it is not whether the Court of Appeal was correct in imputing a constructive trust but rather, whether such trust can be imported into a land sale agreement to defeat a registered title therefrom obtained for valuable consideration without offending the constitutional right to property and other statutory provisions. The Supreme Court found that a constructive trust can be imported into a land sale agreement to defeat a registered title.

On issue no.3, we agree that whereas the Companies Act proscribes the entry of trusts on the register of members, the intention of this provision was not to bar any trust arrangements, and we add, including constructive trusts. There is therefore no bar to the holding of share(s) upon a trust.

The Supreme Court was not persuaded to re-open the merits of the Court of Appeal decision concerning the applicability of the trust. Litigation has to come to an end and the Court of Appeal, having satisfied itself of the facts, came to one conclusion and made its orders.

This Court, however, noted that there may be legal uncertainty over the recourse that parties have upon declaration of trust by the Courts and how to actualise the same especially concerning shareholding. While it is open to each court to have regard to the specific circumstances in a given case, we think this is an issue that the Kenya Law Reform Commission, the Attorney General, Parliament and all other stakeholders should give consideration on whether there is need for legislative intervention on the topic so as to make processes smoother.

Consequently, the Supreme Court issues the following final orders:

- (i) A constructive trust can be imported into a land sale agreement to defeat a registered title therefrom; and**
- (ii) A constructive trust can be imported into a shareholding of a company as to disentitle a registered holder of shares in a company obtained for valuable consideration**
- (iii) The appeal dated 28th July, 2022 is hereby dismissed;**
- (iv) Each party shall bear its own costs; and**
- (v) We hereby direct that the sum of Kshs. 6,000/-, deposited as security for costs upon lodging of this appeal, be refunded to the appellant.**