



**Corner Holiday Inn Limited & 2 others v Wangunyu & another (Civil Case 104 of 2007)
[2024] KEHC 10322 (KLR) (Commercial and Tax) (20 August 2024) (Judgment)**

Neutral citation: [2024] KEHC 10322 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
COMMERCIAL AND TAX
CIVIL CASE 104 OF 2007
PM MULWA, J
AUGUST 20, 2024**

BETWEEN

**CORNER HOLIDAY INN LIMITED 1ST PLAINTIFF
PETER KIMEMIA NJOROGE 2ND PLAINTIFF
JOSEPH MURIUKI GITAU 3RD PLAINTIFF**

AND

**ANDREW KURIA WANGUNYU 1ST DEFENDANT
DAVID CURURU WANGUNYU 2ND DEFENDANT**

JUDGMENT

Introduction and Background

1. About 20 years ago, the 1st and 2nd plaintiffs filed this suit in the subordinate court against the 1st defendant seeking to permanently restrain him from having access to or in any other manner interfering with the staff of, all the records, books of accounts and other records of and the running of the Company business known as Corner Holiday Inn Bar & Restaurant together with all property and or assets of whatever nature belonging to the Company in the 1st defendant's custody. They also sought that 1st defendant be compelled to release to them all records pertaining to the Company in his custody. Two years later in October 2006, the matter was transferred to this court owing to the lack of pecuniary jurisdiction of the subordinate court. Again, two years later in May 2008 the court, on application by the 1st and 2nd plaintiffs, granted them leave to amend the plaint wherein they introduced the 3rd plaintiff and 2nd defendant as parties to the suit. Unfortunately, the 3rd plaintiff passed away on 18th October 2010. One Catherine Gathoni Gitau, on 26th September 2012 successfully applied to substitute him in the suit.



2. Thus, the plaintiffs' case is set out in the amended plaint dated 2nd May 2008. They state that the Company was at all material times carrying on the business of a bar and restaurant at Dagoretti Corner in the name and style of Corner Holiday Inn. They aver that defendants were at all material times its directors and shareholders. That the 1st defendant was a director but not a shareholder and that 2nd defendant was a shareholder and not a director.
3. The plaintiffs claim that in or around December 2003 and without 2nd plaintiff's consent and/or knowledge, the 2nd defendant, in an apparent misapprehension that he was a director of the Company, illegally appointed the 1st defendant to be the General Manager of Corner Holiday Inn. That as the General Manager, the 1st defendant has been running the Company's business as his personal property and in a reckless and negligent manner and not in the best interests of the plaintiffs. Owing to the foregoing, they aver that by the Company's board of directors' resolution made on 3rd June 2004, it was resolved that the firm of M/s Gakumo Mwangi & Company, a firm of auditors, be appointed to urgently carry out an audit as to the affairs of the Company's business aforesaid. The mandate of the said firm was to ascertain the manner in which the 1st defendant ran the Company's business, whether all the moneys that were supposed to have been collected were actually collected, or whether there was any form of impropriety.
4. The plaintiffs contend that all records of the Company's business were at all material times at the place of the business aforesaid, to wit, Title No. Dagoretti/Riruta/23, and they were accessible to the managers and directors the Company. That upon appointment of the auditor pursuant to the board resolution referred to above, the 1st defendant willfully and unlawfully obstructed the said auditors from carrying out their work and also broke into the Company's premises and carried away to an unknown destination all records, books of accounts, receipts and other documents relating to the Company's business. This action denied the plaintiffs access thereto and made it impossible for the auditor aforesaid to carry out the audit. It is the plaintiffs' contention that 1st defendant's action is unlawful and against the terms of his appointment as the General Manager of the Company's business and also against his position as a director of the Company.
5. Further and in addition to the foregoing, that the 1st defendant has shown that he does not intend to run the Company's business in the interests of the plaintiffs and consequent thereto if he is allowed access to the said business, he will interfere with its running thus causing the plaintiffs irreparable loss and damage. The plaintiffs further accuse the defendants together with another member of their family of incorporating another company in the year 2005 to wit, Dagoretti Corner Holiday Inn, to run similar business as the Company's business in the premises leased to the Company. According to the plaintiffs this incorporation of another company to undertake similar business to that of the Company was fraudulent and in breach of their duty of care towards the plaintiffs.
6. The plaintiffs claim that by a valuation report dated 31st October 2003 carried out by Messrs. G. Njoroge & Company, Certified Public Accountants, the net value of the Company was placed at Kshs. 10,450,000.00. Further, that before the appointment of 1st defendant as the General Manager of the Company's business, the directors of the Company used to receive the sum of Kshs 30,000.00 per month as director's allowances. However, that since the appointment of 1st defendant, the 2nd and 3rd plaintiffs have not received the said allowances to date. It is the plaintiffs' contention that in view of the aforesaid acts of the defendants, the Company's business has suffered and its assets have been put to waste thus reducing its net worth.
7. For the above reasons, 2nd and 3rd plaintiffs' claim against the defendants is for the sum of Kshs. 3,500,000.00 each with interest from December 2003 to date, together with the sum of Kshs 30,000.00 per month from the year 2004 and all dividends from the year 2004 being the share of each shareholder



in the Company as per the valuation carried out on 31st October 2003 and the directors' allowances respectively. In sum, the plaintiffs seek judgment against the defendants as follows:

- a. A permanent injunction to restrain the defendant from having access to or in any other manner interfering with the staff of, all the records, books of accounts and other records of and the running of, the 1st plaintiff's business known as Corner Holiday Inn Bar & Restaurant situate in Title Number Dagoretti/Riruta/23
 - b. A mandatory injunction compelling the defendant to release to the plaintiffs all records pertaining to the 1st plaintiff's business known as Corner Holiday Inn Bar & Restaurant together with all property and or assets of whatever nature belonging to the 1st plaintiff in the defendant's custody
 - c. The principal amount in the sum of Kshs 3,500,000/= each to 2nd and 3rd plaintiffs
 - d. The sum of Kshs 30,000/= per month from the year 2004 to date
 - e. Dividends from the year 2004 to date
 - f. Costs of the suit
 - g. Interest on c), d) and e) above
 - h. Any other remedy that the court may deem fit to award.
8. The defendants responded to the suit through their amended statements of defence all dated 23rd May 2014. The 1st defendant admits that he and 2nd plaintiff were directors of the Company but avers that 3rd plaintiff was neither director nor shareholder of the Company. Further that the 2nd defendant was a director/chairman and shareholder of the Company. He contends that he was lawfully appointed General Manager of Corner Holiday Inn by the board of directors of the Company. He contended that the 2nd plaintiff is not entitled to appoint auditors or in any other manner interfere with the management of the Company's business in complete disregard of its corporate entity.
9. The 1st defendant accused the 2nd plaintiff of starting a rival business by the name Tankard next to that of the Company and the purported appointment of auditors as well as this suit are ill-concealed attempts to gain control of the Company's business so as to compromise it for his own gain. He admits incorporation of Dagoretti Corner Holiday Inn Limited but avers that the said company is a separate entity incorporated after the collapse of the business of the Company herein through wrongful interference and undermining by the 2nd plaintiff.
10. According to the 1st defendant this suit is wrong in law for having been filed purportedly to enforce the Company's rights and using its name without authority, and as such it ought to be struck out.
11. On his part, the 2nd defendant states that he was a director and shareholder of the Company together with the 2nd plaintiff and equally denies that the 3rd plaintiff was a shareholder or director. That the latter ceased being a shareholder and resigned as a director on or about 9th May 2004. The 2nd defendant further stated that he reserved the right to object to the competence and lawfulness of the suit as a preliminary matter for determination prior to consideration of the other allegations.
12. The 2nd defendant contends that the appointment of the 1st defendant to run the Company's affairs while was lawfully done while he was Chairman of the Board of Directors and before he left in the year 2000 for an extended medical stay in the United States of America during which period the 2nd plaintiff was the one running the Company's business, which he did so badly, dishonestly and unprofessionally.



13. The 2nd plaintiff was accused of not keeping or maintaining proper books of accounts, hired his relatives to work for the Company all the way from the chief accountant to waiters and worked in tandem and concealed as well as supplying the Company with staff transport, stationary and staff uniform at arbitrary and exorbitant prices and neglecting to pay business debts and taxes.
14. According to the 2nd defendant, the 2nd plaintiff started ‘Tankard’, a brand new Bar and Restaurant Business next door causing an exodus of customers to the new establishment. That the incorporation of a new company on their part was not actuated by fraud but was an attempt to salvage a little business after the 2nd defendant’s action of unfair competition. For these reasons, he urged the court to dismiss the suit.
15. Pw1 (Peter Kimemia Njoroge) and Pw2 (Catherine Gathoni Gitau) testified and relied on their respective witness statements and lists as well as bundle of documents which they produced as exhibits. Equally, the two defendants gave their testimonies.
16. Parties were directed to file written submissions which I have considered and will make reference to in my analysis. (*Even though the Defendants stated that they have filed the same, I cannot seem to locate them in the CTS or physical file).

Analysis and Determination

17. The standard and burden of proof as anchored in the provisions of Section 107 (1) and (2) of the [Evidence Act](#) was appreciated in *Miller v Minister of Pensions 1947 ALL E.R 372*, where Lord Denning aptly summarised the application in the following terms:

“That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in criminal cases. If the evidence is such that the tribunal can say: We think it more probable than not; the burden is discharged, but, if the probabilities are equal, it is not. Thus, proof on a balance or preponderance of probabilities means a win, however narrow. A draw is not enough...”
18. Courts will make a finding based on which party’s version of the story is more believable (*James Muniu Mucheru v National Bank Of Kenya Ltd [2019] eKLR*).
19. From the submissions, the court is invited to determine the following issues which I will deal with sequentially:
 - a. Who are the directors and shareholders of the Company?
 - b. Was there a valuation done of the Company as a going concern?
 - c. Did the 3rd plaintiff cease to be a director/shareholder of the Company?
 - d. Did 1st defendant diligently exercise his fiduciary duty in the running of the Company’s business?
 - e. Did the defendants illegally withhold the books and records of the Company’s business?
 - f. Was 2nd plaintiff’s directorship at ‘Tankard’ a factor in the running of the Company’s business?
 - g. Is the Company properly enjoined?
 - h. Are the plaintiffs entitled to the reliefs sought?



Directorship and shareholding of the Company

20. The plaintiffs' position is that the 1st and 2nd plaintiffs were both directors and shareholders of the Company, that the 1st defendant was a director but not a shareholder and the 2nd defendant was a shareholder but not a director. That at inception in 1987, the shareholders and directors of the Company were 2nd plaintiff, 3rd plaintiff, one Peter Mugo Muriuki and the 2nd defendant. That in due time Peter Mugo Muriuki ceased being a shareholder and director of the Company. Thereafter, the 2nd defendant having travelled to the United States of America for an extended time, resigned as a director and was replaced by his son, the 1st defendant. According to the plaintiffs the records at Registry of Companies to date show the directors of the Company as: Peter Kimemia Njoroge, Joseph Muriuki Gitau and Andrew Kuria Wangunyuu.
21. On their part, the defendants stated that only the 1st defendant, the 2nd plaintiff and 2nd defendant were directors and shareholders of the Company. That the 3rd plaintiff was neither a director nor shareholder. Further that the 3rd plaintiff resigned as a director and shareholder of the Company in May 2004 when his shares were purchased by 1st defendant.
22. From the Company's Memorandum and Articles of Association (pgs. 9-31 of P. Exhibit 1), the position of subscribers is as stated by the plaintiff, each with one share. The defendant's contention that the 3rd plaintiff resigned as a director and shareholder after selling his shares to the 1st defendant was refuted by the plaintiffs who stated that the 1st defendant did not pay the entire share purchase price as indicated in the Share Sale Agreement dated 11th December 2003 and that the sale fell through. That the 3rd plaintiff (Joseph) rescinded his offer to sell his share to the 1st defendant through various letters citing the unpaid balance of his share. Indeed, the letters at pages 61 - 65 of P. Exhibit 1) attest to that fact. The defendants admitted not to have paid the full purchase price of the shares as agreed, but they contended that the same was waived due to liabilities Joseph had. This was however not substantiated the said liabilities. Indeed, Dw1 admitted in his testimony that the Auditor's report indicated that the Company had no debts and liabilities. The auditor had indicated that the report had taken into account all liabilities of the Company.
23. A letter from the Registrar of Companies (page 98 of P. Exhibit 1) indicates that the directors of the Company as at 7th October 2004 were the 2nd and 3rd plaintiffs and the 1st defendant. This record is an official document from the relevant government department that keeps company records and is prima facie evidence of the company records. (See *Arnold Kipkirui Langat v Atticon Limited & 6 others; Linkit Limited (Affected Company)* [2021] eKLR).
24. The defendants did not upstage this evidence or impeach its credibility or veracity and in fact, both Dw1 and Dw2 admitted that they had no evidence to demonstrate that they were both shareholders and directors of the Company. As such, the court is only left to conclude that indeed, the directors of the Company as at the date of filing suit were the 2nd plaintiff, 3rd plaintiff and 1st defendant. Since I have also found that the sale and transfer of shares from the 3rd plaintiff to the 1st defendant did not succeed due to the latter's failure to pay the balance of purchase share price and withdrawal of the offer by the 3rd plaintiff, it follows that the 1st defendant is not a shareholder of the Company. This means that the shareholders of the Company remained the 2nd plaintiff, 3rd plaintiff and 2nd defendant. The only directors AND shareholders are the 2nd and 3rd plaintiffs.



Valuation of the Company

25. It is not disputed that a valuation of the Company was done by D.G. Njoroge Accountants, however the defendants denied that the Company commissioned or resolved that the said valuation be done and they further dispute its contents. The plaintiffs produced minutes of a meeting of the Company dated 11th February 2010 where at Min 4.0 on the valuation of report, it was stated that the same was adopted as a true position of the Company at the time. The said minutes also indicate that both Dw1 and Dw2 admitted that they attended this meeting and that they did discuss the said valuation report. This position was not substantially challenged by the defendants and I therefore find that the Auditor's report was ratified in a meeting of the Company on 11th February 2010.
26. The question of whether or not the Company commissioned the said valuation does not arise as a result of the subsequent ratification. It should not be lost that shareholders of a company at a general meeting may ratify acts or omissions by directors provided the meeting ratifying the act or omission is properly convened meeting attended by the shareholders (See Ghelani Metals Limited & 3 others v Elesh Ghelani Natwarlal & another [2017] eKLR).
27. It is therefore my finding that a valuation of the Company as a going concern was done by Messrs. D.G. Njoroge Accountants on 31st October 2003.

Cessation of the 3rd plaintiff (Joseph) as a director/shareholder

28. I have already found that the 3rd plaintiff did not cease being a shareholder and director of the Company as he withdrew his intention to sell the same to 1st defendant after the latter failed to pay the balance of the share purchase price. The 3rd plaintiff thus remains a shareholder and a director as per the records of the Registrar of Companies dated 7th October 2004.

1st defendant's fiduciary duty as director in running the Company

29. The plaintiffs stated that the 1st defendant abdicated his duty as a director by incorporating another company to run a similar business as that of the Company, thus mismanaging its business and failing to keep proper books of accounts. Pw1 stated that he raised this issue in his letter of 16th January 2004 (Page 48 of P. Exhibit 1) and that the same was tabled in the meeting of 2nd April 2004 (minutes at Page 55 of P. Exhibit 1) and his letter of 18th April 2004 (Page 58 of P. Exhibit 1). In a letter dated 6th July 2004 by the appointed auditor (Page 77 of P. Exhibit 1), the auditor stated that some documents of the Company had not been properly filed and/or were not available. The auditor, in a letter dated 24th July 2003 (Page 140 of P. Exhibit 1) also noted that some cheques had gone through the bank but that they were being credited to another entity and that cheques encashed by the 1st defendant had not been banked and that he still owed this money to the Company.
30. Save for mere and general denials, the 1st defendant did not substantively counter the aforementioned allegations by way of evidence. He also admitted that together with the 2nd defendant, they incorporated a company with a similar business name to that of the Company and that the Registrar of the Companies in a letter dated 26th may 2006 (Page 129 of P. Exhibit 1) noted the similarities and directed that they change the said name.
31. As a general rule, directors are barred from acting in particular ways when there is conflict of interest on their part. There is a duty not to profit from a position of trust which directors hold. That duty has been extended to protect opportunities available to a company. Thus as a director, one should not



take any corporate opportunities for personal benefits (see *Regal (Hastings) Ltd v Gulliver* [1967] 2 AC 134).

32. The conflict will arise even where the company is not pursuing the opportunities in question and they are presented to the directors on their personal capacity. Where the director appropriates the opportunity, he is deemed as a trustee for the company of any profits made and he will be held liable to account in any action by the company for restitution. There is also a duty for a director to apply independent judgment, reasonable care, skill and diligence in running the Company and use the Memorandum & Articles for the use assigned.
33. The director should avoid conflict of interest and where it exists declare it and seek consent approval or authorization from members. (See *Eveready EA Limited v Energizer Middle East and Africa Limited & another* [2017] eKLR and *Exobi (Finance House) Limited v Zahid A Nanji & 2 others* [2020] eKLR).
34. From the evidence above, it is clear that the two defendants were guilty of breaching their fiduciary duties as their actions were at cross-purposes with that of the Company. They both incorporated a company which was not only similar but was not operating in the interest of the Company.

Did the defendants illegally withhold books and records of the Company's business?

35. From the letters of the auditor referred to above, it is evident that he was not able to access all documents of the Company and that as per the minutes of the meeting of 11th February 2010, the 1st defendant admitted that all books, receipts and bank statements were in his custody. He did not release all books and documents of the Company as requested by the auditor. The defendants did not provide any basis for so withholding the books and documents, and the 1st defendant did not explain why the same were in his custody contrary to Section 630(1) of the *Companies Act* which provides that "accounting records must be kept at its registered office and the records shall at all times be open to inspection by the officers of the company.
36. It is therefore my finding that the defendants illegally withheld the books and records of the Company's business.

Was the 2nd plaintiff's directorship at 'Tankard' a factor in the running of the Company's business?

37. The answer to this is in the negative. The defendants, even though raising this matter did not file any counterclaim against the 2nd plaintiff and as such, his ownership of Tankard and its effect on the Company's business was never an issue in this suit.

Whether the Company was properly enjoined

38. The defendants raised the issue that there was no authority from the Company to have it enjoined as a party in this suit. However, I am in agreement with the plaintiffs that the onus is on the defendants to prove that the plaintiffs had no such authority. As directors of the Company, the 2nd and 3rd plaintiffs state that they had authority from the Company to have it enjoined as a plaintiff. This position was not controverted by evidence.
39. A company's brain is the Board of Directors who make decisions on its behalf. A company may in many ways be likened to a human body; it has hands which hold the tools and act in accordance with the directions from the centre. Some people in the company are mere servants and agents who are nothing more than hands to do the work and cannot be said to represent the mind or will. Others are directors and managers who represent the directing mind and will of the company and control what it does.



Are the plaintiffs entitled to the reliefs sought?

40. From my findings above, it is evident that the plaintiffs have made out a case against the defendants. I am guided by the Court of Appeal decision in *Ajay Shah v Deposit Protection Fund Board* (as liquidator of Trust Bank Limited-In Liquidation) [2016] eKLR that “where the directors of a company committed a fraud which caused the company loss, then the directors were liable.” The defendants’ actions herein caused loss to the Company and the other directors, that is the 2nd and 3rd plaintiffs, and hence they are liable.

Conclusion and Disposition

41. For these reasons, it is my finding that the plaintiffs’ suit against the defendants is merited. Judgment is entered in favour of the plaintiffs in the following terms:

- a. A permanent injunction be and is hereby issued restraining the Defendants from having access to or in any other manner interfering with the staff of, all the records, books of accounts and other records of and the running of, the 1st plaintiff’s business known as Corner Holiday Inn Bar & Restaurant situate in Title Number Dagoretti/Riruta/23.
- b. A mandatory injunction be and is hereby issued compelling the defendants to release to the plaintiffs all records pertaining to the 1st plaintiff business known as Corner Holiday Inn Bar & Restaurant together with all property and or assets of whatever nature belonging to the 1st plaintiff in the defendants’ custody.
- c. The principal amount in the sum of Kshs. 3,500,000.00 each to 2nd and 3rd plaintiffs.
- d. The sum of Kshs. 30,000.00 per month from the year 2004 to date.
- e. Dividends from the year 2004 to date.
- f. Costs of the suit.
- g. Interest on (c), (d) and (e) above at court rates

JUDGMENT DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 20TH DAY OF AUGUST 2024.

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P. MULWA

JUDGE

In the presence of:

Ms. Wangui Koech for Plaintiffs

Mr. Wanjau h/b for Mr. Mbigi for Defendants

Court Assistant: Lilian/Julia

