



REPUBLIC OF KENYA



**Bartenge & 9 others v Tuikong & 11 others (Civil Case 322 of 1998)
[2024] KEHC 10342 (KLR) (15 August 2024) (Judgment)**

Neutral citation: [2024] KEHC 10342 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CIVIL CASE 322 OF 1998
SM MOHOCHI, J
AUGUST 15, 2024**

BETWEEN

**SAMUEL K BARTENGE 1ST PLAINTIFF
KIBER KIBUSIA 2ND PLAINTIFF
CHERUIYOT BUNEI 3RD PLAINTIFF
ELKANA KIBINGOR 4TH PLAINTIFF
KIBUSIA TALLAM 5TH PLAINTIFF
KIPTUM MARINAI 6TH PLAINTIFF
KOMEN TOMNO 7TH PLAINTIFF
LISA ROTICH 8TH PLAINTIFF
KIPKOECH CHESIRE 9TH PLAINTIFF
KIBRGEN RUTO 10TH PLAINTIFF**

AND

**KIPTO BUNDOTICH YAGAN TUIKONG 1ST DEFENDANT
WILLY YAGAN 2ND DEFENDANT
LAWI KIGEN KIPLAGAT 3RD DEFENDANT
KIPKUNTY CHERUIYOT 4TH DEFENDANT
KIPLAGAT KOSKEI 5TH DEFENDANT
KUTO CHEBURET 6TH DEFENDANT
RICHARD KIPCHUMBA TALLAM 7TH DEFENDANT
KIBET CHEBURET 8TH DEFENDANT**



PAUL KIPYATOR KOECH	9 TH DEFENDANT
JOHN KIPYATOR KOECH	10 TH DEFENDANT
SINGA CHEBURET	11 TH DEFENDANT
KIPKOECH KIPTOO	12 TH DEFENDANT

JUDGMENT

1. The Plaintiffs instituted this suit against the Defendants vide Plaint dated 13th August 1998. The Plaintiff claimed that they filed suit on behalf of sixty-three (members who made payments to Ekwem Farm Limited with the intention of purchasing land to be excised from LR. No. 9298.
2. That the Defendants surrendered the title secretly. The Defendants purchased LR 1822 and thereafter without informing the members fraudulently and jointly subdivided the land into 17 portions from LR. 8922/1 up to 8922/17 and transferred to themselves.
3. They Plaintiff are therefore are seeking:
 - i. An Order of declaration that the transfers in favour of the Defendants and or their agents were fraudulent and were designed to defeat the lawful claims of the Plaintiffs and are therefore null and void and for an order that the titles issued pursuant to the transfers be cancelled.
 - ii. That an order that the title in respect of L.R. No 8922 previously surrendered and cancelled be reinstated and that the suit premises be resurveyed and the same be subdivided and distributed among the 73 members and or shareholders in accordance with the official register of members as held by the secretary.
 - iii. Costs of this suit with interests at the usual Court rate
 - iv. Any other relief that this Honourable Court deems fit to grant.
4. The Defendants entered appearance and filed their statement of Defence on 21st September, 1998 denying the allegations of fraud. They filed list of documents on 4th June, 2012. The Defendants claimed the Plaintiffs forfeited their right to membership when they ceased making payments towards repayment of the loan and as result the property was put for auction. The auction was shelved on account of the Defendants continued repayment. That they are the only bonafide members of the company.
5. The 3rd Defendant never entered appearance. the hearing got underway on 24th May, 2006 before Koome J (as she then was) the with the Plaintiff availing six (6) witness and the Defendants availed one (1) witness.

Plaintiff's case

6. PW1, Samuel Kiprono Bartenge (1st Plaintiff) a member and, then chairman of Emkwem Farm together with the other Plaintiff's on behalf of 72 members, filed the suit claiming parcel of land known as Emkwem Farm against the Defendants since the farm was not divided for economic value. He produced certified copy of the deed plan dated 5th December, 1964 and transfer as Pexh-1. The consideration was Kshs 125,000 paid to the Settlement Fund Trust. Registration certificated dated 25th June, 1964 as PExh-2.



7. The Defendants, who were management fraudulently transferred the land to themselves leaving out 62 shareholders. They visited the District Commissioner severally and on 25th November, 1995 the District commissioner visited the farm, chaired a meeting where they compiled a list of shareholders which included the Defendants as well. They elected new directors with him as the chairman. All the Plaintiffs and 3 Defendants were elected as committee members. They resolved that the land be divided in seventy (72) plots and members pay survey fees. Resolution PExh-3(a) and list of members PExh-3(b)
8. They started raising fees for subdivision. 10 members boycotted and 62 members raised the survey fees. PExh-4 Receipt bundle and forwarding letter PExh-5(a), (b) and (c) respectively.
9. They lodged a complaint with the Chief Land Registrar in Nairobi. By that time the land had been transferred to Koibatek District. The 62 members were shut out. He had his receipt where he paid Kshs. 10,000 PExh-6. He complained to the Chief Land Registrar PExh-7 and also filed a case in Eldoret before a panel of elders. The award was filed in Court in Eldoret SRMC Case No 98 of 1986 but the Magistrate held that the panel was nor properly constituted. Proceedings MFI-8
10. The Chief Land Registrar wrote to the District Commissioner instructing that there be no subdivision. The copy of the letter was given to Emkwen Farm District Officer, Uasin Gishu. The lands officer Barigo was instructed not to issue titles or carry out subdivisions until all the interests of the 62 members were addressed. MFI-9. He learned later that the land was surveyed into several plots. His land was supposed to be LR. No. 8922 Timboroa which has been subdivided into 17 plots and they do not know the owners of 8922/17, 16, 12, 8, 10, 15, 1, 2, 3, 4, 5, 6, 7.
11. There were several transfers effected in respect of LR No. 8922/8. Kiplangat Koskey got 42.9 hectares on 7th March 1996 as well as transfers for 8922/10,12,16,17 MFI-11(a), (b), (c), (d),and (e). LR No 61333,61536,61337, and 61338 were in the process of registration MFI-12(a), (b) and (c).
12. PW2, Cheruiyot Bunei. Emkwen (3rd Plaintiff) had two parcels of land that is Emken Equator and Emkwen Kipkarus He bought his share in 1965 and they took possession in 1966 but he did not move into the land. Meetings were held and they agreed to grow pyrethrum wheat and keep dairy cows. They Let Kiplagat Koskei as the manager. They learnt in 1984 that the Defendants had subdivided the land and left them out, Mr Kiptoo Thikay and Willy Yegon were not members. The Defendants whose fathers were members did not invite them to pass resolutions for them to be included as members or for the land to be subdivided among the 10 members. He prayed for the transfers to be cancelled.
13. In cross-examination, he stated that, he did not have his membership certificate though his name was in the members register from 1969 to 1983. He lost his receipts. They had a meeting and resolved for everyone to live outside the farm but had no minutes. Emkwen Farm was their farm. Kifati was one of them. He was a chief before. When they collected money they paid for the case in Kipkarus. He however had no receipts. They bought the land from Settlement Fund Trustees with a loan. They sold cows to settle the loan. He paid Kshs.1000 to the office to settle the loan. He lost his receipts.
14. They filed suit on behalf of 62 members. He knew his lawyer obtained leave to file a representative suit but was not aware if the matter was put in the Gazette. They leant in 1982 that the land had bee subdivided and filed suit in 1998. The period in between, the matter was with the District Commissioner and they also sought solution from the Lands office. He was present in the 1968 in a meeting chaired by Mr. Kibet Tanui where it was apparent the land was being sold by the bank. It was agreed that all members to look for money those who paid would; get a share but did not say that those who did not pay would not get a share. The matter went up to the Land Control Board Eldoret but they objected to the consent.



15. The fathers of Yegon and Kipros Tuikong were the members. The Defendants did not involve them in the subdivision. He did not go to the former president to seek a guarantee for the land not to be sold
16. In re-examination, Emkwen Equator has no dispute there was no agreement for one person to pay the loan. They agreed to use the farm produce to redeem the loan. Willy Yegon, John Tomno and Kiplagat were not members. His membership register got lost but no one ever disputed that he was a member.
17. PW3 Edwin Munoko Wafula Registrar of Titles based in Adhi House Headquarters. Was summoned to bring records of LR. 8922/1 to 8922/17. The transfers were attested by parties and stamp duty paid. There's a Rate Clearance certificate and Letter of Consent given on 16th July, 1979 referring to LR 8922 in Eldama Ravine Emkwen Farm Limited transferring to Kiplagat Koskei and 9 others.
18. The first registration was on 24th December, 1983 to Emkwen Farm limited with the second to Nelly Kipruto Yegon on 2nd July 1995. In the consent it refers to the whole parcel 8922 being transferred to ten(10) persons. in the transfer form, it is from Emkwen Farm to Willy Kiprono Yegon. There is company seal with the signatures of the director and secretary but no names. PEXh13 (a)(b)(c) and (d).
19. The Property was also charged to Agricultural Finance Corporation by Willy Kipruto Kshs. 200,000 23rd June 2006, Kshs 1.2 million on 22nd August 2006 and Kshs 700,000 on 11th June, 2009.
20. LR 8922/2 was in the name of Emkwen Farm Limited 44.98 Ha (PEXh 14 as well as 8922/3 33.46 (PEXh 15), 8922/5 33.54 (PEXh 16, 8922/7 1.825 (PEXh 17, 8922/9 0.1012 Ha (PEXh 19) 8922/14 46.21 Ha with consent of 1979 (PEXh 22, 8922/14 0.6051 Ha (PEXh 23).
21. LR 8922/8 was in the name of Kiplagat Koskei 42.91Ha with only copy of title and transfer form. Transfer form no stamp or seal of company but signed by the director secretary. PEXh 18 (a) and (b).
22. 8922/10 in the name of Kuto Cheburet 20.95 Ha transferred on 7th March 1996. No consent signed by company directors or transferee and no seal/stamp. PEXh 20 (a) and (b).
23. 8922/12 in the name of Kipkutuny Cheruiyot 37.59 Ha transferred on 14th March, 1996. No company seal only faint words saying company seal, no stamp signed by directors but no names. Consent is dated 16th July, 1979 transfer to Kiplagat Koskei and 9 Others. The consent is transferring the whole parcel. PEXh 21 (a) (b) and (c).
24. 8922/15 in the name of Paul Kipyator Koech 43.48Ha. Consent of 1879 to Kiplagat Koskei and 9 Others. Transfer form is signed by directors, no names, no seal/stamp, no transferee PEXh 24 (a)(b) and (c).
25. 8922/16 in the name of Lawi Kigen Kiplagat 12.44 Ha. Same copy of consent. Transfer form is signed by directors, no names, no transferee same pattern as others PEXh 25 (a)(b) and (c).
26. 8922/17 in the name of Lawi Kigen Kiplagat 18.45 Ha. Transferred on 7th July, 1995 Same copy of consent. Transfer form in same pattern PEXh 26 (a)(b) and (c).
27. In cross-examination he stated that the land belonged to Emkwen originally but had no records. He had no records of discharge from SFT. The application from Land Control Board related to Agricultural Land on freehold titles but that was a lease before sub-division. The Company before subdivision followed the Land Control Board under Cap 302. The consent in PEXh26 is for subdivision and transfer. The allotment of shares form is from the company to Kiplagat Koskei and nine (9) others. He had no map and had only seen the deed plans and titles.
28. Their job was only to convert titles the director of survey did the survey and subdivision. He assumed proper procedure was followed. They did not keep a list of members. There were no mutations. When



issuing titles there must have been a register and deed plans, he did not see one. A transfer for a company must be sealed and the impression ought to be seen in the copies the originals had to have seals. The titles are from their office. On their part there was no fraud.

29. In re-exam he stated that there must be specific consent to subdivide and consent to transfer.
30. PW4, Kibet Arap Kipusa (2nd Plaintiff) adopted his statement and stated that he was member Emkwen Farm, and member No. 3 in the shamba which was over 1000 acres. The shamba had not been subdivided. They had a debt. They never had a meeting to subdivide. They heard there had been a meeting in Eldoret. They went to Court in Eldoret and produced their receipts all 72 of them and were allowed enter the land by Court. They learnt there was a decision to put Koskei in charge. They never shared out the Shamba. He wanted to share the shamba with the people that gave it to themselves. Their titles are not recognized. Lawi Kiplangat has no shares and is not a member. They paid the loan. Koskei shared out the cows that were in the shamba.
31. In cross examination, he stated the company did not share out the land. The Defendants were sued for obtaining titles without calling a meeting. The leaders were the problem and not the company. Some of the Plaintiffs are since deceased and Some of the Defendants too are deceased.
32. PW5 Elikanah Kibingor adopted his statement filed on 10th March, 2020 and stated that he was a member and bought shares in the farm. They left some members to till the land to repay the loan and some members tried to spoil. They have not shared out the land and they want it shared out. The purchase was equal they want to share it equally. Members paid according to capacity, they would meet and add on. The record showed how much each member paid. The secretaries died and was not sure how much he paid in total. There was fraud and some ‘wajuaji’ who changed the documentation. Lawi Kiplagat who was an MP was not a member and should be removed from the shamba.
33. PW6, Kibet Kipkoech Murgor son to Kipkoech Murgor who was a shareholder adopted his statement signed on 10th March, 2020. Initially the farm was under the management of the directors appointed by the members led by Kiplagat Koskei. There was a loan and members agreed to pay. They found out in 1982 that directors had shared out the land knocking out 62 members. There were no minutes allowing the subdivision. The shares were different for each member.
34. 1st Defendant became a member because his father Kipyegon Rerimoi was a member, Willy Yegon was the son of Rerimot. The 6th, 7th, 8, and 10th Defendants were not members the other Defendants were members. Lawi Kiplagat too was not a member and only the directors knew he was member to the exclusion of the 62 other members. Directors were not allowed to recruit members.
35. The 10 people subdivided the land without a meeting. A meeting was held at the chief’s office in 1982 where it was decided that 72 members were shareholders. The 10 disputed. They moved to the High Court where they were directed to the district commissioner who did nothing. They later found out in 1988 that the directors had organized surveys and transfers. There was loan with STF, AFC and directors were to manage the land, use the proceeds to pay the loan. The directors paid the loan but the subdivision was fraudulent.
36. In cross-examination stated that he did not have anything to show that the directors subdivided the land. It was the directors who did everything and not the company. he was present when the registrar was present in Court. he did not know he wasn’t supposed to be in Court.

Defence case

37. DW1 Richard Kipchumba Talam, (7th Defendant). He adopted his witness statement dated 8th February, 2020. He stated that he became member of Emkwen Farm Limited in 1966. He has a title



- deed as a shareholder. They completed the debt of the Settlement Fund Trust and were told by the company to go to the lands office to get titles. The Company brought surveyors, they balloted for their parcels and there was no fraud. He did not give himself title. It was the Ministry of Lands.
38. In cross-examination, he got to Emkwen when he was 31 years by himself and not through his father and he only found eleven (11) members and does not know of the 72. He was not a director the loan was for Kshs. 1 million and the members shared out the loan and paid it. The order of payment is with the settlement. The land was forested and when they got their titles there was no wheat.
 39. There were two parcels both measuring 900 acres. He was not involved in Kipkabus as the members were different. The loan was paid by 10 of them. They were issued receipts. He forgot his receipt at home. They allowed Lawi to be a member upon assisting in the loan repayment. Those that took the loan took off and they had to repay. The others did not pay for the loan so they got the land. They never attended meetings. They did not attend the chief's meetings. There were documents to prove.
 40. They took the minutes and resolution to Settlement and they approved their distribution. Settlement told them to pay. The 10 of them met up and passed a resolution. There were no directors. Just the chairman Koskei. Did not know that Bartenge was chairman. Did not attend the case in Eldoret. He did not know the directors. They disappeared. He was not present in the meeting of 22nd September, 1989. The documents completing the loan were sealed with company seal.
 41. He was allotted 80 acres where he currently occupies. There was no receipt it was based on the trust for 'wazee'. The land belonged to Settlement, they advertised in newspapers and sold to 'Wananchi'. Lawi Kiplagat got 35 acres. Did not have mutation. He never got the consent. The chairman took it to Nairobi. He went for the consent meeting in Eldoret and assisted in taking minutes. He would record and leave them there. The records are with the chairman. There was no seal in consent. Signature is his and Koskei. Transfer is in the name of only Koskei.
 42. In re-examination he stated that the Plaintiffs are suing in their own names and not as representatives. He has been sued individually and not as secretary. It is the company that should address the grievances of allocations. Has not been accused of fraud. They were only sued because they were issued with titles by the government. Ministry of land has not been sued.

Plaintiff's Submissions

43. The Plaintiffs filed written submissions on 6th June, 2024 and submitted on four(4) issues. Firstly, on whether the suit property was fraudulent, it was submitted that 3 of the Defendants were not members. The property was divided into 17 portions and there were more than 62 members. Counsel relied on the principle of *nemo dat non quod habet*.
44. Secondly it was submitted that the Plaintiffs discharged the burden of proof to prove that the Defendants were fraudulent in accordance with Section 107-109 of the *Evidence Act* through witness testimony. Reliance was placed in Elizabeth Ndolo vs George Matata Ndolo 1966 eKLR where the Court pronounced that the burden of proof lay on the Plaintiffs in proving fraud allegations. Counsel submitted that the signatures were forged, the processing and obtaining of the titles deeds was also marred with fraud, the Defendants never consulted.
45. Thirdly that the Plaintiffs are entitled to the suit property. The farm was co-owned by 72 members the land was not subdivided into individually owned. Reliance was placed in Stanley Maira Kaguongo vs Isaak Kibiru Kahuthis [2002] eKLR to submit that the evidence of the Plaintiff's is irrefutable and that their evidence proved that they were members. Lastly costs be borne by the Defendants.



Analysis and Determination

46. This Civil suit is as troubling as it comes, the substratum of this matter is ownership of land LR 1822 Timboroa previously acquired and registered in the name of Ekwem Farm Limited sub-divided into seventeen (17) parcels and transferred to the defendants.
47. That the alleged fraudulent subdivision and transfers took place on the 2nd July 1995 to Nelly Kipruto Yegon (as a whole) and subsequent subdivisions and transfers to the various defendants.
48. This case has been moved between the environment and land court and this court eventually resting before me for determination. The Property in dispute was owned by a company registered under the companies Act and any alleged fraud affecting the company is strictly subject to the companies Act and a derivative action ought to have been sought.
49. For starters, a fundamental principle of corporate law is that, one who becomes a shareholder in a company generally undertakes to be bound by the lawful decisions of the majority shareholders on the affairs of the company. The principle of majority rule must, however, be balanced against the need for the protection of minority shareholders. Effective protection of minority shareholders is widely recognized as a cornerstone of a sophisticated corporate law system. Pivotal to the minority shareholder's armoury is the statutory derivative action provided in the Companies Act.
50. In the legislative intent, the court is entrusted with a key function of serving as the gatekeeper to derivative actions. It plays a vital screening role in the exercise of its discretion to grant or refuse permission to a minority shareholder (or other suitable stakeholder) to pursue derivative litigation on behalf of the company, when those in control of it improperly fail or refuse to do so. The discretion of the court is a filtering mechanism designed to screen out claims that are frivolous, vexatious or meritless.
51. It must be borne in mind that a derivative action is brought by an applicant (such as a minority shareholder,) on behalf of a company, in order to protect the legal interests of the company. The derivative action is so-called because, the shareholder 'derives' his right of action from that of the company, to redress a wrong done to the company. In other words, the shareholder is seeking to protect not his own rights but the company's rights. This is distinct from the situation where shareholders wish to enforce their own personal shareholder rights, in which case they would have personal redress and would thus rely on a personal action rather than a derivative action. Confronted with a situation in which the same wrongful act was both a wrong to the company and a wrong to each individual shareholder the Ontario Court of Appeal stated in *Goldex Mines Ltd. v. Revill* In one sense every injury to a company is indirectly an injury to its shareholders. On the other hand, if one applies the test:

“Is this wrongful act one in respect of which the company could sue?”, a shareholder who is personally and directly injured must surely be entitled to say, as a matter of logic, “the company cannot sue for my injury; it can only sue for its own.”
52. The corollary must surely be that when both the company and the shareholder have the same standing to sue for the same relief on the basis of the same facts, the company must be entitled to say the shareholder has no need in the interests of justice to litigate in the corporation's name when he can do so in his own. In *Goldex Mines* the court answered the question ‘Where the same acts of directors or of shareholders cause damage to the company and also to shareholders or a class of them, is a shareholder's cause of action for the wrong done to him derivative?’ in the negative.

It is trite that, where a wrong is done to the company, the ‘proper plaintiff’ to take legal action in respect of the wrong is the company itself, and not individual shareholders. As



stated by Lord Davey in *Burland v Earle* ‘in order to redress a wrong done to the company ... the action should prima facie be brought by the company itself.’ The proper plaintiff rule stems from ‘the elementary principle that A cannot, as a general rule, bring an action against B to recover damages or secure other relief on behalf of C for an injury done by B to C.’ The basis of the rule is the cardinal tenet of company law that a company is a separate legal entity, distinct from its shareholders.

The question before the court was, whether a shareholder who held 50% of the shares in a company can be granted leave to institute a derivative action as one of the exceptions to the rule in *Foss Vs Harbottle*? The court held that, the need to establish a majority or minority before being granted leave to institute a derivative action may lead to injustice. According to the court, the paramount function of the court is, to ensure that justice is done. Consequently, the court stated that it would allow leave for the applicant to institute the derivative claim since despite owning 50% of the shares of the company, the applicant had demonstrated that the company had been injured by the acts of one of its shareholders.

53. Applying all the tests discussed above to the facts and circumstances of this case, it is my view that the facts and circumstances presented in this case do not meet the threshold to establish any of the tests discussed above to trigger the discretion of this court in allowing the leave or redress.
54. Firstly, I am not persuaded that, the Plaintiffs have demonstrated any loss suffered or likely to be suffered by the company. The Suit does not impute any loss suffered or likely to be suffered by Ekwem Farm Limited. A prima facie case cannot be founded for the purposes of the suit before me on such a provision.
55. The Plaintiffs are as they allege the Majority shareholder in Ekwem Farm Limited and have not demonstrated that, the company had been injured by the acts of one of its shareholders.
56. The Plaintiffs have equally failed to demonstrate that this suit is in the best interests of the company and, there is no notice calling upon the defendants to remedy the situation hence the alleged failure to remedy the situation (if at all there was a wrong) has not been demonstrated and, there is nothing before me to show that the company has suffered any loss. More so, the plaintiffs did not demonstrate that the company has been injured by the acts of the other directors or shareholders.
57. The Plaintiffs have equally not showcased any invocation of the Ekwem Farm Limited memorandum and Articles of Association to resolve the identified dispute. This court is unable to find locus standi by the Plaintiffs to bring this instant suit.
58. Having failed to incorporate Ekwem Farm Limited in these proceedings or in fact seek the leave of the court to initiate this action. Flowing from my analysis of the law, authorities and the applicable tests in suits of this nature, the conclusion becomes inevitable that the Plaintiff’s Suit does not pass the above tests. Accordingly.
59. The effect of the above finding is that the Plaintiffs’ Plaint dated 13th August 1998 which was filed without leave cannot stand. Accordingly, the Plaintiffs’ Plaint dated 13th August 1998 is dismissed for want of merit. With costs awarded to the Defence.

It is So Ordered.

SIGNED, DATED AND DELIVERED AT NAKURU ON THIS 15TH DAY OF AUGUST 2024

Mohochi S. M.

Judge

