



REPUBLIC OF KENYA



**Gitonga & 2 others v Redken Wells Ltd & 11 others (Civil Case E129 of 2021)  
[2022] KEHC 23 (KLR) (Commercial and Tax) (14 January 2022) (Ruling)**

Neutral citation: [2022] KEHC 23 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
CIVIL CASE E129 OF 2021  
A MABEYA, J  
JANUARY 14, 2022**

**BETWEEN**

**GABRIEL KARIUKI GITONGA ..... 1<sup>ST</sup> APPLICANT  
EUNICE WAMBUI NDIRITU ..... 2<sup>ND</sup> APPLICANT  
PURITY WANGECHI MURINGI ..... 3<sup>RD</sup> APPLICANT**

**AND**

**REDKEN WELLS LTD ..... 1<sup>ST</sup> RESPONDENT  
PETER MACHARIA MWANGI ..... 2<sup>ND</sup> RESPONDENT  
SIMON MURIITHI NJAGI ..... 3<sup>RD</sup> RESPONDENT  
MOSES WANJOHI KAIRONGE ..... 4<sup>TH</sup> RESPONDENT  
TRACY EMILY NDUATA NDUNG’U ..... 5<sup>TH</sup> RESPONDENT  
MARY WANJIKU MBUGUA ..... 6<sup>TH</sup> RESPONDENT  
TIMOTHY KANYONJI KARIUKI ..... 7<sup>TH</sup> RESPONDENT  
EVALYNE WANJIKU KARIUKI ..... 8<sup>TH</sup> RESPONDENT  
BERNICE GATAKAA BOORE ..... 9<sup>TH</sup> RESPONDENT  
SIMON KANUHI NDUNGU ..... 10<sup>TH</sup> RESPONDENT  
FREDRICK KIARIE NJONJO ..... 11<sup>TH</sup> RESPONDENT  
SUSAN WANJIRU KANYONJI ..... 12<sup>TH</sup> RESPONDENT**



## RULING

1. Before Court are two applications dated 11/3/2021 and 16/4/2021, respectively and a preliminary objection dated 22/4/2021.
2. The first application dated 11/3/2021 was by the plaintiffs and was brought Order 40 Rules 1, 2 and 4 of the *Civil Procedure Rules* and Section 3A of the *Civil Procedure Act*. It sought orders inter-alia, that the applicants be granted leave to institute a derivative suit on behalf of the 1<sup>st</sup> defendant (“the Company”).
3. There were also prayers for restraining various actions including passing of a resolution for the construction of a water reservoir in the Company’s parcel known as Mitumbiri Wempa Block 1/6824 Kenol Kabati, disposal of Company assets or withdrawal of funds from the Company’s bank account No 0115xxxx held at Co-operative Bank, and an order for rendering of accounts by the respondents. There was also a prayer to restrain the demand for monthly contribution of Kshs. 10,000/- from members of the Company.
4. That application was supported by the affidavit of Gabriel Gitonga sworn on 11/3/2021. The applicants’ case was that the Company was incorporated with the primary objective of inter alia, investing in real estate. That in 2020, the applicant’s learnt of a huge withdrawal of the Company’s funds without the shareholders’ knowledge or approval. That the funds were used for construction of an illegal/unauthorized water reservoir on the Company’s land.
5. That the construction was done without the necessary permits, licenses or approvals from NEMA and WARMA hence posing a danger to the Company, its shareholders and the public. That the respondent’s declined to share any information regarding the construction with the applicants and intended to remove the applicants as directors vide a Special General Meeting that was to be held on 20/3/2021. That more money was withdrawn by authorized signatories from the Company’s Britam Investment account to fund the construction.
6. That the assets and finances of the Company were on the verge of being wasted or misappropriated by the majority shareholders. That the Company’s major financial resource was the members’ monthly contribution of Kshs. 10,000/= which was at a risk of being wasted.
7. The respondents opposed the application vide the replying affidavit of Peter Macharia Mwangi sworn on 10/5/2021. They contended that the application did not disclose a case for granting the leave sought. That the respondents had always acted within their powers and with the Company’s authorization, or future ratification by the company.
8. That the withdrawals complained of were authorized through a resolution in the meeting of 21/7/2019, where the company resolved to invest in farming requiring an initial sum of Kshs. 1,000,000/=. That the construction of the water reservoir was a result of the farming project. That in a meeting of 11/1/2020 wherein the applicants were in attendance, it was agreed that three water tanks and a water tower were required. That 2 plastic tanks had been bought and a ground level water tank constructed to harvest the water. It was also contended that there was no reservoir in the farms as alleged.
9. That the withdrawal did not require approval of all the directors as the amount was less than Kshs. 1,000,000/= as had been resolved in the meeting of 4/5/2019.



10. The issues raised by the applicants were addressed in a meeting of 7/11/2020 and voted on. That the application did not meet the grounds for orders for temporary injunction, and such prayer was inconsistent with the best interest of the Company. That the Company required funds from the bank account to run its day-to-day affairs.
11. That the respondent needed funds for legal fees, settlement of professional services such as preparation of financial reports, payment of caretakers salary and payment for casual laborers.
12. In rebuttal, the applicants filed a supplementary affidavit sworn by Gabriel Gitonga on 5/7/2021. They stated that the farming project that was approved in the meeting of 21/7/2019 was for maize farming and a withdrawal of Kshs. 1,000,000/= was approved. That the project ended in 2020, a proposal for onion farming was rejected. That withdrawal of funds in excess of Kshs. 1,000,000/= must be authorized by 75% of all directors in a meeting. That the respondents make withdrawals of less than Kshs. 1,000,000/= without the vetting of the liaison committee and fail to communicate such withdrawals and expenses to all members as required.

The application dated 16/4/2021

13. The application dated 16/4/2021 was brought under order 40 Rule 3, 4, 8 of the Civil Procedure Rules and *Civil Procedure Act*. It sought orders that the named persons be cited for contempt of court for disobedience of the order made on 19/3/2021 by holding the special general meeting on 20/3/2021. That meeting resolved to remove the applicants as directors of the Company. It sought that the contemnors be committed to civil jail and be barred from participating in these proceedings until they purge the contempt.
14. The application was supported by the affidavit of Gabriel Gitonga sworn on 16/4/2021. It was alleged that on 19/3/2021, the Court made orders restraining the directors of the Company from holding the Special General Meeting scheduled for 20/3/2021 or from discussing the agenda or passing a resolution removing the applicants from directorship of the Company pending the hearing of the application dated 11/3/2021.
15. The order was served via email yet the contemnors save for the 4<sup>th</sup>, 5<sup>th</sup> and 11<sup>th</sup> respondents proceeded with the meeting and unanimously passed a resolution to remove the applicants from directorship. That the 2<sup>nd</sup> to 12<sup>th</sup> respondent were served through their personal emails but disobeyed the orders.
16. The respondents filed a notice of preliminary objection dated 22/4/2021 seeking an order that the suit be struck out on the grounds that the applicants lacked capacity to present the said application.
17. I have considered the pleadings, evidence and submissions of parties on record.
18. Ordinarily, I would have started with the application for contempt, but for what I would say hereunder, I will start with the application dated 11/3/2021. The issues that arise for determination on that application are: -
  - a) Whether leave should be granted to the applicants to continue a derivative action on behalf of the Company against the respondents;
  - b) Whether an interim order of injunction should issue restraining the respondents as sought in the application;
  - c) Whether accounts should be rendered as prayed for.
19. I should point out here that the jurisdiction of this Court under the *Companies Act* was not invoked. The provision under which the applicants sought leave was not cited. Be that as it may, that does



not defeat the application. The Court will consider the same and ascertain whether with the material presented, a claim under the relevant provision of the law has been established.

20. A derivative claim is defined under section 238 of the *Companies Act*, 2015 as proceedings by a member of a company in respect of a cause of action vested in the company and seeking relief on behalf of the company. Under that provision, a derivative claim may only be brought in respect of a cause of action arising from an actual or proposed act or omission involving negligence, default, breach of duty or breach of trust by a director of a company.
21. A derivative action is therefore an exception to the rule established under *Foss v Harbottle (1843) 2 Hare 462* that a corporation should sue in its own name and in its corporate character or in the name of the person appointed by the law to be its representative.
22. In *Gbelani Metals Limited & 3 others v Elesh Gbelani Natwarlal & another [2017] Eklr*, the court held that there is a two-stage process envisaged by the Act. In the first stage, the court must first satisfy itself that there is a prima facie case on any of the causes of action noted under sections 238(3) and 239(2) of the Act. However, the application for permission will be dismissed if the evidence adduced in support “do not disclose a case” for giving of permission. The importance of judicial approval under the Act, hence, is to screen out frivolous claims. The court will only allow meritorious claims. In this regard, all an applicant needs to establish, through evidence, is that he has a prima facie case without the need to show that it will succeed.
23. In the present case, the applicants are shareholders of the Company. They claimed that the respondents had acted in ways which was detrimental to the Company. The plaint contains averments that the respondents made unauthorized withdrawals from the Company’s bank account of Kshs. 1,000,000/=, and declined to give any information about the withdrawals. That the respondents applied the funds towards unauthorized activity.
24. It was also claimed that the unauthorized project was had no necessary permits from NEMA and WARMA thereby posing a threat to the company, its shareholders and the public. It was further claimed that the respondents were misappropriating Company funds. That there was lack of transparency and accountability with regards to control and management of Company funds and other affairs of the company.
25. If at all the Company’s funds had been embezzled as alleged, it would be in the best interest of the Company to investigate that claim. The claims of lack of transparency and attempt to remove the applicants as shareholders in bad faith also need to be looked into. The respondents did not give satisfactory rebuttals against the allegations.
26. Whilst the foregoing allegations may have met the test for grant of the permission, what has worried the Court is prayer numbers 8 and 9 of the plaint. Definitely those prayers are not for the benefit of the Company. If the ultimate intention of the applicants is to dissolve the Company and share it’s assets, then that cannot be said to be in the best interest of the Company.
27. Be that as it may, since the allegations made against the respondents are wrongs committed against the Company and the applicants have shown that they are acting in good faith, the offending payers aforesaid may be amended once permission is granted. The other prayers are for the benefit of the Company.
28. For the foregoing reasons, I am satisfied that the applicants have met the conditions required for grant of leave to continue a derivative action against the respondents. I am convinced that the applicants are acting in good faith with the aim of protecting the Company affairs.



29. As regards the various prayers for injunction, the principles applicable were well known as settled in the case of *Giella vs Cassman Brown & Company Limited (1973) E A 358*. That the applicant must establish a prima facie case with a probability of success, the court held that an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages and finally, if the Court is in doubt, it will decide the application on the balance of convenience.
30. In *Nguruman Limited v Shompole Group Ranch & Another [2014] Eklr*, the Court of Appeal observed: -
- “We reiterate that in considering whether or not a prima facie case has been established, the court does not hold a mini trial and must not examine the merits of the case closely. All that the court is to see is that on the face of it the person applying for an injunction has a right which has been or is threatened with violation. Positions of the parties are not to be proved in such a manner as to give a final decision in discharging a prima facie case. The orders granted were final in nature as they effectively determined the main suit without the benefit of a trial”.
31. I have already found that the applicants have established a prima facie case in considering the issue of permission. Having considered the evidence and the arguments advanced by the parties, I find that the issue of the misappropriation of funds and lack of transparency and accountability can only be determined and resolved after a full hearing of the suit.
32. Are the applicants likely to suffer irreparable injury that cannot be compensated by damages if the orders sought are not granted? The applicants state that the respondents are bent on misappropriating Company funds and utilizing the same in an unauthorized manner. The applicants are also weary that the members monthly contribution of Kshs. 10,000/= will be misappropriated should the respondents continue to receive the collections. There is also fear that the lack of transparency and accountability will run the company down, and the threat of dire consequences on the Company for embarking on projects without approvals by the relevant statutory bodies.
33. The Court takes the opinion that; if the Company funds are misappropriated as alleged, the Company is penalized for engaging in unapproved projects, the applicant’s investment in the Company and the expected returns may be in jeopardy. They may never recover the same which cannot be at the moment be quantified. The applicants and the Company would suffer irreparable injury that cannot be compensated by an award of damages.
34. On the contrary, any loss of business occasioned to the respondents should an injunction issue is quantifiable and capable of being adequately compensated by damages should the defendants be successful at trial.
35. As to the third limb, the balance of convenience tilts in favour of granting a temporary injunction albeit to give room for the taking of accounts.
36. On the taking of accounts, there are serious allegations of withdrawal of monies from the Company’s account at Cooperative Bank. Secondly, the respondents did not deny such withdrawals and contended that the withdrawals were necessary for a farming project. However, the said maize farming project had already been approved and completed, and from the Company’s minutes produced, no other farm project was approved.



37. In any case, the respondents themselves admitted that the Company had already approved 2 water tanks which had been completed, hence they did not explain the relevance or establish authorization for the subsequent project.
38. The respondents also claimed that they needed to be withdrawing money from the account to meet the Company's day-to-day expenses, but when challenged by the applicants to proof those expenses, they failed to do so but for the caretaker's salary.
39. Order 20 Rule 1 of the *Civil Procedure Rules* provides for orders for taking accounts thus: -
- “Where a plaintiff prays for an account, or where the relief sought or the plaintiff involves the taking of an account, if the defendant either fails to appear or does not after appearance by affidavit or otherwise satisfy the court that there is some preliminary question to be tried, an order for the proper accounts with all necessary inquiries and directions usual in similar cases shall forthwith be made”.
40. It is this Court's opinion that the taking of accounts of the company's account is necessary to illuminate the true position. I believe that audited accounts will aid in the cause of justice and save precious judicial time. Such accounts would enable this Court determine with accuracy, the loss, if any, occasioned to the Company.

The application dated 16/4/2021 and preliminary objection dated 22/4/2021

41. The application dated 16/4/2021 sought orders against the respondents, save for the 4<sup>th</sup> and 5<sup>th</sup> respondents, for committal to civil jail on grounds of being in contempt of court orders made on 19/3/2021. That the named persons proceeded to hold the special general meeting on 20/3/2021 which resolved to remove the applicants as directors of the company. It was alleged that the respondents were served electronically through their respective email addresses.
42. The respondents responded vide the notice of preliminary objection dated 22/4/2021 which the Court directed that it be treated as the grounds of objection. It was based on the grounds that the applicants lack the capacity to present the application. Vide the respondents application dated 31<sup>st</sup> March 2021, the respondents claimed that they had not been served with the order by the time they held the meeting, hence were not in contempt.
43. In contempt proceedings, knowledge of the order complained of must be established by the party alleging the contempt. An Applicant must therefore show that the alleged contemnor has knowledge of the court order alleged to have been disobeyed.
44. In *Embalands Investments Ltd v David Oloo Miruka & 4 Other (2017) Eklr*, Okong'o J held: -
- “The law on contempt of court is now well settled. An applicant seeking the punishment of a person for disobeying a court order must establish that the alleged contemnor knew of the court order alleged to have been disobeyed which knowledge may be gained through service of the order or derived from other sources. The onus was upon the applicants herein to demonstrate that; this court issued an order, the order restrained the alleged contemnors from doing the acts complained of, the alleged contemnors knew of the order and that they disobeyed the same. Contempt of court proceedings are quasi criminal in nature because the contemnor may lose his liberty if found guilty of the contempt complained of. In view of this, the standard of proof of contempt is higher than proof on a balance of probabilities. See, the holding in the court of appeal case of, *Mutitika -vs- Baharini Farm Ltd. (1985)*



KLR 227, where the court stated that the standard of proof in contempt proceedings must be higher than proof on a balance of probabilities, and almost but not exactly, beyond reasonable doubt. It follows therefore that for the applicants to succeed in the present application, they have to satisfy the court to a degree beyond a balance of probability that the alleged contemnors disobeyed the order of the court made herein on 28<sup>th</sup> August 2014”.

45. The Court notes that the emails were sent after workings hours. The timings range between 5:23pm and 8:00pm. It is not clear that the recipients read those emails at that time. There is no sufficient proof of knowledge to justify this court to deprive the alleged contemnors of their liberty.
46. However, that cannot permit the upholding the actions taken pursuant to the restrained meeting. The Court cannot permit resolutions passed in a meeting which it has properly restrained to stand. In this regard, this Court in exercise of its inherent jurisdiction hereby quashes and sets aside the resolutions made in the Special General Meeting of 20/3/2021. This is on the basis that a party cannot be allowed to retain a benefit or a position of advantage he has obtained by wrongful conduct. The preliminary objection cannot stand in view of my holding on the application for permission.
47. Accordingly, I make the following orders.
  - a) The preliminary objection dated 22/4/2021 is dismissed with costs to the applicants.
  - b) The application dated 22/4/2021 is dismissed but all the resolutions made in the impugned Special General Meeting of the Company of 20/3/2021 are hereby quashed and set aside. The Company Secretary of the Company is directed to rectify any Returns made to the Companies Registry pursuant thereto within 7 days of this order.
  - c) The application dated 11/3/2021 is allowed as prayed with costs to the applicants.
  - d) The company’s secretary shall within 14 days of this order notify the Members of the Company to channel their monthly contributions directly to account No 0115xxxx held at Co-operative Bank. The company secretary to receive and keep all receipts and/or transactional messages as evidence of members’ contributions.

It is so ordered.

**DATED AND DELIVERED VIRTUALLY THIS 14<sup>TH</sup> DAY OF JANUARY, 2022.**

**A. MABEYA, FCI Arb**

**JUDGE**

