



**Mshimba v Ackel & 3 others (Civil Case 299 of 2017)
[2022] KEHC 10071 (KLR) (Commercial and Tax) (22 July 2022) (Judgment)**

Neutral citation: [2022] KEHC 10071 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE 299 OF 2017**

EC MWITA, J

JULY 22, 2022

BETWEEN

ISABELLA WAKESHO MSHIMBA PLAINTIFF

AND

ELVIS DAVIS ACKEL 1ST DEFENDANT

LINDA ADHIAMBO ACKEL 2ND DEFENDANT

JOHNSON OMWANDO JUMA 3RD DEFENDANT

CITADEL INSURANCE AGENCY LIMITED 4TH DEFENDANT

JUDGMENT

1. The plaintiff, Isabella Wakesho Mshimba (Mshimba), was one of the promoters of Citadel Insurance Agency Limited, (Citadel), the 4th defendant, a limited liability company incorporated on 7th June 2001 under the *Companies Act*, Cap 486. The nominal share capital of Citadel was Kshs. 20,000 divided into 100 shares of Kshs. 200 each. Mshimba, was the majority shareholder with 50 shares while the 1st defendant, Elvis Davis Ackel (Ackel) had 30 shares.
2. In 2009, Mshimba relocated to Germany and resigned as a director through letter dated 12th December 2009. According to Mshimba, she offered to sell her shares to Ackel for Kshs. 5,000,000 but Ackel declined the offer.
3. Mshimba pleaded that on 22nd March 2011, a general meeting of Citadel was convened by Ackel, Adhiambo and Juma attended by the company secretary, Odongo M. Okeyo (Okeyo), without her knowledge and a resolution was passed to the effect that she had resigned as a director and shareholder of the Citadel and transferred all her shares to Adhiambo and Johnson juma after a consideration,



who became new directors and shareholders of Citadel. Adhiambo was also appointed a signatory to Citadel's documents.

4. Mshimba further pleaded that she did not consent to transfer her shares to Adhiambo and Juma and the transfer of share forms used to transfer the shares were forged. Mshimba asserted that Okeyo had never been retained as the company secretary; that Okeyo did not attend the meeting and David Kerario Marwa, Advocate had denied witnessing the transfer of shares forms.
5. Mshimba stated that on or about 13th October 2011, she reported the matter at Central Police Station and recorded a statement but no action was taken. Mshimba further stated that the Ackel, Odhiambo and Juma had refused to reinstate her as the majority shareholder in Citadel despite demands to that effect.
6. Mshimba's claim is that she had been deprived of her majority shareholding in Citadel whose value had since greatly multiplied as a result of Citadel's thriving business and goodwill.
7. Mshimba filed a plaint dated 18th July 2017 and sought judgment against the defendants for General damages; Punitive damages; Restitution of the company records, audit of the company accounts from 2001 up to date and costs of the suit.

Defence

8. The defendants entered appearance on 30th October 2017 and filed a joint statement of defence dated 3rd November 2017. They denied Mshimba's claims and put her to strict proof. The defendants averred that Mshimba's suit had been brought in contravention of the *Companies Act*, the rules and regulations made thereunder. The defendants asserted that Mshimba's claim for restitution of company records and audit of the company accounts could not be granted and that the suit was time barred. The defendants prayed that the suit be dismissed with costs.

Evidence

9. When the matter came up for hearing, Mshimba testified, adopting the witness statement dated 18th July 2017 filed together with the plaint and produced the documents as exhibits. In the witness statement, Mshimba stated reiterated what was pleaded in the plaint. The main highlights were that she relocated to Germany and had to resign as a director of Citadel in 2009. She offered to sell her shares to Ackel at Kshs. 5,000,000 which was declined. In a meeting of Citadel held on 22nd March 2011, the defendants conspired to defraud her of her shares at no consideration.
10. In cross-examination, Mshimba stated that a valuation of Citadel was done in 2011 and demand letters were sent by her advocates. However, a perusal of the exhibits produced reveals that there was no valuation report of the assets of Citadel.
11. The defendants filed no witness statements and called no witnesses.

Mshimba's submissions

12. Mshimba filed written submissions dated 22nd March 2022, submitting that she had proved that Ackel, Adhiambo and Juma had committed fraud. Mshimba relied on the Court of Appeal decision in *Athi Highway Developers Limited v West End Butchery Limited & 6 others [2015] eKLR*. For the proposition that
13. Mshimba argued that her evidence had not been rebutted; that she did not know the firm of advocates that witnessed the transfer of share forms and that a firm of advocates cannot be a witness to document.



Mshimba further argued that she had not received the purported consideration of Kshs. 8,000 and Kshs. 2,000 indicated in the transfer of share forms and the KRA stamp duty declaration forms.

14. Mshimba admitted that the actions complained of occurred in March 2011, thus she was not pursuing prayers (c) and (d) of the plaint. These related to restitution of Citadel's records and audit of Citadel's accounts from 2001 up to date. Mshimba urged the court to allow the suit against the defendants jointly and/or severally for general and punitive damages together with costs of the suit and interest.

Defendants' submissions

15. The defendants filed written submissions dated 28th March 2022. They argued that Mshimba had not proved fraud against them. According to the defendants, although the standard of proof for allegations of fraud is not as heavy as beyond reasonable doubt, it is more than a mere balance of probabilities. They relied on *R. G. Patel v Lalji Makani* [1957] EA; *Gladys Wairimu Ngacha v Teresa Chepsaat & 4 others* [2013] eKLR and *Vivo Energy (K) Ltd v Maloba Petrol Station & 3 others* [2015] eKLR.
16. The defendants contended that Mshimba failed to prove her case to the required standard. It was their case that Mshimba merely alleged that her signature had been forged without proof from an expert's evidence. The defendants cited the decision in *Zakayo Michubu Kibuange v Lydia Kaguna Japheth & 2 others* [2014] eKLR for the proposition that an allegation of forgery of a signature is a serious issue that ought to be proved by the plaintiff through assistance of document examiners but not to invite the defendant to prove that the signature was not a forgery.
17. With regard to the allegations of fraudulent transfer of shares, the defendants faulted the plaintiff for failure to furnish the firm of Kerario Marwa & Co. Advocates with copies of the alleged transfer forms as requested. The defendants pointed out that although Odongo Okeyo & Co. Advocates denied knowledge of the parties to the suit, the Firm also requested for copies of the transfer documents but Mshimba did not furnish any evidence that the documents requested for had been sent in order for the firm Odongo Okeyo & Co. Advocates to make a conclusive view over the documents.
18. The defendants further argued that Mshimba had not demonstrated that she did not attend the meeting of 22nd March 2011 where she relinquished her rights. The defendants cited the decision in *Mususa v Dhanani* [2001] EA 471 to argue that it is not allowable to leave fraud to be inferred from the facts.
19. The defendants maintained that Mshimba is not entitled to the damages sought as she had not proved that her shares were fraudulently transferred to the Adhiambo and Juma. The defendants argued that Mshimba had not demonstrated how the alleged actions caused her loss and to what extent. The defendant relied on *Shell (U) Ltd v Achilles Mulaiibi (CACA No. 69 of 2004)* for the argument that a plaintiff must understand that if he brings an action for damages it is for him to prove the damage suffered. The defendants also cited *Nakuru Industries Limited v S. S. Mehta & Sons* [2016] eKLR where it was observed that damages awarded are intended to return the plaintiff back to the position he was before the wrongful act was committed.
20. The defendants submitted that Mshimba cannot ask for damages given that there was no valuation report or other evidence to prove the current value of the shares. They relied on *Daniel Gachanja Gitbaiga v Credit Reference Bureau Africa Limited & others (Civil Suit No. 551 of 2011)*; [2020] eKLR, that no general damages could be awarded as the plaintiff neither pleaded to the nature of the loss suffered nor proved defamation. The defendants also argued that Mshimba had not demonstrated how the alleged fraudulent transfer of shares caused her loss. They urged the Court to dismiss the suit with costs.



Determination

21. I have considered this matter, the evidence, exhibits and submissions by parties as well as the decisions relied on. This suit is premised on the contention that the defendants illegally and fraudulently transferred Mshimba's shares to Adhiambo and Juma sometime in 2011. According to Mshimba, the transfer was done without her knowledge or consent and that she did not execute the share transfer forms that eventually transferred the shares to those two individuals. The defendants denied committing the alleged acts of fraud and argued that Mshimba not only failed to prove fraud, but also that the suit was time barred.
22. Mshimba had sought several reliefs in the plaint but in the written submissions dated 22nd March 2022, it was stated that Mshimba was no longer pursuing prayers (c) and (d) for Restitution of the records and Audit of accounts. That means Mshimba's claim is for general and punitive damages respectively.
23. Given the positions taken by parties in this matter, the issue for determination is whether Mshimba proved the case to the required standards and, depending on the answer to this issue, whether Mshimba is entitled to the damages sought.

Whether case is proved

24. The defendants argued that Mshimba did not prove the case to the required standard. The law is settled that a plaintiff bears the burden of proof in civil cases. The general burden of proof is on a balance of probabilities. Section 107 (1) of the *Evidence Act* provides that "whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist." Further section 108 provides that "the burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side." Section 109 is again to the effect that the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence.
25. The burden of proof is not lessened even where the suit proceeds by way of formal proof. The standard of proof remains at all times. It was in that regard that the Court of Appeal stated in *Karugi another v Kabiya & 3 others* [1983] eKLR: [1987] KLR 347 that the burden of the plaintiff to prove his case remains the same and is not in any way lessened because the case is heard by way of formal proof, though where the matter is not defended, or is not validly defended, that burden may become easier to discharge.
26. In *Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission & 2 others* [2017] eKLR, the Supreme Court stated on the evidential burden of proof:
[132] Though the legal and evidential burden of establishing the facts and contentions which will support a party's case is static and "remains constant throughout a trial with the plaintiff, however, "depending on the effectiveness with which he or she discharges this, the evidential burden keeps shifting and its position at any time is determined by answering the question as to who would lose if no further evidence were introduced.
27. The Supreme Court emphasized that once the Court is satisfied that a party action has adduced sufficient evidence to warrant impugning an action, if not controverted, then the evidentiary burden shifts to the other party to adduce evidence rebutting that assertion and demonstrating that there was compliance with the law, stating that while the petitioner bears an evidentiary burden to adduce 'factual' evidence to prove his/her allegations of breach, then the burden shifts and it behooves the respondent to adduce evidence to prove compliance with the law.



28. What the Supreme Court was saying was that the primary burden is on the plaintiff to prove his or her case. Once sufficient evidence has been adduced to call for rebuttal, it then falls on the defendant to debunk that evidence, failure of which, the plaintiff would succeed.
29. Although the burden of proof is on a balance of probability, there are instances, where the burden is higher depending on the nature of the dispute. For instance, in cases where fraud is alleged, like in the case at hand, the burden of proof is slightly higher than that of balance of probabilities but less than the balance beyond reasonable doubt.
30. In *R. G. Patel v Lalji Makani (supra)*, it was held that allegations of fraud must be strictly proved and although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere proof of probabilities is required.
31. Further, in *Gladys Wairimu Ngacha v Teresa Chepsaat & 4 others (supra)*, the court reiterated the principle stated in *R. G Patel v Lalji Makani (supra)* and added it is not enough for a party to plead fraud; he must tender evidence that proves particulars of fraud to the satisfaction of the court.
32. In *Zakayo Michubu Kibuange v Lydia Kaguna Japheth & 2 others (supra)*, the court held that an allegation of forgery of a signature is serious and ought to be proved by the party alleging it. It cannot be left to the opponent to prove that the signature was not a forgery.
33. Similarly, in *Mususa v Dhanani (supra)*, the court again stated that mere suspicion is not enough. There must be circumstances incompatible with honest dealing, and fraudulent conduct must be distinctly proved. It is not allowable to leave allegations of fraud to be inferred from the facts. It must be satisfactorily proved.
34. Mshimba's case, as I understand it, is that her shareholding in Citadel was transferred to Adhiambo and Juma without her knowledge or consent. This, in essence, was done following fraudulent resolutions made at a general meeting of shareholders of Citadel held on 22nd March 2011 to the effect that Mshimba had resigned as a director and shareholder of Citadel and her shareholding was to be transferred to Adhiambo and Juma. That would also mean share transfer forms allegedly signed to facilitate the transfer was a forgery. This is so because according to Mshimba, she neither attended the meeting nor executed the transfer forms as purported.
35. As already pointed out, Mshimba had the burden to prove that she did not attend the meeting, did not agree to transfer her shareholding in Citadel and did not execute the transfer forms. In other words, Mshimba had the legal burden to prove that the actions complained of were fraudulent. That however, is not the case here. Apart from stating that she neither attended the meeting nor signed the transfer forms, Mshimba did not adduce any other material evidence to prove that she did not act in the manner suggested.
36. From the pleadings and submissions, Mshimba is said to have resigned as director through letter dated 12th December 2009 as she was relocating to Germany. There was however no evidence that she never returned to Kenya and that she was not in the meeting of 22nd March 2011 when the impugned resolutions were passed. Mshimba again stated that when she learnt of the actions, she inquired from Okeyo who denied knowing the parties or the meeting. On record is a letter from Odongo Okeyo & Co Advocates which denies that the firm is a company Secretary and that it does not know the parties. However, the letter hastened to add that the documents complained of were not attached. It is important to note that the letter was written on behalf of the firm of Advocates and it does not show who signed it. It is also not clear whether there is only one person known as Odongo M Okeyo.



37. Similarly, there is a letter to Kerario Marwa & Co Advocates dated 19th September 2011 on the share transfer forms. Kerario Marwa & Co Advocates responded through letter dated 27th September 2011 stating that the alleged transfer forms had not been attached to the letter for Mshimba's Advocates and, therefore, Kerario Marwa & Co Advocates were unable to understand what was being alleged or give explanation. This demonstrates that the authenticity of the documents complained of was not dislodged.
38. Fraud being a serious allegation, it is not an issue to be left for conjecture. Fraud must be proved to a high degree than that of a balance of probability. In the case at hand, the allegations of fraud were not proved to the required standard.

Damages

39. Regarding damages, Mshimba urged the court to grant both general and punitive. Mshimba did not demonstrate the loss suffered to require compensation either punitive or general.
40. In *Gdfrey Julius Nduma Mbogori & another v Nairobi City County* [2018] eKLR, the court stated that exemplary or punitive damages are different from ordinary damages. The object of exemplary damages is to punish and deter. (See *Rookers v Barnard* [1964] AZ 112, (Per Lord Devlin.))
41. In *Shell (U) Ltd v Achilles Mulaiibi* (CAC No. 69 of 2004) the Court of Appeal of Uganda stated that a plaintiff must understand that if he brings an action for damages it is for him to prove the damage suffered.
42. In *Nakuru Industries Limited v S. S. Mehta & Sons* (*supra*), the Court observed that an award of damages is intended to return the plaintiff back to the position he was before the wrongful act was committed.
43. Mshimba, did not show that she suffered damage and, if so, to what extent to enable the court assess damages payable to return her to the position she would have been save for the breach.

Conclusion

44. Having considered the pleadings, the evidence submissions and decisions, and having perused the exhibits produced, I am not satisfied that Mshimba proved the case to the required standard. Mshimba did not prove that she did not attend the meeting. She did not also call material evidence to show that she did not execute the transfer forms and that the signature on those forms was not hers. In essence, Mshimba merely pleaded fraud and left it to the defendants to disprove fraud and forgery.
45. In the circumstances, the conclusion I come to is that this suit fails and is dismissed with costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 22ND JULY 2022

E C MWITA

JUDGE

