



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MURANG'A

CIVIL CASE NO. 3 OF 2018

MUGUMOINI FARMERS CO. LTD.....PLAINTIFF

VERSUS

FRANCIS NGONE GATHIGA.....DEFENDANT

JUDGMENT

1. The plaintiff is a limited liability company. The defendant is the immediate former chairman of the company.
2. The plaintiff brought suit claiming that the defendant has unlawfully withheld company assets including the official seal, safe, title deeds, books of accounts and company records.
3. The plaintiff craves *four* principal reliefs: First for an order to compel the defendant to release those assets and records; secondly, an order compelling the defendant to render “*comprehensive audited accounts*” of the company for the period he was in office; thirdly, an injunction to restrain him from dealing, charging or transferring the properties of the company; and, fourthly, a declaration that any transaction carried out by the defendant in the name of the company after his removal from office is null and void.
4. The defendant filed a statement of defence *out of time* on 28th May 2018. He *never* sought leave to extend time within which to file and serve the pleading. That defence denied the plaintiff’s claims *in toto*.
5. A request for *interlocutory judgment* was lodged on 2nd May 2018, long before the filing of the defence. Judgment in default of defence was entered on 22nd May 2018. The defendant has never moved the court to set aside the judgment.
6. The suit thus proceeded by way of *formal proof*. The plaintiff called one witness, Joseph Kamande Ngone. He is the current chairman of the company. He relied largely on his witness statement dated 3rd April 2018.
7. He testified that directions were given by the Registrar of Companies on 23rd March 2016, requiring the company to hold its Annual General Meeting on 14th April 2016 (hereafter *the AGM*). At that meeting, the defendant was voted out as chairman and director of the company and replaced by Joseph Kamande Ngone.
8. The new management wrote to the defendant to hand over all the company assets including monies collected for and on behalf of the plaintiff, land agreements with third parties, title deeds, certificates of leases, company accounts, all company records, company seal, files, receipt books, bank documents and the company safe.
9. The witness said that the defendant defaulted; and, has been trying to sell the plaintiff’s land or retained proceeds from such sale. The witness did not provide specific details of the titles or sale. All he said was that the plaintiff was a land buying company; that it is no longer trading; and, is in the course of winding up its affairs.
10. The witness relied on the list of documents dated 3rd April 2018 and filed together with the plaint (Plaintiff’s exhibit 1). He prayed for the reliefs set out in the plaint.
11. Learned counsel for the plaintiff filed submissions on 22nd May 2018.
12. As I stated the plaintiff was incorporated under the **Companies Act** (now repealed). Under that regime, certain company assets like the company seal and records were supposed to be in the *custody* of the company secretary.
13. The plaintiff did not lead evidence to show that the defendant, as chairman or director; or, in any other capacity was in custody of the seal, receipt books, bank documents, title deeds, books of accounts, or files.

14. The plaintiff's witness never gave particulars of the title deeds, receipt books, books of account or files withheld by the defendant. He did not also elaborate on sale of the plaintiff's land by the defendant or any proceeds from such sale withheld by the defendant. So much so that if that prayer were to be granted as drawn in the plaint, it would be ambiguous and open ended; perhaps even in *vain*.

15. Although the cause was proceeding by way of formal proof, the burden of proof remained entirely on the shoulders of the plaintiff. See section 107 of the **Evidence Act**. Prayer a) of the plaint is accordingly *dismissed*.

16. Prayer b) sought an order to compel the defendant to render "*comprehensive audited accounts*" of the company for the period he was in office. Neither in the witness statement nor in the oral evidence was evidence led that the defendant, as one of the directors, was responsible for making of audited accounts of the company.

17. Under the repealed Act, and subject to the *Articles of Association*, it was the responsibility of the board of directors to appoint *auditors*. It is not lost on me that in the Registrar's letter dated 27th July 2012 contained in the plaintiff's list, the defendant was *only* one of *nine* directors. The operative *Articles of Association* were not produced by the witness.

18. It follows that the plaintiff failed to discharge its evidential burden on that aspect. Prayer b) is accordingly *disallowed*.

19. That takes me to prayer c) of the plaint. The plaintiff sought an injunction prohibiting the defendant from selling, transferring, sub-dividing, charging or transferring the properties of the company. I am satisfied that the company held its *AGM* on 14th April 2016. At that meeting, the defendant was voted out as chairman and director of the company. I am inclined to issue a permanent injunction.

20. For the same reasons, any transaction entered into by the defendant on *behalf* of the plaintiff after 14th April 2016 is hereby declared to be null and void. Prayer d) of the plaint succeeds to that extent.

21. My final orders are as follows-

i) That prayers a) and b) of the plaint are *dismissed*.

ii) That a permanent injunction shall issue prohibiting the defendant from selling, transferring, sub-dividing, charging, transferring or dealing in any manner with the properties of the plaintiff company.

iii) That a declaration is issued that any transaction entered into by the defendant on *behalf* of the plaintiff company after the 14th April 2016 is null and void.

22. Costs follow the event and are at the *discretion* of the court. The plaintiff has *partially* succeeded. The cause proceeded by *formal proof*. In the *interests of justice* I grant the plaintiff only a *half* of the costs.

It is so ordered.

DATED, SIGNED and DELIVERED at MURANG'A this 27th day of June 2019.

KANYI KIMONDO

JUDGE

Judgment read in open court in the presence of-

Mrs. Beacco for the plaintiff instructed by Wanyonyi & Muhia Advocates.

Defendant absent.

Ms. Dorcas and Ms. Elizabeth, Court Clerks.