



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)
Misc. Cause 179 of 2005

NGIMU FARM LIMITED.....PLAINTIFF

VERSUS

KAHUKI KIHANDA1ST DEFENDANT

ELIUD KARIUKI MWANGI.....2ND DEFENDANT

PETER KAMANDE3RD DEFENDANT

JOHN MWANGI GITHUKA.....4TH DEFENDANT

RULING

The Originating summons dated 10th March 2005 was filed on 14th March, 2005. It is supported by the affidavit of **Danson Kariuki Githuka** sworn on 10th March, 2005. The plaintiff in the originating summons is a Limited liability company while the defendants are former directors of the said company. The claim of the Plaintiff revolves around alleged mismanagement of the operations of the plaintiff by the defendants who at the time in question were the lawful directors of the company. And now the plaintiff through the elected Board of directors seeks the following orders:-

- (a) **Deliver a cash account for the sums paid to the Plaintiff/Applicant in respect of the sale of the applicant's properties.**
- (b) **Delivery of all documents books of accounts, receipts titles, agreement relating to the sale of the Plaintiff/Applicants land and proceeds thereof or any other material whatsoever on dealings and/or transactions on any goods and/or properties belonging to the applicant that are in the Defendant's possession.**
- (c) **In the furtherance of or in addition to the above deliver certified copies of all pending and/or determined suits conducted for or on behalf or against the applicants of the period the Defendants herein were acting as board of directors of the applicant.**
- (d) **Deliver an account for monies paid by the applicants against the legal work that was done on behalf of the Plaintiff during the defendants' tenure in office.**
- (e) **Costs of this suit.**

It is alleged that through an annual general meeting held on 13th September, 2003 the defendants were removed from office and a new board of directors was put in place which still holds office to date. Soon thereafter the new board of directors demanded documents from the defendants to enable them take over the office and continue with the normal business of the company. On or about 26th September, 2003 a handing over ceremony was held but it is alleged that the defendants did not hand over all the documents necessary for the running and management of the company. In particular it is alleged no list of title deeds issued during the defendants' tenure as well as a list of the parcels of land scheduled for sale to any prospective buyers was also not supplied. It is further contended that the company had a huge loan with Kenya Planters Co-operative Union but the records and the mode of payment has not been supplied by the defendants. It is the case of the plaintiff that KPCU is now set to sell off the plaintiff's land to recover the debt which is over 100 million.

Further it is contended that the defendants also did not release some of the titles and other documents necessary for managing and/or controlling the affairs of the company and therefore prays for the orders sought in the Originating Summons.

The defendants' reply is that the plaintiff is not entitled to and has not in any way demonstrated that it is entitled to the prayers set out in the Originating Summons. They allege that the rule under which the Originating summons is based is absolutely inapplicable to the plaintiff's case since the said rule generally deals with the administration of estate of deceased person, trusts and issues by beneficiaries of such estates or trustees. It was submitted by **Mr. Muhoro** learned counsel for the defendants that the whole Originating Summons is misconceived, misdirected, frivolous and lacks direction. He therefore urged me to disallow the prayers sought in the Originating summons.

I have considered the submissions, all the documentary and oral evidence presented by the parties in support of their case. The point that comes out from the pleadings of the parties and submissions made by the advocates is that the plaintiff is a limited liability company and the defendants are former directors of the company. It is also clear that the defendants are shareholders of the plaintiff company. In my understanding what the plaintiff is asking is all the relevant documents and assets of the company to enable them to proceed with the running and management of the company to the best interest of the shareholders. That is a legitimate duty bestowed on the current directors so that they are not in future accused of mismanagement and negligence by the shareholders of the company. I also hold the view that the former directors have an obligation to ensure that all documents and assets of the company is handed over to the legal representatives of the company. What the plaintiff is demanding from the defendants is not something that is impossible to comply since the defendants were in a position to protect and preserve all the records, books of accounts, liabilities, assets and all the relevant documentation for the smooth running of the company. Section 147 of Cap 486 states;

(1) Every company shall cause to be kept in the English language proper books of account with respect to-

(a) All sums of money received and expended by the company and the matters in respect of which the receipt and expenditure takes place;

(b) All sales and purchases of goods by the company.

(c) The assets and liabilities of the company:

Provided that in respect of an existing company the requirement that such books of account shall be kept in the English language shall not have effect until after the expiration of a period of two years from the date of the commencement of this Act.

(2) For the purposes of this section, proper books of account shall be deemed not to have been kept with respect to the matters aforesaid if there are not kept such books as are necessary to give a true and fair view of the state of the company's affairs and to explain its transactions.

(3) (a) The books of account shall be kept at the registered office of the company or, subject to the provisions of paragraph (b), at such other place as the directors think fit, and shall at all times be open to inspection by the directors.

(b) The books of account shall only be kept at a place outside Kenya with the consent of the registrar and subject to such conditions as he may impose; and if the books of account are kept at a place outside Kenya there shall be sent to, and kept at a place in, Kenya, and be at all times open to inspection by the directors, such accounts and returns with respect to the business dealt with the books of account so kept as will disclose with reasonable accuracy the financial position of that business at intervals not exceeding six months.

(4) if any person being a director of a company fails to take all reasonable steps to secure compliance by the company with the requirements of this section, or has by his own willful act been the cause of any default by the company thereunder, he shall, in respect of each offence, be liable to imprisonment for a term not exceeding twelve months or to a fine nor exceeding ten thousand shillings or to both:

Provided that-

(i) in any proceedings against a person in respect of an offence under this section consisting of a failure to take reasonable steps to secure compliance by the company with the requirements of this section, it shall be a defence to prove that he had reasonable ground to believe and did believe that the competent and reliable person was charged with the duty of seeing that those requirements were complied with and was in a position to discharge that duty, and

(ii) A person shall not be sentenced to imprisonment for such an offence unless, in the opinion of the court the offence was committed willfully.

It is clear in my mind that what the plaintiff seeks is a legitimate right intended to lawfully protect the interests of the company, the defendants and other shareholders who are interested and/or connected with the success of the company. It is for that reason that the parties like the defendants who were previous managers of the company are obligated to give and hand over all documents showing that everything they did during their tenure was above board. It is alleged that some of the company's assets is in the hands of third parties and the only way to get back such assets is to get the relevant documentation that may be in possession of the defendants. It is also in the interest of the defendants to co-operate with the current directors and ensure that they work for the success of their company. The only way to do so is to ensure that they give all the relevant documentation and evidence in their possession to the current directors of the company. That task in my humble view is easy since the defendants will only be required to give out what is in their possession as they were in control of the company's assets and were the custodians of all the documents and records of the company. It is therefore necessary for the defendants to account for all the transactions undertaken by them during their tenure in office so that everything is clear to the current directors and all the shareholders of the company.

Section 147 of Cap 486 clearly places an obligation and/or duty on the defendants that all books of account shall be kept in good order to indicate the expense, income, purchase of goods, assets and liabilities of the company. It is clear the law places a duty of disclosure on the directors of a company and that duty must be discharged when there is a query as to the way they managed the company during their term in office. It is therefore my decision that the company is entitled to ask the former directors to ensure that they comply with law and their obligation towards the shareholders of the company.

In the premises I grant the orders sought in the Originating Summons dated 10th March 2005. Each party shall bear its own costs. I direct the current board of directors of the company and the defendants to meet within the next 30 days to ensure compliance with the order given by this court.

Dated, signed and delivered at Nairobi this 28th day of May, 2008.

M. A. WARSAME

JUDGE

Court: Judgement delivered in the presence of Mr. Rumba Kinuthia and M/s Githiori for Mr. Muhoro for the defendant in open court.

M. A. WARSAME

JUDGE

28.5.2008