

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAKURU

Civil Case 722 of 1994

KIPSIGIS TUGEN FARM ENTERPRISES.....PLAINTIFF

VERSUS

STEPHEN NGERECHI.....1ST DEFENDANT

DAVID K. KORIR.....2ND DEFENDANT

JUDGMENT

The plaintiff filed a suit on 2nd November 1994, and alleged that sometimes between the years 1987 to 1992, the defendants were directors of the plaintiff company as the Chairman and Secretary respectively. The plaintiff alleged that during their term in office, the defendants committed fraudulent acts against the plaintiff in that the first defendant misappropriated a sum of Kshs.1,296,064/- and the second defendant misappropriated a sum of Kshs.568,400/-. The particulars of the defendants' fraud and breach of their fiduciary duties to the plaintiff were set out in the plaint. The plaintiff therefore urged the court to order a refund by the defendants to the plaintiff the said sums of money which they had misappropriated. The plaintiff also prayed for interest on the said sums and costs of the suit.

The defendants filed a joint statement of defence and denied the plaintiff's claims in their entirety. They stated that the plaintiff's suit was premature because a resolution by the plaintiff company requiring recovery of the said sum from them had not been passed. They further stated that the present directors of the plaintiff had also taken loans from the plaintiff, just as the defendants had done and therefore they could not institute the suit on behalf of the plaintiff.

When this matter came up for hearing on 20th September 2006, the defendants and their advocates did not attend court. The hearing date was taken by the plaintiff's advocate on 20th December 2005 and a hearing notice had been served upon the defendants' advocate and an affidavit of service duly filed.

Mr. Benard Kibisio Bargurei, the secretary of the plaintiff at the time of the hearing, testified on behalf of the plaintiff. He told the court that the first defendant was a former chairman and the second defendant a former secretary of the plaintiff company between 1987 and 1992. The defendants, without approval of the other directors of the plaintiff, took some money from the plaintiff. An audit exercise was conducted and a report prepared and it showed that the first defendant misappropriated Kshs.1,143,318/- and the second defendant Kshs.559,900/-. The **audit report** dated 1st May 1992, was produced as **P.Exh.1**. He further testified that while this matter was pending in court, the petty cash vouchers which showed the amounts that had been unlawfully drawn by the defendants, went missing from the plaintiff's offices. The incident was reported to the police and a police abstract was issued to that effect. The **police abstract** was produced as **P.Exh.2**. The witness produced copies of the missing petty cash vouchers. They showed that the accumulative figure that was misappropriated was Kshs.1,864,464/-. A bundle of those **vouchers** was produced as **P.Exh.3**. They were all signed by the defendants. The plaintiff managed to obtain a few of the **original vouchers** and the same were produced as **P.Exh.4**.

The witness further testified that in an annual general meeting held on 12th September 1992, the shareholders of the plaintiff passed a resolution that the misappropriated money be recovered from the

defendants. The **minutes** of the said meeting were produced as **P.Exh.5**. He therefore urged the court to enter judgment as prayed in the plaint.

The plaintiff's suit was not defended. The defendants and their advocates did not attend court and no reason was given for that.

I have considered the pleadings by both the plaintiff and the defendants and the evidence that was adduced before this court. Although the defendants denied the plaintiff's claim, it would appear that they were at the same time saying that if they misappropriated any money, there was no resolution by the plaintiff that the same should be recovered from them. They also admitted that they had taken loans from the plaintiff. They did not disclose how those loans, if at all, were advanced to them and neither did they state that they had repaid the same. From the evidence that was adduced by the plaintiff, I am satisfied that the plaintiff has proved its case on a balance of probabilities.

The amounts shown in the audit report and the various petty cash vouchers reveal that the defendants actually misappropriated the plaintiff's money as claimed in the plaint. The first defendant should therefore refund to the plaintiff a sum of Kshs.1,296,064/- and the second defendant should refund a sum of Kshs.568,400/-. The defendants will also pay interest at court rates on the aforesaid sums of money from the date of filing of this suit until payment in full. The defendants will also bear the costs of the case.

DATED, SIGNED and DELIVERED at Nakuru this 20th day of December, 2006.

D. MUSINGA

JUDGE

Judgment delivered in open court in the presence of Miss Kagondu holding brief for Mr. Kiburi for the plaintiff and N/A for the defendant.

D. MUSINGA

JUDGE