



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CIVIL APPEAL NO. 481 OF 2000**

**IYEGO RWATHIA COMPANY LTD.....APPELLANT**

**VERSUS**

**MUTHURIMI GIKONYO.....RESPONDENT**

**J U D G E M E N T**

When the respondent filed a suit in the court of the Resident Magistrate Court at Milimani Commercial Court Nairobi on 13th August 1998, he asked for an order for accounts, a permanent injunction to restrain the appellant from deducting further sums of money from the money due to him as dividends and costs of the suit.

The respondent was one of the shareholders – directors of the appellants. At one time he headed the appellant and was alleged to have failed to account for revenue therefrom and the deductions from his yearly entitlement was intended to recover this monies not accounted for. This is why the suit was filed.

The case was defended by the appellant in a defence and counter claim filed in court on 27th October, 1998. The appellant admitted deducting Kshs.25,000/= from the respondents 1997 dividends as part payment of a debt of Kshs.75,000/= owed to the appellant by the respondent.

In the counter claim, the appellant alleged that during the course of the respondent's directorship, he had received Kshs.75,000/= on behalf of the appellant but failed and/or refused to remit it either to the Bank or the company lawyer.

That the appellant then recovered Kshs.25,000/= from the respondents 1997 dividend leaving a balance of Kshs.50,000/= which the appellant was then claiming from the respondent.

The respondent replied to the defence and offered a defence to the counter claim and in particular denied having received and/or defaulted to hand over Kshs.75,000/= and put the appellant to strict proof.

He also denied owing the appellant Kshs.50,000/=.

The case was heard on 13.7.2000 by the Resident Magistrate (W.O. Lichuma (Mrs) when the respondent and the appellant and/or their witnesses testified.

Judgment was delivered on 24th August 2000 when orders in terms of the plaint were made.

In his own evidence before the magistrate the respondent testified that he was incharge of the appellant business during 1980, 1983 and 1984 and that during that period, particularly in 1980, he was incharge of collecting rent from the business premises but that when he did so, he took the rent to the appellant lawyer, Gatimu & Company Advocates.

The respondent produced the receipts issued by the firm of advocates as part of the evidence in the case.

He denied owing the appellant Kshs.75,000/= adding that though he had been getting his dividends well, in 1997 he did not receive it.

Then in the year 2000 more than Kshs.10,000/= was deducted from his dividends. He testified that he had told the general meeting that he owed the appellant no money.

The defence called three (3) witnesses. John Mwangi Maina testified as to how there was a committee to investigate missing money or who owed the appellant money and that all those found to be owing the appellant any money were asked to pay back.

The witness said he was informed that the respondent owed the appellant Kshs.75,000/=.

In cross-examination he said the respondent was supposed to have collected rent which he failed to remit to the bank.

Evans Kuria Gathiori (DW 2) was called to say he was the Secretary of the committee appointed to investigate people who owed the appellant money and who had failed to pay.

He testified that the committee investigated and found the respondent owed the appellant Kshs.75,600/=.

He testified further that he did not sign the report because they failed to meet.

In cross-examination the witness said the appellant was not summoned by the committee.

Andrew Mwangi Njoroge (DW3) was called to say that the select committees' report which disclosed the appellant debtors had the respondent's name as one of such debtors.

That apart from the respondent, there were many others who owed the appellant money and that one of them, Maina Wanduru, was sued in court for the recovery of the debt.

In her judgment, the learned magistrate acknowledged that the appellant had failed to heed notice to and produce all its accounts records and that the respondent had produced receipts amounting to Kshs.32,400/= which the select committee did not consider; nor was the respondent summoned to appear before the said select committee.

According to the Magistrate the appellant breached rules of natural justice by condemning the respondent unheard and on that basis in losing his dividends. So she granted the respondent the protective rights he sought in the plaint.

The appellant was unhappy with this decision and it lodged an appeal to this court in a memorandum of appeal dated and filed in court on 22nd September, 2000. It listed seven (7) grounds of appeal.

These were:

- (1) That the learned Magistrate erred in fact and in law in finding that the appellant wrongly deducted the respondents' dividends, while the respondent had in actual fact failed to pay back the amount of money he had taken away from the appellant while the respondent was the appellants' directors.
- (2) That the learned Magistrate erred in law and in fact in failing to find that the respondent, while in office as a director of the appellant had abused his duties as a director by keeping the appellant's property to himself and to the exclusion of the members.
- (3) That the learned Magistrate erred in law and in fact by failing to appreciate the fact that the respondent while in office as both director and manager of the office of the appellant was aware that there was a select committee appointed to investigate the misappropriation of the company's funds and the respondent knowing that books of accounts for the company were required unlawfully withheld the crucial information from the select committee.
- (4) That the Magistrate erred in law and in fact in finding that the respondent was not given a right to defend himself while in actual fact the respondent had himself frustrated the efforts of the select committee by unlawfully locking them out of office and thus ending the work of the select committee prematurely.
- (5) That the Learned Magistrate erred in law and in fact in failing to consider the evidence adduced by the appellant's witnesses and which weighed heavier against the respondent's.
- (6) That the learned Magistrate erred in law and in fact in ordering the appellant to deliver books of accounts to the respondent while it was the respondent who was holding the books away from the other office bearers and shareholders.
- (7) That the learned Magistrate erred in law and in fact in ordering the appellant to stop deducting the respondents dividends while the appellant was entitled to do so to recover moneys owed to it by the respondent and which money the respondent had adamantly refused and/or neglected to pay back to the appellant.

In this court on 12th November, 2002 counsel for the parties submitted on the appeal with counsel for the appellant stating that during the committee's investigations the respondent refused to produce or surrender the receipts and this is why money was deducted (KShs.25,000/=) from his dividends to cover up the missing money.

Counsel stated that it is the respondent himself who frustrated the work of the select committee which was investigating misappropriation of company funds.

That money paid by one Wanduru to the respondent was not surrendered and that this was the amount deducted from his dividends.

Counsel submitted that it was not true that the respondent was not given an opportunity to be heard. He said that the evidence of witnesses weighed heavily against the respondent and that as the respondent kept books of account, the appellant was entitled to deduct its money from the respondent's dividends. He prayed that the appeal be allowed with costs.

Counsel for the respondent opposed the appeal and said it was incompetent misconceived and an abuse of the court process.

That during the hearing of the case, the appellant failed to prove to the court how they arrived at KShs.75,000/= allegedly owing by the respondent to the appellant.

According to counsel the respondent was unaware of the appointment of the select committee and he was not called to defend himself in respect to the money he was alleged to owe the appellant. That during his management of the appellant, the respondent collected rent from the bar and restaurant and remitted it to the appellant lawyer.

That apart from the allegation by the appellant in the lower court that the respondent owed it money, there was no evidence to support this allegation.

That the respondent gave the appellant notice to produce in the lower court but no documents were produced and that at the end of the case, it appeared in the lower court mind that there was a hidden agenda or a plot against the respondent.

Counsel submitted that a Mr. Wanduru alleged to have paid money to the respondent was not called to testify.

That the respondent did not abuse his office or keep the appellants property to himself.

That the respondent kept the receipts to confirm he had deposited money with the appellant's lawyer.

According to counsel, the magistrate properly ordered for accounts to be produced though this had not been done.

That if the appellant was owed money by the respondent accounts should have been produced to show this.

Counsel prayed that the appeal be dismissed with costs.

This court has heard and recorded submissions in this appeal and perused the lower court record of proceedings and judgment.

That the respondent owed the appellant KShs.75,000/= was speculative otherwise no evidence either oral or documentary was adduced by the appellant to show or establish that the respondent owed the appellant any money.

Not even the investigation report compiled by the committee appointed by the appellant was produced to show how the KShs.75,000/= was arrived at.

Neither was there any evidence tendered by the appellant to show that when the respondent was a director and manager of the appellant he abused his office by keeping the appellant's property to himself and/or to the exclusion of other members.

There was no indication what kind of property was this or why the respondent could keep it. the appellant to investigate those who owed it money, why was the respondent not summons or questioned by it over such debt? No evidence was adduced to show that this even happened. Nor even a letter of demand was ever written to the respondent to ask him to pay the money to the appellant, noting that KShs.75,000/= is not small money to an ordinary Kenyan.

And if the respondent was not called by the committee to explain his indebtedness to the appellant only to be met with a deduction of KShs.25,000/= in 1997 and over KShs.10,000/= in the year 2000, then he was right in saying he was not given a chance to be heard on this alleged indebtedness to the appellant.

There was even no evidence adduced that the respondent frustrated the work of the investigating committee or that he locked them out of officer. This appears to be new evidence being adduced on appeal without following proper procedure.

In fact there was evidence that one of the directors who owed money to the appellant, a Mr. Wanduru was taken to court over it.

It is surprising that the respondent who was alleged to owe the appellant KShs.75,000/= was not taken to court as well.

Though the respondent prayed for an order for the production of accounts, which order the lower court granted, I do not seem to see the purpose of this because I do not see any other prayer sought which relates to production of accounts.

But there being no basis for deducting any money from the respondent's dividends, the prayer for a permanent injunction to restrain the appellant from deducting money from the respondent dividends in repayment of an alleged debt owed for the appellant, which the court granted, was justified.

Having reconsidered all the evidence adduced in the lower court case the judgment and the submissions on this appeal, I am satisfied the orders made by the learned Resident Magistrate, save the one on production of accounts, were justified and I see no merit in this appeal which I dismiss with  $\frac{3}{4}$  costs to the respondent. Delivered this 25th day of November, 2002.

**D.K.S. AGANYANYA**

**JUDGE**