



REPUBLIC OF KENYA



**KENYA LAW**  
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**Gikumbo Farmers Multipurpose Company Ltd & 6 others v Gatumu & 8 others  
(Civil Suit 71 of 2009) [2023] KEHC 23926 (KLR) (17 October 2023) (Judgment)**

Neutral citation: [2023] KEHC 23926 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT EMBU  
CIVIL SUIT 71 OF 2009  
LM NJUGUNA, J  
OCTOBER 17, 2023**

**BETWEEN**

**GIKUMBO FARMERS MULTIPURPOSE COMPANY LTD ..... 1<sup>ST</sup> PLAINTIFF  
FAITH WAMBUI NOORLA ..... 2<sup>ND</sup> PLAINTIFF  
HARRISON MAGUH ..... 3<sup>RD</sup> PLAINTIFF  
SHADRACK NJOGU MUGO ..... 4<sup>TH</sup> PLAINTIFF  
PETER MBOGO NJAGI ..... 5<sup>TH</sup> PLAINTIFF  
BETHA KUTHAIYA KINYUA ..... 6<sup>TH</sup> PLAINTIFF  
FRANCIS MBOGO WAMUNGE ..... 7<sup>TH</sup> PLAINTIFF**

**AND**

**STEPHEN NJERU GATUMU ..... 1<sup>ST</sup> DEFENDANT  
CYRUS NDOGO NYAGA ..... 2<sup>ND</sup> DEFENDANT  
MUCHIRI KIAMBATI ..... 3<sup>RD</sup> DEFENDANT  
JAMES NJAGI NJOROGE ..... 4<sup>TH</sup> DEFENDANT  
FRANCIS GACHOKI NJAGI ..... 5<sup>TH</sup> DEFENDANT  
CYRUS GICHOBI KATHURI ..... 6<sup>TH</sup> DEFENDANT  
FRANCIS MUCHIRA KIAMBATI ..... 7<sup>TH</sup> DEFENDANT  
CATHERINE WAWIRA ..... 8<sup>TH</sup> DEFENDANT  
NANCY REGURU NJOGU ..... 9<sup>TH</sup> DEFENDANT**



## JUDGMENT

1. The plaintiffs filed a plaint dated 10<sup>th</sup> April 2007 in Nyeri High Court Civil Case No 23 of 2007. In the same suit, the defendants responded with a statement of defense and counterclaim dated 09<sup>th</sup> May 2007. The case was transferred to Embu High court vide order of the court dated 25<sup>th</sup> March 2009 for hearing and final determination. The plaintiffs filed an amended plaint dated 28<sup>th</sup> April 2014 and a further amended plaint dated 07<sup>th</sup> July 2021, while the defendants also filed an amended statement of defense and counterclaim dated 15<sup>th</sup> June 2015. Since institution of the suit, there have been series of applications that have been determined.
2. Through the further amended plaint dated 07<sup>th</sup> July 2021 the plaintiffs seek judgment against the defendants jointly and severally for:
  - a. A permanent injunction restraining the defendants by themselves, their agents, servants, employees or any other persons claiming through them from interfering with the plaintiffs' company operations and/or affairs and/or operating the company's bank accounts either at Equity Bank (Kenya) Limited Embu Branch and/or Family Finance Building Society Embu Branch and at Nawiri Sacco;
  - b. A declaration that the notice dated 20<sup>th</sup> March 2007 and any other subsequent meetings based on the said notice or any other such notice issued at the same time are null and void;
  - c. An order that the defendants pay the misappropriated monies owed to the 1<sup>st</sup> plaintiff as particularized under paragraph 9A of the further amended plaint;
  - d. An order that the defendants surrender the 1<sup>st</sup> plaintiff's books, documents, equipment and stationery outlined in paragraph 9B of the further amended plaint;
  - e. Costs of the suit; and
  - f. Any other relief that the court will deem fit to grant.
3. The facts of the case are that by a notice dated 20<sup>th</sup> March 2007, the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants gave notice to the members to attend a special general meeting and elections to be held on 17<sup>th</sup> April 2007. It is the plaintiffs' case that the notice was irregular and it contravened the mandatory provisions of the *Companies Act* and on the basis that: no requisition was lodged at the company's office prior to the notice convening the meeting, the said defendants do not hold a tenth of the shares in the company; the notice was not served upon all members of the company; the notice is not signed and the address given on the notice is not that of the company.
4. They stated that the defendants are interfering with the operations of the company with their illegal and unlawful actions which are bound to cause irreparable harm to the plaintiffs. That the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants intend to change the directorship of the company against the provisions of the *Companies Act* and have refused to surrender the company's bank documents, books, equipment and stationery and had also misappropriated company money in the sum of Kshs 23,381.40/=. That the said defendants are crippling the operations of the company by retaining the company's records and by the 4<sup>th</sup> -9<sup>th</sup> defendants fraudulently changing the directors.
5. Through their amended statement of defense and counterclaim dated 09<sup>th</sup> May 2007, the defendants denied the allegations made in the plaint and put the plaintiffs to strict proof. They stated that as of



- 28<sup>th</sup> September 2006, they were the duly elected directors of the company and were therefore mandated to take control of the affairs of the company. That the 2<sup>nd</sup>-7<sup>th</sup> plaintiffs convened an illegal meeting on 31<sup>st</sup> October 2006 purporting to hold elections and elect themselves as directors. They counterclaimed that they are the rightful directors of the company and they sought declaratory orders to that effect. They also denied the averments of paragraph 9A and B and put the plaintiffs to strict proof thereof. They also sought orders that the meeting held on 31<sup>st</sup> October 2006 by the 2<sup>nd</sup>-7<sup>th</sup> plaintiffs electing themselves as directors, be declared a nullity and an injunction be issued against them from interfering with the business of the 1<sup>st</sup> plaintiff.
6. At the hearing, PW1 was the 4<sup>th</sup> plaintiff who stated that he had not attended any of the meetings alleged by the defendants and that if any meeting had been held on 21<sup>st</sup> and 28<sup>th</sup> of September 2006, the minutes provided had not been signed and stamped. He stated that he was elected as director through a meeting held on 31<sup>st</sup> October 2006 and he had shares in the company. That a notice for the meeting had been pinned on the noticeboard at the company premises and that is where he saw it. That he was not served with a notice for the special general meeting.
  7. It was his further evidence that a notice was issued dated 01<sup>st</sup> October 2006 but the 1<sup>st</sup>-3<sup>rd</sup> defendants were not expected to attend the meeting because they did not have share certificates which was a requirement for attendance of the meeting. That the 1<sup>st</sup>-3<sup>rd</sup> defendants withdrew Kshs 105,800/= and misappropriated part of it and that they have since refused to hand over bank documents and continue to run the company together with the 4<sup>th</sup>-9<sup>th</sup> defendants. He alleged that they have been selling coffee but not depositing the proceeds into the company account.
  8. On cross-examination, he stated that the 1<sup>st</sup>-3<sup>rd</sup> defendants may have had shares but they had not collected their share certificates and they were only interim directors of the company before the next cohort was elected. He stated that their articles of association allowed for 3-5 directors but a 6<sup>th</sup> one could be allowed as a patron. That he was also a member of the interim board together with the 1<sup>st</sup>-3<sup>rd</sup> defendants before the first cohort of directors was elected. That he was the treasurer of the board but he did not authorize withdrawal of the Kshs 105,800/=. That the signatories to the account were not the 1<sup>st</sup> – 3<sup>rd</sup> defendants. That he did not have any proof that the Kshs 23,381.40/= was misappropriated. That the quorum for meetings is  $\frac{3}{4}$  of the members and on 31<sup>st</sup> October 2006 the meeting was attended by 46 members, who also voted. He added that the 4<sup>th</sup>-9<sup>th</sup> defendants were the current directors of the company.
  9. On further cross-examination, he stated that a director was supposed to hold office for 3 years but between 2006-2013 that was not the case. He stated that he did not have proof that the right procedure was followed in electing the current directors and also that he did not have the current audited books of accounts of the company since 2006. On re-examination, he stated that he did not know the whereabouts or the time when the amount was withdrawn from the bank neither does he have any proof that the amount was misappropriated because the books of accounts were never handed over to him. He concluded by stating that the 1<sup>st</sup>-3<sup>rd</sup> defendants wanted to be directors by force.
  10. DW1 was the 2<sup>nd</sup> defendant who stated that he was the honorary secretary having been appointed as such on 21<sup>st</sup> March 2002, that the 4<sup>th</sup> plaintiff was the treasurer, the 1<sup>st</sup> defendant was the vice chairperson and the now deceased 2<sup>nd</sup> plaintiff was the chairperson. That after 4 years in office, some directors rebelled and accused the 1<sup>st</sup> – 3<sup>rd</sup> defendants of misappropriating company money and the same was reported to the local authorities. He stated that they withdrew the Kshs 105,800/= and distributed all of it to the coffee farmers to whom the money was owing and then they parted ways. That



- on 28<sup>th</sup> September 2006, elections were held and new directors were appointed. That soon after, the 3<sup>rd</sup> plaintiff started posing as the patron and yet the position was not provided for in the constitution.
11. That DW1 was arrested together with the 1<sup>st</sup> and 3<sup>rd</sup> defendants and they never got to assume office. That upon arrest, all the documents they had, belonging to the company were confiscated and nothing was spared. On cross-examination, he stated that the meeting where he was elected director was attended by 52 shareholders and in the same meeting the board was dissolved. That the meeting was not marked as an AGM and the minutes were neither stamped nor signed as it should be. That after the arrest, they were forced to give away all the company documents in their custody to the assistant chief.
  12. DW2 was the 5<sup>th</sup> defendant who is the current chairperson of the board which comprises of the 4<sup>th</sup>-9<sup>th</sup> defendants and were elected into office on 15<sup>th</sup> June 2018. That they took over directorship from the 4<sup>th</sup> and 7<sup>th</sup> plaintiffs and not from the 1<sup>st</sup> – 3<sup>rd</sup> defendants and at the time when they took office, they did not find any documents or portable items belonging to the company, including ownership documents, audited statements and title deeds. That the 4<sup>th</sup> plaintiff who was the chairperson at the time refused to acknowledge and attend the meeting where the election was also done. He stated that he himself did not have a share certificate. That by the time they were taking over the company, things were not working well within the company and returns had not been filed for 11 years. That the AGM was necessary because of the wrangles within the company.
  13. The parties filed their written submissions.
  14. The plaintiffs, in their submissions, stated that it is questionable that the 1<sup>st</sup>- 3<sup>rd</sup> defendants held an election on 28<sup>th</sup> September 2006 and then attempted to arrange another election on 17<sup>th</sup> April 2007 unless the alleged prior election was a cover-up to invalidate all other elections. That even the elections and meeting held in 2018 regarding the directorship of the 4<sup>th</sup> – 9<sup>th</sup> defendants did not comply with the procedure of 21 days’ notice according to section 133(2) of the *Companies Act*. That DW1 was unable to verify that he didn’t have the company records as his evidence that the same were confiscated by police, is contradictory. That DW1 admitted that Kshs 105,800/= was withdraw from the company account but couldn’t produce proof as to how the same was utilized. In conclusion, they relied on the cases of *Jatin Shantilal Malde & 9 others v Transmara Investment Limited & 2 others* (2018) eKLR and *Elijah Adul v Rift Valley Sports Club* (2003) eKLR.
  15. The 1<sup>st</sup> -3<sup>rd</sup> defendants submitted abandoning their counterclaim as they are no longer interested in the directorship of the company. They stated that the plaintiffs had failed to prove their case on a balance of probabilities and therefore the orders sought need not be granted. It was their case that the meeting convened on 28<sup>th</sup> September 2006 was held in accordance with the memorandum and articles of association and that the meeting held by the plaintiffs on 31<sup>st</sup> October 2006 should be held as illegal by this court. That the claim that the 1<sup>st</sup>- 3<sup>rd</sup> defendants misappropriated Kshs 23,381.40/= is baseless as all the money withdrawn was used to pay the shareholders for their coffee. That the burden is on the plaintiffs to prove that the money was indeed embezzled by the 1<sup>st</sup>- 3<sup>rd</sup> defendants who are also alleged to have taken off with the company’s financial and other records, but they failed to discharge this burden.
  16. The 4<sup>th</sup> – 9<sup>th</sup> defendants submitted that they were enjoined in the suit in the year 2021 and that they had been elected into office pursuant to article 20 of the articles of association of the company. That the articles of association were clear on the term of directors, which is 3 years but is not clear on procedure for elections and removal of directors. They stated that the plaintiffs have failed to discharge the burden of proof per section 107 of the *Evidence Act* and the case of *Kinyanjui Kamau v George Kamau* (2015) eKLR. That fraud has been alleged but has not been proved. They urged the court to apply the *Companies Act* 2015 and find that the directors acted in the best interest of the company.



17. The issues for determination are as follows:
- a. Whether the notice dated 20<sup>th</sup> March 2007 should be declared null and void;
  - b. Whether the plaintiffs' case has satisfied the requirements for issuance of a permanent injunction against the defendants in the terms claimed;
  - c. Whether an order should be made for the defendants to refund company money that was allegedly misappropriated;
  - d. Whether an order should be made that the defendants should surrender the company records as per the further amended plaint; and
  - e. Who should bear the costs of the suit?
18. On the first issue for determination, it is pertinent that I review the articles of association of the company. I take note of the fact that the 1<sup>st</sup>-3<sup>rd</sup> defendants have since abandoned their counterclaim as it has been overtaken by events and they have lost interest in the same. According to the articles of association of the 1<sup>st</sup> plaintiff, article 4 provides that the directors shall be elected from amongst the highest share contributors; article 13 provides that the number of directors shall not be less than 3 or more than 5; article 20 provides for the term of a director to be 3 years and the director shall be eligible for re-election; Articles 46 and 47 provide for annual general meetings and special general meetings and the latter can be convened by a director if need be; and Article 54 provides for quorum at meetings to be at least 33 members in person.
19. The registered directors in 2006 were 2<sup>nd</sup> – 7<sup>th</sup> plaintiffs according to the annual returns for the year 2006. The trend was consistent over the years as per CR12 dated 10<sup>th</sup> December 2010, the directors were still the same. The contention here is that the 1<sup>st</sup>-3<sup>rd</sup> defendants gave a notice dated 20<sup>th</sup> March 2007 for a meeting and election to be held in April of the same year. According to the evidence, this is about 4 months since the previous election where the 2<sup>nd</sup>-7<sup>th</sup> plaintiffs had been installed in office through elections and had been registered as such by the registrar of companies.
20. When it comes to the people who may convene a special general meeting, the articles of association limit this to the directors of the company. Therefore, it is my view that the attempt by the 1<sup>st</sup>-3<sup>rd</sup> defendants to convene a meeting and yet they were not directors at the time, defeats the purpose whatsoever. According to Sections 276 and 278 of the Companies Act, the directors have the power and duty to convene meetings. In the present case, the notice for the intended meeting by the 1<sup>st</sup>-3<sup>rd</sup> defendants was void as they were not directors of the company at the time.
21. On the second issue for determination, for a court to issue an injunction of any nature, a certain threshold must be met as set out in the case of *Giella v Cassman Brown and Co Ltd* (1973) EA 358. It is a three-pronged threshold based on the following elements:
- a. The applicant ought to have established a *prima facie* case;
  - b. The applicant stands to suffer irreparable harm that cannot be compensated by damages if the order is denied; and
  - c. In whose favour the balance of convenience lies.



22. Additionally, I am well cautioned by the sentiments of the court in the case of *Showind Industries v Guardian Bank Limited & another* (2002) 1 EA 284 in which the court held as follows: -
- “.....an injunction is granted very sparingly and only in exceptional circumstances such as where the Applicant’s case is very strong and straight forward. Moreover, as the remedy is an equitable one, it may be denied where the Applicant’s conduct does not meet the approval of Court of equity or his equity has been defeated by laches”
23. In my determination on this issue, I shall also address the 3<sup>rd</sup> and 4<sup>th</sup> issues for determination. While keeping in mind the standard of proof, the plaintiff has alleged that the 1<sup>st</sup>-3<sup>rd</sup> defendants took the company’s documents and the same have never been returned. If these documents were available and produced in court, they would aide the arguments of both opposing sides. Per section 107 of the *Evidence Act*, he who alleges must prove, albeit to the required standard of “on a balance of probabilities”. The plaintiffs have not produced evidence, rebuttable or otherwise that indeed the 1<sup>st</sup>-3<sup>rd</sup> defendants took the documents and have refused to bring them back.
24. In their defense, the 1<sup>st</sup>-3<sup>rd</sup> defendants stated that they were arrested by the police and the alleged documents were taken into custody by the chief and/or the police. This allegation remains unproven as it is one person’s word against another’s. Even if the court is bound to consider the evidence on a balance of probabilities, the evidence must first of all be placed on the scale for it to tip!
25. The plaintiffs also allege that the defendants withdrew money from the company account in the sum of Kshs 105,800/= out of which Kshs 23,381.40/= is alleged to have been misappropriated. The 1<sup>st</sup>-3<sup>rd</sup> defendants do not deny withdrawing the amount but they deny having misappropriated it. Once again, I see an allegation without evidence to subject to the required standard of proof. The allegations against the defendants have not been proved on a balance of probabilities.
26. Another basis for seeking the permanent injunction is that the plaintiffs are bound to suffer harm which may not be compensated by way of damages if the order is denied. The reading of the prayer is “A permanent injunction restraining the defendants by themselves, their agents, servants, employees or any other persons claiming through them from interfering with the plaintiffs’ company operations and/or affairs and/or operating the company’s bank accounts either at Equity Bank (Kenya) Limited Embu Branch and/or Family Finance Building Society Embu Branch and at Nawiri Sacco”. The 1<sup>st</sup>-3<sup>rd</sup> defendants have since relinquished their interest in directorship of the company.
27. PW1, DW1 and DW2 all stated that the 4<sup>th</sup>-9<sup>th</sup> defendants are the current directors of the company who, according to article 57 of the articles of association of the company, have power to sign against bank transaction in the name of the company. However, the legality of their election is unknown. More so, it is evident that their election as directors is as a result of the impugned notice dated 20<sup>th</sup> March 2007, whose validity is to be determined by this court.
28. Sections 107 and 109 of the *Evidence Act* provide for the standard of proof in civil cases. The plaintiffs are bound to prove their case on a balance of probabilities. In my view, this has been done. The 1<sup>st</sup> plaintiff’s documents relating to all company operations are untraceable and they may or may not be in the custody of the defendants (this, we shall never know).
29. Going by the evidence presented before me, and especially the CR12 dated 10<sup>th</sup> December 2010, the directors of the 1<sup>st</sup> plaintiff are the 2<sup>nd</sup> - 7<sup>th</sup> plaintiffs. I am bound to make a decision based on the available evidence.



30. Ultimately, having considered the arguments herein and the relevant case law, I find that the plaintiffs' case partially succeeds. Therefore, the following orders are hereby issued:
- a. A permanent injunction is hereby issued in favour of the plaintiffs, restraining the defendants by themselves, their agents, servants, employees or any other persons claiming through them from interfering with the plaintiffs' company operations and/or affairs and/or operating the company's bank accounts either at Equity Bank (Kenya) Limited Embu Branch and/or Family Finance Building Society Embu Branch and at Nawiri Sacco;
  - b. A declaration is hereby made that the notice dated 20<sup>th</sup> March 2007 and any other subsequent meetings based on the said notice or any other such notice issued at the same time are null and void; and
  - c. Each party shall bear its own costs of the suit.
31. It is so ordered.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 17<sup>TH</sup> DAY OF OCTOBER, 2023.**

**L. NJUGUNA**

**JUDGE**

