



**Mwanirua & 2 others (Suing as the Officials of Kieni Kithomo Community Based Organization) v Charles & 2 others (Civil Suit E011 of 2023) [2024] KEMC 125 (KLR) (29 July 2024) (Judgment)**

Neutral citation: [2024] KEMC 125 (KLR)

**REPUBLIC OF KENYA  
IN THE GITHONGO LAW COURTS  
CIVIL SUIT E011 OF 2023  
AT SITATI, SPM  
JULY 29, 2024**

**BETWEEN**

**JAMES MWANIRUA & 2 OTHERS & 2 OTHERS & 2 OTHERS ..... PLAINTIFF  
SUING AS THE OFFICIALS OF KIENI KITHOMO COMMUNITY BASED  
ORGANIZATION**

**AND**

**AMARIA KABURU CHARLES & 2 OTHERS & 2 OTHERS & 2  
OTHERS ..... DEFENDANT**

**JUDGMENT**

1. By a plaint dated 10<sup>th</sup> May, 2023 verified by an affidavit of similar date, the plaintiff prayed for the following reliefs:
  - a. Refund of Kshs 264, 205/=
  - b. Special damages Kshs 122, 640/=
  - c. General damages
  - d. Costs of the suit and interest

Accompanying the plaint were:

Plaintiff's list and bundle of witnesses' statements dated 10<sup>th</sup> May, 2023 containing the witnesses' statements of James Mwanirua Gituma, John Kimathi and Judith Kathure. List and bundle of documents containing the following exhibits to be produced in the case: Registration certificate for the plaintiff CBOMinutes Of 27<sup>TH</sup> April, 2023 Charge sheet in Githongo Criminal Case no. 35 of 2019. Judgment in Githongo Criminal Case no. 35 of 2019. Demand letter dated 6<sup>th</sup> March, 2023.



2. The defendants did not appear and did not file any responses whereupon the court entered an interlocutory judgement at the request of the plaintiffs. The matter then went for formal proof. The firm of Kaberia Arimba & Company Advocates represented the plaintiff.

### **The Plaintiffs' Case**

3. The 3 witnesses for the plaintiff adopted their respective witnesses' statements as their testimonies. In summary, they told the court that the defendants were the former officials and signatories to the Kieni Kithomo CBO who stole funds from the CBO. The witnesses told the court that the officials were prosecuted and found guilty of the offences of stealing by agents in Criminal Case 35 of 2019 and penalized accordingly. In support of their case, the plaintiffs relied on the above-listed exhibits and closed their case.

### **Issue For Determination**

4. The only issue for determination is whether or not the plaintiffs had established their case on a balance of probabilities for the grant of the reliefs prayed for.

### **Determination**

5. From the material placed before the court, there is direct evidence to show and prove that the defendants as former officials stole the amounts pleaded in the plaint. They were arrested, tried and convicted on the charge of stealing by agents contrary to section 281 of the Penal Code after it was proved beyond reasonable doubt that the 3 had acted criminally towards the CBO.

6. As officials and signatories to the bank accounts of the CBO, the defendants owed a fiduciary duty to the CBO. In the authority of *Family Bank Limited v Pand Co-operative Savings And Credit Society [2022]eKLR (Ngenye-Macharia J. as she then was)* had this to say on fiduciary duties:

32. According to Black's Law Dictionary, 11<sup>th</sup> edition, a fiduciary duty is:

“a duty of utmost good faith, trust, confidence and candor owed by a fiduciary (such as an agent or a trustee) to the beneficiary (such as the agent's principal or the beneficiaries of the trust); the duty to act with highest degree of honesty and loyalty towards another person and in the best interest of the other person. Also termed as the duty of loyalty, duty of fidelity, duty of faithful service; duty to avoid conflict of interest.”

7. Their criminal actions breached their respective fiduciary duties and also led to special loss of the amounts that were withdrawn illegally and this entitled the plaintiffs to apply for recovery of the stolen amounts. The general damages would arise for the loss and deprivation of the use of the stolen amounts. In addition, therefore, for the breach of fiduciary duties, the case has been made out for the award of general damages. In addition, an award shall be made for the loss of special damages. Costs follow event – there was a demand letter which the defendants disregarded and so an award for costs is made. Interest would be and is hereby allowed. The judgement is against the defendants jointly and severally. In the result, judgment is entered in the following terms:

- a. Refund of Kshs 264, 205/=
- b. Special damages Kshs 122, 640/=



- c. General damages for breach fiduciary duties and loss of use of the stolen monies Kshs 100,000/=
- d. Costs of the suit
- e. Interest at 14% from the date of filing the suit till payment in full.

It is so ordered. Right of appeal is 30 days.

**DATED, READ AND SIGNED AT GITHONGO LAW COURTS THIS 29<sup>TH</sup> DAY OF JULY, 2024**

**HON.T.A. SITATI**

**SENIOR PRINCIPAL MAGISTRATE**

**GITHONGO LAW COURTS**

Present

Mr. Charles Omari Advocate

Brian Court Assistant

Plaintiffs

