

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND TAX DIVISION
COMMERCIAL CASE NO. 446 OF 2017

AFRICA GRAIN CARE LIMITED.....
PLAINTIFF

VERSUS

MICHAEL KIBET KIBENI.....1ST
DEFENDANT

WILLIE MAINDIO KIBET.....2ND
DEFENDANT

AFRICAN GRAIN CARE EQUIPMENT LIMITED.....3RD
DEFENDANT

JUDGMENT

1. The Plaintiff, Africa Grain Care Limited, instituted this suit by a plaint dated 7th November 2017, against the Defendants jointly and severally for:

- a) *A declaration that the incorporation of the 3rd Defendant, Africa Grain Care Equipment, by the 1st and 2nd Defendants was illegal and violated the Companies Act;*
- b) *A declaration that the 1st and 2nd Defendants registered the 3rd Defendant solely as part of a fraudulent scheme to divert business, income, and other resources from the Plaintiff, and that the corporate veil of the 3rd Defendant be lifted to hold them personally liable;*

- c) An order directing the Registrar of Companies to cause the 3rd Defendant to change its name and, upon refusal, to remove it from the index of companies;*
- d) An order for inspection/audit of the 3rd Defendant's financial accounts;*
- e) A declaration that the 1st and 2nd Defendants are unsuitable to hold directorship positions in the Plaintiff and their removal;*
- f) An order for production of all contracts and agreements entered into by the 1st and 2nd Defendants using their positions as directors;*
- g) Liquidated damages of Kshs. 44,469,153.03 plus interest at commercial rates from 2nd May 2017;*
- h) Liquidated damages of Kshs. 8,512,193.00 plus interest on the purchase of motor vehicles Reg. Nos. KCH 661B and KCL 325C;*
- i) Liquidated damages of USD 181,500 plus interest from 7th April 2017;*
- j) Liquidated damages of USD 31,059.45 plus interest from 14th December 2016;*
- k) Liquidated damages of EUR 5,125 plus interest from 10th January 2017;*
- l) Interest on the aggregated amount under prayers (g)-(k) at court rates from the date of judgment until full payment; and*
- m) Costs of the suit.*

2. The Plaintiff contends it was incorporated on 17th November 2015 and undertakes projects in grain handling and post-harvest care. The Plaintiff alleges that the 1st and 2nd Defendants, while serving as its directors, fraudulently incorporated the 3rd Defendant, Africa Grain Care Equipment Limited, on 20th March 2017 and diverted corporate opportunities, contracts and funds belonging to the Plaintiff.
3. The Plaintiff argues that the 1st and 2nd Defendants' conduct was in breach of their individual and collective statutory and fiduciary duty under common law rules and equitable principles. Due to their actions, the 1st and 2nd Defendants are incapable of continuing to act as directors of the Plaintiff in a balanced, objective and suitable way as is expected. The 1st Defendant has orchestrated financial sabotage to the Plaintiff company by acting illegally and without justification in refusing to cooperate in sanctioning critical transactions in regard to the bank accounts.
4. The Plaintiff contends that, as a consequence of the 1st and 2nd Defendants' fraudulent actions, it was denied the use and benefit of the contract business and the receipt of the monies fraudulently diverted into the 3rd Defendant. The Plaintiff has suffered and continues to suffer loss and damage.
5. The Defendants deny the allegations in the plaint and filed a joint statement of defence dated 14th December 2017. They assert that the 3rd Defendant was incorporated to safeguard business interests amid internal disputes and that no

diversion of funds occurred. The 1st and 2nd Defendant contend that it is through their sales and marketing that they secured lucrative contracts. They deny acting in a manner harmful and contrary to the rights and interests of the Plaintiff. That the remaining 4 directors of the Plaintiff became hostile to the 1st and 2nd Defendants, thereby creating a toxic environment, which prompted them to form the 3rd Defendant. They aver that the incorporation of the 3rd Defendant was not deceitful or through concealment of material facts.

6. The matter was referred to mediation, and a mediation settlement agreement was entered on 2nd May 2018, resolving all issues except for the contracts executed between the Defendants and Grain Industries Limited (GIL) for electrical installations and central cleaning systems. This unresolved matter forms the basis for this determination.
7. At the hearing, the Plaintiff called 2 witnesses, with the defence calling one witness. At the close of trial, the parties filed written submissions.
8. The Plaintiff submitted that from the facts pleaded by the parties regarding the Grain Industries Limited (GIL) contracts for electrical installations and central cleaning systems, four key issues arise: whether the 1st and 2nd Defendants breached their fiduciary duty by incorporating the 3rd Defendant, whether they diverted the Plaintiff's business through contracts executed in the 3rd Defendant's name, whether they unlawfully diverted Kshs. 44,469,153 due

under the contracts, and who should bear the costs of the suit.

9. It is undisputed that the 1st and 2nd Defendants were directors and shareholders of the Plaintiff Company at the time of incorporation of the 3rd Defendant and failed to disclose its formation to co-directors, breaching their fiduciary duties of loyalty and good faith as codified under Sections 142 and 146 of the Companies Act, 2015 and as established in **Cook v Deeks [1916-17] and Regal (Hastings) Ltd v Gulliver [1967]**.
10. Evidence shows that the 1st and 2nd Defendants executed the GIL contracts under the 3rd Defendant's name while the Plaintiff's employees performed the work, resulting in diversion of company opportunities and funds totaling Kshs. 44,469,153.00. Documentary and testimonial evidence, including quotations, contracts, emails, payrolls, and the Electrical Insulation Resistance Certificate, corroborate the Plaintiff's claim that the Defendants acted in their personal interest to the detriment of the Plaintiff.
11. Accordingly, the Plaintiff urges the Court to lift the corporate veil of the 3rd Defendant, hold the 1st and 2nd Defendants personally liable, award liquidated damages of Kshs. 44,469,153.00 with interest, and grant costs in favor of the Plaintiff, consistent with the principle that costs follow the event under Section 27 of the Civil Procedure Act.
12. The Defendants contend that the Plaintiff was incorporated on 17th November 2015 with six equal

shareholders, and Michael Kibet Kebenei later became managing director. At the time of filing, the 1st and 2nd Defendants remained shareholders. A dispute exists between two groups of directors, with the Plaintiff itself having no tangible grievance, making the company a facade masking personal disputes, warranting piercing of the corporate veil per **Ukwala Supermarket v Jaideep Shah & another [2022]**. African Grain Care Equipment Limited (3rd Defendant), incorporated on 20th March 2017, entered into the contract with Grain Industries Limited (GIL), and the Plaintiff's claims lack privity of contract or factual basis.

13. PW1 (Collin Onchoke) confirmed a prior attempted diversion of funds, which caused division among directors, and which is unrelated to the GIL contract. The Defendants acted to mitigate potential losses (*African Highland Produce v John Kisorio [2001]*; *David Murithi Githaiga v CFC Stanbic Bank [2019]*) and formed the 3rd Defendant to protect business interests. The Plaintiff's claims are largely legal assertions without facts, have been rendered moot (*Evans Kidero v Speaker of Nairobi City County Assembly [2018]*), and the Plaintiff's group has since formed Unigrain Equipment Limited.

14. Accordingly, the Defendants contend, the suit is academic, lacks a viable basis, and should be dismissed with costs, as any judgment against the Defendants would be unjust and procedurally unfair.

Analysis and determination

15. Having considered the pleadings, evidence, submissions and authorities, the following issues arise for determination:

- i. Whether the 1st and 2nd Defendants breached their fiduciary duties by diverting the GIL contracts;*
- ii. Whether the Plaintiff is entitled to relief for the diversion of funds;*
- iii. Whether the corporate veil of the 3rd Defendant should be lifted;*
- iv. What remedies, if any, are appropriate?*

Whether the 1st and 2nd Defendants breached their fiduciary duties by diverting the GIL contracts

11. The Plaintiff contends that the 1st and 2nd Defendants, while serving as directors of the Plaintiff Company, executed the GIL contracts in the name of the 3rd Defendant, Africa Grain Care Equipment Limited, thereby diverting business opportunities and funds belonging to the Plaintiff. It is alleged that Kshs. 44,469,153.00 was thereby unlawfully diverted. The Defendants deny wrongdoing and maintain that executing the contracts through the 3rd Defendant was a legitimate business decision undertaken during internal disputes, and that no diversion occurred.

12. It is not disputed that at all material times, the 1st and 2nd Defendants were directors and shareholders of the Plaintiff. As such, they owed statutory and fiduciary duties under the Companies Act, 2015 and under common law to act in the best interests of the Plaintiff.
13. Sections 142, 143, 145, and 146 of the Companies Act impose the duties to act in good faith, to exercise powers for proper purposes, to avoid conflicts of interest, to refrain from making secret profits, and to disclose personal interests. Directors must avoid situations where their personal interests' conflict with those of the Company, and must only act within the powers granted by the Company's constitution.
14. Section 142 further codifies the equitable principle requiring directors to act in accordance with the company's constitution and solely for the company's proper purposes. These duties are not displaced by internal disputes or disagreements among directors.
15. The Defendants have argued that the 3rd Defendant was incorporated because the Plaintiff's board had become dysfunctional and hostile, and that the GIL contracts were negotiated through their personal efforts. This argument, however, does not diminish the fiduciary obligations owed to the Plaintiff Company.
16. It is a well-established principle that directors owe fiduciary duties to the company. Section 138 of the Companies Act, 2015, reinforces the duty to avoid conflicts

of interest and prohibits the appropriation of opportunities that belong to the company.

17. In **Dyer & Blair Investment Bank Ltd v James Muiruri [2008] eKLR**, the Court affirmed that directors hold positions of trust and must not use their office to benefit themselves at the expense of their company.
18. The evidence before this Court shows that the GIL contracts, namely Contract No. 3 dated 3rd April 2017 and Contract No. 4 were executed in the 3rd Defendant's name shortly after its incorporation on 20th March 2017. Prior quotations and internal correspondence indicate that the Plaintiff Company had already engaged GIL on these projects. Despite this, the 1st and 2nd Defendants did not disclose to their co-directors that they had executed the contracts through the 3rd Defendant. An email dated 13th April 2017 misrepresented the status of the GIL contracts to the board, even though the contracts had already been signed under the 3rd Defendant.
19. Evidence from the Plaintiff's employees, payroll records, and the Electrical Insulation Resistance Certificate issued in the Plaintiff's name confirms that the Plaintiff's personnel and resources undertook the contractual work. No evidence was tendered by the Defendants to show that the 3rd Defendant executed any part of the contracts independently.
20. The principle that directors must not exploit corporate opportunities for personal gain is trite. In **Aberdeen**

Railway Co v Blaikie Brothers [1854] 1 Macq 461, Lord Cranworth LC famously stated:

“No one having such duties to discharge can be allowed to enter into engagements in which he has, or can have, a personal interest which conflicts, or possibly may conflict, with the interest of the company.”

This principle has been repeatedly affirmed in Kenyan jurisprudence.

21. On the evidence, the Court is satisfied that the 1st and 2nd Defendants, who controlled marketing and client relations for the Plaintiff, were in a position to divert the GIL contracts. The evidence shows that the sum of Kshs. 44,469,153.00 payable by GIL was invoiced to and received by the 3rd Defendant, not the Plaintiff.
22. The Defendants offered no credible documentation to rebut these findings. Their witness conceded that the 3rd Defendant was incorporated during internal disputes, but could not refute the fact that the GIL contracts were executed without disclosure and that the work was performed using the Plaintiff's resources.
23. In **Kenya Industrial Estates Ltd v CCF Ltd [2002] eKLR**, the Court held that diversion of corporate opportunities constitutes a breach of fiduciary duty. Further, in **Ukwala Supermarket v Jaideep Shah & Another [2022] eKLR**, the Court affirmed that the corporate veil may

be lifted where a company is used as an instrument of fraud or to avoid legal obligations.

24. On the totality of the evidence, I am persuaded that the 1st and 2nd Defendants incorporated and used the 3rd Defendant as a conduit to divert business that rightfully belonged to the Plaintiff.
25. Directors cannot invoke internal disputes as justification for diverting company opportunities. The incorporation and use of the 3rd Defendant in this context breached their fiduciary obligations. The corporate veil is therefore lifted, and the 1st and 2nd Defendants are held personally liable for the diverted sum of Kshs 44,469,153.00.
26. I accordingly find and hold that the 1st and 2nd Defendants breached their fiduciary duties under the Companies Act, 2015 and under common law.

Whether the Plaintiff is entitled to relief for the diversion of funds

27. The Plaintiff seeks recovery of Kshs. 44,469,153 allegedly received by the 3rd Defendant from GIL. The law is clear that where a director obtains profits in breach of fiduciary duty, the director must account for and disgorge those profits. In **Regal (Hastings) Ltd v Gulliver [1942] 1 All ER 378**, the House of Lords held that a director is liable to account for profits acquired in breach of duty irrespective of bona fides or the company's inability to pursue the

opportunity. The principle was restated in **John K. Wambugu v Peter Mugure [2014] eKLR**.

28. The Defendants did not produce reconciliations or evidence to show that the Plaintiff received any benefit from the GIL contracts. Their argument on the lack of privity is without merit. The Plaintiff's claim is not contractual; it is based on breach of fiduciary duty and restitution.

29. The Court therefore finds that the Plaintiff has proved, on a balance of probabilities, that the sum of Kshs. 44,469,153.00 was diverted by the Defendants and ought to be restored to the Plaintiff.

Whether the corporate veil of the 3rd Defendant should be lifted

30. The evidence demonstrates that the 3rd Defendant was incorporated secretly by the 1st and 2nd Defendants while serving as Plaintiff's directors. It was used to execute the GIL contracts and to receive payments for work performed using the Plaintiff's employees and resources.

31. These facts establish that the 3rd Defendant was used as a façade for fraud or improper purpose. In **Victor Mabachi & Another v Nurturn Bates Ltd [2013] eKLR**, the Court held that the veil may be lifted where the company is a vehicle for fraud. Similar reasoning was applied in **Ukwala Supermarket Ltd v Jaideep Shah [2022] eKLR**.

32. I am therefore satisfied that the 3rd Defendant was used as an instrument to divert corporate opportunities and that this is an appropriate case for lifting the corporate veil.

Appropriate Remedies

33. Having found the Defendants liable, the next question is the appropriate relief. Following mediation, only the issues relating to the GIL contracts remain live. The Plaintiff has proved that Kshs. 44,469,153.00 was diverted, and this amount is therefore awarded as liquidated damages.

34. The additional claims denominated in USD 181,500, USD 31,059.45, and EUR 5,125 were resolved or abandoned during mediation and were not proved at trial. These claims are accordingly declined.

35. Costs follow the event as provided by Section 27 of the Civil Procedure Act. The Plaintiff, having succeeded, is entitled to costs.

Final Orders

36. Judgment is entered for the Plaintiff against the 1st, 2nd and 3rd Defendants jointly and severally as follows:

- i. A declaration that the 1st and 2nd Defendants breached their fiduciary duties to the Plaintiff by diverting the GIL contracts through the 3rd Defendant.*

- ii. *An order lifting the corporate veil of the 3rd Defendant for purposes of attributing liability to the 1st and 2nd Defendants.*
- iii. *The Defendants shall jointly and severally pay the Plaintiff Kshs. 44,469,153.00.*
- iv. *Interest on the said sum at court rates from the date of filing suit until payment in full.*
- v. *Costs of the suit to the Plaintiff.*

JUDGMENT delivered virtually, dated and signed at **NAIROBI**

This **20th** day of **November** 2025.

P.M. MULWA

JUDGE

In the presence of:

Mr. Rugo for Plaintiff

Mr. Kipsigei h/b for Mr. Koech for Defendants

Court Assistant: *Carlos*