



REPUBLIC OF KENYA



KENYA LAW
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**Zinga v Maina & 3 others (Civil Suit 102 of 2018)
[2025] KEHC 12310 (KLR) (31 July 2025) (Judgment)**

Neutral citation: [2025] KEHC 12310 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL SUIT 102 OF 2018**

**F WANGARI, J
JULY 31, 2025**

BETWEEN

BAKARI KASSIM ZINGA PLAINTIFF

AND

STELLA WANJIRU MAINA 1ST DEFENDANT

EMMANUEL RONO 2ND DEFENDANT

TIWI HOLDINGS LIMITED 3RD DEFENDANT

REGISTER OF COMPANIES 4TH DEFENDANT

JUDGMENT

1. This suit was instituted vide the Plaint dated 19/11/2018. The Plaintiff prayed for judgment against the 1st, 2nd and 3rd Defendants jointly and severally for;
 - a. A declaration that the transfer of the Plaintiff's 10 shares in the company (3rd Defendant) to the 1st and/or 2nd Defendants was unlawful and fraudulent hence the same is void.
 - b. An order directing the Registrar of Companies to expunge the names of the 1st and 2nd Defendants from the list of shareholders in the company.
 - c. An order directing the Registrar of Companies to reinstate Bakari Kassim Zinga as a shareholder of the company.
 - d. An order directing the Registrar of Companies to restore the status quo ante of the shareholders in the company.
 - e. Spent
 - f. General damages, exemplary damages and mesne profits.



- g. Costs of the suit.
- h. Any other relief that the honourable court may deem fit and proper to grant.
2. The Plaintiff avers that at all material times to the suit, him together with a man known as Eric Stanley Clifford, formed the 3rd Defendant company incorporated and issued with a Certificate of Incorporation No. 102260 on 24/02/2003. That the company had two shareholders that is the Plaintiff with 10 shares and Eric Stanley Clifford with 990 shares.
 3. The Plaintiff stated that the sole aim of incorporation of the company was to purchase land and construct cottages in Tiwi within Kwale County. That the Plaintiff gave land known as Kwale/Tiwi/2609 to the company on agreement with Eric that upon successful transfer of the land, Eric would transfer 490 shares to the Plaintiff making them equal shareholders. That the land was transferred to the company and construction of the cottages commenced.
 4. The Plaintiff averred that not long after, the 1st Defendant created a rift between Eric and the Plaintiff which led to disagreements. As a result of the 1st Defendant's influence, Eric illegally transferred shares to the 1st Defendant and that they illegally and fraudulently removed the Plaintiff as a Director of the 3rd Defendant. That thereafter, the alleged shareholding was that Bakari Kassim Zinga (Plaintiff) held 10 shares, Stella Maina (1st Defendant) held 20 shares and Eric Stanley Clifford held 970 shares.
 5. It was averred that the disagreements created were calculated by the 1st Defendant to remove the Plaintiff as a shareholder of the company, which disagreements led to quarrels and a series of suits to wit Kwale Principal Magistrates Civil Suit No. 287 of 2004, Mombasa High Court Civil Case No. 54 of 2006 and Kwale Criminal Case No. 391 of 2015.
 6. That in some time in the year 2015/ 2016/2017/2018 or thereabout, the 1st and 2nd Defendants unlawfully, fraudulently and illegally without the Plaintiff's knowledge and/or consent transferred/dispensed the Plaintiff's 10 shares in the company to themselves thus changing the shareholding where Stella Wanjiru Maina held 980 shares while Emmanuel Rono held 20 shares.
 7. The Plaintiff averred that as a result of the 1st, 2nd and 4th Defendants' actions, the Plaintiff has suffered financially, emotionally and physically because the 1st Defendant has on several occasions gotten him arrested and jailed when he was trying to follow up on the company and the land. That the cottages which were constructed by the company generated rent and profit which the 1st and 2nd Defendants have illegally enjoyed without involvement of the Plaintiff who has been denied his dividends from the company.
 8. Service of pleading was done through substituted service, and by way of advertisement in a Kenyan Local Daily of nationwide circulation as per the court order. The 1st, 2nd and 3rd Defendants entered appearance and filed their Statement of Defence dated 04/02/2019 denying all the allegations by the Plaintiff and put him to strict proof thereof.
 9. The Defendants admitted that Eric was the shareholder of the 3rd Defendant company and that in the alternative and without prejudice to their denials, they averred that the shares from Eric were bought legally and effected procedurally without any illegality and/or fraud. They also stated that the suit as filed and served was bad in law and went against the doctrine of res judicata. That the Defendants therefore reserved the right to raise a preliminary objection on or before the hearing of the suit. They therefore prayed that the suit be dismissed with costs.
 10. The 4th Defendant entered appearance through their Memorandum of Appearance dated 03/12/2018. However, the 4th Defendant did not file a Statement of Defence.



11. The matter proceeded to hearing where the Plaintiff testified as the only witness. He adopted his Witness Statement dated 19/11/2018 together with his List of Documents dated 19/11/2018, produced as exhibits 1 to 11.
12. On cross examined by counsel for the 1st, 2nd and 3rd Defendants and he stated that together with Eric Stanley Clifford, they formed a company called Tiwi Holdings where he had 10 shares while Eric had 990 shares and that PW1 had property known as Kwale/Tiwi/2609. PW1 stated that they had agreed that Eric would transfer 490 shares to make them equal shareholders but there was no written agreement.
13. He said that he did not sue Eric because he was the one in charge of the project and that there was no agreement that they needed to consult each other when transferring the shares. PW1 stated that he did not have proof that the land was transferred. That the Defendant forged everything including his signature, and that there were cottages in the property but he did not have photos of the project. PW1 was re-examined and the Plaintiff closed his case.
14. The counsel for the 1st, 2nd and 3rd Defendants sought for an adjournment to call 2 defence witnesses. The matter was adjourned for defence hearing on 24/09/2024. On the said date, the Defendants and their advocate were absent. The defence case was therefore marked as closed.
15. The court directed that the parties do file their submission. However, as at the time of writing the judgment herein, only the Plaintiff had filed their submissions. On 17/02/2025 when the matter came up for mention to confirm compliance on filing of submissions, the counsel for the Plaintiff was present. The counsel for the Defendants was on the virtual court platform but did not respond when the matter was called out. The counsel for the Plaintiff confirmed filing of submissions. The Plaintiff was directed to serve the submissions upon the Defendants.
16. On 07/04/2025, Mr. Cheruiyot advocate for the Defendants stated that he had filed the defence submissions. Matter was fixed for Judgment for 06/11/2025. The judgment date was brought forward to 24/07/2025. On the said date, there was no appearance by either party and the Judgment was not ready. Judgment was rescheduled to be delivered on 31/07/2025 with notices being issued to the parties.
17. Upon settling down to write the Judgment, only the Plaintiff's written submissions were filed in the e-filing platform. Even though the counsel for the Defendant had stated that he had filed his submissions, no such submissions were on record.

Submissions

18. The Plaintiff in his submissions dated 14/10/2024 submitted that his evidence was clear on the allegations of fraud and illegalities which the Defendants failed to controvert by failure to defend their case and present evidence before court. That being uncontroverted, the suit ought to be allowed as prayed. The Plaintiff relied on the Court of Appeal Case of Arthi Highway Developers Limited v West End Butchery Limited & Others, Civil Appeal No. 246 of 2013.

Analysis

19. This court has considered pleadings, oral and documentary evidence on record and the submissions filed. The issues for determination are: -
 - a. Whether the Plaintiff's suit is merited
 - b. Who should bear costs and interest of the suit



20. On the first issue, it is a cardinal principle of the civil process that he who alleges must prove. Section 107, 108 and 109 of the Evidence Act is the starting point. It provides thus: -

107

(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of fact which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies in that person.

108. The proof a suit or proceedings lies on that person who would fail if no evidence at all were given on either side.

109. The burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence unless it is provided by any law that the proof of that fact shall lie on any particular person.

21. It is the duty of the Plaintiff to present his evidence in support of his averments in his pleadings. In *CMC Aviation Ltd v Crusair Ltd (No. 1)* [1978] KLR 103; [1976 – 80] 1KLR 835, Madan, J (as he then was) expressed himself as follows: -

“...Pleadings contain the averments of the parties concerned. Until they are proved or disproved, or there is an admission of them or any of them, by the parties, they are not evidence and no decision could be founded upon them. Proof is the foundation of evidence. Evidence denotes the means by which an alleged matter of fact, the truth of which is submitted for investigation. Until their truth has been established or otherwise, they remain un-proven. Averments in no way satisfy, for example, the definition of “evidence” as anything that makes clear or obvious; ground for knowledge, indication or testimony; that which makes truth evident, or renders evident to the mind that it is truth...”

22. I have perused through the documentary exhibits produced by the Plaintiff. The evidence that he was the registered proprietor of LR No. Kwale/ Tiwi/2609 then transferred to the 3rd Defendant Company is supported by the copy of green card produced as exhibit no. 9. The 3rd Defendant company was registered on 27/02/2003 a few days after the company was incorporated on 24/02/2003 as per exhibit no. 1.

23. The 3rd Defendant company Memorandum and Articles of Association dated 19/02/2003 and the CR 12 dated 10/05/2005 produced as exhibits 3 and 4, indicates that the Plaintiff had 10 shares in the 3rd Defendant company. The Plaintiff alleges that the Defendants fraudulently transferred his shares to themselves as per the CR 12 dated 28/09/2018 produced as exhibit 5.

24. The 1st to 3rd Defendants Statement of Defence stated they bought the share from Eric. There is no document to show how the shares were transferred from the Plaintiff to the Defendants. The Defendants did not testify in support of their case.

25. What are the consequences of the defence failing to adduce evidence? In the case of *Motex Knitwear Limited v Gopitex Knitwear Mills Limited* [2009] eKLR, Lesiit, J (as she then was) citing the case of *Autar Singh Bahra & Another v Raju Govindji*, HCCC No. 548 of 1998 observed as follows: -

“...Although the Defendant has denied liability in an amended Defence and counterclaim, no witness was called to give evidence on his behalf. That means that not only does the defence



rendered by the 1st plaintiff's case stand unchallenged but also that the claims made by the Defendant in his Defence and Counter-claim are unsubstantiated. In the circumstances, the Counter-claim must fail..."

26. Again, in *Trust Bank Limited v Paramount Universal Bank Limited & 2 Others* [2009] eKLR, it was held as follows: -

"...It is trite that where a party fails to call evidence in support of its case, that party's pleadings remain mere statements of fact since in so doing the party fails to substantiate its pleadings..."

27. The Plaintiffs evidence that his shares in the 3rd Defendant company were fraudulently transferred remains unchallenged. I have perused through the court pleadings filed. There is no document filed by the Defendants in support of their Defence. There is no evidence showing how the 1st and 2nd Defendant became shareholders and Directors of the 3rd Defendant company.

28. As for the claim of General and Exemplary Damages, no evidence has been adduced by the Plaintiff in support of the claim. The Plaintiff has failed to demonstrate the harm suffered as a result if the actions of the Defendants. The claim fails. The claim for mesne profits also fails as the Plaintiff did not even submit on the same.

29. On costs, it is settled that the same follows the event. However, the court retains discretion whether to grant them or not. In exercising this discretion, courts must not only look at the outcome of the suit but also the circumstances of each case. In *Morgan Air Cargo Limited v Everest Enterprises Limited* [2014] eKLR the court noted as follows: -

"The exercise of the discretion, however, depends on the circumstances of each case. Therefore, the law in designing the legal phrase that "Costs follow the event" was driven by the fact that there could be no "one-size-fit-all" situation on the matter. That is why section 27(1) of the *Civil Procedure Act* is couched the way it appears in the statute; and even all literally works and judicial decisions on costs have recognized this fact and were guided by and decided on the facts of the case respectively. Needless to state, circumstances differ from case to case."

30. The Defendant had failed adduce evidence in support of their case. I see no reason why the Plaintiff should be denied costs having diligently prosecuted the suit. Costs are awarded to the Plaintiff.

Determination

31. The upshot is that this court makes the following orders;

- a. A declaration that the transfer of the Plaintiff's 10 shares in the company (3rd Defendant) to the 1st and/or 2nd Defendants was unlawful and fraudulent hence the same is void.
- b. The 4th Defendant, the Registrar of Companies, to expunge the names of the 1st and 2nd Defendants from the list of shareholders in the company.
- c. The Registrar of Companies to reinstate Bakari Kassim Zinga as a shareholder of the company.
- d. The Registrar of Companies to restore the status quo ante of the shareholders in the company.
- e. Costs of the suit to the Plaintiff.

It is so ordered.



DATED, SIGNED AND DELIVERED AT MOMBASA ON THIS 31ST DAY OF JULY, 2025.

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HON. F. WANGARI

JUDGE

In the presence of;

Mr. Mwawasa Advocate for the Plaintiff

N/A by the Defendant.

Ms. Norah, Court Assistant

