



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL & TAX DIVISION

CIVIL SUIT NO. 542 OF 2007

PANKAJ VRAJLAL SOMAIAPLAINTIFF

VERSUS

BILL KIPSANG ROTICH 1ST DEFENDANT

FLORENCE ROTICH2ND DEFENDANT

METRO PETROLEUM LIMITED.....3RD DEFENDANT

JUDGMENT

This is a case about the 3rd Defendant, **METRO PETROLEUM LIMITED**, a company that was incorporated in March 1999.

1. The original Directors were the 1st Defendant, **BILL KIPSGANG ROTICH** and the 2nd Defendant, **FLORENCE ROTICH**.
2. Those two Defendants were also the first shareholders of the company, each holding one Ordinary Share.
3. It is common ground that on 30th June 2003, Florence resigned as a Director, and the Plaintiff, **PANKAJ VRAJLAL SOMAIA**, was appointed as a Director on the very same date.
4. The Original Share Capital was Kshs 20,000/= which was divided into 1,000 shares of Kshs 20/= each.
5. By a resolution passed on 30th September 2003, the Share Capital of the Company was increased to Kshs 30,000,000/=.
6. It is common ground that the Plaintiff and the 1st Defendant held 25,000 shares each.
7. It is further common ground that the Company maintained bank accounts at **IMPERIAL BANK** and at **GIRO BANK LIMITED**. The signatories to the said bank accounts were the Plaintiff (hereinafter "*Pankaj*") and the 1st Defendant (hereinafter "*Kipsang*").
8. It was the Plaintiff's case that whilst he was still a director of the Company, he learnt that he had purportedly ceased to be a director. In his place, the second Defendant ("*Florence*") had become a director.
9. But the Defendants position was that the Plaintiff voluntarily ceased to be a director of the Company, as he and Kipsang had signed a Resolution to that effect, on 15th June 2007.
10. The Plaintiff countered that assertion by saying that the Company never held a properly constituted meeting, at which the alleged resolution could have been passed.
11. Accordingly, the Plaintiff asked the court to hold that the purported appointment of Florence as a Director of the Company was irregular, null and void.
12. The Plaintiff's further case was that the Returns which were lodged at the Companies Registry were a nullity, because they had been filed

by an entity which had no lawful authority to do so.

13. The Returns in issue were lodged by Messrs **KILONZO & CO. ADVOCATES**.

14. According to the Plaintiff, the Law Firm of Kilonzo & Co. Advocates had never been appointed as the Company Secretary for **METRO PETROLEUM LIMITED**.

15. The Plaintiff asserted that at all material times the only legitimate Company Secretary was **JOHN CUMMING REGISTRARS**. Therefore, any Returns filed by any "person" other than John Cumming Registrars would not have been filed by the Company.

16. After the Plaintiff had been removed, (as he said), from the position of a Director, he says that Kipsang and Florence continued running the Company, to his complete exclusion.

17. Of course, because he was of the view that his removal was irregular and thus a nullity, the Plaintiff asserted that the Defendants were accountable to him.

18. In particular, the Plaintiff pointed out that by the time he was sidelined, the Company had products worth about Kshs 100,000,000/= awaiting loading.

19. The Plaintiff was fearful that the Defendants would divert the proceeds of the Company's business, from the bank accounts to which he was signatory, so that the said proceeds would go through the bank accounts which Kipsang and Florence had opened at **GIRO COMMERCIAL BANK** or at the **CONSOLIDATED BANK LIMITED**.

20. It was the Plaintiff's prayer that the Defendants be stopped from operating bank accounts for the Company, at any bank where the Plaintiff was not a joint signatory with Kipsang.

21. Furthermore, the Plaintiff prayed that the Accounts of the Company should be taken, to establish if Kipsang and Florence had misappropriated any funds from the Company.

22. In the event that the process of taking accounts revealed any misappropriation by Kipsang and Florence, the Plaintiff prayed for an Order Compelling them to refund the said money, which they had misappropriated.

23. The Plaintiff prayed that Florence be removed from the position of management of the Company, which should then revert to Kipsang and the Plaintiff.

24. The Plaintiff also prayed for Exemplary and Punitive Damages against the Defendants.

25. But the Defendants denied all the Plaintiff's claims and sought the dismissal of the suit.

26. If anything, the Defendants expressed the view that it was the Plaintiff who, (through the interim orders he obtained in this case), was causing the Company to suffer losses to the tune of Kshs 2,500,000/= daily.

27. Therefore, the Defendants indicated in their Defence, that they would lodge a counter-claim against the Plaintiff, at an appropriate time.

28. When the case came up for trial the Plaintiff called eight (8) witnesses, whilst the Defendants called one (1) witness.

29. The parties are in agreement that the following issues arise for determination;

a. Whether or not the removal of the Plaintiff as a Director of the Company was valid.

b. Whether or not the allocation of 100 shares to the 2nd Defendant, and her appointment as a Director were valid.

c. Whether or not the actions of the 1st and 2nd Defendants, in their capacities as Directors of the Company were lawful.

d. Whether or not the Defendants were obliged to provide an Account of the Company's assets between 2006 and 2010.

e. Whether or not the 1st and 2nd Defendants misappropriated funds from the Company;

and if so, whether or not they should compensate the Plaintiff.

f. Whether or not the Plaintiff was entitled to Exemplary or Punitive Damages; and if so, in what sum?

g. Who should pay the costs of the suit?

30. The Plaintiff testified as **PW1**.

31. He said that during the years 2005 and 2006 he and Kipsang started having difficulty in their communication as directors.

32. The Plaintiff testified that by a letter dated 15th June 2007 he executed a Memorandum of Understanding with Kipsang, which was intended to provide a formula for the Plaintiff to disengage from the Company.

33. Following the execution of the Memorandum of Understanding, the 2 directors put together a team which was to assist them negotiate the terms for disengagement.

34. However, according to the Plaintiff, the negotiations broke down.

35. As stated in the Defendant's written submissions, at paragraph 19 (vi);

“As a result of the irreconcilable differences between the directors of the 3rd Defendant then, and when confronted by the 1st Defendant, the Plaintiff agreed to a meeting to discuss the issues and way forward, which meeting was held on 15th March 2007.

In this meeting the Plaintiff voluntarily agreed, that owing to the irreconcilable differences he would cease to be a Director, Chairman and Shareholder of the 3rd Defendant, but an audit of the Company was to be undertaken to facilitate the separation.”

36. According to the Defendants, it was agreed by the Plaintiff that the Board of Directors of the Company would need to be reconstituted. And that therefore, in the Defendants' opinion, explained why Florence attended the meeting of the Board on 28th March 2007.

37. In my understanding of the law, the persons who are eligible to attend meetings of Boards of Directors are the Directors and the Company Secretary.

38. Therefore, even assuming that the Plaintiff had expressed the desire to cease being a Director, he was eligible to attend Board meetings until he ceased to be a Director.

39. Meanwhile, Florence was not eligible to attend a Board meeting until after she had become a Director.

40. In that regard, it is clear from the Defendants' submission (above-quoted) that the Plaintiff was to cease being a Director **AFTER** an audit had been undertaken to facilitate the separation.

41. According to the uncontroverted evidence of **PANNA B. SHAH (PW2)**, she was the proprietor of **JOHN CUMMING REGISTRARS**.

42. Her firm was appointed as the Company Secretary of **METRO PETROLEUM LIMITED** in 2001.

43. **PW2** testified that on 26th June 2003 the Company notified her firm that Florence had ceased to be both a shareholder and a director of the Company.

44. As the Company Secretary of Metro Petroleum Limited, **PW2** testified that John Cumming Registrars duties included the filing of Annual Returns.

45. Notwithstanding the fact that the Company had, by the year 2015, not ever notified John Cumming Registrars that it was no longer the Company Secretary, some Returns were filed for the year 2007, without the knowledge or involvement of the said Company Secretary.

46. **PW2** disowned the Returns for 2007, and added that the directors of the Company were Pankaj V. Somaia and Bill Kipsang Rotich.

47. PW3, RICHARD MUNDIA KARIUKI, confirmed that there was never a change of the Company Secretary, from John Cumming Registrars; That implies that any Returns that were lodged at the Companies Registry, by any other person, purporting to be the Company Secretary of Metro Petroleum Limited, were not authentic.

48. PW4, JAMES KIMAIYO, was the Depot Manager of the Kenya Pipeline Corporation.

49. He testified that the Company lifted products from the Corporation, by giving Loading Orders to the Corporation.

50. From the records of the corporation, **PW4** demonstrated that petroleum products worth over Kshs 162 Million were lifted from the corporation's depots, subsequent to the date when the Plaintiff had been excluded from the management of the Company.

51. PW5, CHIEF INSPECTOR GEOFFREY KINYUA, carried out investigations into the alleged falsification or forgery of returns for the Company.

52. There were also investigations carried out on the alleged diversion of funds from the Company's legitimate bank accounts, to accounts which had been opened on the basis of forged returns.

53. Following the investigations, criminal charges were preferred against both Bill Kipsang and Florence Rotich, for the offences of;

a. Forgery;

b. Uttering false documents; and

c. Theft of fuel belonging to Metro Petroleum Limited.

54. As at the time **PW5** testified in this case, the criminal case was still pending at the Magistrate's Court, Kiambu.

55. During cross-examination, **PW5** explained that the Complainant, in relation to the case of theft of petroleum products was Metro Petroleum Limited.

56. However, the Chief Inspector also clarified that the proceeds from the sale of the petroleum products were largely banked in accounts which were in the name of Metro Petroleum Limited.

57. The reason why he deemed the actions of the two accused persons as theft is that the accounts into which the proceeds were banked were being operated by Kipsang and Florence, (as Directors of the Company), whereas the Plaintiff who was a bona fide Director was completely sidelined.

58. Given the fact that it was Kipsang and Florence who operated those accounts, **PW5** described them as the beneficiaries of the money paid into the said accounts.

59. PW6, MARGARET WANGU, was an employee working at the Office of the Attorney General, who was based at the Companies Registry.

60. She testified that the records at the Companies Registry showed that in 2005 the Directors of Metro Petroleum Limited were Bill Kipsang Rotich and Pankaj R. Somaia.

61. PW6 said that on 5th September 2007, a letter was received at the Companies Registry, which indicated that Florence Rotich had replaced Pankaj Somaia, as a Director.

62. Thereafter, Messrs Havit Sheth Advocates lodged a complaint with the Companies Registry, concerning the alleged removal of Pankaj as a Director.

63. Following receipt of the said complaint, and upon verifying that the Company had not complied with the Companies Act and also with its own Articles of Association, when notifying the Companies Registry about the changes, **PW6** said that the changes were reversed.

64. However, the witness made the following statements during cross-examination;

“If a company alters its directorship, it files a Notification of Change. The office of the Registrar General does not have authority to undo the resolution of the company.”

65. She made it clear that the Registrar General did not either carry out investigations or carry out interviews with the persons believed to have caused the removal of the Plaintiff as a Director, before reversing the records.

66. PW7, CHIEF INSPECTOR MICHIRA NDEGE, is a Document Examiner. He works at the Directorate of Criminal Investigation, Document Examination Section.

67. On 8th April 2010 their officer received a request to investigate some Annual Returns, for Metro Petroleum Limited.

68. The particular Returns examined by **PW7's** colleague were for the years 2005, 2006 and 2007.

69. The colleague who carried out the actual examination is Antipas Nyanjwa. However, by the time this case came up for trial, Antipas Nyanjwa had left the Police Service.

70. The examination revealed that the signatures of the Plaintiff were cut out from the Returns of the previous year, and were then superimposed on the Returns for 2007.

71. In effect, the documents which the Registrar of Companies had relied upon, to replace the Plaintiff as a Director of Metro Petroleum Limited were forgeries.

72. PW8, CHARLES GITAHU MWANGI, was a former Chief Accountant of Metro Petroleum Limited.

73. He worked in that capacity between October 2003 and September 2007.
74. During that time, the Company had its accounts at Imperial Bank and also at Giro Bank; and the sole signatories to the said accounts were Kipsang and the Plaintiff.
75. **PW8** analyzed the Stock Balances of the Company's petroleum products, which were in the hands of the Kenya Pipeline Corporation.
76. He testified that after 30th September 2007 the quantity of stock which was moved from the Kenya Pipeline was 4,650,040 litres, whose value was Kshs 162,432,774/=.
77. However, notwithstanding the said value of the stock that had been moved, **PW8** traced only Kshs 25,596,395/= which had been banked into the accounts which he knew, as the Company's bank accounts.
78. Therefore, **PW8** concluded that the sum of Kshs 136,836,379/= was not traced by him.
79. When the witness was questioned about the source of the bank statements which he relied upon to come up with his figures, he explained that the Plaintiff provided the same. He further explained that the Plaintiff was able to obtain the bank statements from the Post Office Box of Metro Petroleum, as the Plaintiff had keys to the said Post Office Box.
80. After **PW8** testified, the Plaintiff closed his case.
81. The Defendants indicated that they would call two witnesses.
- 82. DW1, BILL KIPSANG ROTICH**, testified that by a letter dated 22nd February 2007, he was asking the Plaintiff to clarify if it was true that he was leaving the Company.
83. According to **DW1**, he was told by the Plaintiff that he (the Plaintiff) intended to leave the Company.
84. He said that at a meeting held on 15th March 2007, the Plaintiff decided to leave the Company.
85. However, the Plaintiff never signed the minutes of that meeting. The said minutes were signed by Kipsang only.
86. Kipsang confirmed that it is he who had given instructions to **KILONZO & CO. ADVOCATES**, to file a Notification of Change of Directors.
87. He explained that the said instructions were only in relation to the Plaintiff's capacity as a Director, but did not affect his status as a shareholder.
88. Kipsang said that it is he who gave instructions to have Florence allotted 100 shares.
89. In his understanding, although the Memorandum dated 15th June 2007 made reference to a proposed date for the separation of the 2 directors, there had already been a separation, in practical terms. He said that it was only the assets that remained to be separated.
90. However, during cross-examination, Kipsang conceded that the Memorandum bore the heading;
- “Status of matters of Split of Metro Directors.”**
91. He further conceded that the Memorandum expressly stated that issues were still under negotiations.
92. Kipsang gave three versions concerning the resignation of Pankaj as a Director.
93. First, he said that Pankaj had resigned as the Directors meeting held on 15th March 2007. Pankaj denied attending that alleged meeting.
94. It is noteworthy that if the minutes of the meeting held on 15th March 2007 were authentic, it would mean that Pankaj had resigned from the positions of Director, Chairman and Shareholder.
95. Yet Kipsang testified that Pankaj had, at all times, remained a shareholder.
96. From the testimony of Kipsang, here in court, I find that Pankaj never ceased to be a director on 15th March 2007.
97. Secondly, Kipsang said that by 26th June 2007, Pankaj had ceased to be a director. Of course, if it is by 26th June 2007 when Pankaj ceased to be a director, that would fortify my finding that Pankaj did not cease to be a director in March 2007.
98. However, as Kipsang conceded, there was no Memorandum which he and Pankaj signed on 26th June 2007, evidencing a resolution of

the issues which the 2 directors had still been negotiating.

99. Thirdly, Kipsang testified that Pankaj continued to operate from his office at the Metro Premises until 22nd September 2007.

100. To my mind, the continued use of the office, by Pankaj, until 22nd September 2007 is further proof that he had not yet split from the company.

101. And although Pankaj was still operating from the offices of Metro Petroleum, Kipsang testified that Pankaj only became aware that the Company had opened new Bank Accounts at Consolidated Bank and at Oriental Bank and Family Bank through a notification issued by Kilonzo & Co. Advocates.

102. Upon learning of the change of directors, Pankaj challenged it.

103. Kipsang confirmed that when the Registrar of Companies investigated the issue concerning the change of directors, the Registrar concluded that the removal of Pankaj, and his replacement by Florence were wrongful.

104. In the light of the findings made by the Registrar of Companies, the changes were reversed.

105. In my understanding, the effect of the reversal is that Florence was not a director of Metro Petroleum, whilst Pankaj was restored as a director of the company.

106. Therefore, the actions of Kipsang and Florence, in their capacities as Directors of Metro Petroleum Limited were not lawful.

107. Florence became a director and a shareholder of the company through forged documents.

108. Therefore, when she and Kipsang opened new Bank Accounts, to the exclusion of Pankaj; and then had money which was payable to the Company, deposited in those accounts, that constituted misappropriation of Company Assets.

109. Although the removal of Pankaj as a Director of the Company was unlawful, in reality it was effective.

110. In other words, even though the Registrar of Companies reversed the appointment of Florence, (thus effectively reinstating Pankaj), that was only on paper.

111. Pankaj never resumed his position as a director of the Company.

112. Kipsang testified that the proceeds from the sale of the petroleum products belonging to the Company, were put into the accounts to which he and Florence were the signatories.

113. He made it clear that he and Florence never gave to Pankaj the accounts of the company.

114. During re-examination, Kipsang said that, in his capacity as a Director of the Company, he had never refused to furnish Pankaj with Accounts.

115. He said that the only reason why he had not yet provided the Plaintiff with accounts is that the Plaintiff had never asked for them.

116. At that stage, Mr. Bwire, the learned advocate for the Defendants informed the Court that the Defendants knew that the Plaintiff was entitled to the Company Accounts, by virtue of the fact that he was a shareholder.

117. The Court then recorded a consent order, pursuant to which the Defendants would provide Accounts for the period between 2006 and 2010, within the span of 3 weeks.

118. Therefore, the Issue numbered **(d)** was resolved affirmatively, by consent of the parties.

119. Not only did the 1st and 2nd Defendants open an account for the Company unlawfully, they caused money to be paid into those accounts, whereas the money ought to have been paid to the legitimate Bank Accounts to which Kipsang and Pankaj were signatories.

120. By causing funds belonging to the Company, to be paid into accounts which had been opened irregularly, the 1st and 2nd Defendants deprived the Company of its lawful entitlement.

121. The Defendants have given several examples, in their submissions, of the manner in which the Plaintiff's actions violated his legal duty to the Company; and how the interim injunctions obtained herein had negatively impacted the Company.

122. However, it must be noted that the Defendants failed to lodge any counter-claim against the Plaintiff.

123. The decision by the Defendants, not to institute the counter-claim they had threatened, has meant that there is no legal foundation upon which the Plaintiff can be found liable to the Defendants or to any of them.

124. And whereas **Article 38 (ii)** and **Article 46** of the **Company's Articles of Association** spelt out the minimum requirement for the number of Directors, and also the authority which any Director had in the removal of a fellow director, those Articles are inconsistent with the defence pleaded in this case.

125. All along, the Defendants' position had been that the Plaintiff resigned from his position as a director.

126. The Defendants had not asserted that Kipsang removed Pankaj, in accordance with **Article 46**. I therefore find that their submissions, with regard to other possible ways in which the Plaintiff could have ceased to be a director, do not advance their case. My said finding is based on the clear legal understanding that parties are bound by their pleadings.

127. The Defendants have also faulted the Registrar of Companies for failing to seek the opinions of Kipsang and Florence before revoking the changes which replaced Pankaj with Florence.

128. Citing the decision in **HOLMAN Vs JOHNSON [1775 – 1802] ALL E.R. 98**, the Defendants invited this court to hold that no court can lend a hand to enforce an enterprise that is illegal.

129. In that authority (of **Holman Vs Johnson**) the Court had said;

“No court will lend its aid to a man who founds his cause of action on an immoral or an illegal act. If, from the Plaintiff's own stating or otherwise, the cause of action appears to arise ex turpi causa, or the transgression of a positive law of this country, there the court says that he has no right to be assisted.

It does not matter that the Defendant is equally guilty of the illegality, for it is not for the Defendant's sake that objection is allowed, but it is founded on general principles of policy which the Defendant has advantage of, contrary to real justice.”

130. First, it is noted that the Defendants did not take any legal steps to challenge the decision of the Registrar of Companies.

131. Secondly, the Registrar of Companies was not a party to these proceedings. Therefore, he has no cause of action which was founded on any immoral or illegal action or at all.

132. In this case, the Registrar of Companies was simply a witness. His testimony was in support of the Plaintiff's cause of action.

133. The Defendants had every opportunity of trying to object to the admissibility of the evidence, however, no such objection was raised.

134. Secondly, the Defendants had every opportunity of challenging the decision of the Registrar of Companies through Judicial Review, with a view to having it quashed.

135. In the case of **MIRUGI KARIUKI Vs THE ATTORNEY GENERAL, CIVIL APPLICATION NO. 70 OF 1991**, the Appellant had sought to have quashed, the decision by the Attorney General, rejecting a request to have Michael Mansfield Q.C. granted authority to represent him in a criminal case.

136. The Court of Appeal made it clear thus;

“The mere fact that the exercise of discretion by the decision making authority affects the legal rights or interests of some person makes it judicial, and therefore subject to the procedure required by natural justice.

Thus, that discretion must be exercised judicially, that is to say, fairly.

The fact that the exercise of discretion is administrative does not make it any the less judicial for this purpose.”

137. Perhaps if the Defendants had challenged the decision of the Registrar of Companies, appropriately, there is a possibility that the decision may have been quashed.

138. But in this instance, the Registrar is not a party to the proceedings before this court. If I were to purport to quash his decision, this court would be guilty of violation of natural justice.

139. I hold that because the Defendants failed to take steps that would have enabled a court to determine whether or not the decision of the Registrar ought to be quashed, the decision remains firmly in place.

140. However, the fundamental question is the legal impact of the decision made by the Registrar of Companies; did it invalidate the appointment of Florence, and the removal of Pankaj, from the position of Director of Metro Petroleum Limited?

141. Pursuant to **Section 181** of the **Companies Act**;

“The acts of a director or manager shall be valid notwithstanding any defect that may afterwards be discovered in his appointment or qualification.”

142. The Defendants understand that provision to mean that even if the appointment of Florence is held to have had a defect, her actions would still remain valid.

143. I must say that I initially almost accepted that interpretation. However, upon a closer scrutiny of the wording, I noted that the law-makers were talking about actions of directors before it was discovered that the appointment of such directors had a defect.

144. Once there was a finding or a discovery of a defect in the appointment or qualification of a director, the actions of such a director, thereafter cannot be deemed to remain valid.

145. The defendants' final submissions were that the suit herein was in the nature of a derivative action. Therefore, as it was filed without the leave of the court, the defendants submitted that it was not sustainable.

146. That issue was raised for the first time, during the final submissions.

147. As to whether or not a suit was sustainable is an issue which goes to the jurisdiction of the court.

148. Therefore, it is a matter which ought to be raised at the earliest possible time, in the life of the case.

149. And once such an issue is raised, the court is enjoined to determine it at the earliest opportunity, so that if the case was not sustainable, precious judicial time is not spent on going ahead to a trial which should never have been conducted.

150. However, the Defendants insist that the issue concerning the competence of the suit is not a technicality, but is a matter of procedure which ought to have been followed.

151. As a matter of abundant caution, the Plaintiff sought leave of the court, if the court were to find that this is a derivative suit.

152. But the Defendants reasoned that if the trial court were to consider granting leave at this late stage, that would be extremely prejudicial to the Defendants.

153. It was perhaps lost on the Defendants that the converse is equally true: that by their raising the issue of the competence of the suit after parties had closed their respective cases, that could be extremely prejudicial to the Plaintiff.

154. I hold the considered view that justice demands that the court ought not to be obliged to determine a matter which was raised so late in the proceedings, as it was never in the contemplation of the parties during the trial.

155. The determination I am making now is a judgment, after a full trial.

156. To consider a legal issue of a preliminary nature, and to use it as a basis for concluding this hard-fought, emotive dispute, would be to elevate procedural matters to a level that was higher than substantive justice.

157. Accordingly, I decline to render a determination on a matter which had never been an Issue during the trial.

158. Another reason why I decline to take the bait which the Defendants have laid out so tactfully at the tail-end of the trial, is that the Defendants already conceded that the Plaintiff was entitled to Accounts.

159. A consent order was already recorded, requiring the Defendants to provide accounts for the period 2006 to 2010.

160. There has been partial compliance with that consent order. Surely, when the Defendants and their advocate expressly and unreservedly declared a readiness to provide accounts to the Plaintiff, that must imply that they deemed as valid, the said prayer which is in the Plaintiff.

161. It thus goes back to the pleadings, in which the Defendants never disputed the competence of the suit; and also during both the pre-trial stage and the stage through which all the witnesses gave their evidence, when the conduct of the Defendants affirmed the lack of any legal challenge to the competence of the suit.

162. In conclusion, I find that the documents which were filed at the Companies Registry, for purposes of notifying the whole world that Pankaj had been removed as a director and had been replaced by Florence, were forgeries.

163. Therefore, as far as the official depository of information about the composition of the Board of Directors was concerned, Florence had not replaced Pankaj as a director in Metro Petroleum Limited.

164. However, the Defendants shut out Pankaj completely; and Kipsang with Florence continued to operate as the bona fide directors of the Company.

165. To that extent, the Defendants are right when they submitted that;

“..... it must shock any objective conscience if, after the totality of the evidence adduced herein, the Plaintiff would still be

insisting to be a director of the 3rd Defendant.”

166. Nonetheless, I reiterate that the removal of Pankaj as a director was not lawful. Although I appreciate that in reality he was effectively stopped from carrying on the duties of a director.

167. There is in place a consent order, requiring the Defendants to provide Accounts to the Plaintiff. The Defendants have failed to comply with the terms of the said consent order. In particular, the Accounts for the period 2006 up to 2008 have not been provided.

168. Similarly, the Defendants have failed to provide copies of most of the bank accounts, especially those which Florence and Kipsang had operated, to the exclusion of the Plaintiff.

169. I find that the Plaintiff is entitled to the Accounts, in accordance with the consent order, and I grant judgment that within the next 30 days, the Defendants must comply with the said consent order.

170. As a 50% shareholder, the Plaintiff is entitled to 50% of the profits made by the Company.

171. Kipsang and Pankaj had agreed on the need for an audit before the two directors could separate. No such audit was conducted.

172. The critical period for Kipsang and Pankaj is 2007 and 2008. I find that the Company stocks as at 2007 was 4,650,040 litres of petroleum products, as ably demonstrated by **PW4**.

173. The proceeds of the sale of the said products ought to have been paid into the Company's account; and the profits arising from the sales ought to have been available to Kipsang and Pankaj.

174. In a nutshell, I grant judgment in favour of the Plaintiff. He was irregularly side-lined by Kipsang and Florence, from being a director of the Company.

175. Kipsang and Florence had absolute control over the management of the Company from June 2007. Therefore, the accounts of the Company are in their hands. I believe that that is the reason why the Defendants readily agreed to make available the Accounts for the period between 2006 and 2010.

176. The court will make the final orders on issues as to quantum, after the period of 30 days, when the Defendants are required to have fully complied with the consent order dated 22nd February 2017.

177. Costs of the suit are awarded to the Plaintiff, against the Defendants.

FRED A. OCHIENG

JUDGE

DATED, SIGNED at DELIVERED at NAIROBI This 30th day of January 2020

MARY KASANGO

JUDGE