



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & ADMIRALTY DIVISION

HCC. NO. 16 OF 2015

CHARLOTTE NDAYISABA MFASONI.....PLAINTIFF

VERSUS

NADIANO CAR HIRE COMPANY LTD.....1ST DEFENDANT

NOEL ONYANGO ONYANGO.....2ND DEFENDANT

JUDGMENT

1. Nadiano Car Hire Company Limited (the Company or the 1st Defendant) has seen happier times. Charlotte Ndayisaba Mfasoni (Mfasoni or the Plaintiff) who claims to be an alternate director in the Company brings this suit against the Company and Noel Onyango (Onyango) for the sum of Kshs.26,608,900.00, interest thereon at commercial rates from 6th February 2009 until payment in full and taking of accounts of the Company's operations.

2. Annick Nadia Mfasoni (Annick) is the daughter of Mfasoni. She and Onyango are shareholders and directors of the Company. The Memorandum and Articles of the Company shows that each holds one (1) share therein. The Company was incorporated for purposes, inter alia, of running a Car Hire and Tour Business.

3. Mfasoni's case is that it was through use of her personal fortune, time and energy that the Company's fleet grew from 6 vehicles to over 22 by 2011. She avers and testified that she not only paid for the first batch of cars but also negotiated their purchases with the car dealers.

4. Mfasoni told Court that she made the following investments in the Company:-

<u>Date</u>	<u>Kshs.</u>
1. 6 th February 2009	Cash deposit Kshs.3,380,000/= into account No. 0102032200300 (P Exhibit (NM2)
2. 13 th May 2009	Cash deposit Kshs.250,000/= into account No. 01020332200300 (Exhibit (NM 3)
3. 6 th November 2009	Cash deposit Kshs.2,000,000/= into account No.0102028578300 (car max car Dealer)(P Exhibit (NM 4)
4. 20 th November 2009	Cash Deposit Kshs.232,000/= into account No.0100208671200 (p Exhibit (NM 5)
5. 29 th December 2009	Transfer of Kshs.920,000/= from CFC Stanbic Bank into Company's account (P Exhibit (NM6)
6. Between 1 st January	Various cash disbursement and 31 st March 2010 of Kshs.5,383,500/-.
7. 3 rd August 2011	Deposit of Kshs.2,100,000/= to Rosa Motors (P Exhibit (NM 8)
8. 4 th April 2011	Cash transfer of USD 25,000 (=Ksh.2,200,000/) to Rosa Motors (P Exhibit (NM10)

9. 10th September 2011 Credit of Khs.800,000/= to Rosa Motors.

10th January 2012 Cash deposit of Kshs.1,100,000/= into Company's account.

11. Monies paid in cash to third parties on behalf of the Company or given to the 2nd Defendant or his brother – Kshs.7,743,400/=

5. Mfasoni pleads that the arrangement with the Defendants was partly oral and partly by conduct. The oral arrangement, it is said, can be inferred from discussions between the Plaintiff and Onyango as the Company's Managing Director. As for conduct, it is averred that it can be inferred from the conduct of the Plaintiff in making the investment for the benefit and growth of the Company.

6. Further that as the business of the Company improved, Mfasoni and Onyango decided to open a health club, christened Nadiano Health Club. Her testimony was that she negotiated the lease and signed the Articles of Association of the intended Company. However, Onyango fraudulently registered the Health Club in his sole name and has used funds from the Company and from Mfasoni as startup capital to the Health Club.

7. In addition, Mfasoni complains that she not has received any returns or dividends from the Company for and on behalf of Annick save for payment of some Hospital Bills and Hotel accommodation. Mfasoni states that Onyango is the sole signatory of the Bank accounts of the two businesses, withdraws money for his personal use and mixes money of the two business.

8. Lastly that Onyango has refused to honour Bank loans contracted by Mfasoni on behalf of the Company yet he honours other loans. For that reason she continues to meet those loans alone.

9. Onyango and the Company resist the claim. Onyango admits that Annick and he are the Shareholders and Directors of the Company. He however denies that Mfasoni is an alternate Director and if so then her appointment was irregular and breached Article 14 of the Company's Articles of Association.

10. He denies the cash input or time and energy allegedly made by Mfasoni. He asserts that as Annick has been a permanent resident of Canada and the Plaintiff is a full time employee of the United Nations, he has solely run the Company including sourcing for contracts.

11. Onyango's defence is that the Plaintiff has never been interested or involved in the day to day running of the Company and she is allowing her personal differences arising from their romantic relationship to spill over to the running and management of the Company.

12. The above is the gist of the Statement of Defence dated 23rd March 2015 and filed on even date and the evidence in chief of Onyango.

13. His cross-examination was somewhat more revealing. His testimony was that Mfasoni was an alternate Director of her daughter Annick. That although the Company initially had two shareholders namely Annick and himself, the Company was an investment of three people.

14. At the close of hearing parties filed their respective submissions and there was concurrence that the following are the issues for determination:-

- a) Whether the Plaintiff purchased motor vehicles for and on behalf of the 1st Defendant?
- b) Whether the Plaintiff made personal investments in the business operations of the 1st Defendant?
- c) Whether the Plaintiff and the Defendants had any contractual arrangement?
- d) Whether the Plaintiff is entitled to the sum of Kshs.26,608,900.00 as against the Defendants?
- e) Whether the Court should order for the taking of accounts of the 1st Defendant?
- f) Who is entitled to the cost of the suit?

15. During the hearing of the Plaintiff's case Mfasoni fully relied on her witness statement of 15th January 2015 which is adopted as her evidence in-chief. She further produced a bundle of documents filed on 15th January 2015. She was not cross-examined on her evidence as neither the Defendant nor Counsel were present at the date of hearing. However, on 30th October 2017 there was an agreement between Counsel for the parties that this matter proceeds to defence hearing without the need for recalling the Plaintiff. For that reason the Plaintiff's testimony was not tested in cross-examination. Her evidence of the various contributions made to the Company was therefore literally unchallenged. This is of some significance because the tenor of the evidence by Onyango was not that Mfasoni did not contribute investments to the Company but that the money was part of her investment in the Company. The question of contribution made by Mfasoni was therefore not rebutted.

16. In the face of the various documentary evidence alluded to in paragraph 4 of this decision, this Court finds that the first two issues must be answered in the affirmative in favour of Mfasoni. There is evidence that she purchased vehicles for and on behalf of the Company. There is also evidence that she made some contribution in form of money to the business operations of the Company. The more crucial question is, what was the nature of contribution made by Mfasoni? In the Plaintiff and witness statement, the Plaintiff asserts that she has been an alternative Director to the Company. The shareholders being Onyango and her daughter. This is expressly admitted by the Defendants. In his

evidence Onyango suggests that the Plaintiff was infact a sleeping shareholder. He stated as follows:-

“The Plaintiff could not participate actively because she was employed. The Company was an investment of three people. We did not agree that the investment would be refunded to any of the Directors”.

17. In the submissions filed on her behalf by her Counsel, Mfasoni asserts:-

“We humbly submit that from the foregoing, it is very obvious that the Plaintiff was at the heart of the operations of the Company and symbolized all that was good, through her actions she brought out the proof of the intentions of the parties to enter into a legally binding agreement. The Plaintiff’s evidence was not controverted by the Defendants and the same remains unshaken”.

18. The evidence that emerges is that although not registered as a shareholder, the Plaintiff had a bigger interest in the Company than of a mere director hence her substantial contribution to the Company. This is perhaps buttressed by her expectations from the company when she stated:-

“To date I have not received any returns or dividends for and on behalf of my daughter, Annick Mfasoni save for the payment of my hospital bills and hotel accommodation expenses”.

19. This Court accepts the Plaintiff’s proposition that whether to treat the contribution as a loan to the Company or otherwise is a question of evidence. The Court also accepts the force of the following passage from the Court of Appeal decision in Abdukadir Shariff Abdirahim & Another vs. Awo Shariff Mohammed T/A A.S Mohammed Investments (2014) eKLR, that,

“There is no general rule of law that all agreements must be in writing. The numerous advantages of a written agreement notwithstanding, all that the law requires is that certain specific agreement must be in writing or witnesses by some written note or memorandum”.

20. Whilst a contract can be inferred from the conduct of the parties, there is need, where an agreement is not in writing, for the evidence to be cogent and clear. The Plaintiff in this matter has alleged that a loan agreement can be inferred from oral discussions between herself and the 2nd Defendant and from her conduct in making the substantial investments for the benefit and growth of the Company. On the issue of oral arrangement it is the word of the Plaintiff against that of the 2nd Defendant. With the 2nd Defendant insisting that this was an investment made by the Plaintiff without expectation of repayment.

21. On the Plaintiff’s part there is evidence that not only did she provide substantial funds for the Company but that she was fairly involved in its operations. That said, there is no evidence of any conduct between her and Onyango that suggests that the investments made were a loan to be repaid. There is no evidence that the term of the loan or the interest, if any, it would attract was directly or tacitly agreed or even discussed. There is no evidence that repayment was mutually anticipated.

22. It seems to this Court that the reason why the Plaintiff made the substantial investment was because her daughter was a shareholder of the Company. This can be inferred from the following statements in her testimony:-

“16. By 2010, Nadiano Car Hire business and its financial health was getting better and better and as a result we decided to open a health club- Nadiano Health Club, in which I was involved- I negotiated the lease, and signed the Articles of association (Annex CNM 15).

17. He fraudulently registered Nadiano Health Club in his sole name after I had entrusted him with the incorporation and registration of the business, which I had long assumed would be registered as a subsidiary of the Nadiano. The funds to start up the business were from me and the Company.

18. When I discovered this fraudulent and deceitful act, I demanded for accounts from the 2nd Defendant, but he was hostile and has remained so to date. He runs the two businesses as if they were his sole property and accounts to absolutely no one.

19. To date I have not received any returns or dividends for and on behalf of my daughter, Annick Mfasoni save for the payment of my hospital bills and hotel accommodation expenses”.

23. If the investments made are shareholders’ contributions to the Company and not a loan then the Plaintiff’s claim for recovery of money lent cannot succeed.

24. There is a second prayer for taking of accounts of the Company from the date of incorporation. Since it has been accepted by the 2nd Defendant that the Plaintiff is an alternate director in the Company then the Plaintiff has the standing to make a claim for taking of accounts if she can demonstrate that she is deserving of that order. The evidence is that it is the 2nd Defendant who has been solely involved in running of the Company. This is infact conceded to by the Defendants. For that reason it is believable that accounts may not have been rendered to the directors as required by law as claimed by the Plaintiff. Had they been, then nothing would have been easier than for the Defendants to produce those accounts which they failed to do.

25. The upshot is that prayers (a) and (b) of the Plaint dated 15th January 2015 are hereby dismissed. I allow Prayer (d). The accounts shall be taken by an independent Accountant to be appointed jointly by the parties and who shall file his report within 60 days of the date of

appointment. In default of such agreement, each party to appoint an Accountant and the two Accountants to appoint an umpire and the three to prepare a Report of accounts within 60 days of the appointment of the umpire. The cost of the Accountant or Accountants and umpire to be met by the Company.

26. The Plaintiff's suit being partially successful she will have half the costs of this suit.

Dated, Signed and Delivered in Court at Nairobi this 25th day of April, 2019.

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F. TUIYOTT

JUDGE

PRESENT:

Mbaji h/b Dar for Plaintiff

Akhaabi h/b Kimathi for Defendant

Nixon - Court Assistant