REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

CIVIL SUIT NO.135 OF 2012

PAUL MAKETE

JOHN MAKETE.....APPLICANTS

VERSUS

GILBERT HILLARY OKUMU….....DEFENDANT

J U D G M E N T

1. In the plaint dated 16th January 2012, the plaintiffs, ***Paul Makete*** and ***John Makete,*** plead their case in the following terms to wit that together with the defendant, ***Gilbert Hillary Okumu***, and one ***Agnes Masika,*** they are all directors cum, shareholders of the petrol or service station dealing in Lubricants, LPG gas and Petroleum products under the name ***Kiminini Service Station Limited***, a company incorporated the Companies Act (Cap 486) L.O.K).

2. That, in the year 2009, the defendant and ***Agnes Masika*** transferred to the plaintiff 5000 out of 10000 of their shares by way of sale and the injection of Kshs.1,250,000/= into the company by the plaintiffs who thereby became the majority shareholders. In ***September 2012***, Barclay Bank of Kenya advanced to the company a loan of Kshs. One (1) Million upon a guarantee by all the four directors of the company and in the month of ***October 2012***, the defendant secretly and without the knowledge and / or consent of the plaintiffs diverted three thousands(3000) litres out of the ten thousands (10000) litres of fuel destined to the company's petrol station using a motor vehicle Reg. No. KAU 053 W. The other petrol station being at a place called Kiungani and the value of the diverted fuel being Kshs.340,000/=.

3. That, the said action by the defendant amounted to theft and conflict of interest as the other petrol station was operated secretly by the defendant. Again, on ***25th October 2012***, the defendant acting unilaterally and without the knowledge and / or consent of the plaintiffs or without a resolution of the company's board of directors, locked and closed the company's petrol station (i.e Kiminini Service Station) for a period which extended upto ***26th December 2012***, when it was unilaterally opened by the defendant and after loss and inconvenience had been occasioned to the company and to the plaintiffs who could not access the station.

4. That, at the re-opening of the station in December, a stock taking was not undertaken as the station was run by the defendant to the exclusion of the plaintiffs who were barred by the defendant from accessing it. The plaintiffs therefore pray for judgment against the defendant for the sum of Kshs.340,000/= together with interest being the value of the diverted fuel and for orders that the station remain closed and only be re-opened after stock taking and a resolution of the board in that regard and further that the plaintiffs be allowed unconditional access to the petrol station and participate in its operations and also

that unpaid salaries, utility bills, re-current expenditure and other liabilities accrued during the closure period be paid personally by the defendant and that a special extraordinary meeting of the board of directions be convened within such time as the court may direct for normalization of the company's affairs.

5. As for the defendant, it was pleaded in the statement of defence dated 28th February 2013, that prior to the 24th November 2009, the defendant and Agnes Masika, were the beneficial owners of the entire share capital respecting Kiminini Service Station Limited. Upon their request, the plaintiffs were later allowed to join the business as partners and in that regard, five thousands (5000) shares of the company were transferred to them without the alleged consideration of Kshs.1,250,000/=. A mutual agreement was reached that in exchange for the transferred 5000 shares, the plaintiffs would operate the business on a full time basis thereby owing the defendant and the other partner a duty to act for proper purposes of the business. However, the plaintiff acted contrary to the agreement by depositing company funds into their personal accounts and running down the company business causing it to collapse and occasion loss and damage to the company "inter-alia."

6. The defendant further pleaded that the loan taken by the Company in ***September 2012***, was a top-up of an earlier loan taken in the year 2011, and was to be serviced through income from the business for which the plaintiffs were responsible. That, the fuel purchased and destined for the company petrol station was duty delivered. That, the vehicle transporting the fuel was through prior arrangement also transporting fuel to another petrol station, as such, there was no secret diversion of the fuel or theft. That, the business having been run down by the plaintiffs who also failed to meet public health requirements and pay rent, was mutually wound up. The station was thus shut down after existing stock was disposed off and was eventually let out and taken over by a different entity which currently operates it.

7. The defendant contends that the plaintiffs are not entitled to the reliefs sought. He denied the jurisdiction of this court and counter-claimed against the plaintiffs for an order directing them to provide accounts for petrol/ service station for the period between ***November 2009*** and ***October 2012*** and for an order of dissolution of the partnership between the defendant and the plaintiffs together with costs and interest of the counter-claim.

8. From the pleadings, the basic issues arising for determination are whether the entity known as Kiminini Service Station Limited is a company or a firm i.e partnership and whether depending on its description, the plaintiffs are entitled to the reliefs sought against the defendant. The plaintiffs contended that the business entity was a company and not a partnership as claimed by the defendant.

9. To fortify and establish their contention, the plaintiffs through ***John Simiyu Makete*** (PW1), produced a certificate of incorporation dated 15th August 2007 (P.Ex.1) together with the memorandum and articles of association (P.Ex.2). Also produced were company resolutions made on 24th November 2009 (P.Ex.3),Transfer of shares forms (P.Ex.4 1-b), the change of directors forms (P.Ex.7) and the annual returns presented on ***24th November 2009*** (P.Ex.8).

10. On his part, the defendant for purposes of establishing that the business was a partnership produced a partnership agreement dated ***9th November 2009***, signed by himself and the plaintiffs (P.Ex.2) and the minutes held by themselves as partners on the ***10th November 2009*** (D.Ex.1). However, the agreement came long after the business had been incorporated by himself (defendant) and Agnes Masika as clearly shown in the certificate of incorporation (P.Ex.1) and the Memorandum and Articles of Association (P.ex.2). In the circumstances, the partnerships agreement (D.Ex.2) was of no effect as indicated in the minutes (D.Ex.1) showing that for all intents and purposes the meeting was a meeting of the board of directors of the company rather than partners of a firm.

11. Suffice for this court to hold that the entity known as Kiminini Service Station Limited was a company incorporated under the Companies Act. (Cap 486 LOK) rather than a partnership under the Partnership Act (Cap 29 LOK).

For purposes of Company Law, incorporation denotes the legal process by which a group of people are

constituted and then enabled to carry on business in such a way that the business is legally regarded as a legal entity that is altogether separate from the members of the group, individually and collectively.

12. Under the companies Act (S.16(2)), the subscribers to the memorandum of association are a body corporate by the name contained in the memorandum from the date of incorporation as appears in the certificate of registration and the registration of the company constitutes it a body corporate to become a "***legal person***." The certificate of incorporation may therefore be regarded as the company's **"birth certificate"** and the date therein as the company's "***birthday.***" Herein, the company was born on ***15th August 2007***, with the defendant and Agnes Masika being the first two directors and shareholders.

13. The memorandum of association showed that the defendant held eight thousand (8000) shares while Agnes Masika, held two thousand (2000) shares. Later, five thousands (5000) shares were transferred to the plaintiffs at two thousands five hundred (2500) shares each (see P.Ex.4 a-b). The respective transfer was at a consideration of Kshs.250,000/- each and was effected on ***16th December 2009*** although the notice of change of directors (P.Ex.7) indicated that the plaintiffs were appointed as new directors of the company with effect from ***24th November 2009.*** This was confirmed by the company's annual returns (P.E.8)

14. The plaintiff thus joined the company when it was a going concern and since it had already been incorporated it was treatable like any other independent persons with rights and liabilities appropriate to itself. Its rights and obligations were not the same as the rights and obligations of the subscribers to its memorandum of association and other persons who joined it later as its members (***see, Salomon vs Salomon & Co. Limited) (1897) AC 22).*** In a partnership, a relationship subsists between persons carrying on business in common with a view of profit. Such a relationship is not a body corporate and is non existent in the contemplation of the law. Such business as appears to be carried on by a partnership is in fact carried on by the individual partners and thus explains why the plaintiffs and the defendant failed to agree on how to operate their common business. Whereas the plaintiffs believed that they were a company, the defendant believed that they were a partnership.

15. Because a company is at Law a different person from its members, it follows that a wrong to or by the company is not a wrong to or by the company's members. As such, members of a company would not therefore be subjected to the trauma and expense that are associated with litigation. It may not therefore have been wise for members of one company to bring this suit against themselves under the camouflage of protecting and defending the company which is by itself a legal entity with rights and liabilities appropriate to itself.

16. It is a known fact that the business of a company is managed by the directors and the manner in which they exercise their power is not governed by the Companies Act but such power is conferred on the directors collectively as a board and not individually. The powers are normally exercised by the holding of board meetings after due notice to all directors in that regard.Articles of Association may however empower the directors to appoint a managing director and other officers of the company and to confer on such officers such powers as the directors think may fit.

17. Herein, it is apparent that the company was disorganized. The rules pertaining to operations of a company were thrown out of the window by the plaintiffs and the defendant. They were all engulfed in petty disputes and disagreements and formed themselves into two groups pitting the plaintiffs against the defendant and Agnes Masika. To say the least, the organization and operation of the company business became a total mess. It was impossible to tell who among the directors was in-charge and responsible for the employees of the company. At one point it seemed that the plaintiffs were in-charge yet at another point it seemed that the defendant was running a "one man show" out fit.

18. Given the ugly state of affairs at the hands of all the directors of the company, it was not possible to tell whether any income generated by the business was "pocketed" and by which director or whether any of the directors stole or diverted to another petrol station fuel meant for the company or whether the loan obtained from a bank was fully repaid personally by any of the directors or whether it was repaid from the proceeds of the business or whether any of the directors was responsible for the closure of the business by

the pubic health authorities or whether any of the directors was actually denied access to the business premises.

19. The company was dealt the ultimate blow by the directors' fall out such that it had to surrender its business to a separate entity even without a resolution to that effect being reached by the directors. As it were, the company remained nothing but a shell of its former self. It's losses and damage were a direct result of its mismanagement by all the directors occasioned by a complete deadlock in the management of its affairs such that it was only just and equitable for it to be brought to an end by way of winding up rather than by the institution of this suit.

20. From all the foregoing factors, it is apparent that the reliefs sought by the plaintiff against the defendant may not be granted. Similarly, the counter-claim by the defendant against the plaintiffs may not be granted.

In sum, this suit and the counter-claim are hereby dismissed with each party bearing their own costs.

Delivered and Signed this 30th Day of June 2015.

J. R KARANJA

JUDGE