



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL & ADMIRALTY DIVISION
CIVIL CASE NO.607 OF 2010

CHARLES A. K. MULELA PLAINTIFF

V

KYANZAVI FARMERS COMPANY LIMITED DEFENDANT

J U D G E M E N T

1. The Plaintiff filed this suit on 14 February 2005 although the Plaintiff was dated 31 January 2005. He claimed that he had been elected as a director of the Defendant Company at an Annual General Meeting held on 27th March 2003. As a result of his appointment as a director, he was entitled to a monthly allowance of Shs. 90,000/-per month together with annual (directors) fees of Shs. 40,000/- per annum plus Medical Insurance Cover (AAR) of Shs. 65,000/- per annum. The Plaintiff in his Plaintiff, maintained that he acted as a director of the Defendant company from April 2003 until December 2006 when he ceased being a director. Taking into account the above emoluments, the Plaintiff claimed that he was entitled to an amount of Shs. 5,710,000/- together with costs at Court rates.

2. The Defence herein detailed that the said Annual General Meeting of 27th March 2003 had been called off and consequently the election of directors was not conducted. As a consequence, the Defendant denied that the Plaintiff had been validly elected as a director and further denied that it owed any monies to the Plaintiff in the form of allowances and/or annual fees for the periods claimed in the Plaintiff. As a consequence of the two separate applications before Court, the Plaintiff was first amended 23rd February 2005 and re-amended on 29th December 2009. On the latter occasion, the Plaintiff added the claim for Medical Insurer Cover. The Defence was amended to follow suit.

3. The hearing proceeded before Court on the 6 February 2013. The Plaintiff gave evidence to the effect that he was a director of the Defendant Company from 1985 to 2006. His problems with the Defendant

had started at the Annual General Meeting of the Defendant Company held on 27 March 2003. He was the Secretary of the Defendant Company at the time and he detailed that there was a dispute as regards the election of directors at the meeting. He stated that there was chaos at the meeting but nevertheless it was concluded and the minutes of the same were prepared by him. He agreed that the minutes were unsigned but stated that they would normally have been confirmed and signed at the next Annual General Meeting. From the minutes, six persons were elected as directors including the Plaintiff. He gave evidence that he was getting a salary of Shs. 9000/- per month and, once a year, he received Shs. 40,000/- by way of directors' fees. The Plaintiff thereafter referred to various vouchers detailing his emoluments in the Plaintiff's bundle of documents. However after 2003, he was not paid his allowance through to the year 2006. He maintained that he attended meetings of the directors every month and the Defendant company had visits from personnel from the Coffee Research Station at Ruiru ever so often, to show the company's personnel how to treat coffee, pruning et cetera. He used to attend such visits as part of his duties as a director. Thereafter, the Plaintiff produced a letter from the Registrar of Companies dated 10 July 2006 which clearly showed him as a director of the Defendant Company. Thereafter, the Plaintiff confirmed the contents of the Plaintiff as regards his claim against the Defendant Company.

4. Under cross-examination, the Plaintiff confirmed that he had taken the minutes of the Annual General Meeting of the Defendant Company held on 27th March 2003. One shareholder had suggested that he should be elected as a director unopposed but that the other directors would have to go. However, on being pressed, the Plaintiff confirmed the election of directors as per the minutes of the meeting. He also confirmed that as from that date, he had not taken the minutes again. The Plaintiff then took the Court through the cases that had been filed in court more particularly seeking the removal of directors, which case had been unsuccessful. With regard to directors' allowances, the Plaintiff confirmed his travelling allowance of Shs. 90,000/- monthly. He maintained that the Board of Directors had passed a resolution as to the payment of directors' allowances. He could not produce the minutes of that particular Board meeting. However, he confirmed that if he had to travel on behalf of the Defendant company, he was given a further allowance over and above the Shs.90,000/- monthly. He also confirmed that there had been a complaint levied against the former directors (of which he was one) before the Criminal Investigation Department. Nothing was ever proved. Finally, the Plaintiff noted that as at the end of October 2003, he was owed Shs. 990,000/- and no further allowances were paid until he ceased to be a director in December 2006.

5. Under re-examination, the Plaintiff maintained that the same 6 directors of the Defendant Company were in office from 2001 to 2006. The fact that Annual Returns were not filed by the Defendant Company during that period did not take away from the real position that the 6 were still directors of the Defendant Company. He confirmed that he was still a director of the Defendant up until the time the elections were held on 16 December 2006. He had produced the vouchers in order to show that they bore the rubber stamp of the Defendant Company indicating that they were proper vouchers issued by the Defendant Company. At the close of his evidence, the Plaintiff produced the Plaintiff's bundle of documents as Plaintiff's Exhibit 1 and two letters from the Registrar of Companies dated 27 September 2004 and 10 July 2006 were admitted into evidence as Plaintiff's Exhibit 2.

6. The Defendant company called its Managing Director, **Jovenna Musyoki Kaveta**, as its sole witness at the hearing hereof. He confirmed that he knew the Plaintiff and had worked with him from 1985 up to 2003. He recalled the Annual General Meeting held on 27 March 2003. When it came to the election of directors, the witness maintained that there were a lot of questions and the meeting was called off. There was chaos amongst the members of the Defendant Company over the fact that such members were unaware of who was running the company. Since 2003, there had been a number of court cases involving the Defendant Company. Mr. Kaveta confirmed that it was only at Annual General Meetings of the Defendant Company, where directors were given the power by the shareholders to fix their remuneration.

However, he confirmed that if the Plaintiff was a director of the Defendant Company, he was supposed to get something by way of fees, every month. He emphasized that it was not for the Plaintiff to come to court to claim emoluments, as a director, for the years that the Defendant Company did not call an Annual General Meeting. The witness confirmed that the last Annual General Meeting of the Defendant Company was held in 2001 while even the meeting held in 2006 had been interrupted by some of the older directors. Under cross-examination, the witness detailed that he was elected Managing Director of the Defendant Company on 16 December 2006. Before that date, he did not sit on the Board. The witness was then referred to a letter dated 21 September 2007 addressed by the Defendant Company to the Provincial Criminal Investigation Officer, Eastern Province. He confirmed that he was one of the signatories to the letter. Finally, under questioning from the Court, Mr.Kaveta stated that he did not know who had drafted the minutes of the Annual General Meeting of the Defendant Company held on 27 March 2003. The minutes produced by the Plaintiff were not correct as regards the election of directors. What had been said at the meeting was that some people refused the directors there to take office. Some members felt that the Defendant Company should not be taken care of by people who were not elected as directors. The witness noted that, at the end of the meeting, it was agreed that another meeting should be called but such meeting never did take place. The directors that were there before went to court, while the shareholders continued asking for the Annual General Meeting to be held, which direction was finally given by the Court in 2006.

7. The Plaintiff's submissions were filed herein on 14 March 2013. The Plaintiff sought recovery of terminal dues and/or unpaid dues owed by the Defendant Company. The Plaintiff submitted that whilst he was serving as a director, he was entitled to monthly allowances of Shs. 90,000/- per month, annual (directors') fees of Shs. 40,000/-and medical insurance cover for Shs. 65,000/- per year. The Plaintiff noted that the Defendant's refusal to pay these amounts was premised on the view that the Plaintiff was not its director in the period in contention. It maintained that the critical issue to be considered by the Court and to be proved on the balance of probabilities, was whether the Plaintiff continued serving as a director of the Defendant company between April 2003 and December 2006. With regard to the balance of probability, the Plaintiff submitted that even as at July 2006, the Registrar of Companies had acknowledged that the Plaintiff was a director of the Defendant Company. Further, the Defendant Company by its own letter dated 21 September 2007 addressed to the said Provincial Criminal Investigating Officer, Eastern Province had acknowledged the fact that the Plaintiff was a director of the Defendant company until 16 December 2006 when elections were ordered by the Court. The Plaintiff also maintained that he was entitled to the various allowances by reference to the vouchers produced before court relating to payments made to him in 2002 and 2003. Finally, the Plaintiff submitted that the Defendant was indebted to him and that DW 1 had not brought before court any evidence to contradict the Plaintiff's testimony that he was a director of the Defendant Company through to December 2006.

8. The Defendant through its submissions noted that the nature of the Plaintiff's case was for a liquidated claim and special damages, which have to be specifically pleaded and proved. The Defendant submitted that the Plaintiff had failed to prove his case to the required standard being the balance of probability. As regards the minutes of the Annual General Meeting of the Defendant Company held on 27 March 2003, the Defendant noted that the election for directors had been conducted by the area District Officer and it was alleged that 14 members had been put forward as suitable to be directors. The minutes purported to say that the District Officer had asked the 14 people to go outside and elect from their number, 6 directors. The Defendant noted that the minutes were not signed by the Chairman and the Secretary of the Defendant Company as required by law. Also, they were not lodged with the Registrar of Companies. As regards the Plaintiff's actions, although he had alleged that he was the secretary to the Defendant Company, he had failed to produce any evidence proving that he ever attended to any of the Defendant's business during the period in question. The Defendant then pointed to the letter from the Registrar General dated 10 July 2006 in which it had been detailed that the last annual returns filed by the Defendant Company had been for the period ending 31 December 2001. Further, the Registrar had noted that the Defendant Company could not file any annual returns since it had not been holding any Annual

General Meetings. Leaving aside the history of the Defendant Company immediately after the Annual General Meeting of 27 March 2003, the Defendant referred the court to section 184 of the Companies Act. That section detailed that the election of directors should be done by shareholders by way of voting. The Defendant maintained that the particulars of elections ought to be registered at the appropriate Registry. This was never done and thus the Plaintiff was not elected as a director. The Defendant submitted that all the documents tendered by the Plaintiff in his bid to prove the fact that he was a director of the Defendant Company were self-defeating, contradictory and generally in support of the Defence position that the Plaintiff was not a director between 2003 and 2006. Interestingly, the Defendant submitted that the Plaintiff would only be entitled to allowances if at all he was a director of the Defendant Company and there was a Company resolution approving such allowances. The Defendant concluded by stating that the Plaintiff's claim was an attempt to enrich himself unjustly. The Defendant asked this Court to dismiss the Plaintiff's suit with costs.

9. There is no doubt that the record-keeping of the Defendant Company in terms of its officers (being its directors and company secretary) has been diabolical to say the least. From the evidence before Court, the last Annual Return filed with the Registrar of Companies in relation to the Defendant Company was as at 31 December 2001. This Court would have been a lot the wiser if either of the parties had called a witness from the Registrar of Companies to produce the Defendant Company's file at the Registry. The Plaintiff would seem to be relying on the two letters dated 27 September 2004 and 10 July 2006 (Plaintiff's Exhibit 2) as proof that he was a director of the Defendant Company during the period for which he claims that he was entitled to emoluments being from April 2003 to December 2006. The letter from the Registrar of Companies dated 27 September 2004 simply states that from the Registrar's records 4 persons were directors of the Defendant Company including the Plaintiff. The second letter from the Registrar of Companies dated 10 July 2006 is more informative. It details that the Plaintiff among three others, were the current directors of the Defendant Company based on the 2001 annual returns. (Underlining mine). The letter went on to say that the last annual returns were filed for the period ending 31st December 2001. It then went on to say that the Defendant Company could not competently file any annual returns since it had not been holding any annual general meetings. In my opinion, all that can be garnered from those letters from the Registrar of Companies is that the Plaintiff was a director of the Defendant Company in 2001.

10. The List of Documents filed by the Defendant on 5 February 2013 contained a copy of the Memorandum and Articles of Association of the Defendant Company. By Article No. 1, the Regulations contained in Table A, Part II of the First Schedule of the Companies Act was to apply to the Defendant Company. Article 1 of Part II of Table A provides that the regulations contained in Part I of Table A shall apply in relation to the management of a private company limited by shares. Such, of course, includes provisions in relation to directors and Article 76 of Table A Part I reads:

“The remuneration of the directors shall from time to time be determined by the company in general meeting. Such remuneration shall be deemed to accrue from day to day. The directors may also be paid all travelling, hotel and other expenses properly incurred by them in attending and returning from meetings of the directors or any committee of the directors or general meetings of the company or in connection with the business of the company.”

11. This Article, which applies to the Defendant Company, affects the position of the Plaintiff. During his cross-examination, counsel for the Defendant asked him whether he could produce any resolution of the Defendant Company passed in general meeting as to the remuneration of directors. The Plaintiff was

unable to do so. Instead he has relied upon photocopies of various petty cash vouchers shown at pages 19 to 28 of the Plaintiff's bundle of documents. Such not only refer to the Plaintiff but also other directors of the Defendant Company. Unfortunately there is little consistency as between the various vouchers for the various directors. A lot of the vouchers detail directors' travel allowance for a particular month plus more money covering trips to Nairobi from time to time. I say "inconsistent" because, for example, the directors travel allowance for Mr. J. M. Munuka for November 2002 was Shs. 80,000/- but this included a trip to Nairobi on official duty. The Plaintiff's travel allowance for November 2002, drawn on 22 November 2002 (but with no trip to Nairobi) was Shs. 90,000/-, while Mr. I. W. Nzyaka drew Shs. 110,000/- for the same month but this included one trip to Nairobi on official duties. Finally, for the same month of November 2002, Mr. S. K. Muinde, another director, received Shs. 80,000/-which also included a trip to Nairobi on official duty. Then for December 2002 Mr. S.K. Muinde received Shs. 100,000/- by way of travel allowance, Mr. J. M. Munuka also received Shs. 100,000/-for the month, Mr. I. W. Nzyoka received Shs. 130,000/-while the Plaintiff received Shs. 120,000/-. What may be significant however is the last Petty Cash Voucher exhibited by the Plaintiff covering his director's travel allowance for the month of March 2003 clearly detailed at Shs. 90,000/-. As the court and the parties are well aware, the fateful Annual General Meeting for that year was held on 27 March 2003 and it is the Plaintiff's evidence that since that date he had received no travel allowance, to which he felt entitled. What the Plaintiff has not done, is to provide evidence of his claimed annual director's fees in the amount of Shs. 40,000/-per annum from 2002 to 2006 totalling Shs. 200,000/-. The Plaintiff has also not provided evidence of his entitlement to Medical Insurance Cover at a premium of Shs. 65,000/-for the 4 years 2003 to 2006. There is no Defendant company resolution at general meeting or even a Board of Directors' resolution which has been produced before this Court to show any entitlement to the amounts claimed by way of emoluments to the Plaintiff. All that the Plaintiff detailed in his evidence before Court was that the directors' allowances were accumulating every year. However, the Defence witness did inform the Court that if the Plaintiff was a director of the Defendant Company, "he was supposed to get something every month".

12. That brings me to the question of whether the Plaintiff was in fact a director of the Defendant Company from April 2003 to December 2006. Firstly, the letter from the Plaintiff's then advocates, Makau, Isika & Company dated 3 October 2003 is instructive. It noted in the second paragraph that the chairman of the Defendant Company had held directors' meetings without inviting the Plaintiff. It also went on to say that the Plaintiff had not been paid seven months directors' allowances of Shs. 90,000/-per month, annual directors fees of Shs. 40,000/-per annum for two years and car transport allowances per week for the period April 2003 to October 2003 being Shs. 280,000/-. That would seem to work out at approximately Shs. 40,000/- per month by way of transport allowance. This letter lends even more confusion to the Plaintiff's claim. As if that was not enough, the Plaintiff has also produced before Court his letter to the chairman of the Defendant Company dated 16 June 2003. In my opinion, the following quotation therefrom is telling:

"I therefore would like to emphasize to you that as far as everything is concerned, I am still a director of Kyanzavi Farmers company ltd, and I am supposed to be receiving my monthly allowances plus other extra travelling allowances for visiting coffee picking exercise twice every week.

As I told you during that meeting with you, you should not mix two issues that is, the meeting of 27th March 2003 (A. G. M.) and my directorship. I was elected by the owners of the Kyanzavi F. co. ltd all the years since 1985 to 2003. So I am a director plus....."

Further down in that letter at the fifth paragraph thereof, the Plaintiff wrote:

“I therefore ask you kindly to pay my allowances for the months of April, May and June and continue doing so for future months until when new directors will be registered by the Registrar of companies.” (Underlining mine).

13. In my opinion, the Plaintiff’s said letter implies that he was only a director from 1985 to March 2003 but as the Annual General Meeting of 27 March 2003 aborted, the Plaintiff considered himself to be continuing as a director of the Defendant Company. The Plaintiff tried to make much of the letter dated 21 September 2007 from the Defendant Company to the Provincial Criminal Investigation Officer, Eastern Province. The Plaintiff felt that he was confirmed as a director as his name (together with others) was detailed in the heading to the letter which then stated in its first paragraph:

“The above persons were Directors of Kyanzavi Farmers Company Limited. The elections as ordered by the High Court were held on 16th Dec 2006.”

However this court takes cognizance of the second part of the third paragraph of the said letter which read:

“Another reason for approaching your office for assistance is that all along from 2002 up-to Dec 2006, the Company never held any Annual General Meeting and every time the members agitated for the same and attempted to meet at the company’s registered office that are situated along Kangundo-Thika Road in the recently created Kangundo District, Police officers would always be used to disperse them through the influence of the Directors until when the High Court intervened.” (Underlining mine).

It was Mr. Kaveta’s evidence that meetings for the election of directors should be held and it was not for the directors to come and claim something for the years that they did not call an Annual General Meeting.

14. I have no doubt and it has not been challenged, that the Plaintiff was a director of the Defendant company right up to the aborted Annual General Meeting held on 27 March 2003. I have read with interest Minute 6/27/03/03 – Election of directors, in the minutes which the Plaintiff said that he took at/of the Annual General Meeting as the Secretary of the Defendant company. Those minutes were never signed and consequently are of little effect. In fact, they amount to the Plaintiff’s word for what took place. What the Plaintiff has detailed therein is that all the directors who were in office up to the date of the meeting would retire and a fresh election held for 6 directors to be elected. The meeting then became heated and eventually, after the local MP calmed everybody down, the District Officer, Matungulu, took

charge to supervise the election of directors. It appears that the said District Officer asked members present for nominees for directors and 14 people were put up for election. It also appears that the 14 were to leave the meeting, go outside and nominate 6 of their number to be the directors of the Defendant Company. The minutes read that amongst the 6 elected (by the 14), the Plaintiff was one of them. However, this is not what the Defendant's witness recalled as to what happened at the Annual General Meeting. He stated:

“I remember 27th of March 2003, there was an A. G. M. and when it came to the election of directors, there were a lot of questions and the meeting was called off.”

15. Whichever version is correct to what transpired, proceedings of companies at general meetings are spelt out in their Articles of Association. Bearing again in mind, that the Defendant's company's Articles adopted Table A to the Companies Act, article 62 thereof will apply to the Defendant Company as regards the votes of members. It reads:

“Subject to any rights or restrictions for the time being attached to any class or classes of shares, on a show of hands every member present in person shall have one vote, and on a poll every member shall have one vote for each share of which he is the holder.”

From the Plaintiff's version of events at the said Annual General Meeting the 6 directors who were “elected” were in fact elected not by the members of the Defendant Company present at the Meeting but only by 14 of them. If the court was to go by the Defendant's witness' account of the Meeting, it was aborted anyway prior to any directors being elected. Whichever version, to my mind the result is the same – no director was validly elected at the Annual General Meeting held on 27 March 2003. It is probably correct that the resolution that the previous directors should stand down en masse was properly passed by a majority of the members of the Defendant Company at the Meeting. It seems therefore that with effect from 27 March 2003, the Defendant Company was without directors. It is probably for this reason that Annual Returns were not filed and that Annual General Meetings were not held until ordered by the Court in December 2006.

16. The conclusion to all the above is that I find that the Plaintiff retired as a director of the Defendant company at the aborted Annual General Meeting held on 27 March 2003. I find that he was not re-elected at that Meeting or at any other meeting of the Defendant Company. Accordingly, I find that his claim for travelling allowances, directors' annual fees and Medical Insurance Cover are unwarranted and I dismiss the re-Amended Plaint with costs to the Defendant.

DATED and delivered at Nairobi this 23rd day of May, 2013.

J. B. HAVELOCK

JUDGE