



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
COMMERCIAL & TAX DIVISION
CIVIL CASE NO. 542 OF 2007

PANKAJ SOMAIA.....PLAINTIFF

VERSUS

BILL KIPSANG ROTICH 1ST DEFENDANT

FLORENCE ROTICH 2ND DEFENDANT

METRO PETROLEUM LIMITED....3RD DEFENDANT

FINAL FINDINGS ON QUANTUM

On 30th January 2020 the Court delivered its judgment.

1. By the said judgment I held that the Plaintiff had been irregularly side-lined by Kipsang and Florence from being a director of the Company.
2. Whilst the Plaintiff had been effectively stopped from carrying on the duties of a director, I held that his removal from the Board of Directors was unlawful.
3. The court noted thus;

“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.”

4. The agreement was embodied in a consent order which was made on 22nd February 2017, and which was in the following terms;

“1. The Defendants will provide to the Plaintiff Accounts for the period 2006 to 2010, within the next 3 Weeks.

2. The Accounts include:

(a) Bank Statements at Consolidated Bank: Family Bank & Oriental Commercial Bank;

(b) Financial Statements

(c) Statements of Loading and Supplies of Kenya Pipeline, in respect of 3rd Defendant;

(d) Supporting documents including invoices and receipts; payroll

3. Directors' Accounts for 2006 to 2010.”

5. Notwithstanding the consent order dated 22nd February 2017, the trial court concluded its judgment by holding that the Defendants had failed to comply with the terms thereof.
6. I reiterated that the Plaintiff was entitled to receive the Accounts, in accordance with the consent order. The Defendants were ordered to provide the Accounts within a period of 30 days from 30th January 2020.
7. The Defendants filed 3 bundles of documents, comprising Annual Accounts for the Company, **METRO PETROLEUM LIMITED**, for the period between 2006 and 2014.
8. The parties filed submissions, in an endeavor to provide the trial Court with a summary of their respective understandings of the Accounts.
9. It is common ground that the Total Sales Turnover during the period when the Plaintiff was side-lined as a director, was Kshs 1,512,213,900/=.
10. Meanwhile, the Plaintiff asserts that the aggregate sum deposited in the Company's Accounts was Kshs 1,166,241,264/=, whilst the Defendants cite the total sum deposited as being Kshs 1,512,609,632/=.
11. Going by the Plaintiff's figures, there was a shortfall of Kshs 345,972,632/=. However, if we went by the Defendants' figures, there would be a surplus of Kshs 395,800/=.
12. The parties utilized different exchange rates for calculating the Kenya Shillings equivalent for the payments which were received in Dollars.
- 13./ On the one hand, the Plaintiff applied the conversion rate of 1\$ = Kshs 85.00. Whilst on the other hand, the Defendants applied the conversion rate of 1\$ = 84.40 Kshs.
14. According to the Defendants, the application of that exchange rate was testament to their candour and commitment to the truth.
15. Meanwhile, the Plaintiff submitted that the rate he had applied was the

"approximate average of applicable rates during the period under consideration."
16. Apart from his said assertion, the Plaintiff did not provide material upon which the court rely to verify his said assertion.
17. The Defendants position is equally unsupported by supporting documents. They simply cited the proposed rate of being

"the average exchange rate"
18. Accordingly, neither of the parties provided useful supporting documents that would have been verifiable.
19. In the circumstances, the court reminds itself that it is the Defendants who had the onus of providing Accounts, in accordance with the terms of the consent order.
20. Secondly, it is the Defendants who were actually operating the businesses, and were therefore operating the Company accounts. In the circumstances, I hold the considered view that the Defendants were in a position to provide actual rates which they had applied at every given time.
21. By failing to provide the court with the actual rates that were applied, the assertion by the Defendants concerning their alleged candour and commitment to the truth, rings hollow.
22. I note that the Defendants failed to produce the Financial Statements for the year 2006.
23. The said failure is a breach an order which the parties had consented to.
24. Considering that the consent order was entered into on 22nd February 2017, it would have been expected that the Defendants knew, or ought to have known, that the accounts for the year 2006 were available.
25. The Defendants have attributed their failure to provide the Accounts for 2006 to the following:

"Secondly, the financial statements of 2006 having been largely handled by the outgone auditors and the plaintiff, whilst they were seen by the 1st Defendant in draft, and not having been signed, they could not be laid before the court."

26. I am unable to fathom the wisdom in that statement, which was made on 25th September 2020, long after the Defendants had expressly committed themselves to provide the accounts.

27. This is not the stage of proceedings at which a party may seek to justify why accounts cannot be made available. At this stage, the Defendants had an obligation to discharge, pursuant to the consent order.

28. They have failed to comply with the said consent order: and that conduct speaks volumes about the Defendants.

29. As regards the financial position as at 30th June 2009, the bank statement from Giro Bank Limited reflected an overdraft of Kshs 25,242,721.28. Meanwhile, the accounts reflected a credit balance of Kshs 39,205,983.00.

30. The Defendants submitted that their decision to put forward bank statements which were at variance with the audited accounts was yet a further testament of their candour and their commitment to the process.

31. Far from it.

32. Documents speak for themselves. And what they have said very loudly is that there is a huge discrepancy between the bank statements and the audited accounts. Such a discrepancy cannot be evidence of reliability of the material presented by the Defendants.

Invoices and Receipts

33. As the Plaintiff pointed out, the invoices provided by the Defendants account for Kshs 20,073,665.20, whilst the turnover for the period was in excess of Kshs 1.5 Billion.

34. The Defendants acknowledged that, pursuant to the consent order dated 22nd February 2017, they were required to supply receipts, invoices and other documents for the period between 2006 and 2010.

35. However, instead of complying with the order, the Defendants submitted thus;

“32. Lordship, these invoices and receipts are available, and can be furnished to the Plaintiff: to demonstrate that, sample of the invoices have been made available to the Plaintiff and the Court.”

36. In effect, the Defendants have invoices and receipts which they are supposed to have made available. However, they have failed to provide them.

37. In **KENYA AKIBA MICRO FINANCING LIMITED Vs EZEKIEL CHEBII & 14 OTHERS HCCC NO. 644 OF 2005** Mabeja J. held as follows;

“Where a party has custody or is in control of evidence which that party fails or refuses to tender or produce, the court is entitled to make an adverse inference, that if such evidence was produced, it would be adverse to such a party.”

38. On 22nd February 2017, the 1st Defendant told the court that he would provide the accounts if the Plaintiff asked for them or if the court directed him to provide the said accounts.

39. Thereafter, Mr. Bwire, the learned advocate for the Defendants told the court that his clients would have no problem in providing the accounts, because, (as he said),

“Pankaj is entitled to the accounts as a shareholder.”

40. When the court sought to know how much time the Defendants required to enable them provide the accounts, they said that they needed a period of 3 weeks.

41. That means that by the end of March 2017 the Defendants should already have provided the accounts.

42. In the circumstances, when the Defendants had still not provided invoices and receipts to support the financial statements, it means that they had no intention to comply with the court order.

43. Accordingly, I can only infer, as I hereby do, that the audited accounts for the year 2006, as well as the invoices and receipts which have been withheld, would have been adverse to the Defendants.

44. A similar inference is hereby drawn in relation to the Loading Orders and the Kenya Pipeline Statements for the period between 2006 and 2010.

Directors Accounts

45. The Defendants have reasoned that the 1st and 2nd Defendants did not make any drawing and benefits from the Company, save for the 1st Defendant's salary.

46. It was explained that the 1st Defendant was an Executive Director of the Company, on a full-time basis.

47. I note that the Defendants have not disputed the Plaintiff's contention that Bill Rotich drew a salary of Kshs 25,799,928/=. Therefore, I find that that is the amount Bill earned as his salary.

48. The Plaintiff has not demonstrated that, apart from the said salary, Bill Rotich earned any other drawings or benefits from the Company. Therefore, the absence of Directors' Accounts does not, of itself, give rise to any adverse inference against the Defendants.

Salaries, Wages, Rent & Rates

49. The Defendants said that the Company continued to pay rent at its leased offices between 2008 and 2014. They reminded the court that during that entire period, the Company was a going concern.

50. In my understanding, when the company was a going concern, that implies that it not only had the resources needed for it to continue operating, but also that it was operational.

51. When the Company herein was able to continue paying salaries, wages, rents and other outgoings, that implies that it was, indeed, a going concern.

52. However, I also note that the Defendants have confirmed that between 2012 and 2014, the Company was not trading. In the said circumstances, one could question the wisdom in continuing to incur expenses, in paying both salaries and rents, during the said period.

53. However, I am fully alive to the fact that my task is not to assess whether or not the Defendants made prudent decisions.

54. The Defendants have confirmed that the rent paid between 2012 and 2014 was Kshs 35,151,633.00. However, my calculations show that the rent for that period was a total of Kshs 18,431,602/=-.

55. During the period between 2012 and 2014, the Company paid salaries totaling Kshs 43,479,432/=-.

56. Although the Company was allegedly not carrying on business during the said period, the Defendants say that the Kenya Revenue Authority claimed Tax amounting to Kshs 115,171,256.26. Out of the said sum, the Principal Tax liability was said to be Kshs 62,000,000/=-.

57. In my understanding, the tax base for a company consists of the total amount of its Income, Property, Assets, Consumption, Transactions or other economic activity, which is subject to taxation as by law prescribed.

58. In this instance the Kenya Revenue Authority presumably demanded tax based on the Company's economic activity.

59. The Company said that it entered into a Deed of Settlement, pursuant to which;

“ the total amount owed to KRA was Kshs 115,171,256.26, of the said amount Kshs 62,000,000.00 was the principle tax liability of the 3rd Defendant”

60. The Defendants went on to say that;

“Of the Line fill of 1,616,000 litres. 770,000 litres were utilized by the Kenya Revenue Authority to settle the tax obligations of the 3rd Defendant. There is a balance on the Line fill of 846,000 litres.”

61. From the foregoing, I find that the Company was, indeed, a going concern.

62. It carried on business, even if not at optimal levels. In order to be able to continually pay rents, salaries, wages and tax, the Company was making money.

63. The amount of money being made by the company is not ascertainable from the accounts filed by the Defendants. I so hold because the said accounts have both gaps and errors. The accounts also lack supporting documents.

64. But there is consensus about the value of the turnover, which was in the value of Kshs 1,512,213,900/=-.

65. Considering that the principal tax liability was agreed upon between the Company and the Kenya Revenue Authority as being Kshs 62,000,000/=-, I find that a reasonable presumption was that the profits made by the Company would be Kshs 186,000,000/=-. The said sum constitutes 3 times the agreed principle tax, as the highest tax payable in Kenya is ordinarily up to 30% of income.

66. I find that the Plaintiff was entitled to 50% of the profits. That means that the Plaintiff was entitled to Kshs 93,000,000/=-. He is therefore awarded that sum, together with Interest at Court rates from 1st January 2015. The date from when interest is calculable has been informed by the fact that the figures about which the Defendants have provided accounts, date back to the period up to December 2014. Therefore, I hold the considered view that by January 2015, the Plaintiff had become entitled to receive his share of the profits.

67. Indeed, in respect of profits for the earlier years, he would have become entitled to his share year by year. Therefore, by ordering interest to be payable from 1st January 2015, the court was being extremely generous to the Defendants.

68. Finally, I decline to give orders with regard to the Plaintiff's proposed Recovery Strategy. The mode of execution, if it became necessary for the Plaintiff to have the Decree executed, is not a matter that the trial court can get involved in determining, when delivering judgment.

DATED, SIGNED and DELIVERED at KISUMU Through Virtual means This 10th day of November 2020

FRED A. OCHIENG

JUDGE