



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CIVIL CASE NO. 1 OF 2015

DAHIR SADIK AUSAAD.....PLAINTIFF

VERSUS

MODOGASHE CONSTRUCTION LTD.....1ST DEFENDANT

JELLE MAALIM ABDI.....2ND DEFENDANT

ABDI BASHIR ABDI.....3RD DEFENDANT

FIRST COMMUNITY BANK.....4TH DEFENDANT

JUDGEMENT

1. The plaintiff herein came to this court through a plaint filed on 10th April 2015 claiming to have been a director of Modogashe Construction and Transportation Company Limited, the 1st defendant and alleging that the 2nd and 3rd defendants Jelle Maalim Abdi and Abdi Bashir Abdi illegally operated the company through excluding him and in the process denied him participation and sharing of profits. He alleged that through secrecy the company acquired two motor vehicles Reg. No. KHMA 664E – a tractor and KHMA 697E – a roller/grader/crane. In addition that the company opened and operated a bank account with the 4th defendant First Community Bank without informing him. He alleged that as a consequence he had suffered loss and damage and asked from this court judgement against the four defendants jointly and severally for –

(a) A permanent injunction do issue restraining the 2nd, 3rd and 4th defendants, their servants and/or agents from wasting, mismanaging, misappropriating, tempering, drawing or operating the said bank account without a Board Resolution sanctioning the same.

(b) A permanent injunction restraining the 2nd and 3rd defendants from wasting, using, transferring and/or use of motor vehicles Reg. Nos. KHMA 664 (crawler tractor) and KHMA 697E (roller/grader/crane) without the consent of the plaintiff.

(c) Damages for losses occasioned by the acts of the 2nd and 3rd defendants.

(d) Damages for acts and/or omissions of the 4th defendant.

(e) Cost of the suit.

(f) Any other relief the court deem fit to grand.

2. In response, the defendants filed a joint statement of defence and counter claim on 12th May 2015. They denied the allegations in the plaint and stated that the plaintiff did not participate in any manner in the acquisition of the motor vehicles and that the plaintiff relinquished his shares on 25th August 2009 on ceasing to be a director. They stated also that there was a previous civil suit Garissa Chief Magistrate Civil Suit No. 43 of 2014 on the same subject matter. The 1st, 2nd and 3rd defendants also claimed that the plaintiff ceased to be a director on 25th August 2009 and was reimbursed his contributions to the initial capital of the 1st defendant. Secondly, they counter claimed against the plaintiff for a declaration that the plaintiff ceased to be a shareholder and director of the 1st defendant on 25th August 2009 and sought that the suit be dismissed with costs and also that a declaration do issue that the plaintiff ceased to be a member and director of the 1st defendant on 25th August 2009.

3. In response to the defendants' defence and counterclaim, the plaintiff filed a reply to defence on 5th June 2015, and stated that he was not

aware of the alleged meeting of 25th August 2009 and denied receiving reimbursement for his contributions to the initial capital of the 1st defendant. He said that he had never opted to cease being a director and shareholder of the 1st defendant as he could only do so through due process in accordance with the Companies Act and the Memorandum and Articles of Association the 1st defendant.

4. The case proceeded to hearing through oral evidence of the parties and witnesses. At the close of the case, both the plaintiff's and the defendants' advocates filed written submissions which I have perused. Counsel attempted to raise issues in their respective submissions for determination by this court.

5. In summary, the plaintiff Dahir Sadik AUSAAD testified as PW1, and adopted his filed witness statement as well as list of documents. He stated that one of his document (No. 12) which was a bank statement to be provided by the 4th defendant First Community Bank had not been provided and thus was not in the bundle documents filed by him. He confirmed that the other documents were marked as plaintiff exhibits 1 to 23.

6. According to him, he came up with the idea of forming Modogashe Construction Company in early 2007 and proposed the same to Jelle Maalim the 2nd defendant who said that as he did not understand English and Kiswahili, he would want his brother Abdi Bashir Abdi the 3rd defendant to join them.

7. The three then registered the company with him having 35% shareholding while Jelle had 35% and Abdi Bashir Abdi 30%. When they started operating the company however, Jelle became selfish and said that the plaintiff and Abdi should leave.

8. Later Jelle and Abdi prepared a fake certificate and removed him as one of the three directors of the company. He denied discussing his removal as director from the company and denied knowledge of any resolution for his resignation from the company. He said that he did not swear an affidavit to transfer his shares to Jelle Maalim, nor sign a share transfer form in favour of Jelle Maalim.

9. With regard to the defendants supplementary list of documents filed in February 2016 on minutes of a meeting held on 29th August 2009, he said that though the minutes showed that Jelle Maalim Abdi, Abdi Bashir Abdi, Dahir Sadik AUSAAD and Shukri Sadik AUSAAD were in attendance, and that the discussions were for refund of shares to Dahir Sadik AUSAAD, he did not attend that meeting, and Shukri AUSAAD his brother also did not attend the meeting. According to him he did not sign any attendance register of the meeting, nor did Shukri AUSAAD, which minutes were also not confirmed by them as directors.

10. On the letter dated 5th September 2009 said to be written by him to Jelle Maalim to request transfer of his shares to Jelle, he denied writing the letter and said that if it was genuine, the same would have been addressed to Modogashe Construction Company, not to Jelle.

11. He denied signing document 21 a letter, and 22 a bank performance bond, in plaintiff's list of document. He admitted that his name was in the documents but denied that the signature was his. He also said that as the documents were dated 2014, and he was said to have left the company in 2009, such action by him would be an impossibility.

12. On the company bank account with First Community Bank, he stated that as they operated the account, Jelle used to inform him what was happening, as he was involved in other personal jobs. He only made decisions as a director when Jelle asked him to do so, and did not know how much money was in the bank account.

13. He asked this court to find that he was a bona fide director of the company and possessed rights like other directors. He complained that though the three directors initially came together to form the company to make profits, the other two directors did not want him to benefit, but merely to bear burdens and liabilities of the company. According to him, he was entitled to get profits from jobs executed by the company, in proportion to the shares the three (3) directors had agreed to.

14. In cross-examination, he stated that the other two directors kept him in the dark on bank statements and thus did not know the company profits. He also did not have copies of documents or minutes to show the decisions made with regard to plaintiff's exhibits 1 to 23. He agreed that documents 3 to 11 were tenders awarded to the company none of which he signed. He agreed that though the company was incorporated in 2007 tenders were awarded only from 2010. He agreed also that a bank account with First Community Bank was opened in 2010 but insisted that he was not consulted or informed about it, and was thus not a signatory to the same.

15. When referred to plaintiff's document No. 20 – a letter dated 5/9/2009 he said that he signed the letter acknowledging receipt of money, and said there was a meeting of August on the same. He agreed that there were several meetings they held without minutes.

16. When shown the defendants' list of documents, he agreed that he was sole proprietor and director of Dayaa Construction Company registered in August 2008. He agreed that he owned another company with other partners, Mansale Engineering registered in 2010, and that both companies carried out construction business. He agreed that the two tractors KHMA 665E and KHMA 697E belonged to Modogashe Construction Company – and were acquired through loan facilities, and that he did not pay money for their acquisition.

17. In re-examination, he maintained that the letter dated 5/9/2009 bore his signature and stated that he owned three bank accounts with First Community Bank, one personal and two for companies. He said that though there existed minutes of 29/8/2009, his signature and that of his brother were missing, but agreed that the stamp for 7/7/2015 was for First Community Bank. He said that the award of contract from County Government of Garissa – Ministry of Transport was for Ksh.98,206,495/=. He stated also that his commitment with the company was based on oral agreements, and no minutes were kept.

18. That was the end of the plaintiff's evidence.

19. DW1 was Omar Abdi Hassan a former Bank Manager of First Community Bank between 2011 and July 2016 when he resigned. He adopted his witness statement and said that Modogashe Construction and Transport Company opened a bank account on 9/9/2010 in the name of two directors, as one director had resigned. The account was opened at Garissa Branch as No. 29772189, Memorandum and Articles of Association, Certificate of Registration of Directors, KRA PIN numbers and a letter showing that one director had sold his shares to Jelle Maalim Abdi on 5/9/2009 was submitted. There was also a minute showing that one director Dahir Sadik AUSAAD wanted a refund of his shares. The bank account after clearance from the headquarters was opened on 9/9/2010. At that time no loans had been taken on the account. He was aware that the plaintiff operated other bank accounts in the same bank.
20. According to him, the two motor vehicles KHMA 664E and KHMA 667E (tractors) were financed by the bank for Modogashe Construction Company Limited in April and May 2014 and the company repaid the money.
21. In cross-examination, he stated that the bank account was opened in 2010, while he worked as manager for the bank from 2011 to 2016. He however knew the requirements for opening an account.
22. He stated that a search at the Companies' Registry to confirm directorship was ordinarily done after opening of the account. He said that no company minutes for opening the account were received by the bank, and said that the company resolution would be a bank document which he did not have. He also did not bring the application forms, as they were bank documents and the bank did not know he was coming to testify in court. He said that he attended court because he was the Bank Manager when the case was filed, but said that he did not ask the bank for any documents before coming to court. He denied knowledge of contempt proceedings commenced against the bank.
23. He maintained that he was a witness for the bank because he filed a witness statement, but was not aware of a criminal case pending in the Magistrate's Court relating to his work.
24. In re-examination, he said that he joined the bank in 2008 as a Customer Service Officer and his work included verifying documents from customers.
25. DW2 was Abdi Bashir Abdi, the 3rd defendant who is a businessman. He adopted his written witness statement and stated that he was a director and shareholder of Modogashe Construction Company which was formed on 28/5/2007 by three people, himself, Jelle Maalim and Dahir Sadik AUSAAD as directors and shareholders – with Jelle having 35%, Dahir 35% and himself 30% shares. The company's purpose was to do construction and transportation.
26. According to him, they did not commence business until 2010. On 29/8/2009 Dahir left the company. This happened on 19/8/2009 Dahir approached Jelle Maalim his neighbour and shopkeeper, and Shukri a brother of Dahir told Jelle that his brother wanted to leave the company as it was not operating. Shukri asked for a meeting and they met on 28/8/2009 and as each of the three initial directors had paid Kshs.15,000/= as shares (Kshs.45,000/= total), and Dahir asked for Kshs.30,000/=, they did not refuse. Minutes of the meeting of the four (4) were recorded, which he produced as D-exhibit 1.
27. It was his evidence that on 5/9/2009 – they paid Dahir the money and then wrote a letter to him, which he signed (3rd letter in the list). He also signed a company's resolution and form of transfer of shares which were with the Registrar of Companies. They however did not transmit the documents to the Registrar of Companies until 10/1/2014, because as Muslims they trusted one another. They only sent the documents to the Registrar of Companies when Dahir said he would take them to court. They then got a confirmation dated 29/6/2015 that Dahir had ceased to be a member of the company, addressed to Kenyanya & Associates Advocates. The letter also confirmed only two shareholders Jelle Maalim with 70% and Abdi Bashir 30% shareholding. He produced the documents as a bundle. He stated that the company started operating in 2010, starting with the project of Modogashe Hospital – and stated that all contracts were not signed by Dahir.
28. According to him, they opened an account with First Community Bank on 9/9/2010 – No. 29772189 Garissa Branch with only two registered signatories, as the plaintiff had left the company. They also took a loan and bought two tractors – bulldozer KHMA 664E, and grader KHMA 697E in the name of the company – after borrowing Kshs.20,000,000/= which they paid through personal accounts and earnings from Makuti Hotel, and the company funds. He stated that Shukri Sadik a brother of the plaintiff who was to be their witness, had died.
29. According to him, the plaintiff operated another company under a business name called Dayaa Construction Company registered on 2/7/2008. He stated that the plaintiff had not called a shareholders or directors meeting, nor had the company received a letter of complaint from him that they sidelined him. He said that he was the Secretary of the Company, though there was no Chairman.
30. In cross-examination, he maintained that the plaintiff left the company on 5/9/2009. He said that he was aware of the process of one leaving a company. He insisted that the meeting of 29/8/2009 was attended by four people, but only himself and his brother Jelle signed the minutes, which was one of the documents they filed with the Registrar of Companies, with other documents, of which he did not have copies.
31. They did not send forms to the Registrar of Companies till 10th January 2014, and before then he could not say if a person searching in the companies' registry would say whether the plaintiff was director. He confirmed that in his witness statement, he said that the documents were sent to the Registrar of Companies on 31/10/2014. He agreed that they opened the bank account on 9/9/2010 before sending the documents to the Registrar of Companies. He said that they used the said bank account to take loan from the bank, but said the letter they used to take the loan was with the bank and confidential. He however admitted that there was a letter of offer from the bank, which he said only the bank could explain.
32. He confirmed that only him and Jelle signed contract documents. He did not know the amount of company's operation costs. He admitted that there existed a contract dated 29/6/2012 for Ksh.6,432,006/=, another for Red Cross to dig a water dam Kshs.3,253,800/=, Northregion Refugee Council in 2010 for ksh.1,800,150/=, Ausi Foundation in 2011 for Ksh.4,364,885, Ausi Foundation 2011 for Kshs.19,999,040/=, and Danish Refugee Council October 2012 for Kshs.17,144,830/=.

33. He said that he operated the company bank account before it was frozen, but did not know the amount in the bank account. He admitted that he did not bring bank statements to court as ordered. He said that they used the money to grow the company but maintained that as stakeholders they did not share the income nor were they paid by the company.

34. In re-examination, he stated that he got the date 31/12/14 from the Company's Annual Return Form. He stated that they sent the documents signed by Dahir to the Registrar of Companies in January 2014, and that the document from the Registrar dated 29/6/15 was a response to a letter dated 24/6/15 on the returns of 31/12/14. He stated lastly that, the letters for the credit facility with First Community Bank were not in court.

35. DW3 was Jelle Maalim Abdi a shareholder and director of Modogashe Construction Company, registered in 2007 where he initially had 35% shareholding, Dahir 35% and Abdi 30% but the company did not start operations till 2010 after one director Dahir had left the company.

36. According to him, he operated three matatus, and two shops by then. In and in 2009 the brother of the plaintiff Shukri went to his shop and said that his brother the plaintiff Dahir wanted to be refunded the value of his shares in the dormant company. He accepted the request and repaid the value of the shares in the amount of Ksh.30,000/=, though the actual amount of shares was for Kshs.15,000/=, and that such payment to Dahir was done on 29/8/2009.

37. According to him, the company started operating in 2010 without Dahir, and that the two remaining directors opened a company bank account on 9/9/2010. He said that he knew that Dahir operated another company. He lastly said that the company acquired tractors.

38. In cross-examination, he stated that he operated the company with his brother Abdi Bashir and opened a bank account on 9/9/2010 after he personally took documents to the bank, which were CR 12, identity cards, and Articles of Association of the Company. He said that they started operating the bank account in 2014. According to him, they used another bank account for the contracts, whose number he could not remember, though the account was in the name of the company. He however, did not have the CR 12 used, though he was in charge of company finances.

39. He could not remember when they borrowed money from the bank, but was aware that money borrowed was for buying tractors. He did not separate the company's business from the business of his matatus, as if the company needed money same would be taken from the shops and vice versa.

40. In re-examination, he stated that he got CR 12, document No. 5, on 29/5/2015 – confirming the position of the existing directors.

41. This was the end of the defence evidence.

42. At the close of the defence evidence, Mr. Mutembei for the defendants' stated that he would supply to the court clearer copies of documents dated 29/6/2015. Parties counsel also agreed to file written submissions which they did. They did not highlight submissions and the court fixed a judgment date.

43. This is a civil case, and a plaintiff is required to prove his case on the balance of probability, unlike in criminal cases where the standard of proof is beyond any reasonable doubt - see **Kirugi & 3 Others vs Kabiya & 3 Others [1987] KLR 347**. It is also important to bear in mind from the outset that parties are bound by their pleadings, and a court will only deal with averments in the pleadings and prayers that have been sought herein, unless an issue arises in the course of hearing and is fully canvassed by the parties – see **Kinyanjui Kamau vs George Njoroge Kamau [2015] eKLR** and **Odd Jobs vs Mubia [1970] EA 476**.

44. The first issue in my view is whether the plaintiff ceased to be a director and shareholder of the 1st defendant company in August 2009. It is admitted by all the parties that the plaintiff was indeed a director and co-founder of Modogashe Construction Company since 2007. He claimed in his evidence that he was still a director and shareholder of the company but that the 2nd and 3rd defendants, who are brothers, excluded him from the affairs of the company and conducted the business of the company without involving him. The 2nd and 3rd defendants on the other hand relied on a letter 5th September, 2009 and minutes of a meeting held on 29th August 2009 to support their contention that the plaintiff had ceased to be a director and shareholder. They also stated that he was refunded his share contributions to the company in August 2009, though the change of directorship and shareholding was not reflected in the Registry of Companies until 2015. They claimed that once the plaintiff signed and submitted his letter dated 5th September 2009 he ceased to be interested in the affairs of the company as he was neither a director nor a member of the company from that date.

45. Both sides have relied on several sections of the Company's Act. The 2nd and 3rd defendant however states that they relied on the previous Companies Act (Cap. 486) before it was amended in 2015, and alleged that the plaintiff wrongly relied on the Amended Companies Act, which was not operational then.

46. I agree that if transactions were conducted in 2009, then the law applicable would be the law existing then. The Companies Act and Rules applicable would thus be those of 2009. In this regard section 138, 210 and 211 of the Companies Act relied upon by the plaintiff's advocates in submissions on removal of directors and refund of shareholding relates to the Companies Act amended in 2015, is not applicable. In any event, this was a matter of resignation, not removal of director.

47. The above notwithstanding, though the plaintiff's counsel submitted that the plaintiff denied the directors meeting of 29th August 2009, and the letter he signed for refund of share contribution dated 5th September 2009, that is not the position from the evidence on record. The plaintiff though he initially denied, very clearly in his evidence admitted that he signed the letter dated 5th September 2009 both in cross-examination and re-examination. He also admitted in cross examination that there was a meeting in August, and that in fact there were several Company meetings where minutes were not recorded. It cannot be said therefore that there was no meeting to discuss his resignation as director, or that he was not refunded his share contribution.

48. The question that remains on this issue is whether the failure by 2nd and 3rd defendants to register the changes with the Registrar of Companies until 2015 meant that the plaintiff remained a director and a shareholder of the 1st defendant. I take it that the primary purpose of official registration is official record keeping, and indeed, it is meant to be up to-date, and correct. In my view, if the issue was between the Gamadid Trading Company (1st defendant) and a third party who relied on the company's official records, at the office of the Registrar of Companies, the company would not escape liability for misleading the third party. However, internally between the shareholders and directors themselves, depending on the factual situation, the position could be different. In my view, in the circumstances of this case, the plaintiff ceased to be a director and shareholder of the 1st defendant latest when he was paid the refund of his shareholding and signed for such receipt on 5th September 2009. Even if there was a legal requirement that the plaintiff signs an affidavit, he has not said that any of the defendants prevented him from doing so, and therefore it cannot be said that he remained a member and director of the company.

49. The second issue is with regard to the conduct of the 2nd and 3rd defendants in the way they conducted the affairs of the company after 5th September 2009, and the delay in filing returns and notices of change of directorship and shareholding of the company, which the plaintiff claims amounted to fraud and denied him a voice and share of profits of the company.

50. All the complaints made by the plaintiff against the 2nd and 3rd defendant in my view, do not make him a director and shareholder of the company or confer a benefit to him as a director and shareholder. The irregularities or delays in filing the notices of change of directorship and shareholding of the company (1st defendant) is for the Registrar of Companies and the police to investigate and if need be take necessary action. The complaints with regard to opening bank accounts and operation of the same by the 2nd and 3rd defendant are for the commercial banks regulator Central Bank of Kenya and the police to investigate. Even if crimes or illegalities were committed, this court cannot say that the result would be to make the plaintiff a shareholder or director of the 1st defendant and to entitle him to profits.

51. The third issue is whether this court can grant any of the prayers sought. In the submissions, the counsel for the plaintiff has asked for things like profit. There is no such prayer in the plaint and such cannot be granted, as it has not been pleaded. In the plaint, the plaintiff sought permanent injunctions, one in respect of the bank account and another in respect of the two motor vehicles. He also asked for damages without indicating whether it is general damages or special damages, which I classify as general damages. He also sought for costs of the suit.

52. The plaintiff has not given any evidence which would persuade any reasonable court to grant the injunction order in the form asked for under prayer (a) and (b). It is also noteworthy that in his written submissions, counsel did not address the issue of grant of injunction but addressed the issue of award of damages and loss of profits, claiming an amount of Ksh.29,254,502/= as damages to be awarded to the plaintiff for illegal and fraudulent act, as his 35% share of company's profit. The way this figure of damages was calculated and arrived at seems to ask this court to go into details of the running of the company (1st defendant) and its financial activities, which this court is not able to do. The prayer for the damages will fail.

53. In my view therefore, the plaintiff failed to tender sufficient evidence in court to support any of the prayers he has sought, and only managed to show that he was initially a director and shareholder of the company upto September 2009. The evidence fell far short of supporting any of the prayers sought against the defendants.

54. Consequently, I will not grant any of the prayers sought, and the suit of the plaintiff will thus fail.

55. No substantive evidence was tendered to support the counterclaim of the defendants, and the counterclaim cannot thus succeed.

56. I thus dismiss the suit of the plaintiff herein, with costs to the defendants.

57. Any interim orders that may have been granted by this court are hereby vacated. Right of appeal explained.

Dated and delivered at Garissa this 20th Day of November, 2018.

George Dulu

JUDGE