



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CIVIL SUIT NO. 78 OF 2015**

**ALOIS OCEANO D'SUMBA.....PLAINTIFF**

**VERSUS**

**RAJNIKANT NARSHI SHAH.....1<sup>ST</sup> DEFENDANT**

**NEW OCEAN TRADING (K) LIMITED.....2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

**BACKGROUND**

1. The plaintiff, Alois Oceano D'sumba on 18<sup>th</sup> June, 2015 filed a plaint alleging that in the year 2011, the 1<sup>st</sup> defendant, Rajnikant Narshi Shah a Director of the 2<sup>nd</sup> defendant, New Ocean Trading (K) Ltd (the company) purported to have transferred 19% shares of the company to the plaintiff to enable him to be a shareholder. The plaintiff alleges that as a result of the foregoing, he initiated and contracted the business venture of supplying foodstuff to Government correctional institutions and injected capital amounting to Kshs. 3,500,000/= to the company. The plaintiff further alleges that he and the 1<sup>st</sup> defendant agreed to draw a salary of Kshs. 300,000/= each per month and share all the profits accrued, but no salary was paid to him. The plaintiff prays for:-

- (i) A declaration by this court that he is a Director of the company;
- (ii) A declaration that he is entitled to access and peruse the company's books of accounts from 2011 to determine his emoluments and profits accrued;
- (iii) Salary in the sum of Kshs. 300,000/= per month and profits accrued from 2011 to date;
- (iv) Costs of and incidental to the suit and interest;
- (v) Such further or other relief as this court in the interest of justice deems fit and/or necessary and reasonable; and
- (vi) Any other or further relief this court may deem fit to grant.

2. The defendants filed their statement of defence on 9th July, 2015 averring that no official transfer of shares was effected at the company's registry due to the plaintiff's failure to pay the requisite capital of Kshs. 3 Million to the company. The defendants denied that the plaintiff injected capital of Kshs. 3.5

Million, that he was entitled to a salary of Kshs. 300,000/= and to a share of all profits accrued. The defendant's prayer is for the plaintiff's case to be dismissed with costs.

### **THE PLAINTIFF'S CASE**

3. PW1 was Avula Viswanatha Reddy, a former Director of the company. He testified that he registered the company with the 1<sup>st</sup> defendant and that at a certain time, the said defendant proposed to offer the plaintiff 10% shares in the company. The 1<sup>st</sup> defendant introduced the plaintiff to PW1 and gave him a document to sign for the shares offered. PW1 further stated that he and the 1<sup>st</sup> defendant were signatories of a bank account in Diamond Trust Bank, Moi Avenue. He resigned from the company in June, 2012 and transferred his shares to the 1<sup>st</sup> defendant.

4. PW1 informed the court that the plaintiff was a Director of the Company and that the other Directors save for him had visiting/business cards. He added that they were supplying foodstuff to schools and Shimo-la-Tewa Prison. He indicated that in June 2012, the 1<sup>st</sup> defendant paid him some of his money and said he would pay the balance later.

5. On cross-examination, PW1 stated that when they started the company the Directors were himself, the 1<sup>st</sup> defendant and a 3<sup>rd</sup> Director whose name he could not recall. He informed the court that they did not put anything in writing to show that the plaintiff would become a Director of the company. He did not avail any cash capital. There was also nothing in writing to show that the plaintiff would be paid Kshs. 300,000/= per month. PW1 further stated that the plaintiff became a signatory to the bank account either in the year 2011 or 2012. He however knows that anyone can be a signatory of a bank account of a company. He indicated that he did not know if the plaintiff put in any cash contribution although on his part he did. He further stated that Kahindi (PW2) and Titus (PW3) were not entitled to information and deliberations of the Board meetings.

6. On re-examination, PW1 informed the court that the plaintiff used to take business to the company. They did not discuss about the plaintiff injecting cash into the company. They however discussed the salaries for Directors, which were subject to incoming business. This was not put down in writing. He added that he signed off his shares at United Sports Club, Mombasa and not before a Company Secretary.

7. PW2, Justin Kahindi Ngumbao testified that he was working in the company in the year 2011 as a Driver of motor vehicle registration No. KBQ 774T. According to him, the Directors of the company were the plaintiff, the 1<sup>st</sup> defendant and PW1. It was his evidence that he used to supply food from the company godown at Changamwe to Shimo- La Tewa Prison and Shimba Hills High School. He stopped working in the company in September, 2012 after a misunderstanding with the 1<sup>st</sup> defendant.

8. On cross examination, he stated that the plaintiff is the one who took him to the company to be employed by introducing him to the 1<sup>st</sup> defendant and PW1. In his view, the shareholders were the plaintiff, PW1 and the 1<sup>st</sup> defendant. It was the plaintiff who told him that he was a Director. He added that PW1 also told him that the plaintiff was a Director of the company.

9. PW3, Titus Musyoki Kavilu informed the court that he knew the plaintiff as a Director of the company. He was employed as a Clerk cum Messenger in the company. He worked there from the year 2011 to October, 2012. He previously worked for the 1<sup>st</sup> defendant in a company known as Kanash Transporters Ltd. He stated that the 3 Directors of the company were the 1<sup>st</sup> defendant, the plaintiff and PW1. They would sign cheques and if one was absent, 2 of them would sign. He stated that when PW1 left the company, the plaintiff and the 1<sup>st</sup> defendant were left as Directors. He indicated that he had worked for the 1<sup>st</sup> defendant for 27 years. PW3 informed the court that the Accountants for the company were Bhatt and Bhatt.

10. PW3 further testified that the plaintiff, the 1<sup>st</sup> defendant and PW1 would authorize payments to 3<sup>rd</sup> parties as Directors. He knew that before the company was formed, the 1<sup>st</sup> defendant and the plaintiff

used to do business together and that the plaintiff became a Director after Jamal left Directorship.

11. On cross-examination, PW3 stated that he was not sent with share transfer documents to take to the company's Accountant. He also stated that in his view, if someone signs a cheque he is a Director of a company.

12. The plaintiff, Alois Oceano D'sumba testified as PW4. He indicated that he has known the 1<sup>st</sup> defendant for 18 years after they met in business circles. He joined the company in March, 2012 after the 1<sup>st</sup> defendant invited him to join them. Their idea was to export cashew nuts to India but he told them that cashew nuts export was banned. He proposed that they start the business of supply of foodstuff and building material to prisons and schools. PW1 and the 1<sup>st</sup> defendant requested him to tender for the same. He stated that they secured Tenders at Shimo-La Tewa prison, Jela Baridi, Manyani prison and a few schools in South Coast.

13. It was the plaintiff's evidence that in a meeting held at Mombasa sports club, he was offered 10 ordinary shares and he gave out his full name, PIN No. and personal details to the 1<sup>st</sup> defendant. He indicated that after Mr. Jamal resigned, he was offered 9 ordinary shares in November, 2011. He, the 1<sup>st</sup> defendant and PW1 signed share transfer forms at the company's office in Nyali. The forms were to be handed over to Bhatt & Bhatt Accountants but he did not make a follow up of the same. The plaintiff further testified that the 1<sup>st</sup> defendant informed him that documentation for the 10 ordinary shares was in order and had been executed. He added that his dealings and business transactions with PW1 and the 1<sup>st</sup> defendant were based on good faith. He recounted that in a certain meeting, they agreed that they would be paying themselves Kshs. 300,000/= per month as salaries subject to payment by their suppliers. He added that they used to note down the minutes of their meetings which would be transferred to Bhatt & Bhatt, the consulting firm that dealt with accounting and taxation issues of the company. The plaintiff asserted that the 1<sup>st</sup> defendant and PW1 did not ask him to inject any capital into the business as they were relying on his expertise and he had contacts that enabled him to secure Tenders for supply of food stuff and building material. He informed the court that the foregoing was his input to the company. He testified that he was a signatory to the company's bank account at Diamond Trust Bank. He stated that he became a signatory of the bank account as he was one of the Directors. Further, when PW1 resigned from the company, he transferred 9 shares to him and the rest to the 1<sup>st</sup> defendant.

14. It was the plaintiff's testimony that PW1 is still registered as a Director of the Company. On his part, he never resigned from the company. He prayed for a declaration that he is a Director of the company. The plaintiff asserted that from March 2011 to March 2013 he was an active Director of the company and that the 1<sup>st</sup> defendant printed for him calling cards as a Director. It was in the said capacity that he received a notification of award from the Office of the President, Provincial Administration and Internal Security dated 14<sup>th</sup> October, 2011. The plaintiff indicated that he did not fail to inject Kshs. 3 Million to the company as there was no requirement for him to pay the said cash.

15. It was the plaintiff's evidence that when PW1 left the company, he expected that he would share profits equally with the 1st defendant and he would get his salary. He has however never been paid a coin. He testified that when the company was eventually paid by Shimo-La Tewa prison, Jela Baridi and Manyani prison, the 1st defendant started telling him that he was not a Director.

16. The plaintiff prayed for his recognition as a Director of the company and for a share of the profits. He indicated that he blamed the 1<sup>st</sup> defendant who was the Managing Director for non-registration of his shares at the Registrar General's Office. The plaintiff testified that he only went to the Bhatt & Bhatt consulting firm when Ethics & Anti-Corruption Commission asked him about payment of personal taxes. He was told that the 1<sup>st</sup> defendant had given instructions that the plaintiff was not supposed to see any documents. He prayed for the court to order his access to the company's books of accounts. He also prayed for costs.

17. The plaintiff produced the documents marked 1, 2, 3, 4, 5, 6, 7, 8 as plaintiff exhibits 1-8 and the ones

in the supplementary list of documents as plaintiff exhibits 9-15 and those in the further supplementary list of documents as plf. exhibits 16-18.

18. On cross-examination, the plaintiff informed the court that he knows that companies are run by Board resolutions. He saw a Board resolution that he was to be invited to join the company, that was before his name was taken to the bank (as a signatory). He stated that in the year 2014 he went to the Companies Registry to establish if his name was registered as a Director of the company, it was not. No Board resolution was registered there to show that he was a Director.

19. The plaintiff reiterated that 10 shares were transferred to him when he joined the company and a Board resolution to that effect was drawn. The 1<sup>st</sup> defendant said he would take the same for registration at the Companies Registry through Bhatt & Bhatt Accountants. He did not make a follow up of the same. He stated that 9 shares were later transferred to him by PW1 before he left the company and they signed share transfer forms. He admitted that they signed the form on the part reserved for witnesses to sign and the transfer form is undated and bears no stamp duty impression to show that it was registered in the Companies registry. There was no Board resolution when they allocated themselves duties. Most of their deliberations as Directors were informal.

20. He reiterated that at one time, they agreed that each would receive Kshs. 300,000/= per month but he never saw a Board resolution to that effect. The plaintiff stated that between September and December 2011 the company's volume of trade in cash was Kshs. 5-7 Million. He indicated that in his witness statement, he wrote that he injected a sum of Kshs. 3.5 Million to boost the company through a bank transfer from Mumias Sugar Company to Kanash Transporting Company. The company herein did not confirm receipt of the Kshs. 3.5 Million in writing. He stated that he is aware that one does not have to be a Director to be a signatory to a company's bank account and that he was never invited to sign the financial statements of the company. He asserted that as a Director he is entitled to see the company's accounts.

21. On re-examination, the plaintiff stated that their Board resolutions would be recorded and taken to Bhatt & Bhatt for registration. He indicated that most of their meetings were informal due to the high level of trust they had amongst them. He was surprised to find that PW1's and Jamal's names still reflected as Directors of the company. He felt that there was dishonesty and cheating on the part of the Directors when he saw the records at the Companies Registry. He further stated that he found the share transfer form awaiting him with a space marked on it for him to sign. He indicated that PW1 had signed the share transfer form and a document for his resignation. The plaintiff informed the court that he could not have signed the share transfer form if he was not a Director. He denied that he was required to plough in Ksh. 3 Million for purchase of shares. He further stated that he contributed a lot by bringing in supply business to the company. He testified that the initial procurement documents show that he was a Director of the company. He sought a fair share of the profits the company has made; costs and interest.

22. DW1, Anand Girish Bhatt testified that his work is to audit the books of accounts and to handle taxation matters. They also file returns to the Companies Registry. He was the Internal Auditor and Company Secretary for the company. He testified that the plaintiff was never a shareholder or Director of the company. He stated that he received a request on 2<sup>nd</sup> November, 2011 for the plaintiff to become a Director of the company subject to him injecting Kshs. 3 Million against transfer of 9 shares from PW1. He never injected the capital thus transfer was not effected. DW1 produced the letter marked 2 in the defendant's list of documents as defence exhibit 1 (def.exh. 1), the letter dated 2<sup>nd</sup> November, 2011 as def. exh 2, the minutes dated 30th June, 2012 as def. exh. 3, these contained a resolution to transfer 30 shares from PW1 to the 1<sup>st</sup> defendant. PW1 as a Director resigned on 30<sup>th</sup> June, 2012 as per the document produced by DW1 as def. exh 4. The said witness executed a share transfer for 30 shares produced as def. exh. 5.

23. DW1 further stated that the plaintiff went to his office seeking information on issues concerning the company's affairs and financial standing. He was not entitled to such information as he was not a Director or employee of the company. He stated that during the audit period of the year 2012 and 2013, the company was not in a position to pay the Directors Kshs. 300,000/= on a monthly basis. He received no

instructions of such payments being made. It was DW1's evidence that formal minutes must be signed by existing and new shareholders and Directors. Signatures must be witnessed on the share transfer document by an Advocate and stamp duty paid for transfer (of shares). This was not done. It was thus not possible for the plaintiff to be a shareholder of the company.

24. On cross-examination, DW1 informed the court that the company's annual returns, minutes of an Annual General Meeting (AGM) and share transfer documents show that the plaintiff is not a Director. DW1 stated that although he marked the space in the share transfer form where the plaintiff and PW1 were to sign, they were supposed to do so in his presence. He had written their names as well. They however signed on the space provided for witnesses. The share transfer form was undated.

25. DW2 was Rajnikat Narshi Shah, the 1<sup>st</sup> defendant. He testified that the founder shareholders of the company were himself, PW1 and Shiraz Jamal and that currently he is the majority shareholder with 80% shares with Ali Ahmed owning 20% shareholding. He stated that the plaintiff has never been a shareholder of the company although he had been offered 10% shareholding if he injected Kshs. 3 Million. The plaintiff did not do so. He stated that they did not sign a share transfer form in favour of the plaintiff. He further indicated that the plaintiff is not entitled to any shares and there was no agreement to pay him Kshs, 300,000/= per month from the company. DW2 informed the court that the plaintiff was a signatory to the bank account for convenience as PW1 was operating business at Changamwe. He explained that the plaintiff used to run errands for them on commission from the defendants. He was not an employee of the company and his signing of the cheques did not make him a shareholder.

26. The 1<sup>st</sup> defendant concluded his evidence by stating that the plaintiff is not entitled to the company's books of accounts as he was not a Director and that he is also not entitled to Kshs. 300,000/= from the year 2011 as there was no Board resolution to that effect. In DW2's view, the plaintiff is not entitled to costs. He informed the court that he had been authorized by the company to appear on its behalf.

27. On cross-examination, the 1<sup>st</sup> defendant indicated that the shareholders of the company did not give him a resolution to appear on the company's behalf. He informed the court that PW1 transferred his shares to him but the CR12 dated 25<sup>th</sup> March, 2015 shows that he, Avula and Jamal were the shareholders of the company. He maintained that Ali Ahmad is a shareholder. The plaintiff was invited to be a shareholder in the year 2011 by contributing Kshs. 3 Million but this was not in writing. It was discussed by himself, Jamal and Avula.

## **ANALYSIS AND DETERMINATION**

28. Agreed issues were filed on 11<sup>th</sup> November, 2015. While maintaining the same issues, I condense them into the following:-

- (i) Is the plaintiff a shareholder of the 2nd defendant company? Was there registration of shares transferred at the companies registry in his favour?
- (ii) Is the plaintiff a Director of the 2nd defendant company? Was there a proposal for the plaintiff to be made a Director of the company? If yes, was it effected? If not, why was it not effected?
- (iii) Did the plaintiff inject any capital contribution to the 2nd defendant's company? If yes, how much? If no, how much was he supposed to inject?
- (iv) Was the plaintiff in his capacity as either a Director or employee of the company drawing Kshs. 300,000/= monthly from the 2nd defendant? If yes, was he withdrawing the same as a Director or employee?;
- (v) Was the plaintiff entitled to receive information as to how the 2nd defendant was being run?
- (vi) Is the 1<sup>st</sup> defendant in breach of fiduciary duty as against the plaintiff?

(vii) Is the plaintiff entitled to the prayers sought and costs?

29. As at the time when the issues herein arose, the Companies Act, Cap 486 was in force. This case will therefore be decided on the basis of the law that was applicable then.

30. In reference to plf. exh.1, it is a letter dated 2<sup>nd</sup> November, 2011 from Bhatt & Bhatt Consultants forwarding to the company a share transfer form. With regard to plt. exh. 4, the share transfer form, the 1st defendant testified that PW1 and the plaintiff endorsed their signatures on the portion that was assigned for witnesses. The transfer of shares was to be done pursuant to a meeting held on an unnamed date at the company's registered office. One of the resolutions arrived at was for PW1 to transfer 9 ordinary shares to the plaintiff. The minutes of the said meeting, plt. exh. 3, were signed by two Directors whose names were not specified in the minutes. The said minutes are also not dated. It was DW1's evidence that the said form was never executed because it was conditional to the plaintiff's injection of share capital in the sum of Kshs. 3 Million to the company. He testified that he was informed by the 1st defendant that the plaintiff did not inject the said capital into the company.

31. It was the plaintiff's evidence that the Directors, namely, PW1, the 1st defendant and he agreed on a monthly salary of Kshs. 300,000/= which he was never paid. He stated that the said information was not captured in the minutes of a Board meeting as the decision was arrived at an informal meeting. CR12 produced as plf. exh. 8 gives the names of the 1<sup>st</sup> defendant, PW1 and Shiraz Ali Kassam Jamal as Directors of the company as at 25<sup>th</sup> March, 2015. The plaintiff produced plf. exhs. 9, 10 and 11 to show that he signed on the face of the said exhibits acknowledging receipt of the letters from the District Commissioner's office, Kisauni District in his capacity as a Director of the company. The plaintiff produced plf. exh. 12 being a letter written by the 1<sup>st</sup> defendant to the Manager, Diamond Trust Bank Limited, introducing the plaintiff as the third signatory to the company's bank account. It is worth noting that in the said letter, the 1<sup>st</sup> defendant did not describe the plaintiff as a Director of the company.

32. The signature card for the said bank account, produced as plf. exh. 13 bears the plaintiff's photo identification. The said card also bears photo identifications of the 1st defendant and PW1. Each signatory filled the said card in his own handwriting and wrote his designation. The plaintiff wrote the inscriptions that he was a Director.

33. Def. exh. 2 is a letter dated 2nd November, 2011 from the company written by the 1st defendant that informed Bhatt & Bhatt Consultants, that the share transfer form that was to be used to transfer 9 shares from PW1 to the plaintiff would not be handed over since the contribution that was to be injected by the latter for him to own shares in the company was not forthcoming in spite of several promises.

34. The 1<sup>st</sup> defendant produced minutes of an annual general meeting of the company held on an unnamed date where it was resolved that PW1 transfers 30 ordinary shares to the 1<sup>st</sup> defendant. The minutes were signed on 30<sup>th</sup> June, 2012 by two unnamed Directors. On the same date PW1 tendered in his resignation through the letter produced as def. exh. 4. The share transfer form dated 18<sup>th</sup> July, 2012 was duly executed. This was produced as def. exh. 5.

35. On the issue of whether the plaintiff is a shareholder of the company, Ms Okumu, Learned Counsel for the plaintiff submitted that he was given 10 ordinary shares in joining the company and that this assertion was not contested. She submitted that although Directors have power to decline to register a transfer, it is a fiduciary power that must be exercised in good faith in the interest of the company and due regard must be had of a shareholder's right to transfer his shares and they must fairly consider the question at a Board meeting. She referred to the case of **Heron International Ltd. vs Lord Grade** [1983] B.C.L.C 244 which states that where the articles do not restrict the right to transfer, a shareholder may transfer to any one *sui generis*.

36. In Ms. Okumu's view, the directive by the 1<sup>st</sup> defendant to stop the transfer of ordinary shares to the plaintiff was null and void as there was no Board meeting to discuss and stop the transfer of shares. She

added that the letter dated 21<sup>st</sup> November, 2011 is of no legal effect as company decisions are made by way of resolutions. She referred to the case of **Mwagola Farmers and Growers Ltd. Vs Kayanja & Others** (No. 7) Civil Appeal No. 355 of 1970 where the Court of Appeal stated that **“the register is most important but not conclusive”** and that other evidence can be adduced to prove that a person is a shareholder.

37. Mr. Omwenga, Learned Counsel for the defendants’ written submissions indicate that the share transfer forms were not registered in the Companies Registry and that no stamp duty was paid for the transfer of shares. For the said reason, the plaintiff was not a shareholder of the company.

38. On the issue of the transfer of 9 ordinary shares from the PW1 to the plaintiff, Section 77 of the Companies Act, Cap 486 provides as follows:-

***“Notwithstanding anything in the articles of a company, it shall not be lawful for the company to register a transfer of shares or debentures of the company unless a proper instrument of transfer has been delivered to the company.”***

39. The evidence adduced by DW1 makes it as clear as day that no share transfer form was registered with the Registrar of Companies since no instrument of transfer for 9 shares was delivered to Bhatt & Bhatt, Consultants, for their further action. It can therefore not be construed that the plaintiff is a shareholder of the company since no share transfer form in his favour was duly lodged at the Companies Registry as required by law. Although he said that when he joined the company he was given 10 shares, he did not produce a Board resolution to support the said assertion. It is therefore my finding that he was not a shareholder of the company.

40. On the issue of whether the plaintiff was a Director of the company, Ms Okumu, Learned Counsel for the plaintiff in her written submissions stated that he was, as according to the evidence of PW1 and the 1<sup>st</sup> defendant, they invited the plaintiff to be a Director of the company. She referred to Black’s Law Dictionary that defines a Director as a person appointed or elected to sit at a Board that manages the affairs of a corporation. She cited the case of **White House vs Carlton Hotel PTY LTD** [1987] 162 CLR 285 where the court stated that a person would be a Director if his permitted powers were over and above those that would be expected of a mere member or employee. It was the Counsel’s submissions that PW1 and the 1<sup>st</sup> defendant in an ordinary general meeting held at a Sports Club in March, 2011 resolved to accept the plaintiff as a Director; and that the plaintiff accepted the offer. Counsel referred to plf. exh. 13, a copy of the mandate to Diamond Trust Bank that referred to the plaintiff as a Director of the company.

41. Mr. Omwenga’s submissions were to the effect that the plaintiff was not a Director of the company. He made reference to sections 134(1), 385(2) (c) and 497 (1) of the Companies Act, 2015. As already pointed out, the events herein occurred when the Companies Act, Cap 486 Laws of Kenya was the operative Act. For the said reason the provisions of the Companies Act, 2015 and regulations thereof do not apply to this case. Counsel stated that there was no invitation made to the plaintiff to join the company. No formal documents or resolutions were produced to that effect. On the issue of Directorship, the defendants’ submissions were that there was no formal appointment of the plaintiff as a Director of the company.

42. I have considered the arguments of both Counsel and the evidence tendered by witnesses and the fact that the plaintiff did not produce to this court any resolution of the company wherein he was appointed a Director. The Bank mandate forms that were submitted to Diamond Trust Bank were filled individually by the Directors. It is the plaintiff who described himself as a Director in the said form. This in itself cannot lead to the conclusion that the plaintiff was a Director of the company. The inevitable conclusion on the issue of Directorship is that the plaintiff has not proved on a balance of probabilities that he was a Director of the company. Indeed the CR12 dated 25th March, 2015 produced in court as plf. exh. 8 reveals that the Directors of the company were the 1st defendant, PW1 and Shiraz Ali Kassam Jamal with each Director's shareholding standing at 30%.

43. The third issue raised was whether the plaintiff injected any capital contribution to the company.

According to the evidence of the 1<sup>st</sup> defendant, the plaintiff was to inject cash to the tune of Kshs. 3 Million in order for him to facilitate the share transfer. The plaintiff asserted that there was no agreement to that effect. It was the plaintiff's evidence that he contributed Kshs.3.5 Million towards the company through Kanash Transporting Company owned by the 1<sup>st</sup> defendant. He also testified that his contribution to the company was through the expertise he gave the company to secure Tenders. The 1<sup>st</sup> defendant and DW1 confirmed that the plaintiff did not inject any capital to the company. It is my finding that if at all the plaintiff injected Kshs.3.5 Million to Kanash Transporting Company, the said money cannot be said to have gone to the benefit of the company herein for the reason that the former company and the 2<sup>nd</sup> defendant herein are separate and distinct legal entities. It is therefore my finding that the plaintiff did not inject Kshs.3.5 Million to the company.

44. On the 4<sup>th</sup> issue of whether the plaintiff was entitled to draw Kshs. 300,000/= monthly from the company in his capacity as either a Director or employee, Ms. Okumu referred to the purported agreement to pay Kshs. 300,000/= per month to each Director as a gentleman's agreement. It is my finding that such an agreement cannot suffice in the running of the affairs of a company. This court has already determined that the plaintiff was not a Director of the company, there is no evidence that he was an employee of the company either. I have no doubt in my mind from the evidence adduced that the plaintiff was working on a commission basis as was testified by the 1<sup>st</sup> defendant. Although PW1 stated that it was agreed that Directors would be paid Kshs. 300,000/= when the business of the company improved, it is my finding that the plaintiff was not entitled to the said amount. The buck stops at the fact that he was not a Director of the company.

45. On the 5<sup>th</sup> issue, since the plaintiff was neither a shareholder nor a Director of the company, it is my finding that he was not entitled to receive information on how the company was being run. If at all the plaintiff had been a Director he would have been privy to the signing of the audited accounts and financial statements of the company. He testified that he was never requested to sign the financial statements of the company. This evidently shows that the 1<sup>st</sup> defendant never regarded him as a Director of the company.

46. On issue No. 6, the fiduciary duty of Directors is to act in the best interest of the company. The 1<sup>st</sup> Defendant therefore cannot be held to be in breach of the fiduciary duty. He directed DW1 not to register the share transfer form at the Company's registry as the plaintiff failed to inject the required share capital of Kshs. 3 Million. It was the plaintiff's evidence that the 1<sup>st</sup> defendant was the Managing Director thus the person in charge of discharging administrative duties for the company. This court therefore deems his action of writing to DW1 instructing him not to lodge the share transfer form as being part of his administrative function and I hold that the action taken by the 1<sup>st</sup> defendant was not null and void.

47. The burden of proof in civil cases is on a balance of probabilities. In so stating I am guided by the case of **D.T. Dobie & Co. Ltd. Vs Wanyonyi Wafula Chebukati** [2014] eKLR.

***“The degree is well settled. It must carry a reasonable degree of probability but not so high as required in a criminal case. If the evidence is such that the tribunal can say; we think that it is more probable than not, the burden is discharged, but if the probabilities are equal, it is not. Thus, proof on a balance or preponderance of probabilities means a win, however narrow. A draw is not enough. So in any case where a tribunal cannot decide one way or the other which evidence to accept, where both parties explanations are equally (un)convincing, the party bearing the burden of proof will lose, because the requisite standard will not have been attained.”***

48. The totality of the evidence in this case shows that the plaintiff has failed to prove his case on a balance of probabilities. The case is hereby dismissed with costs to the 1<sup>st</sup> and 2<sup>nd</sup> defendants.

It is so ordered.

**DELIVERED, DATED and SIGNED at MOMBASA on this 18TH day of JULY, 2017.**

**NJOKI MWANGI**

**JUDGE**

**In the presence of:-**

Mr. Kinyua holding brief for Ms Okumu for the plaintiff

Mr. Omwenga for the respondent

Mr. Oliver Musundi - Court Assistant