



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI LAW COURTS)
CIVIL SUIT 505 OF 2009

OBADIAH K.
MACHARIA.....PLAINTIFF

VERSUS

KIRIMA BUS SERVICES
LIMITED.....DEFENDANT

JUDGMENT

1. The Plaintiff commenced the suit in this matter at the subordinate court as Resident Magistrates Court Civil Suit Number 9586 of 2003 through a Plaint filed on 17th September 2003. In the Plaint the plaintiff claimed a sum of Kshs. 86,000/- against the Defendant being unpaid director's fees and allowances.
2. Upon service of summons, the Defendant entered appearance on 2nd October 2003 and filed its defence on the same day in which it denied being indebted to the Plaintiff in the sums claimed. On the contrary, the Defendant claimed that the Plaintiff had deserted work with effect from November 2002.
3. An amended Plaint was filed on 8th August 2007 in which the Plaintiff revised its claim to Kshs. 696,000/- together with such further sums in director's remuneration as may thereafter accrue by virtue of his being a director of the company.
4. On 15th May 2009, the suit in the subordinate court was withdrawn and transferred to this Court under its current case number.
5. The Plaintiff's case is that on or about 5th June 1973, he was appointed a director of the Defendant company. Under Article 21 of the company's Articles of Association, and pursuant to resolutions of the board of the company, directors' remuneration was fixed at Kshs. 7,200/- per month for working directors with a daily allowance of Kshs. 200/-. The directors were further entitled to a telephone allowance of Kshs. 1,000/-. On 17th December 2003, the monthly remuneration was revised and increased to Kshs. 10,000/-. Between the months of March 2003 to December 2003, the Plaintiff served as Assistant Secretary to the Company and claims remuneration as a working director for this period. He also claims the daily allowance of Kshs. 200/0 as well as telephone allowance at Kshs. 1,000/- per month. All these are computed in the Plaint to a total of Kshs. 696,000/-. The Plaintiff further claims subsequent accrued

director's remuneration as he claims to still be a director of the company.

6. The Defendant did not file an amended Defence following service by the Plaintiff with the amended Plaintiff. The parties however filed a statement of issues date 13th February 2012 and filed on 7th March 2012 in which four issues were identified for trial, namely,

- 1) *Whether the Plaintiff was a working director or a non-working director;*
- 2) *Whether the Defendant owes the Plaintiff the amount of money claimed in the Plaintiff;*
- 3) *Whether the Plaintiff is entitled to interest on the sum due and owing;*
- 4) *Who should bear the costs of the suit.*

7. Hearing of this matter proceeded *ex parte* with the Plaintiff testifying on his own behalf.

8. In his evidence, the Plaintiff testified that he served as a director of the Defendant around June 1973 when the company was incorporated up to August 2007 when he ceased to be a director of the defendant Company. By virtue of Article 21 of the defendant company's Articles of Association, and by virtue of various resolutions of the defendant company, the plaintiff was entitled to earn emoluments by rendering services as a working director as envisaged by the said article. The Plaintiff produced as an exhibit the Memorandum and Articles of Association of the Defendant company in which Article 21 of the Articles of Association provided as follows:-

“A Director may hold any other office or place of profit under the company, except that of Auditor, upon such terms as to remuneration, tenure of office and otherwise as my determined by the Board and may act and receive remuneration in a professional capacity for the Company in conjunction with his office of Director”

9. The plaintiff testified further that he did work as such director for the company and duly received his emoluments for services rendered until on or about the month of March 2003 when the defendant without any reason or notice to the plaintiff stopped paying his remuneration. The plaintiff produced in evidence a letter dated 29th July 2002 which letter clearly set out his duties and responsibilities in the defendant company. The plaintiff also produced in evidence various minutes of the board meetings of the defendant Company that showed that the plaintiff was indeed a working director. The minutes also showed that the company had on various occasions addressed the claim but ultimately never effected payment. For instance, from minutes dated 4th March 2004, the issue of payment of the Plaintiff's allowances was discussed and documented as follows:

“Payment of outstanding allowances for Mr. Obadiah K. Macharia. It was resolved that as agreed at the last Board meeting the Chairman should write a letter to Mr. Macharia advocated (committing the Company to pay the allowances) with a view to terminating the case on mutual agreement. The Chairman undertook to write the letter after consulting with P.K. Njoroge Advocate. The Board felt that there was no need of paying unnecessary legal fees whereas Mr. Macharia has agreed settlement out of court. Action Chairman.”

10. In his further testimony, the Plaintiff stated that other working directors, such as Moses Mathews with whom he was working had been paid their allowances and there was no reason as to why he could not be paid. The Plaintiff produced minutes of a meeting held on 17th December 2003 where the following position was recorded:

“... it was noted that Moses Mathew who worked hand in hand with Mr. Macharia was paid his allowances vide Min 009/11/2003 ...Members saw no reason why Mr. Macharia should not be paid. It was therefore resolved once the case is withdrawn the allowances be paid without undue delay.”

11. The Plaintiff therefore prayed for judgment to be entered based on the foregoing evidence.

12. As the defendant never participated in the hearing, the court takes it that the defendant's response to the claim is as stated in the statement of defence filed on 2nd October 2003. From the defence, the defendant admits at paragraph 2 that the plaintiff was indeed entitled to the said emoluments from the defendant company. The only issue in contention is the period the Plaintiff claims to have served as a working director.

13. I have carefully considered the pleadings, the affidavit evidence on record and the oral evidence of the Plaintiff. I have also considered the written submissions by counsel for the Plaintiff.

14. From the material placed before me, I am satisfied that the Plaintiff served as a working director of the company during the period March 2003 to December 2006. The Minutes of the Board of the Defendant of 19th June 2002 expressly designated him as such. For the period March 2003 to December 2003, the Plaintiff was entitled to director's remuneration at the rate of Kshs. 7,200/- per month. For the period January 2004 to November 2006, the Plaintiff was entitled to payment of director's remuneration at the rate of Kshs. 10,000/- per month. For the whole period of March 2003 to December 2006, the Plaintiff was entitled to telephone allowance at Kshs. 1,000/- per month and also to a stipend of Kshs. 200/- per day. For the period December 2006 to August 2007, the Plaintiff was also entitled to the remuneration of a non-working director. According to the minutes of 19th June 2002, the salary for a non-working director was set as Kshs. 3,000/- per month with sitting allowances of Kshs. 1,000/- per sitting.

15. For the above allowances, the Defendant does not appear to have any basis for not paying the Plaintiff. Indeed, from the minutes of 18th February 2004, the Board of the Defendant deliberated upon the issue and agreed to pay the allowances forthwith in the following terms:

“It was therefore resolved that a letter of undertaking to pay the allowances without undue delay be written and signed by the Chairman Mr. K. Mwangi and delivered to Mr. Macharia's advocate, Mr. A. Nguru so as to reach him before the hearing commences on 19th February 2004”

16. In my view, the above minutes without more constitute an unequivocal admission of the claim by the Defendant.

17. In the circumstances, and in the light of the Plaintiff's evidence in this case being wholly uncontroverted, I am satisfied that on a balance of probability, the Plaintiff has proved his case as against the Defendant.

18. I am therefore inclined to enter judgment in favour of the Plaintiff as prayed in the Plaint, as I hereby do. I further award costs of this suit to the Plaintiff. These shall be the orders of the court.

DATED, SIGNED AND DELIVERED IN NAIROBI THIS 12TH DAY OF JULY 2012.

**J.M. MUTAVA
JUDGE**