



REPUBLIC OF KENYA



KENYA LAW
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Bamahriz v Rehab Trading Company Limited & another (Winding Up Cause 3 of 2014) [2022] KEHC 17028 (KLR) (30 June 2022) (Ruling)

Neutral citation: [2022] KEHC 17028 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
WINDING UP CAUSE 3 OF 2014
MN MWANGI, J
JUNE 30, 2022**

BETWEEN

MOHAMED SALIM BAMAHIRIZ PETITIONER

AND

SALEH OMAR BA MAHDI APPLICANT

AND

REHAB TRADING COMPANY LIMITED RESPONDENT

RULING

1. The applicant's Notice of Motion dated December 14, 2016 is brought under Section 698 of the *Insolvency Act* No 18 of 2015, and all enabling provisions of law. The applicant seeks the following orders –
 - i. Spent.
 - ii. Spent;
 - iii. That the Winding Up Order together with all the subsequent/consequential orders therefrom on record, be vacated/set aside; and
 - iv. That Costs of the application be granted.
2. The application is premised on the grounds on the face of it and the affidavit sworn on December 14, 2016 by the applicant, Saleh Omar Ba Mahdi. He averred that he is a foreign resident of Riyadh, Saudi Arabia, and as per the company's records, the petitioner and he are the only directors and shareholders of the respondent company. He stated that there is a written Declaration of Trust dated April 12, 2010 which grants him the shares and company's property.



3. The deponent deposed that sometime in 1987, while visiting Mombasa, representations were made to him on the establishment of a flour-milling factory. He further deposed, that thereafter, the respondent company was incorporated as a vehicle for implementation of his investment intentions, with no financial contribution, from the petitioner. He averred that he invested an aggregate of US\$ 352,332 in the company, while leaving it under the petitioner's management, control and marketing of the products, since the petitioner had the knowhow as he is a citizen of Kenya. The deponent also averred that he executed a Power of Attorney on September 29, 1987 nominating the petitioner as his agent in Kenya.
4. It was averred that using funds sourced from the applicant, the petitioner purchased Mombasa/Block XVII/1129, and Portion No 2045 (Original 4185/2) Malindi. He stated that along the way, the applicant discovered that the representations made by the petitioner on his ability to control, manage and market the flour milling factory were false, since the petitioner had been majorly residing in Yemen and partly in Kenya. The applicant deposed that it was not practical for the petitioner to perform his representations and the applicant cut all the funding towards the investment. That when he visited Kenya at the end of March, 2010, he demanded to inspect the two properties purchased using his investment funds, only to be informed that the petitioner had sold the two properties in Malindi (Portion No 2045 (Original 4185/2]) for One (1) Million shillings each and utilized the proceeds of the sale for his own benefit, notwithstanding that the said properties were supposed to be in the name of the respondent and held in trust for the applicant.
5. The applicant averred that after the disclosure of the sale of the properties, he revoked the Power of Attorney dated September 29, 1987 donated to the petitioner, and a mutual understanding agreement was entered between the petitioner and him where the petitioner executed a Power of Attorney nominating the applicant as his attorney in relation to Mombasa/Block XVII/1129. He also stated that a written Declaration of Trust dated April 12, 2010 was executed by the petitioner confirming that Mombasa/Block XVII/1129 was registered in the name of the company and it belonged to the applicant. He deposed that the said declaration also revoked an agreement dated December 10, 2010 which provided for the sale of the said property and sharing of its proceeds and a restriction was subsequently registered against the said property on April 9, 2010.
6. The deponent averred that while registering an injunctive order issued in ELC No 380 of 2016, restricting any dealings in respect of Subdivision No 1611 to 1632/XVII MOMBASA, it was established that the petitioner had instituted winding up proceedings herein, which were fraudulent and intended to steal a march against the applicant through non-disclosure of material facts.
7. The applicant deposed that the petitioner falsely and unlawfully declared by way of affidavit that the original title for Mombasa/Block XVII/1129 was lost, and consequently, he obtained a replacement of the title deed and removal of the restriction without the applicant being heard on the same. Further, the applicant averred that the petitioner in bad faith and fraudulently executed a Declaration of Trust, moved the Court and obtained orders authorizing subdivision of the said property into several portions/sub-plots Nos 1611 to 1632 and obtained titles thereto and at the same time he purported to close Title Number Mombasa/Block XVII/1129 with the full knowledge that the original title had been in the applicant's custody since April, 2010.
8. The deponent deposed that the petitioner had been in occupation and had been utilizing Mombasa/Block XVII/1129 for his own gain without doing any accounting, to the detriment of the investor (applicant). He stated that the income from the sale of water from the property had never been reflected in the company's books of accounts.



9. The applicant averred that the agreement of April 10, 2010 was revoked, and the understanding that the petitioner was to be paid Kshs. 70 Million was also revoked, and for avoidance of doubt, the executed copies of transfer and original title Mombasa/Block XVII/1129 were handed over to the applicant in April, 2010 after the petitioner executed the aforementioned Declaration of Trust in the applicant's favour. It was stated that the petitioner was not entitled to the proceeds of any sale of the subject property, and that he has never been agreeable to any disposal of the subject property having rejected a proposal by a prospective buyer in 2011 via telephone from the petitioner.
10. The applicant also averred that title Mombasa/Block XVII/1129 is registered in the company, in trust for him, and that the applicant had been paying all the rates through the petitioner and as such, there is no inability on the part of the respondent company to meet its obligations since the applicant is able, ready and is in the process of paying due land rates. The applicant contended that this Court was misled in the winding up proceedings.
11. The petitioner opposed the application through a replying affidavit sworn on March 24, 2017. He averred that the winding up cause was not filed in bad faith and that he was not fraudulent or taking advantage of the applicant's absenteeism in Kenya, since the winding up petition was advertised in the newspapers.
12. The petitioner deposed that he and the applicant provided capital for the establishment of the company. He stated that though the plot in Malindi is in the name of the company, there was no contribution from the applicant. He stated that pertaining to Mombasa/Block XVII/1129, there was someone who wanted to grab the said property prompting him to successfully sue the grabber in the name of the company without any assistance from the applicant, since the applicant did not want to be part of the case. He deposed that the applicant instead ran away, only to resurface in the year 2010 claiming that the company's land belonged to him.
13. The deponent averred that the agreement before M/s Balala & Abeid Advocates was that Mombasa/Block XVII/1129 was to be sold, and the proceeds therefrom shared after deducting a sum of US\$ 330,000.00, and that at some point, the petitioner was willing to sell his share of the company to the applicant at Kshs 70,000,000.00/=, but the applicant reneged on that arrangement and began to act maliciously.
14. The deponent deposed that all along Mombasa/Block XVII/1129 belongs to the company, the directorship and shareholding of the company remains the same, and there has never been statutory change of the law, and the so called Declaration of Trust could not change the shareholding of the company. The petitioner averred that everything done by him was done on behalf of the company and that there is no provision in the Companies Act that would allow the petitioner to hold the said land in trust for the company. He further averred that the company does not have such a provision in its Articles of Association and that the said Articles had not been amended to reflect so.
15. The petitioner deposed that the applicant had not proved how he managed to bring such huge sums of money into the country without declaring the same as per the law then (the Foreign Exchange Act).
16. The applicant's submissions were filed on December 1, 2020 by the law firm of Mogaka Omwenga & Mabeya Advocates, while the petitioner's Counsel only relied on the replying affidavit sworn on March 24, 2017 and submitted orally.
17. Mr Mogaka, learned Counsel for the applicant submitted that the applicant who is a foreigner was not present when the winding up process commenced and was finalized as the petitioner never bothered to forward to the applicant the winding up petition and/or advertisement of the same for purposes of notification. He stated that the applicant could not have known about the winding up advertisement



- made in a Kenyan daily newspaper. He submitted that the winding up proceedings were conducted without any notice to the applicant who is a director and shareholder and the petitioner knows that he resides out of jurisdiction.
18. Mr Mogaka also submitted that in the absence of service of a hearing notice to the applicant for the hearing that was scheduled on September 24, 2014, then the hearing and the judgment delivered on September 25, 2014 are a nullity and the orders subsequent to the judgment obtained without service of the hearing notice are also null and void.
 19. In support of his submission, the applicant's Counsel cited the Court of Appeal finding in *JMK V MWM & Another* [2015] eKLR, where the Court held that a decision in breach of natural Justice is not cured by holding that the decision would otherwise have been right and that if the principle of natural justice is violated, it matters not that the same decision would have been arrived at.
 20. Mr Mwanzia, learned Counsel for the petitioner submitted that the instant application has been brought under Section 698 of the *Insolvency Act* No 15 of 2015, which is not applicable as the same was not in force when judgment was entered.
 21. He further submitted that the winding up petition was advertised and that was not controverted. He stated that the judgment of September 25, 2014 was a regular judgement, and that no evidence had been supplied to show that the applicant was not in Kenya. He stated that the application to set aside the judgment had been brought too late in the day, and that the applicant had failed to disclose when exactly he became aware of the judgement.
 22. Mr Mwanzia also submitted that the applicant had not demonstrated any hardship or injustice occasioned by the Judgment, since the Court only wound up the company and appointed a liquidator for the purposes of distributing the assets of the company.

Analysis and Determination

23. I have considered the application herein, the affidavit filed in support thereof as well as the replying affidavit by the petitioner. The issue that arises for determination is whether there was an obligation on the part of the petitioner to serve the applicant with the winding up petition.
24. It is worth noting that at the time the winding up petition was advertised, heard, and determined, it is the *Companies Act* Cap 486 that was the applicable law in matters winding up and not the *Insolvency Act* No 18 of 2015, which came into force on September 11, 2015. As such, and in order to hear the application herein on merits, the Court will consider the applicable law at the time of the winding up of the respondent and not pay undue regard to procedural technicalities.
25. It was the applicant's Counsel's argument that the applicant's right to natural justice was infringed when the petition and the proceedings that resulted in the winding up of the respondent were not served upon the applicant who is a citizen of Saudi Arabia, outside the jurisdiction of this Court.
26. Section 391(1) of the repealed *Companies Act* made provision for service of documents in the following terms-

“A document may be served on a company by personally serving it on an officer of the company, by sending it by registered post to the registered postal address of the company in Kenya, or by leaving it at the registered office of the company.”



27. Rule 24(1) of the Companies (Winding-up) Rules stipulated as follows-

“Every petition shall, unless presented by the company, be served upon the company at its registered office, if any, and if there is no registered office, at the principal or last known principal place of business thereof, by leaving a copy of the petition with any member, officer or servant of the company, or, if no such member, officer or servant can be found, by leaving a copy at such registered office or principal place of business, or by serving it on such member, officer or servant of the company as the court may direct; and where the company is being wound up voluntarily, the petition shall also be served upon the liquidator, if any, appointed for the purpose of winding up the affairs of the company.”

27. In this case, it is common ground that the applicant and the petitioner are the only directors and shareholders of the respondent company. It is also common ground that the applicant resides outside the jurisdiction of this Court and that the company never commenced the objective it was incorporated to achieve.

28. The Court of Appeal in *Director of Public Prosecutions v Attorney General & 12 others* (Civil Appeal 206 of 2016) [2022] KECA 397 (KLR) (Civ) (4 March 2022) (Judgment) stated as follows:

“It is also settled that a company can only operate and undertake actions through its directors. The consequences of the above is that any director who is in office becomes responsible for the acts of the company both the past, the present and the future. Gikonyo, J, in *Agricultural Development Corporation of Kenya v Nathaniel K Tum & Another* [2014] eKLR put this issue as succinctly as possible when he stated as follows:

“I find myself re-stating the celebrated legal innovation in *Salomon & Co Ltd v Salomon* [1897] AC 22 HL.; that a company is a legal entity distinct from the its shareholders and the directors, in other words, it is a juristic person-a legal person- with corporate legal personality separate from those who compose it. Except, however, a company operates through human agents- the board of directors who are appointed in accordance with the Article of Association and registered with the Registrar of Companies. Therefore, the directors assume the responsibility of ensuring that the company abides by all legal requirements; all that will preserve its juristic personality and property; and avoiding default that would attract serious legal sanctions, or affect its juristic personality and assets. The legal requirements include; accountability of its business to the shareholders and to the law; operations; directorship; liabilities; assets; payment of taxes, only to mention but a few. Besides liability on the directors, if a company fails to observe the legal responsibilities and obligations set out in law, it will face serious legal penalties and sanctions.”

29. It is noteworthy that during the hearing of the petition, the petitioner maintained that from the formation of the company to date, the company has remained dormant and that they had not held any meeting since his partner resided in Saudi Arabia and there has not been any co-operation on his part.

30. From the foregoing, it is evident the respondent company is a legal person- with corporate legal personality separate from those who compose, save for the fact that a company operates through human agents. Therefore, since there is no evidence that the company had any employees appointed to run the day to day affairs of the company, and since it has been established that the company was dormant, it was prudent and logical to serve the winding up petition upon the applicant personally in Saudi Arabia, since he was the only other director of the company, apart from the petitioner.



31. It would have been absurd for the petitioner to serve the winding up petition to himself. In order to ensure that the effect of service was not defeated, the petitioner was required to give the applicant a notice of the winding up proceedings that he had instituted against their company. The applicant was however not notified of the winding up petition. The advertisement in the Kenyan newspapers was of no effect since the petitioner was very well aware that the applicant resided in Saudi Arabia.
32. In *Onyango Oloo vs Attorney General* [1986-1989] EA 456, the Court of Appeal expressed itself as follows:
- “The principle of natural justice applies where ordinary people would reasonably expect those making decisions which will affect others to act fairly and they cannot act fairly and be seen to have acted fairly without giving an opportunity to be heard... A decision in breach of the rules of natural justice is not cured by holding that the decision would otherwise have been right since if the principle of natural justice is violated, it matters not that the same decision would have been arrived at...Denial of the right to be heard renders any decision made null and void ab initio.”
33. Similarly, in *General Medical Council vs Spackman* [1943] 2 All ER 337 cited with approval in *R vs Vice Chancellor JKUAT* Misc Appl No 30 of 2007 it was held that:
- “If the principles of natural justice are violated in respect of any decision, it is, indeed immaterial whether the same decision would have been arrived at in the absence of the departure from essential principles of justice. The decision must be declared as no decision.”
34. Consequently, it is my finding that service by way of an advertisement in the local newspapers defeated the purpose of service since the petitioner himself admitted that the applicant herein resided in Saudi Arabia. I therefore hold that this is a proper case for the setting aside of the judgement dated September 25, 2014. In the result, the winding up order is hereby set aside. Costs are awarded to the applicant

It is so ordered.

DATED, SIGNED AND DELIVERED AT MOMBASA ON THIS 30TH DAY OF JUNE, 2022.RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

NJOKI MWANGI

JUDGE

In the presence of:

Mr. Mwanzia for the petitioner

No appearance for the applicant

Mr. Oliver Musundi – Court Assistant.

