



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND TAX DIVISION
INSOLVENCY PETITION NO.E003 OF 2018

DANKAR RAMBHAI PATEL.....APPLICANT

VERSUS

UNITED ENGINEERING SUPPLIES LTD....THE COMPANY/1ST APPLICANT

SANJAY RAMESHBHAI PATEL.....RESPONDENT/2ND APPLICANT

RULING

Background

1. On 27th February 2019 Makau J. directed that the application herein dated 18th September 2018 and an application in a related case (Misc. App. No. 176 of 2018) dated 26th February 2019, be heard together.
2. On 10th June 2019, this court directed that this matter and the related case Miscellaneous E176 of 2018 be consolidated and that both applications be canvassed by way of written submissions.
3. This ruling is therefore in respect to the two applications dated 18th September 2018 and 26th February 2019.

Introduction.

4. Vide a liquidation petition dated 18th June 2018, the petitioner herein who is also a shareholder in the 1st respondent company initiated the instant petition on grounds that there was blatant disregard of the mutual understanding and agreement of the parties regarding the running of the 1st respondent, (hereinafter “**the Company**”) as a family business and a quasi partnership. According to the petitioner under such an arrangement all members needed to be involved in the management of the affairs of the company and to derive benefit from it.
5. The petitioner also accuses the 2nd respondent of using his majority shareholder status to remove him (petitioner) and his son one **Parag, D. Patel** from their positions in the company thereby precipitating that the initiation of the instant liquidation petition.

Application dated 18th September 2018

6. Following the filing of the petition the 2nd respondent filed this application seeking the following orders in the said application:

a) Spent

b) That this Honourable court be pleased to issue a temporary injunction restraining the petitioner jointly and severally by himself and/or through his agents, servants and/or employees or otherwise whatsoever from advertising the petition in the Kenya Gazette and/or in any newspaper and/or howsoever pending hearing and determination of the application herein.

c) That this honourable court do strike out the petition filed herein for being an abuse of the court process.

d) That in the alternative and without prejudice to prayer No. 3 above, this Honourable court be pleased to stay proceedings herein pending the determination in the appropriate legal proceedings of the actual number of shares held by each of the contributors and also the recovery of directors fees by the company/1st applicant wrongfully paid to Parag D. Patel when he was

not lawfully appointed a director of the company/1st applicant.

e) That the cost of this application be provided for.

7. The application is brought under Section 427(1) (a) and (4), 428(1) (a) of the Insolvency Act, is supported by the 2nd applicant's affidavit and is premised on the grounds *inter alia* that:

a) That the petition as filed herein lacks merit both in law and fact whereas the imminent advertisement of the petition will result in the adverse consequence of irreparably damaging the business reputation of the Company/1st Applicant whereby customers, banks and creditors will avoid dealing with the Company/1st Applicant which will expose the Company/1st Applicant to financial ruin, which is not in the best interest of the contributors and in particular the 2nd respondent/2nd applicant unless this honourable court restrains the said advertisement.

b) That the petitioner's reasons for seeking the liquidation of the company do not meet the threshold of just and equitable grounds as the entire petition has been brought in bad faith with the singular aim of depriving the Respondent/2nd Applicant his only source of livelihood.

c) That the petitioner has as far back in 2012 breached his fiduciary duty of trust as a director of the Company/1st Applicant by incorporating another rival company called United Tools Limited together with his son (Parag D. Patel), passing it off as a sister company of the United Engineering Supplies Ltd whilst diverting customers and sales to the rival company.

d) That in addition the company/1st applicant has been deprived of money through the fraudulent conduct of petitioner and his son, whereby the son (Parag Dinkar Patel) applied for a work permit in 2015 under United Tools Ltd where they are both directors and not as a director of the Company/1st Applicant but came to work for the Company/1st Applicant and was paid a salary yet he knew that what he was doing was unlawful and the Company/1st Applicant needs to recover this money before liquidation as it is part of the assets of the Company/1st Applicant illegally obtained by the petitioner's son.

e) That it is therefore inequitable and unjust for the petitioner who breached and continues to breach his director's fiduciary duty of trust to the Company/1st Applicant and the Respondent/2nd Applicant to seek liquidation of the Company whose business he has unlawfully jeopardized for his selfish interest whereby he seeks to profit from the customers of the Company/1st Applicant once it is liquidated to the exclusion of the Respondent/2nd Applicant.

f) That further the petitioner has been an impediment to the smooth running of the affairs of the Company/1st Applicant by refusing to authorize overdraft facilities required by the Company/1st Applicant for better cash flow and even refused to sign cheques when requested to do so and has also refused to attend Company Annual General Meetings even after being provided with the Company/1st Applicant audited accounts and notified that this was a proper forum for him to raise concerns if any, which would be responded to by the Company/1st Applicant auditors appropriately and to his satisfaction.

g) That in contrast the Respondent/1st Applicant has diligently used all his energy and resources solely in ensuring that the Company/1st Applicant is run profitably and the audited accounts of the Company/1st Applicant is evidence that the Company/1st Applicant has not been mismanaged and is in fact making profit despite the impediments and ill-will from the petitioner's conduct.

h) That the petitioner has also perjured himself and shown that he is willing to lie on oath in order to have the Company/1st Applicant liquidated whilst making false accusations against Respondent/2nd Applicant and is undeserving of the orders sought in the petition for coming before this honourable court with unclean hands.

i) That inter alia the petitioner falsely alleged at paragraph 10 of his verifying affidavit that the Respondent/2nd Applicant increased nominal shares of the Company/1st Applicant and allocated 60,000 nominal shares to his mother Premila Patel without the petitioner's knowledge and/or information yet this was done at the behest and instructions of the petitioner himself given in writing to the Company Secretary.

j) That it has now come to the Respondent/2nd Applicant attention and knowledge that in fact the petitioner fraudulently capitalized the debt of Kshs 12 million owed to United Auto Tools Ltd which was bought by United Engineering Supplies Ltd without any resolution passed being by the shareholders of United Auto Tools Ltd of which the Respondent/2nd Applicant was one of them and further any capitalization of the debt ought to have been apportioned pro rata to the shares held at United Auto Tools Ltd by each shareholder and the Respondent/2nd Applicant was deprived of his shares thus reducing his shares at United Engineering Supplies Ltd which the petitioner fraudulently allocated himself.

k) That as there is a dispute on the shares that each of the contributors are legally entitled to be holding both from the false allegations contained in the petitioner's verifying affidavit and contents in the respondent's replying affidavit it is incumbent that the issue of shareholding be determined first in appropriate legal proceedings which the Respondent/2nd Applicant intends to file before the hearing of the liquidation petition filed herein.

l) That the petitioner unilaterally appointed his son (Parag Dinkar Patel) a director of the Company in 2007 without adhering to

the procedures and requirements under the Memorandum & Articles of Association of the Company/1st Applicant and the said son was therefore illegally and unlawfully paid director's fees, salary and benefits which should all be recovered from him prior to the hearing of the liquidation petition as he was not legally and validly entitled to the said payments from the Company/1st Applicant.

m) That it is therefore extremely urgent that this Honourable court grants the injunction restraining the petitioner from advertising the petition pending hearing and determination of the application herein to avert adverse publicity to the Company/1st Applicant whose business reputation will be irreparably ruined if the injunction is not granted.

8. The petitioner opposed the application through the Grounds of Opposition dated 25th September 2018 herein he listed the following grounds:

1. There is no threat or imminent risk of advertisement of the petition herein for the following grounds:

a) There is no requirement for advertisement under the Insolvency Act, 2015 for this type of liquidation.

b) Leave of court is required before advertisement and the petitioner has not yet obtained leave of court.

2. The applicants' proposal to stay the proceedings contravenes Section 1A, 1B and 3A of the Civil Procedure Act because the issue raised by the applicants, to wit, determination of the shareholding of the company before hearing of the petition, is an issue that can be determined during the hearing of the petition.

3. The application is brought in bad faith and is only meant to delay the speedy conclusion of this matter and should therefore be dismissed with costs.

4. The application as is misconceived, lacks merit, is frivolous and an abuse of the process of court and ought to be dismissed with costs.

9. The petitioner also filed a replying affidavit dated 22nd October 2018 wherein he expounds on the grounds listed in the Grounds of Opposition and avers that since an advertisement, under the Insolvency Act, can only be done with the leave of the court, he has not taken any such steps and that the applicant's apprehension of imminent threat of advertisement is therefore unfounded. He claims that the applicant engineered his removal as a director thereby depriving him of his only source of livelihood. He accuses the applicant of lying under oath and maintains that one United Auto Tools Ltd (UATL) is not a party to these proceedings and that any claims against the said company can only be pursued in a separate suit.

10. He avers that 2nd Respondent/Applicant authorized capitalization of the United Auto Tools Ltd by signing the resolution authorizing the capitalization. He further states that United Tools Auto Limited (UATL) was incorporated with the main aim and objective of purchasing the respondent's shares in the company following discussions and negotiations and that the allegations of breach of Fiduciary duty of trust is an afterthought. He accuses the 2nd Respondent/Applicant of dishonesty in his allegations that the company is being run profitably as he has in the past stated that the company is not making profits. He states that the applicant's proposal to stay the proceedings is a ploy to delay the prosecution of the petition so as to bring about piece-meal litigation which does not promote the overriding objective of expeditious disposal of suits.

Applicant's submissions

11. In the written submissions in support of the application, **Mr. Thuo**, learned counsel for the applicant, submitted that the prayer for a temporary injunction to restrain the petitioner from advertising the petition is merited for the reason that an advertisement will result in adverse consequences of irreparably damaging the business reputation of the company as its customers, banks and creditors will avoid dealing with it, thus exposing the company to financial ruin.

12. For this argument, counsel relied on the decision in **Joginder Singh Dhangal vs Dangal Brothers Limited and Another** [2006] eKLR wherein the need for an order stopping an advertisement of a winding up petition was discussed.

13. It was submitted that the petition is an abuse of the court process as it seeks to pile pressure on the 2nd applicant to buy the petitioners shares at unfavourable terms through the threat of adverse publicity in view of the fact that the petitioner and his son already jumped ship and formed a rival company. It was also submitted that the 2nd applicant has availed the company's audited accounts as evidence of the company's financial position to demonstrate that the company is not being mismanaged.

14. The applicant maintained that the copies of Annual General Meeting (AGM) notices inviting the petitioner to the Annual General Meeting show that he declined to attend the meeting thus excluding himself from the management of the company's affairs. The 2nd applicant accused the petitioner of sabotaging the company by refusing to approve overdraft facility and to take up additional shares in the company.

15. It is the applicants' case that the petitioner has not come to court with clean hands having breached his fiduciary duty of trust as a director in the company by incorporating a rival company called United Tools Limited. For this argument counsel cited the case of **Re Shine Styling Ltd** [2005] ALL ER (D) 34 (Feb) where it was held:

“It was a well established that a petitioner who relied on the “just and equitable” clause should come to court with clean hands, and if the breakdown in confidence between him and other parties to the dispute appeared to have been his misconduct he could not insist on the company being wound up if they wished to continue.”

16. Counsel further relied on the provisions of Section 427(4) of the Insolvency Act which empowers the court to decline to grant an order for winding up where there is an alternative remedy.

17. It was the applicants’ case that they have demonstrated, by averments and evidence contained in the affidavits, that there is a prima facie case/dispute on the respective shares held by him and that requires to be determined prior to the hearing of the petition, since liquidation of the company will require that the assets of the company be shared according to the correct shares held by the shareholders.

18. The applicant argued that his prayer for stay of proceedings was therefore necessary so that the actual number of shares held by each contributor may be ascertained in appropriate legal proceedings. Counsel contended that by the petitioner’s own admission, the dispute on shares cannot be heard under this petition as it requires the rectification of the company register of members by a separate suit for rectification of the company register of members – which the 2nd applicant filed under Nairobi HC Miscellaneous Application No. E176 of 2018. For this argument reference was made to the case of **Re Bambi Restaurant Ltd** [1965] 2 ALL ER 79 wherein it was held:

“The petition raises an issue which lies between the petitioner on the one hand and the company on the other and I do not think that this court could properly determine the issue of shares in these proceedings.”

19. On 5th December 2018, the 2nd respondent, Sanjay Rameshbhai Patel, filed an originating Notice of Motion in Misc, E176/2018 against the petitioner and Registrar of Companies seeking orders that:

1. Spent.

2. That this honourable court be pleased to order the Registrar of Companies to rectify the Register of Members of United Engineering Suppliers Ltd C.59839 by striking out the number of 154,454 shares as shown to be held by Dinkar Rambhai Patel and in place thereof to insert 114,254 shares against his name.

3. That this honourable court be pleased to order the Registrar of Companies to rectify the Register of Members of United Engineering Suppliers Ltd C.59839 by striking out the number of 154,454 shares as shown to be held by Sanjay Rameshbhai Patel and in place thereof to insert 305,746 shares against his name.

4. That the cost of this application be provided for.

20. The application is based on the grounds that:

a) That the 1st respondent herein has filed a petition seeking to wind up the United Engineering Supplies Ltd (the company) and has in his petition and verifying affidavit both dated 18th June 2018 falsely alleged that the applicant increased the nominal shares of the company and allocated 60,000 nominal shares to his mother Premila Patel without the 1st respondent’s knowledge and/or information.

b) That in fact contrary to the 1st respondent’s false allegation the increase of the nominal share of the company was done at the behest and instructions of the 1st respondent himself who gave written instructions to the Company Secretary on 30th June 2010.

c) That further it has now come to the applicant’s attention and knowledge that the 1st respondent fraudulently capitalized the debt of Kshs 12 million owed to United Auto Tools Ltd which was bought by United Engineering Supplies Ltd within any resolution passed being by the shareholders of United Auto Tools Ltd of which the applicant was one of them.

d) That any capitalization of the debt of United Auto Tools ought to have been apportioned prorata to the shares held at United Auto Tools by each shareholder.

e) That the applicant was deprived of his shares through the wrongful and unlawful conduct of the 1st respondent which reduced his shares at United Engineering Supplies Ltd that the 1st respondent fraudulently allocated himself.

f) That as there is a dispute on the shares that each of the contributors/members are legally entitled to be holding both from the false allegations contained in the 1st respondent’s petition and contents in the 1st respondent replying affidavit it is incumbent that the issue of shareholding be determined first in this matter before the hearing of the liquidation petition as this will determine how the assets of the company are shared out in the event of liquidation.

21. In the application dated 26th February 2019, the petitioner seeks orders to strike out the originating Notice of Motion filed on 5th December 2018 on the basis that the claim lacks basis, is time barred, is incurably defective and is therefore an abuse of the court process.

22. The 2nd respondent opposed the application through his replying affidavit sworn on 14th March 2019 wherein he states that the application is an abuse of the court process as the petitioner has not filed any response to the motion dated 4th December 2018 seeking the rectification of the register of members of United Engineering Supplied Ltd.

23. The 2nd respondent further avers that the petitioner fraudulently and deceitful acquired his rightful share allocation after capitalizing the debt of Kshs 12 million in the company's book of accounts. He contends that the motion cannot be dismissed for alleged non joinder of a party and explains in detail, how the alleged fraud in the allocation of shares was committed.

Petitioner's submissions

24. On the issue of advertisements of the liquidation petition **M/S Oraro & Company Advocates** for the petitioner submitted that there was no imminent threat of advertisement of the petition so as to warrant the granting of orders of temporary injunction. For this argument counsel cited the decision on the case of **Amina Adam & 3 Others V Rosamma Alexander & 2 Others [1993] eKLR** wherein it was held:

“The object of a temporary injunction is to prevent future injury. In addition one cannot secure himself by means of a temporary injunction against a mere possibility that he will be disadvantaged by the 2nd respondent's acts in future, the risk must be very probable to be suffered and suffered soon, that is imminent.”

25. It was submitted that there is nothing in the law that prohibits a party who has filed a liquidation petition from advertising it especially when the purpose of such an advertisement is to ensure that creditors with claims against the company get a chance to establish/prove their debts.

26. Counsel argued that the prayer for temporary injunction does not meet the three part test set out in the case of **Giella V Cassman Brown [1973] 358 EA**.

27. It was submitted that the petition should not be struck out as it is merited and raises the pertinent issues of provision of audited accounts of the company, breach of fiduciary duties by a director among other issues. Counsel reiterated that the petitioner has a bona fide claim and has demonstrated that it is just and equitable to liquidate the company.

28. It was further submitted that there is no alternative remedy to liquidation as the parties have previously and on numerous occasions engaged in negotiations aimed at either party buying the shares of the other without success. Counsel stated that the prayer for the liquidation of the company stems from a long history of failed attempts by either of the parties to sell their shares in the company and added that the 2nd respondent is still unwilling to buy the petitioners shares. It was therefore the petitioner's case that the only available remedy for the parties was an order for the dissolution of the company. It was submitted that the allegation that the petitioner and his son, Parag, incorporated a rival company and passed it off as a sister company to the company herein was unsubstantiated and completely irrelevant to the matter raised in the instant petition.

29. On the prayer for stay of the proceedings in the Liquidation Petition pending the determination, in appropriate legal proceedings, of the actual number of shares held by each of the contributors and the recovery of director's fees alleged to have been wrongfully paid to one Parag, counsel submitted that the said Parag is not only not a party to these proceedings but that the mere fact that he is the petitioners son does not mean that the petitioner should be held liable for his alleged misdeeds. Counsel denied that there was any dispute in the shareholding of the company and argued that the existence of a dispute in the shareholding of the company, if any, would form a basis for the liquidation of the company.

Analysis and determination

30. I have carefully considered the applications dated 18th September 2018 and 26th February 2019, the responses filed by the parties, the submissions and the authorities that were cited.

31. As I have already stated in this ruling, the files containing the two applications were, through the directions issued on 10th June 2019, consolidated. I will embark on delivering my analysis and findings on both applications separately even though they are closely related.

Application dated 18th September 2018.

32. The main issues for determination in this application are:-

- a) Whether the respondents have made out a case for determination of orders of injunction to restrain the petitioner from advertizing the liquidation petition.***
- b) Whether the petition should be struck out for being an abuse of the courts process.***
- c) Whether the court should stay the hearing and determination of the liquidation petition.***
- d) Who should bear the costs of the applications.***

Injunction

33. The 2nd respondent seeks orders to restrain the petitioner from advertising the petition on the basis that such an advertisement will have a negative impact on the company whose business reputation may be irreparably ruined by such adverse publicity.

34. On his part, the petitioner argued that not only was there no imminent threat of such an advertisement, but there is no requirement for

advertisement for the type of liquidation sought under Insolvency Act which stipulates that leave of the court be sought and obtained before an advertisement is done.

35. My finding is that the instant application does not meet the threshold for the grant of orders of injunction as set out in the ***Giella V Cassman Brown*** case (supra). I say so because the 2nd respondent has not demonstrated that there is any imminent threat/danger of an advertisement of the petition. Furthermore, an advertisement of a liquidation petition, if any is carried out, is a legal and statutory requirement/process under the Insolvency Act which this court cannot stop by an order of injunction as has been suggested by the applicant/2nd respondent. I am not persuaded that the 2nd respondent has established a prima facie case so as to warrant the granting of an order of injunction.

Striking out.

36. The 2nd respondent seeks the striking out of the liquidation petition on the basis that it is an abuse of the process of court. I have however perused the liquidation petition filed on 22nd June and I note that in the said petition, the petition has outlined several grounds/reasons for seeking the liquidation of the company which is a family business run by members of the same family who no longer see eye to eye. That there is a long standing disagreement between the members/directors of the company is a fact that has not been denied by the 2nd respondent who, in turn, accuses the petitioner of committing fraud in the distribution of the shares of the company.

37. In the circumstances of this case and bearing in mind the accusations and counter accusations made by the protagonists in this case, this court finds that the liquidation petition cannot be said to be an abuse of the court process. Courts have taken the position that they would not strike out a suit is a draconian measure only to be adopted in the clearest of cases.

Stay of the liquidation petition.

38. The 2nd respondent sought an order of stay of the petition pending the determination of the shareholding of the members of the company and the recovery of the directors fees allegedly paid to one Parag. I find that following the consolidation of this suit with Misc. E176 of 2018 wherein the 2nd respondent seeks the rectification of the register of members in respect of to the shareholding, it is no longer necessary to stay the liquidation petition on the basis that shareholding needs to be determined first.

39. Regarding the alleged fees paid to one **Parag**, I find that it cannot be a basis for stay as it has not been shown that any such claim has been filed against the said Parag and the court cannot therefore be called to stay a mater in anticipation of an event that is yet to happen or may never happen.

40. The above finding notwithstanding, I find that the claim of fees alleged to have been wrongfully paid to a director cannot form a basis for stay of a liquidation suit as the two claims are separate and distinct and one cannot prejudice the other.

Application dated 26th February 2019

41. The issue which arises in this application is whether the applicant/petitioner has made out a case for the striking out of the Originating Notice of Motion dated 4th December 2018. I note that the applicant in this application who is the respondent in the Originating Notice of Motion dated 4th December 2018 did not file any response to the said motion but instead file an application to strike out. My take is that the application dated 26th February 2019 ought to have been the response to the Originating Notice of Motion dated 4th December 2018.

42. The court is appalled but the multiplicity of motions that have been instituted by the parties in this case which have had the effect of clouding the main issues between the parties which are the shareholding of the company and whether or not it ought to be dissolved.

43. For the above reasons, I find that both the application dated 26th February 2019 and 18th September 2018 are not merited I therefore dismiss them with orders that costs shall abide the outcome of the main petition.

Dated, signed and delivered in open court at Nairobi this 24th day of January 2020.

W. A. OKWANY

JUDGE

In the presence of:

Mr. Kadima for the respondent

Court Assistant – Sylvia