



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
COMMERCIAL & ADMIRALTY DIVISION
INSOLVENCY PETITION NO. 22 OF 2018
IN THE MATTER OF THE INSOLVENCY ACT NO. 18 OF 2015
AND
IN THE MATTER OF THE COMPANIES ACT NO. 17 OF 2015
AND
IN THE MATTER OF THE LIQUIDATION OF KENHAJIR COMPANY LIMITED
ABDIRASHID MUDE ULOW.....PETITIONER
-VERSUS-
HASSAN OMAR KASSAI.....RESPONDENT
JUDGMENT

BACKGROUND

LIQUIDATION PETITION

The Petitioner herein **Abdirashid Mude Ulow** approached the court through a liquidation petition filed on 8th of August 2018 seeking orders that;

1. Kenhajir Trading Company Limited (hereafter referred to as “the company”) be liquidated under the provisions of the Insolvency Act.
2. All the assets of Kenhajir Trading Company limited be sold and distributed to the shareholders in their respective shareholding.
3. In the alternative the company or the Co-director/Shareholder of the company other than the Petitioner be ordered to purchase the Petitioner’s shareholding in the Company at the current market value to any other party.
4. Costs to be provided for.
5. The court to issue any other order as it may deem fit.

The Petition was supported by an affidavit of the Petitioner.

The Petitioner is a Director/shareholder in the Company. The Company was incorporated to carry on business of general contractors, carry on the business as transporters of goods, livestock and all types of merchandise for reward, to carry on the business of clearing and forwarding as principle or agents and shippers on the basis of commission fee or agency charges and to carry on the business in general supplies of electrical goods.

The Petitioner sought the Company to be liquidated for the following reasons;

- a) The petitioner and the Co-Director have equal amount of shares (500 shares)
- b) The Co-shareholder and Director operates the company's bank account alone being the only signatory
- c) The Co- Shareholder and Director operates the Company's business without involving the Petitioner and has previously entered into contracts with British American Tobacco (BAT) and the County Government of Wajir without involving the Petitioner.
- d) The petitioner has suffered mental and financial strain due to the actions of his Co-shareholder.
- e) The co-shareholders/Directors cannot agree on the manner of running the affairs of the Company.

REPLYING AFFIDAVIT

The Co-Shareholder/Director **Hassan Omar Kassai** filed a Replying

Affidavit to the Liquidation Petition on 11th March, 2019, and deposed that the original directors of the Company were Mohammed Abdille & Mohammed Abdullahi. He averred that the Petitioner did not contribute any value for the share. In 2011 the directors transferred their shares to the Petitioner and Respondent all their shares. The petitioner and Respondent each held 50% shares of the Company. The Petitioner was brought in to the fold for compliance purposes where the Companies Act required companies to have two directors.

The Respondent admitted the Petitioner was indeed a signatory to all the Company's bank accounts. The Petitioner did not have any interest in the affairs of the company and has also never invested towards the growth of the company.

He further averred that despite the Articles of Association providing for an out of court approach in settling disputes, the Petitioner rushed to court without even raising the issue with the Respondent.

The Respondent does not deny the Company being in a Contract with the British American Tobacco – Kenya PLC but avers that the same was entered into before they took over the company. The Petitioner served on BAT the insolvency proceedings despite them not being a party to this Petition, an action the Respondent views as a plan to sabotage or frustrate the company's contract.

He averred further that the Petitioner, who engages in cigarette selling business just like the company, might be working with a competitor from their local region. The company used to sell 1600 miles per week and now only manages to sell 500 miles per week due to the frustration by the Petitioner who allegedly runs his business through a competitor company.

The Respondent averred that the Petitioner was in the company for seven years, remained inactive and disinterested in the affairs of the company and raised no formal complaint.

The Respondent urged the court to dismiss the petition since it is lacking in merits and raises no grounds for liquidation of a company.

SUPPLEMENTARY AFFIDAVIT

The Petitioner replied to the Replying Affidavit through a Supplementary Affidavit filed on 18th April, 2020. He averred that he was not included as the Company's Director to comply with the Company's Act, but he went into business with the Mr. Kassai with the aim of making and sharing profits with him. He stated that he paid consideration for the shares in the company. He denied all allegations of frustrations and the allegation he was not interested in the running of the Company and did not invest to grow the Company. The Respondent opened another account with Kenya Commercial Bank (KCB) in a clandestine manner. The Petitioner, urged the court to dissolve the company.

RESPONDENT'S SUPPLEMENTARY AFFIDAVIT

The Respondent filed a Supplementary Affidavit on 4th June, 2019 and averred that the Petitioner did not incur any expenses in securing the shares. The Company was incorporated in 2004. The Respondent stated he was Managing Director of the Company and dealt with business and contracts before he was Director of the Company and invited the Petitioner to be a Director. The Respondent averred that he used to send goods to the Petitioner in Wajir and he was paid commission for brokerage by the company. That the Petitioner works with a competitor company known as Leah Distributors Ltd and he was distributing goods for the competitor at the same time he worked for the company.

PETITIONER'S SUBMISSIONS

The Petitioner submitted that the evidence he adduced in court points to the fact that the relationship between him and his co-director has irretrievably broken down. That he has been kept out of the running of the Company and its affairs without any reasonable or just cause. The company should be dissolved.

He has also submitted that costs be awarded in favor of himself.

RESPONDENT'S SUBMISSIONS

The Respondent submitted while referring to ***Re Ukwala Supermarket Limited (2019) eKLR*** that liquidating a company is a draconian step which amounts to 'corporate execution'. The court still in the same case stated that "the Insolvency Act confers wide judicial discretion on liquidation Petitions of companies. It is trite law that if the court sees a petition to liquidate a company which is not brought in good faith it would apply its legal mind to dismiss it with costs.

He submitted that the present application lacks *bona fides* and is brought in bad faith with ulterior motive which does not require great imagination to read that the Petitioner's desire to eliminate the company for the benefit of another. This is because the Petitioner has been and is still working with a competitor known as Leah Distributors Limited. The Petitioner serving the Petition on BAT was with intention to have the contract cancelled, not seeking liquidation of other companies where he is a Co-Director. It is therefore not just and equitable to liquidate the company.

ISSUE

Whether the Court should declare the Company insolvent and place it under Liquidation

Relevant Provisions of the Insolvency Act, No. 18 Of 2015

Part VI of the **Insolvency Act, 2015** provides for liquidation of companies and **Section 423** of Insolvency Act gives the High Court the jurisdiction to supervise the liquidation of companies. It distinguishes between voluntary liquidation and liquidation by the Court. The matter before the Court is not a voluntary liquidation and must be seen to have been brought pursuant to **Section 424 (a) and 425(1) (a) of Insolvency Act**. These provisions merely permit and provide for liquidation of a Company by the Court.

Section 424 (1) of the Insolvency Act 2015 gives scenarios where a company may be liquidated by Court.

Section 425 of the **Insolvency Act** provides for persons eligible to apply to the Court for liquidation.

"(a) The Company or its Directors.

(b) A creditor or creditors

(c) A contributory or contributories of the Company

(d) Provisional Liquidator or an Administrator of the Company"

The procedure for liquidation by the Court is provided for in **Regulation 77 B of the Insolvency Act (Amendment) Regulations 2018**. For purposes of **Section 425 of the Insolvency Act**, an application for liquidation shall meet the procedural requirements of **Regulation 77B (1) of the 2018 Regulations** as follows:

"77B. (1)

(a) by way of Petition in Form 33B1 set out in the First Schedule

(b) Accompanied by a verifying affidavit in Form 33B2 set out in the First Schedule; and

(2) The Petition for liquidation shall be accompanied by the following documents—

(a) A statutory demand if the reason for Petition is indebtedness; and

(b) A statement of financial position in Form 32 set out in the First Schedule where necessary."

ANALYSIS

Halsbury's Laws of England 4th Edition Volume 7 (2) at page 1095, the learned author states that

"the words just and equitable in company law are a recognition of the fact that a limited liability company is more than a mere judicial entity with a personality in law with its own: behind or among it there are individuals with rights, expectations and obligations interse which are not necessarily submerged in the company structure."

The court may subject the exercise of legal rights by various shareholders to equitable considerations of a personal culture arising between the shareholders in order to determine whether any of the actions are just or inequitable.

Several examples are cited to illustrate instances where it may be just and equitable to wind up a company. The instances include;

a) Where the substratum has gone

b) Where it is impossible to carry on a company's business owing to internal disputes which have produced a state of deadlock

c) Where directors withhold information from shareholders in circumstances which give rise to that suspicion that they are attempting to buy their share at an undervalue

However, where the court establishes any or all of these instances exist, a winding up order may not be granted if there is an alternative remedy.

The Petitioner complained that he is not involved in running of the Company, he is not called for meetings and is not a signatory to the company's bank accounts.

In response, the Respondent admitted that the Petitioner was a signatory to all the bank accounts of the company and that with respect to the Company's business; the company had acquired the British American Tobacco contract before the Company was incorporated into the Company. The Respondent also indicated that the Petitioner was not interested in the affairs of the Company but instead is involved with a competing company. The Respondent averred that he gave the Petitioner shares in the company as a compliance measure to the Companies Act that requires a Company to have a minimum of two directors. The Petitioner claimed that he joined the Respondent in the Company to do business and share profits with him.

During the hearing, the Petitioner stated the Respondent was/is a shareholder director of the Company and signatory to the accounts. Both Petitioner & Respondent testified that each held 500 shares of the Company but none provided proof of how each acquired them. The Petitioner testified he paid into the Company Ksh 6 million as investment. However, no proof was provided to this effect.

From the evidence attached to the Petition and its Affidavit, it is clear that the shares were transferred to the Petitioner and the Respondent in equal measure of 500 shares each from the former directors. It is therefore not true that Respondent gave the Petitioner shares as a measure of compliance with the Companies Act.

The allegation of the Respondent being the only signatory to the Company's bank accounts was admitted by the Respondent but opening a secret account with KCB was not proved and the court disregards the allegation.

The Petitioner submitted that there is an irretrievably broken down relationship between him and his co-director. The Respondent while admitting that the Petitioner owned 50% share of the Company, admitted the Petitioner was not involved in the Company's operations and management as he was not interested and had not invested in the company. If the Petitioner is an equal shareholder of the Company, why was/is he deprived of his legal rights of/to the Company as shareholder/Director of the Company as the Respondent? It means the Respondent unlawfully locked out the Petitioner out of the Company. This relationship deteriorated and is irretrievable.

The Respondent mentioned that the Articles of Association provide for alternative methods of dispute resolution to solve any disputes that may arise in the course of running the business. The Petitioner has not sought any remedies through such processes. The Petitioner has also not initiated any meeting for a possible voluntary liquidation.

Section 114 (3) Companies Act prescribes that the members are entitled to the following rights.

This section applies to the following rights—

(a) the right to be sent a proposed written resolution;

(b) the right to require circulation of a written resolution;

(c) the right to require directors to call a general meeting;

(d) the right to receive notices of general meetings;

(e) the right to require circulation of a statement;

(f) the right to appoint a proxy to act at a meeting;

(g) the right to be sent a copy of the company's annual financial statement and reports; and

(h) if the company is a public company, the right to require the circulation of a resolution for the annual general meeting of the company.

The Petitioner as owner of 500 shares of the Company was/is entitled to the above mentioned rights just as the Respondent is entitled as the other half; majority shareholder with 500 shares of the Company. No evidence was presented to prove that the Respondent allowed the Petitioner any or all rights of a member and equal owner of the Company.

Section 424 of Insolvency Act prescribes

Circumstances in which company may be liquidated by the Court

(1) A company may be liquidated by the Court if—

(a) the company has by special resolution resolved that the company be liquidated by the Court;

(b) being a public company that was registered as such on its original incorporation—

(i) the company has not been issued with a trading certificate under the Companies Act, 2015; and

(ii) more than twelve months has elapsed since it was so registered;

(c) the company does not commence its business within twelve months from its incorporation or suspends its business for a whole year;

(d) except in the case of a private company limited by shares or by guarantee, the number of members is reduced below two;

(e) the company is unable to pay its debts;

(f) at the time at which a moratorium for the company ends under section 645—a voluntary arrangement made under Part IX does not have effect in relation to the company; or

(g) the Court is of the opinion that it is just and equitable that the company should be liquidated.

The Company was formed 2004 and conducts cigarette distribution business in parts of North Eastern area. There is no evidence that from then to date the Company is unable to carry out its business and is no longer a going concern, there is no evidence presented that the Company cannot pay its debts. The evidence presented is that there is a deadlock and/or stalemate by the Directors of the Company's dispute on who/how to conduct management and operations of the Company. The Respondent admittedly ousted the Petitioner from the Company. This is a directors/shareholders dispute and not any handicap to the Company's conduct of business to necessitate its dissolution. The Company is a separate legal entity carrying out its business. The court does not find the Directors feud a just and equitable basis to dissolve the Company. There also other remedies available to settle the Petitioners and Respondents tussle in management and operations of the company.

DISPOSITION

1. The Petition that Kenhajir Trading Company is liquidated under the provisions of the Insolvency Act is dismissed/denied.

2. The Company shall purchase the Petitioner's 500 shares of the Company at current market value within 180 days failing which the Petitioner shall be at liberty to sell the shares at current market value to any other party and in accordance with Articles of Association of the Company.

3. Each party to bear its own costs.

DELIVERED SIGNED & DATED IN OPEN COURT ON 24TH NOVEMBER 2020 (VIRTUAL CONFERENCE)

M.W. MUIGAI

JUDGE

IN THE PRESENCE OF:

MR. GITOBU INOTI FOR THE PETITIONER

YUNIS, OSMAN & MWITI ADVOCATES FOR RESPONDENT- N/A

COURT ASSISTANT - TUPET