



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL & TAX DIVISION
WINDING UP CAUSE NO. 8 OF 2016
IN THE MATTER OF GIAKI FARM LIMITED
IN THE MATTER OF THE COMPANIES ACT

BETWEEN

ARBI ALIMOHAMED MUSSANI.....PETITIONER

-VERSUS-

BHARATKUMAR RAOJIBHAI PATEL.....1ST RESPONDENT

GIAKI FARM LIMITED.....NOMINAL RESPONDENT

J U D G M E N T

1. **Arbi Alimohamed Mussani** (hereby after Arbi) has filed this Petition, which although is entitled winding – up Petition, indeed seeks prayers in alternative, that is either winding-up or in alternative other prayers which include declaratory prayers.

1. The Respondent is **Bharatkumar Raojibhai Patel** (herein after Patel) and a Nominal Respondent **Giaki Farm Limited** (herein after the Company).

2. Arbi, by his verifying affidavit has set out the back ground for seeking the prayers in this Petition. I will reproduce the depositions of Arbi.

3. He deponed that he is a co-Shareholder and co-Director, of the Company, with Patel. The Company was incorporated on 12th April 1989. At incorporation the Company’s shares were allotted as follows:

a) Bharatkumar RaojibhaiPatel-1 share.

b) Arbi Alimohamed Mussani-1 share.

c) 98 shares remained un-alloted.

4. That by an agreement between Arbi and Patel, when incorporating the Company, it was agreed that Arbi would contribute his personal parcel of Land Title No. Nyaki/Giaki-Kiburine/393 to the Company’s business. Vegpro Kenya Limited (herein after Vegpro) would contribute its business experience and knowledge; that Vegpro and Arbi would, through the Company, carry on horticulture farming; and that the profits generated from the business would be shared equally; and that Vegpro would nominate Patel to hold its share in the Company.

5. Arbi deponed he, as agreed, transferred his parcel of land to the Company in July 1989. That land was previously owned by Arbi and his brother, Walimohamed Mussani.

6. That on the last annual returns filed by the Company in 2003 the shareholding Directorship of the Company was:

a) *Bharatkumar Raojibhai Patel Shareholder/Director 40 shares.*

b) Arbi Alimohamed Mussani Shareholder/Director 25 shares

c) Walimohamed Mussani Shareholder 25 shares.

d) Estate of the late Chandubhai Patel Shareholder 10 shares.

7. That Arbi relocated to UK from 1990 up to 1995. On his return to Kenya Arbi engaged himself in his other business but in 2013 he realized that the Company was not carrying out farming or business activity but that rather it had leased out the Company's property.

8. Arbi attempted to get details or information and updates of the Company's business performance but Patel failed/neglected to give that information.

9. Arbi said he carried out his own investigation which revealed that Patel is incapable of continuing to act as a Director of the Company. He deponed that he reached that conclusion on revelation from his inquiries. This is what Arbi stated in his affidavit:

From these enquiries, I have discovered that over time, Bharatkumar Raojibhai Patel has used his position of influence to usurp total control of the Company, gradually disregarding the requirements of the Law and the Memorandum and Articles of Association, especially after the death of his co-Director in Vegpro Kenya Limited who was instrumental in the negotiation of the above-stated agreement and incorporation of the Company. He has now taken unilateral control over the management of the affairs of the Company in reckless disregard of the due process in the management of, and ownership of the Company's assets and in an oppressive manner towards the other Shareholders of the Company. I discovered that:

a) Bharatkumar Raojibhai Patel has made numerous changes to the shareholding in the Company without regard to the provisions of the Articles of Association;

b) Bharatkumar Raojibhai Patel has on numerous occasions made decisions reserved in the Company's Shareholders, including appointment of statutory officers, without any valid resolutions of the Shareholders in general meeting or otherwise;

c) Bharatkumar Raojibhai Patel has on numerous occasions filed false or misleading returns with the Registrar of Companies without the knowledge of other Shareholders or Directors;

d) Bharatkumar Raojibhai Patel has without knowledge and valid resolutions of all Shareholders and Directors in the Company borrowed funds using the Company land as security, and failed to disclose and account for the utilization of the funds to enable a determination of whether it was for the Company's benefit. I am reasonably apprehensive that these funds were utilized to benefit Bharatkumar Raojibhai Patel and/or his business which is why he has refused, neglected and/or failed to account for the same to the Company and myself;

e) Bharatkumar Raojibhai Patel has failed, neglected and/or refused to avail the Company's financial statements, books of accounts, records of meetings including notices, agendas, minutes and resolutions, to the Shareholders and Directors in the Company;

f) Bharatkumar Raojibhai Patel has denied other Shareholders and Directors access to any information, records and documents relating to the Company and its businesses; and

g) Bharatkumar Raojibhai Patel has managed and ran, and continues to do so, the affairs of the Company as if the same was personal property and business.

10. For the above reasons Arbi stated that Patel is incapable of continuing to act as a Director of the Company in a balanced or objective way. That Patel had derived sole and personal benefit of the business of the Company to Arbi's detriment. Arbi then stated:

"In the event that this honourable Court finds that the best remedy to the ills bedeviling the Company is for a nullification of the initial agreement between Bharatkumar Raokibhai Patel and I and for one Shareholder to exit, I confirm that I am ready and willing to exit and transfer my shares to Bharatkumar Raojibhai Patel for valuable consideration of Kenya shillings 185,000,000.00.

In the alternative and without prejudice to the foregoing, I am ready and willing to exit the Company and transfer my shares to Bharatkumar Raojibhai Patel for valuable consideration of Kenya shillings 120,000,000.00 plus a transfer of the parcel of land known as Title Number Nyaki/Giaki-Kiburine/393 in my favour being reasonable and valuable compensation for my shareholding in the Company. Thereafter Bharatkumar Raojibhai Patel can remain and manage the Company in the manner he deems fit."

11. It is on the basis of the above depositions Arbi seeks the following prayers:

"In these circumstances, your Petitioner submits that the affairs of the Nominal Respondent Company are being conducted in a manner oppressive to a part of the member of the Company (including the Petitioner), and that, while it would be just and equitable that the Company should be wound up, to do so would unfairly prejudice your Petitioner, the Nominal Respondent Company and other members of the Nominal Respondent Company.

Your Petitioner therefore, in the alternative to winding –up humbly prays for:

- a) An order quashing all the changes in shareholding and Directorship in the Nominal Respondent done without the knowledge and participation of the Petitioner, together with the attendant returns filed with the Registrar of Companies and
- b) A declaration that the affairs of the Nominal Respondent Company have been conducted and/or managed in an oppressive manner, by and/or through the influence of the Respondent; and
- c) A declaration that the Respondent has conducted the affairs of the Nominal Respondent Company in a manner oppressive to the rights, interests and entitlement of a part of the Shareholders of the Nominal Respondent; and
- d) A permanent injunction restraining the Respondent, either directly, or acting through any other person, from selling, transferring, alienating or effecting the registration of any transfer of the assets of the Nominal Respondent Company, and/or in any way dealing with the assets of the Company; and
- e) An Order for the forensic audit of the Nominal Respondent Company financial accounts and reports from year 1990 to the present or to such a date as the Court may direct; and
- f) An order for the production and inspection of all audited annual financial statements from year 1990 to date; all books of accounts; all bank statements in respect of all Company accounts; all annual and other tax returns filed by the Company; and any other accounting document held and maintained by or on behalf of the Nominal Respondent Company; and
- g) An order for the production and inspection of all records of meetings of the Shareholders and Directors of the Nominal Respondent Company, including notices convening the meetings, resolutions waiving issuance of such notices (if any), agendas for each meeting, minutes of all such meetings and resolutions or extracts thereof of all such meetings; and
- h) An order for the production and inspection of all contracts and agreements of whatever form or nature entered into by the Respondent on behalf of the Nominal Respondent Company, and
- i) An order for the production and inspection of all audit reports, external and internal, in respect of audits and inspections carried out on the Nominal Respondent Company's assets and/or business at any time and for any purpose; and
- j) An order for the production and inspection of all appraisals, assessment and/or valuations carried out in respect of the Nominal Respondent Company's assets and/or business at any time and for any purpose; and
- k) An order restoring to the Nominal Respondent; and
- l) An order that the Respondent is personally liable to indemnify the Nominal Respondent Company from all liabilities occasioned by commitments made in contracts and agreements of whatever form or nature entered by the Respondent purporting to act on behalf of the Nominal Respondent Company; or
- m) In the alternative and without prejudice to the aforesaid prayers, an order that the Petitioner be paid a sum of Kenya shillings 230,000,000.00 being reasonable and valuable compensation for his shareholding in the Nominal Respondent Company in order for the Petitioner to exit the Company and leave it to the Respondent to manage and run as he deems fit; or
- n) In the alternative and without prejudice to any of the aforesaid prayers, an order that the Petitioner be paid a sum of Kenya shillings 120,000,000.00 together with a transfer of all that parcel of land known as parcel of land known as Title Number Nyaki/Giaki-Kiburine/393 in favour of the Petitioner being reasonable and valuable compensation for his shareholding in the Nominal Respondent Company in order for the Petitioner to exit the Company and leave it to the Respondent to manage and run as he deems fit; and
- o) Costs of the Petition herein”

ANALYSIS AND DETERMINATION

12. The Petition is brought under the provisions of the now repealed Companies Act. Since 2015 the law on liquidation of Companies is governed by the Insolvency Act 2015. If what Arbi sought was to liquidate the Company, he could not, and I repeat, could not be seeking to be compensated as the alternative prayers. The Petition undoubtedly is incompetent in view of that.

The Insolvency Act, Section 424 provides the circumstances under which a Company may be liquidated. That Section 424 provides:

“Circumstances in which Company may be liquidated by the Court

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.”

13. There are no circumstances presented in this Petition under which the Company would be liquidated. Arbi's affidavit is lacking in supporting document of his allegations against Patel or even of what was the basis of setting up the Company. It is unbelievable that major decisions affecting the formation of a Company and contribution made to that Company would be oral. Arbi also failed to provide documentation to show that Patel has declined to supply the information about the Company.

14. What is surprising is that the Company was incorporated in 1989. Since 1989 it took Arbi up to 2013 to realize that the business was not been run properly, as he alleges. He doesn't seem to have made inquiries, even on his return, if that is true, from U.K in 1995. This inconsistency leads me to believe that what Patel deposed in his Replying Affidavit is more truthful than what is stated by Arbi.

15. Patel by his Replying Affidavit stated he and, his now deceased, co-Director of Vegpro agreed to buy Arbi's immovable property at Kshs.4 million. Arbi was paid through vouchers. The payment of the purchase price was to be done by instalments and to secure Arbi and his brother, Patel and his co-ordinator agreed to transfer shares to Arbi and his brother pending completion of the purchase of the land. That after the instalments were fully paid Arbi refused to sign the transfer of shares as agreed. Patel stated that Arbi stayed away from the Company and when he next heard of him was when he filed the present Petition.

16. As stated before - the Petition is incompetent. There is no evidence that can lead to liquidation of the Company. In the case; **IN RE NAKUMATT HOLDINGS LIMITED (2017) eKLR** when the Court was considering an order of administration, it stated thus:

In Re Bowen Travel Ltd (Supra) the Court was clear that Directors of a Company will not be allowed simply to pick and choose what details to give to the Court when they seek an administration order. The Court stated as follows:

“...it is, in my judgment, essential that the evidence presented to the Court is reliable. Implicit in the noun ‘reliable’ in the context is not only that it is accurate evidence and true in so far as it is factual, but also that a clear account is given of all potentially relevant facts and circumstances”

17. In this Petition also Arbi has failed to present reliable evidence on which the orders he seeks can be granted.

18. It has also often been held that a Company cannot be liquidated over a disputed debt. See the case In **RE LYMPNE INVESTMENTS LTD (1972) ALL ER 385** where the Court held:

“The Companies” Court must not be used as a debt collecting agency, nor as a means of bringing improper pressure to bear on a Company. The effects on a Company of the presentation of a winding up Petition against it are such that it would be wrong to allow the machinery designed for such Petitions to be used as a means of resolving disputes which ought to be resolved in ordinary litigation, or to be kept in suspense over the Company's head while that litigation is fought.”

19. I believe I have said enough to show that this Petition cannot succeed. It is dismissed with costs to both Respondents.

DATED, SIGNED and DELIVERED at NAIROBI this 30TH day of MAY, 2019.

MARY KASANGO

JUDGE

Judgment Read and Delivered in Open Court in the presence of:

Sophie.....COURT ASSISTANT

..... FOR THE PETITIONER

..... FOR THE 1ST RESPONDENT

..... FOR THE NOMINAL RESPONDENT