REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAJIADO

INSOLVENCY CAUSE NO. 1 OF 2017

IN THE MATTER OF NATURE GREEN HOLDINGS

AND

IN THE MATTER OF THE INSOLVENCY ACT NO. 18 OF 2015

RULING

Douglas Okeyo, the applicant sought an injunction against a winding up petition by Donald Muhonda Andolo pursuant to Regulation Section 10 of the Insolvency Regulations 2016, **Section 3A** of the Civil Procedure Act, order **2 Rule (5) (1) (b), (c) and (d)** of the Civil Procedure Rules; on orders crafted as follows:

> **1. That the petitioner by themselves, their servants, and or agents be restrained from making any publication or advertisement of the petition that may be injurious to the interest of the applicant shareholder.**
>
> **2. That the registrar of the court be restrained from taking any step I the proceedings, whatsoever and howsoever.**
>
> **3. That the applicant shareholder be allowed to run and manage the company solely as if he were the only director**
>
> **4. That the petition dated 12th April, 2017 as amended and filed on 6th September, 2017 be and is hereby struck out.**
>
> **5. That the petitioner be and is hereby ordered to Forthwith to resign from the Directorship of Nature Green Holdings Limited.**
>
> **6. That the petitioner relinquishes his entire shareholding in the company by transferring them to the applicant shareholder or their nominees.**
>
> **7. That the petitioner be and is hereby ordered to surrender to the company all company assets in their possession/custody.**
>
> **8. That application as filed is supported by the affidavit of Dauglas Okeyo, the applicant.**

In the said affidavit the applicant deposes and states in part ***inter alia*** as follows:

> **1. That the petitioner herein has filed the winding up cause in bad faith and with ulterior motives to slander the company in the eyes of the public and associates.**
>
> **2. That the petitioner has not pursued or exhausted all the less costly and damaging remedies available to them**
>
> **3. That the company is a source of livelihood for the applicant shareholder and the petitioner should not be allowed to destroy it**
>
> **4. That the petition by its nature is scandalous, frivolous vexatious and the same should be struck out**

The Respondent on his part Donald Muhonda Andolo filed a replying affidavit to oppose the application. The respondent has set out various averments touching on the history and performance of the company – "**Nature Green Holdings**". He further deposed that there are many issues involved which culminated in petitioning for the compulsory winding up of the company. That there are several points of law for determination by the court both under the company's act and Insolvency Act which process cannot be curtailed by way of injunction.

BRIEF BACKGROUND

Brief background Donald Muhunda Andolo and Douglas Okeyo are the two Directors of Nature Green Holdings Limited with an equal shareholding in the company. "**Nature Green Holdings"** was a company which carried on, business to develop real estates, civil work projects, prepare building sites, to construct, reconstruct, pulldown, alter, improve, furnish, maintain flats or mansonattes, dwelling houses, shops, clubs, buildings works and conveniences of all kinds, to lay out roads and leisure gardens and recreation of grounds, to plant, drain or otherwise improve the land or any part thereof etc.

From the affidavit evidence and the amended petition the company seemed to have experienced financial difficulties in early 2016 and also governance issues among the directors. It was later noticed that a meeting of the directors to pass resolutions on the disputed debts and reflect on the auditor's report became a near impossibility. There was a substantial dispute between the two directors as to the management of the company as a going-concern from the extensive volume of materials and annextures filed before the court.

Mr. Donald Muhonda Andolo took a different approach aimed at unlocking the stalemate by filing a petition to wind up the company alleging indebtness and failure to hold meetings over one year period as specified in the company's act. According to Mr. Donald Muhonda Andolo there was considerable merit in exceptional circumstances to file this petition to chart the way forward. In his plea the petition for winding up was therefore filed as of necessity.

SUBMISSIONS

After the hearing both counsels Mr. Okoth for the applicant/respondent and Mr Karanu for respondent/petitioner agreed to file written submissions on the objection raised to the petition. Mr. Okoth for the respondent/applicant opposed the petition stating that there is dispute as to whether the debts under various contracts with the company are verifiable and due as alleged by the petition. Learned counsel argued and submitted that the creditors themselves who may be aggrieved of the debt have not petitioned for winding up of the company.

He further contended that the respondent/applicant view this action by the petitioner is an effort to destroy the company. In keeping with the terms of the memorandum and Articles of Association, learned counsel urged this court to allow the application to enable the company continue operating by issuing an injunction against the winding up petition. In support of the application he relied and cited the following provisions of the law, **Section 427 (3), (4)** of the Insolvency **Act, Section 1 (A)** of the Civil Procedure Act, **Order 11(3)** of the civil Procedure Rules. Further the decision in the case of **ONELL V. Phillips 1999 All ER D 513** learned counsel placed reliance on the legal Principals that there are other remedies besides winding up relief which only should be invoked in the rarest of the situation. In this case learned counsel contention was that the petitioner has not brought himself .within such exceptional circumstances to warrant intervention by this court. He prayed for the application for grant of injunction to be allowed.

THE RESPONDENT COUNSEL SUBMISSIONS

Mr. Karanu, for the respondent/petitioner on the other hand vehemently opposed the application. In his submissions, Mr. Karanu argued that the petition is premised on the indebtness and the dysfunction of the company precipitated by the sour relationship between the directors. In addition Mr. Karanu contended that there is no provision made for a vast number of existing creditors who are known to the applicant.

In support of the objection Mr. Karanu placed reliance on the Statutory Provisions under Section **427** and **514** of the Insolvency Act. In his submissions Mr. Karanu argued that the statutory scheme for winding up of a company is provided for in the Companies Act 2015 and the Insolvency Rules 2016. In this context Mr. Karanu argued and submitted that even out of court settlements avenues proposed by the applicant are provided in the law. The only challenge Mr. Karanu submits is the disagreement between the directors to give effect to any of the alternative adjudication methods to resolve the dispute. That the winding up of petition is not only meant to seek enforcement of the debts but the petitioner as an equal share holder has a legal right over the ownership of the company.

According to Mr. Karanu the respondent/petitioner has the ***locus standi*** founded on substantial grounds to seek redress before a court of law. He therefore disagreed with learned counsel for the applicant that an order of injunction would be for the best interest of the company.

ANALYSIS AND DETERMINATION

I have considered the application, corresponding affidavits and submissions by both counsels.

"what then is the course for this court to take?"

This incidence on the liability of a company may depend in the first place on the type or classification of a legal entity incorporated under the Companies Act Cap. 86 (repealed) and the provisions of the current Act 2015.

In small or close proprietorship companies, the directors will often be the same as the shareholders or owners of the company. Whereas in large companies there is a structure of management dealing with execution of the policy and the board of directors lay down matters on vision and strategy. The board is also tasked with executive functions of approving capital investment, Human Resource development and other Executive Policy direction.

The Jurisdiction to wind up companies registered in Kenya is provided for in **section 423** and **424** of the insolvency Act which provides as follows:

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 has not been issued with a trading certificate under the companies Act 2015, more than twelve months has elapsed since 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. Except in the case of a private company limited by shares or by guarantee the number of members is reduced to below two.

d. The company is unable to pay its debts.

e. The court is of the opinion that it is just and equitable that the company should be liquidated.

Section 425 of the Insolvency Act provides for persons eligible to apply 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 petitioner/respondent has invoked this provisions seeking liquidation of the company on stated grounds of indebtness and that shareholders are deadlocked in power relations and have failed to hold an annual general meeting. That the application is otherwise just and equitable in the circumstances.

The applicant's contention is that the petition is based on lack of good faith on the part of the respondent. His argument as espoused in the affidavit that the company is commercially viable to be restored back as a going-concern. He further disputed that their relationships as directors has irretrievably broken down to warrant compulsory winding up by the court. If anything, the applicant prayed that the respondent should be ordered out of the company as he appears in his petition to be vexatious and frivolous.

From the above statements, can this court at this interlocutory stage render judgment that the petition has filed is vexatious or an abuse of court process?

As to what constitutes vexatious proceedings is a matter which caught the attention of parliament which enacted vexatious proceedings **Act Cap. 41** of the laws of Kenya Section 3 of the Act provides as follows:

"No *suit shall, except with leave of the High Court or of a Judge thereof, be* instituted by or on behalf of a vexatious litigant in any court, and any suit instituted by him in any court before the making of an order under section *2(1) of this Act shall not be continued by him without such leave; and such leave shall not be given unless the Court or the Judge is satisfied that the suit is not an abuse of the process of the court and that there is a prima facie ground for the suit"*

The Act does not define the phrase vexatious highlight by I found refuge on the case of **ONELL v Deacons 2007 AD QB 754** where the court described vexatious litigants as follows:

"What ***the various common law and statutory criteria suggest is that*** **vexatious litigants are those who persistently exploit and abuse the processes of the court in order to achieve some improper purpose, or obtain some advantage. Vexatious litigants tend to be self represented and quite often the motivation appears to punish or wear the other side down through the expense of responding to persistent, fruitless applications. This is why the failure to pay costs to such applications is a significant element in determining whether a litigant is vexatious."**

Further in the case of **Lang Michener v Fabian 1987 59 H.C.J** the court enunciated the following principles as a guide to determine whether the legal proceedings are vexatious.

1. Where it is obvious that an action cannot succeed or if the action would lead to no possible good or if no reasonable person can reasonably expect to obtain relief, the action is vexatious.

2. Vexatious actions including those brought for an improper purpose, including the harassment and oppression by other parties, by multifarious proceedings brought for purposes other than the assertion of legitimate rights.

3. In determining whether proceedings are vexatious the court must look at the whole history of the matter and not just at whether there was originally a good cause of action.

The Kenyan High Court addressed the issue in the case of Trade Bank Ltd v. Amin Company Ltd and Another 2000 KLR where Ringera, J. held

"A pleading or an action is frivolous when it is without substance or groundless or fanciful and is vexatious when it lacks

bona fides and is ***hopeless or offensive and tends to cause the opposite party unnecessary anxiety, trouble or expenses. A pleading which tends to embarass or delay fair trial is a pleading which is ambiguous or unintelligible or which states immaterial matters which raises issues which may involve expenses which will prejudice the fair trial of the action".***

The above legal proposition is in contrast to what is generally defined as bona fide claim which in **RE Welsh BMCK Industries 1946 2 ALL ER 197** is stated to be as follows:

" that a bona fide claim is one based on some substantial grounds for defending or pursuing remedy in court"

Essentially in the instant petition by the petitioner/respondent in so far as his affidavit and pleadings are concerned he has outlined the grounds upon which he has set to cause the company to be wound up. On interpreting the law on winding up it is a matter to be determined at a full hearing of the petition. It suffices to say that there is no evidence the petitioner has filed the winding up cause for collateral and sinister motives.

The petitioner has relied on clauses of the Articles of Association and Memorandum to buttress the statutory provisions of the **Insolvency Act no. 18 of 2015** to seek a remedy before the High Court.

In appraising both parties' respective affidavits there is some level of personal hostility and or venom of uncompromising nature but certainly it does not amount to slander, malice or an abuse of the court process. The Insolvency Act confers vide Judicial discretion on winding up 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.

What the applicant has opted to do is to raise an objection to the petition based on the replying affidavit without filing a substantive defence to the petition. The question whether the company is indented or not or failed to hold an annual general meeting for the last twelve months or that the directors are deadlocked are precise issues to be determined in the main petition.

In my view the approach taken by the applicant is a short cut which leads to nowhere but only aimed at wasting valuable judicial time in resolving the dispute between both parties. In enacting of section 212 of the Companies Act the legislature incorporated provisions on how a company may be wound up in Kenya. It is either voluntary or by order of the court. Subject to the provisions section 218 gives the High court jurisdiction on winding up causes. The conditions are set out at section 219 of the Act these are the provisions of the law the applicant relief on injunction is targeting at from being invoked in this petition.

Having regard to the rival affidavits and submissions on the facts of the instant petition and the principles of law articulated herein I am of the following conceded View. That the litigation commenced by the petition could not be said to be vexatious or an abuse of the court process. This is so because the issues raised in the petition No. 1 of 2017 are yet to be determined on the merits. Also the respondent/applicant is a party to the petition by virtue of being a director of the Nature Green Holdings Ltd. Accordingly if this court was to exercise discretion in staying the proceedings; such interference would presumably occasion an injustice to the parties who are desirous of an outcome on the pending petition.

By virtue of the provisions of Article 165 (2) (3) of the constitution 2010 and subject to the provisions of the companies Act 2015and the Insolvency Act 2015and other provisions thereof the High Court has jurisdiction to hear and determine any civil proceedings in which the existence or exercise of legal right, duty Liability, interest or claims is an issue between natural persons or legal entities capable of suing or being sued.

It is the pleadings or the claim as pleaded and filed in any of the prescribed form one needs to look at to find whether there is a competent cause of action as well as the jurisdiction of the court to entertain the claim.

The main 'question' I ask myself is whether the applicant has brought himself within the threshold of the traditional principles for grant of interlocutory injunction? A temporary injunctive relief is basically provided for under order 40 of the civil procedure rules. It serves a basic purpose of requiring the defendant to do or to refrain from an act stated in the pleadings. It has been held time and again that injunctive orders may not issue unless the following elements are supported by the facts of the case. In the celebrated case of **GIELLA VS CASSMAN BROWN 1973 EA** the court held as follows:

"first an applicant must show a prima facie case with a probability of success, secondly, an interlocutory injunction may not normally be granted unless the applicant suffer irreparable harm, which will not be adequately compensated by a word damages, thirdly, if the court is in doubt it will decide on a balance of convenience." (see also Mrao Limited v First American Bank Limited & 2 Others 003 KLR 2005)

In the first principle the applicant must not only show that he will succeed at the trial but he has a strong case to be tried at the main suit.

In this application the applicant has been sued by the petitioner. The relevant question in regard to this condition is,

D**oes an applicant have a prima facie case for interim injunction to issue in his favour?**

What can be deduced from the affidavit evidence the applicant is that the applicant is the respondent to the petition filed by the petitioner. He has therefore no case which he must show capable of being tried at the trial to enable this court to consider existence of prima facie case. I consider the right recourse available to him was to raise serious arguments in defence of the petition already filed. The subject matter of litigation is the company called **Nature Green Holdings Limited** where both the petitioner and the defendant claim ownership. It is only left to be seen whether or not and if so in what manner the provisions of Insolvency Act 2015 apply to the petition. Perhaps most importantly a

substantive order restraining the hearing of the petition would not be available to the applicant in view of the fact that the petitioner is entitled to the right of access to the courts under Article 50 (1) of the constitution 2010.

From the nature of the affidavit evidence provided by the applicant it is appreciated that it is materially inconsistent and has not satisfied the burden of proof for grant of injunction. Following annextures filed by the petitioner/respondent against the applicant/defendant there is no doubt that the applicant's affidavit borders on threats of infringement or a violation of the right to a fair hearing to be accorded to the petitioner under the constitution.

On the basis of the above I purpose not to extensively enter into the realm of the other grounds on grant of injunction. In this regard it is important to note that the principles in **GIELLA VS CASSMAN BROWN 1973 EA** and **Mrao Limited v First American Bank Limited & 2 Others 003 KLR 2005)** sets the test which the applicant must overcome in order to obtain an injunction has not been fulfilled in this case. This court to exercise discretion for such orders must have material evidence which makes the likelihood of success of a case at the trial an essential element.

In deciding whether or not it just to grant an injunction this court must have regard to the interest of both the defendant as well as the petition.

Accordingly the application is hereby dismissed and the following orders do abide.

1. **The hearing of the petition is hereby ordered to be heard on a priority basis**.

2. **As a consequence the petition be and is hereby ordered to be advertised in the Daily Nation newspapers which has wide circulation and also the Kenya gazette within 21 days from today's date.**

3. **That the parties do appear on 23rd April, 2018 for status conference to monitor compliance.**

4. **The cost of this application to abide the outcome of the main petition**.

Dated, delivered and signed in open court on 21st day of March 2018.

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R. NYAKUNDI JUDGE

In the presence of:

Mr.Akoth for the applicant/defendant

Mr. Karanu for the petitioner/respondent