



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**COMMERCIAL AND ADMIRALTY DIVISION-MILIMANI**  
**PETITION NO.3 OF 2017**  
**IN THE MATTER OF MAWE MBILI LIMITED**  
**AND**  
**IN THE MATTER OF INSOLVENCY ACT NO.18 OF 2015**  
**RULING**

The Respondent filed Notice of motion dated 27<sup>th</sup> July 2017 seeking to set aside/vary advertisement of this Petition and upon issuing stay of advertisement the to give direction on hearing of the Preliminary Objection filed by the Respondent. I issued stay of advertisement of the Petition and directed the parties herein to file submissions on the Preliminary Objection. This is a ruling on the Preliminary Objection. The Preliminary Objection raised the following grounds;

1. That the Petition is bad in law for offending provisions of Insolvency Act No.18 of 2015.
2. That the application is brought in bad faith aimed at aiding the Petitioner to achieve a purpose other than contemplated in law.
3. That the Petitioner has no capacity to commence proceedings.
4. The Court lacks jurisdiction.
5. The Memorandum of Association provide for dispute resolution mechanism.
6. The donor of Power of Attorney has committed criminal activities.
7. The Petition is frivolous.

The Respondent submitted that Parliament is yet to enact procedural rules and guidelines required under Insolvency Act and on that ground this Court lacks jurisdiction to entertain this Petition and the Petition should be struck out. Respondents Counsel cited **WINDING UP CAUSE NO.7 OF 2016 IN RE WINDING UP OF BLUE AVIATION LIMITED (2016)** where Justice Ogola held as follows;

***“.. there are no procedural rules that would enable, or invoke the Court’s jurisdiction to hear and determine the dispute since the regulations are yet to be enacted. The Court lacks jurisdiction, and neither the inherent powers nor the provisions of Article 159 of the Constitution would provide a panacea to the quandary in which the petition now finds itself...”***

Secondly, the Respondent submitted that the Petition is an abuse of Court process as the Petitioner ought to have exhausted alternative dispute resolution as provided in the Articles of Association before filing this Petition.

She submitted that filing of this Petition is an abuse of Court process in that the Petitioner alleges that the Respondent run the Company while he was abroad and contrary to allegation that he came back to the country after treatment, he has filed the Petition through donee of Power of Attorney which raises question as to whether he has fled the country on account of criminal charges and warrants of arrest which have been issued against him.

In response, the Petitioner submitted that a Preliminary Objection must raise pure points of law and not general grounds raised to oppose the application on merit. He referred to **Mukisa Biscuits Manufacturing Co. Ltd vs. West End Distributors Ltd** where the Court held as follows;

***“Ordinarily, a Preliminary Objection should be raised on presumption that the pleadings are correct. It may also be based on agreed facts, it, however, cannot be entertained where there is a dispute as to facts ...***

It may not also be entertained in cases where the Court has discretion whether or not to grant the orders sought for the simple reason that an exercise of discretion depends largely on the facts of each particular case which facts must be established before the Court exercises discretion.”

He submitted that the Petition raises matters of evidence which require the Court to ascertain some facts.

On capacity to file the Petition the Petitioner/Respondent submitted that Jean Francois Damon is shareholder of mawe mbili Ltd and has a right in law to Petition the Court in insolvency matter.

On jurisdiction he submitted that the Petition has been filed in the right forum since the High Court’s jurisdiction is conferred by Section 423(1) of the Insolvency Act 2015; that the Petitioner has a right to seek redress in the high Court irrespective of provisions of Company’s Articles of Association which allegedly call for alternative dispute resolution mechanism. He concluded that this Petition is properly before Court and the Court has jurisdiction to entertain it and that the Preliminary Objection lacks legal basis.

On the issue of capacity to file Petition, the Petitioner submitted that the Petitioner is the major shareholder holding 96% of the shares which he jointly owns with his wife Jackline Mack Damon the Respondent herein and are both Co-Directors in the Company.

I have considered rival submissions by both parties. I first wish to consider the issue of jurisdiction. The Respondent has quoted decision by Ogola Where he held that in view of the fact that Parliament has not made rules of procedure High Court lacks jurisdiction to entertain Petition to wind up companies. I am aware of the fact the Rules Committee has not made rules of procedure as required by Section 697 of Insolvency Act. The question that arises in my mind decision is, “does failure by Parliament to make rules oust jurisdiction conferred to Court by statute?” I respectfully disagree with that decision. It is the Act of Parliament which validate the rules but nonexistence of the rules as anticipated cannot invalidate the Act. I believe the rules were meant to guide the parties on how to approach the Court on different issues relating to insolvency. It’s over two years now and rules are not out yet; should all matters relating to insolvency remain at stand still as we wait for Parliament to make rules? I do not believe so. I find that this Court has jurisdiction to entertain this matter.

The Respondent has indicated Petition is intended to achieve other purpose other than what is contemplated in the law. Those are issues which can be ascertained from evidence.

On the issue of Petitioner failing to make use of internal dispute resolution mechanism as stipulated in the Company’s Articles of Association before filing this Petition, the Applicant however averred that the Respondent has refused all attempts to negotiate. That the Respondent took over the running of sleeping

worrier lodge and camp with his authority while he was overseas for medical treatment but has continued to run the business and blocked the Petitioner from running the business and ensured he does not take up directorship in direct contravention of memorandum of Association. He added that the Company's business is conducted in a manner oppressive to the Petitioner.

The Applicant has demonstrated reason for filing this Petition and has done so through authorized agent

From the foregoing I find that this Court has jurisdiction to entertain this Petition. I however do find that this matter is suitable for Court annexed mediation and do direct that this matter goes through Court annexed mediation. If parties fail to settle, the matter to proceed before Court.

**Dated and Delivered at Nairobi this 24<sup>th</sup> day of October 2017**

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**RACHEL NGETICH**

**JUDGE**

**IN THE PRESENCE OF**

.....COURT ASSISTANT

.....COUNSEL FOR APPLICANT

.....COUNSEL RESPONDENTS