



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
WINDING UP CAUSE NO. 4 OF 2004

PETER MUKORAPETITIONER

VERSUS

NEW MAREWA..... RESPONDENT

RULING

Introduction

1. The interested parties, as directors of the Respondent company, prepared an application dated 14.12.2015 and had same filed in court on the 15.12.2015 seeking among other orders that the consent order dated 14.9.2009 be vacated in its entirety and status quo before the filing of the Winding up cause be reinstated. The gist of that application as disclosed in the grounds on the face of the application and the affidavit in support sworn by MICHAEL THUKU WANYOIKE is that the petitioner is neither a shareholder, creditor nor director of the company but a director of a debtor to the company owing the company rent arrears in the sum of kshs.22,248,655 and that there was never authority by the company to have the consent recorded.
2. When the application came up for hearing on the 11.4.2016 Mr.Kaburu appeared for the Applicant while Mr. Lutta appeared as holding brief for Mrs. Ngigi for the petitioner. It is noteworthy that the court papers reveal that the petitioner is represented by the firm of MWANGI NJENGA and company advocates and not Mrs.Ngigi.
3. Mr.Kaburu informed the court that although the application had been served on the other parties there had never been any opposition to it and prayed that it be allowed as prayed in terms of Order 51 Rule 14(4) Civil Procedure Rules.
4. Ms.Lutta on behalf of Mrs.Ngigi then made an application for adjournment on the basis that Mrs.Ngigi was unable to attend for being on maternity leave and that the other counsel in the firm Ms.Mohamed was before the Environment and Land Court Judge and was also unable to attend.
5. Despite protest by Mr.Kaburu that the matter be dealt with forthwith, the court adjourned the application for a while to enable Ms.Mohamed finish before the other court and attend to the application. The matter was then adjourned to the afternoon. When the matter was called out at 2.50, Ms.Mohamed was in attendance and reiterated the application for adjournment on the same terms as those made by Mr.Lutta. She then added that a party has a right to an advocate of own choice and that the petitioner having chosen Mrs.Ngigi, the court had to respect his choice of legal representation. She then pleaded her inability to proceed in those circumstances. Mr.Kaburu, then reminded the court that a similar

adjournment had been made earlier and disallowed and matter ordered to proceed as unopposed under the provisions of order 51 Rule 14(1) & (2) Civil Procedure Rules.

6. This ruling, is therefore made Pursuant to order 51 Rule 14(4) on the basis that the application albeit served was never responded to and the advocate having been given a chance to comment on it did not so comment. I have looked at the petition dated 15/4/2004 and note that the petitioner grounds the petition on allegations that there were irreconcilable difference between the members of a company that makes it impossible for the company to carry out it business or pass a resolution due to mistrust and possible continous litigation. It is however not disclosed on what capacity the petitioner brought the petition.

7. I have read and taken note that this is a petition to wind up the company by the court. Under section 218 of the companies Act, under which the petition was filed,(Now repealed), there are 9 grounds upon which a company may be wound up by the court. The petition before me does not appear to me to have been founded on any of the statutory grounds. However that is not before me today and may be an issue for another day.

8. What however is critical for the determination before me is whether the consent should be set aside or mintained. A factor that leads a court to set aside a consent order must be seen as a factor that would vitiate a contract. **SEE BROOK BOND LEIBIG LTD -VS- MALIYA [1975] EA 266** where the court of appeal said:

“A court cannot interfere with a consent judgment except in such circumstances as would afford good ground for varying or rescinding a contract”

9. I have said that the application is not opposed with the consequence that the factual depositions by the applicant on lack of instructions have not been contested. I am equally of the opinion that winding up of a company should be to the benefit of the company and its directors/shareholders. Now that there is uncontested allegation that there was never instructions by the company to record the consent, effectively selling the company asset prior to a winding up order, I am persuaded that is a clear vitiating factor.

10. Equally the shareholder say they were not consulted and that they contest the petition as having been presented by a debtor to the company and one who may be keen to evade its obligation to the company. The *bona fides* of the petition may as well have been called into question and only setting aside that consent order will set a stage for all concerned to canvass their respective positions in court.

11. Finally I allow the application as prayed while conscious that the petition remains pending and anybody interested in it is still at liberty to apply as appropriate.

12. To enable the matter proceed to its logical conclusion, I direct that this petition be mention in court on a date to be fixed at the registry by the parties.

13. Costs are ordered to be in the petition.

Dated, signed and delivered at Mombasa this 18th day of April 2016.

In the presence of:-

Mr.Kaburu for the company/Respondent.

No appearance for the petitioner.

P.J.O.OTIENO

JUDGE