REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI HIGH COURT

WINDING UP CAUSE NO 7 OF 2016

IN THE MATTER OF THE COMPANIES ACT

(CAP 486 OF THE LAWS OF KENYA)(NOW REPEALED)

AS READ WITH SECTIONS 381 & 734(1) & (2) OF THE INSOLVENCY ACT,

ACT NO 18 OF 2015

AND

IN THE MATTER OF THE WINDING UP OF BLUE BIRD AVIATION LIMITED

RULING OF THE COURT

1. Before the Court is the Petition by Yussuf Abdi Adan dated 9th March 2016, in which he sought for the winding up of Bluebird Aviation Ltd, a company which was incorporated on 29th May 1992, and in which he is a Director with a twenty –five percent (25%) shareholding interest. The Petitioner's allegations as set out in the Petition and the verifying affidavit are that since the incorporation of the Company, there hasn't been any annual general meetings, that he has been excluded from the management of the company, that he has no details or financial information about the company and that he has never received any dividends as a shareholder of the company. Further, the Petitioner states that his co-directors have breached their fiduciary duty to the company, and that they have misappropriated company funds, created a parallel financial system within the company through which revenue from the company business is stashed abroad and, have created a number of shell companies into which these monies are put. The Petitioner further averred that he has in vain requested for the financial statements and records of the company over the last twenty-three (23) years. It was reiterated that the current relationship between the Petitioner and his co-directors was seriously strained, and for that reason, the company cannot be run in accordance with its Articles of Association, and further, that the other directors have refused to and continue to refuse to meet to discuss the pertinent issues regarding the company.

2. The Petition was opposed by the other directors through the replying affidavits filed on diverse dates.

3. In an application dated 15th March 2016 and brought under the provisions of Article 159 of the Constitution, Sections 1A, 1B & 3A of the Civil Procedure Act, Companies Act No 17 of 2015, Insolvency Act No 18 of 2015 and the inherent jurisdiction of the Court, the Company sought to strike out the Petition, ostensibly on the grounds that the same sought reliefs and remedies under the Companies

Act, which law had been repealed, and that therefore, the Court has no jurisdiction to grant any reliefs pursuant thereto. Further, it was averred that the Petition was not predicated on the provisions of the Insolvency Act, or any other permissible law, and that the same therefore, was an abuse of the Court process and that it was only fair and just that the Petition was struck out. In the affidavit in support of the application, and in further reiterating the grounds adduced in support of the application, it was contended that the Petition was fatally defective and that the same had been filed purely for extraneous purposes, and should therefore, be struck out.

4. Hussein Ahmed Farah, also a director and shareholder of the company, through an application dated 15th March 2016, and brought under the provisions of Article 159 of the Constitution, Sections 1A, 1B & 3A of the Civil Procedure Act, the Companies Act No 17 of 2015, the Insolvency Act No 18 of 2015 and the inherent jurisdiction of the Court, sought to have the Petition struck out, and an alternative prayer for stay of proceedings pending the hearing and determination of the dispute by arbitration as provided in the Memorandum and Articles of Association. The application was predicated upon the grounds that the Petition was brought in bad faith and was an abuse of the process of the Court. It was further averred that the Petition was incompetent and fatally defective as the same sought remedies under the repealed Companies Act, Cap 486 of the Laws of Kenya, and that in any event, there was an alternative dispute resolution mechanism provided in the Memorandum and Articles of Association of the Company. In the affidavit in support of the application, further to reiterating the grounds adduced in support of the application, it was deponed to that the Applicant had not been served with the Petition despite being a shareholder of the Company, and further that there was no evidence on record to sustain the claim.

5. Also brought before the Court was the application by Hussein Unshur Mohamed dated 15th March 2016. The application was brought under the aegis of Article 159 of the Constitution of Kenya, Sections 1A, 1B & 3A of the Civil Procedure Act, Order 2 Rule 15(1)(b), (c) & (d) and (3) of the Civil Procedure Rules, Rules 7, 23, 24 & 203 of the Companies (Winding Up) Rules and Sections 3 & 427(1)(a) & (4) of the Insolvency Act No 18 of 2015. The applicant primarily sought for the striking out of the Petition, and further restraining the Petitioner from publishing advertisements and gazette notices of the Petition pending the hearing and determination of the application. The grounds upon which the application was premised were that the Petition was frivolous, scandalous and vexatious, and that the same was filed in bad faith and with ulterior motives. It is the Applicant's case that the Court was without jurisdiction to adjudicate the disputes upon which the Petition was premised, ostensibly for the reasons that there were alternative dispute resolution mechanisms under the Articles of Association that had not been pursued, and which were binding upon the parties. Further, it was contended that the Petitioner mischievously intended to litigate unsubstantiated allegations and further sought to have the Company liquidated instead of pursuing other readily available alternative remedies. These averments were reiterated in the affidavit in support of the application, and in which it was further deponed that, under the Company's Articles of Association, more so under Article 33 thereto, there is a provision for resolution of disputes through reference to arbitration. It was deponed that in filing the Petition, the Petitioner acted in an unreasonable, malicious and improper manner, and in disregard of the suitable processes readily available to him under the Articles and Memorandum of Association of the Company.

6. Mohamed Abdikadir Adan, a director and shareholder of the Company, also filed an application seeking to strike out the Petition. The application dated 16th March 2016 was brought under the ambit of Article 159(2)(c) of the Constitution, Order 2 Rule 15(1)(b) & (c) and Order 51 Rule 1 of the Civil Procedure Rules, the Companies Act No 17 of 2015 and the Insolvency Act No 18 of 2015. The grounds upon which the application were predicated are that the Petitioner sought for orders under the Companies Act, Cap 486 of the Laws of Kenya, which has since been repealed and replaced by the Companies Act No 17 of 2015 and the Insolvency Act No 18 of 2015, and as such, the Court could not entertain such Petition. Further, it was submitted that the Court lacked the jurisdiction to adjudicate on the dispute as the Petitioner had avoided the mandatory procedure for dispute settlement as provided in the Company's Articles of Association, and further, that the claim was a derivative action disguised in the form of a Petition to wind up the Company. It was contended that there were ample alternative remedies available to the Petitioner, and that, therefore, he should not be permitted to continue the instant Petition as it would cause irreparable damage to the Company.

7. These applications were opposed through the Grounds of Opposition and Replying Affidavit filed by the Petitioner on 16th March 2016. It was reiterated that the applications were incompetent and devoid of merit, and solely aimed at delaying the expeditious and just disposal of the Petition. It was further submitted that the Company was incorporated under the provisions of the Companies Act, Cap 486 (repealed) and that by invoking Sections 381, 734(1) & (2) of the Insolvency Act No 18 of 2015 which provided for transitional and saving provisions of the repealed Companies Act, the Petition was therefore properly before the Court, despite the same being filed under the repealed laws. Further, it was submitted that the provisions under the Articles of Association, more particularly Article 33, had no application with regard to winding up proceedings, and that an arbitrator appointed under the said provision, had no jurisdiction to entertain a winding up petition.

8. The pertinent issue to be determined at this juncture in not whether there are alternative remedies available to the Petitioner and the other shareholders to amicably resolve any issue amongst them, but whether the instant application as filed is in conformity with the law and statute. All the four applications challenge the very jurisdiction of this Court to hear and determine the matter, presumably or on the conviction that the substantive law that has been applied in the making of the Petition has been repealed, and that the proper provisions of the law have not been invoked in the instant case. It is therefore imperative for the Court to determine, initially, the issue of jurisdiction *vis-à-vis* the repealed laws, and to ascertain whether or not there exists that jurisdiction for it to hear and determine the Petition, and all other issues emanating there from. It was stated in the **Supreme Court of Kenya Petition No 7 of 2014 Mary Wambui Munene v Peter Gichuki Kingara & 6 Others; (2014) eKLR** that a question of jurisdiction is a pure question of law, which should therefore, be resolved on a priority basis.

9. The incorporation of the Company is not in dispute, and neither is its directorship and its shareholding. The issues in dispute are with regard to the disgruntlement of one of the directors, who filed the instant petition seeking for the winding up of the Company. On the one hand, the Petitioner avers that the applicable law was the repealed Companies Act, which Act was effectively repealed by the enactment of the Companies Act No 17 of 2015. Further, the Petitioner has not denied that this Act, as well as the Insolvency Act No 18 of 2015, are the applicable laws, save to reiterate that, due to the incorporation of the Company before the enactment of the new Companies Act No 17 of 2015 and the Insolvency Act No 18 of 2015, the applicable law was the repealed Companies Act. The Petitioner's submissions were rendered thus; Part VI of the Insolvency Act No 18 of 2015 was operationalized on 18th January 2016, but that the same only caters for companies registered or incorporated under the Companies Act No 17 of 2015. It was further argued that under Section 734(1) & (2) of the Insolvency Act, there were transitional and saving provisions of the repealed Companies Act, Cap 486, and especially for the purposes of winding up petitions. It was the Petitioner's argument that therefore, the Company being a creature of the repealed Companies Act, Cap 486, and by invoking the provisions of Sections 381, 734(1) & (2) of the Insolvency Act, then the Petition was properly before this Court.

10. However, this interpretation of Section 734(1) & (2) of the Insolvency Act was disputed by the Respondents. The Respondents contended that the term "Winding-Up" had now been replaced with the term "Liquidation". It was asserted that Section 381(1) of the Insolvency Act provides for the liquidation of a company, which further at sub-section (2) provides for either voluntary or Court mandated liquidation. Further, it was the Respondents' contention that Section 3 of the Companies Act, holistically provided even for companies that had been registered and incorporated under the repealed Companies Act, Cap 486, and that therefore, the transitional and saving provisions under Section 734(1) & (2) could not be invoked to save an erstwhile fatally defective Petition. It was averred that there were proper procedure encapsulated in the Insolvency Act, and particularly under Sections 424 & 425 thereof.

11. It was one of the Respondent's arguments that there was a lacuna in law since the Minister had not yet made rules for the processes of insolvency. It was contended that Section 736, which was subject to Section 734(2) was not in existence, and therefore, by the repealing of the Winding Up Rules vide Section 1023(4) of the Companies Act No 17 of 2015, it effectively meant that a party that intended to move the Court on a winding up procedure was bereft of procedural guidelines. It was averred that there was no clarity on the law and procedure to guide the determination of Petitions such as is before the court.

12. However, a further and closer reading of the provisions of the Companies Act No 17 of 2015 and the Insolvency Act No 18 of 2015, provide not only a resolution of the perceived lacuna, but also the legal framework for instances in which a party seeks to have a Company dissolved. Section 381(1) of the Insolvency Act No 18 of 2015 read thus:

This Part applies to the liquidation of a company registered under the Companies Act, 2015.

The provisions found under the repealed Companies Act, Cap 486 with regard to winding up now fell under the ambit of the aforementioned provision of the Insolvency Act No 18 of 2015. Pursuant to Section 1023(4) of the Companies Act No 17 of 2015, as read together with Legal Notice No 1 of 2016, the provisions of Section 342 of the Companies Act, Cap 486 stood repealed, and in their place, was the commencement of the Insolvency Act No 18 of 2015 with regard to winding up of companies. Section 1023 of the Act reads;

> ***1. The provisions of the Companies Act are repealed on such date or such different dates as the Cabinet Secretary may appoint by notice published in the Gazette.***
>
> ***2. When bringing provisions of this Act into operation by a notice made under section 1(3) of this Act, the Cabinet Secretary shall ensure that all provisions of the Companies Act that correspond to those provisions are repealed contemporaneously by a notice published under subsection (1) of this section;***
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> ***3. However, if the provisions of this Act that are to be brought into operation correspond to provisions of the Companies Act that are to be repealed by notice under subsection (1), the Cabinet Secretary may instead combine the repeal of those provisions of the Companies Act in the notice under section 1(3) of this Act bringing the relevant provisions of this Act into operation.***
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> ***4. On the repeal of section 342 of the Companies Act, the following rules are revoked: (a) the Companies (winding up Rules); (b) the Companies (Winding-up Fees) Rules; (c) the Companies (High Court) Rules.*** *(Emphasis added).*
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> ***5. On the repeal of section 402(4) of the Companies Act, the Companies Regulations are revoked.***

Whilst Section 2(1) of the Insolvency Act No 18 of 2015 defines a company as one registered under the Companies Act No 17 of 2015, the said Companies Act No 17 of 2015 defines a company as one formed and registered under the Act, or an existing company. By extension therefore, a company under the Insolvency Act No 18 of 2015, may be deemed as a company formed and registered under the Companies Act No 17 of 2015, or an existing company, and of which therefore, the provisions of the Insolvency Act No 18 of 2015 would apply *mutatis mutandis*.

13. Further, Section 734(1) & (2) of the Insolvency Act, read closely with Section 3(1) of the Companies Act, provide for past events, which in this instance would refer to Section 734(1)(b) on the making of an application for the winding up of a company, which had been made before the commencement of the Act. Sub-section (2) reads;

> **Despite the repeal of the Companies Act, or of Parts VI to IX of that Act, those Parts, and any other provisions of that Act necessary for their operation, continue to apply, to the exclusion of this Act, *to any past event and to any step or proceeding preceding, following, or relating to that past event*, even if it is a step or proceeding that is taken after the commencement.** (Emphasis added).

This provisions is similar to Sections 1024(2)(a) of the Companies Act, in which it is provided *inter alia*;

> **If — (a) any act, matter or process required or permitted to be done under, or for the purpose of, a provision of the repealed Act before this section came into operation; the act, matter or process shall or (as the case requires) may be completed, or continues to have effect, under the corresponding provision of this Act as if done under or for the purpose of that provision.**

The registration of the Company may be deemed as a past event, since it was registered under the repealed Companies Act, Cap 486. However, pursuant to Section 3(1) of the Companies Act No 17 of 2015, as read together with Section 2(1) of the Insolvency Act No 18 of 2015, the Company was deemed as a company that was existing, and therefore, a Company within the meaning of both the Companies Act No 17 of 2015 and the Insolvency Act No 18 of 2015. If the winding up proceedings had been commenced before the commencement of the new laws, it would then have been deemed to be a past event or proceeding relating to a past event. But for the reason that the event that has been commenced was after the commencement of the new laws, *viz* the Companies Act No 17 of 2015 and the Insolvency Act No 18 of 2015, then the provisions of Section 734(1) & (2) of the Companies Act No 17 of 2015 would be inapplicable as a salve for the defectiveness and deficiencies of the Petition.

14. Perhaps what this court ought to note is that as it stands now there are no procedural rules and guidelines with regard to the question of winding up, or as provided in the Insolvency Act No 18 of 2015, for the liquidation of companies. By Legal Notice No 1 of 2016, which effectively repealed the provisions under Parts VI-IX of the Companies Act, Cap 486 and particularly Section 342 of the said Act, there wasn't in place procedures that the Court would rely on in the event of a petition for liquidation, or a winding up petition. Further, the winding up rules were repealed by dint of Section 1023(4) of the Companies Act No 17 of 2015. The provisions of Section 7(1) under the Sixth Schedule of the Constitution may, on the question of *lacunae* in the law, be used to interpret and provide a resolution to the impasse. At Section 7(2)(a) & (b) of the Sixth Schedule, it is provided that if there is a conflict with regard to any law that was in existence before the promulgation of the Constitution which assigned responsibility of a matter to a particular state organ, and which responsibility is thereafter under the constitution assigned to a different state organ, then it would be that the provisions of the Constitution would prevail in the circumstances.

15. In the present instance, and in consideration of the provisions of Sections 7(1) as read together with Section 7(2)(a) & (b) of the Sixth Schedule, the provisions of the Companies Act No 17 of 2015 and the Insolvency Act No 18 of 2015 would prevail. However, 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. The Supreme Court in **Civil Application No 29 of 2014 Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others; [2014] eKLR** on the issue of *lacunae* in law held *inter alia*;

> ***"This is a clear lacunae in the law that fails to protect the legal interests of an NGO or its creditors upon deregistration, but one that also threatens the role of NGO's in public interest litigation and in effect, social change and human rights defense through litigation. What is to become of public interest where an NGO in the course of litigation in a matter affecting the larger citizenry, is deregistered? Who then protects the public concern raised and defends the ongoing matter? This clearly is an issue that needs resolve either through legislative initiative and reconsideration by Parliament, through an amendment of the appropriate law or a proper challenge of constitutionality in line with the provisions of Articles 22 and 258 of the Constitution."*** **(Emphasis added).**

16. For all the foregoing reasons contained in this ruling, it is the finding of this court that the Petition herein is founded on faulty grounds, a quicksand, which renders the petition incapable of proceeding beyond the four applications aforesaid seeking to strike it out. The inescapable verdict therefore is that the petition herein by Yusuf Abdi Adan dated 9th March 2016 is truck out.

17. A recommendation is hereby made to Parliament to enact the procedural rules and guidelines required

under the Insolvency Act No. 18 of 2015 for liquidation of companies.

18. The costs of the Petition, and of the applications striking it out, shall be paid by the Petitioner.

Orders accordingly.

READ, DELIVERED AND DATED, AT NAIROBI THIS 24th DAY OF MAY 2016.

E. K. O. OGOLA

JUDGE

Ruling Read in open court in the presence of:

M/s Hanan for the Petitioner

Mr. Kenboy for the company

Mr. Sagana for Hussein Unshur Mohamed

Mr. Daud for Mohamed Abdikadir Ahmed

M/s Jan Mohamed for Hussein Ahmed Farah

Mr. Jelle for Mohamed Hassan.

Teresia – Court Clerk