REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION

WINDING UP PETITION NO. 32 OF 2014

ERIC MUGENDI M'BARINE……...…….…….1ST PETITIONER

MICHAEL T. MAINA…….....2ND PETITIONER

WALLACE MUGENDI MURUNGI……..….3RD PETITIONER

- **VERSUS -**

ANTHONY MURIITHI M'BARINE.....1ST RESPONDENT

MARINE POWER GENERATION LILMITED……...…NOMINAL DEFENDANT

RULING

1. This is an application by **ANTHONY MURIITHI M'BARINE,** for an order to compel the petitioners, **ERIC MUGENDI M'BARINE, MICHAEL T. MAINA** and **WALLACE MUGENDI MURUNGI,** to furnish security for costs.
2. Anthony has asked the court to order the petitioners to furnish security in the sum of Kshs. 2,100,000/- within 14 days. It is Anthony's prayer that if the petitioners failed to provide security for costs, all further proceedings ought to be stayed.
3. It is the position of Anthony that because all the petitioners were resident in the United States of America, Anthony was justifiably apprehensive that he shall not be able to recover his costs.
4. As far as Anthony was concerned, the case brought by the petitioners was a sham, frivolous and baseless. Therefore, because he was going to be exposed to colossal costs in the case, Anthony believes that it was in the interests of justice to have the petitioners provide security for costs, on a full indemnity basis.
5. Anthony set down a number of reasons why he believed that the case against him was an abuse of the process of the court and also fatally defective: those reasons are as follows;

> *"i) The petition is not under seal contrary to Rule 10 of the Companies (Winding-up) Rules.*
>
> *ii) Winding up is a process commenced against companies and not against natural persons. Sections 219 (f) only applies when companies are to be wound up and not to any perceived internal management disputes between shareholders.*

iii) The petition seeks no Orders of Winding up against the Nominal Respondent.

iv) No Verifying Affidavits have been filed by the petitioners within 4 days after the petition was presented, contrary to the mandatory provisions of Rule 25 of the Companies (winding up) Rules.

v) No Affidavits or written authority by the 2nd and 3rd petitioners have been filed to demonstrate that they duly authorized the 1st petitioner to institute these proceedings".

6. For the record, it is important to note that the Respondent had, on 4th September 2014, filed a Notice of Preliminary Objection to the whole winding up petition herein.

7. The said Preliminary Objection was dismissed by Mwongo P.J on 21st October 2014. In his Ruling, the learned Principal Judge observed as follows;

> *"29. A careful perusal of the petition shows that the petitioners allege that the Nominal Respondent is being managed in a manner that is unjust and oppressive to them and other members of the company. This is the crux of the petition. It is not disputed that the petition does not seek the winding up of the company".*

The court then declared that it has jurisdiction to hear and determine the petition. Thus ground (iii) above, has already been disposed of by the court.

8. Mwongo PJ also had occasion to determine the questions regarding the failure to seal the petition and the failure to file verifying affidavits within 4 days of filing the petition.

9. By dint of Rule 3 (1), 3 (3) and Rule 4 of the Companies (Winding-up) Rules, the court held that the failure to comply with Rules 10 and 25 was not fatal to the petition.

10. Finally, the absence from the record, of the authorizations given to the 1st petitioner, by the 2nd and 3rd petitioners, to enable the 1st petitioner swear an affidavit on their behalf, was construed as a technicality.

11. In the light of the provisions of Article 159 of the Constitution of the Republic of Kenya, 2010, the court appreciated the need to administer substantive justice without undue regard to procedural technicalities.

12. I have deemed it necessary to summarise the findings already made, as that makes it clear that those issues as are alleged to demonstrate that the petition was an abuse of the process of the court or that the petition was fatally defective, were already determined.

13. In effect, the only limb now still available to the Respondent, in his quest for an order for security for costs, was that the petitioners were resident in the United States of America. By virtue of that fact, the Respondent felt justifiably apprehensive that he shall not be able to recover his costs.

14. It was the contention of Anthony (the 1st Respondent) that the value of the subject matter was US Dollars, 1,500,000.00, which was equivalent to Kshs. 132,000,000.00. The said value is derived from the Convertible Loan Agreement dated 16th October 2012.

15. On the basis of that value of the subject matter, Anthony has calculated *"the cost of the proceedings"* as being Kshs. 2,100,000.00.

16. An application for security for costs may be brought pursuant to Order 26 Rule 1 of the Civil

Procedure Rules, which provides as follows;

> *"In any suit the court may order that security for costs for the whole or any part of the costs of any defendant or third or subsequent party be given by any other party".*

17. As was pointed out by the Respondent;

> *"Some of the circumstances that a court is supposed to inquire into before allowing or disallowing an application for security for costs is the residence of the plaintiff, the nature of the plaintiff's claim and whether the Defendant's defence raises a bona fide defence"* per-

Angote J. in **TASMAC LIMITED VS REBERTO MACRI & 3 OTHERS, MISC. APPLICATION No. 5 of 2013** (at Malindi).

18. There is no doubt that the petitioners are resident in the United States of America.

19. As regards the question whether or not the Respondent had a *bona fide* Defence, it is the Respondent's position that he has put forward a formidable defence.

20. On their part, the petitioners have also put forward a case which they consider as formidable.

21. Mwongo P J has already made a finding that the court has jurisdiction to intervene in the company's affairs, when, as in this case, members of the company allege that the company was being managed in a manner which was unjust and oppressive to them and to other members of the company.

22. From my reading of the allegations directed against the 1st Respondent, and the counter-allegations directed against the 1st petitioner, I have come to the, prima facie, conclusion that those two parties were finding it very difficult to work together in a manner which would help the company achieve positive results.

23. Until the court gives a substantive hearing to all the parties, it may be premature to make any informed assessment on the question about which party will ultimately carry the day.

24. Of course, I am alive to the following criterion which the Court of Appeal lay down in the case of **SHAH VS SHAH [1982] KLR 85**, at page 98;

> *"The general rule is that security is normally required from plaintiffs resident outside the jurisdiction, but as was agreed in the court below, a court has a discretion, to be exercised reasonably and judicially to refuse to order that security be given. The test on an application for security is not whether the plaintiff has established a prima facie case, but whether the defendant has shown a bona fide defence".*

25. In this case the defence is largely premised on the very factors that the petitioners are challenging. For instance, the 1st Respondent was not originally the majority shareholder; but he had since become one.

26. If the trial court were to find that the manner in which the 1st petitioner's shareholding was diluted was irregular or unlawful, the *bona fides* of the defence would be doubtful. Yet, as I have already hinted herein, the cases being put forward by the petitioners and the respondents appear to be relatively balanced, at this moment. I say so because the allegations being made by the petitioners are of a very serious nature indeed. But the 1st Respondent, who is the person being blamed by the petitioners appears to acknowledge that if he were to be found to have done the things he is accused of, then there would be no doubt that he was blameworthy. For instance, if

the increase of the nominal capital and the resultant increase of the proportion which the 1st respondent owned in **MARINE POWER GENERATION LIMITED,** was irregular, that would constitute a significant, yet irregular, alteration to the structure of the company.

27. In the light of the volume and value of the contracts which the company has negotiated with other companies, I hold the considered view that if the 1st petitioner were to be held to continue being the majority shareholder in the company, then the value of the shares he and the other petitioners hold in the company would constitute sufficient security for costs.

28. But I am also cognizant of the possibility that the change in the structure of the company, which resulted in the 1st Respondent becoming the majority shareholder, may well be found to have been lawful.

29. If indeed, the 1st petitioner did purchase some of the shares that became available after the change in the structure of the company, it may be difficult for him to insist that such shares became available through an irregular process.

30. This possibility simply reinforces the position which I alluded to earlier; that the cases being put forward by the two sides, were very much balanced.

31. Therefore, if the court were to impose upon the petitioners an order that they must provide security for costs, that may well constitute a clog to the petitioners right to prosecute the petition.

32. In arriving at this decision I have conducted a balancing exercise; weighing the injustice to the petitioners if they were prevented from pursuing their claim, against the injustice to the 1st Respondent if the petitioners were not compelled to provide security for costs as a precondition to the prosecution of the petition.

33. Accordingly, I decline the invitation from the 1st Respondent, to have the petitioners provide security for costs. However, the costs of the application shall be in the cause. In the event, the parties who are ultimately successful in the substantive petition shall also be awarded the costs of the Notice of Motion dated 4th September 2014.

DATED, SIGNED and **DELIVERED** at **NAIROBI** this **17th** day of **March** 2015.

FRED A. OCHIENG

JUDGE

Ruling read in open court in the presence of

…….. for the 1st Petitioner

…… for the 2nd Petitioner

…… for the 3rd Petitioner

……for the Respondent.

…….for the Nominal Respondent.

Collins Odhiambo – Court clerk