



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & ADMIRALTY DIVISION

WINDING UP CAUSE NO. 4 OF 2014

IN THE MATTER OF THE COMPANIES ACT, CAP 486 LAWS OF KENYA

AND

IN THE MATTER OF THE WINDING UP OF THE ACADEMY OF DANCE AND ARTS LIMITED

BETWEEN

MICHAEL JOHN STANHOPE DUCKWORTH ::::::::::::::: PETITIONER

AND

PERNILLE KJAER DUCKWORTH ::::::::::::::: OBJECTOR

R U L I N G

INTRODUCTION

1. The application before the court is a Chamber Summons dated and filed in court on 22nd July 2014. The application is filed under Rules 5(e), 25 and 203 of the Companies (winding Up rules) and seeks the following orders:

1. The Petition for the Winding Up of the Academy of Dance and Arts Limited be struck out with costs to the respondent.

2. In the alternative, that the Petition for the winding up herein be stayed pending the determination of the present application.

3. That costs of this application be in the cause.

2. The application is premised on the grounds that the Petition herein as filed is in breach of mandatory provisions of the law pertaining to winding up of companies and that the Petition is brought prematurely as the Petitioner has by his conduct after the filing of the Petition shows.

3. The application is supported by the affidavit of **PERNILLE KJAER DUCKWORTH**, (who is the Objector to the Petition) filed in court on 22nd July 2014.

4. The application is opposed by the affidavit of **MICHAEL JOHN STANHOPE DUCKWORTH** (who is the Petitioner herein) dated and filed in court on 31st October 2014.

5. The brief history of the application is as follows. The Petitioner on 31st March 2014 filed the

Petition herein seeking the winding up of the company called the Academy of Dance and Arts Limited. The Petitioner and the Respondent are estranged husband and wife and are the only directors to the said company with each having 1 share. The Petitioner and the Co-shareholder are currently living separately and also have initiated divorce proceedings. They are unable to see eye to eye in the running of the company and the Petitioner alleges that the co-director is running the company as a personal property or as though she was the sole majority shareholder.

6. The Respondent opposed the Petition vide affidavit filed in court on 24th April 2014, and has also now brought this application praying that the said Petition be altogether struck out upon the grounds already stated.

7. **THE APPLICANTS CASE:**

The Applicant states that the petition is materially defective for breaching mandatory provisions of the law, and that the petition for the winding up is brought prematurely as the petitioner has not exhausted the other remedies available to him. The Applicant states that petitioner through his advocates on record has, after the filing of this petition, made an offer for the purchase of his share in the company for the amount of Kenya Shillings Fifty Five Million (KShs 55,000,000/=). That the petitioner has also sent persons to assess the property on which the company operates its business with a view to buying out his share in the company. The Applicant states that she has sent communication through her advocates that any proposed sale of shares has to be guided by the provisions in the memorandum and articles of association of the company, but that parties involved have not had adequate time to explore the offer(s) and indeed the modalities of determining a fair valuation of the shares of the company. The Applicant states that the company is a legal person in its own right and is entitled to protection under the law. The reason the petitioner has brought this petition is because of the dispute with regard to the divorce, and that it is evident from the afore going that the petition herein is premature and is only intended to give the petitioner a bargaining position in the matrimonial proceedings pending before a different division of this court. The Applicant states that the intended action of winding up severely prejudice the rights of numerous individuals and institution.

8. **THE RESPONDENTS CASE**

The Respondent objected to the application, stating that besides being his co-shareholder and director of the subject company, the Objector is also his estranged wife. The relationship between the Objector and him has degenerated to an extent that they cannot conduct the affairs of the company efficiently as necessary meetings cannot be held or resolutions signed which has crippled the operations of the Company. Whatever actions are taken by the Objector are unilateral and not sanctioned by any resolutions and can therefore not be said or held to be company dealings. The Respondent stated that the matter came up to confirm compliance before the honourable Deputy Registrar on the 15th day of July, 2014. That at all times the matter was mentioned, the Objector had already been enjoined in the proceedings and conceded that the Petition was ready for hearing, and that all the information that the Objector now seeks to rely upon to strike out the Petition was well within her knowledge and possession. The Objector was well represented and conceded that the petition was ready for hearing although it was indicated that parties were hopeful that the matter would be settled. The attempts at an out of court settlement have failed and all that is left is for the Court to hear and determine the petition. The Petition has complied with the requisite provisions for its winding up and any attempt by myself to avert the same through negotiations have failed having been frustrated by the Objector. The application is therefore an abuse of the court process and intended to delay the prosecution of the matter while the Objector who solely runs the affairs of the company in brazen disregard of the Petitioner continues to appropriate the company proceeds in breach of the Companies Act. The Respondent stated that upon reading the application as well as the affidavit in support thereof, it is apparent that the Objector has not disclosed the breached provisions of the law or satisfied the grounds for the striking out of the Petition. The application is merely meant to delay the speedy conclusion of this matte, and should be dismissed with costs.

ANALYSIS AND DISPOSITION

9. Parties filed written submissions which I have considered. In my view there is only one issue for this court to consider in order to resolve this matter. That issue is whether it is justice, at this stage of the proceedings, to determine the Petition on issues of technicalities.
10. To answer this question it is now trite law that a court of law will not strike out proceedings unless the case before the court is as clear as day light and that striking out the suit is the best thing to do. In this particular instance, the application is premised on the allegation that Petition is filed in breach of mandatory provisions of the law pertaining to the winding up of companies and that the Petition is filed prematurely. In regard to this allegation it is noteworthy that the parties did appear before the Deputy Registrar on 15th July 2014 and pledged themselves ready to have the Petition herein heard on the grounds that they had complied with all pre-trial directions. Indeed, after the submissions by the parties, the Deputy Registrar ruled as follows:

“Certificate of compliance be and is hereby issued.

Hg. 25.07.14.”

11. It is after the Deputy Registrar had certified the matter ready for hearing, and issued a hearing date for 25th July 2014, that the applicant herein conceived of the current application which was filed on 22nd July 2014, 3 days to the day of hearing. In my view, this application was not necessary. It seeks to strike out the Petition. That same end could be secured by having the Petition heard on 25th July 2014. By 15th July 2014 when the matter was mentioned before the Deputy Registrar, the objector had already been enjoined in the proceedings and conceded that the Petition was ready for hearing. Besides, there is a reason for pre-trial directions. These directions make the works of the court smoother and faster. They are resorted to in order to save time for litigants. They are not resorted to for window dressing, so to speak. Under Sections 1A, 1B and 3A of the Civil Procedure Rules, this court is mandated to dispense justice with speed and at least cost to parties while preserving the judicial time. I do not consider the applicant to be using the time and other resources of this court judiciously in this particular matter. If the Applicant's case is as clear as to have this court strike out the Petition, then the same end would be achieved in a full hearing of the Petition where parties would in any event give oral evidence.
12. It is my view that this application has been brought in abuse of the process of this court, and I have no hesitation dismissing it. Costs shall be in the cause.

Orders accordingly.

DATED, READ AND DELIVERED AT NAIROBI

THIS 30TH DAY OF APRIL 2015

E. K. O. OGOLA

JUDGE

PRESENT:

M/s Nyagah for the Petitioner

Mr. Mwendwa for the Objector

Teresia – Court Clerk