



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI COMMERCIAL & ADMIRALTY DIVISION**  
**WINDING-UP CAUSE NO. 3 OF 2013**

**IN THE MATTER OF: THE COMPANIES ACT CAP 486 OF KENYA**

**AND**

**IN THE MATTER OF WINDING UP OF NADIANO CAR HIRE COMPANY LTD.**

**RULING**

1. The one Petitioner's Application before this Court is by way of Notice of Motion dated 18th of October 2013 brought under **sections 231, 325 and 237** of the *Companies Act* as well as **rules 7, 27 and 36** of the *Companies (Winding-up) Rules*. The Application is also brought under the provisions of **Order 40 rules 1, 2, 3 and 4** of the *Civil Procedure Rules, 2010*. The Application seeks the appointment of one **Jean Baptiste Harelimana** as interim liquidator of **Nadiano Car Hire Company Ltd** (hereinafter "the Company") with powers to take over immediate possession and custody of all of the Company's assets, corporate premises, vehicles, gym equipment, furniture and fixtures as well as its books of accounts, minutes books and all other records including its bank accounts and the cash deposits. In the alternative is the Application sought that one **Noel Onyango Onyango** be restrained from managing the Company, operating at the bank accounts therefore and allow the said Mr. Harelimana to manage the Company and its accounts instead.
2. The Application was supported by the Grounds as detailed below:

**“(a) Unless an interim liquidator is appointed immediately, the current management and director, namely Noel Onyango Onyango will waste further and/or dissipate the assets of the company by acting to its detriment as well as the Petitioners a co-director and majority shareholder.**

**(b) It is imperative that the assets of the company be preserved and the available records of the company be secured pending the hearing and determination of the Petition herein as the current management under Mr. Noel Onyango Onyango is likely to destroy and/or interfere with or tamper with the records of the company.**

**(c) In view of his past conduct and failure to be candid about its affairs, the current management and minority shareholder will was away, dissipate and/or misappropriate any cash balances and other stocks and assets that may be standing to the credit of the company presently.**

**(d) In the alternative the court should order that the said proposed interim liquidator manages the company in place of the said Noel Onyango Onyango until his**

**appointment as the interim liquidator in order to preserve the company assets.**

**(e) It shall be more economical to appoint the aforesaid person as interim liquidator in the place of the Official Receiver in the Winding up of the company.**

**(f) It is in the interest of justice and with a view to preserve the assets and all available records of the company that the interim liquidator be appointed ex parte as aforesaid”.**

3. The Petitioner's said Application was supported by the Affidavit of **Charlotte Ndayisaba Mfasoni** sworn on 18th October 2013. She deponed to the fact that she was swearing the Supporting Affidavit both for herself and on behalf of **Annick Nadia Mfasoni** who, as a shareholder of the Company, had given her authority to do so. She noted that the Company only had to issued shares one in favour of the said Mr. Onyango and the second in favour of **Annick** and that they were both directors. She then went on to say that she was an alternative director to **Annick**. She maintained that the Company had never passed any resolution as to the appointment of Mr. Onyango as the Managing Director but he held himself out as holding such position. Ms Mfasoni went on to say that she and **Annick** had made actual contributions for the start-up operation of the Company in excess of Shs. 25 million. She noted that Mr. Onyango had only contributed Shs. 1 million thereto. He had also handled the affairs of the Company and had totally excluded both the deponent and his co-shareholder/director from the operations of the Company. The deponent went on to say that Mr. Onyango had failed to keep proper accounts and did not manage the Company in a transparent manner.
4. Ms. Mfasoni then accused Mr. Onyango of employing secretive strategies including the employment of his relatives more particularly his brother, his sister, his sister-in-law and other relatives. Due to the un-procedural manner in which Mr. Onyango, that is the affairs of the Company, it had incurred a lot of debt, resulting in creditors suing it. The deponent stated that she had been approached by the Kenya Revenue Authority who was investigating the Company for tax evasion. Mr. Onyango had arrogated himself the authority to sign cheques leading to misappropriation of Company funds. He had recently paid himself an amount of Kenyan shillings 2,000,020/- plus paid out a further Shs. 2 million from the Company's account for undisclosed purposes. Ms Mfasoni accused Mr. Onyango of receiving money from Company clients and diverting the same for his own use. Vehicles belonging to the company had broken down and some of them had been transferred. Since the Petition was filed in Court, Mr Onyango had continued to waste the assets of the Company causing the deponent's to have suffered much anguish and loss. She was urging this Court to make Orders to preserve the Company's assets. One of the exhibits to the Supporting Affidavit was a letter from the Assistant Registrar of Companies addressed to the advocates on record for the Petitioner dated 21st November 2012. That letter detailed Mr. Onyango and Ms **Annick Mfasoni** as shareholders and directors and Ms **Charlotte Mfasoni** as a director but with no shareholding.
5. The said Mr. Onyango swore a Replying Affidavit dated 14th of November 2013 on behalf of himself as the Respondent. He maintained that, in answer to the Supporting Affidavit, he had never been informed as to the appointment of **Charlotte Mfasoni** as an alternate director as is required by clause 14 of the Company's Articles of Association. He agreed that the original subscribers to the Memorandum and Articles of Association of the Company were himself and **Annick Nadia Mfasoni**, with one share each. He annexed to his Replying Affidavit a copy of a letter from the Asst Registrar of Companies addressed to his advocates on record and dated 17th June 2013. This letter gave similar information as to the directors and shareholders of the Company as did the letter dated 21st November 2012 addressed to the advocates on record for the Petitioners. As a consequence, **Charlotte Mfasoni** was a director but not a shareholder of the Company. Mr. Onyango went on to say that since the incorporation of the Company, he had been solely running its affairs including sourcing for contracts as the other shareholder/director, **Annick Mfasoni** was permanently resident in Canada. He went on to deny that the Company had incurred a lot of debts and no creditor had petitioned for the winding up of the same on the grounds of inability to pay debts. He denied taking loans in the name of the company and accused **Charlotte Mfasoni** of initiating the investigation by the Kenya Revenue Authority. Finally, Mr. Onyango

went on to say that there were two pending appeals being **High Court Civil Appeal Nos. 385 and 386 of 2012** (consolidated) as between the Company and two motor vehicle supply companies. The appeals were yet to be heard and determined. The deponent went on to say that a deposit had been paid into Court as security for stay of execution.

6. The Respondent also filed a Preliminary Objection dated 11th November 2013. Such raised two grounds namely:

**“1. THAT the Petitioner/Applicant has no capacity and/or locus standi to institute winding up proceedings pursuant to section 221 and 214 of the Companies Act Cap 486.**

**2. THAT the Petitioner/applicant having no capacity to institute the winding up proceedings herein deprives this honourable court of jurisdiction.”**

In Court on 13th November 2013, it was agreed between the counsel for the parties that the Petitioner’s said Application dated the 18th October 2013 would be disposed of by way of written submissions, such to include submissions relating to the Respondent’s said Preliminary Objection.

7. As regards the Preliminary Objection, the Petitioners’ submissions maintained and that they had both brought the Petition before Court as contributories. They noted that **section 214** of the *Companies Act* defined a contributory as:

**“any person liable to contribute to the assets of a company in the event that it is being wound up, and for purposes of all proceedings for determination, and all proceedings prior to the final determination, the persons who are to be deemed contributory is, includes any person alleged to be a contributory.”**

The Petitioners maintained that the said Annick Nadia Mfasoni was expressly a contributory, as both director and shareholder of the Company. The Petitioners maintained that the said Annick had a right to appoint an alternate director in her place during her absence from Kenya or her inability to act as a director. The Petitioners maintained that she pointed Charlotte Ndayisaba Mfasoni as her alternate. She had also given Charlotte a special Power of Attorney which formed part of the pleadings in this Court. The Petitioners further pointed out that as per **section 214** of the *Companies Act*, any person alleged to be a contributory could bring a winding up petition. The petitioners submitted that the reason why the word “alleged” was used in the statutes was so as to allow a petitioner to prove that he/she is a contributory. The Petitioners then referred the Court to 2 authorities on the point being **Civil Appeal No. 13 of 1975 Re Ghelani Impex Ltd** as well as **HCCC No. 958 of 2001 Omondi & Anor. v National Bank of Kenya Ltd**. The first of those two authorities filed under that where an appellant had shown a debt which was not disputed by the respondent then he would be considered as a contributory. In the opinion of the Petitioners, the said Charlotte Mfasoni had shown that she was indeed a contributory, being a creditor of the Company, bearing in mind the exhibits to the Supporting Affidavit marked as “CNM 3” and “CNM 7”.

8. In his submissions on the Preliminary Objection, the Respondent first maintained that there had been no notification of the said Charlotte Mfasoni being appointed as an alternate director of the Company and no Board resolution approving the same. He pointed to the fact that she had never been a shareholder and had never taken up shares in the Company, a fact that she had admitted in her Supporting Affidavit to the Application. It was the Respondent’s submission that a Petition for the winding up of a company can only be taken out by the company itself, a creditor or a contributory. He maintained that the Applicant, Charlotte Mfasoni did not qualify as a contributory. As regards the Petitioner’s suggestion that as an alternate director she had the capacity of being a contributory, the Respondent submitted that Article 14 of the Company’s Articles of Association as read with Article 22 thereof, did not confer the status of a contributor to the Petitioner by virtue of being an alternate director. The Respondent also submitted that the Petitioner’s submission that she had made a capital contribution could not hold fast in the absence of the share allocation. The Respondent maintained that the Petitioner had not provided documents showing movement of funds over time, being a contribution towards the share capital of the

Company. Further, the Respondent maintained that the fact that the Petitioner held a Power of Attorney from Annick Mfasoni was not sufficient to confer upon Charlotte Mfason the capacity to institute a winding up petition. To this end, the Respondent referred this Court to **Winding Up cause No 18 of 2007 Re Unitconsult Ltd** in which the Court had held that a personal representative could bring a winding up petition only upon the demise of the contributory and only when such personal representative was acting in the capacity as the representative of the estate of the deceased contributory. Moreover, only then, if he could show that he derived a direct interest in the shares previously held by the deceased contributory.

9. The Petition in this Cause was filed on 20th February 2013 the Petitioners were shown to be the said Annick and Charlotte Mfasoni. At paragraph 6 thereof the Petition details that the Petitioners and the said Noel Onyango Onyango of the directors and shareholders of the Company. From the Supporting Affidavit to the Application before this Court, it is quite clear that the said Charlotte Mfasoni is an alternate director of the Company and not a shareholder. The letters from the Assistant Registrar of Companies annexed to the Supporting and Replying Affidavits, indicate that she is in fact a director but has zero shares. The whole issue as I understand the Preliminary Objection of the Respondent is whether the fact that she is an alternate director bestows upon her the position of contributory. Bearing in mind the definition of contributory under **section 214** of the *Companies Act*, I do not consider that the position of “director” or even “alternate director” entitles one to be considered as a contributory.
10. That said I have closely perused the Notice Motion before this Court dated 18th October 2013. The heading thereof notes that it is brought on the part of the Petitioner (singular). After the grounds of the Application, again it details that:

**“the Applicant/Petitioner will rely upon the affidavit....”.**

Even the firm of Owaga and Associates describe themselves therein as the advocates for the Petitioner. The first paragraph of the Supporting Affidavit of Charlotte Mfasoni details that she is:

**“a director and shareholder of the Respondent company herein and therefore competent to make his affidavit.”**

At paragraph 10 of that affidavit, the deponent states that she is an alternate director and a major contributor to the capital of the company. If she were so, then I would agree with the submissions of the Respondent that she has failed to show what her contribution to the capital was and that she holds shares in the Company. In my view, this Petitioner has not even shown that she is a creditor of the Company. Exhibits “CNM 3” and “CNM 7” do not show that she has contributed in any way to the Company either as a contribution towards shares or as a creditor. The Applicant has not shown either that she brings the Application on behalf of herself and the said Annick Mfasoni. All she has said is that she makes the Supporting Affidavit on her own behalf and on behalf of the said Annick Mfasoni not that she has brought the Application on the latter’s behalf.

11. Reference been made to the Special Power of Attorney donated to the Applicant by the said Annick Mfasoni. I have noted a copy of that document exhibited as “CNM 1” to a Supporting Affidavit in respect of a Notice of Motion dated 8th February 2013 in relation to **HCCC No. 45 of 2013**. Firstly, that Power of Attorney is not stamped. Secondly, the copy that I have seen is not witnessed by an advocate and is not registered in any Government Registry including the Registry of Documents. Such may have a reflection upon its validity but sub clause b) thereof does give power to Charlotte Mfasoni (*inter-alia*):

**“To commence, initiate, pursue, withdraw, terminate action; make all necessary applications to relevant statutory authorities, including Judicial court; and where so require, attend before all such necessary authorities, for the purposes of any enquiry such authorities are mandated by law to make in that capacity and on my behalf, as may be required; for the purpose of transacting, securing my interest as a subscriber/shareholder and director in Nadiano Car Hire Company Limited, whether in Kenya or otherwise;”**

Such may be sufficient for Charlotte Mfasoni to act as the attorney as regards the Petition herein on behalf of the donor of the Power of Attorney the said Annick Mfasoni. However, it does not give her any power to bring her own Application before this Court.

12.As a result of the above, I find that this Petitioner/ Applicant, Charlotte Mfasoni is not a contributory of the Company being neither a shareholder nor a creditor. In the circumstances therefore, I uphold the Preliminary Objection of the Respondent dated 11th November 2013. I find that Charlotte Mfasoni lacks the capacity to bring either the Application or the Petition before this Court. However, I am not in a position to strike out the Petition as the same is brought jointly by Annick Mfasoni who I am satisfied is a shareholder of the Company and therefore a contributory. As I have upheld the Respondent's Preliminary Objection, I do not have to consider here the merits of the Notice of Motion dated 18th October 2013 and accordingly, I strike out the same with costs to the Respondent.

**DATED and delivered at Nairobi this 24<sup>th</sup> day of April, 2014.**

**J. B. HAVELOCK**

**JUDGE**