REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Winding Up Cause 18 of 2009

IN THE MATTER OF KANGAWANA INVESTMENTS COMPANY LIMITED

AND

IN THE MATTER OF COMPANIES ACT

RULING

By a Notice of Motion dated 25th February 2011 expressed to be brought under the provisions of Section 6(1)(b) of the Arbitration Act, Companies Act and all other enabling provisions of the Law and filed in this Court the same day on behalf of **Kangawana Investments Company Limited** (hereinafter referred to as the Company) the Company seeks the following orders:

(1) That there be a stay of all proceedings in this cause pending arbitration.

(2) That the costs of this application be borne by the Petitioner.

The application is based on the following grounds:

(i) Clause 28 of the Company's Article of Association provide for arbitration in the event of a dispute of the nature contained in the Petition dated 25th June 2009.

(ii) The said arbitration clause is valid, operative and capable of being performed.

(iii) In view of the said arbitration clause the cause is premature in that arbitration is a condition precedent to the making of the petition.

The application is supported by an affidavit sworn by **Bernard Nganga Kamau,** a Director of the Company on 25th February 2011. According to the said affidavit, the differences have arisen between the Company on the one hand and the Petitioner on the other hand in respect of the affairs of the Company. Such differences, it is deposed are governed by Article 28 of the Articles of the Company hence the Company is entitled under section 6 of the Arbitration Act to apply for stay of proceedings in this Petition.

The application is opposed by **Cecilia Wacuka Nganga**, the Petitioner on 10th March 2011. According to her, the application is fatally defective, incompetent, misconceived, bad in law and without merit for the reasons that the application has been filed under the wrong legal provisions, the applicant have (sic) failed to tender a valid resolution for the Company to engage in the case; the issues arising in the winding up cause are not of a dispute between the two controlling and equal shareholders but rather a petition under law for winding up of the Company; the clause establishes a prima facie case with probability of success;

the applicants have neither locus standi to institute the present Application nor judicial basis to sustain the Application; and the 1st respondent has not demonstrated the source of his authority to swear the Affidavit on behalf of the Co-applicant and the Respondents have instructed their Advocates on record to raise and argue a preliminary objection to strike out the Affidavit and the Application. According to the deponent, clause 28 referred to by the applicant envisages reference of disputes between the Company on one hand and a shareholder on the other and therefore has no application to this petition for winding up of the Company which is not a dispute between the deponent as a shareholder and the Company but rather a request for the Company to be wound up on the grounds set out in the petition and that the 1st applicant has illegally and unilaterally in breach of mandatory provisions of the law been mismanaging the affairs of the Company and pilfering Company revenue and finances to the petitioner's detriment and the best interest of the Company. Accordingly, there is no evident legal or equitable basis for the Court to issue the orders sought and the application as filed is bad in law and in breach of mandatory legal provisions and the same should be ipso facto struck out with costs as there is no dispute between the petitioner and the co-shareholder or the company which warrants to be referred to arbitration.

The same deponent swore a further replying affidavit on 26th October 2012 in which she reiterated that the 1st respondent has not been duly authorised to swear an affidavit in the Company's behalf and has no locus standi to represent the Company in a legal capacity as he has never been authorised to do so by a resolution of the Company. It is further denied that the properties held by the company are held in trust for the 1st respondent and instead it is averred that the 1st respondent is an equal share holder in the Company as the Petitioner and is therefore only entitled to the proceeds of the Company that are due to him. Further, it is deposed that there is no provision in the Memorandum of Association that the property of the Company is to be held in trust for him as a shareholder of the Company and therefore the said allegation is fuelled by ill motive on the 1st respondent's part in an effort to bar the Petitioner from enjoying the fruits of her labour as a director of the Company. She deposes that she was coerced into transferring her matrimonial home to the 1st respondent and subsequently to the 2nd respondent in the promise that there would be returns to her and her family and to generate more income for the company that they jointly owned. On the transfer of the 1st respondent, the petitioner assumed an absolute control over the management of all the properties of the Company in Mombasa including the property in Kiembeni- Kiembeni Flats which on completion she marketed, got tenants and leased and channelled the revenue therefrom into the Company's accounts. She also appointed an agent to run and manage the said flats but the relationship became sour when the firm started embezzling funds belonging to the 2nd respondent and the petitioner saw to it that the firm was not only prosecuted but the Company was adequately compensated for the losses incurred. t is contended by the petitioner that she has been actively involved in the affairs of the Company including paying of land rates and obtaining necessary clearances for the property of the Company s well as participating in decision making process in the Company as well as execution of contracts. In the premises, it is the petitioner's view that the 1st respondent has not come to court with clean hands in alleging that the petitioner had never taken part in the running of the Company. To her, it is her ouster from the running of the company by the 1st respondent that has denied her access to the Company leading to her recent contribution not being able to be felt. The petitioner is not interested in resigning as a director but rather in winding up of the company thus leaving the 1st respondent to be at liberty to incorporate other Companies and manage them as he wishes without the petitioner. In her view, whereas Article 28 of the Articles of Association does provide for Arbitration of disputes and is valid, a proper reading of the clause shows that it does not capture winding up proceedings. A statutory remedy such as winding up, conferred on shareholders to apply for relief is inalienable and arbitration cannot be a condition precedent to winding up since its source is a statute and hence independent of a party's contractual terms. Even if the clause does contemplate winding up proceedings, it is deposed that the clause is inoperative and void to the extent that under the Company law the High Court has exclusive jurisdiction over winding up causes and it is trite law that Arbitration is not one of the three modes of winding up by an order of the court, voluntarily or voluntarily but under the court's supervision. In her view, the making of winding up proceedings subject to arbitration would be contrary to public policy since certain proceedings that affect various parties such as creditors should be preserved for open courts and not arbitration which is the preserve of contractual parties only. Further the application for stay is fraught with inordinate delay and the Court is duty bound to exercise its jurisdiction

and power as conferred to it by the Constitution of Kenya and the Company's Act to dismiss the application filed by the 1st respondent seeking orders which are non-existent in law.

The application was prosecuted by way of written submissions. In the applicant's submissions, based on the decision in **Hickman vs. Kent or Romney Marsh Sheepbreeders Assocation [1915] 1 Ch 881**, Articles constitute a statutory contract which binds the members to the company, and also binds the company to the members. Consequently a company may sue a member to restrain an imminent breach of the articles. Under section 28(1) of the Companies Act, it is submitted that a members is described as follows: The subscribers to the memorandum of a company shall be deemed to have agreed to become members of the company, and on its registration shall be entered as members in its register of members. It follows that the Respondent is a member of the Company who has a statutory contract with the company binding her to it and its Articles of Association as long as the company's legal existence has not yet come to an end. It is further submitted that the Company has only two members who re also the directors therein, the Applicant and the Respondent with equal shares in the company and equal power to run the affairs of the Company. Resolutions, it is submitted, can only be passed when a meeting reaches a decision whether ordinary or special. In the present circumstances it is not possible to have a simple majority of votes cast when both members of the company want different things. As the Company has not been wound up, it is only logical for the Applicant who is the sole remaining member and director to act for the Company. According to the applicant, the arbitration clause is valid and binding on the parties herein, operative and capable of being performed. Accordingly the applicant prays that the application be allowed as prayed to enable the Company resolve its disputes by arbitration as this will allow the Respondent to resign as a member and director of the Company and allow the parties' four children to become shareholders therein who will continue to run the affairs of the Company.

On the part of the petitioner it is submitted that since the decision in HCCC No. 31 of 2005 which arose from divorce proceedings between the petitioner and the 1st respondent were proceedings in a matrimonial proceedings, the Court had no jurisdiction in matters relating to the Company and the said decision ought not to form a basis for the current and subsequent winding up proceedings. In her view, the scope of clause 28 aforesaid does not contemplate winding up proceedings as subject to Arbitration. In the petitioner's view, winding up proceedings are left to courts of law and not arbitrators and therefore clause 28 cannot, upon a true construction, have envisaged Arbitration for winding up proceedings. Clause, 28, it is contended, referred to disputes arising where the parties still want the company running as a going concern and not where a shareholder is at the end of the rope and wishes to wind up the company. Hence once a petition to wind up is filed, the matters now rest with the High Court alone, since certain grounds for winding up are not strictly speaking disputes that can be reconciled in Arbitration. It is further submitted that the Companies Act, Cap 486, Laws of Kenya section 218 bestows exclusive jurisdiction to the High Court for winding up proceedings. Accordingly to the extent that that clause 28 contemplated winding up proceedings as arbitrable, it would be inoperative as it would breach section 218 of the said Act. Whereas shareholders may agree to wind up voluntarily, it is submitted that their agreement must be placed before a judge of the High Court and not an arbitrator since arbitration is not one mode for winding up under section 212 of the Company's Act. That, however, is not the case in this matter. In the petitioner's view, to subject winding up proceedings to Arbitration is not only bad in law but also contrary to public policy since arbitration is a private and confidential affair between select contractual parties while winding up processes are by their nature public and affect more than just the shareholders and directors. In support of her submissions, the petitioner relies on Singapore Court of Appeal decision in **Four Pillars Enterprises Co. Ltd vs. Beiersdorf AG, ASA Bulletin, Vol. 19 No. 2 (2001) pp 370-379 paras 22-26** and the Indian Case of **Haryana Telecom vs. Sterlite Industries [1999] 5 SCC 688**. The petitioner further submits that arbitration is not a condition precedent to filing a winding up petition under clause 28 since any clause in a contract which is a clear violation or waiver of a party's right granted by statute must be spelled out succinctly without equivocations otherwise the Court will be slow to come to such an adverse interpretation. It is similarly contended that restrictions to the exercise of rights granted by law are always to be read with utmost circumspection. Relying on **Exeter City AFC Ltd vs. Football Conference Ltd and Another**, it is submitted that statutory rights conferred on shareholders to apply for relief were inalienable and not arbitrable. In her view, a statutory remedy, lke winding up, conferred on shareholders to apply for relief is inalienable and arbitration cannot be a condition precedent to winding up since its source is a statute and hence independent of a party's

contractual terms. On the authority of **ACD Tridon Inc. vs. Tridon Australia Pty Ltd 2002 NSWC 896**, it is submitted that matters arising under the Corporations Act can generally be submitted to arbitration, but only provided that these do not concern the parties' rights stemming from the statute, instead of the contract. It is therefore submitted that winding up proceedings are not subject to the provisions of section 6 of the Arbitration Act regarding stay of court proceedings in favour of Arbitration. In the petitioner's view, grant of stay is conditioned on the requirements, firstly, that the party making the application does so apply not later than the time that party enters appearance or, secondly, otherwise acknowledges the claim against which the stay of proceedings is sought. The remedy being in the nature of an injunction is equitable and the law will decry an indolent application. Though the application was made on the date of appearance, this was done one year and seven months later and is still affected by laches because he otherwise acknowledged the claim against which the stay of proceedings is sought by taking so long to apply for stay. Accordingly, the petitioner prays that the application be dismissed.

Having outlined the parties' rivalling cases as well as submissions, I now proceed to determine the issues raised. The central issue for determination in this application, in my view is whether Winding Up proceedings can be subject of arbitral proceedings.

The first port of call in matters concerning the invocation of arbitral process is Article 159(2)(c) of the Constitution. That provision provides as follows:

(2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles —

(a) ……..

(b) ……..

(c) alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3);

Clause (3) aforesaid provides:

(3) Traditional dispute resolution mechanisms shall not be used in a way that—

(a) contravenes the Bill of Rights;

(b) is repugnant to justice and morality or results in outcomes

that are repugnant to justice or morality; or

(c) is inconsistent with this Constitution or any written law.

The petitioner's objection if I understood her well is that the orders seeking reference to arbitration would be inconsistent with the written law i.e. the provisions of the Companies Act, Cap 486 Laws of Kenya which mandate that winding up proceedings be determined by the High Court. The first question is therefore whether a clause referring a matter to arbitration may be enforced when it comes to winding up proceedings. For the clause to be enforced the arbitrator must be clothed with jurisdiction to determine the matters forming the subject of arbitration. Whereas I am cognisant of the fact that an arbitrator is properly empowered to deal with the issue whether or not he has the necessary jurisdiction to determine the mater referred to him, where it is clear that the arbitrator has no jurisdiction it would be a waste of precious judicial time to refer the subject of the dispute to arbitration. The issue before me was the subject of the decision by Kimaru, J in Rift Valley Railways (K) Ltd vs. Kenya Shell Limited Nairobi (Milimani) HCWC No. 2 of 2009. In that case the learned Judge held inter alia:

"I am in agreement with the submission made on behalf of the respondent that the fact that there exists an agreement with an arbitration clause does not oust this Court's jurisdiction to entertain a winding up cause under the provisions of the Companies Act and the Companies (Winding Up) Rules. Indeed an arbitrator does not have jurisdiction to entertain any winding up proceedings if the same would be presented to him…The applicant has failed to raise any substantial ground to

entitle this court to decline to proceed with the winding up proceedings...The upshot of the above reasons is that the notice of motion dated 10th February 2009 lacks merit and is hereby dismissed with costs. The respondent shall have the liberty to proceed with the winding up cause. The interim orders issued pending the hearing of the present application are hereby set aside".

In circumstances where the arbitrator would not be clothed with the jurisdiction to entertain the dispute, it is my considered view that there would be no need to stay the proceedings with a view to referring the matter to arbitration.

It is not in dispute that Clause 28 of the Company's Articles of Association provides as follows:

Whenever any differences arises between the Company on one hand and any of the members, their executors, administrators, or assigns on the hand, touching the true intent or construction, or the incidents, or consequences of these articles, or of the status, or touching anything then or thereafter done, executed, omitted, or suffered in pursuance of these Articles, or the statutes or touching any breach, or alleged breach, of these Articles or to any statutes affecting the Company or to any of the affairs of the company, every difference shall be referred to the decision of an arbitrator, to be appointed by the parties in difference or if they cannot agree upon a single arbitrator to the decision of two arbitrators, of whom one shall be appointed by each of the parties in difference.

In my considered view, the said article is meant to protect the interest of the company as against those of the members. It is not meant to cater for interests of the members who decide to fight amongst themselves. If it was intended to apply to disputes between members *inter se*, one would have expected the same to use such phrases as "or between members of the company". Here the clause is clear that on one hand there must be a company. From the evidence on record, it is clear that allegations of impropriety are majorly directed against the 1st respondent with little if any allegation being directed against the Company. In the circumstances it is my finding and I so hold that clause 28 aforesaid is of no assistance to the applicant. See **Nairobi High Court (Commercial & Admiralty Division) Miscellaneous Application No. 832 of 2010 (OS) – Daniel Njogu vs. Wilson Gichihi Gachagwi.**

In the circumstances, the application dated 25th February 2011 lacks merit for two reasons. First, the winding up cause is not arbitrable and secondly, the clause relied upon by the applicant does not warrant the reference of the issues herein to arbitration.

In the result the said application fails and is dismissed with costs.

Dated at Nairobi this 30th day of November 2012

G.V ODUNGA
JUDGE

Delivered in the presence of the petitioner in person.