



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Winding Up Cause 41 of 2011

IN THE MATTER OF ELGON APARTMENTS LIMITED

AND

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

JUDGMENT

1. This is a Petition by Inderjit Singh Chana and Minakshi Chana (hereinafter “**the Petitioners**”) to wind up the Elgon Apartments Ltd (hereinafter “**the Company**”). The Petition was heard by way of Affidavit evidence and written submissions that were hi-lighted by Counsels for the respective parties.
2. The Petitioner’s case is that they are joint shareholders in the company of one share, that the affairs of the company are being conducted in an oppressive manner as against the Petitioners, that they have not been afforded any chance to participate in the affairs of the company, that they have demanded for elections which have not been held contrary to the Articles of Association of the company, that they have been denied minutes of meetings of the company, that receipts of expenses as well as accounts of the company have not been supplied although demanded, that copies of bank statements or contracts have not been supplied, that the management of the company has discriminated against them, that the Petitioner have been denied communal security and other essential services, that the management has instructed the guards to deny the Petitioners the right of egress and access to the Petitioner’s premises, that they have been defamed and caused mental anguish, that the management are using the company as a vehicle to fleece and steal from its members and that the company is being conducted contrary to the Memorandum and Articles of Association.
3. Mr. Kithi, learned Counsel for the Petitioners submitted that the winding up commences the date of filing the Petition whereby the Directors are dismissed and therefore cannot act for the company, that any document signed by such directors is void ab initio. Counsel relied on Section 226 of the Companies Act and the case of **Queensway Trustees Ltd –vs- Official Receiver (1983) KLR 52** for that proposition. Counsel further submitted that the Replying Affidavit of Bipin Joshi was objectionable as the deponent described himself as a chairman of a management committee and was neither a director or a shareholder of the company and did not have any authority to represent the company, that there was no evidence to show that he had any authority to swear the affidavit, that there was also no authority to show that the firm of Khayenga Chivai Advocates had been authorized to file any documents for the company in these proceedings. Reliance was placed in the cases of **Trade Bank Ltd –vs- L.Z Engineering Construction Ltd and Bugare Coffee Growers –vs- Sebanuka and EASA Ltd –vs- Kegode**. That there was, therefore, no defence to the Petition. That the Petitioners had suffered oppression from some members of the company. That in the premises it was just and fair to wind up the company. Counsel relied on the text of **Charlesworthy’s Company Law**, 17th Edition for the proposition that where a contributor’s petition is based on just and equitable ground alleging failure to supply accounts and information about its affairs, a surplus need not be shown. Counsel therefore urged that the Petition be

allowed.

4. The Company responded through a Replying Affidavit of Bipin Joshi sworn on 30th January, 2012. He swore that he was the chairman of the management committee of the company and was authorized to swear the Affidavit opposing the winding up petition, that the Petitioners own only one (1) share out of the 48 issued shares that the original directors and manager were the directors of the company that put up houses on LR NO. 209/12167 and upon selling all the apartments, the management company was handed over to the Lessees in early 2008, that the company was a party to each lease executed by the Lessees, that the Petitioners as owners of one share, they own and/or occupy house No.C5, that there has been disagreements as to the service charge on which however the majority of the members are in agreement, that the disagreements with the Petitioners arise from the fact that the Petitioners are not residents of Kenya. He further swore that the company has had two annual general meetings on 26/1/08 and 22/01/2011, respectively he denied the Petitioner's allegations that the Petitioner had been denied opportunity to participate in the affairs of the company or lack of elections, he further denied that the company had refused to give the petitioners the Audited Accounts. He further swore that the documents of expenses were available for inspection or taking copies. He accused the Petitioners of failing to pay service charge like other members, behaving negatively to other members of the company. That the company is a registered owner of the reversion interest over LR No. 209/12167, winding up the company will cause hardship to the other members as well as other financial institutions who may have financed the Lessees, that winding up is not the only remedy available, that the Petitioners are in arrears of service Charge to the tune of Kshs.113,500/- as at 2011, and it will be inequitable to wind up the company.

5. Mr. Khayega, learned Counsel for the company submitted that under Section 219 of the Companies Act (hereinafter "the Act") the only ground for which a company may be wound up is if the court is of the opinion that it is just and equitable that the company be wound up, that that discretion can only be exercised under Section 222 of the Act if there is no other remedy available to the Petitioners, that the Principal object of the company was to acquire LR No. 209/12167 and hold the same as an investment for the Lessees of the flats erected thereon. Counsel submitted that the allegations by the Petitioners had been answered in the Replying Affidavit by Bipin Joshi whose averments had not been denied. He further submitted that the petition had been brought with ulterior motives of having the directors of the company ease the pressure on the Petitioners from paying service charge. Counsel referred the court to the case of **WU Matter of Gilani Butchery Ltd for this proposition and the case of Vadag Establishment –vs- Shretta CA No. 83 of 2000** for the proposition that if there is an alternative remedy a winding up order will not be made. Counsel urged that the petition be refused.

6. Jane Njeri Onyango the objector filed Grounds of Opposition to the petition and written submissions. She indicated that she was a shareholder of the company. She opposed the petition on the grounds that the company was being run in accordance with the Memorandum and Articles of Association, that the nature and purpose for which the company was formed do not lend itself to the process of winding up as sought by the Petitioners. In her view, these proceedings were an abuse of the process of the court. She relied entirely on the Replying Affidavit of Bipin Joshi.

7. I have considered the petition, the Affidavits on record, written submissions, oral hi-lights of Counsel and authorities cited. The first issue to consider is whether the petition is opposed. Mr. Kithi for the Petitioners did submit that since the winding up proceedings commence on the filing of the winding up petition, under Section 226 of the Act, upon presentation of the petition the directors of the company are suspended, there was no board of directors to authorize the defending of the petition, that there was no resolution to appoint Khayega and Company and that the Replying Affidavit of Bipin Joshi was field without authority. I have considered the provisions of the law as well as the authorities cited in support of the proposition. I agree with Mr. Kithi that the process of winding up commences upon the presentation of the petition. However, I do not think that such presentation of a Winding up petition suspends the board of directors of a company. What I believe it does is to suspend the powers of the directors in relation to disposition of the properties of the company. This is what I believe is the effect of Section 224 of the Companies Act. The Board still retains the powers to carry out the day to day operations of the company. The submission that such presentation suspends the Directors from office is not correct. The directors are only suspended and/or dismissed either once a winding up order has been made or once a

liquidator has been appointed. That is the gist of the decision in **Queensway Trustees Ltd –vs- Official Receiver & Liquidator Tanneries of Kenya (Supra)** that was cited by Mr. Kithi.

8. As regards the contention that there was no resolution and/or authority to defend the petition or appointing Ms Khayega and company to act in the matter or to Mr. Bipin Joshi to swear the Replying Affidavit, I am alive to the fact that a company must authorize the filing of proceedings by way of resolution. However, I know of no law that requires a company to file a resolution to defend itself once sued. It is expected that in the ordinary course of its business, the directors will make a decision to defend or ratify such a decision. I believe that to require that every time a company is sued, the board is called upon to meet and resolve to defend actions will be tenuous and probably impractical. It is expected that those in charge of the day to day running of the company will take such action that is beneficial to the company in relation to suits against it and have the same thereafter ratified by the full board of directors.

9. In the case before me, Mr. Bipin Joshi swore on 30th January, 2012 that he had been authorized to swear the Replying Affidavit to oppose the winding up petition brought against the company. There was no denial of that fact. The Petitioners did not file any Affidavit controvert that deposition. That being the case, it is the view of this court that that statement is prima facie true. It cannot be challenged at the submission stage of the proceedings without a basis. I believe and so hold that where however, there is a dispute and/or a suit is between the Board of Directors of a company inter se or a proceeding by the company against its directors and/or members then the requirement that the company files a resolution will hold water. In my view, the case of **Trade Bank Ltd (Supra) and Bugerere Coffee Growers Ltd** cited by the Petitioners is not applicable. In the **Trade Bank Ltd case**, a liquidator had been appointed thereby dismissing the Board of Directors. The requirement of authority was therefore mandatory. In the **Bugerere case** there was infighting by the Directors and there was need to establish which of the two groups were the bonafide directors who would commence proceedings in the name of the company. In the case at hand, no liquidator has been appointed and there is no dispute as to who are the directors of the company. Accordingly, I admit the Replying Affidavit of Bipin Joshi for consideration in opposing the petition.

10. The basis of the Petitioners complaint is, inter alia, that they have been excluded from the affairs of the company that no audited accounts have been prepared, that the company is run contrary to the Memorandum and Articles of Association and that there has been no Annual General Meeting as required by law. Bipin Joshi did in his Affidavit give a detailed response to the Petitioner's allegations. He indicated that there has been two Annual General Meetings one of which the Petitioners had attended, that the Petitioners could raise any of their concerns at such meetings, that the minutes of such meetings had been circulated to all the members of the company including the Petitioners, that the audited accounts have been circulated and do form part of the agenda for the company's general meeting. Having considered the foregoing I am satisfied that, all the complaints raised by the Petitioners have been substantively answered in the Replying Affidavit by Bipin Joshi. As I have already indicated, there was no Affidavit that was filed to deny the averments in that Replying Affidavit. In this regard, those averments remain true.

11. I have also seen the annexure to the Replying Affidavit of Bipin Joshi. They were also not denied or controverted. Considering the matters raised in both the Verifying Affidavit and the Replying Affidavit, I am unable to say that the Petitioners have proved their case to the standard required.

12. Even if the Petitioners would have proved their case, I would have still found it difficult to grant the winding up order sought for the reason that, the company seems to have been formed primarily to hold the reversionary interest in LR No. 209/12167 of which all its members totaling forty eight (48) are Lessees of various apartments erected on that property. It was contended that some of the Lessees had been financed to purchase the subject leaseholds. In my view, therefore, if a winding up order is made, the hardship to be suffered will be monumental as it will affect 3rd parties (financiers) who completely have nothing to do with the company. Obviously, a court of law will have to consider the proportionate hardship to be suffered by the Petitioners vis a vis the rest of the membership of the company as well as 3rd parties before making any order in any matter before it. In any case, the objector had indicated in her Grounds of Opposition without however supplying particulars, that the dispute was subject to arbitration.

That is one of the remedies available to the Petitioners.

13. For the foregoing reasons, I hold that the Petitioners have not proved their case to the required standard and I dismiss the Petition with costs.

DATED and delivered at Nairobi this 9th day of November, 2012.

.....

A. MABEYA
JUDGE