**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT ELDORET**

**PETITION NO. 1 OF 2011**

**IN THE MATTER OF BEIJING KENYA COMPANY LIMITED**

**AND**

**IN THE MATER OF THE COMPANIES ACT, CAP 486 OF THE LAWS OF KENYA**

**THROUGH**

**DR. ZHAO XIAO HUA..........................................................................................................PETITIONER**

**AND**

**BEIJING KENYA COMPANY LIMITED...........................................................................RESPONDENT**

**RULING**

The petitioner, **Zhao Xiao Hua**, (hereinafter **"the petitioner"**), on 25th January, 2011 petitioned this court for an order to wind up Beijing Kenya Company Limited (hereinafter **"the Company"**). The primary ground for the petition is that a deadlock exists between the directors of the company who are the petitioner and one Charles **Jakait Sangalo** (hereinafter **"the Co-owner"**). The two directors are also the only share holders of the company. The petitioner's main complaint is that the said co-owner has solely taken over the control of the company, finances, corporation-seal and vital documents of the company to her exclusion and has permitted non-members of the company to participate in its control and management again to her exclusion.

On 28th Janury,2011, the petitioner, by her summons dated 27th of the same month, sought two main

orders of the court namely; that the Official Receiver be appointed an interim liquidator of the company and that the said interim Liquidator takes possession and management of the company seal, books, registers and documents of title and Imani Hospital. The said orders are sought on an interim basis pending the hearing and determination of the petition.

The petition and summons were served upon the said Co-owner presumably on behalf of the company. On 4th Febraury, 2011, **M/s Gicheru & Co. Advocates** filed a Notice of entry of appearance and stated that they had done so on behalf of the company and the Co-owner. On the same date, they lodged a Notice of Motion under section 6 of the Arbitration Act No. 4 of 1995 as amended by the Arbitration (Amendment) Act 2009, seeking mainly a stay of all proceedings in the petition pending reference to arbitration. The application is predicated on the main grounds that Article 32 of the Company's Articles of Association directs that all disputes and /or differences between the company and or the parties be submitted to arbitration and that this petition has been instituted in contravention of the said Article and should therefore be stayed and the dispute be referred to arbitration. The application is supported by an affidavit sworn by the said Co-owner who depones that he has sworn the affidavit on his own behalf as a person affected by the petition and on behalf of the company. He further avers that the petition raises matters touching on perceived differences between him and the petitioner and also between the petitioner and the company. He also swears that clause 32 of the Company's Articles of Association mandates that any dispute or differences between any of the members and the company should be submitted to arbitration and that the filing of this petition contravenes the said article and should therefore be stayed and their dispute or differences be referred to arbitration.

The application is opposed and there is a replying affidavit sworn by the petitioner. There is also a notice of preliminary objection filed by the petitioner's advocates. The gist of the opposition to the application is that there are differences or a dispute between the petitioner and the Co-owner as directors but not between them or any of them with the company. In the premises, the arbitration clause does not apply to the dispute or difference. Besides this main objection, the petitioner has also challenged the competence of the motion on notice and the supporting affidavit. She contends that the same do not comply with rules 5 (2), 6(2) and 10 of the Companies (Winding-Up) Rules; that the application offends section 226 (2) of the Companies Act (Cap 486 Laws of Kenya); that an order of stay will deny her the opportunity to seek any interim relief; that the company could not have appointed the advocates on record for it because no resolution for such appointment could be made given the deadlock.

In a further affidavit sworn by the Co-owner, he reiterates that the issues raised in the petition relate to differences between him and the petitioner and between her and the company thereby attracting the provisions of the arbitration clause. Regarding the notice of entry of appearance the Co-owner contends that the same is valid as he was served in both his personal capacity and on behalf of the company. In any event, according to him, with the deadlock acknowledged by the petitioner, the company would not remain without representation for want of a resolution. Not to be outdone, the petitioner also filed a further affidavit. She reiterated her averments in her Notice of Preliminary Objection and her replying affidavit.

When the application came for hearing before me on 29th March, 2011, counsel agreed to file written submissions which were in place by 10th May, 2011. The parties reiterated the stand points taken by their clients in their respective affidavits.

I have considered the Petition, the application, the affidavits filed and the annextures annexed thereto. I have also given due regard to the submissions of counsel. Having done so, I take the following view of the matter. I think it is appropriate to first deal with what I consider preliminary issues raised by the parties. So, does the application contravene rule 2 of the Arbitration Rules 1997 and if so with what consequences? Under that rule, all applications are to be made by Summons. This application has been lodged by way of a motion on notice. As it has been made under section 6 of the Arbitration Act, among others, it clearly offences section 2 thereof. Is it therefore incompetent for that flaw? I do not think so. There is authority for so saying. In **Boyes –vrs Gathure [1969] EA 385**, the predecessor of our Court of Appeal held, *inter alia*, as follows:-

**“Use of the wrong procedure did not invalidate the proceedings, because:**

**(a) It did not go to jurisdiction, and**

**(b) No prejudice was caused to the applicant.”**

In that case, an application under section 57 of the R.T.A which should have been made by Originating Summons was made by Chamber Summons. The lapse in that case was worse than here because an Originating Summons and a Chamber Summons are vastly different as compared with a Notice of Motion and a Chamber Summons which are both interlocutory procedural modes of making applications. That case was followed in **John Joshua Kinyanjui –vrs- Racheal Wahito Thande [CA No. 284 of 1997]** which is a decision of our present Court of Appeal.

In addition to case law, we now have Article 159(2) (d) of the Constitution which reads as follows:-

**“159 (2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles:-**

**(d) Justice shall be administered without undue regard to procedural technicalities.”**

In the premises, I cannot dismiss the application merely because it contravenes rule 2 of the Arbitration Rules of 1997.

The petitioner has also opposed the application because it contravenes rules 5 (2), 6(2) and 10 of the Companies Winding-Up) Rules. The first two sub-rules provide for hearing in Chambers of an application such as is before me. Objection is made, no doubt, because the Co-owner has invoked the Court’s jurisdiction by way of a motion on notice rather than a Summons in Chambers. On the same authority of **Boyes –vrs Gathure (Supra)**, and the Supreme Law of the Land, I cannot dismiss the application for contravening the said sub-rules.
Rule 10 is in the following terms:-

**“10. All orders, summons, petitions, warrants or other documents of any kind in any proceedings and certified copies thereof should be sealed.”**

In rule 2, **“sealed”** means sealed with the seal of the Court. Having perused this application, I observe that it indeed does not have the seal of the court. So, is it, to that extent, incompetent? That in my view is a defect of form and not substance. It does not go to jurisdiction and has caused no prejudice to the petitioner. The failure to have the motion on notice sealed does not therefore invalidate the same.

The petitioner has further contended that since the company was incorporated on 6th December, 2006, the Arbitration (Amendment) Act, 2009, which the Co-owner has invoked, does not apply, since it did not exist at the incorporation of the company. The objection in my view has not been well taken given that the application is made under the Law as it applied then and as amended by the Arbitration (Amendment) Act 2009.

Finally the petitioner objects to the affidavit supporting the notice of motion on two grounds namely that it is not sealed by the Company Seal and was not also authorized. The first ground has already been discussed above. The second ground would have carried weight if the company was in a position to give such authority. The circumstances obtaining herein are distinguishable from those in **Re The Standard Ltd [2002] 2 EA 617,** which has been invoked by the petitioner. The petitioner herself has acknowledged

that there is a **"dead lock"**. The only shareholders of the company cannot meet, so she admits, yet the company's interests must still be considered the relationship between its members notwithstanding.

In the end, all the technical and procedural objections to the application are without substance and are overruled.

I turn now to the merits or otherwise of the application the gist of which is that no referable dispute exists as the petitioner and the Co-owner are directors of the company and the differences/disputes and deadlock have arisen in the mode of exercise of the functions of directors and not as members of the company. The petitioner has invoked the decision of **Beattle –vrs- E & F Beattle Ltd [1938] CA 708,** to buttress her contention. There, the court held that the dispute was between a member and a director which dispute was not covered by the arbitration article.

In this case, the relevant article is 32 and it reads as follows:-

**"ARBITRATION – DIFFERENCES TO BE REFERRED**

**32. Whenever any differences arises (sic) between the Company on the one hand and any of the members, their executers, administrators, or assigns on the other hand touching the true intent or constitution, or the incidents, or of the statutes, or touching anything then or thereafter done, executed, omitted, or suffered in pursuance of these articles, or any claim on account of any such breach or alleged breach, or otherwise relating to the premises, or to 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."**

It is plain therefore that a referable dispute or difference must be between the company on the one hand and any of its members or their executors, administrators or assigns on the other hand. In her petition, the petitioner has made various complaints, the substance of which is the action of the Co-owner to solely take over the control of the company, finances, corporation seal and vital documents of the company to the exclusion of the petitioner for his own personal benefit. Besides that primary complaint, the petitioner further complains that the company has not held the annual general meeting; that the Co-owner has allowed persons who are not members to participate in the control and management of the affairs of the company to her exclusion and that since the dead-lock between shareholders commenced, no proper books of accounts have been kept, no auditing and proper safeguarding of the property and funds of the company has been kept. These complaints go beyond the relationship of the petitioner and the Co-owner as directors. They are complaints that disclose a dispute not merely between directors but between the petitioner and the company. Indeed, the petitioner challenges the introduction of non-members of the company participating in the control and management of the company. She further challenges the failure of the shareholders to meet and transact any business.

Prior to the commencement of this petition, the Co-owner and one **Beatrice Kamonya Jakait** had filed a suit against the petitioner in which they sought mainly a restraining order against the petitioner on the basis that she had sold her shares to the said **Beatrice Kamonya Jakait**. It was pleaded in that suit, *inter alia*, that despite the said sale, the petitioner was frustrating the operations of an entity called **Imani Hospital** which is a business run by the company. In the defence filed by the petitioner, she, among other things, acknowledged the said business and pleaded that the same belonged to the company and only the company could sue or enforce its business.

The significance of that suit is that the difference or dispute between the petitioner and the co-owner is not merely about their relationship as directors but goes to the root of the company- its -ownership.

In all those premises, I have come to the conclusion that the differences disclosed in the pleadings are

covered by the Article 32 of the Company's Articles of Association. Even if an issue arose as to whether indeed the matter is so covered, it would appear on the authority of **East African power Management Ltd –vrs- Westmount Power (Kenya) Ltd [2010] e KLR (UR)** , that the arbitrator can still rule on the same.

Is it too late to make a referral order in view of the provisions of section 226(2) of the Companies Act? Under that sub-section, the winding up of a Company by the Court is deemed to commence at the time of the presentation of the petition for the winding-up. In the petitioner's view as the winding up process has commenced, a stay is not possible. That contention, with due respect is misconceived. There is no other occasion for seeking stay save after the petition has been presented. In view of my finding that Article 32 of the Company's Articles of Association covers the differences between the parties, it would not be logical to find that the same article is ousted by section 226 (2) of the Companies Act.

For the reasons given above, the application dated 4th February, 2011 by the Company and the Co-owner, is allowed in terms of prayer (a) thereof.

Costs shall be in the cause.

Orders accordingly.

**DATED AND DELIVERED AT ELDORET THIS 21ST DAY OF JUNE 2011.**

**F. AZANGALALA**

**JUDGE**

Read in the presence of:-

**F. AZANGALALA**

**JUDGE**

**21/6/2011.**