



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI MILIMANI COMMERCIAL COURTS
WINDING UP CAUSE NO.45 OF 2001

IN THE MATTER OF RIFT VALLEY AGRICULTURAL CONTRACTORS LIMITED

AND

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

RULING

The applicant, Rift Valley Agricultural Contractors Limited, filed an application purportedly pursuant to the provisions of **Rules 7 and 203** of the **Companies (Winding Up) Rules** and the inherent jurisdiction of this court seeking an order that the petition filed herein be dismissed with costs for want of prosecution. The grounds in support of the application are stated on the face of the application. The applicant contends that the petitioner, having lodged the petition in 2001, seeking, *inter alia*, the court's intervention to obtain the taking of accounts or in the alternative the Winding Up of the company, had failed to prosecute the Winding Up petition. The applicant states that since 19th July 2006, the petitioner had been reluctant to prosecute the Winding Up petition. The applicant was of the view that the petitioner had lost interest in the petition and therefore the court should exercise its inherent powers to dismiss the petition for want of prosecution. The petitioner is supported by the annexed affidavit of Benson Thiru Karanja, a director of the applicant.

The application is opposed. The petitioner filed notice of preliminary objection challenging the competence of the application. The petitioner stated that the application was incompetent since it had not been served upon the six (6) supporting creditors who are parties to the petition and who have a stake in the petition and its fate. The petitioner further stated that the affidavit in support of the application was fatally defective as it offended the mandatory provisions of the law in that it does not disclose the source of the deponent's information or his believe. Mahesh Kumar Manibhai Patel, the petitioner herein, swore a replying affidavit in opposition to the application. In the said affidavit, he deponed that he had always been keen to prosecute the petition save that he had been frustrated from prosecuting the same by the applicant who had filed several interlocutory applications whose effect had been to delay the just determination of the petition. The petitioner was of the view that the grounds put forward by the applicant were not sufficient to support the applicant's assertion that the petition ought to be dismissed for want of prosecution.

At the hearing of the application, I heard oral rival arguments made by Mr. Karanja for the applicant and Mr. Naeku for the respondent. I have carefully considered the said submissions. I have further read the pleadings filed by the parties herein in support of their respective opposing positions. There is a long standing dispute between the majority shareholders and the petitioner, who is a minority shareholder of the company. Since 1999, the petitioner has been kept out of the management of the company. The

majority shareholder, Benson Thiru Karanja, has since 1999 been in actual control of the affairs with the company. The petitioner was of the view that the majority shareholder was running the affairs of the company in a manner that was oppressive to his rights as a minority shareholder. That was the reason why the petitioner lodged the present petition seeking orders from this court to compel the majority shareholder to provide accounts in regard to how he had managed the affairs of the company or in the alternative to have the company wound up. It is apparent that the petitioner was aggrieved because he was not getting a return on his investment in the company. The petitioner had also been frustrated from the participating in the management of the company.

It appears that since the petitioner filed the present petition, for one reason or the other, the hearing of the petition has not taken off. The earlier reason for failure by the petitioner to prosecute the petition is attributable to the applicant's decision to challenge the petitioner's choice of counsel to represent him in the petition. The issue regarding the petitioner's choice of counsel has been appealed to the Court of Appeal. There are several other interlocutory applications which were filed whose effect has been to delay the hearing and determination of the petition herein. The issue for determination by this court is whether the petitioner can be blamed for failure to prosecute the petition since the last time the petition was listed for hearing before this court. As correctly observed by the applicant, the last time the petition was listed for hearing was 18th July 2006. Since then, the petitioner made no effort to move the court until 19th June 2009 when the applicant filed the present application seeking the dismissal of the petition for want of prosecution.

The petitioner argued that the application could not be allowed by the court because the applicant had not served all the parties to the petition. After the petition was lodged, five (5) creditors entered appearance seeking to be enjoined as parties in the Winding Up petition. The petitioner is therefore justified in asserting that the said creditors who had entered appearance in the petition ought to have been served with the application seeking the dismissal of the petition for want of prosecution. The petitioner correctly pointed out that the **Companies (Winding Up) Rules** made under the **Companies Act** does not contain a provision that grants this court jurisdiction to dismiss a Winding Up petition on the grounds that it has not been prosecuted. Further, unless otherwise specifically provided by the said **Companies (Winding Up) Rules**, the **Civil Procedure Act** and the **Rules** made thereunder are not applicable in regard to petitions for Winding Up of companies. However, this court agrees with the submissions made on behalf of the applicant that it has inherent jurisdiction to dismiss a petition for want of prosecution when it is clearly apparent that the petitioner is no longer interested in the prosecution of the same.

Taking into consideration the entire circumstances of this petition, it is apparent to the court that the applicant failed to make a case for this court to dismiss the petition for want of prosecution. The petitioner persuaded this court that he has an interest in the prosecution of the petition herein. The applicant cannot blame the petitioner for the delay in the prosecution of petition. This is because for a period of about five (5) years, the applicant frustrated the petitioner from prosecuting the petition by filing several interlocutory applications. It is this court's view that the petitioner should be allowed to ventilate his petition. The petitioner is clearly a person who has been seriously aggrieved by being kept out of the management of the company where he has made substantial investment. It is only just that the issues in dispute between the petitioner and the applicant be resolved on merit rather than on legal technicalities. It is clear from the foregoing that the court has not been persuaded by the argument advanced by the applicant seeking the dismissal of the petition herein for want of prosecution. The application lacks merit and is hereby dismissed. However, the petitioner is ordered to fix the petition for hearing within the next thirty (30) days. If the petitioner fails to fix the petition for hearing, the applicant shall be at liberty to move the court for appropriate orders of dismissal. The petitioner shall have the costs of the application.

DATED AT NAIROBI THIS 3RD DAY OF DECEMBER, 2010

L. KIMARU
JUDGE