REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Winding Up Cause 52 of 1998

IN THE MATTER OF SUMMIT TEXTILES LIMITED

AND

IN THE MATTER OF THE COMPANIES ACT

RULING

This is a very long and protracted matter. If the parties in dispute had the spirit and willingness to resolve the outstanding issues between them, this matter would long have been concluded. No matter. This court has to discharge its mandate in determining disputes involving parties who are unable or unwilling to reach amicable settlement. Before me is an application made by the applicant under the provisions of **Order XLV Rule 19** of the **Civil Procedure Rules** and **Section 3A** of the **Civil Procedure Act** seeking the variation of this court's orders made on 3rd April 2001 by Hewett J wherein the learned Judge appointed the date upon which the shares of the companies were to be valued as at 31st March 2001 for the purposes of settlement of the said value of the shares by the arbitrator. The applicant seeks orders of the court for the arbitrator to be granted the following power or mandate in determining the value of the shares i.e. to deal with, hear and determine the issue of interest on the ascertained value of the shares owned by minority shareholder and further powers to order payment of the ascertain value of shares and interest thereon, if any. The application is supported by the annexed affidavit of Jayantkumar Vrajlal Shah and the grounds on the face of the application. The application is opposed. The respondents filed grounds in opposition to the application. The respondents state that the court lacks jurisdiction to vary the said order of Hewett J as proposed or at all. They state that after the appeal arising from the said decision of Hewett J was heard and determined by the Court of Appeal, this court has no residual jurisdiction to deal with the matter. The respondents were of the view that the application was filed in abuse of the due process of the court.

Before the hearing of the application, the parties herein agreed by consent to file written submissions in support of their respective opposing positions. Mr. Munyu for the applicant and Mr. Chacha Odera for the respondents highlighted the said submissions during the oral hearing of the application. Having carefully considered the facts of this application and the arguments presented by counsel for the parties herein, the issues for determination by this court are as follows; firstly, whether this court has jurisdiction to hear and grant the orders sought in the application, and secondly, if the court determines that it has jurisdiction, whether the orders sought by the applicant merit favourable consideration by the court.

On the first issue, it is the applicant's case that the arbitration that is the subject matter of this application was court mandated under the provisions of **Order XLV** of the **Civil Procedure Rules** and therefore in the event of any dispute regarding the scope of the said mandate of the arbitrator, the court had residual power to give directions on the conduct of the arbitration proceedings. On the other hand, the respondents argue that the pending arbitration arose from a clause in the articles of association of the companies that are the subject of the dispute and therefore the proceedings before the said arbitrator are governed by the **Arbitration Act**. In essence, the respondents are saying that the pending arbitration proceedings are as a result of a dispute settlement mechanism provided in the articles of association of the companies and not on account of an order issued by of the court. The respondents are of the view that this court cannot in the premises therefore issue directions on the conduct of the arbitration as it lacks the requisite jurisdiction to give such directions.

Having considered the rival arguments made by the parties herein, I take the following view of the matter. From the ruling of Hewett J, it was clear that the parties herein, although they had the opportunity of resolving the dispute by arbitration, it took the court's intervention for the parties to agree on the mode of determining the pending dispute between them by arbitration. The court also gave directions on the date that shall be adopted for the purposes of determining the value of the shares of the applicant to be purchased by the respondents. The Court of Appeal in its judgment recognized that Hewett J had made his ruling while exercising his jurisdiction in hearing the Winding Up petition filed by the applicant in this application under the provisions of **Section 222 (1), (2) & (3)** of the **Companies Act**.

I am of the view that the learned Judge exercised his jurisdiction in considering whether or not to wind up the two companies, and opted for the choice provided under **Section 222 (2) (b)** of the **Companies Act** that mandates the court to consider whether there was other remedy which could be appropriate other than the option of winding up of the company. At the time Hewett J made his ruling, it was apparent that the parties herein had agreed that the only way to resolve the outstanding dispute between them was for the majority shareholders to buy out the shares of the minority shareholder, the applicant in this case. It is therefore clear that the pending arbitration is court mandated and not arbitration as contemplated by the articles of association of the two companies.

In any event, having read the judgment of the Court of Appeal in regard to the dispute herein, it was clear that the articles of association of one of the companies herein does not contain a clause mandating any dispute between the shareholder be resolved by arbitration. I agree with holding of Mbaluto J in **Indigo EPZ Limited vs Eastern and Southern Africa Trade & Development Bank [2002] 1KLR 810** by which he stated that even where the parties have agreed to resolve any dispute between them by arbitration, Kenyan courts retained residual jurisdiction to deal with peripheral matters and to see that the dispute between the parties is resolved in the manner contemplated by the arbitration agreement. The Court of Appeal in Kenya **Shell Ltd vs Kobil Petroleum Ltd [2006] eKLR** recognized that parties in the course of litigation may agree under **Order XLV** of the **Civil Procedure Rules** to have the outstanding dispute between them resolved by arbitration.

In the present application, it was clear that the parties opted to have the dispute between them resolved by arbitration during the pendency of winding up proceedings. I hold that the pending arbitration herein is court mandated under **Order XLV** of the **Civil Procedure Rules** and not arbitration as contemplated in the **Arbitration Act, 1995**. This court therefore has the requisite jurisdiction to give directions that would lead to resolution by arbitration of the dispute between the parties herein. I further hold that the application presented by the applicant herein is competently before this court.

On the second issue on whether the court can give the directions sought by the applicant in his application, I hold that the applicant established just cause for appropriate intervention by this court. It is clear that the dispute between the applicant and the respondents is in regard to the determination of the value of the shares of the two companies i.e. Midco Holdings Ltd and Summit Textiles Ltd to enable that the majority shareholders can buy out the shares of the minority shareholder. From the time the parties agreed to have the value of the said shares determined, it was apparent that the parties were aware that the date upon which the value of the shares was to be determined would be important. That is the reason why the parties herein were unable to agree on the appointed date for the ascertainment of the value of the said shares. It took the court's intervention for the date of 31st March 2001 to be ascertained as the date when the values of the said shares of the company were to be ascertained.

When the parties appeared before the duly appointed arbitrator, the applicant, correctly in my view, made two proposals with a view to giving effect to the order of the court that had given directions in respect to the date of valuation of the applicant's shares to be purchased by the remaining shareholders. That date is 31st March 2001. The two proposals were in regard to whether interest should be paid and whether an order regarding when payment of the ascertained amount should be made by the arbitrator. The respondents were unwilling for the arbitrator to make a ruling in respect to the proposals made by the applicant hence the decision by the applicant to seek intervention of this court.

As stated earlier in this ruling, it was clear that the appointed date of 31st March 2001 was important in

the determination of the value of the said shares. It therefore naturally follows that upon valuation of the said shares as at that date, interest is payable in view of passage of time and inflationary trends. The arbitrator is therefore granted mandate, after determining the value of the said shares, to determine the interest that shall be paid. Further, the natural consequence of making any award in regard to the payment of any amount is that the period should be specified upon which the ascertained amount shall be paid. The arbitrator is therefore granted mandate, on ascertaining the sum to be paid, to make an order within what period such sum shall be paid.

I therefore allow the applicant's application in terms of prayer 2 of the application. The applicant shall have the costs of this application.

DATED AT NAIROBI THIS 19TH DAY OF JUNE 2009

L. KIMARU

JUDGE