



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

**Winding Up Cause 30 of 2006**

**IN THE MATTER OF KIRIMA BUS SERVICES LIMITED**

**AND**

**IN THE MATTER OF THE COMPANIES ACT (CAP 486) LAWS OF KENYA**

**R U L I N G**

On 15<sup>th</sup> October 2008, this court dismissed the petitioner's application seeking the appointment of the official receiver as the interim liquidator of the company pending winding up of the company. The petitioner was aggrieved by the said decision, and by notice of motion dated 27<sup>th</sup> March 2009, purportedly made under **Order XLIV Rule 1(1)** and **2** of the **Civil Procedure Rule** and **Section 243** of the **Companies Act** sought to review the said orders of this court. The petitioner contends that since the court made the order, the petitioner had discovered new and important matter which was not within his knowledge at the time the application was argued. The petitioner states that the said discovery is a legal question which makes review necessary on the ground of error apparent on the face of the record. The petitioner argues that the orders granted in favour of the company by this court were not deserved and therefore ought not to have been granted. The petitioner was aggrieved that the company he help incorporate was being run like private property to the benefit of a few people and to his detriment. The application is supported by the annexed affidavit of Obadiah K. Macharia. The application is opposed. Lucy Waithira Mwangi, the chairperson of the company, swore a replying affidavit in opposition to the application.

At the hearing of the application, I heard the submissions made by Mr. Gachie for the petitioner and Mr. Karuga for the respondent. Mr. Gachie submitted that the petitioner was seeking the review of the orders of this court because he had discovered new information which was not within his knowledge at the time the application was argued. The new facts that he claims to have discovered is that the company had changed its management on 3<sup>rd</sup> August 2007 after the present petition had been filed. Mr. Gachie submitted that under **Section 224** of the **Companies Act**, any change in the directorship of the company after a winding up petition had been filed must be done with leave of the court. He submitted that the new directors of the company had not been served with the petition and therefore they could not purport to swear any pleadings in opposition to the petitioner's application. He submitted that the petitioner had further discovered that the persons purporting to be the directors of the company had been barred from taking office by the court and therefore they could not purport to act on behalf of the company. It was for these reasons that the petitioner was seeking to review the said orders of this court issued on 15<sup>th</sup> October 2008 and the setting aside of the same. The petitioner urged the court to allow the application.

Mr. Karuga for the company opposed the application. He submitted that the facts relied on by the petitioner in support of his application for review did not constitute new and important matter or evidence. He submitted that the matters that the petitioner was canvassing in this application ought to have been presented to the court at the time the previous application was argued. He submitted that there was no evidence that the petitioner had served the new directors of the company with the order. Neither was there evidence that the chairperson of the company had been specifically served. He explained that the new directors of the company had notified the court that they had only become aware of the winding

up proceeding on 6<sup>th</sup> February 2008. He maintained that the petitioner had failed to establish the prejudice he is suffering as a result of the company being managed by the new directors. He pointed out that the petitioner had even been paid dividends by the new directors. He was of the view that the present application by the petitioner was actuated by malice and not on account of discovery of new or important matters which could not be procured at the time the application was argued if there was due diligence. He urged the court to dismiss the application with costs.

I have carefully considered the rival arguments made by counsel for the parties in this application. I have also read the pleadings filed by the parties in support of their respective opposing positions. The petitioner wishes the court to review its ruling of 15<sup>th</sup> October 2008 on the grounds of discovery of new and important matter which was not within the knowledge of the petitioner at the time the ruling was made. The new and important information that the petitioner claims was not in his knowledge at the time the order was made is the information that the new office bearers of the company had taken office when there was an order prohibiting change of office. The petitioner relied on an order that was issued on 6<sup>th</sup> September 2007 by Nambuye J. in support of this assertion. I have read the said order. The said order stayed the legal validity of the Registrar of Companies decision contained in the letter dated 3<sup>rd</sup> August 2007. It did not bar the newly elected directors of the company from holding office. I do not accept the basis of the petitioner's application that the company should remain with the officials who were in office prior to the election of the new directors on the basis that a winding up petition had been filed.

It is the view of this court that what the petitioner claims to be new and important matters are actually matters which even if the court was made aware of it would still have reached the decision that it did. I think the petitioner is mistaken in assuming that the legal technicalities that he has raised would make this court divest itself of the jurisdiction that it has of doing justice to the parties that appear before it. Under **Section 222(2) of the Companies Act**, where a contributor of the company files a winding up cause, this court has jurisdiction to consider whether there is other remedy other than the winding up of the company that can be pursued by the petitioner to address his grievance. In the present case, it is clear to this court that the petitioner, having acquiesced to the management of the company by its new directors, cannot purport to prosecute an application that seeks the appointment of an interim receiver. The petitioner was paid dividends by the new directors of the company. He signed the register acknowledging receipt of the dividends. It appears that the petitioner is not prepared to accept that the reasons that compelled him to file the winding up cause are no longer in existence. That is why he wishes to engage the company through the courts rather than through a general meeting of the company where all the members will be involved in decision making process. The petitioner is abusing the process of this court. This court cannot allow the petitioner to manage the affairs of the company through the court.

The present application is one instance where the petitioner is seeking to vex the managers of the company with a view to getting his way in regard to the manner which the company should be run. I find no merit with the petitioner's application for review. I proceed to dismiss it with costs. It is so ordered.

**DATED AT NAIROBI THIS 15<sup>TH</sup> DAY OF JULY 2009**

**L. KIMARU**

**JUDGE**