**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

**Winding Up Cause 25 of 2009**

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

**AND**

**IN THE MATTER OF WINDING UP SPAN IMAGE FZC AND SPAN IMAGE BVI LIMITED CONTRIBUTORIRES OF P.O. BOX 116**

**BRITISH VIRGIN ISLANDS RESEPCTIVELY SHOWETH AS FOLLOWS**

**RULING**

This petition was filed by Span Image FZC and Span Image BVI Limited seeking to wind up the company by the name Span Image Kenya Limited (herein after called the company). According to the petition, Faisal M Moalin was instrumental in setting up the company. The entire business idea which includes technical knowhow was valued by the company's Board of Directors at its meeting for an equivalent of equitable share holding at US three million dollars. Due to his contribution, he was allotted 30% of the equity share holding through the petitioning companies. Each of the petitioners owns 15% in the company.

The petitioners contend that it was mutually agreed that the other share holders namely Omar Mahfoudh Musallam and Najeeb Mahfoudh Musallam were to inject into the business US $ 3,500,000 which entitled them to 35% of the Equity Shareholding of the Company. The remaining 35% is held by Iqgal Kanji and Mohammed Ali Taib by themselves or through their companies for which they were supposed to contribute a total of US $2,500,000/. In addition to the said contributions, the petitioners used their connection, network, influence and their management skills to promote and develop the business of the company.

It is alleged that the Taib family who hold 35% shareholding in proxy, have incorporated a company by the name of Taifa Outdoor, with the sole objectives of frustrating the business of the company. The directors of the company have made unilateral decisions regarding the accounts of the company and failed to disclose to the petitioners vital information and excluded Faisal from the management of the company. It is further alleged the company applied for financial facility from Gulf African Bank excluding Faisal Moalin and the other board members.

The petitioners and Faisal Moalin have been excluded in the affairs of the company, and in particular they are not allowed to inspect the records, accounts books and files of the company. It is also alleged the directors are in the process of alienating company properties in order to deprive the petitioners of their rightful share in the Equity of the company by transferring the existing contracts of the company to Taifa

Outdoor, refusing to pay the petitioners any emoluments as shareholders or even to pay Faisal Molina who is a director any remuneration. For those reasons the petitioners had sought the company be wound up.

Following this petition which was filed on 14th August 2009, the company filed the notice of motion on 17th September 2009 under section 6(1) of the Arbitration Act order 6 r13 of the Civil Procedure Rules and section 22 of the Companies Act. The company is seeking for an order that the petition filed by the petitioner be stayed or be dismissed on the grounds that the petition is an abuse of the court process for reasons that the petitioners have an alternative remedy.

Secondly, the company contends that the petition is defective for want of compliance with rules 10 and 25 of the Companies (Winding up Rules). The verifying affidavit was filed on the same day as the petition which is also in contravention of r 25 of the Companies Winding up Rules. Lastly, the petitioners have offered their shares for sale which is an alternative remedy and filing the petition is unreasonable. By virtue of shareholders agreement dated 7th July 2007 there is a dispute resolution mechanism by way of arbitration before a party can apply for winding up of the company.

This application was supported by the affidavit of Mohamed Ali Taib sworn on 16th September 2009, which has expounded the above grounds at a greater detail. The first prayer which sought for an order to stop the advertisement of the petition was overtaken by events because the petition was advertised on 30th September 2009. Counsel urged the court to strike out the petition or order the stay of proceedings firstly because the petition is defective because it was not singed by two petitioners. One petitioner sealed the petition and the other petitioner merely placed a rubber stamp. A company seal ought to be witnessed by a director. It is clear that the petition was signed for and on behalf of the director.

Counsel cited the case of In the matter of the **Standard Limited vs. In the matter of the Companies Act Winding Up Cause No. 14 of 2002** where Ringera J (as he then was) held that failure to seal the petition is a defect which is not a mere irregularity. Moreover this petition was filed by a contributor of the Memorandum and Articles of Association on the grounds that they have been excluded from participating from the affairs of the company. These are matters that can be remedied pursuant to the provisions of section 222 of the Companies Act which provides that if there is some other remedy available to the petitioners, the court should order pursuit of the alternative remedy.

The petitioners by a letter dated 30th March 2009 offered to sell their 30% shares at US 1.350,000 to the other shareholders. This offer was to be followed by the valuation of the shares. The memorandum and articles of the company provided how the shares in a company should be valued to establish their equitable value as opposed to the unilateral price placed by the petitioners. That is the alternative remedy contemplated under the Companies Act. Since this remedy was available to the petitioner, counsel submitted that the winding up cause is an abuse of the court process. He cited the case of in the matter **of Leisure Lodge Ltd WC No.28 of 1996.** The same principle was articulated also in the case of **Vadag Establishment vs. Yashvin Shretta & Others Civil Appeal No. 83 of 2000 (The East Africa Law Reports [2001] Vol.2, 588.** The business of the shareholders is distinct from the business of the company and if a shareholder is aggrieved by the way the company is managed there is the alternative remedy which the petitioner already invoked by offering the sale of the shares.

Moreover the parties had entered into an agreement by a deed dated 25th February 2008 which contains an arbitration clause. The parties are bound to refer the matter for arbitration. That is what the petitioner should have done before filing this petition. Counsel urged the court to either dismiss the petition or refer the dispute to arbitration. Under section 6(1) of the Arbitration Act, the petitioner cannot proceed with this suit.

This application was opposed by the petitioners, Counsel submitted that the petition was in compliance with the laid down procedures, after it was filed, it was advertised because there was no order of stay from the court. On the merits of the petition, counsel submitted that under rule 10 of the winding up rules, the seal referred to is the seal of the court. The petitioner is not required to affix their own seal.

The petition was by two petitioners who have signed the petition. The other signature required is the acknowledgment by the court of the petition. The petitioner has no control of whether the deputy registrar uses a stamp or a seal. Under rule 202 of the Companies Winding up Rules, a petition cannot be invalidated by mere irregularities. The court should look at the substantial injustice caused to the petitioner, and the prejudice if any caused to the company before striking the petition. Moreover a court of law has discretion to order that a procedural mistake be rectified.

The petition is supported by a verifying affidavit of Faisal Molian who is the chairman of both companies and a majority share holder in both petitioners. If a further affidavit is required, counsel urged the court to consider that time can be enlarged under the provisions of rule 202 to file. The issue of whether there are alternative remedies are matters for trial. It is on record that the petitioner was the pioneer of the company and possessed the technical knowledge on digital advertising. However the petitioners have been excluded and the company is exclusively under the control and the management of Taib family who have secretly formed another competing company called Taifa Outdoor in order to frustrate the petitioner.

Counsel made reference to the case of **Brahmbhatt vs. Dynamics Engineering Limited KLR [1986] 133 in** which the court of appeal set out the test to be applied by the courts in winding up petitions to find out whether the petition should be struck out. In particular the court found as follows:

"***Failure to comply with the Companies (Winding Up) Rule 23 was not fatal to the petition and it had not been shown that the company had suffered any substantial or irremediable prejudice or injustice."***

The petitioners have been able to show by affidavit evidence that they have been excluded from the company. The money is being pilfered from the company to Taifa Outdoor and huge sums of salaries being paid to staff while Faisal is not being paid a penny despite being the brain behind the company. These allegations can only proceed to full trial to be determined. The company has not indicated that it intends to purchase the shares from the petitioners. The petitioners offered the shares before the matter came to court and there was no reasonable offer. It will be prejudicial and not in the interest of justice to strike out the petition while drawing a parallel that even the notice of motion filed by the respondent was not endorsed by the deputy registrar which has not caused any party any prejudice.

The above is the summary of the rival submissions, the matter to consider at this interlocutory stage is whether to stay the proceedings or dismiss the petition. For a court to dismiss a petition for a winding up cause, the applicable test is set out in several authorities that were cited. It includes that the party seeking to strike the petition must show the petition was not filed in good faith. There is jurisprudence that if the petitioner has alternative remedy, against the company, the provisions of the Companies Act should not be invoked to black mail a company through the threats of winding up proceedings. The above propositions is supported by the provisions of section 222 (b) of the Companies Act which provides:--

"***That in the absence of any other remedy it would be just equitable that the company should be wound up, shall make it a winding-up order, unless it is also of the opinion both that some other remedy is available to the petitioners and that they are acting unreasonably in seeking to have the company wound up instead of pursuing that other remedy."***

Perhaps before dwelling on whether there is an alternative remedy the other matter which was raised in this application is regarding the arbitration clause which according to the company is contained in the Companies Documents especially the agreement dated 23rd May 2009 and 7th July 2007 which provisions are quoted *in extenso* in the supporting affidavit of Mohamed Ali Taib sworn on 16th September 2009. It is clearly provided in the event of any dispute between the parties regarding the matter of the company, the dispute should be referred to arbitration.

I am persuaded that this matter should be referred to arbitration to determine the dispute between the parties including the issue of the alternative remedy as contained in the Petitioners letter dated 30th March 2009. I decline to strike the petition off. The irregularities pointed out by the petitioner while considered with the substantive issues and allegations contained in the petition can be remedied by the party seeking leave to rectify the defects, they are mere procedural irregularities which do not affect the substance of

the matter. That is as provided for under rule 202 of the Winding Up Rules.-

"***No proceedings under the Act or these Rules shall be invalid by reason of any formal defect or any irregularity, unless the Court before which any objection is made to the proceeding is of opinion that substantial injustice has been caused by the defect or irregularity and that the injustice cannot be remedied by any order of that court"***

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This is also in line with broader principles in administration of justice as held in the Court of Appeal decision in **Trust Bank Limited vs. Amalo Company Limited [2003] 1 EA 350 at page 352.**

"***The principle which guides the court in the administration of justice when adjudicating on any dispute is that where possible disputes should be heard on their own merit."***

Accordingly the parties are directed to refer the matter for arbitration. Meanwhile while the arbitration process is ongoing, the petition is hereby stayed pending the outcome of the arbitration. Costs will be in the cause.

RULING READ AND SIGNED ON 30TH OCTOBER 2009 AT NAIROBI.

**M.K. KOOME**

**JUDGE**