



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA**

Winding Up Cause 1 of 2007

IN THE MATTER OF: WEMBE TOURS & SAFARIS LIMITED

AND

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

AND

IN THE MATTER OF:-

- 1. MBARAKA AMANI SALIMU**
- 2. BAHATI AMISI PASENMWGA**
- 3. FRANCIS MANGANGA MWANGALE**
- 4. JOHN MUTUA**
- 5. GIDEON NDERI KIBINDU**
- 6. MOHAMED OMARI RAGUNDA**
- 7. MATANO MWARUPIA**
- 8. MOHAMED MWAPESA**
- 9. DICKY CHIKOZA MWERO**
- 10. OMARI KOMBO**
- 11. ROBERT MASIKA SICHANGI**
- 12. JOEL G. MWATANDO**
- 13. FRANKLIN C. KITI**
- 14. FRANK RASI NGAO**
- 15. SAIDI HAMISI BAWA**

16. BAKARI SHEE MWAKISIRA

17. SAMMY OSANO

18. SHIDA JEMBE MWACHIRO PETITIONERS/RESPONDENTS

R U L I N G

This application was brought under a Certificate of Urgency by way of a Chamber Summons dated 15th February, 2007. It is made pursuant to Sections 211, 218, 219, 221 and 222 of the Companies Act, Cap 486 of the Laws of Kenya; Rules 4, 5(2), 7(2), 8, 10, 11, 17, 22, 23, 24, 25 and 28 of the Companies (Winding Up) Rules; Sections 3A and 63 of the Civil Procedure Act (Cap 21); Order XXXIX rules 1, 2 and 3 of the Civil Procedure Rules; and O. VI rule 13(1) (d) of the said rules.

The applicant seeks from the court orders that:-

1. *(spent)*
2. *A temporary injunction do issue to restrain the petitioners/respondents individually and collectively, together with their agents, employees and/or servants, and/or otherwise from advertising the petition pending the hearing and determination of this summons.*
3. *The petition be struck out for being otherwise an abuse of the process of this court.*
4. *The costs of this summons be met by the petitioners/respondents.*

The application is supported by the annexed affidavit of Jonathan Mwema Mutheke, the applicant's managing director, and is brought on the following grounds:-

- (a) The Winding up petition is scheduled for hearing on 22nd February, 2007, and is due to for advertisement as required by the Rules.
- (b) The advertisement of the petition will severely, irreparably injure and damage the character, credit, goodwill and reputation of the company, which is in the Tourism/Service industry, thereby causing the company to suffer irreparable damage and close down. Its creditors may also call their accounts, thereby putting the company in a cash crisis and paralyzing its operations.
- (c) The petition is otherwise an abuse of this court (sic) because:-
 - i) *The petitioners, whose main complaint is oppression, and who are a minority do have an alternative remedy under Section 211 of the Companies Act. The petition is thus unreasonable and brought with the sole aim of paralyzing the company's operations.*
 - ii) *It is filed by purported contributories who are in competing business against the company, with the aim of driving it out of business, for their sole advantage and benefit.*
 - iii) *The purported contributories/petitioners*

are persons who have been unable to pay for their respective shares, have decamped to a competing company contrary to Clause 9 of the articles of association and are driven by ill will to see the company cease operating.

(d) The petition is, in any event, incurably defective and incompetent for failing to comply with the Companies (Winding Up) Rules in that:-

(i) *No security has been deposited with the Official Receiver's Office pursuant to Rule 22(3).*

(ii) *It has not been served on the company at its registered office, principal place of business or upon any member, or upon any officer or servant of the company contrary to Rules 17 and 24.*

(iii) *It has not been sealed with the seal of*

this court contrary to Rule 10.

(iv) *It is not dated contrary to Rule 8.*

(v) *It does not state the Registered address*

of the Company, especially the particulars of the Land Parcel contrary to Rule 4.

(5) In the premises, it is not just and equitable that the

company be wound up.

By consent, the applicant filed its written submissions on 24th May, 2007, and the respondents filed theirs on 29th May, 2007. While highlighting those provisions, Mr. Muthama for the applicant submitted that the petition was a non starter as it was fundamentally incompetent since there was no deposit paid to the Official Receiver and as such it should not have been received by the Registry when it was filed.

He further submitted that the affidavits filed do not comply with the rules thereby rendering the petition fundamentally defective. Thirdly, he also submitted that the petitioners' principal complaint is oppression, pursuant to which they could move the court for protective relief. Consequently, by seeking to wind up the company, they were being unreasonable.

In his response for the respondents, Mr. Kaburu referred to Rule 202 of the Companies Winding UP rules and submitted that proceedings are not to be invalidated unless the irregularity complained of cannot be remedied by an order of the court. The court allowed the petitioners to pay the Official Receiver and date the application and therefore the application was in order. Counsel further submitted that it would be dangerous to leave this company to operate as it had no secretary; the membership had gone "below 50" (sic); and therefore illegal. The capital had also been changed illegally, and therefore it should be wound up. He urged the court to dismiss the application and allow the petitioners to advertise.

Replying to this response, Mr. Muthama said that he was not aware that there was an order granting the petitioners leave to regularize the irregularity.

I have considered the application and the submissions of counsel, both oral and written. As both counsel are agreed, and this court agrees with them, the main issue in this matter revolves around the allegation that the affairs of the company are being conducted in a manner oppressive to a large part of the members of the company, including the petitioners, and that it is just and equitable that the company be wound up. The alleged oppression relates back to the formation of the company when a few members were mandated to explore ways of incorporating the company. The petitioners alleged that some two named members, Matano Hamisi Kirema and Ali Abdalla Mwanambao, purported to sign the memorandum and articles of association, each taking one share, thereby distorting the nature of the company by showing that only two persons were desirous of being formed into a company. After the incorporation of the company, and quite contrary to the company's articles of association, it is further alleged that the directors later decided that each member contributes a minimum of Kshs. 10,000/- which is equivalent to

100 shares, thus automatically changing the share capital of the company from Kshs. 100,000/- to Kshs. 500,000/- without notifying the Registrar of Companies. When the petitioners raised these issues in a special general meeting, they were barred from attending the annual general meeting despite being shareholders, founder members and contributories. Hence, they contend, they have been denied the right to participate in the affairs of the company. They further argue that when they insisted on being told how the company was being run, they were refunded their money by the directors unprocedurally without being paid any dividends. Finally, the petitioners believe that the directors have invited strangers to join the company, and that the number of members is now beyond 50. For these reasons, the petitioners believe that the company's affairs are being run in an oppressive manner, and that it is just and equitable that the company be wound up.

Section 219 of the Companies Act enumerates the grounds upon which a company may be wound up by an order of the court. Under paragraph (f) thereof, a company may be wound up if-

“the court is of the opinion that it is just and equitable that the company should be wound up.”

The phrase *“just and equitable”* is not defined in that section or anywhere else in the Act. Yet, it is repeated in Section 211 of the Act which provides an alternative remedy to winding up in cases of oppression. The relevant portion thereof is in the following words-

“(1) Any member of a company who complains that the affairs of the company are being conducted in a manner oppressive to some part of the members (including himself) ... may make an application to the court by petition for an order under this Section.

(2) If on any such petition the court is of opinion:-

(a) that the company's affairs are being

conducted as aforesaid; and

(b) that to wind up the company would

unfairly prejudice that part of the members, but otherwise the facts would justify the making of a winding up order on the ground that it was just and equitable that the company should be wound up,

The court may, with a view to bringing to an end the matters complained of, make such order as it thinks fit, whether for regulating the conduct of the company's affairs in the future, or for the purchase of the shares of any members of the company by other members of the company and, in the case of purchase by the company, for the reduction accordingly of the company's capital, or otherwise.”

Arising from the above observations, the issues to be determined in this matter are whether this company's affairs are being run in an oppressive manner; whether it is just and equitable that this company should be wound up; and if not, whether there is any alternative remedy. With regard to whether the petitioners or any other members of the company are oppressed, it is notable that Section 211 uses the word “oppressive,” but the word is not defined therein. Although learned counsel did to cite any authorities, this court is aware of some attempts at common law to define that term. One of the earliest attempts was made by Lord Simonds in SCOTTISH CO-OPERATIVE WHOLESALE SOCIETY LTD v. MEYER [1959] AC 324 H.L in which his Lordship defined oppression in that Section to mean conduct which is *“burdensome, harsh and wrongful.”* Although his Lordship described it as the dictionary meaning of the word, sadly, the dictionary from which he took it has never been found. Another case where the court found that there was oppression was that of RE H. R. HARMER [1959] 1 WLR 62 in which the founder and sole proprietor of a philatelic auctioneering business had formed a company to carry on the business in association with his two sons, to whom he gave shares, and who were appointed directors of the company. The father was appointed chairman and life director. He and his wife held such a majority votes that they, together, could secure the passing of any ordinary or special resolution. The father disregarded the resolutions of the board of directors, assumed powers which he did not

possess, and exercised them against the wishes of the sons who were shareholders as well as directors. It was held that the autocratic and unbusinesslike behaviour of the father was oppressive.

In the instant case, the petitioners have raised several concerns. Their first complaint is that when a few members were mandated to find ways of incorporating the company, only two persons purported to sign the memorandum and articles of association, taking one share each, and thereby “*distorting the nature of the company, an issue which was raised in the first general meeting.*”

The background against which this complaint is made is that the purpose of forming the company was to convert the then South Coast Beach Safari Operators Group consisting of 50 members into a private limited liability company so that they could tap into the tourist industry. When only two of them subscribed their names to the memorandum and articles of association in order to secure the incorporation of the company, the others seem to have taken it they were thereby shortchanged. It seems to me that they all expected to subscribe their names to the memorandum and articles of association in order to secure the incorporation of the company. That expectation was misguided. Section 4(1) of the Companies Act is very clear. It mandates that-

“Any seven or more persons, or, where the company to be formed will be a private company, any two or more persons, associated for any lawful purpose may, by subscribing their names to a memorandum of association and otherwise complying with the requirements of this Act in respect of registration, form an incorporated company, with or without limited liability.”

The pre-incorporation procedure adopted was the conventional modus operandi for the incorporation of private companies. This complaint is therefore unfounded and cannot form the basis of the alleged oppression or of winding up the company on the ground that it is just and equitable to do so.

The second complaint is that contrary to the articles of association, the directors decided that each member contributes a minimum of Kshs. 10,000/- which was equivalent to 100 shares, thus automatically changing the share capital of the company from Kshs. 100,000/- to Kshs. 500,000/- without notifying the Registrar of Companies. The company denies doing this and states that the share capital has neither been varied, nor has there been variation or amendment of clause 4, which limits the capital of the company to Kshs. 100,000/- divided into 1,000 shares of Kshs. 100/- each. In substantiation, the company has produced a copy of a letter dated September 22, 2006, addressed to its directors by the Registrar of Companies. The letter confirms that as of that date, the nominal share capital of the company stood at Kshs. 100,000/- divided into 1,000 ordinary shares. If the allegation by the petitioners is true, then the company would have breached Section 65(1) of the Companies Act the relevant words of which are as follows-

“Where a company having a share capital ... has increased its share capital beyond the registered capital, it shall, within thirty days after the passing of the resolution authorizing the increase, give to the registrar notice of the increase, and the registrar shall record the increase.”

And in the words of Section 65(3)-*“If default is made in complying with this Section, the company and every officer of the company who is in default shall be liable to a default fine.”*

In the context of oppression of the members, I don't think that what is alleged to have happened, and which is denied, is anything that can be labelled as unjustly burdensome, harsh or wrongful. And if it did happen, the Companies Act carries its own sanction. I don't think that this allegation establishes oppression in the context of Section 211, nor does it pose any justification for the company to be wound up, as it affects everyone in the company, and not some part of the members.

The third complaint is that when the petitioners raised the above issues in a special general meeting, they were barred from attending the annual general meeting despite being shareholders and contributories, and hence have been denied the right to participate in the affairs of the company. The company's response to this charge is that indeed the petitioners were barred from attending the annual General Meeting because they were in breach of article 9 of the Company's Articles of Association which

prohibits its members from engaging in competition with the company. It is further their case that the petitioners are persons who have been unable to pay for their respective shares under article 8 and who have therefore decamped to a competing company, and are driven by ill will to paralyze the company's operations.

In the affidavit supporting the application, the company's managing director contradicts himself in paragraph 11 thereof when he concedes that the petitioners are contributories to the company, and in the same breath avers that they are not members. You cannot have it both ways. It not possible to become a contributory unless one is or has been a member. The petitioners will therefore be taken to be members. As such members, the right to attend and vote at the company's meetings is one of most central incidents of a share. It was wrong, therefore, for the company to bar them from attending and voting at the company's annual general meeting. Whereas such an incident sounds to me both harsh and wrongful, it is doubtful whether it would rank or qualify to be called oppressive within the meaning and tenor of Section 211. This is because the Section requires the petitioner to complain that "*the affairs of the company are being conducted in a manner oppressive to some part of the members ...*"

This wording denotes that there must be a continuous course of conduct, and that isolated acts of impropriety will not suffice to found an order under that section. I would hesitate, therefore, to find that this was oppressive within the meaning of the section.

The last charge against the company is that the number of members has risen above the 50 – mark, and yet this is a private company. To prove their point, the petitioners have attached a copy of a list of some 52 persons who constituted the attendance of a meeting of Wembe Tours & Safaris Ltd and South Coast Safari Operators Group. This list does not show the number of shares held by any of the persons named. In the absence of any such indication, it would be difficult for such a list to prove conclusively that the number of members is beyond 50. At any rate, Section 30(1) (b) of the Companies Act excludes from the number of 50 the persons who are in the employment of the company and persons who, having been formerly in the employment of the company, were while in that employment, and have continued after the determination of that employment to be, members of the company. To that list, the company has added a proviso to the clause limiting the number of members to 50. That proviso is in terms of Section 30(2) of the Act which states:-

"Where two or more persons hold one or more shares in a company jointly, they shall, for the purposes of this section, be treated as a single member."

The list produced cannot, per se, therefore prove conclusively that the number of members has risen above the statutory maximum. One would also need to know the shareholding before making such a finding.

In sum, what I see from the petition are alleged irregularities in the conduct of the company's affairs which, apart from barring some members from attending the company's general meeting, do not affect only some part of the members as required by Section 211. How, for instance, does the lack of a company secretary as alleged; having a higher capital than provided for; a higher number of members than required – oppress the petitioners? It only boils down to saying that the company's affairs are not being properly managed. That is not the same as to say that those affairs are being conducted in a manner oppressive to some part of the members. These sentiments are summed up in paragraph 27 of Mr. Mbaraka Amani Salim's affidavit sworn on 21st February, 2007, and paragraph 25 of his affidavit sworn on 20th March 2007 in which he avers, respectively:-

"27. THAT this company does not have a Secretary which is contrary to the Companies Act and hence the manner in which the Directors of such a large company (in view of its membership) are running it in a very unprofessional manner and yet they are going on to purchase motor vehicles using money generated by the company (sic)."

"25. THAT contrary to the Companies Act as to the procedure of buying and selling of shares in a company the Directors of this company have no system of selling, transferring or re-calling any money

owed to the company by a contributory or a shareholder as they do not know how to do it and all they know is to receive people's money and to spend it.”

It is strange that the petitioners should come complaining about the manner in which the directors are managing the company, and yet the same directors are voted into office by the petitioners and other members of the company. Why not vote them out of office and vote in those more to the petitioners' taste?

In the case of RE FIVE MINUTE CAR WASH SERVICE LTD [1966] WLR. 745, the conduct which the petitioner complained of was the alleged extreme incompetence and inefficiency of one Evason, who was a former chairman of the company's board of directors and managing director, in the management of the company. It was held that these allegations only suggested that Evason was unwise, inefficient and careless in the performance of his duties as managing director, but did not establish that he had acted unscrupulously, unfairly, or with lack of probity towards the petitioner or any other member of the company, or that he had disregarded the wishes of the board of directors, or that his conduct could be characterized as harsh or burdensome or wrongful towards any member of the company. I find these observations most appropriate in this case. In my view, if the above complaints had been substantiated, it may have made a difference if the petition had been founded simply on lack of confidence in the probity with which the company's affairs were being conducted. But oppression of a part of the members does not lie.

In addition to the above, it is the company's contention that the petition is in any event incurably ineffective and incompetent for failing to comply with the Companies (Winding Up) Rules in that-

- (i) No security has been deposited with the Official Receiver's office pursuant to Rule 22(3).
- (ii) It has not been served on the company at its registered office, principal place of business or upon any member, or upon any officer or servant of the company contrary to Rules 17 and 24.
- (iii) It has not been sealed with the seal of this court, contrary to Rule 10.
- (iv) It is not dated, contrary to Rule 8.
- (v) It does not state the Registered address of the Company, especially the particulars of the Land Parcel, contrary to Rule 4.

To these allegations, Mr. Kaburu for the petitioners submitted that under rule 202 of the Companies (Winding Up) Rules, proceedings are not to be held invalid unless the irregularity is one which cannot be regularized by an order of the court. The court allowed the petitioners to pay the Official Receiver and date the application, and therefore the application is in order.

In reply, Mr. Muthama said that he was not aware that there was an order granting the petitioners leave to regularize the irregularity. Rule 202 (1) of the Companies (Winding Up) Rules is in the following words-

“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.”

The record shows that the winding up petition was filed in court on 6th February, 2007. The affidavit in opposition to the winding up was sworn and filed on 14th February, 2007 pleading, *inter alia*, that the petition should not have been received without a receipt showing that the requisite deposit had been made with the Official Receiver. Rule 22(3) of the Company's (Winding UP) Rules states as follows-

“Upon the presentation of a petition, the petitioner shall deposit with the official receiver the sum of one thousand shillings and such further sum, if any, as the court may from time to time direct, to cover the

fees and expenses to be incurred by the official receiver as provisional liquidator, and no petition shall be received unless the receipt of the official receiver for the deposit payable on the presentation of the petition is produced to the proper officer of the court.”

The receipt from the Official Receiver is dated 27th February, 2007. That was long after the petition had been presented. This means that the petition was presented and received in blatant breach of rule 22(3). This application had also been already filed, raising that issue. In these circumstances, it would be substantially prejudicial to the company if the court were to condone the irregularity under the aforesaid rule since the company had already raised the flag to denote a violation of the rules. Even more significant is that on 6th February, 2007, the petition was set down for hearing on 22nd February, 2007. This application was filed in court on 15th February, 2007, only 7 days to the hearing date. It was not until after this application was filed that the petitioners woke up to the gravity of their omission and paid the deposit. I don't think it would be fair to the company for the court to turn a blind eye to the seriousness of this omission.

A side issue relates to the service of the petition. The company takes the stand that it was not served with the petition in accordance with the rules. Instead, it was their consulting advocate who was served. In the replying affidavit sworn by Mr. Mbaraka Amani Salim, on behalf of the petitioners, the deponent states in paragraphs 4, 5 and 7:-

“4. THAT I have been informed by my

advocates on record which information I verily believe to be true that indeed the said petition has not been served upon the company and therefore the act of the applicants coming to court before being served is premature and an abuse of the process of this Honourable Court and arises out of panic as they fear the due process of law to be followed.

5. THAT I am not aware that Mbatia &

Company Advocates were served but I am aware that a notice of intention to wind up the company and other correspondence were going on in between the advocates.

7. THAT it was upon the applicants to wait

to be served before they rush to court as no advertisement could have been done before service.”

I find these averments unpalatable. The petition was filed in court on 6th February, 2007. M/s Mbatia & Co. Advocates, were not parties to the suit. Yet they were served the following day on 7th February, 2007. A week came and went without the company being served, and yet the petition was set down for hearing on 22nd February, 2007. This prompted the company to file an affidavit in opposition to the winding up petition on 14th February, 2007. With respect, I find the argument by the petitioners to be very naive. It underrates other people's intelligence. If the company should have waited until it was served, then why were Mbatia & Company, Advocates, served, and why does the deponent deny that which is on the court record? I am constrained to find, which I hereby do, that service on Mbatia & Company, Advocates, was meant and intended to be service on the company, and that it was only after the petitioners were caught with their pants down that they changed their tune to be that the Advocates were served with a notice of intention to wind up the company. This change has not fooled anyone. I find that the petition was not served on the company as required by the rules, and that it was instead served on the supposed advocates for the company. This was incurably irregular. The litany of omissions is too long to recite.

For the above transgressions alone, I find that this petition was incurably incompetent.

In sum, I don't think that the irregularities complained of by the petitioners amount to oppression within the meaning of Section 211, nor would they justify the making of a winding up order on the basis that it

would be just and equitable to do so. If I am wrong in so finding, I am further of the opinion both that some other remedy is available to the petitioners in the form of transferring their shares as spelt out in article 8 of the company's articles of association, and that they are acting unreasonably in seeking to have the company wound up instead of pursuing that other remedy.

I accordingly strike out the petition for winding up the company as prayed. The parties to meet their respective costs.

Dated and delivered at Mombasa this 13th day of March, 2008.

L. NJAGI

JUDGE