**REPUBLIC OF KENYA**

**IN THE MATTER OF CHETAMBE ESTATES LIMITED**

**AND**

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

**BETWEEN**

**ABDUL AZIZ KANJ..... PETITIONER**

**AND**

**CHETAMBE ESTATES LTD..... RESPONDENT**

**JUDGMENT**

Abdul Aziz Kanji hereinafter referred to as the petitioner filed this Winding-Up of Chetambe Estates Limited hereinafter referred to as the respondent. Before the Winding-Up Cause was listed for hearing, he successfully petitioned the court to appoint an interim liquidator who was to take care of the company's assets pending its Winding-Up. The company has therefore been under an interim liquidator since 28th of October 2005. The Winding-Up Cause was heard thereafter and this is now the judgment in respect of the same. The petitioner has based his prayers for Winding-Up the company on the following grounds as enumerated in paragraphs 23-25 of his petition.

***23 (i) That the company has defaulted in delivering the statutory report to the Registrar and has never held any Statutory meeting.***

***(ii) The number of members has reduced below two.***

***24. The company has not rendered any account to the petitioner to date and has not been carrying on business for over 10 years now.***

***25. That in the above circumstances, It is also just and equitable that the company should be wound up.***

In the body of the petition, he has given the history of the company from its inception and registration with the Registrar of Companies in January 1971. Luckily, most of these facts are largely admitted by the other side. It will be noted that one Janet Eloise Mwangale who is an undisputed shareholder of the company filed a notice of intention to appear in the petition through Langat & Wandabwa Advocates on 5.2.2007 but she never appeared. She did not file any Replying Affidavit to the petition either. The petition is nonetheless opposed by one Salome Naliaka Mwangale – an administratix of the Estate of the late Elijah Wasike Mwangale who was one of the directors of the company and who passed away on 25th November, 2004. In her affidavit dated 17-4-2007, she has cited some procedural irregularities as to service of the petition to the other shareholder and other interested parties e.g Hillbroke Dairies Limited. She also contends that the company – was irregularly reinstated by the Registrar of Companies and it cannot therefore be wound up. I will address this issue later in detail. As stated earlier on, the facts herein are largely uncontested.

Indeed even all the exhibits produced herein by both parties were put in by consent and this was commendable as it saved a lot of court's time. I must mention here that counsel for the respondent filed his submission outside the time allowed by the court but since I had not prepared the judgment, and in the interests of justice, I decided to admit the said submissions as part of these proceedings. I have therefore read the same and have been informed by the contents and

authorities therein in the same way that I have been informed by the submission filed by the petitioner's counsel. While on this, I wish to laud and thank both counsel for their well researched and articulate submissions. They have been of great help to me in the preparation of this judgment.

At the hearing of the petition, the petitioner testified and called an officer from the office of the Registrar of Companies as his witness. Salome Mwangale filed a Replying Affidavit and did not therefore adduce any viva voce evidence. Her affidavits were admitted in evidence and their contents have been duly considered. From this evidence on record, Chetambe Estates Limited was incorporated on 22nd day of January, 1971. According to F.203 which shows the particulars of the Directors and Secretary, the Directors were the late Elijah Wasike Mwangale and the petitioner herein. The form in question which was produced in court as exhibit shows that the name of Mrs. Janet Eloise Mwangale had been entered as a director but the same is deleted. Her name appeared also at page 15 of the Articles of Association but the same was whitewashed and thus erased. She nonetheless appears at page 18 as one of the subscribers. It is worth noting that all these documents are dated 22.1.1971 and they are therefore the documents which were lodged at the Companies' Registry when the company was incorporated. It appears that the 3 shareholders could not make up their minds as to whether they wanted Eloise to be one of the directors or to remain as an ordinary shareholder. I would say however that after entering her name as a director initially, they changed their mind and decided to exclude her and hence the deletion of the name. I say so because in the subsequent returns to the Registrar of Companies, - dated 31.12.1971, the names of the shareholders remain 3 ( 1 share for each) while the particulars of directors are Hon. Wasike Elijah Mwangale and Aziz Kanji. The other returns dated 31.12.1985 also indicated that Eloise Mwangale was a shareholder but she was not one of the directors. In his evidence in court, PW2, who produced as exhibit the original file for the company stated that the directors of the company were Hon. Mwangale and Mr. Aziz. I also note that even in her notice of intention to appear in the petition, she is described as a "***contributory in the Company".*** In my considered view therefore Eloise Mwangale was never a director of the said company but a shareholder of one share. This therefore means that upon the death of Hon. Elijah Mwangale on 25.11.2004, the company was only left with one director but with 2 subscribers or shareholders. Contrary therefore to what Salome Naliaka Mwangale has deponed in her affidavit of 15.6.2005, Janet Eloise Mwangale was not and still is not a director of the said company. This finding therefore puts to rest the contention as to whether Eloise was a director or not. My firm finding is that she was only a shareholder and not a director. This point has been canvassed by both parties at length. According to counsel for the respondent at page 13 of his written submission;

"…… ***assuming without conceding that there is only one Director, there is nothing unlawful or contrary to statute about it. It is perfectly within the contemplation of the Companies act to have the affairs of a Private Company run by one individual."***

He cites section 177 of the Companies Act. Counsel for the respondent is actually right on the position in law. There is therefore nothing wrong in only having one director for the company. This would nonetheless only work if and when there is a Company Secretary as provided for under Section 179 of the Company's Act – because the sole Company Director cannot also act as the Company Secretary. In this case, the evidence tendered before the court does not explicitly reveal if there was a Company Secretary, and if there was one, who it was – indeed the petitioner denied knowledge of any Company Secretary and said that he did not even know the signature of the person who had signed against some documents as the secretary. It would not therefore be possible for one director – in this case the petitioner to act as a sole director and run the company as such. This is actually compounded by the fact that he does not wish to do so otherwise he could not have filed this petition. My considered view also is that the Companies Act only gives the guidelines and basic requirements to be complied with in the formation and operation of a company. True, a company must adhere to these basic requirements (e.g a private company having only 1 director) but the company must be run in accordance to its own Memorandum and Articles of Association. In this case, the issue of directors of the company is dealt with under article 20 – 22.

Article 20 provides:-

"***The number of directors shall not be less than 2 or more than 7."***

Article 22 on the other hand provides:

"***The quorum of directors for transacting business shall unless otherwise fixed by the Directors, be two and in the event of the number of Directors in the company being two, the quorum shall be two."***

The members of this company did voluntarily and in mandatory terms bind themselves to the requirement that 2

directors will form a quorum to conduct the business of the company. We have not been shown a resolution waiving this requirement. Article 33 of the company also required that the Company seal shall not be affixed to any document unless there are atleast 2 directors present. Clearly therefore, this Company cannot be run by one director only – and an unwilling one at that. This brings me to the next issue as to whether the administrators of the Estate of the late Mwangale can sit on the Board of Directors. Does Salome become an automatic Director to replace her late husband? The law is very clear on this issue. The fact that Salome Mwangale is an administratix of the Estate of the late Mwangale does not ipso facto make her a director of the said company. I agree with counsel for the petitioner that indeed even the grant she holds needs to be confirmed first before the said share can be transmitted. Even after this is done, the directors of the company would still need to accept her and enter her into the company's register as the shareholder of the one share formerly held by her husband. This would require a resolution of the Board of directors which must be singed by at least 2 directors. There being only 1 Director in this case, that would not be possible. Justice Ringera succinctly restated the correct position in law in the ***RE KAHAWA SUKARI LTD*** case when he said:-

"***Even a person with a full Grant cannot be treated as a member of the Company until he is entered in the Register of members."***

This being a private company however, my view is that things would be a bit different since no Register of Members as such exists. The Board of Directors would nonetheless still need to accept and recognize her as a subscriber and amend their articles accordingly. This has not been done. In any case, even for the sake of argument, if we were to take her as a member or shareholder of the company, she remains a shareholder and not a director and that does not change the situation as the director still remains one. I will revisit this issue towards the end of this judgment. I will now address the other issues that have been canvassed by both counsel. I will start with the issue of whether the petitioner is owed Ksh.500,000/= by the company. This debt is not disputed as there is no evidence that it was ever paid back. Nonetheless, as rightly submitted by counsel for the respondent, the position in law is clear on this issue as are well articulated and enunciated in the cases of ***MATIC GENERAL CONTRACTORS LIMITED –VS- KENYA POWER & LIGHTING COMPANY and RE STANDARD LTD*** Ex Parte Tricom Paper International – both cited by the respondent's counsel. A creditor cannot use a Winding-Up Cause for purposes of debt collection. There are other remedies open in law for debt collection. I note however that the petitioner dropped this claim as he conceded in his submissions (see page 7) that the same had become statute barred and thus irrecoverable. I see no need to discuss that issue further. This brings me to two thorny and very delicate issues. i.e the sale of the 450 acres to Hillbrook Ltd and the de-registration and eventual restoration of the company onto the register of companies. According to the petitioner, he was not aware of the sale of the said portion of land. There is nonetheless on record a resolution duly signed by him and the late Elijah Mwangale where they agreed to sell 400 acres out of the company's land. Part of the money raised from the sale was to be utilized to settle outstanding debts with Pan African Bank. The land was already charged for Ksh.35,000,000/= but there is no resolution whatsoever or evidence as to why the company needed that money and what it was used for. That is nonetheless not for me to inquire into. According to the petitioner, this sale transaction was marred with fraud and he had given the particulars of fraud. I do not wish to go into the details as to who signed the consent, and transfer forms; how much money was raised; how it was applied; etc. what strikes me however is that this sale was conducted in 1998. The property itself had been charged in 1988 (10 years earlier) what transpires however is that within this period, the company had already been struck off the Register of companies vide Gazette Notice No.2920 of 28th July 1983. Such a company therefore stands dissolved. Section 340 of the companies Act then comes into play. The same provides as hereunder:-

"***Where a Company is dissolved, all property and rights whatsoever vested in or held in trust for the company immediately before its dissolution ….. shall, subject and without prejudice to any order which may at the time be made by the court under section 338 of section 339, be deemed to be bona vacantia, and shall accordingly belong to the Government."***

My understanding of this provision is that once a company is dissolved, it is divested of its free property – i.e property that is not held in trust for other persons. The company's property in this case therefore became *bona vacantia* and reverted to the state on 5.7.1983. The company on dissolution ceased to exist. It had no title to the land in question and the directors could not purport to pass any title to a third party. My finding therefore is that as at 1998 when the 181.1 hectares of land it was sold, the company had no title to pass to Hillbrook Limited and the sale was therefore null and void for all intents and purposes. The company did however get good title to its properties on 14.2.2005 after it was restored to the register. This being my position, I get very surprised that the respondent was opposing the reinstatement/restoration of the company since it was also for her own good and for the good of the other directors. I feel constrained not to say more about the transaction with Hill brook since it is not a party to this Winding-Up Cause. I need to point out however that it was properly left out of the cause because it had no legally recognizable interest in the company in question. This brings me to the issue of the restoration of the company. It is the respondent's stand that the

company was wrongly or unlawfully restored onto the register of companies. As stated earlier, this contention surprises me and is self defeatist given that the respondents were equally losers if the company remained dissolved. Be that as it may however, my finding on this is that the restoration was done pursuant to a valid lawful order of a court with jurisdiction to grant it. That order was not set aside, reviewed or vacated by that court. I have considered the argument advanced by counsel for the respondent on that issue: My stand however is that the order was issued by a Judge of equal and contemporary jurisdiction as myself, and I have no jurisdiction therefore to upset that it. The cases cited to me by counsel for the respondent are clearly distinguishable from the circumstances I find myself in. I am fortified in this finding by the finding of the ***Court of Appeal (Omollo J.A) in Civil appeal No.272 of 2003, where he stated;***

"***In our jurisprudence, and with greatest respect to Mulwa J, he himself had absolutely no jurisdiction to declare unlawful and unacceptable the orders made by a brother Judge of equal and concurrent jurisdiction. If this kind of thing was to be allowed to take root, there will, in my view, be total chaos and confusion in the High Court and there would even be no need for the appeal process……"***

The said orders should have been reviewed or set aside vide a separate application and a ruling made on the same. As things stand now, I lack jurisdiction to declare them unlawful. As far as this court is concerned therefore, the restoration order was lawful and the Winding Up Cause is therefore properly before the court. Having said all that, what remains is for me to decide on whether the company should be wound –up and on what grounds.

I have earlier on in this judgment outlined the grounds on which the petitioner is relying for the winding –up of the company. I shall now go through them and see if any one of them has been proved and if there is any other remedy open for the petitioner to pursue. As far as ground (i) is concerned, according to PW2, the company never filed its statutory report or the returns as required by the Registrar of Companies. The respondent argues that the company could not file returns since it had been struck off the register, and then this cause was filed immediately after it was restored onto the register. The question however is, had it complied with the said requirement between 1971 and 1983 when it was dissolved? The answer is '***no***'. That ground would therefore succeed. On the ground that the number of members has reduced to 2, that cannot hold as Eloise is still a member and there are still 2 members in the company's membership. On the ground of rendering accounts – the petitioner maintains that no accounts were ever rendered to him and that the company has not been carrying out business for 10 years. My considered view on this is that for this ground to succeed, the petitioner ought to have asked for the accounts first. If the same were not forthcoming then he would seek for the winding up of the company on that ground. There is no evidence that such accounts were ever requested for when the other director was alive and he refused to avail them. That ground would also imminently fail. The last ground, which the petitioner seems to place much emphasis on is the ground that;

"***It is just and equitable that the Company should be wound up."***

Extensive case law has succinctly established that the court's discretion to wind up a company on this ground is very wide indeed. This discretion must nonetheless be exercised judicially. Each case must also be considered on its own peculiar circumstances. I have been informed by the various authorities cited to me by both counsel on this issue. A company can be wound up on the ground that it is "***just and equitable***" for many reasons. Some of these reasons which would be relevant to this case as contained on page 1096 of the ***HALBURY'S LAWS OF ENGLAND.***

4th edition include:

"……***where it is impossible to carry out business owing to internal disputes which have produced a state of deadlock……"***

In this case, the petitioner has averred that even if Salome was to be made a Director of the company, they cannot work together since she had made very adverse statement against him that are tantamount to creating mistrust between them. Indeed, that is just a presumption as I have held earlier on that it would not even be possible for the company to make any resolutions to admit her into the Company since there is only one director.

I am aware that I have already made a finding to the effect that Eloise Mwangale who has since migrated to the United States of America is not a Director. But even if she was, would it be possible for her to attend to the daily affairs of the Company from that distance? Certainly not. How then would this company be ran in the present circumstances? As

stated earlier, each case must be considered on its own peculiar circumstances. In this case, the late Mwangale conducted the affairs of the company on its own without even accounting to the petitioner. He caused the Company to be struck out and did not even notice and did not do anything about it. It took the petitioner's diligence to have the Company restored back on to the register. Had he not acted in this manner, the Company and its shareholders would have lost their money for good. That act of the late Director on its own would in my considered view amount to a"***just and equitable***" reason to wind up this company. Afterall, the remaining shareholders have shown by their conduct that they are unwilling to resuscitate the company and run it for the purposes for which it was formed. Indeed, I do not see what any of the parties herein stands to gain if this company is not wound up. There is no other remedy available to the petitioner herein. If the company is not wound up, then it runs the risk of being struck out or dissolved again and all the parties herein will stand to lose immensely. It is my considered view that it will be in the interests of all the parties herein that this company is wound up so that they can salvage whatever is left.

In sum therefore, for the aforegoing reasons, I am satisfied that the petitioner has proved his case on a balance of probability. Accordingly, I allow the petition and order that the company be and is hereby wound up. Costs of the petition are awarded to the petitioner. Same be paid out of the assets of the company. The interim liquidator who was appointed by the court earlier on to handle the distribution of the assets of the company and liquidate its affairs as by law required. It is further ordered that this order be served on the liquidator and a copy thereof on the Registrar of Companies. Orders accordingly.

**W. KARANJA**

**JUDGE**

**DELIVERED, Signed and dated at Bungoma this 23rd day of May 2008.**