



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)
Winding Up Cause 18 of 2007

IN THE MATTER OF UNICONSULT (K) LIMITED.....PLAINTIFF

AND

IN THE MATTER OF COMPANIES ACT. 1ST DEFENDANT

RULING

The two Preliminary Objection filed by Mr. Mburu on 02.07.2008 and M/s Mukoma Advocates dated the 07.07.2008 raise objections that the late Paul Mbau deceased was not a contributory of the Company and therefore the Petitioner has no locus to file this petition.

Mr. Mburu submitted that the late Paul Mbau was not a contributory of the Company. The Petitioner claims to be administrator of the estate and legal representative of the deceased, the said Paul Mbau.

At the time of death was the deceased a contributory of the company? He held 75,000 shares fully paid in his lifetime. Section 214 of The Companies Act defines who is a contributory “Section 214”

“The term “contributory” means every person liable to contributing to the assets of a company. In the event of its being wound up and for the purposes of all proceedings for determining and all proceedings prior to the final determination of the persons who are to be deemed contributors includes any person alleged to be a contributory.”

“Section 213 – liability as contributories of present and past members.” In the case of a Company limited by shares, no contribution shall be required from any member exceeding the amount, if any, unpaid on the shares in respect of which he is liable as a present member or past member. It is clear that all members of the Company are contributors but in case of limited liability Company, liability to contribute is limited. It is submitted that the deceased shares were fully paid and he had nothing to contribute in case of a winding up.

The case of Kentazuga Hardware Limited, the petition was fully heard and the evidence taken. The judgment was in 62 pages, the Court found deceased husband was not a member of company. The other authority relied upon by Mr. Mburu is the extract from the book “***Principles of Modern Company Law by Gower***” at page 649. It is stated “a member however can petition only if he is an original member or holder of shares which devolved on him on the death of a former holder. Mr. Ibrahim for second Preliminary Objection for interested party supported Mr. Mburu in his submissions. He argued on the point of *locus standi*. *Is deceased a member of the Company or contributory?* The provisions of section 213 of the Companies Act provides for liability of contributors of present and past members of a Company.

The definition of a contributory is set out” The term “contributory” means every person liable to contributing to the assets of a company. In the event of its being wound up and for the purposes of all proceedings for determining and all proceedings prior to the final determination of the persons who are to be deemed contributories includes any person alleged to be a contributory. No contribution shall be required from any member exceeding the amount, if any, unpaid of shares in respect of which he is liable as a present or past member. In cases where the Company is limited by shares, (Section 213 d) Companies Act.”

In case of death, section 216 provides that a contributory who dies either before or after his personal representative

shall be required to contribute and shall be a contributory. However, a member at the time of liquidation whose liability to contribute is zero is nonetheless is a “contributory” see the decision in *The National Savings Bank Association 1866 LR 1 ch App.547*, and *Re Anglesea Colbery Co. Ltd 1866 LR 1 ch App.555* and *the Consolidated Goldfields of New Zealand Ltd (1953) ch 689*.

The term contributory means every person liable to contribute to the assets of the Company in winding up. The section includes fully paid shares and in Anglesea case the court of Appeal held, a holder of fully paid up shares in a limited liability company is a contributory. Section 221 of the Act provides as to who may file a petition for Winding Up a company.

Contributories are eligible provided a contributory shall not be entitled to present a Winding Up petition unless, either the number of members is reduced below 2 in case of private company or the shares in respect of which he is a contributory or some of them either were originally allotted to him or have been held by him and registered in his name for at least six months during 18 months before the communication of Winding Up. Or have devolved on him through the death of a former holder.

The Court did discuss the issue of contributory petition in the case of *The Kentazuga Hardware Ltd. 92005) eKLR* full hearing was undertaken before Hon. Justice Onyango Otieno (as he then was).

In that case, the petitioners were administrators of the estate of deceased shareholder. The learned Judge found that there was no evidence that the administrator were claiming through the deceased who was a contributory of the Company or had held any shares in the Company.

In Halsbury Laws of England Vol.6 at page 262 subject on transferring of shares, it is stated that: “upon the death of the sole shareholder the title to his shares devolves upon his personal representative who may transfer the shares without being registered in the register of shareholders. In this case, there is no doubt that Petitioners husband died holding shares in the Company and the Petitioner is his widow. And the deceased shares devolve upon her. Therefore, she is a contributory and she is entitled to file a Winding up petition under the ground of “just and equitable” section 219 (f). All she has to prove that she has tangible interest in claiming the Company be wound up for, example a financial interest. However these are issues to be proved on evidence at the hearing of the petition.

In the case of the Kentazuga Winding Up, the court found that the petitioners had not proved that they would benefit out of a winding up petition. From what I have said I am of the view that the petitioner has fulfilled the conditions under Section 221 of the Companies Act.

Every member of a Company is primarily liable to contribution subject to the limited amount to be paid by a holder of a fully paid up shares is a contributory. The authority by the Applicant at page 53 *Re Bayswater Trading Company Ltd.* supports the proposition that the personal representative of a shareholder is entitled to present a petition for the winding up of the Company and the word contributory should be construed accordingly.

The issue in that case is that a personal representative applied for restoration of the Company to the register and the winding up of the same. On the two issues, the court held that a personal representative has a right to make application to restore the Company on register and also as a contributory to present a winding up petition.

Our Section 221 (1) Provision (b) is relevant “the shares of which he is a contributory or some of them either were originally allotted to him or have been held by him and registered in his name for at least six months during the 18 month before the commencement of the winding up or have devolved on him through the death of a former holder. The court said

“There is nothing there to indicate that a person on whom shares have devolved on the death of a former holder must have been registered the holder of those shares before he is entitled to present a petition under Section 224 (English Act, 1948) and I think that those words in the provision of the subsection clearly indicate that a personal representative of a deceased shareholder is entitled to present a petition and that the word contributory in the subsection must be construed in a way so as to extend to such a personal representative.”

Again the case of the *JN2 Ltd. 1977 3 All E.R.* The issue was whether a contributory had *locus standi*. It was held that an allottee of shares was liable to contribute to the assets of the Company in the event of winding up. There is evidence that she was appointed director of the Company after the death of her husband and she is an active member of the Company.

For the purpose of the preliminary objections raised this court finds that the petitioner has Locus Standi to present a

petition for winding up of the company. And she is a contributory herself being a personal representative of a deceased holder of shares which devolve upon her.

The Preliminary Objections are therefore overruled with costs to the Applicant.

It is so ordered.

DATED this 10th day of November 2008.

JOYCE N. KHAMINWA

JUDGE