



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA
WINDING UP CAUSE OF 2005

IN THE MATTER OF: SAFARI SPA LIMITED

AND

IN THE MATTER OF: THE COMPANIES ACT, CHAPTER 486, LAWS OF KENYA

R U L I N G

This is an application by the Respondent in this Petition seeking under Order 6 Rule 13(1) (b), (c) and (d) of the Civil Procedure Rules the striking out of the Petition herein. It is sought on the grounds that:

- “ (a) **this petition is an abuse of the process of this Honourable Court;**
- (b) the matters in issue herein and which the Petitioner seeks to rely upon in support of the prayers sought in the Petition, are directly and substantially in issue in previously instituted suits between the parties and the respective shareholders;**
- (c) the Petition filed by the Petitioner herein is scandalous, frivolous and vexatious and may prejudice or embarrass the fair trial of the action.”**

The application is supported by the affidavit of the Respondent in which he has enumerated the suits that the parties to this Petition have previously filed in this court and annexed copies of the pleadings thereof.

The Petition itself seeks the winding up of SAFARI SPA LIMITED (the Company under section 219 (f) of the Companies Act (the Act) which provides that:

“ **A company may be wound up by the court if:**

- (f) the court is of the opinion that it is just and equitable that the company should be wound up.”**

Striking out a petition for the winding up of a company is, like any other pleading, a draconian step which courts should be slow to take except in clear and obvious cases. As was stated by Shah JA (as he then was) in the case of **Rai –VS- Rai [2002] 2 LLR 141** a petition for the winding up of a company can only be struck out if, on the material placed before the court, it is plain and obvious that the petition is bound to fail any way and not when there is conflicting evidence on its merits or otherwise. A petition like this one brought under section 219(f) of the Act will also be struck out when it is shown, as stated in section 222(2) of the Act, that the petitioner has an effective alternative remedy. Such remedy would for instance

be where the petitioner has been given an offer to purchase his interest in the company at a reasonable price but persists on going on with the winding up of the company.

Is the Petition in this cause one that is obviously going to be dismissed or has the Petitioner been offered an alternative remedy?

I have carefully studied the 46 grounds upon which the Petitioner seeks the winding up of the Company. I have also carefully perused the Respondent's affidavit in support of this application. The annexures to that affidavit are mainly copies of the pleadings in Mombasa HCCC No. 327 of 2003(Safari Spa Ltd – VS- Marcus Ressel), HCCC No. 174 of 2004 (Marcus Russell – VS- Mehboob Hasham Ahmed and 3 others) and HCCC No.197 of 2005 (Mehbood Hasham Ahmed – VS- Marcus Russell and 2 others) in which Marcus Russell (Russell) and Mehbood Hasham Ahmed (Ahmed) the parties to this Petition are the main protagonists. They are the same cases the Petitioner has referred to in the Petition. A scan through the pleadings in those cases make it quite clear that they are on wrangles between Russell and Ahmed the two shareholders in the Company who are trying to wrestle from each other the control of the Company's tourist camp at **Kishushe** in Taita Taveta District which is the Company's only business.

The cases have not been heard let alone the injunction applications in them. Ahmed obtained in HCCC Number 197 of 2005 Ex-parte orders restraining Russell from interfering with the management of the company's business. He claims in this application that the Petition is intended to go round that order and make nonsense of that case hence his claim that this Petition is an abuse of the process of the court.

Looking at those cases one wonders if Ahmed is himself not abusing the process of the court. In 2003 he filed HCCC No. 27 of 2003 and obtained orders removing Russell from the Management of the Company. When those orders were stayed it is alleged he purported to hold inquorate meetings of the board of directors of the company in which he purported to increase his share capital to 700 and that of Russell to 300 and appointed alternative directors. Russell then also rushed to court and filed HCCC No.174 of 2004 and obtained an order stopping those people from acting as directors of the Company. It is after that that Ahmed filed HCCC No. 197 of 2005 and obtained the said Ex-Parte order restraining Russell from interfering with the management of the Company business.

As Ahmed admits in this application the issues raised in those cases are more or less the same as the ones raised in this Petition.

In this Petition there are allegations and counter-allegations of death threats. The Petitioner's allegation that there are irreconcilable differences between him and the Respondent are therefore not without foundation.

If there are irreconcilable differences between two shareholders who happen to be the only shareholders in a company it means that that company cannot continue operating as a company. A petition based on that ground cannot therefore be said to be a hopeless one which can be struck out.

In my view even if the cases are heard and determined the irreconcilable differences will still remain. But a determination of the Petition will resolve all the issues in those cases. If the Company is wound up the final order on the parties' respective interests in the Company will obviously address the issues of lack of probity and accounts raised in those cases.

In the result I find that this petition is not an abuse of the process of court and I accordingly dismiss this application with costs.

DATED and delivered this 19th day of January 2007

D.K. MARAGA

JUDGE