REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Winding Up Cause 10 of 2003

IN THE MATTER OF YORK HOUSE PROPERTIES COMPANY LIMITED

AND

IN THE MATTER OF THE COMPANIES ACT (CAP 486)

BETWEEN

MOHAMED YUSUFALI……..……...…….1ST PETITIONER

FARIDA MOHAMEDALI ……...……....……2ND PETITIONER

AND

BHARAT BHARDWAJ ……..……..…….....……1ST RESPONDENT

USHA BHARDWAJ……..…..…..…...……..2ND RESPONDENT

RULING

The Respondent to the petition (herein called the Respondent) have moved this Court by Notice of Motion dated 6th of May 2003. That Notice of Motion is brought under section 222 of the Companies Act, Rule 7 [1], and rule 203 of the Companies (Winding up) Rules and Order VI Rule 13 [1] [D] of the Civil Procedure Rules. The application seeks that petition filed herein on the 2nd of April 2003 be struck out or dismissed.

The petition to wind up the Company called York House Properties Company Limited is based on the following grounds:

a) That there are only four shareholders in the Company York House Company Limited.

b) That the respondents in this matter are man and wife and hold 50% of the Companies share holding.

c) That the Petitioners are man and wife and hold 50% of the share holding.

d) That the shares of the company are held equally between the applicants and the Respondents.

The basis upon which the petitioners seek the winding of the Company are:

1) That the relationship between the members have completely broken down.

2) That there is a complete break down in the conduct of the business affairs

3) That the Directors have been unable to agree on the conduct of the handling of the Companies affairs

4) That there have been allegations of lack of probity and the manner in which the company has been run and no agreement has been reached as to the manner in which these are to be addressed.

5) That there is a deadlock.

6) That it is just an equitable that the Company be wound up.

The notice of Motion is anchored on the following grounds: -

a) The Petition has been made in abuse of the process of the court since the petitioners have other available remedies.

b) The Respondents have offered to purchase the petitioners shares and have made a reasonable offer to purchase the same at a fair market value.

c) The petitioners have refused the offer and are acting unreasonable in seeking to have the company wound up instead of pursuing that alternative remedy.

The Notice of Motion is supported by an affidavit sworn by Bharat Bhardwaj. The same was sworn on 7th of May 2003 and provides the following: That in the year 2001 the Respondent discovered that the petitioner had made arrangements to subdivide the Companies property occupied by both petitioners and respondents. This is the property owned by the company namely L.R. No. 209/11866 Nairobi. Upon that said property is a house known as York House. The Respondent on making enquires to the petitioners why they were proceeding with the sub division the petitioners refused to discuss the matter and instead pressed on with the process as a consequence the respondent proceeded to court for injunction in *High Court Civil Suit NO. 695 of 2001*. After that suit was filed the Respondents through their advocate made several attempts to resolve the issue. The deponent stated that the petitioners had been adamant in totally destroying the company. In that regard the respondent annexed correspondence between the parties, which showed that although there were discussions going on the petitioners insisted on proceeding to have the injunction application heard. The deponent further stated that they were discussions through correspondence in respect of the Respondents intention to purchase the petitioners share in the Company. That the petitioners have refused to accept the offer within the time period that had been given. It is noteworthy that it is the petitioner through their advocate letter reproduce herein after dated 6th February 2002 and marked BB2 in the Respondent affidavit whereby the petitioner made an offer to sell their shares in the company to the Respondent.

Our Ref: MYA/056/01/SWC 6th February 2002

Messrs Kibet & Company

Advocates

Trans – National Plaza (2nd Floor)

Mama Ngina Street

NAIROBI

Dear Sirs

NAIROBI HCCC NO. 695 OF 2001

YORK HOUSE PROPERTIES & 2 OTHERS – VS – FARIDA MOHAMEDALI & ANOTHER

We refer to the discussions between your Mr Kibet and the writer in court on 5th February 2002.

Please let us know when we can meet to try and resolve this matter.

In the meantime, we shall invite you for purposes of fixing a mutually convenient hearing date for your application dated 30th April 2001.

Incidentally, are your clients interested in buying out our clients' chare of the subject property?

Yours faithfully

MOHAMED MADHANI & CO.

SAHAFFIQ DAR

CC Mohamedali Yusufali Esq

Zanzibar Curio Shop

Moi Avenue

NAIROBI

The petitioners advocates letter was responded to by the respondent advocate by their letter dated 13th of Mary 2002.

1/284/1/1/rm

13th March 2002

Mohamed Madhani & Co

Advocates

Nation Centre 7th Floor

NAIROBI

Attention: Mr Shaffiq Dar

Dear Sir

HCCC NO. 695 OF 2001 York House Properties & 2 Others Vs Farida Mohamedali And Another

We refer to your letter dated 6th February 2002 and to the telephone conversation earlier on this morning between the writer and your Mr Dar.

As confirmed on the phone, our client is interested in buying out your client's share of the subject property. Our view is that the best way to proceed is for the parties to carry out a joint valuation. The

valuation is to be carried out by a professional firm of valuers to be nominated by our respective clients.

Once the process of valuation has been finalised, the sums agreed as payable by our clients will be paid less the sum agreed due and owing from your clients to ours.

In regard to the sum our client is claiming, we enclose herewith a copy of our clients' letter to yours dated 9th January 1995. The interest playable can be worked out. There is an additional sum of kshs 175, 560. 40, which our clients paid to KPLC and KPTC (as it then was) for shifting the lines that were running in the lane prior to construction.

Yours faithfully

KIBET & COMPANY

J Kipkemoi Kibet

Enc

Cc Clients

The petitioners also through their advocate wrote another letter dated 9th of April 2002.

9th April 2002

Our Ref: MYA/56/01/SWC

Messrs Kibet & Company Advocates

Trans National Plaza (2nd Floor)

Mama Ngina Street

NAIROBI

Dear Sirs

HCCC NO. 695 OF 2001

YORK HOUSE PROPERTIES & 2 OTHERS – VS –

FARIDA MOHAMEDALI & ANOTHER

We refer to the above matter.

Before our client incurs any expenses in carrying out a joint valuation as requested by you, our client would wish to resolve the dispute with regard to your client's claims. Such amounts are, according to our client, not payable. Further, please let us have your client's offer for our client's share in the property for our client's consideration.

In the meantime, our instructions are to proceed to have your client's application dated 30th April 2001 heard and determined one way or the other.

Yours faithfully

MOHAMED MADHANI & CO.

SHAFFIQ DAR

CC Mohamedali Yusufali Esq

Zanzibar Curio Shop

Moi Avenue

NAIROBI

The last letter annexed to the Respondent supporting affidavit was written by the Respondent Advocate addressed to the Petitioner's Advocate and dated 17th March 2003.

17TH March 2003

Mohammed & Muigai Advocates

Hazina Towers, 10th Floor

Monrovia Street

NAIROBI

Dear Sir

Winding Up Cause NO. 10 of 2003

In the matter of York House Properties Company Limited

We act for Bharat and Ushal Bhardwaj and refer to previous correspondence between our respective firms and in particular to our letters dated 13th March 2002 and 4th October 2002 (copies enclosed).

Our clients have instructed us to again make to your clients through yourselves an offer to acquire all your client's shares in York House Properties Company Limited at a fair market value to be agreed or failing agreement to be determined by Arbitration following the criteria herein stated:

i) The Arbitration to be before a single Arbitrator who shall be a senior Advocate or Chartered Accountant practicing in Nairobi and acceptable to both parties:

Alternatively;

ii) Each party may appoint one Arbitrator and the two arbitrators so appointed would then chose an umpire who should preferably be a Senior Advocate or a Chartered Accountant practicing in Nairobi.

A For purpose of such fair market valuation, each party would have full access, to the financial records and accounts of the Company upto such date of valuation.

B The Arbitrators would have authority to call information that may be necessary for such determination.

C The Arbitrators would also have specified authority to determine any other issue, including our clients claim as already particularised in the correspondence exchanged between our firm, your firm and the firm of Mohammed Madhani & Company Advocates.

Please let us have your confirmation within seven (7) days of the date hereof to enable us proceed further.

Yours faithfully

OCHIENG' ONYANGO, KIBET & OHAGA

J Kipkemoi Kibet

Cc Clients

The Respondent thereafter deponed that from the conduct of the petitioner as seen in the correspondence is that they are not keen on pursuing alternative remedies available to them but that they are merely interested in the winding up of the Company. The respondent stated that he believes that the petitioners are using the winding up process to exert pressure on the respondents to accept the subdivision and distribution of the Companies assets. In this regard the respondents advocate submitted that the petitioner's intention was indeed to exert pressure as stated herein before and that the petitioners having been stopped by an order of an injunction which stopped their attempts to subdivide the company's property are insisting on proceeding with the winding up of the company. The respondent advocate submitted that it was the respondent who showed a desire to dispose off their share in the company and the respondents accepted that offer and accordingly that the petitioners insistent in proceeding with the winding up of the company is an abuse of the process of the court and that the petitioner are acting unreasonably. On the law the respondents advocate submitted that the petition having been brought on the ground that it is just inequitable that the company be wound up. That the petition therefore falls within the ambits of section 222 [2] of the Companies Act. The Respondents advocate stated that if the court is of the opinion 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 the court will have to refuse to make a winding up order. That submission was premised on the fact that there is an alternative remedy which is the disposal of the petitioners shares at a fair price. That the petitioners are unreasonably refusing to pursue that remedy and instead insisting on winding up the Company yet it was the petitioners themselves who had desired that this option be followed and the respondents duly complied. The respondent relied on a number of authorities. The first is:-

(1) RE A COMPANY (1983) 2 ALL E.R. Page 854.

In that case the petitioner to a winding up of a company was excluded from participating in the management of the company. The petitioner rejected a counter offer for the purchase of his share and instead presented a petition to wind up the company. The other two Directors applied to have the petition struck out under section 225 [2] of the United Kingdom Companies Act 1948. That section is similar to our Section 222 [2] of the Companies Act. The Respondent relied on the holding of that case as follows: -

"Section 225[2] of the 1948 Act contemplated the making of a winding-up order under S 225 only if the continuance of the company would cause the petitioner an injustice which could not be remedied by an other step reasonably open to him. If any other remedy, and not just the statutory remedy of a court direction under s 75 that the petitioner's shares be purchased by the other shareholders, was reasonably available to the petitioner a winding-up order under s 225 would not be made. It followed that if the offer by C and R to purchase the petitioner's shares was a reasonable offer the petitioner's acceptance of that offer would be 'some other remedy' reasonable available to him to redress any injustice done to him and in those circumstances the court would not make a winding-up order"

The Respondent also placed reliance on an extensive passage of the judgment of Vinelott J, in that case. That passage states as follows: -

"I do not think that this consequence follows. Whether, if T had made it clear in August 1980 that he was not willing to sell his shares at any price but would insist on a winding up of the company and had presented a petition forthwith, it would have been right to make a winding-up order notwithstanding the offer that has now been made, I do not find it necessary to decide. That is not what happened in this case. At the time when T was first excluded from participation in the affairs of the company he was

willing to seek his shares to his co-shareholders if a fair price could be negociated. Negotiations having proved unfruitful, his co-shareholders now offer to acquire his shares at a value reached a machinery which, in my judgement, meets all T's reasonable objections. In insisting on a winding-up order he is, in effect, asking that the respondents should either buy out his shares at the price he chooses to place on them or face the disruption of a winding up order; and that notwithstanding the fact that at least until July 1982 they continued to run the company in the expectation that a price, or a fair machinery for ascertaining the price, could be agreed and exposed themselves to a continuing liability under a guarantee to the company's bankers in order to do so. In these circumstances, in my judgement, T is not entitled to the order he seeks. However, I think it would be wrong to dismiss the petition forthwith with possible consequence that if some unforeseen difficult arises in formulating a detailed agreement governing the machinery for ascertaining the value of the shares, T will have to start all over again. I will, therefore, stand over this petition to enable the parties to agree the terms of a submission to arbitration or to an expert; in the meantime all further proceedings on the petition will be stayed. The matter can be mention to me if an agreement can be reached and at the state the petition will be dismissed. If there is any disagreement as to the terms of the submission I will hear further argument on that question"

The second case that the respondent relied on is *High Court of Kenya*

bi Winding Cause No. 28 of 1996. In the matter of Leisure Lodge Limited and In the Matter of Companies Act. The court held that where there are found to be alternative remedies petitioner is not entitled to a winding up order. The judge in that case stated "*in my judgement the petitioner is and will be acting unreasonably if he turns round to reject his own proposal to have the price for his shares determined in whatever forum customarily available for the determination of such matters and the value of shares"*. The judge specifically found that the petitioner had alternative remedy namely to go to arbitration on the issue of the price at which the respondent was is to buy his shares in the Company. That because the petitioner had this alternative remedy the learned judge concluded that the petitioner would not in the circumstances be entitled to a winding up order as prayed for in his petition. That finding by the learned Judge was approved by the court of Appeal when the matter was taken to that court on a different issue. Omolo J.A. at that Appeal stated that even if the allegation contained in the petition were in the end to be found to be true they would not entitle the petition to a winding up order because there was an alternative remedy other than a winding up order which would effectively address the complaints raised by the petitioner. That that remedy was that the majority share holders would buy out the shares of the petitioner in the Company at their market price and accordingly the petitioner would no longer be a member of the company and the oppression which he alluded to in his petition would then cease. The judge concluded that there therefore would be no reason to wind up the company. The Respondent also relied on the case *Ken-Wheat Industries Limited High Court Winding Cause NO. 37 of 1984*. In that case the judge was dealing with an application to dismiss the petition on the ground that the petitioner had an alternative remedy in that a reasonable offer had been made to him and that in refusing the offer the petitioner was acting unreasonably. The judge thought that the offer that had been made to the petitioner for the purchase of the share was not reasonable but he did not then dismiss the application but stood over the application to enable the other party to make a reasonable offer to the petitioner. When the matter did again appear before him the judge held "in my view the offer now made by the majority share holders is a reasonable one and that the petitioner is now acting in unreasonable manner. A suitable remedy in the circumstances of this petition other than proceeding with the winding up of the Company is available in my view the petition in not accepting this remedy is acting in an unreasonable manner. The respondent is seeking a dismissal of the petition. In view of my findings I have no alternative but to accede to what is prayed for in the application. The petition is dismissed". The third case which the respondent relied upon is entitled *Jasbir Singh Rai and 3 others v Tarlochan Singh Rai and 13 others Civil Appeal 63 of 2001*. In that case it was argued by the appellant that the respondents were using the winding up process to exert pressure on the majority to settle all family disputes on terms the respondent dictated. The court of appeal held that the established principal in Kenya is that if a reasonable offer is made for purchase of minority share holding by the majority the Company ought not to be wound up and that a proper formula ought to be provided for valuation of such shares so that the dissident share holders go out of the company leaving it to the other share holders to run. The court further stated that at the stage when it comes to dealing with breaches of fiduciary duties and remedies sought in the petition the Company court should down tools and say "*please go to a regular civil Court by way of plaint*" the respondent concluded by urging that this

court will find that there is an alternative remedy and that therefore the petition ought to be struck off.

The respondents application is opposed by the petitioners and in opposition the petitioners filed a Replying Affidavit. The petitioners stated in their replying affidavit that contrary to what the respondent has stated in the affidavit in support that petitioners were the ones who made all attempts to streamline the company but that those efforts had been frustrated by the respondents. The petitioners further stated that the company's property known as York House houses two Companies. One being *Optica Ltd* which is a company run by the respondents hereof and also houses a business called Zanzibar Curio Shop Limited which is a business run by the petitioner hereof. It is stated in the Replying Affidavit that each party was involved in the improvement of the suit property in their respective areas where they run the said business. The petition was of the view that the alternative remedy which is the purchase of their share by the respondent is unjustified and prejudicial to the rights of the petitioner to the suit property. That the petitioner are the sole share holders and directors of *Zanzibar Curio Shop Limited* which shop is run on 40% of the suit property and that the petitioners have a long time attachment to the suit property and therefore to resort in the remedy of selling the shares to the respondent will prejudice the petitioners right to remain in and continue lawfully using the portion of the suit property for their family's said business undertaking. He therefore stated that it is equitable that the Company be wound up to enable each shareholder retain through subdivision their lawful portion of the property. He further stated that the mutual trust and confidence requisite for the management and sustenance of a quasi partnership had been eroded and as such it was only just and equitably to wind up the Company. The deponent further said that the Company is no longer existing as a going concern because it had abandoned its objects and had lost its substratum. That the Company is also in a partnership with Hassan Rafansi and that partnership own certain businesses situated in a property title NO. I.R. 5037 LR NO. 209/2544. It was stated that the 1st Respondent was a tenant on the said property and had failed to remit rental charges for the rent due for the portion they have occupied to the partnership. In the petitioners advocate submissions, it was submitted that the petitioners had a right as a contributory to petition for a winding up of a Company. That this right is a statutory right under the Companies Act section 219, 221 and 222. It was therefore submitted that because the petitioner have this statutory right the court should exercise the jurisdiction of striking out sparingly and with caution. Counsel stated that the Company has only four shareholders. That the respondents are husband and wife holding 50% of the shares and the respondents are also man and wife who also hold 50% of the share holding. That accordingly the share holding are equally held by the Petitioners and the Respondents. It was submitted that the petition is brought on the grounds that the relationship between the members has completely broken down. That there is complete break down in the conduct of the Companies affairs and that the Directors have been unable to agree on the conduct of and the handling of the Company's affairs. There is also an allegation of lack of probity leading to deadlock in the Company. Petitioners counsel referred to the Memorandum and Article of Association of the Company and drew the courts attention to Article No. 1 and 2 [c]. Counsel stated that the Articles provided that shares may be transferred by a member of his father, mother, brother or any male issue of such member and in case of a share of a deceased member the same may be transferred by his executors or administrators to any male issue or widow of such deceased members. Counsel submitted that the restriction of that transfer of shares demonstrated that the Company was intended to be and was formed to be run as a joint family business and quasi partnership of two families. Counsel further submitted that the Articles further restricted the offer of shares to any member of the company. This counsel stated showed that the shares of the Company could not be acquired by any person not a member of the Company. Counsel further submitted that they were other provisions in the Articles of the Company, which demonstrated the intention with which the Company was formed. That is that the spirit of partnership and mutual trust was to be forged at incorporation. Petitioners counsel stated that the petitioners run their business on the Company's property that is LR No 209/11/866 Nairobi and that they run their said business *Zanzibar Curio Limited* on a portion of 40% of the floor area of that property and the respondent run a business known as *Optica Limited* on the rest of the portion that is 60% of the floor area. Counsel argued that the Company is a quasi partnership and that it is also a joint family business. That being so the mutual trust and confidence between the parties requisite for management of such a Company had been eroded. That there has been lack of probity in the management of the Company by the respondents. Petitioners counsel further submitted that the respondent even in their correspondence had accepted that they were equal partners in the Company with the respondents. This counsel brought out to show that the respondent also accepted that the Company was a quasi partnership. Counsel referred to on going

conflicts between the parties and she stated that one of the sources of the conflict has been the management of L.R. No. 209/2544 owned by the Company in partnership with Hassan Ratansi. That further there had been conflict in the valuation of the areas occupied by the businesses *Optica Ltd* and *Zanzibar Curio Ltd* and that these conflicts had not and cannot be resolved as there had been deadlock between the parties.

Petitioners counsel then proceeded to distinguish the authorities relied upon by the respondent. Counsel began by referring to the Rai Limited case (supra) where counsel described it as a private and domestic Company. However to the contrary, it ought to be noted that the judgment of Shah J.A page 3 the judge described the Company as having been incorporated on the 31st of December 1971 under the Companies Act of Kenya as a public Company Ltd by Shares. The petitioners distinction is therefore not correct and is therefore rejected. However counsel on the case of Rai Limited did state that all the parties were members of one family and the petition to wind up the company had been made by the minority shareholders. Counsel said that the facts of that case are different to the present case where the Company is made up of two families jointly and that none had any greater interest in the Company than the other. That if the court wants to hold that the respondents could buy out the shares of the petitioners then the court will be finding that the respondents have a greater right in the Company and its properties and other assets than the petitioners. Counsel further said that those authorities relied upon by the respondent were not quasi partnership like the present case. Counsel submitted that the Court of Appeal in that case of Rai Limited had stated that the court before striking out a petition ought to consider whether the petition has any prospects of success. Counsel also in respect of the case *Vadag Establishment v Yashvin Shretta & 10* others counsel said that that case was materially different and that the principals of law in that case were far removed from the present case. Again she stated that in that case it was quasi partnership like the present case. With respect to the case of Leisure Lodge Limited relied upon by the respondent the petitioners also sought to distinguish it with the present case. Counsel stated that in that case the issue of deadlock lack of trust and confidence did not arise. That the only issue that was before the court was the price to be attached to the shares to be sold. This she stated was contrary to the present case.

The petitioner in support of its stand in this matter relied on certain authorities. In the case *Re Lundie Brothers Ltd [1965] 2 er 692*, the court proceeded to order the winding up of the Company and in so doing the court found that the Company was in substance partnership. It is important to note that there was no alternative remedy, which was available in this case. The Petitioner also relied on the case in *Re Modern Retreading Company Ltd [1962] E.A.* In this case also it is not obvious that there was an alternative remedy other than the prayer for an order for the winding up of the company. The finding of that case is as follows:

(i) The principle applicable is that in the case of a small private company, which is more in the nature of a partnership, a winding up under the "*just and equitable*" clause will be ordered in such circumstances as those in which an order for the dissolution of a partnership would be made.

(ii) The existence of the quarrel had made it impossible for the company to be run in the manner in which it was designed to be run, or for the parties' disputes to be resolved in any other way than by a winding-up; accordingly the petition must be granted. Winding-up order made.

As can be seen from this Holding the court found that when the winding up is in respect of a small company such mode of winding up would be the same as in a partnership. The Petitioner relied on a case of Milimani Commercial Court namely *HCCC Winding Up Case NO. 41 'A' of 2000 IN THE MATTER OF NATION WIDE ELECTRICAL INDUSTRIES LTD NAIROBI*. In narrating the facts of that case it ought to be noted that the respondent made an application for the striking of the petition under section 222[2] [b] of the Companies Act. At the hearing of that application the court noted that the applicant had misrepresented to the petitioner that negociations would take place to find a solution, as a consequence the petitioner had failed to attend to the compliance hearing in accordance with Rule 28[2] of The Companies (Winding Up) rules. The applicant in that case went back on his word and failed to negociate the matter. The judge concluded that in the case of an application under section 222[2] [b], every case must be considered on its own facts and peculiar circumstances. He further found that a right of a contributory to petition for winding up of a Company is a statutory. That it is conferred by statutory and

cannot be comprised by the Articles of Association. The judge proceeded to dismiss the application for striking out the petition. In the case of *Re Fildes Brother Ltd [1970] I all r 923* the court found that the right for the court to apply for the winding up of a quasi partnership it depends not only on the contractual rights of the parties as determined by the Articles of Association but also on the settled and accepted course of conduct between the parties. In the case of Lawrence vs Lord Norrey [1886 – 90] ALL ER 858, the petitioner relied on holding by Lord Herschell:

"The court has an inherent jurisdiction to dismiss an action, which is an abuse of its process, but that jurisdiction ought to be very sparingly exercised, and only in very exceptional cases. Its exercise would not be justified merely because the story told in the pleadings was highly improbable, and one which it was difficult to believe could be proved".

The next case that the petitioner relied upon is the case of *Ebrahimi v Westbourne Galleries Ltd & others*. In that case the court sought to clear the issue of the term of quasi partnership that had been argued. The court in that regard said:

"But the expressions may be confusing if they obscure, or deny, the fact that the parties (*possible former partners*) are now co-members in a company, who have accepted, in law, new obligations. A Company, however small, however domestic, is a company not a partnership or even a quasi-partnership and it is through the just and equitable clause that obligations, common to partnership relations, may come in".

There were other cases that were relied upon by the petitioner but as it was to be seen from the ones that has been quoted in this ruling there was not one case where the respondent to the winding up made an offer which could be regarded as an alternative remedy. The court in all the case that are relied upon by the petitioner dealt with the issue of winding up per see. Therefore the court has found that the authorities that had been relied upon by the petitioner are not useful in consideration of the application that is before the court.

"Where the petition is presented by members of the company as contributories on the ground that it is just and equitable that the company should be wound up, the court, if is of opinion –

a) ……

b) that in the absence of any other remedy it would be just and equitable that the company should be wound up, shall make 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."

The respondent has come to court by virtue of the above section. The respondent has stated to this court that the petitioner prior to filing the present petition did make an offer for the purchase of their shares by the respondent. That is obviously seen in the letter written by the petitioner's advocate, which is quoted herein before. The respondent did respond to that offer by accepting in the offer and by proposing the process of valuation of the petitioner's shares. The petitioner however renegaded on the offer made and subsequently filed the present petition. As can clearly seen from the jurisprudence of the Court of Appeal decision in regard to section 222 [2] [b] of The Companies Act is that if there is an alternative remedy to the winding up order that the court should strike out the petition. In this case there is obviously an alternative remedy, which the petitioner is now refusing to accept. The basis of not accepting is that since the respondent and the petitioners are equal shareholders if the court would strike out the petition it would be taken to mean that the court is of the view that the respondents have a greater right over the company than the petitioner. The petitioner does seem to have a concern that if the petition is struck out and if an order is made for the respondent to buy their shares that they would have to vacate the property owed by the company where they are running the business called *Zanzibar Curio Ltd* and that such vacation would be to their detriment. The court fails to appreciate those two arguments for indeed the articles of the Company do recognise that there can be a transfer of shares after notice has been given to the members of the company rather to argue that the selling of their shares petitioners would suffer in that their running of business on the company's property would be interfered with does not hold water because nothing has

been shown that the place where the business is run is so unique that the business cannot be run in any other premises. After all it is not unusual to hear business moving premises alternative to the usual premises. The Articles of the Association of the company particularly Article 11 recognises that shares may be transferred to a member of the family of the transferor. Article 12 recognises that transfer can be made to persons who are not members of the company or members of the family of the transferor so long as notice is given to the company of such desire to transfer the same. Such notice should specify the sum fixed as the fair value of the share and the transferor constitute the Company as the agent for sale of the shares. If the Company fails within a space of 42 days after being served with that notice to find a purchasing member the person proposing to transfer shall be at liberty to sell such shares to any person at any price. I refer to these articles because the petitioners advocate was heard to argue that the transfer of shares cannot be transferred to any other person other those who are members of the company or members of the family of those who hold shares. It is obvious that that a provision is made that in the first instance priority to purchase is given to members of the company but also those shares can be sold to any person at any price. Accordingly it would not be arduous for the respondents to purchase the shares that held by the petitioner in this matter. This is so particularly when one considers that it was the petitioner who initiated that negociation by asking the respondent whether they could purchase their shares. In the case of *Vadga Establishment* (Supra) the judgment of Omollo J A. found that once the court finds that there is alternative remedy to winding up order, all the issues that are in petition cease to be live issues. In the case in the judgment of Akiumi J.A. he was of the opinion that where there is other remedies available the petitioner would be found to be acting unreasonably in seeking to have the company wound up. In this matter both the petitioner and the respondent have made counter accusations of each others of wrong doing with regards to the running of the Company. When I consider those accusations I am guided by the finding in the case of *Jasbir Singh Rai* where the Judge Shah J.A. stated hereinbefore that in such a situation parties ought to go to the regular civil court and should not be entertained in the company court. That indeed would be my finding in this case. The accusation of lack of confidence break down in communication and lack of probity all belong in the civil court and would certainly have no bearing in my mind sitting as a company court since I have made a finding that there is an alternative remedy available to the petitioner. The court rejects the petitioners argument that the company was a quiasi partnership. It is an incorporated company and is subject to the provisions of the Companies Act. The finding of this court therefore is there is an alternative remedy and accordingly the petition cannot stand. I do therefore hereby order that the petition filed herein be and is hereby struck out. I will further order that each party would appoint one arbitrator each. The two arbitrators would then appoint an umpire and such an umpire shall be a senior advocate or a chartered accountant both practising in Nairobi. Such arbitrators would for the purpose of finding a fair market value of the petitioner's shares have full access of the financial records of the company. The arbitrators are also granted authority to call for whatever information is necessary to enable them to reach a conclusion. I do order that the arbitrators will commence their deliberations within 30 days from todays date and on the determination of the value of the shares owned by the petitioner, the respondent shall pay such sums to the petitioners within 30 days of such finding. The costs of the petition and the costs of the Notice of Motion dated of 6th of May 2003 are awarded to the respondent herein.

MARY KASANGO

JUDGE

Dated and delivered this 14th day of February 2007.

M KASANGO

JUDGE