REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Winding Up Cause 27 of 2004

IN THE MATTER OF ENGINEERING MANUFACUTERERS LIMITED

AND

IN THE MATTER OF THE COMPANIES ACT CAP 486 SECTION 211 [1] AND [2] [A] & [B] OF THE LAWS OF KENYA

N THE MATTER OF THE COMPANIES ACT CAP 486 SECTION 165 AND 166 OF THE LAWS OF KENYA

RULING

The petition for winding up has been filed by Engineer Holden Kipyegon Rotich. In the petition he has stated that he is holder of 50% shareholding of the company ENGINEERING MANUFACUTERERS LIMITED. The petition further states that the other 50% share holding is held by Terrence O'Donovan. The petition alleges wrong doing against the said Terrence O'Donovan as follows:

That while Terrence O'Donovan was the Managing Director in the company, he breached express and/or implied terms of his services aforesaid, and in breach of his general duty and responsibility to the petitioner, he fraudulently withdrew and transferred money from Company's accounts without any authority, diversified funds to other unauthorized new accounts, failed to account for sale proceeds of Company's property and failed to pay statutory and other remittances due from the company, and/or fraudulently omitted or was privy to the concealment of material particulars of the company's financial affairs to the other Director with the aim of defrauding both the Government and the shareholders of the taxes, dividends and proceeds realized by the company.

The petition has given particulars of the alleged fraud, alleged negligence and alleged bleaches of fiduciary duties. What is interesting is that the title of the petition states that it is a winding up petition but when one comes to the prayers in that petition one finds that the petitioner seeks the removal of the Managing Director O'Donovan and the appointment of a Receiver Manager to run the affairs of the company and also to carry out investigations. There is no other prayer that the petitioner seeks. One is therefore left wondering whether what is before the court is a winding up petition or an ordinary action. That as it may be what is now before the court is Notice of Motion filed by the Respondent O'Donovan. It is dated 25th of November 2004 and brought under section 222 of the Company Act Rule 7 and 203 of the Companies Winding up Rules and Order VI Rules 13 (1) (d) of the Civil Procedure Rules. The application seeks the striking out of the winding up petition filed herein. The affidavit in support is sworn by O'Donovon. At first in that affidavit O'Donovan denied any wrong doing as contained in the petition. He further deponed that by a letter written by his advocate dated 9th November 2004 he made an offer to the petitioner to buy his shares at a price to be ascertained by an independent valuer after arbitration. He

further alluded to the response to that letter which was made by the advocate for the petition. That response was a letter dated 17th November 2004. It is of some assistance to record what that response was:

17.11.2004

Katwa & Company Advocates

5th Floor Transnational Plaza

Mama Ngina Street

NAIROBI

Dear Sir,

RE **NBI WINDING UP CAUSE NO. 27 OF 2004**

ENGNINEERING MANUFACUTRUERS LIMITED

We refer to the above matter and your letter dated 9.11.2004.

Our client is agreeable to your client's proposal only if all the amounts due and owing to Engineering Manufacturers Ltd by Marshal Fowler Engineers Ltd (as claimed in Nairobi HCCC No. 778 of 2002) are paid to Engineer Holden K Rotich in full.

The said payment is a condition precedent for any arbitration proposal by your client, and should not be construed to be a bar to our client's right to recover other dues from your client.

We wait your response.

Yours faithfully

G Khafafa

KIPKENDA, LILAN & Co.

The deponent stated that by the petitioner imposing the conditions seen in the above letter it can be taken that the petitioner has rejected the respondents offer to purchase his shares. The deponent further stated that the petition herein is an abuse of the court process and should therefore be struck out. The respondents advocate in oral submission stated that the petitioners conditional acceptance of the purchase of his shares was unreasonable because it sought payment of costs of a suit that had not been determined. That accordingly that is why the present application was filed seeking the striking out of the petition. The respondents advocate stated that the winding up as sought by the petitioner could only be on the basis of what is just and equitable. He stated that even if the petitioner had been mistreated in the company it is not a reason enough to wind up the company particularly when a reasonable offer has been made to purchase his shares.

The petitioner filed a replying affidavit in opposition to the respondent's application. He pointed out that the offer to buy his shares was made on a letter entitled without prejudice. He was therefore of the view that the respondent could not rely on that letter in the present application. He stated that he had responded to that offer and it was the respondent who rejected his counter offer. The respondent therefore sought that the application would be dismissed. In oral submission counsel for the petitioner stated that the offer made to purchase his clients shares was not made within a reasonable time. He stated that it was made two weeks before the filing of the present application and that therefore it could not be taken seriously. In particular he stated that it had been made after the petition was filed and therefore had

been made with a view to conceal material facts which are obvious on the petition. Counsel for the petitioner further stated that the petition had raised various grounds of forgery and fraud and it was therefore necessary for the petition to be heard in full. He alluded to a case that had been filed namely HCCC NO. 778 OF 2002 in which he said the matter involved kshs 150 million. He therefore concluded that the court cannot dispose of this matter by striking out the petition as prayed by the respondent. The parties relied on authorities. The respondent relied on the following cases:

1) In the matter of New – Wheat Industries Limited – Vs – In the matter of the Companies Act HCCC Winding Up Cause NO. 37 of 1984.

2) Vadga Establishment – vs – Yashvin Shretta & 10 others C.A. No. 83 of 2000.

3) **Re A Company (No. 000709 of 1992) O'Neil and Another – vs – Phillips & Another, The EAR, 1999 Volume 2.**

The jurisprudence of these cases is that where an offer to buy out the petitioner has been made and where the petitioner insists on proceeding with the petition for winding up that it would be unreasonable to allow the petition to proceed. The petitions in those cases were struck out.

The petitioner also relied on certain authorities as follows: **Jitendra Brahmbhatt v Dynamics Engineering Ltd [1982 88] 1KAR**. In this case the Court of Appeal in considering a petition that has been struck out by a superior court reinstated it for hearing and in making that order stated that the superior court could not have made a finding on the mala fide of the respondent on affidavit evidence alone. He therefore found that the petition was not a plain and obvious case for striking out. It is to be noted that in this case there was no alternative remedy such as an offer to purchase shares that was made. That is a distinguishing feature to the present facts. The respondent also relied on the case **Musa v Life Agencies International (Kenya) Ltd [1981] KLR.** This case does not seem to be relevant to the facts before the court because it involved an appeal where the superior court had failed to hear evidence on the contested matters and the Court of Appeal reinstated the petition and ordered a retrial. The respondent also relied on the case **CC NO 191 of 1995 between Lilian Njeri Mungai and Dr Njoroge Munga**i. This case is very dissimilar to the present case in that it went to the Court of Appeal after the dismissal for non disclosure of a cause of action of the petition by the superior court. Finally the petitioner relied on the **W.C. NO. 41 'A' of 2000** In the matter of Nationwide Electrical Industries Limited and In the matter of Companies Act (Cap 86 Laws of Kenya). This is a High Court case where the court had to consider an application for striking out of the petition under the provisions of section 222 [2] [b] of the Companies Act. The court found that the availability of an alternative remedy does not plainly make it unreasonable to seek a winding up order so as to seek striking out of the petition. The judge found that every case must be considered on its own facts and peculiar circumstances. The judge did not in that case strike out the petition.

The application before the court is based on section 222 [2] [b] which provides as follows:

"**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 it 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".

As it can be seen from the provisions of that section the court will not order the winding of a company where there exists alternative remedy. This matter has been the subject of much litigation both in the superior court and in the Court of Appeal. In the case of **Vadga Establishment – vs – Yashvin Shretta & 10 others C.A. No. 83 of 2000** the Court of Appeal in considering an appeal from the superior court

stated as follows as per the judgment of Omolo J.A.:

"**I have held that even if the allegation in his petition were to be proved to be true, that would not entitle him to a winding up order as of right particularly if there were an alternative remedy available. The availability of a remedy alternative to a winding up order takes away his entitlement if any, to such an order and the dispute over the winding up is no longer a live issue**"

The superior court in that case had found that it was unreasonable for the minority share holder to reject his own proposal to have the price of his shares determined. In the case from the United Kingdom namely **Re A Company (No. 000709 of 1992) O'Neil and Another – vs – Phillips & Another, the EAR, 1999 Volume 2**. 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 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 court is aware of the argurement made by the petitioner's advocate that weighty issues had been raised in the petition which would therefore not justify the striking out of the petition. I have considered those issues raised therein they mainly deal with the fiduciary duties of the managing director O'Donovan. The Court of Appeal in the case ***Jasbir Singh Rai and 3 others v Tarlochan Singh Rai and 13 others Civil Appeal 63 of 2001*** had the following to say in regards to breach of fiduciary duties. 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 petitioner's statement that the offer made by the respondent was late in time cannot stand. The essential thing is that an offer has been made to purchase the petitioners shares. Similarly the argument that the offer was entitled "*without prejudice*" and cannot therefore be used in the present application is misconceived because the use of the title "*without prejudice*" can only be invoked by the person who has used it. The respondent having chosen to use that letter has forgone the protection of "*without prejudice*". In considering whether or not the respondent application can be entertained it is not in the place of the court to consider the alleged wrongs of the respondent as pleaded in the petition the only thing that the court needs to concern itself is whether there is an alternative remedy made. The finding of this court is that there is indeed a reasonable alternative remedy made to the petitioner and the fact that the petitioner responded as he did by his advocate's letters dated 17th November 2004 shows that the offer was reasonable. On the other hand it is unreasonable for the petitioner to seek the settlement of a claim which is still outstanding in this court, and which does not involve the petitioner personally, before accepting the offer to purchase his shares. The court is of the view that having found a reasonable remedy was same to the petitioner the petition stands to be struck out. Indeed that was the finding of the Court of Appeal case **Vadga Establishement – vs – Yashvin Shretta & 10 others C.A. No. 83 of 2000** the Court of Appeal stated that the availability of a remedy alternative to winding up was a basis for striking out the petition. I would therefore order that the petition filed herein on the 30th September 2004 be and is hereof struck out

and that the value of the shares of the petitioner be ascertained by an independent valuer following an arbitration. Such a valuer shall be appointed by the parties hereof. The court has considered that the offer to purchase the petitioner's shares of the company was made formally on a letter after the petition was filed. For that reason the court will not make any order as to costs in respect of this matter.

M KASANGO

JUDGE

Dated and delivered on the 12th day of February 2007

M KASANGO

JUDGE