REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Winding Up Cause 5 of 2007

IN THE MATTER OF NYAKIO INVESTIMENTS LTD…....PLAINTIFF

VERSUS

IN THE MATTER OF COMPANIES ACT……...DEFENDANT

R U L I N G

I have before me an application by way of Chamber Summons under Sections 231, 235, 237, 239 and 241 of the Companies Act and Rules 7, 27 and 36 of the Companies (Winding Up) Rules. The applicant, John Mwangi Wagako is the petitioner in the petition dated 27.2.2007 which petition is verified by an affidavit sworn on 26.2.2007 and filed together with the petition on 27.2.2007.

The petitioner is the son of the later Wagiko Ndibaru (hereafter "the deceased") who incorporated the respondent (hereafter "the Company") in 1995. The deceased was polygamous and was survived by three widows and several children including the petitioner. The nominal share capital of the Company is 50,000/= divided into 500 shares of 100/= each. The deceased subscribed 20 shares and the petitioner - 10 shares. The remaining 20 shares were taken up by Gabriel Muturi - 10 shares and Stephen Karanja - 10 shares. Gabriel Muturi and Stephen Karanja are also sons of the deceased and step brothers of the petitioner. The four were the only shareholders and directors of the Company. During the lifetime of the deceased he bought ***inter alia*** two properties L.R. No.209/2211/20 which is a residential property in Parklands Area of Nairobi and L.R. No. 209/1496, a commercial plot on River Road in Nairobi. In the year 2000 the deceased transferred those properties to the Company. Unfortunately it is the same year that he died. The main business of the Company is to let out the said properties at various rents. Differences arose between the petitioner and his step brothers after the death of the deceased that have culminated in various suits the most recent being the applicants petition to wind up the Company. He petitions the court as a contributory for an order that the Company be wound up as it is just and equitable to do so under Section 219 (f) of the Companies Act.

The principal reasons for the petition are that the Company can no longer be managed as a quasi-partnership of the members of the deceased's polygamous household; that the majority shareholders have excluded the petitioner from the management of the Company; that probity and trust have been eroded; that the majority shareholders are running the Company fraudulently and illegally; that the majority shareholders are oppressing the minority shareholders and that the majority shareholders are running the Company for their sole benefit.

Simultaneously with the lodging of the petition, the petitioner took out a Chamber Summons in which he seeks three orders of the Court as follows:-

(1) That H.W. Gichohi, a Certified Public Accountant, be appointed interim liquidator of the

Company.

(2) That the powers of the said H.W. Gichohi (proposed interim liquidator) be limited and restricted to the powers set out in Section 241 of the Companies Act except Section 241 (2).

(3) That the said interim liquidator do take immediate possession of among others L.R. No.209/1496 and L.R. No.209/2211/2.

The application is said to be premised on the grounds that:-

(a) The petitioner's co-directors have in breach of their fiduciary duties which they owe the Company, converted the Company's money and premises to their personal use.

(b) The petitioners co-directors who are in control of the Company are running it as a partnership of both of them in disregard of the Articles of Association and the Companies Act; they have not called any general meetings or board meetings since July 2001.

(c) The Companies business has not been conducted in accordance with its Memorandum and Articles of Association.

(d) The petitioner's co-directors do not recognize their late father's widows who are executrices as shareholders who are entitled both to participate in the management and deciding what dividends are to be made to them.

(e) The petitioner's co-directors have frustrated their late father's wish that the Company's assets be managed for the benefit of his three houses.

(f) The petitioner's co-directors excluded the petitioner from the management of the Company in November 2001 to enable them to steal the revenue of the Company.

(g) The petitioners co-directors have following exclusion of the petitioner misappropriated, the Company's revenue taking the form of rent fetched by the companies properties; they have used it to invest in large shops, started on the Company's premises, in purchasing a fleet of cars for road transport business, and on luxurious lifestyle; they have purchased personal cars and let premises for personal use using the company's revenue.

(h) The petitioner's co-directors do not pay rent for the premises of the company in which they carry on business established with the companies moneys.

(i) The petitioner's co-directors have in addition to grabbing premises used as shops grabbed other premises which are used as offices and stores for which no rent is paid.

The application is supported by an affidavit sworn by the petitioner to which affidavit are annexed numerous exhibits. There is also a further affidavit sworn by the same petitioner to which one exhibit is annexed. The affidavits elaborate the grounds in the application and in the petition.

The Company has opposed the application and has in that regard filed a replying affidavit sworn by the said Stephen Karanja Wagako. The said affidavit also has many annextures. The Company has also filed a Notice of Preliminary Objection which objection was incorporated in its reply to the application.

The advocates for the parties agreed to submit in writing which submissions were filed by 28.3.2007. From those submissions, the principal issues for determination appear to be the following.

1. Whether or not the application is defective.

2. Whether or not the petition is validly verified.

3. Whether or not the proposed interim liquidator is fit to be so appointed.

4. Whether or not the management of the Company was designed to be run on a quasi-partnership basis and family disagreements are such that it can no longer be run as so designed.

5. Whether or not the majority shareholders have excluded the petitioner from the management of the Company since November 2001.

6. Whether or not there is want of probity and trust amongst shareholders and directors as to make it impossible for the company to be run as a quasi partnership.

7. Whether or not the majority shareholders are running the Company fraudulently and illegally.

8. Whether or not the majority shareholders are oppressing the minority shareholders.

9. Whether or not the majority shareholders are running the Company for their sole benefit.

On whether or not the application is defective, counsel for the Company submitted that the application violates Rule 7 of the Companies (Winding Up) Rules which provides that every application in court other than a petition should be made by motion. The petitioner has approached the court by way of summons in chambers which according to counsel for the Company is improper and for that reason the application is incompetent and should be struck out. Counsel for the petitioner on his part submitted that the Court of Appeal in **Leisure Lodges Ltd. vs. Y.A. Shretta - C.A. No.10 of 1997 (UR)** had held that the proper procedure to be used is the Chamber Summons but that the use of a Notice of Motion does not render the application defective.

I am bound to follow the Court of Appeal decision on the matter. Indeed the Court of Appeal has held similar views in other cases the effect being that an application should not be defeated on the mere basis that the wrong procedure has been adapted **(See Johnson Joshua Kinyanjui & Another vs. Rachael Wahito Thande & others – C.A. No.284 of 1997).** (UR) I cannot therefore strike out the petitioner's application on the ground that the same has been made by summons in Chambers.

On whether or not the petition is incompetent for failure to comply with rule 25 of the Companies (Winding Up) Rules, counsel for the company submitted on the authority of my decision in **Re Sheela Supermarket [2004] 2 EA 264** that the affidavit verifying the petition in this matter was filed together with the petition in contravention of the clear provisions of rule 25 aforesaid. Emukule, J. was of the same view in **HC W/U Cause No.22 of 2004 – Re Mode 1996 – Security Ltd. (UR).** Counsel for the Company submitted that rule 25 did not apply in this case as the petition was based ***inter alia*** on fraud. Reliance was placed on **Halsbury's Laws of England 3rd Edition Vol.6 at pages 547-548** where the Learned authors state as follows:-

"**Every petition must be verified by an affidavit referring thereto which must be by the petitioner or one of the petitioners, if more than one or may be in a proper case be made by his or her solicitor or agent when the latter knows the facts …… The affidavit must be sworn after and filed within four days after the petition is presented. Such affidavit is prima facie evidence of the statements in the petition unless fraud is charged in which case the facts alleged must be set out in an affidavit."**

Counsel further relied upon **Pennington's Company Law at pages 698-699** and **Palmers Company Precedents 17th Ed. P.70** for the proposition that where fraud is alleged more than a verifying affidavit is required.

Rule 25 reads as follows:-

"**Every petition shall be verified by an affidavit which shall be sworn by the petitioner, or by**

one of the petitioners if more than one or where the petition is presented by a corporation by a director, secretary or other principal officer thereof and shall be sworn and filed within four days after the petition is presented and such affidavit shall be prima facie evidence of the contents of the petition."

It is plain that the rule governs every petition without exception. In my view the rule must apply with equal force to petitions alleging fraud. To this extent therefore, the English position could be different if their equivalent rule has exceptions. There is none to our rule and it is our rule that we must apply. I am therefore not persuaded that the allegations of fraud made by the petitioner in his petition oust the provisions of rule 25 of the Companies (Winding Up) Rules.

As observed by Emukule, J. in **Re Mode 1996 – Security Ltd.** (supra), the statutory verifying affidavit is declared to be prima facie evidence of the contents of the petition which is a procedure for the cessation or guillotining the life of the Company and the provisions that bring about that process should be construed strictly.

The petitioner has not sought leave to enlarge time to file a compliant verifying affidavit or for leave to deem the verifying affidavit in question duly filed with the leave of the court. The end result is that the petition and the purported verifying affidavit are clearly in breach of rule 25 of the Companies (Winding Up) Rules and are liable to be struck out but before doing so, and out of deference to counsel appearing, I will comment on the other issues canvassed before me.

On the suitability of the proposed interim liquidator, I have found as follows. It is not in dispute that H.W. Gichohi, the proposed interim liquidator is a brother-in-law of Counsel for the petitioner. Counsel for the petitioner sees no conflict of interest. He says there is no authority for the proposition that there would be conflict of interest if the person proposed is related to counsel for the petitioner. In his view, the interim liquidator is an officer of the court who will be discharged if he commits a misconduct. Speaking for myself, I think one needs no authority for such a proposition. The apprehension of counsel for the Company is not without foundation. In my view such an appointment would offend the very well known maxim of Law that justice even though it may be done, it will not be seen to be done. The courts jealously guard against offending that maxim as on it our peoples faith in our justice system depend. In the premises, I would strike out the petitioner's application on the basis of the unsuitability of Mr. H.W. Gichohi who is proposed by the petitioner as the sole interim liquidator.

With regard to the other issues, I think it is convenient to deal with the same together. On the basis of the history of the Company the petitioner persuaded me that although the Company has separate legal existence in law – nevertheless it was run on a quasi partnership basis. The deceased must have intended that his entire polygamous household benefits from the business of the Company hence his inclusion of at least one son from each house in the initial subscription.

The petitioner has further persuaded me that there are serious family differences which have led to the various cases by and/or against the petitioner or the Company or the current directors of the Company. If the business of the Company was more complex than were letting out of the Company's real property a case would be made out for winding up of the Company. Luckily in my view in the light of the nature of the business of the Company winding up would not be the best option available to the petitioner.

The family disagreements have led to name calling by the directors and the petitioner as evidenced by the language used in the affidavits in this application. Those affidavits confirm that the majority shareholders have excluded the petitioner from the management of the Company at least since April 2005. The accounts exhibited by the Company, do not reflect any payments to the petitioner or the widows of the deceased. They however reflect substantial payments to the directors. The Company may justify those payments but there is no doubt that the current directors would be reluctant to alter the scenario. There is therefore basis for the petitioner's complaint that there may be want of probity and trust amongst shareholders and directors. However, I do not think as I have already stated above that in the light of the business of the Company Winding Up is the only option available to the petitioners. As Kneller said in **Re Garnets Mining Co. Ltd. [1978] KLR 224** each case where relief is sought on the

ground that it is just and equitable that a Company be wound up depends on its own facts. On whether or not the majority shareholders are running the Company fraudulently or illegally, I prefer to express no view on the same in this application as the same would put the judge who will deal with other aspects of the dispute between the petitioner and the Company and/or its directors in a bind. I would also for the same reason not express any view on whether or not the majority shareholders are oppressing the minority shareholders.

There is another reason why the petitioner's application and petition would be struck out. The petitioner has filed **HCC Misc. Civil Application No.127 of 2005** in which he seeks the appointment of Inspectors to investigate the affairs of the Company and the Inspection Report thereof be filed in court. The application is supported by the petitioner's affidavit in which complaints similar to the ones made in this application and petition are made. That application is pending hearing. In the application the Company has applied that the proceedings therein be stayed and the parties be referred to arbitration in accordance with Article 30 of the Company's Articles of Association. I am informed that that application for reference to arbitration has not been heard.

Counsel for the petitioner has submitted that article 30 of the Company's Articles of Association does not apply where a dispute is between the minority and majority shareholders and where the Company disregards the law as in this case. Counsel further submitted that the Article is null and void to the extent to which it seeks to oust the jurisdiction of the Winding Up court conferred by Sections 219 and 222 of the Companies Act. It was also his submission that as the majority shareholders are in fundamental breach of the Articles of Association of the Company, the petitioner is entitled to repudiate the term of the contract embodied in article 30 aforesaid hence the filing of his petition and application.

With all due respect to counsel for the petitioner, his arguments should be made in the application filed in **H.C. Misc. Civil Application No.127/2005.** If the petitioner is of the view that the Winding-Up cause is best suited for his complaints, he should have withdrawn the said Misc. Civil Application No.127 of 2005 before lodging his petition. In my humble view to lodge this petition for winding up and seek the appointment of an interim liquidator when there is existing between the same parties an application for the appointment of inspectors to investigate the affairs of the same Company would amount to abuse of the court process. The petitioner by filing that application has elected that winding up would not be appropriate. He is caught by the provisions of Section 222 (2) (b) of the Companies Act. In the end, I strike out the petition and application. In view of the fact that the Company is owned by the same family, I will depart from the rule that costs follow the event and Order that each party bears his/its own costs of the application and petition. I hope the petitioner and the directors of the Company who are his step brothers will recall the noble intentions of their deceased father and work out a strategy to run the Company for the benefit of the entire surviving family of the deceased to avoid the inevitable dissolution of the Company if the acrimony persists when there will obviously be no winners.

For now however, the petitioner's application and petition stand struck out for the reasons given in this ruling with each party to bear their own costs.

Orders accordingly.

DATED and **DELIVERED** at **NAIROBI** this 23rd day of May 2007.

F. AZANGALALA

JUDGE

Read in the presence of:-

Kahuthu for the respondent.

F. AZANGALALA

JUDGE

23/5/07