



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)
Winding Up Cause 35 of 2005
IN THE MATTER OF NYUKI LIMITED
AND
IN THE MATTER OF THE COMPANIES ACT CAP 486 LAWS OF KENYA

RULING

The petitioner, in this Winding up Cause, before the hearing of the petition sought by chamber summons, dated 1st December 2005, the following orders: -

1. That interim managers of NYUKI Ltd be appointed pending judgment in the petition, and that such managers be conferred with power to collect protect and take possession of the assets of the company Nyuki Ltd; to protect the business of that company; carry on the business of that company; ensure that no changes shall take place in the present issued share capital of the company; take possession of any books, records and other documents of the company.
2. That the appointed managers do have power to appoint instruct, advocates, accountants, and other professionals and advisers with power to commence prosecute any action; with power to appoint managers and employees; power to borrow and power to exercise managerial power on behalf of the company.
3. That a restraining order be issued restraining the present directors of the company from carrying on the business of the company or operating the company's bank accounts.
4. That the court does fix remuneration of the said interim managers.

Nyuki Limited has a nominal capital of kshs 50, 000 divided into 500 shares of kshs 100/- out of which 500 shares were issued.

Ø YESHOSHUA ARUSI 375 shares

Ø MERCY WAMBUI MUGO 125 shares.

The petition of winding of Nyuki Ltd (hereinafter called the respondent company) was filed by Mercy Wambui Mugo. The 2nd respondent is Yehoshua Arusi

It is pleaded in the petition that the respondent company was formed in 2001 by both the petitioner and the 2nd respondent. That differences between the petitioner and the 2nd respondent have arisen which necessitated the present petition. The said differences that are pleaded are as follows: -

- Ø That the 2nd respondent disrupts the smooth operations of the respondent company by making unilateral decisions;
- Ø The 2nd respondent inhibits access of the petitioner to the financial reports information and documents of the respondent company;
- Ø That the 2nd respondent denies the petitioner access to legitimate benefits;
- Ø That the 2nd respondent talks negatively about the petitioner to junior staff and is generally quarrelsome.

The petition stated that the aforesaid state of affairs has resulted in the stalemate of the running of the respondent company's business.

The supporting affidavit to the chamber summons, sworn by the _____ petitioner hereof states: -

- Ø That the petitioner at the formation of the respondent company used her existing business contacts for the benefit of the respondent company.
- Ø That the petitioner has procured 99% of the respondent company clientele.
- Ø That the 2nd respondent has embarked on a mission to frustrate the petitioner's work as the managing director.
- Ø That when the respondent company receives orders from clients, these are forwarded to another company known as Express Promotion Ltd, where the 2nd respondent is a director, which company prepares the order for the final product to be supplied to the client of the respondent company.

The petitioner's chamber summons is brought under Rule 5 (2), 7 (2), 203 of the Winding up Rules and section 235 of the Companies Act. In the alternative the petitioner relies on section 63 of the Civil Procedure Act, order 40 Rule 1 of the Civil Procedure Rules.

The chamber summons as stated herein before seeks appointment of interim managers, namely Peter Mwicigi Kironyo or Stephen Kanguru Githinji.

The 2nd respondent on his behalf and on behalf of the respondent company filed a replying affidavit. The following information follows from that affidavit: -

- Ø The 2nd respondent denied '*pushing*' out the petitioner from the company.
- Ø That all the records and documents of the respondent company are in the possession of the petitioner by virtue of her position as the managing director.
- Ø That Express promotions Ltd requires a down payment to be made prior to orders being worked on, which the petitioner failed to do despite being paid by the clients of the respondent company.
- Ø That the respondent company is not making sufficient money to enable it to continue occupying office space at Nation Centre.

Ø That the respondent company is owned by its clients kshs 1, 250m 857. 12 for the year 2002 and kshs 1, 496, 692 for the year 2004.

Ø That the petitioner has been running down the respondent company and the present petition is an attempt to avoid facing the co-director shareholder of the respondent company.

Ø That before filing the present petition the petitioner ought to have notified the company secretary.

Ø That the appointment of managers would be an unnecessary expense for the respondent company.

In oral submissions the respondent counsel submitted that the petition is null and void because its heading suggested that the petitioner is the company; that it is also void for failing to be sealed by the court as required by Rule 10 of The Companies (Winding up) Rules.

Having so summarised the arguments presented before court by the parties, the court will now give its findings.

The first thing the court wishes to deal with is the petitioner's reliance, in the alternative, to the Civil Procedure Rules. Civil Procedure Rules do not apply to actions brought under the Companies Act. The Companies Act is complete in itself with its rules.

The respondent raised a valid point in opposition to the petitioners application under Rule 10 of The Companies (winding up) Rules that rule provides:

“ALL orders, summonses, petitions warrants or other documents of any kind in any proceedings and certified copies thereof shall be sealed” (underling mine).

The definition section of those rules defines seal to mean: - **“.....sealed with the seal of the court.”**

The respondent's argument was that the petitioner chamber summon must fail for breaching the said rule 10. That argument finds favour with the court for indeed the rule 10 provides that all the stated documents, which include chamber summons, ought to be sealed with the seal of the court. The petitioner's chamber summons was not so sealed and on that ground alone the chamber summons would fail. The parties did however present other arguments, which deserve the court's attention.

The petitioner seeks the appointment of interim managers, to run the respondent company's business and those orders are sought under section 235 of the Companies Act. The respondents argue that he prayers sought, in the chamber summons, cannot be granted under section 235. That section gives the court power to appoint interim liquidator not manager. The word liquidator is defined in the Black Law Dictionary to mean;

“A person appointed to carry out the winding up of a company.”

The court therefore find that there is value in the respondent's argument that the section relied upon by the petitioner does not provide for the appointment of a manager. Rule 27 provides interim liquidator once the petition has been filed; Rule 39 [1] provides that the official receiver can by an application in court, seek to appoint a special manager.

The route perhaps that the petitioner ought to have taken is to seek the appointment of an interim liquidator rather than managers. Even if the petitioner had sought to appoint interim liquidator under Rule 27 the petitioner ought to show sufficient grounds for the court to so appointing. I have examined the grounds brought forward by the petitioner in the present application and I find that they do not justify the appointment of an interim liquidator. The petitioner states that another entity Express promotion Ltd is failing to supply goods to the respondent company. That can hardly be ground sufficient to grant orders in the interim. The other allegations that the 2nd respondent is unprocedurally seeking the vacation of the respondent's company office premises was not sufficiently proved. The 2nd respondent in his

replying affidavit detailed the debts owed to the respondent company and showed by accounts that the respondent company is not making profit to justify continuing to pay rent at Nation Centre that averment was not countermanded by the petitioner. The other ground raised by the petitioner was that she has been denied access to documents and financial records. The petitioner described herself as the managing director of the respondent company. She further stated that she is in touch with the clients of the respondent company. It is not clear what documents she then says she has no access to with regard to financial records; it is presumed that since she deals directly with the client she is the keeper of payments being made by those clients. What other financial records can there be, the petitioner fails to state.

The petitioner's chamber application is an interlocutory application, and being so for the petitioner to succeed she ought to prove that she has a prima facie case with probability of success. The court's finding is that the petitioner fails to prove a prima facie case with probability of success, in view of the court's findings herein before.

The end of the matter is that the petitioner's application fails.

The order of the court is that the chamber summons dated 1st December 2005 is hereby dismissed with costs to the respondent.

MARY KASANGO

JUDGE

Dated and delivered this the 27th February 2006.

MARY KASANGO

JUDGE