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

Winding Up Cause 12 Of 1995

IN THE MATTER OF MADHUPAPER INTERNATIONAL LIMITED

AND

IN THE MATTER OF THE COMPANIES ACT

J U D G M E N T

The prayers sought by the petitioners, hereof, are that either (1) MADHUPAPER INTERNATIONAL LIMITED be wound up by the court under the provisions of the Companies Act; or (2) that such other orders be made as the court shall deem just.

The petitioners are, SAMUEL NJOROGE MUCHIRI, WILLIAM WOKABI KARANJA and JOSEPH MONORU MUTURI.

The petition states that Madhupaper International Limited (hereinafter called the company was incorporated on 20th April 1976 under the Companies Act. That the nominal capital of the company is kshs 10, 000.00 divided into 500, 000 shares of kshs 20. 00 each. The amount of capital paid up or credited as paid is kshs 482, 300. The shareholding is as follows: -

SAMUEL NJOROGE MUCHIRI - 6, 724;

WILLIAM WOKABI KARANJA - 6, 250;

JOSEPH MONORU MUTURI - 9, 500

SAMUEL KAMAU MACHARIA - 341,151

That Samuel Kamau Macharia (hereinafter called the Respondent) is the director and chief executive of the company.

That the company has neglected to call Annual General Meetings of the company and has not filed Annual Returns since 1985. That the company and the Respondent have refused defaulted and/or neglected to furnish the shareholders of the company, balance sheet, Audited accounts of the company, a statement of Affairs of the company and minutes of the annual general meetings of the company if any.

The petitioners plead that it is just and equitable to wind up the company due to their oppression by the manner in which the majority shareholder has conducted the affairs of the company. That the petitioners have been oppressed in that they have not been informed of: -

"(a) the amount realised on sale of company assets;

(b) the amount paid to the debenture holders who had in 1995 placed the company in receivership;

(c) the amounts owed to creditors (secured or unsecured);

(d) the amounts paid to such creditors;

(e) the balance of the sale proceeds after payments to creditors"*and*

(f) failure to supply the petitioners with copies of audited balance sheet and accounts and minutes for the last four years.

The respondent by his undated affidavit, filed on 1st November 1995, denied that the petitioners have at any one time been shareholders of the company and stated that they are therefore not entitled to the prayers sought.

The petitioners in their rebuttal as contained in their supplementary affidavit sworn on 16th August 2000 averred that as members of staff of the company they were entitled to take up shares in the company as per minute No. 14/81.

The petitioners did take up and buy shares in the company and to prove this they annexed to their affidavit a copy of the company's register of members/shareholders the share certificates of each petitioner, and a copy of the receipt of their payment.

To disprove the respondent's allegation that the petitioners were not shareholders, they annexed a letter by the respondent dated 4th December 1991, written by the respondent to all the petitioners. It is useful to quote a paragraph of that letter as follows: -

"Last but not least, as Mr Karanja indicated during our last meeting, any shareholder has a right to sell his/her shares if he/she wishes.

You cannot sell to one particular person as a demand.

The demand that I do so was merely meant to be derogatory or abusive to me directly as a person. You can sell you shares if you wish and you could also buy mine yourselves if I am willing to sell……"

The respondent filed a further replying affidavit, filed in court on 13th June 2005. He deponed that the petitioners are not share holders, in one paragraph, then contradicted himself in another paragraph by saying that when the company was considering expansion and restructuring that "In execution of that plan, the petitioners were offered shares on the assumption that the plan would work."

The respondent further deponed that the petitioners have nothing due from the company, that they are not oppressed and that they are prompted to bring this present action by greed and selfishness.

The respondent in his stated affidavit gave a detailed catalogue of his individual and sustained fight for the company against person, companies and the then Government that were bent on denying the Company its rights. As a consequence the respondent has filed about eight suits on behalf of the Company. The respondent also stated that through his own personal effort he borrowed funds for the Company. The following quote captures the respondent's stand.

"(h) the majority shareholder has since, 1985, at great personal cost been promoting the interests of the respondent company:"

The petitioners filed a further supplementary affidavit, filed on 28th June 2005. It is deponed in that affidavit that the petitioners have not been invited to the company's annual general meeting for the last 20 years, that the company has not provided annual reports and financial statements, including balance sheet

and account and that the company has not filed annual returns with the Registrar of Companies.

The petitioners further stated that they have not been informed or advised of any major decision made by or on behalf of the Company; and that; "The majority shareholder's effort and attempt to deny the petitioners their rightful place in the company is ……. Oppressive and apparently actuated with malice."

That the respondent sold assets of the Company and filed various suit in court on behalf of the Company without notice to the petitioner.

The petitioners have brought the present action under section 219 (f) of the Companies Act, Cap 486. This section provides that the court may wind up a company if:

"(f) the court is of the opinion that it is just and equitable that the company should be wound up,"

The petitioners presented the present petition as shareholders of the company. To support their contention that they are shareholders, they annexed to the affidavit minute Number 14/81 which showed the resolution to allot shares to members of staff of the company at that relevant time. The petitioners further annexed a copy of the Register of members which reflected their names. It was argued by the respondent that the petitioners did not have locus standi, because they have failed to prove on a balance of probability that they were shareholders. The respondent relied on the case: HC W/U Cause No. 23 of 2002 IN THE ESTATE OF KAHAWA SUKARI LTD and section 120 of the Companies Act. That section provides:

"The register of members shall be prima facie evidence of any matter by this Act directed or authorised to be inserted therein."

The petitioners, as stated herein before, annexed a copy of the company's register, which reflected their names and also annexed copies of share certificates. The respondent other than deponing in his replying affidavit and stating that the petitioners were not shareholders did not annex the company's register to disprove the assertions of the petitioners. The respondent also did not disown his letter to the petitioners dated 18th November 1991, which stated in the last paragraph as follows:

"Last but not least, as Mr Karanja indicated during our last meeting, any shareholder has a right to sell his/her share if he/she wishes.

You can sell your shares if you wish and you could also buy mine yourselves if I am willing to sell which I am not……."

The respondent even in his submissions on the issue of shareholding, as well as his replying affidavits, contradicts himself on his stand with regard to the petitioner's shareholding in the company. The respondent has stated, therein, that the petitioners are not shareholders only to later contradict this stand. On page 6 of the respondents written submission, it is stated:

"The petitioners are the minority shareholders in the said Limited Liability Company. The second respondent is the majority shareholder in the said Limited Liability Company."

The court considered the evidence presented by the petitioners was and having considered the inconsistency of the respondent on this issue finds that the petitioners are members and shareholders of the company. The court therefore have locus to bring the present petition as per section 221 (1) (b) of the Companies Act.

Having made that finding the court now needs to consider whether the petitioners have made out a case for winding up. The words 'just and equitable' found in the section 219 (f), Companies Act was stated in the case of: LOCK AND ANOTHER – VERSUS – JOHN BLACKWOOD, LIMITED J.C. 1924, 783 to be:

"…….words of the widest significance and do not limit the jurisdiction of the court to any case. It is a question of fact, and each case must depend on its own circumstance……"

The respondent argued that the court should dismiss the petition or grant alternative reliefs under section 211 of the companies Act. Section 211 provides for relief and alternative remedy to minority shareholders, that the court may make orders regulating the conduct of the company's affairs in future or in the purchase of the shares of any member.

The petitioners in support of their petition state that the company has failed to file annual returns for the last 19 years; has failed to call an annual general meeting since the petitioners acquired their shares and that without those meetings the petitioners have no information of the company and they remain in the dark as to its status. They further state that the reasons they become members of the company was to get a return on their investment, which they have not to date obtained that the respondent in disposing the company's assets without the approval of the other members, that is the petitioners hereof, was oppressive to them and that they did not get an account of how much the said sale realised since they have not had sight of the directors report, balance sheet or the financial statement. Petitioners are of the view that the respondent has displayed lack of good faith and probity in denying that the petitioners are shareholders and denying them the aforesaid statutory reports. The respondent, they state, has refused to give them audience to discuss the aforesaid matters.

The respondent failed to specifically respond to the contentions of the petitioners and instead denied that the petitioners were oppressed and proceeded to show how single-handedly he has stirred the company in fighting for its rights particularly through various court cases and in ensuring that funding was obtained. To show the respondents attitude towards the petitioner's action one only needs to quote from his submissions where he stated:

"*It also become clear that the petitioners are hypocrites pessimists and greedy persons who are feigning oppression in the hope that the company may be wound up and they hopefully get a share of what they regard to be surplus assets realised through the majority shareholder's entrepreneurship, energies and investment*s."

The respondent's stand as seen in his replying affidavits and submissions seems to go against he 'thread' of consequences of incorporation. As stated in the book Gower and Davies – principles of Modern Company Law 7th Edition:

"…….fundamental attribute of corporate personality from which indeed all the other consequences flow – is that the corporation is a legal entity distinct from its members."

Indeed in the famous case SALOMON – V – SALOMON CO. [1897] A.C. 22, the House of Lords held that the business of a validly incorporated company belongs to that company and not to Mr Salomon. As per Lord Macnaghten:

"The company is at Law a different person altogether from the subscribers."

Having that decision in mind one is tempted to climb to the roof top and shout to the respondent that the company is not his personal property, which he has to protect from the other shareholders, who request for disclosure of how its business is being carried out. A typical example of the respondent's manner of making unilateral decisions and disregarding the views of other members is to be found in his replying affidavit filed in court on 13th June, 2005. Paragraphs 46 and 47 state:

"That the very day when the respondent paid kshs 110 million to debenture holders, Mr Ketan Somaia and other parties forcibly demanded that the assets which were worth kshs 764 million be sold to them for kshs 250 million.

That I could not resist force, the respondent accepted the price and subsequently filed HCCC No. 1042 of 1992, in which it has claimed the difference."

In the case of In RE H.R. HARMER LTD [1959] 1 W.L.R. 62, it was stated as follows:

"If there is oppression, it remains oppression even though the oppression is due simply to the controlling share holder's overwhelming desire for power and control, and not with a view to his own advantage in the pecuniary sense. It seems to me the result rather than the motive is the material thing."

Oppression in that case was defined as: "burdensome, harsh and wrongful."

The respondents failure and actions in relation to the company, although it may well be well intended, amount to oppression to the petitioners. The petitioners are entitled to have the affairs of the company conducted as required by Law and as laid down in the Articles of Association, without being referred to as greedy or hypocrites.

The court does find that the petitioners have, on a balance of probability made out a case for the winding up of the company. Considering how the respondent has for many years failed to account the going on of the company, to the rest of the members, and it does seem from the affidavits filed herein that there is a breakdown of communication between the respondent and the petitioner; it is in the opinion of the court that it is just and equitable that the company be wound up. The respondent states that he has sold assets of the company in times past. It is not clear whether such dispositions were after the commencement of this petition. If indeed they were such disposition are void by virtue of section 224 of the Companies Act.

That as it may be the judgment of this court is as follows: -

(1) That MADHUPAPER INTERNATIONAL (KENYA) LIMITED be and is hereby wound up under the provisions of the Companies Act.

(2) The costs of the petitioners shall be paid by the company Madhupaper International (Kenya) Ltd.

MARY KASANGO

JUDGE

Dated and delivered this 6th March 2006.

MARY KASANGO

JUDGES