REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

WINDING UP CAUSE 12 OF 1995

IN THE MATTER OF MADHUPAPER INTERNATIONAL LTD

AND

IN THE MATTER OF THE COMPANIES ACT

R U L I N G

This court by its judgment dated 6th March 2006, ordered the Winding up of MADHUPAPER INTERNATIONAL (Kenya) Limited (hereafter called the company).

The majority shareholder Mr Samuel Kamau Macharia, being a respondent was aggrieved by that judgement and has since filed a notice of appeal and a Notice of Motion seeking stay pending appeal. The stay bought is stay of the Order to wind up the company. The application is sought under Section 251 of the Companies Act, Rule 7 of the Companies the Companies (Winding up) Rules and Order 41 of the Civil Procedure Rules.

Counsel for S.K. Macharia, the applicant herein submitted that the court should borrow from United Kingdom's practice, where the official received is entitled, on a winding up order being made, to allow any profitable business to continue trading or operating until an intended appeal is heard and determined. That also even where there is no pending appeal, the practice in United Kingdom is for all profitable business to continue running.

Counsel said that this case is unique in that the assets of the company were the pending litigation both in the High court and the court of appeal that the applicant was seeking stay to enable him through the company to continue pursuing the rights of the company in those litigations. That if stay is not granted all pending cases can only be prosecuted by the official receiver. The said official is part of the Registrar general's office and therefore is part and parcel of the Government which eroded the rights of the company which action is subject of the pending litigations. Additionally the applicant stated that since litigation is costly the Official Receiver will not use his own funds to conduct the pending cases and that, the said official receiver has no incentive to conduct the cases. That if that was to happen it would be in violation of the Company's rights of fair hearing enshrined in section 77 (9) of the Constitution. That the applicant, all he seeks, is the right to appeal and that the subject matter of the appeal be protected. That accordingly if stay is not granted the applicant will suffer substantial loss, whereas the respondents will not suffer any loss since their interest, like creditors will be served by prosecution of the pending claims.

The applicant in his affidavit in support introduced issues, which show that he has arguable appeal, for he tried to rehash the arguments raised at the hearing of the petition. In the court's view the fact that the applicant has an arguable appeal or not is not a consideration in an application for stay pending appeal.

The applicant in response to averments in the replying affidavit argued that he was not obligated to get an approval, in the form of a resolution, to file the present application. That by virtue of him being the holder of 94% he had authority to bring the present application. The applicant supported his submission with the case MARSHALL'S VALVE GEAR COMPANY, LIMITED – V – MANNING, WARDLE & CO. LIMITED [1909] 1 ch. 267, and to its holding that:

"**On the construction of article 55, that the majority of the shareholders had the right to control the action of the directors in the matter, and that the motion must be dismissed with costs as between solicitor and client**…"

In response the respondents faulted the application for introducing what they described as extraneous and irrelevant issues in the affidavit in support of the application. That the applicant's plea to continue pursing the company's various litigation ought to be defeated by the court's finding, in its judgement, that the applicant is not accountable to the co-shareholders, that is the respondents.

The respondents also argued that the applicant had failed to show substantial loss that would be suffered by them.

The supporting creditor opposed the application and argued that the application must fail for the applicant's failure to obtain leave under section 228 of the Companies Act. The creditor further argued that the official receiver was bound, by the law, to carry out his duties properly and if he was unsatisfactory the applicant could apply for his removal.

Having considered the above arguments and the affidavit evidence I would in considering my ruling, wish to start with consideration of whether an application to stay a winding up order ought to be brought under Order 41 Rule 4 of the Civil Procedure Rules or section 251 of the Companies Act. I am of the view that the companies Act provide the law regulating the conduct of companies and the rules of procedure. Being so I find that the civil Procedure Act and rules does not apply to matters under the Companies Act. Even if the Companies Act did not provide for stay of winding up orders, the court is adequately '*clothed'* with its inherent power, which can be invoked to issue stay. However I find that section 251 (1) of the Companies adequately provides stay of winding up orders. That section provides: -

"**Section 251 (1) The court may at anytime after an order for Winding up, on the application either of the liquidator or the official receiver or any creditor or contributory, and on proof to the satisfaction of the court that all proceedings in relation to the winding up ought to be stayed, make an order staying the proceedings, either altogether or for a limited time, on such term and conditions as the court thinks fit**."

The applicant under that section ought to satisfy the court that the winding up order ought to be stayed.

For the court to determine whether it is satisfied that stay ought to be ordered I will give the background to the present application. The applicant is the holder of 341, 151 shares in the company. The respondents, who are three, cumulatively hold total of 22, 474 shares in the company. The respondents brought the petition to wind up the company. The respondents brought the petition to wind up the company for the failure to call annual general meeting since 1985, failure of the company to file annual returns since 1985 and failure to furnish the respondents share holders with the balance sheet, audited accounts, statements of affairs of the company and minutes of, if any, of the annual general meeting. The allegations which were accepted by the court in its judgment were that the applicant had locked them out of the affairs of the company and was running the company single handily.

The court having found that the petitioners had proved their case and that it was just and equitable to order that the company be wound up would need the applicant, in seeking stay of that winding up order, to satisfy the court that that order ought to be stayed. The applicant did not address the default that the company finds itself in, in that it has failed to meet statutory requirement of filing annual returns, failed in calling for annual general meeting where audited accounts would be tabled. The applicant instead

proceeded in his present application to dwell greatly on pending litigations, which have been instituted by the company on the initiation of the applicant. The applicant argued that substantial loss will be suffered if the company does not pursue those litigations. The applicant did not at one time address the expense that the company will incur if the company loses those litigation. Much more than that considering the affidavit evidence both in support of the application for stay and in opposition to the petition, the suits which were instituted by the applicant using the company's name, one gets a distinct impression that those suits are personal grudges against the Government and persons who were in power at the time of filling the actions. That to me is not not sufficient reason, nor does it satisfy this court that an order of stay of the winding up order ought to be granted. After all the one accusation against the applicant by the respondents is that they were denied the right to get involved or to know about the running of the company since 1985.

The case of A. & B.C. CHEWING GUM LTD TOOPS CHEQING GUM INCORPORATION COAKLEY AND OTHERS [1985] I W.L.R. 579 it was held:

"**That an entitlement to management participation was an obligation so basic that if broken the association had to be dissolved**;"

Therefore since the respondent had been denied an obligation so basic the winding up order ought to take effect.

The supporting creditor on his submission regarding section 228 is not well founded. The applicant, was the respondent in the petition, it is in that matter where a winding up order was made, that the applicant has sought stay. There is, to my view, no necessity to seek leave of the court to file an application for stay as done here by the applicant. Section 228 of the Companies Act provides:

"**When a winding up order has been made or an interim liquidator has been appointed under section 235, no action or proceeding shall be proceeded with or commenced against the company except by leave of the court and subject to such terms as the court may impose**."

That section gives control to the courts, to afford protection to a company the subject of a winding up order, where there is existing litigation or litigation is being initiated or where a party intends to institute proceedings. The application is not caught by the provisions of this section.

For the reasons stated herein before the application dated 9th March 2006 is hereby dismissed with costs being awarded to the petitioner and the supporting creditors, being payable by the company.

MARY KASANGO

JUDGE

Dated and delivered this 10th July 2006.

MARY KASANGO

JUDGE