



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT BUNGOMA
WINDING UP CAUSE 1 OF 2005**

**IN THE MATTER OF CHETAMBE ESTATES LIMITED
AND
IN THE MATTER OF THE COMPANIES ACT (CAP.486 LAWS OF KENYA)**

BETWEEN

ABDUL AZIZ KANJI PETITIONER

AND

CHETAMBE ESTATES LIMITED RESPONDENT

RULING

Abdul Aziz Kanji, hereinafter referred to as the petitioner, lodged a petition before this Court in which he prayed for the winding up of Chetambe Estates Ltd hereinafter referred to as the company. The petition is dated 4th March 2005. The same is yet to be fixed for hearing.

In a summons dated 17th May 2005, the petitioner applied to this Court under rule 27 of the Companies (Winding Up) Rules to appoint an interim liquidator of the company pending the hearing and determination of the petition. The summons is resisted by the company who filed an affidavit in reply of one Salome Naliaka Mwangale sworn on the 15th day of June 2005.

From the pleadings placed before this court I gather the history of this matter as follows: On the 22nd day of January 1971, Abdul Aziz Kanji (the petitioner), Elijah Wasike Mwangale and Janet Eloise Mwangale jointly caused Chetambe Estates Ltd to be incorporated with the main objective of purchasing or otherwise acquiring moveable and immovable property to enable it carry out the business of farming. Pursuant to that objective the company purchased L.R.NO.4164 (L.R.NO.3801/3) measuring 950 acres from the Lands Ltd using a loan advanced to the company by Kenya Commercial Bank Ltd. The company also purchased a considerable number of moveable assets.

It would appear Elijah Wasike Mwangale was left by the other directors to run the day to day affairs of the company until he passed away on 25th November 2004. Upon the demise of Elijah Wasike Mwangale, the petitioner took steps to establish the state of affairs of the company. The Petitioner discovered that 450 acres was excised from L.R.NO.3801/3 and sold to Hillbrooke Dairies Ltd without his knowledge on 25.2.98. He also discovered that the company had been struck off the register of companies by a gazette Notice of 28th July 1983. The petitioner caused the company to be restored to the register of companies in a gazette notice dated 18th February 2005. The petitioner now complains that most of the activities of the company were done in secrecy without his knowledge. In view of these developments he then petitioned for the winding up of the company.

I wish to now consider the arguments for and against the summons dated 17th May 2005, the subject matter of this ruling. The petitioner has filed a supporting affidavit he swore on 17th May 2005.

The first ground argued by the petitioner in support of the summons is that the petitioner has shown that he has a prima facie case to sustain the prayer for the winding up of the company. Mr Gicheru who appeared for the petitioner urged this court to appoint a receiver because the company does not have the necessary quorum to transact meaningful business. It was averred that at its inception the company had three directors/shareholders namely Elijah Mwangale, the petitioner and Janet Eloise Mwangale. It was pointed out that Janet Eloise Mwangale has migrated to USA hence she is out of jurisdiction of the company and that Elijah Wasike Mwangale has passed away leaving the petitioner as the only remaining director/shareholder. It was argued that in the absence of Janet Eloise Mwangale then the company cannot transact any business for lack of the requisite quorum of 2 directors/shareholders. Mr. Wena who represented Salome Naliaka Mwangale, the administratrix of the Estate of Elijah Wasike Mwangale, deceased, was of the view that there was quorum in view of the fact that there was quorum in view of the fact that Janet Eloise Mwangale is still a director/shareholder of the company. He argued that Janet Eloise Mwangale occasionally visits Kenya hence she is available to meet the required quorum. Mr Wena further argued that the law did not prevent the administrators of the Estate of Elijah Wasike Mwangale deceased, from sitting in the board meetings of the company to represent the interest of the deceased. I have considered the able submissions of both learned counsels over the issue touching on the quorum. Article 14 of the articles of association of Chetambe Estates Ltd sets the quorum of two members. It is not denied that Elijah Mwangale is dead. It is not also in dispute that the other director, Janet Eloise Mwangale has migrated to the United States of America. There is also an averment by the petitioner that there is a dispute as to how Janet Eloise Mwangale came to be a director or shareholder of the company. I have examined a copy of the company minutes annexed to the affidavit of Salome Naliaka Mwangale and it is evident from document that the deceased and the petitioner held a meeting on 12th May 1997. There is no reference of Janet Eloise Mwangale. The other aspect which may lend credence to the petitioner's assertion is the fact that Janet Eloise Mwangale has not filed any reply to the summons nor to the petition despite the same having been advertised in the Kenya Gazette. The only inference I can make is that though Janet Eloise Mwangale is shown as a director/shareholder she has never participated in the management of the company and most probably because of the distance she is. I am convinced that it is possible that the petitioner may prove at the hearing of the petition that the company will lack the necessary quorum to transact business. He is likely to establish that a quorum may arise between him and Janet Eloise Mwangale but a dispute may arise which is likely to paralyse the activities of the company. Mr Wena has argued that the administrators of the Estate of Elijah Mwangale, deceased may sit in the board of the company thus creating the necessary quorum of two. In this regard the law is well settled that where a member of a company dies, his shares rest in his executors or administrators, and the estate is liable for calls if the shares are not fully paid. However the executors or administrators do not ipso facto become members of the company, nor is the company entitled, without their consent, to register them as members. The decision whether to admit the administrators of the Estate of the late Elijah Mwangale as members of the company will solely depend on the decision of the petitioner and Janet Eloise Mwangale.

In an attempt to show that the petitioner has prima facie evidence to sustain the petition for the winding up of the company, Mr. Gicheru urged this court to take into account the fact that the company has not held any statutory meeting since its inception nor has it filed its annual returns as required by law. It was argued that the company had remained dormant for a long time until it was struck out from the register of companies on the 5th day of August 1983. The petitioner had to take steps to have the company restored on 25.2.2005. The company did not dispute these facts. I am satisfied that the petitioner has shown that he has prima facie evidence that the company is likely to be wound up. Basically the petitioner is stating that he would be relying on the principle that it would be 'just and equitable' to convince this Court to issue an order to wind up Chetambe Estates Limited. When applying this principle this Court's jurisdiction is not fettered. The Court will apply its discretion judicially and of course depending on the facts and circumstances of each case before it.

In this matter the petition has alluded that he is to offer evidence to prove the following facts inter alia: First, that he lacks confidence in the conduct and management of the company's affairs. Secondly, that the late Elijah Mwangale lacked probity in the conduct of the Company's affairs to the extent that he treated the business of the company as his own. Thirdly, that there would be lack of quorum to conduct the company business in the absence of Elijah Mwangale, deceased, and Janet Eloise Mwangale. Fourthly, that the company failed to supply accounts and information with a consequence that the

petitioner is unable to know the overall state of affairs of the company.

Fifthly, that even if a quorum arose to enable the company hold regular meetings he has no confidence in the other director hence they cannot work together in the way they could at the time of the inception of the company.

I believe the above issues are valid grounds which are strong enough for this Court to hold that the petitioner has established that he has prima facie evidence to prove that it is necessary for Chetambe Estates Limited to be wound up. This is one of the grounds necessary to be proved before appointing a receiver.

The second ground argued by the petitioner is that it is necessary to appoint a receiver to preserve the assets and to ensure continuity in the company business pending the winding up of the company. It was argued that since there is lack of a quorum, the only person who can conduct the business of the company is the official receiver. The petitioner annexed to his affidavit a copy of the list of assets which he thought the receiver should take possession upon appointment. On his part, Mr Wena pointed out that the petitioner was no longer a director nor a shareholder of the company because he was brought out and that the application was lodged for purposes of harassing the administrators of the Estate of Elijah Mwangale. Mr. Wena accused the petitioner of having filed the petition in bad faith and that he was actuated by malice.

I have considered the rivaling submissions and at this stage I have not been shown tangible evidence that the petitioner ceased to be a director or a shareholder of the company. I have not also been given the particulars of malice or bad faith on the part of the petitioner. Perhaps these matters will become clear when the petition is heard and determined otherwise for now I am convinced that the petitioner has shown good and sufficient grounds to enable this court grant him the prayers under rule 27 of the Companies (winding up) Rules.

The petitioner has averred that the company seal and various assets are in possession and custody of persons who are not shareholders or directors of the company. This averment is not countered by the company or the administrators of the Estate of Elijah Mwangale deceased. It is only fair and just that the revenue due from the company's assets should be secured and accounted for through an interim liquidator. The power to appoint a provisional liquidator conferred on the Court by sections 234 and 235 of the companies Act is wide and unfettered. The law gives this court the power to appoint a provisional liquidator to take possession of and protect the company's assets at any time after the presentation of a winding up petition and before the making of a winding-up order.

The upshot is that the summons dated 17th may 2005 is allowed as prayed. Costs shall be met by the company.

Dated and Delivered this 28th day of October 2005.

J. K. SERGON

JUDGE