



**REPUBLIC OF KENYA**

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

**WINDING-UP CAUSE NO. 17 OF 1996**

**IN THE MATTER OF KENTAZUGA HARDWARE LIMITED**

**AND**

**IN THE MATTER OF THE COMPANIES ACT (CAP. 486) OF THE LAWS OF KENYA**

**J U D G M E N T**

In a petition dated 6th May, 1996 and filed on 26th June, 1996, John Njoroge Michuki and Rose Waruino Muthemba seek one main prayer and an alternative prayer. The main prayer they seek is that Kentazuga Hardware Limited be wound up by the court under the provisions of the Companies Act and that a person other than the official receiver be appointed under section 231 of the Companies Act for that purpose. The alternative prayer sought is that the voluntary winding-up of Kentazuga Hardware Limited be continued but subject to the supervision of the court and that a person other than the official receiver be appointed under section 231 of the Companies Act for that purpose.

The other prayer is the usually abused saving prayer that the court do make such further order as may be just in the circumstances. The two petitioners, Rose Waruino Muthemba and John Michuki presented the petition as the Administrators of the Estate of the late Louis Njuguna Muthemba (her husband) who died on the 14th day of October, 1985. The two petitioners stated at paragraphs 17 and 18 of the petition as follows:

**“17. Louis Juguna (sic) Muthemba died on the 14th day of October, 1985 at Nairobi and on the following year your petitioners were granted letters of administration of his estate intestate and thereby became the holders of 50,000 shares in the company.**

**18. The shares are currently held by your petitioners in the name of Rose Waruino Muthemba.”**

In the petition, the petitioners state what I may sum up in brief that the late Louis Njuguna Muthemba who was a brother to Andrew Mungai Muthemba (who was also deceased by the time this petition was heard) floated the company of Kentazuga Hardware Limited in 1968 to conduct business as dealers in hardware and other related businesses. They state further that the two brothers floated the same company with the intention of running the company as a family enterprise and “*both contributed equally to the management of the business*”. Rose Waruino Muthemba (the second petitioner) was at inception of the company appointed a director of the company whereas her husband Louis Njuguna Muthemba was the company secretary and the respondent, Andrew Mungai Muthemba (now deceased) was also a director of the company. According to the petition, the company traded very successfully between 1968 and 1985 and grew from a small company into a big and enterprising company and it did, during the said period, purchase two properties, Beaver House along Tom Mboya Street registered as L.R. No. 209/663 and a

godown along Patel Road LR. 209/8172, both in Nairobi. However, beginning the year 1984, personal relationship between the brothers began to deteriorate with the effect that the business went down and the company ceased to function effectively as management became increasingly impossible and by the year 1985, the company had ceased trading. The two brothers then decided to dissolve their joint operations and to hold their respective shares in the company and the petition states there were resolutions passed at various meetings in an attempt to wind-up the company voluntarily. These attempts did not succeed and Louis Njuguna Muthemba died before the company was wound-up voluntarily. After Louis Njuguna's death, Andrew Mungai Muthemba again approached the second petitioner for voluntary winding-up of the company but these attempts again fizzled away by October 1992. Thereafter, there had been serious misunderstandings between the second petitioner and Andrew Mungai Muthemba (deceased) such that no business has ever been carried out by the company although the properties acquired by the company are already physically divided between the second petitioner and Andrew Mungai Muthemba. According to the petition, the petitioners therefore seek the winding-up of the company because:

**“(a) It has since 1984 ceased to operate along its original objects.**

**(b) It is impossible for the properties of the company to be managed jointly due to the acrimonious attitude of one of its directors, Andrew Mungai Muthemba towards your petitioners.**

**(c) The children of the late Louis Njuguna Muthemba who are beneficiaries of this estate would have great difficulties operating as partners of Andrew Mungai Muthemba.**

**(d) In the present state of affairs, it would be impossible to equally distribute the half share of the company among the beneficiaries referred to.”**

The respondent company, in its reply dated 11th October and sworn by Andrew Mungai Muthemba states, again in brief, that whereas he, (Andrew Mungai) incorporated Kentazuga Hardware Limited in 1968, he did not incorporate it with Louis Njuguna Muthemba as alleged by the petitioners but rather he incorporated it with two other directors. He further states that the late Louis Njuguna Muthemba was invited to be a director of the company in 1969 but this was on gratuitous basis and the late Louis Njuguna Muthemba never held any shares in the company until his death. He (late Njuguna) was only on a monthly salary for being a director. Thus, the company denied the allegation that the second petitioner had 50% shares of the company by virtue of being the administrator of the deceased's estate. In the same reply, the company through Andrew Mungai Muthemba maintained that there had been no bad blood relationship between the alleged two shareholders i.e. Louis Njuguna Muthemba and Andrew Mungai Muthemba and states that the company is still in operation and is pursuing the objects and purposes for which it was incorporated.

According to the reply, no attempts had been made to have the company voluntarily wound-up. The reply to the petition states further that the petitioners (particularly the second petitioner, Rose Waruino Muthemba) lacks locus standi to being the petition as she is not a director, contributory, and/or share holder in the company and her allegation as concerns the impossibility of managing the properties of the company jointly have no basis and that the company cannot in law be wound-up compulsorily on the **“just and equitable principle”**.

The above are in my view the salient parts of the pleadings which the parties presented to the court and which, in law, they were bound to prove albeit within the standards of probabilities. Before the petition was set down for hearing, several interlocutory applications were made and were each dealt with by the court. The most important of them was an application that sought striking out of the entire petition. The court (Hayanga J., as he then was) on hearing that application dismissed it but struck out paragraphs 26, 27, 28, 32 and 33 of the petition. Although the petitioners indicated that they would appeal against the same order, there is nothing on record to show that that then intended appeal was pursued and if pursued, that it succeeded. The effect of that is that paragraphs 26, 27, 28, 32 and 33 of the petition before me did not form part of the pleadings when the petition was canvassed before me.

The second petitioner, Rose Waruino Muthemba, gave evidence as PW 3. She is the widow of the late Louis Njuguna Muthemba. The first petitioner, John Njoroge Michuki, is her uncle and that is why she filed the petition jointly with him. The company, Kentazuga, was incorporated in 1968 when her late husband was working in a bank and the late Andrew Mungai Muthemba had no job. The name Kentazuga was a name suggested by the second petitioner after her late husband told her the company would be trading in Kenya, Tanzania and Uganda. After incorporating the company, her late husband resigned from his job in the bank to concentrate on the business. Her husband raised the capital to start the business from CFC, Kenya Capital Finance, Commercial Bank of Africa and Kenya Commercial Bank where he was working. The company was operating on Tom Mboya Street at a site where Beaver House now stands. Beaver house was put up in 1980 after the company bought the same plot in 1973. The company's registered office is at Beaver House. At the time of incorporating Kentazuga, Andrew Mungai Muthemba was working with some Asians, one of whom is Natin Patel at the same house which stood where Beaver House is now built. Andrew was learning how to do hardware business. Her husband told her that Andrew Mungai Muthemba had 50% of the shares in the Kentazuga Company and her husband also had 50% of the shares. The Asians were employees of the company. Natin Patel, Andrew and her husband were the directors of the company. The two brothers had interest in other companies as well. Between 1979 and 1980, the relationship between Andrew and Louis became bad and after her husband passed away, she decided to go and take over his office and continue business with Andrew. At that time, Kentazuga was operating at Beaver House and on Pate Road in Nairobi where it had a godown. There was another godown at Bamburi Road in Industrial area. When she moved to take over her husband's role at Beaver House, Andrew made it difficult for her to enter the relevant offices as he became hostile to her and even attempted to refuse giving her keys to the relevant parts of the premises. Andrew wanted her to stay at home and only go for help whenever she wanted help. They never had meetings of Board of Directors. Earlier, before her husband died, he had told her of his frustrations at the hands of Andrew and that they (Andrew and Louis) had decided as a result of the same to wind-up the company and go their separate ways. The strained relationship between them affected the other companies to which the two had interest such as Universal Industries, Commercial & Hardware, Bussy Beaver Manufacturing Company, Ken Pumps and Appliances, and Bussy Beaver Limited. After differences arose between the two, they decided to share out the goods in the various companies. When the second petitioner eventually occupied an office at Beaver House, Andrew told her she could take two floors and Andrew would also take two floors to manage. The total income from the floors would be shared equally. The second petitioner would take 2nd floor and 4th floor while Andrew would take 1st floor and 3rd floor. She floated a company, Underwoods Limited to run the floors and Andrew used the name Wema Holdings to run his portion of Beaver House. That arrangement worked till 1997 when Andrew decided to stop the 50/50 arrangement. She tried to put into effect the resolution passed between her husband and Andrew to wind-up the company but Andrew frustrated the same as he refused to surrender title deed to effect the subdivision of the properties. She narrated in details attempts to divide the properties and attempts to have each of the two i.e. herself and Andrew, bear responsibilities for each of the various plots and the frustrations she encountered from Andrew in doing the same. To her knowledge, the company had not filed any statutory returns. On the affidavits sworn by Andrew denying that her husband was a shareholder in the business, her response was that earlier, prior to filing the affidavits, Andrew had never denied her late husband's interest in the company. At the Beaver House, Andrew made it very difficult for herself and her tenants to access several essential services such as the water tanks on the roof, and parking areas and as a result of all these frustrations, she moved her office to another area. That was with the advice of her elder brother-in-law, Dedan Chege Muthemba. Later, she realized that Andrew had floated a company called Kentazuga Nairobi Limited which was, in her view, the company formed to collect all the Kentazuga company monies held by debtors and so all the money that was out with debtors was siphoned to that company. After sometime, that company was wound-up. She developed half the plot at Pate Road single handedly as the company had developed the one part but refused to help her develop the other half.

From the time she went to Andrew's office and the floors of Beaver House were divided, the two did not communicate except in writing through cheats. The Pate Road plot is divided into two and the petitioner had half as Andrew also had half of the plot. She lets out her half share whereas Andrew also used to let out his half share. The two floors she took at Beaver House are still hers, although as a result of the animosity she let out her part. They shared the rents for the two shops on the ground floor equally. This was till 1997 when Andrew directed tenants to pay him the full rents. Andrew collected debts that accrued

to the company before the petitioner's husband died but did not pay to her, her share except a small part after she came to know of some of the debts that were collected such as the money left in fixed account with Continental Credit Finance Company. She produced a bundle of documents, one of which was a document presented by Kiagayu, Advocate who was working as company lawyer employed by Kentazuga. In that document, Kiagayu found it fit to let her have 50,000/= shares which belonged to her husband as an administrator of her husband's estate. That represented 50% of the shares in the company. A firm of Advocates, namely Hamilton, Harrison & Mathews carried out a search for her and the search showed that her husband, the late Louis Muthemba, had 50,000 shares and Andrew Muthemba also had 50,000 shares. Directors were Andrew Muthemba and herself and her husband was the secretary to the company. Another firm of Advocates, Ndung'u Njoroge & Kwach Advocates wrote a letter advising the company on how to divide the company properties. The petitioner also produced letters in which Andrew asked her to buy 50% of Beaver House and 50% of Pate Road plot or sell the same to him and she produced another letter reminding her of the same. She ended her evidence in chief by stating that there was no possibility of their working together as they do not communicate; do not hold any meetings and there is a lot of bitterness between the two of them such that they cannot operate the company and her children would not operate the company at all.

On cross-examination, she said she was a director by virtue of her being the Administrator of Louis's Estate as Louis was a share holder in the company. Earlier on, she was involved in her own business and was not involved in Kentazuga previously. Her late husband was a banker with Ottoman Bank, but joined Kentazuga Hardware in July 1969, but she had no evidence that that was the year her husband joined Kentazuga. Her husband, Louis, stopped working with the bank at the end of 1968. According to her, Kentazuga was incorporated in November 1968 and her husband joined as a co-owner of the company. Shown page 4 of the Memorandum and Articles of Association, she admitted that her husband's name did not appear there as one of the shareholders, but said that was because her husband was still working with the bank and his terms of service did not allow him to join the company. She felt her husband must have entrusted his shares to somebody and most likely his brother Andrew. She admitted that she had no documents e.g. prospectus to show that her husband and Andrew ever had any arrangements such as financial arrangements to float Kentazuga Hardware Limited together. She further did not have any resolution to show that some shares had been given to her husband and she would not know if there was a resolution authorizing her husband to have shares in Kentazuga Hardware Limited. Her husband was not a salaried director. The other directors were Commercial Hardware, Andrew Muthemba and Natubhai Patel. Louis's shares would have been entrusted to any one of those named in the Memorandum of Association, but she admitted that she had no deed or memorandum of understanding to support her contention on that aspect. Her husband (Louis) did not give her any paper to show he (Louis) was a director. Relationship between Andrew and Louis started being strained between 1980 and 1981. There was a Board of Directors' meeting in 1985 but she was not aware as to who called the meeting. Only Louis and Andrew attended the meeting as the Asian director had left the country.

The petitioner was in the United States at that time. Her husband (Louis) told her on phone to return home quickly as he (Louis) and Andrew, were parting ways and were sharing out everything. Although she was given a copy of the minutes of the meeting, the same was not produced by her as it was not an original document. Her husband recorded the minutes. The intention of the meeting was to wind-up the company. After her husband's death, and when she went to Beaver House, Andrew called her to his office and told her she would take 2nd and 4th floor while Andrew would take 1st and 3rd floor. The two shops could be shared but no minutes of the same meeting were recorded.

She did not call any meeting of the directors although she was aware that as a shareholder, she could call a meeting of directors but there was hostility between them. She did not write to Andrew any letter calling for a meeting. In any case, they had stopped operating as a company in 1984 so that there was no company to run as only the buildings were left. Further, Andrew had written to the Registrar of Companies saying Kentazuga was no longer in operation. At one time, her husband was bitter that Andrew was spending a lot of money overseas with women not his, but she had no evidence to support the same. When referred to page 30 of Exh. 3, - Return of Allotment, she said the same were prepared by Kiagayu, and filed by the same Kiagayu but she did not know whether Kiagayu was a company secretary or not. She stated further that she did not have any evidence in writing of her husband's shareholding in

the company. Her husband's title deeds were used by the company to secure the loans but she did not have any documents to show how many shares her husband had in the company. She also stated that they make profit from the rent collection. She wants the company to be wound up because it was no longer trading as the company has no bank account; there are no board meetings, they are unable to communicate as the relationship is so tense that it is no longer possible to run the company. Rents are being collected separately. She accepted that according to the Memorandum of Association, one of the objects of the company was to purchase properties and Beaver House was purchased pursuant to the same objective but the company is no longer doing any other business. She referred to a letter dated 10th January, 1986 addressed to the Registrar of Companies, which stated that Kentazuga was no longer in business. She further agreed that prior to the filing of the petition, the buildings were leased and that was in line with the objects of the company.

In re-examination, she said debts which were uncollected amounted to about Ksh.6,000,000/= or thereabouts. She also stated that apparently, Andrew Mungai Muthemba had incorporated Nairobi Kentazuga Company on 13th September, 1985. That was two months after their final meeting on the subject of winding-up and that was incorporated solely for purposes of collecting the outstanding debts. There was Ksh.395,000/= which was deposited in the Continental Credit Bank. When she discovered that a cheque for this money had been paid to Andrew, she claimed her 50% share to be paid to her and it was eventually paid.

The petitioner called two witnesses. PW 1, Mary Grace Wambugu, was an officer from Income Tax Department of Kenya Revenue Authority. She produced original Income Tax File for Kentazuga Hardware Limited - Exh. 1. The file contained tax returns filed by the company. These were returns between the years 1973 to 1982. In answer to Mr. Lutta for the defendant, she stated that the returns are prepared by an accountant and after the same are prepared, they are signed by the director and the returns she produced were prepared by an accountant. The other witness, PW 2, Hezron Wabomba Wamalwa, was a document examiner. He examined a set of three (what he called) known handwriting (marked K1-K3) and sixteen questioned documents marked Q1 - Q16. He was to establish whether or not the handwriting on Q1 - Q16 were in the same hand as K1 - K3. He examined the same and in his opinion, they were all in the same hand. He also examined signatures on Q1, Q2, Q4, Q5, Q6, Q7, Q8, Q10, Q13, Q14 and Q16 with known signatures on page 11 of the schedule and K2 and found them to have similar formations. His report was Exh. 2.

After the close of the petitioners' case and before the company's case could start, the court was informed that Andrew Mungai Muthemba passed away. This necessitated a fairly lengthy adjournment as parties were still contemplating the next move in the entire matter. When the hearing resumed, the company called four witnesses.

The first witness of the company was Hilda Muthoni Karanja. She was a sister to both Andrew Mungai Muthemba and Louis Njuguna Muthemba. She was the eldest of the three. According to her, Andrew went to Moscow for studies in 1966 and returned in 1969. He was then employed as a teacher at Kabete Approved School but after about two years, left teaching and went to Nairobi to look for employment. He met two Asians, Patel & Natubhai with whom he set up a business. The place of business was next to Ambassador Hotel but she could not remember the name of the building. At that time, Louis Njuguna Muthemba was employed at Ottoman Bank. At the time Andrew and Asians did business, Louis was not doing any business. The two had no joint venture and she did not know any business they were doing together. Andrew had no money. His mother gave him two plots which he sold and raised money to start the business. Plots were located at King'uru. They were sold at Ksh.200/= each, totaling Ksh.400/=. This was about 1968. With this money, he joined Asians. She knew Andrew started the business and then called Louis to join him. She does not know the year Louis joined Andrew in business but it was two years after Andrew and Asians started their business. Andrew and Louis loved each other as blood brothers but she knows that at one time the two divided the properties at Thika shop. She did not know whether Louis has shares in Kentazuga Hardware Limited. The two Asians were shareholders. She knew Asians were the owners of the business. On cross-examination by Kowade for the petitioners, she stated that from the time she was married, she was not staying with Andrew but in 1970, she was staying with Andrew. Sometime she was at Kabete while Andrew was at Karen. She was aware that before Andrew joined

Asians in business, he had no job and no means of income while Louis was an officer with Ottoman Bank. She did not know when Kentazuga Hardware Limited was incorporated neither did she know when it started operating. She did not know the origins of the name Kentazuga.

Later she remembered that the business started in a house which was then standing where Beaver House is now built. That house was demolished to give way for Beaver House, and the money used for building Beaver House came from the Bank. She did not know that Louis was a shareholder and director of Capital Finance Limited. She did not know that Louis's property at Kiambu was used as security for monies used in building Beaver House. She did not know how many companies Louis and Andrew had together. She had not been involved in the day to day running of Kentazuga Hardware Limited, neither had she been involved in the decision making of the company. She accepted that Louis and Andrew divided properties at Thika which in re-examination, she said belonged to Louis and Andrew, but she did not know whether the same properties divided belonged to another company. In re-examination, she admitted that Andrew could not have sold the plots belonging to his mother in 1968 as he (Andrew) returned to Kenya in 1969.

Lucy Wanjiku Njoroge was an employee of Kentazuga Hardware Limited having been employed before the company was incorporated. By the time the company started working, she was there and her employers were Andrew Mwangi Muthemba and Natubhai Patel. She was employed as a secretary. Muthemba and Natubhai were at that time sharing one office. Natubhai was trading as commissioning agent with a company called United Representatives while Andrew was trading as Kentazuga Trading Company. Andrew was also a commissioning agent. Andrew would get orders from Government and Natubhai would get material from Asian Suppliers on commission. Kentazuga was opened in 1969 but it was incorporated towards the end of 1968. According to her, Andrew Mungai Muthemba, Natubhai Patel and another Asian Laljibhai Patel registered Kentazuga Hardware Ltd. Laljibhai was a supplier of goods for Commercial Hardware which was his, while Andrew and Natubhai were the people behind the business. She came to know Louis Njuguna Muthemba later but never saw any documents indicating that Louis was a shareholder of Kentazuga Hardware Limited. She worked with Kentazuga upto 1984. She never dealt with the petitioner. Natubhai & Laljibhai were directors of the company and not employees. Louis joined the company on a full time basis in 1977 or in 1978. In the first four years of the bank's inception, Kenya Commercial Bank would give the company overdraft to do the business. Later, Laljibhai left to start another business called Comhand. Natubhai also left at about the same period. She was not dealing with any documents that would indicate shareholding in Kentazuga Hardware Limited. She used to address Louis's letters as director but not as shareholder. When she was there, several other companies were started and one of them was Bussy Beaver Limited which was Louis's company. All those companies would draw stock from Kentazuga. After Natubhai & Laljibhai left, Louis was managing the company from Industrial Area while Andrew was managing it from town. Beaver House, Bamburi Place, and another building on Pate Road Industrial Area were all built by Kentazuga and belonged to Kentazuga Hardware Company. By the time the company closed, Beaver House and Pate Road plots were fully developed. When she left working with the company, no properties of the company had been divided between the shareholders.

In cross-examination, she said that after Natubhai and Laljibhai left the company, the signatories to the bank accounts were Louis and Andrew, but she did not know who was the Finance Director of the company, neither did she know who was the company secretary. She did not know how the rent from the rented premises was shared out. She also did not know how the loans used for putting up such properties as Beaver House were secured. Beaver was an idea of Louis and he also gave the building the name of Beaver House. She never sat in any board meetings of Kentazuga. She was not able to answer whether the company had a management Board. She used to type only documents showing Louis Muthemba as director and not as shareholder. She did not know who bought shares of Natubhai and Laljibhai when the same two shareholders left the company. She ended by stating further that she never typed any letter heads showing Andrew Muthemba as shareholder of Kentazuga. In re-examination, she added that in her capacity as the secretary, she could not have known all the financial transactions of the company.

Johnson Otieno Adera is working at the department of the Registrar General in the Attorney General's Chambers. He produced a skeleton file of Kentazuga Hardware Limited in the absence of the original file. According to the reconstructed file, the original subscribers of Kentazuga Hardware Ltd. on incorporation

were three, namely, Commercial Hardware Limited, which had one share, Mungai Muthemba, who had one share, and Natubhai Bithalbhair Patel who also had one share. Thus, the total number of shares at the inception of the company were three and Louis Njuguna Muthemba was not reflected as one of the shareholders at that time. He produced copies of the documents to that effect after laying the basis for the production of the copies. He did not have any original documents as the file could not be traced and the copies he relied on were supplied to the department by a firm of advocates way back in 1996. The documents that he produced however did not reflect the names of Louis Muthemba. Documents dated 12th May, 1979 showed that Mungai Muthemba had 1677 shares, David Muthemba had been allotted 1660 shares and John Mungai had 1560 shares whereas the returns dated 20th January 1981 had Mungai Muthemba allotted 25,000 shares, David allotted 10,000 shares and John had 10,000 shares. On 20th October 1996, the firm of Boisabi Oyaro & Company Advocates requested for a list of the then (as at 1996) directors and shareholders of the company and the Registrar General's office responded and gave the list of the then shareholders as Mungai Muthemba, David Muthemba and John Muthemba. He produced the same letter dated 15th October, 1996 as the reply they gave to the firm of advocates. It was produced as Exh. DB. In his evidence, the name Louis Muthemba was not shown as a shareholder and the name of Rose Muthemba was also not shown as a shareholder. On cross-examination, he said that because in the past, files and documents used to get lost often, the registry had devised a practice whereby whoever wanted to file documents at the registry would be required to photocopy the same documents he was presenting so that should the documents filed get lost, the same person presenting the documents would have copies readily available for reconstruction of the file. That practice had been at the registry for a long time. He did not know the person who presented the copies he was producing in court to the Registrar of Companies. The company secretary according to the records was Rael Njeri Kiarie. He could not tell the court under what circumstances the file of Kentazuga got lost but the registry loses many files. He however would not know whether what he produced of the contents of the file reflected true copies of the original documents as he only came to handle the file after receipt of summons to give evidence in court. The photocopies are normally taken before stamping the documents at the registry. In re-examination, he said that the copies produced had not been challenged.

The last witness for the company was Raojibhai S. Patel. In 1967, he was one of the directors of Commercial Hardware on Tom Mboya Street (then Victoria Street). He was holding 29% of the shares in that company. Nashibhai C. Patel and Manibhai C. Patel were the other directors. They were doing industrial hardware business. In 1968, Natubhai Patel introduced Andrew Muthemba to him as a person who knew many government departments and so could help bring the business for their company. Natubhai was running his own business and was importing goods through his agency and the witness was also importing goods through Natubhai's company. After five months, they opened Kentazuga Hardware Limited. Shareholders were Commercial Hardware with 49% whereas Natubhai Patel and Muthemba had jointly 51%. The witness got involved as his company had 49% of the shares in the company. Commercial Hardware Limited supplied Kentazuga with goods for their business. The Kentazuga Hardware shop was on the present Tom Mboya Street next to Ambassador Hotel. Directors of Kentazuga Hardware Limited were Commercial Hardware, Mungai Muthemba and Natubhai Patel and this witness used to represent Commercial Hardware in the Board of Directors' Meetings. At the commencement of the company, he did not know Louis Muthemba but he came to know him early 1969 when Andrew introduced Louis to him. They stayed at the building on Tom Mboya Street upto 1976 but he was not a shareholder or a director in the company.

The signatories to the account, which was at National & Grindlays Bank were Andrew Muthemba who would sign for Kentazuga and either this witness or M.C. Patel for Commercial Hardware. The witness worked for Commercial Hardware upto 1973 and as at that time, Andrew Muthemba was the Managing Director of Kentazuga Hardware Limited. Natubhai was in charge of sales while Commercial Hardware looked after the finances. Later when this witness returned to the witness box, he told the court that Louis Muthemba joined Kentazuga Hardware Limited in 1970 as Sales Manager and General Manager in-charge of sales in Industrial Area Godown. However, according to this witness, Louis Muthemba never brought any capital into the Kentazuga Hardware Limited. When Kentazuga started, it was Commercial Hardware that provided all the capital and none other provided the original capital to the company. The account was moved from National & Grindlays Bank to Commercial Bank of Africa in 1973. There was a building where Beaver House now stands. The company, Kentazuga, was a tenant in that building but

either in 1971 or 1972, the same building was bought by Kentazuga Hardware Limited from Rahemtulla at a price of Ksh.240,000/= which was paid by installments. Later the other companies were closed down and all the 49% shares were transferred to Kentazuga Hardware Limited. Upto 1973, the shares in Kentazuga were held by Andrew Muthemba and Natubhai Patel. This witness later joined Kentazuga and was offered 25% of the shares in Kentazuga Hardware Limited. At that time, only Andrew Muthemba and Natubhai were the two directors of Kentazuga. Louis Muthemba was a nominated director but was working like the witness who was also a nominated director, without a share holding. On dividend, Natubhai would give 25% of his dividend to the witness. In the same way Andrew would also give 25% of his dividend to Louis Muthemba. Louis Muthemba used to report on duty at the company premises everyday till he got sick which was about 1975 or 1976. The witness eventually left Kentazuga Hardware Limited in either June or July 1979. He and Natubhai resigned from the company in 1979 after Andrew Muthemba got involved in politics in March 1979. Natubhai was then paid his shares and he divided that with the witness. Natubhai's shares were sold to Andrew by way of a transfer form signed by Natubhai and given to Andrew. When he left in 1979, Louis was the General Manager and was working as usual but the witness did not know what happened after he left the company.

In answer to Mr. Kowade's questions in cross-examination, he said he was not aware that Andrew Muthemba was running other companies during the times he (witness) was with Kentazuga Hardware Limited, but he knew of companies called Kenpumps and Allied Equipment Limited which belonged to Andrew, himself (witness), MR. Rao and Jakin but these were part of Kentazuga Group of Companies. He did not know how many shares were listed initially. He was the company secretary in 1973 and thereafter Natubhai became the company secretary. He was not aware that Louis was at any time a Company Secretary. After 1973, Andrew Muthemba held 50% shares and Natubhai Patel held 50% shares. Louis Muthemba had no shares. He was just a nominated director and that was upto June or July 1979 when he left the company. He did not know that Rose Muthemba joined the company as a director after her husband had died. He admitted that when he met Andrew in 1968, Andrew had no any source of income whereas Louis was in gainful employment. On re-examination, he agreed that when he was at Kentazuga, Louis was their Company Secretary.

The above is a fairly detailed summary of the evidence that was adduced in the entire case. I make no apology for its being somewhat detailed because, in my mind, and reading the pleadings and the submissions, five issues came out clearly for answers in this case. These are three issues of fact and two issues of law. The issues of fact are, first, whether or not the petitioners, either on their own or through the deceased husband of Rose, the second Petitioner, had shares in the company Kentazuga Hardware Limited or whether either of the two had shares in the same company. The second issue of fact is whether the relationship between the shareholders i.e. between the petitioners or either of them as a shareholder and other shareholders, had deteriorated to an extent that the legal principles of "*just and equitable*" winding-up would be evoked. The third issue of fact is whether or not the company was still effectively in business and was to that effect, still carrying out its core functions such that it would not be just and equitable to wind it up. The two issues of law that must, in my mind, be answered are, first, supposing the petitioners are not shareholders, or have not proved positively that they are shareholders or that the deceased whose estate they administer was a shareholder, can a winding-up order be issued at their behest, and secondly, on the evidence before the court, can a winding-up order be issued on the basis of "*just and equitable principles*". These are issues that require that all the relevant evidence already adduced in this case be considered and analyzed at some length.

The petition, part of which I have referred to hereinabove, states at paragraph 17 that Louis Njuguna Muthemba died on 14th October 1985, but that before his sad demise, he was the holder of 50,000 shares in Kentazuga Company and that the two petitioners are the administrators of his estate. It goes on to state at paragraph 18 that the same shares are now held by Rose Waruino Muthemba, the second petitioner herein, by virtue of the fact that she is one of the administrators of the estate of Louis Njuguna Muthemba, the deceased. It is upon those assertions of facts that the petitioners say they are entitled to bring this petition. In short, they bringing this petition in their capacity as shareholders or contributors in the company – Kentazuga Hardware Limited. The petition further states that as at the time the petition was presented on 6th May, 1996, Rose Waruino Muthemba, the second petitioner, was the holder of all the alleged 50,000 shares having acquired the same by virtue of being the administrator of the estate of Louis

Njuguna Muthemba. Earlier on, in the petition at paragraph 5, the petitioners state as follows:-

**“In November 1968, Andrew Mungai Muthemba and his late brother Louis Juguna (sic) Muthemba floated the company to conduct business as dealers in hardware and other related businesses.”**

These allegations were denied in the company’s reply to petition. At paragraph 6 of the reply, Andrew Muthemba states that whereas he agrees the company was incorporated, he did not incorporate it with his brother Louis Njuguna Muthemba. He incorporated it with two other directors. At paragraph 7, he agrees that he invited Louis to be a director of the company on gratuitous basis but the said Louis did not hold any shares in the company up until his death. My understanding of all these allegations and denials is that the petitioners having made allegations that Louis Njuguna Muthemba, whose estate they are administering, had 50,000 shares in the company which Rose, his wife, has taken over as administrator, and as the same allegations have been denied, they have the burden of proving that Louis had shares in the company. Ideally, they have undertaken to prove that he had 50,000 shares in Kentazuga Hardware Limited but, in my mind, for purposes of bringing themselves within the ambit of section 221 of the Companies Act Cap 486 of the Laws of Kenya, all they needed to do is to show that they are administrators of the estate of a deceased who was a contributor or a shareholder. Even if they prove ownership of less shares than 50,000, they would still have proved their capacity to seek winding-up of the company. I will consider the provisions of that section later in this judgment.

First, I need to consider whether the evidence adduced by both sides to this petition satisfies me that the petitioners are or either of them is a contributor or a shareholder as is alleged in the petition and denied by the company.

In my mind, to prove that the petitioners are or either of them is a contributor or a shareholder, all they need to do is to show the court that the deceased, whose estate they are administering, had share certificates to show he held shares in the company. Alternatively, they or either of them needed to show that they were allottees of shares in the company. In the reported case of Re JN2 Ltd. [1977] 3 All ER 1104 to which I will later refer in this judgment, it was held as follows:

**“An allottee of shares was liable to contribute to the assets of a company in the event of its being wound up even though his name was not included in the register of members of the company. Accordingly an allottee who was not a registered shareholder was a contributory for the purposes of s. 224(1) of the 1948 Act and was therefore entitled to present a winding-up petition.”**

Thus, even though one may not hold share certificate to prove he is a shareholder and one’s name may not appear in the register of the company, if one is able to prove that he is an allottee of shares in the subject company, he can bring a winding-up petition. I do believe that there must be other ways of proving that one is either a registered shareholder in a company or an allottee. The proof of shareholding or of being an allottee in such situation where one’s name is not in the register must be to such a standard that the court is left in no doubt whatsoever, that although not registered, the circumstances are such that the only conclusion the court must come to is that one is an allottee of shares in that company.

In this case, the company has denied the 2nd petitioner’s allegations that she was a shareholder in the company and that she held 50,000 shares that she took over from Loius Njuguna Muthemba as one of the administrators of the estate of the deceased. The second petitioner gave evidence and stated as follows on the relevant issue.

**“I do not have any evidence in writing of my husband’s shareholding in this company. Title deeds belonging to my husband were used to secure loans. I do not have any documents to show how many shares he has in the company.”**

The effect of this is that the only petitioner who gave evidence had no share certificate nor entries in company register to show that her late husband was either a registered shareholder in the company or an

allottee of shares in the company. The Memorandum and Articles of Association of Kentazuga Hardware Limited shows that the company was incorporated on the 28th day of November, 1968 and a certificate issued bears that out. As on that day, the share holders of the company were Commercial Hardware Limited, Mungai Muthemba and Natubhai Vithalbai Patel. Each had one share. That document, which, in my view, is a very important piece of evidence, contradicts the petitioners' allegation at paragraph 5 of the petition that in November 1968, Andrew Mungai Muthemba and his late brother Louis Juguna (sic) Muthemba floated Kentazuga Hardware Limited. The evidence supports the company's assertion through Andrew Mungai Muthemba and Raojibhai Patel that the company was floated by Mungai Muthemba and two other people none of whom was Louis Njuguna Muthemba. Be that, as it may, the petitioners annexed a bundle of documents mainly Income Tax Returns that the company made to the Income Tax Department and communications allegedly from Andrew Mungai Muthemba, Tax Returns of allotments allegedly prepared by Advocate Kiagayu and letters from another firm of advocates. These were produced by PW 1, Mary Grace Wambugu. The returns were from the year between 1973 and 1982 both years inclusive. She stated in cross-examination that the returns are generally prepared by an accountant and after they are prepared, the Directors sign them and that the one she produced was prepared by the accountants. There was also some evidence that the returns as well as alleged allotment returns were supposed to have been prepared by the Company Secretary who was at one time an advocate. Whoever prepared the ones that were produced before me was not called to identify what he/she prepared and the truth or otherwise of the contents of the same. I note that the returns for the year 1982 appear to have contained a declaration purportedly made by L.J. Muthemba and apparently signed by the same L.J. Muthemba on 29th September, 1983. It states that as on that date A.M. Muthemba had 50,000 shares valued at Ksh.120,000/= and L. J. Muthemba had 50,000 shares worth Ksh.120,000/=, but the auditors who made reports on the accounts have not been called to give evidence as to whether the same report was extracted from the company register, or was reflected in the share allotment certificate or whether any share certificates existed to prove the same. No need to say L.J Muthemba was not there to shed light on what he wrote, if he indeed wrote it. The second petitioner's witness, Hezron Wabumba Wamalwa, a document examiner, examined certain documents and found them to have been in the same hand, but again, none was called to identify the same documents and to tell the court where the documents examined were collected from and to identify the writer of the same documents and how that witness came to identify the handwriting of whoever wrote the same documents i.e. whether he was familiar with the same handwritings and what gave rise to the same familiarity with the same handwritings. Without all those aspects being before the court, I find myself unable to assign any weight to the evidence in the Income Tax Returns and to the document examiner's report. As to documents allegedly handled by advocate Kiagayu, and the firm of Hamilton Harrison and Mathews, one wonders why none of the advocates was called as they were the makers of the same documents. In their absence, the evidence remained without legal value in law.

The next point I need to consider is as to whether the conduct of Andrew Muthemba towards his brother Louis and later towards Rose Muthemba, Louis's wife, can lead the court into a presumption that Louis was a shareholder and none other. There is evidence that Louis joined the company and was made a director. He was in charge of the properties in Industrial Area. There is evidence which was not rebutted that after Louis's death, Rose, his wife and co-administrator of his estate, was allocated two floors at Beaver House and was collecting rent from the same. She also had half of the plot on Pate Road which she developed. There was also evidence that when money erstwhile held in Continental Credit Finance Company and other monies that were being paid by another company on monthly basis in respect of stocks in trade bought from Kentazuga were put into Andrew's other companies' account, Rose Muthemba caused her share of that money to be paid to her and it was paid to her so that that money was eventually divided on a 50/50 basis, and there was evidence that properties at a company in Thika was divided between Louis and Andrew. Could all these add to irrefutable evidence that the deceased was a shareholder in Kentazuga Hardware Limited? In my humble opinion, those, without any more, can only raise a suspicion that the two brothers had a deal between them which was known to Andrew Mungai. The evidence however cannot be taken as proof of shareholding in itself. In any event, Patel's evidence was that when the four of them i.e. Andrew Mungai Muthemba, Louis Njuguna Muthemba, Natubhai Patel and himself Raojibhai S. Patel were running the company, only Andrew Mungai Muthemba and Natubhai Patel were the share holders while Louis Njuguna Muthemba and Raojibhai S. Patel (DW 4) were employees of the company but were enjoying the status of nominee Directors so that when dividend

of the company was to be divided, a practice evolved whereby the dividend would be divided between Andrew and Natubhai on a 50/50 basis but Natubhai would divide his share of the dividend to Raojibhai again on a 50/50 basis so that Raojibhai would end up being given 25% of the dividends. Andrew Mungai Muthemba would do the same for Louis Njuguna Muthemba. This is what Raojibhai said in evidence on the pertinent issue:

**“At that time only Andrew Muthemba and Natubhai Patel were the two directors of Kentazuga. Louis Muthemba was also a director – nominated director but he was working like one. I was also a nominated director without a shareholding. I used to get my shares from Natubhai’s share holding 25%. I used to get 25% from the profit. Each of us had equal shares of the profit. We would also get annual bonus. Bonus depended on the profit but we used to get the same bonus. On dividend, what Natubhai got he would give me 25% and Andrew also would give 25% of his dividend to Louis Muthemba.”**

According to Raojibhai Patel (DW 4), this arrangement did not in itself confirm any shares neither to himself nor to Louis Muthemba and was not allotment of shares in Kentazuga. In the absence of any other hypothesis to the contrary, this practice explains the activities of Andrew Muthemba in the way he divided part of Beaver House to the widow of Louis Muthemba and his agreeing to divide the deposit refund from Continental Credit Finance Company and proceeds of sale of stock in trade to other companies. In any event, the petitioners have not offered any explanations other than pegging these actions to the allegation that the deceased had shares in Kentazuga, the ownership of which they cannot prove by direct evidence such as share certificates; having their names in the company register, calling of the accountants of the company during the relevant period or secretary to the company or calling of those who were preparing and filing various returns to the company or producing company files or Memorandum and Articles of Association or any witness familiar with the handwritings of those who may have made relevant entries in relevant documents that would help shed some light as to the ownership of shares in the company of Kentazuga Hardware Ltd.

The company’s documents which were produced as exhibits in defence of this case by Johnson Otieno Adera as defence Exh. 1 were all secondary evidence as they were photostat copies of a reconstructed file allegedly constructed from the photocopies held by the company as on the date of filing the originals. Originals were not produced and even then, copies from which they were made were also not shown to the court. It would be difficult in law to give them any serious weight as again, whoever filed them was also not called to give evidence on their authenticity. I have perused them thoroughly as I must do, they being exhibits in the case. One of them dated 17.7.69 has an entry to the effect that with effect from 17.7.69, Mr. Louis Njuguna Muthemba was appointed a director without shares. The return with that entry is signed but it does not state whose signature it is. It also states in another return that with effect from 12th August, 1979, David Muthemba and John Mungai were appointed as new directors for Commercial Hardware Limited. None of the returns exhibited by the company states that Louis Njuguna Muthemba was at any time a shareholder in the company of Kentazuga Hardware Limited although I do not attach much weight to that because of what I have said about the company’s documents.

The petitioner has also not proved that the deceased’s shares were being held by another person or by Andrew during the time he was employed by a bank. In any case, if he could not hold shares at the time he was an employee of the bank, what about the period during which he had left the bank and was working with the company as its director. Why could he not have his shares in his name?

As is clear from the pleadings, the main pillars of the petitioners’ case on which they rely for the petition were at paragraphs 5, 17 and 18 of the petition. I have reproduced the same hereinabove. They are seeking winding-up on their capacity as shareholders, having acquired the same shares as the administrators of the deceased, Louis Njuguna Muthemba. From the facts I have analyzed above, I am far from being satisfied that they have proved what they or the second petitioner (as the first petitioner faded into the thin air and never appeared in court at any time), set out to prove i.e. that they are shareholders by virtue of their being administrators of the estate of Louis Njuguna Muthemba.

What is the legal position in such a scenario? First, they have in any event not proved what they asserted in the pleading and the law on that is now well settled. I need not cite a legal authority to the effect that a litigant who goes to court on one ground cannot succeed on a completely different ground not pleaded unless the issues framed by the parties and matters canvassed by the parties and left to the court make that other ground an issue. In any case, in this case, parties have not canvassed and left to the court a different issue. By the end of this case, the issues remained the same and were based on pleadings.

Back to the case before me and the law. Can a non-shareholder or a person who says is a shareholder in a company but has not proved the same have capacity to petition for winding-up of the company for whatever reason?

**Section 221(i) and (ii)** of the Companies Act Chapter 486 states as follows:

**“221(1) An application to the court for the winding-up of a company shall be by petition presented, subject to the provisions of this section, either by the company or by any creditor or creditors (including any contingent or prospective creditor or creditors), contributory or contributories, or by all or any of these parties together or separately: Provided that –**

**(i) a contributory shall not be entitled to present a winding-up petition unless –**

**(a) either the number of members is reduced, in case of a private company, below two, or, in the case of any other company, below seven; or**

**(b) the shares in respect of which he is a contributory, or some of them, either were originally allotted to him or have been held by him, and registered in his name, for at least six months during the eighteen months before the commencement of the winding-up, or have devolved on him through the death of a former holder; and**

**(ii) a winding-up petition shall not, if the ground of the petition is default in delivering the statutory report to the registrar or in holding the statutory meeting, be presented by any person except a shareholder, not before the expiration of fourteen days after the last day on which the meeting ought to have been held.”**

Whereas **section 221(ii)** confines petition for winding-up on grounds of default in delivery of statutory report to the registrar or in holding of statutory meeting to be presented only by a shareholder and none other meaning, in my mind, that a creditor cannot file a petition for winding-up based on those two grounds, **section 221(i) (b)** is clear that a contributory or contributories may present a petition for winding-up provided the shares in respect of which he is a contributory or some of the shares either were originally allotted to him or have been held by him and registered in his name for at least six months during the eighteen months before the commencement of the winding-up or have devolved on him through the death of a former holder. Thus, the petitioners in this petition had the duty to show the shares in respect of which they would be contributories or in case of Rose Muthemba alone the shares that have devolved on her through the death of her husband.

I have carefully perused the cases that were cited by the learned counsel in their submissions before me. I have been unable, with respect, to find any of them covering this issue of whether a person who relied on being a shareholder can successfully petition the court for a winding-up order if he does not adduce sufficient evidence to prove he is a shareholder. I know that law allows a creditor to petition for winding-up of a company but what about a person who seeks to wind it up as a shareholder? The case of **Vincent vs. Cole 1828 M&M 258** was not on this point. The case of **Winding-Up Cause No. 788 of 1987 – In the Matter of Grosvenor Properties Ltd. & Grosvenor Hotel Ltd.** covered the principle of “*just and equitable*” grounds for winding-up. Indeed, in that case the deceased were shareholders and there was no dispute on that aspect. Case of **Ebrahimi v. Westhorne Galleuios and Others (1972) 2 All ER 492** was also a case of an application by a contributor for winding-up mainly based on the principles of “*just and equitable*” grounds. However, a passing remark in the body of the judgment in that case is of some

help in the matter before me. The learned Judge in that case, Lord Wilberforce states at page 496 as follows:

**“Secondly, it has been suggested, and urged on us, that (assuming the petitioner is a shareholder and not a creditor) the words must be confined to such circumstances as affect him in his capacity as shareholder. I see no warrant for this either. No doubt, in order to present a petition, he must qualify as a shareholder, but I see no reason for preventing him from relying on any circumstances for justice or equity which affects him in his relations with the company .....**”

(Underlining supplied) This tends to suggest that in order to present a petition, if one is not a creditor, he must be a shareholder or in other words, a contributor. That however is the farthest this authority goes in being relevant to the issue at hand. The last case cited by the petitioner i.e. **In The Matter of Falcon Bay Lorge (1990) Limited – Winding-Up Cause No. 3 of 1993**, was also eventually decided on the principles of “just and equitable” ground for winding-up. Equally, none of the cases relied on by the company was relevant on this aspect of the case.

Our **section 221** is very close to **section 224(1)** of the Companies Act 1948 in England. In my mind, cases decided on section 224(1) in England would be persuasive authorities in Kenya. I turn to them. In **Re GATTOPARDO, LTD. (1969) 2 ALL ER 344**, the Court of Appeal in England held as follows:

**“On the true construction of section 224 the right of a contributory to present a petition by winding-up was expressly denied unless the shares had been held and registered in the contributory’s name for at least six months during the 18 months before the commencement of the winding-up; accordingly, since no shares had been held by the petitioner or registered in her name for longer than approximately two months at the date of presentation the petition was demurrable.”**

In the case before me, the position is that no satisfactory evidence has been adduced to show that Rose Muthemba, through her late husband, holds shares in Kentazuga as she has alleged in the petition unlike in the case above where the petitioner had shares but had not held them for the time specified in the act. Our section 221(1) also specifies the same period like section 224 of the Companies Act 1948 of England. In the case of **RJN2 Ltd. (1977) 3 All ER 1104** to which I have referred herein above, the second holding was as follows:

**“(ii) The court should not, however, allow the petition of a contributory to remain on the file where his status as a contributory was bona fide in dispute since he should not be permitted to present a petition, and thereby interfere with the company’s disposition of its assets, so long as his right to be a shareholder was in question. Since there was a bona fide dispute whether any shares had been allotted to the petitioner the petition would be dismissed.”**

And the case of **Re Garage Door Associates Ltd. (1984) 1 All ER 434** states that in a case where the ownership of shares in a company is in dispute, a petition for winding-up the company is not an appropriate procedure. Mervyn Dakes J. states as follows:

**“It seems plain that if when a contributory’s petition to windup has been launched there emerges the fact that there is a relevant dispute about the ownership of the shares in the company, then the Petition to wind-up will be dismissed and the appropriate course is by writ or otherwise to have the dispute about the share ownership settled.”**

This sounds obvious because as in this case, the first thing should have been to determine, at a different forum, whether Louis Njuguna Muthemba had shares in Kentazuga or not. Once that is determined and if it is found that he had shares, then Rose Muthemba, the second petitioner, would by virtue of her being one of the administrators of Louis’s estate be registered as holder of the same shares. Having been so registered and that question of share ownership having been settled, she would then have the capacity as a

shareholder or a contributor under **section 221(1) (ii)** to present a petition for winding-up.

It does not appear that this legal issue has been canvassed extensively in Kenya. At least the reported decisions on it are in short supply. However, the case of **Re- Garnets Mining Co. Ltd. [1978] KLR 224** does make the same legal proposal as the English cases I have cited above, that the petitioner in a winding-up case must qualify as a shareholder, if not a creditor or the company itself, or department of trade. It states in part as follows:

**“The phrase “just and equitable” should not be applied in any timorous way by the courts, but given its full force. Categories and heads within or under which it should be applied are to be eschewed, but illustrations may be used. It is to be wielded as an equitable supplement to the common law for the company. It was not to be confined to proved cases of mala fides by those who controlled it. The petitioner must qualify as a shareholder, if not a creditor or the company itself, or the Department of Trade.”**

From what I have stated above, I do find that the petitioner has not satisfactorily proved what she asserted in the petition that she is a shareholder by virtue of her being the administrator of the estate of the late Louis Njuguna Muthemba who, she says, was a shareholder. I also find that in law, petition for winding-up by court can only be brought by creditor(s), contributor(s) or the company itself and in Kenya, the Department of Trade. The evidence before me does not show that the petitioners in this case do fit into any of the above categories. To avoid any doubt and for any future matters concerning the company, I want to make it clear that I am not saying the deceased was not a shareholder of the company. He may have been or may not have been. All I am saying is that the petitioners have not satisfactorily proved that he was a shareholder. Thus, I am saying that the dispute on the allegation that he was a shareholder is not frivolous and that dispute should have been sorted out first before this petition was brought, just like a creditor’s petition for winding-up would not be entertained by the court if there is a bona fide dispute over the debt relied on by the creditor for filing the petition for winding-up.

The above takes care of this case and I would not need to go into other matters raised on the prayer to wind-up the company on the principle – **“just and equitable”** - to wind it up. I need however to briefly state on that aspect that the relevant law is well stated in the case of **Re Garnets Mining Co. Ltd. (1978) KLR 224**, I have cited above.

The pertinent part reads as follows:

**“The relevant law is this. A company may be wound-up by this court if, among other things, the court is of the opinion that it is just and equitable that the company should be woundup.”**

**Section 219** of the Companies Act Chapter 486 confirms that and it is specifically stated as **section 219(f)**. The guiding principle is found in that case where the notes read:

**“Whether or not a company should be wound up by the court on the ground that it is just and equitable to wind it up under section 219(f) of the Companies Act is a matter of discretion. The court’s discretion in this respect is wide and must be exercised judicially. Each case depends on its own facts as they are at the time of the hearing; but, generally, where a petitioner can show that he has lost confidence in the management of the company because it has a lack of probity, the court’s discretion (in the absence of special circumstances) is likely to be exercised in his favour. A petitioner seeking to rely on the just and equitable grounds must approach the court with clean hands.”**

That, in general, is the law. In this case, Rose Muthemba stated in evidence in brief that the relationship between her husband and Andrew Mungai Muthemba started being strained in the period between 1979 and 1980. Even after her husband died, and she took over as administrator, the relationship between herself and Andrew Mungai Muthemba was strained. They never held Board of Directors’ meetings because of the strained relationship. Although two floors at Beaver house were left for her and she was

collecting rents from tenants on the same floors, sometimes the access to the premises were blocked. I do accept that there was clearly animosity between the two and as she said, communication between them was reduced to that in writing only. No company can run under such circumstances. But that was when Mungai Muthemba was alive and was when the petition was filed and when Rose gave evidence. Since the time she gave evidence, Mungai Muthemba has passed on and Rose has not given any evidence as to her relationship with whoever is the administrator of the estate of Mungai Muthemba. I must go by what is before me and what is before me is summed up by Rose as follows in her evidence in chief:

**“As a result of all these hostility and hatred, I decided to move my office to get away from there. I was advised of the same by his own elder brother called Dedan Chege Muthemba.”**

Apart from the hostility that made it impossible to hold Board of Directors meetings, there was also evidence that attempts had been made to wind-up the company and that at least a letter had been written to the relevant authorities on the same. There was also evidence that Andrew Mungai Muthemba had clandestinely floated another company with nearly the same name called Kentazuga Nairobi Ltd., into which payments to the company was being siphoned. Rose learnt this later and this in itself must have seriously eroded any trust that could have remained in the way the company was being run. The cross-examination on these aspects did not in any serious way affect the veracity of the evidence. In any case, none was called by the company among those alleged to be present company directors namely David Muthemba and John Mungai or any of the administrator(s) of the estate of Andrew (if letters of administration has been issued), to shed some light on their present relationship with the widow of Louis. Further, the company, if it was being properly run and was carrying out statutory duties like filing returns and doing proper business, would have produced evidence to show that it was still in some business and was carrying out its core functions as stipulated in its Memorandum and Articles of Association. It did not do so. In my mind, the legal requirement for winding-up a company on grounds that it is just and equitable to do so exist. However, as I have stated, the petitioners before me have not shown that they have or that either of them has the capacity to seek the same winding-up, and can thus benefit from the same situation.

The alternative prayer likewise cannot stand for the same reasons. In any case, I was not satisfied that a proper meeting had been convened by the company shareholders to initiate proceedings that would have led to voluntary winding-up of the company.

The sum total of all the above is that this petition fails and is dismissed. The company will have the costs of this petition. Judgment accordingly.

**Dated and delivered at Nairobi this 17th day of November 2005.**

**J. W. ONYANGO OTIENO**

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**J U D G E**