In re Tamarind Valley Embakasi Limited (Insolvency Cause E015 of 2021)
[2025] KEHC 5880 (KLR) (Commercial and Tax) (8 May 2025) (Ruling)

Neutral citation: [2025] KEHC 5880 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

INSOLVENCY CAUSE E015 OF 2021

AA VISRAM, J

MAY 8, 2025

IN THE MATTER OF TAMARIND VALLEY EMBAKASI LIMITED

AND

IN THE MATTER OF THE INSOLVENCY ACT(CHAPTER 53 OF THE LAWS OF KENYA)

BETWEEN

TAMARIND INVESTMENTS LIMITED ..... 1ST PETITIONER

CHERWELL LIMITED ..... 2ND PETITIONER

AND

KIRUBI KAMAU ..... 1ST RESPONDENT

RYPE LIMITED ..... 2ND RESPONDENT

JACKSON KIONGA KAMAU ..... 3RD RESPONDENT

WAWERU KAMAU ..... 4TH RESPONDENT

LYDIA WANJIRU ..... 5TH RESPONDENT

RULING

Introduction and Background

1. Before the Court is the Petitioners' Notice of Motion dated 7th March, 2024, made under Section 3 of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya) and rule 203 of the High Court and Companies Winding Up Rules, principally seeking leave to amend their Petition. The Application is

supported by grounds set out on its face and the supporting affidavit of Robert Darby, a member of the Boards of Directors of the Petitioners, sworn on 7th March, 2024.

2. The Application is opposed by the Respondents through the grounds of opposition dated 10th June, 2024, and the replying affidavit of the 1st Respondent sworn on 23rd August, 2024.

3. The Application was canvassed by way of written submissions, which form part of the record. I have considered the grounds on the face of the petition together with the supporting affidavit, the rival submissions of the parties, and the applicable law. I will be making relevant references to the same in my analysis and determination below.

Analysis and Determination

4. The Petitioners seek to amend their petition dated 19th April, 2021, to include an additional prayer which reads as follows:-

> "..as an alternative to prayer (1) this Honourable Court be pleased to order the Majority shareholders namely; Omega Commercial Services Limited and Rype Limited to buy the Petitioners' shares in the company in liquidation."

5. In support of the Application, the Applicants submitted that the Petitioner is a minority shareholder that has been oppressed by the majority shareholders, and alienated from the management of the company. They contended that the rulings of 24th June, 2022, and 17th August, 2023, in this matter, provide for an alternative to the winding up orders sought. In the Petitioners' view, the alternative is a buyout by the majority shareholders of the minority shareholders. However, to date, this has not happened. The Petitioners therefore seek to include a prayer for the purchase of shares by the majority shareholders.

6. In opposition to the Application, the Respondents submitted that the proposed amendment would include a prayer purporting to give the court jurisdiction to force a party to enter into a commercial agreement for the purchase of shares, which is not a power available under Section 427 of the *Insolvency Act*.

7. The Respondent relied on the decision of the High Court in Edwin Kipng'eno Rono v Leawin Limited & another [2019] eKLR, where the court states as follows:-

> "74. From the above definitions of the term 'buyout', it is clear that it is a transaction where there is a seller and a buyer. I am of the view that shares in a company are assets just like any other asset that a person may have ownership rights over as contemplated under Article 40 of *the Constitution*. This being the case, I find that it is not within the purview of this court to compel a party to go into a buyout against his wish. I hasten to add that the issue of buyout can best be handled on a willing buyer willing seller basis... (Emphasis mine)

8. Further to the above, the Respondent outlined that an Insolvency Court has no jurisdiction to make and or grant the orders sought by the Applicant. The Respondents submitted that an Insolvency Court's jurisdiction is limited to hear and determine issues limited to the insolvency and or Bankruptcy of Companies, and that the alternative prayer which is the subject of the amendment, will tilt and or change the course of the Insolvency Proceedings into a commercial dispute, which should be resolved through the dispute resolution forum provided in the contract between the parties.

9. Having considered the submissions as stated above, I note that the relevant law in respect of its liquidation petition is found at Section 427 of the *Insolvency Act*. The said section states as follows:-

> 427. Powers of Court on hearing of liquidation application
>
> (1) On the hearing of a liquidation application, the Court may make such of the following orders as it considers appropriate—
>
> (a) an order dismissing the application;
>
> (b) an order adjourning the hearing, conditionally or unconditionally;
>
> (c) an interim liquidation order; or
>
> (d) any other order that, in its opinion, the circumstances of the case require.
>
> (2) However, the Court may not refuse to make a liquidation order on the ground only that the company's assets have been mortgaged to an amount equal to or in excess of those assets, or that the company has no assets.
>
> (3) If the application is made by members of the company as contributories on the ground that it is just and equitable that the company should be liquidated, the Court shall make a liquidation order, but only if of the opinion that—
>
> (a) that the Applicants are entitled to relief either by liquidating the company or by some other means; and
>
> (b) that, in the absence of any other remedy, it would be just and equitable that the company should be liquidated.
>
> (4) Subsection (3) does not apply if the Court is also of the opinion that—
>
> (a) some other remedy is available to the Applicants; and
>
> (b) they are acting unreasonably in seeking to have the company liquidated instead of pursuing that other remedy.

10. Guided by the above, the Applicant's prayer for inclusion of an order that provides for an alternative remedy appears on face value, to be one contemplated under the terms of the Act. However, my interpretation of the above, is that a court ought not to make a liquidation order where there is an alternative remedy available. The inverse in not however true. A court should not impose an alternative remedy that is unacceptable to the parties. An agreement for sale and purchase ought to be mutual. I do not think a court may compel parties to enter into a commercial transaction. In my view, the inclusion of such a prayer is beyond the intention and purpose of the section 427 outlined above.

11. In this regard, I am further guided by the decision of the court in Edwin Kipng'eno Rono Supra, where the court went on to state the following:-

> " This court is of the view that whether or not the parties settle for a winding up or a buyout, it would be necessary that the value of the shares of the Petitioner be ascertained by an independent valuer so that the parties can agree on the buyout or winding up. Such a valuer shall be appointed and agreed upon by the parties hereof. In default, the valuer shall be nominated by the president of the Institute of Chartered Accountants. The costs of the expert shall be shared by the parties."

12. The language of the court implies, and I agree, that in the event parties agree on a buyout as an alternative remedy, then there are various steps to be taken to ensure that the process is carried out in a fair manner, including a valuation of the share by an independent institution.

13. In such a scenario, I think it would be suitable for the parties to agree that they have settled on an alternative remedy, rather than to seek a prayer from the court compelling a specific and unilateral remedy, within the contemplation of only one party.

14. In my view, the decision relied on by the Applicant conforms to the above rationale because the Learned Judge concluded that there was an alternative remedy available to a winding up order and found that in the circumstances, a winding up order ought not to issue. The court stated that the Petitioners ought to pursue the alternative remedy faced with an application seeking final winding up orders. It is also instrumental to note the fact that the parties were also bound to participate in arbitral proceedings at the London Court of International Arbitration. The decision of the court was not to impose a buyout, but rather, to refuse a liquidation order because an alternative remedy was available both here in Kenya, and at the London Court of International Arbitration. The same remains a valid ground upon which a court may refuse to make a liquidation order.

15. Guided by the above, I am satisfied that this Court ought not to allow the amendment sought by the Applicant. I am satisfied that this Court has no jurisdiction to compel parties to enter into a commercial agreement for buyout. Therefore, the inclusion of a prayer which the court has no jurisdiction to grant would not serve any purpose other than to cause further confusion, and to prolong the dispute between the parties.

Conclusion and Disposition

16. In the foregoing, the Application is dismissed with costs.

DATED AND DELIVERED VIRTUALLY VIA MICROSOFT TEAMS THIS 8TH DAY OF MAY, 2025

ALEEM VISRAM, FCIArb

JUDGE

.....Court Assistant

.....1st Petitioner

.....2nd Petitioner

.....1st Respondent

.....2nd Respondent

.....3rd Respondent

.....4th Respondent

.....5th Respondent