



**In re Lexico Six Limited (Insolvency Petition E051 of 2023)
[2024] KEHC 1494 (KLR) (Commercial and Tax) (19 February 2024) (Ruling)**

Neutral citation: [2024] KEHC 1494 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
INSOLVENCY PETITION E051 OF 2023
JWW MONG'ARE, J
FEBRUARY 19, 2024**

RULING

1. Mr. David Karanja Macharia, a director of Lexco Six Limited (the company), through a petition dated 10/8/2023, moved this Honourable Court for an order declaring the company insolvent and unable to pay its debts and an order to have the company liquidated.
2. The Petitioner's grounds were that the company owed him a sum of Kshs.33,979,042/- which figure was advanced to it as a loan and had not been repaid.
3. The Petitioner argued that the company had been primarily incorporated for the purpose of real estate property investment and that it owned two real estate properties and one motor vehicle, namely:-
 - i. Apartment No. 2 Block C, Riara Prestige Apartments.
 - ii. Naivasha/Maraigushu Block 10/2041(Kedong).
 - iii. Motor Vehicle Jeep Grand Cherokee Limited 3.6.

That the aforementioned assets, including a second Motors Vehicle; Mercedes Benz GLE 400 4-Matic RHD(which the Petitioner confirms was sold off to offset part of his shareholder loans) are the only avenue in which he could be repaid as the company lacks the cashflow necessary to repay the loan.

4. The Petitioner further asserted that since the company was co-owned by his ex -wife, difficulties in co-running the company had arisen and he was concerned that the outstanding loan would never be repaid unless the court would intervene and give an order to liquidate the company.
5. The petition was opposed through a preliminary objection dated 9/11/2023 filed by Carol Ngori. The grounds of the preliminary objection were as follows:-

- “ 1. That the petition is bad in law, misconceived and intended to defeat the Respondent's claims under Article 45 of *the constitution* 2010.



2. That the petition does not disclose a reasonable cause of action and is an abuse of the court process.
3. That the statutory demand is defective in substance and unenforceable in the circumstances.
4. That the Petitioner has not exhausted the mechanism in the Memorandum and Articles of Association of the Company and therefore the petition is premature.
5. That the court lacks jurisdiction to admit, hear and determine a dispute involving matrimonial property held by a company formed for that purpose.
6. That the petition is oppressive and purely intended to put undue pressure on the Respondent unlawfully.”

Analysis And Determination

6. The matter was canvassed by way of written submissions pursuant to the directions of the Court filed thereto in support and opposition to the preliminary objection which the court has duly considered. Having carefully considered the pleadings and all the supporting documents filed together with the petition and the response by the Respondent together with the preliminary objection, I have identified only one issue for determination, to wit; “whether the Preliminary Objection filed by the Respondent to this Petition is merited.”
7. In determining a preliminary objection, the court is guided by the Court of Appeal decision in the case of *Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd* [1969] EA 696 at page 700 paragraphs D-F Law JA, as he then was, had this to say on preliminary objections:-

....A Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the Jurisdiction of the court or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.

At page 701 paragraph B-C Sir Charles Newbold, P. added the following:-

A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is usually on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion....
8. The grounds upon which the Respondent has raised an objection include the fact that this court lacks jurisdiction to determine the portion as filed as the company in question and the assets therein form matrimonial property yet to be distributed pursuant to the dissolution of the marriage between the parties by the courts.
9. From the record, it is evident that both the Petitioner and the Respondent, Carol Ngori, were once married but have since divorced. During the course of the marriage, the Petitioner and Respondent registered the company with each party being a director and an equal shareholder. The company was co-managed by both of the parties during the subsistence of the marriage and even after dissolution.
10. The record, as provided by the Petitioner herein, further reveals that the company, subject matter of this suit, was incorporated on 7th March 2014 with the Respondent and the Petitioner as the original subscribers and directors with equal shareholding. The Company’s objectives as found in its



Memorandum and Articles of Association attached to the Petitioner's bundle of documents, inter alia, include:-

“To carry on the business of an investment holding company and as such use the funds or any other resources of the Company, available to the Company, to acquire and hold, deal in and sell or otherwise dispose of, either in the name of the Company or in that of any nominee, investments of all kinds and other property or interests whatever and wherever as may from time to time be thought fit.”

11. Prior to the filing the present petition, the Petitioner issued a statutory demand through his advocates to the Respondent dated 8/3/2023 (annexed to the Respondent's supplementary affidavit sworn on 7th December 2023 which stated the following:-

“We act for David Karanja Macharia who instructed us to write to you and address you as here below.

That the aforementioned Company was incorporated during the subsistence of your marriage and was intended to be and was jointly operated and managed as a family company.

In the circumstances and in the light of the unfortunate dissolution of the marriage between yourself and Mr. Macharia, it is no longer practical or reasonable for the Company to continue being jointly run and or managed.

In the circumstances, we have been instructed to write to you and inquire as to whether you would be amenable to having the said Company voluntarily wound up to enable parties to sever their joint ownership and go their separate ways. If you are so amenable, kindly let us know so that we can draw up the relevant paperwork and undertake the necessary procedure...”

12. It is clear from the Memorandum and Articles of Association and Statutory demand letter from the Petitioner that the company is owned and managed jointly by the Petitioner and Respondent who were a married couple and that its objective was to be an investment holding company.
13. The company was incorporated during the subsistence of the marriage and the parties herein are its only shareholders/directors. The record shows the purchase of property by the company whereby both the Petitioner and Respondent signed the sale agreement. Further, the record shows that the parties held joint bank accounts whereby the money for the purchase of the properties was remitted from.
14. The parties in this petition acquired property during marriage and registered that property in the name of the holding company which they jointly incorporated. This means that although the properties are owned by the company, they constitute matrimonial property.
15. In the Court of Appeal case of [PWK v JKG \[2015\]](#) eKLR it was held:-

“That practical approach to matrimonial property that is so closely linked to or mixed inextricably with property in the name of a company under the sole shareholding of a couple without outsiders in it, appears to us to be more conducive to the doing of real and substantive justice untrammelled and unfrustrated by the technicalities and esoteric niceties of company law that would defeat what ordinary citizens would see as rather straight-forward issues of division of matrimonial property. Muthembwa -vs- Muthembwa has been followed in other cases including RFS -VS- JDCS [2010] eKLR where the Court appreciated that when the matrimonial home is built on land belonging to a company where



the husband is the major shareholder with his consent, the property becomes altered and he cannot be heard to raise the distinctions of company law in the hope of defeating the spouse's interest in it as matrimonial property.”

16. In the present case, it is clear that the company was registered to hold property that was jointly bought during the subsistence of the parties marriage. The former couple were the sole and equal shareholders and financed the company's activities through the joint bank accounts that they held. In light of this, I agree with the Respondent's submissions that this dispute primarily deals with the division of matrimonial property and the same ought to be dealt with in the Family Division of the High Court. This present case closely resembles the decision cited above (*PWK v JKG* [2015] eKLR) with which I concur with the courts holding.
17. I note that from the pleadings parties confirm that the divorce cause has been concluded and a decree nisi issued which is awaiting to be made absolute by the court. I am satisfied therefore that the dispute being raised herein is a matrimonial dispute and that the same will properly be adjudicated before the Family Division of the High Court as it related to distribution of matrimonial property upon dissolution of a marriage. The fate of the company and the assets held by it therein can be raised when the parties commence the motions for distribution of their matrimonial properties in the Family Division.
18. On this ground alone, I find merit in the Preliminary Objection and uphold the same. I dismiss the Petition before this court in its entirety and order that each party bear their costs of the same.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 19TH DAY OF FEBRUARY, 2024.

.....
J.W.W. MONG'ARE

JUDGE

In the Presence of:-

Ms. Mukui holding brief for Mr. Mbogori for the Plaintiff.

N/A for the Respondent.

Amos - Court Assistant

