



**Warari v Suntap Kenya Limited & another (Insolvency Petition E023 of 2023)
[2024] KEHC 6284 (KLR) (Commercial and Tax) (15 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 6284 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
INSOLVENCY PETITION E023 OF 2023**

MN MWANGI, J

MAY 15, 2024

BETWEEN

PETER KAMAU WARARI PETITIONER

AND

SUNTAP KENYA LIMITED AFFECTED COMPANY

AND

IRENE WARUKIRA KIRAGU RESPONDENT

JUDGMENT

1. The petitioner filed a Liquidation Petition dated 14th April, 2023 against the respondent seeking the following orders -
 - i. The Court makes an order for the liquidation of Suntap Kenya Limited the Company on just and equitable grounds pursuant to the provisions of the *Insolvency Act*;
 - ii. The Court do appoint the Official Receiver who is an authorized Insolvency Practitioner as the Provisional Liquidator;
 - iii. The assets of the Company be distributed in specie, that is, in accordance with the members' respective shareholding;
 - iv. The costs of these proceedings be borne by the respondent; and
 - v. This Honourable Court do make such other order(s) that it may deem fit.
2. The petition is premised on the grounds on the face of the petition and supported by a verifying and further affidavit sworn on 14th April, 2023 and 17th July, 2023 by Peter Kamau Warari, a Director and



- Shareholder of the Company. In opposition thereto, the respondent filed a replying affidavit sworn on 5th July, 2023, by Irene Warukira Kiragu, the respondent herein, a Director and Shareholder of the Company.
3. The petition proceeded by way of affidavit evidence, and was canvassed by way of written submissions. The petitioner's submissions were filed on 28th August, 2023 and on 29th November, 2023 by the law firm of Oraro & Company Advocates, whereas the respondent's submissions were filed on 29th January, 2024 by the law firm of Onyango & Ameyo Advocates.
 4. Ms. Lubano, learned Counsel for the petitioner submitted that the petitioner and the respondent are the only Directors and Shareholders of the Company with the petitioner holding 35,001 shares and the respondent 35,000 shares. She stated that for the said reason, the parties herein cannot transact the business of the Company on account of a stalemate in its management resulting from an irretrievably broken-down relationship between them. She further stated that both parties herein have indicated that they no longer want to be in business together, thus it is in their interest to bring the Company to a meaningful end. She cited the provisions of Section 424(1)(g) of the *Insolvency Act*, 2015 and the case of *Re Garnets Mining Co. Ltd* [1978] eKLR and submitted that this Court has an extremely wide discretion to make a liquidation order.
 5. She referred to the case of *Abdirashid Mude Ulow v Hassan Omar Kassai* [2020] eKLR, where the Court gave instances where it may be just and equitable to wind up a Company. Ms Lubano stated that in this case, the internal disputes within the company have produced a state of deadlock as defined by the Court in *Re Kenya Airfreight Handling Limited* [2021] eKLR. She pointed out that in this case, parties cannot agree on important issues affecting the Company, including its re-capitalization, adoption of the Company financial statements, the appointment of a Valuer and Auditor, or the possibility of a voluntary liquidation. Further, meetings to resolve the foregoing have not materialized or yielded substantial results. She cited the case of *Re Modern Retreading Company Ltd* [1962] E.A and contended that in the absence of consensus between the company's Shareholders, the Company cannot move forward and ought to be dissolved.
 6. Counsel argued that a winding up or liquidation order is a remedy of last resort which ought not to be granted where an alternative remedy exists. Counsel relied on the case of *Re Modern Retreading Company Ltd* [1962] E.A and asserted that the petitioner has demonstrated that there exists no effective alternative remedy available to the petitioner, thus the orders sought ought to be granted. She further relied on the case of *O'neil & another v Phillips* [1999] 1 WLR 1092 cited with authority by the case of *Cecilia Wacuka Nganga v Bernadus Nganga Kamau & Another* [2016] eKLR, where the Court set out what would amount to a reasonable offer of an alternative remedy and contended the respondent has neither presented any offer to buy the petitioner's shares nor has she put forward a remedy which is available and sufficiently attractive as an alternative to a winding up order.
 7. Ms Mulomi, learned Counsel for the respondent cited the provisions of Section 427(3) & (4) of the *Insolvency Act* and the case of *Re Bondi Better Bananas Limited & Vallario et al* [1951] O.R. and submitted that there are no restrictive principles which would confine the phrase "just and equitable" and each case depends to a large extent on its own facts. She relied on the case of *Abdirashid Mude Ulow v Hassan Omar Kassai* (supra), where the Court outlined circumstances which could justify this remedy. She also relied on the Supreme Judicial Court of Massuchetes in the case of *Koshy v Sachdev* SJC-12222, 2017 which established the standards and elements of proof necessary for a petitioner to make out a claim for dissolution of a Company in the event of a true deadlock between its Directors. She contended that there is no corporate paralysis in the company as alleged by the petitioner.



8. She contended that in view of the fact that the recapitalization of the Company coincided with the estrangement of the parties herein, it was not genuine but solely engineered to set the stage for dilution of the shares of the respondent who holds 49% shares in the Company so that the petitioner can assume full control of the company and solely benefit from its rental property. Further, the issue of recapitalization of the Company was brought up by the petitioner on 8th April 2020 on grounds that the Company was required to refund Kshs. 23,700,000/= which amount the respondent claims was taken by an unrelated Company known as New Valley Estate Limited where the petitioner also happens to be a Director, to facilitate the construction of the residential units on the Company's property.
9. She argued that from the above it is clear that the proposal for recapitalization was to unlawfully transfer the debt of the petitioner's other third-party company, to the company in dispute in a bid to saddle the said Company with unexplained debts in form of unexplained shareholder loans, thus forcing the respondent into a debt position that would lead to dilution of her shareholding. Ms Mulomi submitted that the petitioner's allegations that there has been a deadlock in the management of the Company are unfounded since all the respondent sought for was clarity, which the petitioner failed to fully respond to. She stated that there is a clear pattern of the petitioner taking unilateral actions including collecting rent from the various premises owned by the company, paying wages, as well as engaging professional advisors and operating company bank accounts without sanction, which paints a picture of a company that is running smoothly but with the majority shareholder making unilateral decisions as opposed to a Company in a stalemate.
10. Counsel submitted that the petitioner's averments at paragraph 29 of his further affidavit demonstrate that he has all the powers necessary to transact business at the company unilaterally, and that there is no deadlock and/or stalemate in the running and management of the Company by the parties herein. She further submitted that the alleged notices issued to the respondent to convene Board meetings are a sham and are only meant to justify liquidation of the Company. She asserted that the petitioner has failed to discharge his burden of proof to establish a real stalemate. He contended that on the alleged refusal to appoint Auditors and Valuers, the petitioner has not tendered any evidence showing that he formally requested the respondent to appoint an Auditor upon providing her with a list of suitable Auditors and she failed to do so.
11. She stated that by the time the petitioner sent a notice to the respondent for a proposed meeting for the review of 2019 accounts, he had already single-handedly instructed Ndumbi Mugambi Auditors to prepare the company's books of accounts, and the said Auditors then prepared the impugned financial statements which the respondent was once again required to approve as a formality. Counsel contended that the same pattern was adopted by the petitioner in the appointment of a Property Valuer and change of the Company Secretary. Ms. Mulomi submitted that the above illustrates the petitioner's bad faith and non-existence of a true deadlock. She further submitted that mere existence of deadlock is not by itself justification for the Court to grant an order for dissolution of a company, especially if the company is still a going concern.
12. Ms. Mulomi contended that it is clear from the above that there is no stalemate or standoff between the Directors which can prevent the Company from legally discharging its corporate objectives. She indicated that the company only has one asset which generates annual rental income of approximately Kshs.4,000,000/=. Further, that there has been no allegation that the Company has been unable to discharge any of its mandates. She relied on the Ontario Superior Court of Justice holding in the case of Animal House Investments Inc. et al. v Lisgar Development Ltd [2008] 237 O.A.C. 261 (DC), and stated that there is real danger that the respondent will be subjected to significant loss if liquidation of the company is allowed in view of the fact that the petitioner has indicated that his Shareholder's



loan is an unverified amount of Kshs.44,105,026.00, the total liabilities of the company are Kshs. 54,356,058.00 and the Company's sole asset is worth Kshs.62,000,000/=.

13. In submitting that dissolution of a Company is equal to corporate execution hence a company ought to be allowed to seek almost any other available remedy before resorting to such a draconian act especially in instances where it is still making profitable business, Counsel referred to the cases of *Re Ukwala Supermarket Limited* [2019] eKLR and *Flamco Limited v Prime Bank Limited* [2021] eKLR. She also referred to the provisions of Section 3 of the *Insolvency Act* and submitted that the *Insolvency Act* frowns upon premature liquidation of sustainable businesses, and that it maximizes on mechanisms for rescue as opposed to corporate execution.
14. She cited the provisions of Articles 31 and 32 of the Company's Articles of Association and stated that if the petitioner does not wish to continue with the Company, his shares can be valued and thereafter he can be bought out by the respondent or any other third party. The respondent urged this Court to direct that the petitioner's shares be offered for sale at a fair market value after valuation by independent Auditors. Ms. Mulomi relied on the decision in *Flower City Limited v Polflanks & Containers Kenya Limited (Insolvency Cause 033 of 2020)* [2021] KEHC 34 KLR and expressed the view that the petition herein is an abuse of the Court process.
15. In a rejoinder, Ms. Lubano relied on the case of *Re Swan Millers Limited* [2015] eKLR and submitted that as it can be seen from the minutes of the Extraordinary General Meeting held on 2nd March, 2023 the respondent admitted that she no longer wants to be in business with the petitioner but in her submissions, she has contradicted herself by denying that owing to internal disputes which have produced a state of deadlock, it is impossible to carry on the company's business, hence it is clear that the respondent intends to fight a process which seeks to get each shareholder to redeem their value without any justifiable reasons. Counsel argued that the respondent has neither indicated in her pleadings that she is ready and willing to co-operate with the petitioner with a view to resolve the current stalemate of the Company nor presented any viable remedy as an alternative to a winding up order.
16. She contended that it has never been contested that the petitioner invested Kshs. 44,105,026.00 into the company which was partly funded by a loan obtained through New Valley Estate Limited for the sole purpose of supporting the company's construction of the property, and in any event, that recapitalization was solely meant to re-distribute the company's shares to reflect the petitioner's and respondent's respective contributions in the company. Ms. Lubano submitted that all issues concerning the figures of the Company, the respondent's contribution and resultant entitlements thereto shall be determined by a Liquidator appointed by this Court, thus the respondent does not stand to suffer any loss in the event the company is liquidated.
17. On the allegations raised by the petitioner that the respondent was not involved in the appointment of a Valuer, Counsel referred to annexure PW-16 to the petitioner's verifying affidavit and stated that it was agreed between the parties herein that the respondent would involve an independent valuer of her choice to review the Valuation Report submitted by the petitioner, but she failed to do so. That in any event, the audited accounts produced before this Court have been prepared by registered, competent and qualified Accountants and as such, reflect a true and accurate state of affairs of the Company as at 31st December, 2021.

ANALYSIS AND DETERMINATION.

18. I have considered the instant petition as well as the affidavits filed by the petitioner in support thereof. I have also considered the replying affidavit by the respondent, together with the written submissions by



Counsel for the parties. The issue that arises for determination is whether a liquidation order should issue against the Company.

19. The petitioner in his replying affidavit deposed that the Company was incorporated on 1st February, 2012 by the petitioner and one Ms. Lydia Nyambura Gathoga. It had a nominal capital of 100,000/=, with the petitioner holding 70,000 shares and Ms. Lydia holding 1 share. He averred that on 17th February, 2012 Ms. Lydia resigned as a Director of the Company, and the respondent was appointed as her replacement and issued with 35,000 shares, leaving the petitioner with 35,001 shares.
20. He contended that the parties herein are the sole Directors of the Company which was established to inter alia, carry on the business of developers and agents, to purchase, take or lease, develop and turn to account or otherwise acquire for the purpose of the Company, any estates, houses, buildings, easements or other interests in real estate. He further averred that sometime in the year 2012, the company purchased all that property known as Kajiado/Ole Kasasi/1167 and developed a four storey residential building known as Suntap Apartments, which it began letting out in early 2021, following completion of the same.
21. It was stated by the petitioner that the company is the registered owner of the said property. He further stated that before completion of the property, the respondent withdrew from participating in the Company's affairs without any justification, thus making it difficult to not only manage the affairs of the Company but to also transact any business on behalf of the Company.
22. The petitioner deposed that on or about 23rd July 2019, the respondent agreed to match the capital required to retain her shareholding in the Company and even made a partial deposit of Kshs.1,100,000/= to the Shareholders' joint account at I &M Bank during the first quarter of the year 2020. Consequently, he proposed re-capitalization and re-distribution of the company's shares in order to reflect the said capital injection, but the respondent failed to respond to the said proposal.
23. That consequently, vide an email sent on 27th May, 2020 he informed the respondent that he intends to engage the Company Secretary to convene a Shareholders' meeting in order to transact the said business and asked her to propose the date and time for the meeting, but the respondent once again declined to engage with the petitioner.
24. He averred that to date, the respondent has failed and/or declined to participate in any discussions with respect to re-capitalization and re-distribution of the company's assets, thereby preventing the Company from transacting any business with the resultant effect that it has reached a stalemate in its management. He further averred that sometime in December 2021, Ndumbi Mugambi Advocates prepared an audited financial report of the company.
25. The petitioner stated that the said report highlighted the company's liabilities as Kshs.54,356,058.00 comprising the Company's short-term liabilities incurred as at the end of the year 2021, inclusive of the tenancy deposit held by the company, the total Shareholder loan as Kshs.44,105,026.00 for the petitioner and Kshs. 3,852,839.00 for the respondent. He stated that there was however an additional Kshs.5,000,000/= injected into the Company and held in trust as additional capital.
26. It was stated by the petitioner that he engaged a registered Valuer, one Hossano Valuers Limited to inspect the property, advise on its market value and prepare a Valuation Report, he convened a Board Meeting scheduled to take place on 17th October, 2022 pursuant to a Notice dated 7th October, 2022, which listed inter alia, the voluntary liquidation of the Company as one of the agenda items for consideration. He stated that the said meeting did not take place since the respondent requested for it be held at a later date, and requested to be supplied with various documents relating to the Company including the company annual returns, the company formation documents, transaction receipts and



- more. That as a result of the said request, on 26th October, 2022, the respondent was supplied with the aforesaid documents via registered post and a fresh Notice was circulated via email indicating that a Board Meeting would be held on 17th November, 2022, and in the said meeting, the proposal to voluntarily liquidate the Company would be considered, but the respondent did not attend the meeting of 17th November, 2022.
27. The petitioner deposed that he proceeded with the meeting since the quorum of the Board was met in line with Article 104 of the Company's Articles of Association and resolved that a declaration of solvency be signed and filed with the Registrar of Companies and the Company's Shareholders, to voluntarily liquidate the company and for its assets to be distributed to the creditors and the shareholders of the company in accordance with the *Insolvency Act, 2015*.
 28. He further deposed that the Board convened an Extraordinary General Meeting pursuant to Articles 52 and 56 of the Company's Articles of Association, for a meeting to be held on 17th January, 2023, for purposes of passing a resolution to voluntarily liquidate the company, and the respondent was served with a notice of this meeting dated 20th December, 2022 together with the minutes of the meeting held on 17th November, 2022. The petitioner contended that in view of the fact that the petitioner and the respondent are the only shareholders of the Company, it cannot be liquidated without the respondent's approval, since members of the company must pass a special resolution in order for the liquidation of a Company to proceed as a voluntary liquidation, which special resolution requires at least 75% of votes cast by members in favour of it.
 29. He averred that the respondent failed to attend the meeting of 17th January, 2023 hence it was adjourned to 24th January, 2023 and a Notice was issued and shared with the respondent to that effect. That the respondent attended the meeting of 24th January, 2023 where the parties herein agreed that they did not want to be in business together thus it was in the Company's best interest to bring it to a meaningful end. The petitioner further averred that it was resolved in the said meeting inter alia, that the respondent would consider involving an independent Valuer of her choice to review the Valuation Report submitted by Hossano Valuers Ltd, and she would review the documents submitted to her including the company's financial reports and seek additional information, if any, on or before 17th February, 2023.
 30. The petitioner stated that the parties herein then adjourned the meeting to 3rd March, 2023 in view of the fact that the proposal for the voluntary liquidation of the Company had not been passed and to give the respondent sufficient time to review any documentation, conduct an independent valuation and arrive at an informed decision in regard to the liquidation of the Company. He indicated that to date, the respondent has refused to engage with him regarding the proposal for the voluntary liquidation of the Company.
 31. He contended that the company has reached a deadlock in so far as its operations are concerned as it is unable to hold any statutory or other meetings to transact its business, or pass any resolutions regarding its affairs. He asserted that this stalemate has been made worse by the fact that he and the respondent who were a married couple have since divorced, and the said divorce was finalized sometime in June 2021. He expressed the view that it is highly unlikely that the objects of the company will be realized.
 32. The respondent in her replying affidavit averred that she became a Director and Shareholder of the Company in the year 2012, after being married to the petitioner and subscribed to 35,000 shares, issued at a nominal value of Kshs. 1/- and fully paid up on subscription. She explained that during that time, the Company was a shelf Company with no assets. That thereafter, both the petitioner and the respondent contributed equal sums of money in cash, and also contributed in kind, over a period of



time and during the course of their marriage, towards the purchase of all that parcel of land known as Kajiado/Ole Kasasi/1167 sometime in October 2012.

33. She averred that during the course of their marriage, the petitioner would regularly ask her for money to facilitate the construction of rental units on the property between the period 2017-2018 and she complied by numerously giving him cash and making bank transfers to fund the Company's project. In addition, that on 7th September, 2018 her mother Dr. Florence Kiragu Nyamu, transferred Kshs.5,000,000/= which was her inheritance and that of her grandchildren to their joint account to facilitate the building of the flats on the property.
34. The respondent further averred that sometime in late 2019, her marriage to the petitioner started experiencing problems and he started excluding her from all aspects of his life, including the management and affairs of the Company. She contended that it is through her capital injection and investment that the Company was able to acquire and develop the rental units on its property, thus the petitioner cannot conveniently claim that the Company needs to recapitalize.
35. She asserted that noting the time between the petitioner's claim for recapitalization and filing of the divorce cause, the re-capitalization and distribution of shares is just a way to strip the company of its only asset on allegations of debt, while at the same time transfer the property and the improvements thereon to the petitioner through his related company. The respondent stated that decisions on the company's affairs were shrouded in secrecy so there was no way for her to be present during Board meetings despite the fact that she is interested in the running and affairs of the Company.
36. She asserted that she believes that these proceedings are meant to enable the petitioner acquire the company's residential flats they jointly constructed on the cheap, and has absolutely nothing to do with the company being dysfunctional or insolvent as alleged in paragraph 12 of his replying affidavit. The respondent deposed that in an email sent to her on 8th April, 2020, the petitioner referred to a loan of Kshs.23,700,000/= allegedly acquired by New Valley Estate Limited in the year 2020 from Housing Finance Kenya Ltd, which the Company was allegedly required to pay.
37. She stated that she did not sanction the acquisition of the said loan as a Director of the Company, and there is no agreement between the Directors of the Company and those of New Valley Estate Limited with regard to the said loan, and she is not aware when the funds were purportedly transferred to the Company's account and utilized at all. That on 29th April, 2020, she sought clarity on the said loan amount, how it was taken without her consent, and requested the petitioner to provide her with the Company's books and financial statements, together with the Company file, but no documentation was provided on the utilization of the purported loan by the Company.
38. The respondent averred that the audited accounts submitted by the petitioner are not genuine as they were prepared by Auditors unilaterally handpicked by the petitioner to create a false narrative of the Company's liabilities best suited to his intended course of action. She deposed that the petitioner had not disclosed when the debt of Kshs.54,356,058.00 was incurred by the Company, how they were sanctioned, and the time the respective loans became non-performing. She referred to the Valuation Report of the suit property presented by the petitioner, and further deposed that the fact that the Company is still receiving rental income to date, is an indication that the Company is a going concern.
39. She stated that in any event, the said debt was incurred by New Valley Estate Limited, which is owned by the petitioner and his siblings, with the petitioner being one of the largest Shareholders and doubling up as the Chief Executive Officer, which calls into question whether the petitioner disclosed such an interest and disqualified himself from any such decisions. That since the petitioner has adopted a secretive approach in the management of the Company's affairs as can be seen from the foregoing



averments, he cannot now turn around to claim that there has been a deadlock as that would only arise if both parties were actively participating in the management of the company.

40. She contended that the meeting to discuss the voluntary liquidation of the Company was convened and constituted contrary to the Company's Memorandum & Articles of Association and was only convened for purposes of sanitizing the petitioner's unilateral pre-determined actions. She confirmed that she asked that the meeting called for 17th October, 2022 be held at a later date and requested to be furnished with the essential company documents to enable her prepare for the meeting and meaningfully participate in the set agenda, but despite several reminders regarding her request, the petitioner went ahead and convened an illegal meeting on 17th November, 2022 in her absence without honouring her request.
41. She stated that the documents she requested for were received way after the meeting held on 17th September, 2022 citing that they were lost on postage. It was stated by the respondent that whereas the Company's Articles are clear, the law does not envision a party having a meeting by himself hence this Court should not sanction the petitioner's attempt to hide behind the Company's Memorandum & Articles of Association. Further, that the purported minutes annexed to the petitioner's supporting affidavit are in violation of the Company's Articles for failing to adhere to the basic principles of convening and constituting a meeting.
42. The respondent argued that even if the petitioner's allegations were true, there is still evidence of ill will, bad faith, and malice by the petitioner in rushing to liquidate the company on unsubstantiated and padded debts and a make-believe stalemate without exploring the full repertoire of solutions such as buying out of the ascertained shares of the petitioner and getting new Directors on board to invest, as this would allow the Company to continue doing business. She confirmed having attended the meeting of 24th January, 2023 only to discover that the petitioner had not even sent a virtual link to the Company Secretary or to any other party who was to attend the said meeting.
43. The petitioner deposed that she raised queries as to why the meeting was being convened without the attendance of the Company Secretary, the lack of provisions of inputs to the financial reports such as receipts, invoices and requested that she be furnished with amended minutes to the meeting held on 17th November, 2022 signed by all attendees in accordance with Article 10 of the Company's Articles of Association, but the said information was not captured in the minutes prepared by the petitioner and annexed to his verifying affidavit. The petitioner confirmed that she declined to attend the meeting of 3rd March, 2023 due to lack of transparency, hoarding of documents and constant shifting of goal posts.
44. She referred to paragraph 1K of the purported minutes prepared by the petitioner which state that she did not have information to make a decision regarding the liquidation of the company. She therefore argued that it does not make sense how she would agree to dissolve the Company in light of her numerous requests for information and documentation that would assist her in offering suggestions on the best way forward. She further stated that she believes that the Company's books of account and its financial statements ought to be audited by an independent audit firm since the alleged liabilities are not genuine as the Company is an investment vehicle with no known liabilities.
45. The petitioner in his further affidavit confirmed that together with the respondent, they equally contributed towards the purchase of all that parcel of land known as Kajjado/Ole Kasasi/1167 and registered it in the name of the Company, but he later paid an additional Kshs.80,000/= in order to effect the transfer of the said property. He confirmed that on 7th September, 2018 the respondent's mother deposited Kshs.5,000,000/= into their joint account, which money has been recognized in the company's financial accounts as additional capital.



46. The above notwithstanding, the petitioner deposed that respective contributions and resulting entitlements is an accounting issue that can be properly determined by a liquidator. He denied that he has been conducting the affairs of the Company in an opaque fashion to the exclusion of the respondent. He asserted that matters concerning the company were frequently discussed and decided informally since the Company had only one asset and the at the material time, he was married to the respondent and there was no need for frequent Board meetings.
47. He stated that in as much as he was the one heavily involved in the construction, development and management of the building on the property, he consistently kept the respondent updated throughout the construction of the property, and upon completion, he shared the final construction accounts with the respondent detailing each party's contribution. Further, that he never excluded the respondent from participation in the project, and she did she express any interest to be involved in the same.
48. The petitioner averred that at no point in time did the Company obtain an unsanctioned loan. He further averred that he obtained a facility through New Valley Estate Limited in his personal capacity for the sole purpose of supporting the Company's construction of the property, and any liability arising from the loan rests with him as opposed to the Company. He stated that the only liabilities incurred by the Company are Shareholders' loans being money due and owed to the petitioner and the respondent.
49. He deposed that whereas the Company's indebtedness triggered discussions for its voluntary liquidation, it is the deadlock and impasse between him and the respondent that has prompted him to petition for the liquidation of the Company on just and equitable grounds. It was stated by the petitioner that the Company has no active accounts as it was not actively involved in any operational transactions. That the joint account registered in the name of the petitioner and the respondent on the other hand became inactive when all funds were exhausted during the construction, and he had since opened an account at Kenya Commercial Bank which is used for all matters relating to the property.
50. He averred that the respondent used the firm of Igeria & Ngugi Advocates to administer all matters relating to the Registrar of Companies, hence Mr. Arthur Igeria was captured as the Company Secretary in its Shareholding Certificate. That all Board meetings were convened and conducted in accordance with the provisions of Articles 103 and 104 of the Company's Articles of Association, thus it was not true that he conducted the affairs of the Company and made decisions involving the Company to the exclusion of the respondent.
51. The petitioner further averred that the respondent's proposal for a share buy-out is neither practical nor reasonable as there is no reasonable prospect of the parties herein reaching an agreement on a share buy-out given the irretrievable break down of their relationship, which has resulted in the current deadlock in the management of the affairs and operations of the Company.

Whether a Liquidation Order should issue against the respondent.

52. The instances under which a Company may be liquidated by a Court are provided for under Section 424(1) of the *Insolvency Act*, 2015 which provides that –

“A company may be liquidated by the Court if-

- a. the company has by special resolution resolved that the company be liquidated by the Court;
- b. being a public company that was registered as such on its original incorporation –



- i. the company has not been issued with a trading certificate under the *Companies Act* (Cap. 486); and
- ii. more than twelve months has (sic) elapsed since it was so registered;
- c. the company does not commence its business within twelve months from its incorporation or suspends its business for a whole year;
- d. except in the case of a private company limited by shares or by guarantee, the number of members is reduced below two;
- e. the company is unable to pay its debts;
- f. at the time at which a moratorium for the company ends under section 645— a voluntary arrangement made under Part IX does not have effect in relation to the company; or
- g. the Court is of the opinion that it is just and equitable that the company should be liquidated.”

53. In urging the Court to liquidate the Company, the petitioner has relied on the provisions of Section 424(1)(g) of the *Insolvency Act*. Courts have a very wide discretion to issue an order of liquidation against a company if it is of the opinion that it is just and equitable to do so. However, this discretion must not only be exercised cautiously and sparingly, but must also be justified by a sound consideration of all the facts. Halsbury’s Laws of England 4th Edition Volume 7(2) at page 1095 defines the term just and equitable as hereunder -

“the words just and equitable in company law are a recognition of the fact that a limited liability company is more than a mere judicial entity with a personality in law with its own: behind or among it there are individuals with rights, expectations and obligations interse which are not necessarily submerged in the company structure. ”

54. The Court in the case of *Abdirashid Mude Ulow v Hassan Omar Kassai* (supra) in declining to wind up a company stated that –

“The court may subject the exercise of legal rights by various shareholders to equitable considerations of a personal culture arising between the shareholders in order to determine whether any of the actions are just or inequitable. Several examples are cited to illustrate instances where it may be just and equitable to wind up a company. The instances include;

- a. Where the substratum has gone;
- b. Where it is impossible to carry on a company’s business owing to internal disputes which have produced a state of deadlock;
- c. Where directors withhold information from shareholders in circumstances which give rise to that suspicion that they are attempting to buy their share at an undervalue...”

55. When it is apparent to the Court that there exist grounds to warrant issuance of an order to wind up a company, the said order may still not be granted if there is an alternative remedy available to the parties in the petition.



56. In this case, the petitioner and the respondent are the only Directors and Shareholders of the company with the petitioner holding 35,001 shares and the respondent with 35,000 shares. It is evident from the pleadings that the petitioner and the respondent were married at some point and during the said time, they were running the Company, Suntap Kenya Limited, as a family business. Inasmuch as petitioner managed the day to day activities of the Company including handling the construction of the four storey apartments on the Company's parcel of land, both the petitioner and the respondent invested capital and/or financially participated in acquiring all that parcel of land known as Kajjado/Ole Kasasi/1167, and construction of the four storey apartments on the said parcel of land.
57. It is not disputed that other than the aforesaid parcel of land and the improvements thereon, the Company does not hold and/or have any other assets. From the record, it is evident that when the marriage between the petitioner and the respondent started facing challenges, the said challenges manifested themselves in the management of the Company's affairs, a fact which is admitted by the parties herein. It is noted that since the respondent joined the Company as a Shareholder and Director, the Company has been running smoothly and was even able to acquire a parcel of land and successfully construct a four storey apartment on it. It is noteworthy that as late as 7th September, 2018, the respondent was not only comfortable but confident on the potential of the Company to the extent of investing Kshs.5,000,000/= into it, an amount which was deposited by her mother in the respondent's and petitioner's joint bank account, which the respondent averred was her inheritance and that of her children.
58. The petitioner deposed that the Company was established to inter alia carry on the business of developers and agents, to purchase, take or lease, develop and turn to account or otherwise acquire for the purpose of the Company, any estates, houses, buildings, easements or other interests in real estate. The evidence tendered before this Court is that the Company bought a parcel of land and constructed on it a four storey apartment it comprising residential houses, which it started letting out in the year 2021. The petitioner contended that before completion of the construction, the respondent withdrew from participating in the Company's affairs without any justification thus making it difficult to not only manage the affairs of the Company but also transact any business on behalf of the company. The petitioner does not however deny that the Company is still a going concern as it is still receiving rental income from the said property.
59. Additionally, he has not alleged and/or demonstrated that he is facing any challenges when it comes to payment of bills in respect of the parcel of land and the improvements thereon. I note that despite the fact that the petitioner has produced the Company's financial accounts indicating that it has liabilities of Kshs.54,356,058/= comprising the company's short-term liabilities incurred as of the end of the year 2021 inclusive of the tenancy deposit held by the company, the total Shareholder loan of Kshs.44,105,026/= for the petitioner, and Kshs. 3,852,839.00 for the respondent, he has not tender in any evidence to demonstrate that the company is unable to pay its debts, and that the Company's working capital and value of its assets is way below the value of its liabilities.
60. The petitioner is urging this Court to issue a liquidation order against the Company on grounds that due to the irreconcilable differences between the petitioner and the respondent, there is a deadlock and/or stalemate in the running of the Company's affairs. The petitioner in his affidavit however contradicted himself by tendering in evidence in the form of notices issued to the respondent for Board meetings and minutes of Board meetings that were to be held on different dates, demonstrating that he has been able to hold successful meetings in the absence of the respondent. In the premise, this Court agrees with the petitioner that even though there are differences between the petitioner and the respondent, the said differences have not stopped the Company from holding successful Board meetings.



61. This Court has already found that the Company is a going concern considering the fact that the only business it has been conducting since its inception has not been affected by the differences between its Directors. The Company is still receiving rental income from the residential apartments constructed on Kajiado/Ole Kasasi/1167, a parcel of land owned by the Company. Further, the petitioner in his further affidavit deposed that he has even opened a bank account at the Kenya Commercial Bank, which account is used for all matters relating to the property. This means that the petitioner is not unable to access the company funds and pay any bills due and or arising despite the fact that there are issues in the internal management of the Company.
62. It is not disputed that there is an irretrievably broken-down relationship between the petitioner and the respondent evidenced by the fact that they were once married but have since divorced as at the year 2021. The petitioner has unilaterally made decisions affecting the company and/or on its behalf for one reason or another, and he unilaterally opened an account at the Kenya Commercial Bank used for matters in relation to the Company.
63. From the above facts, and on perusal of the parties' respective submissions, this Court is satisfied that there is no evidence that the Company is unable to carry out its business and is no longer a going concern, and that it is unable to pay its debts. However, I am persuaded that there is a deadlock and/or stalemate between the company's Directors on how to conduct management and operations of the Company. In view of the fact that a Company is a separate legal entity from its Directors and Shareholders, see the case of *Salomon v Salomon* [1897] AC 78. This Court finds that the differences between the petitioner and the respondent do not qualify as a just and equitable ground to warrant dissolution of the Company.
64. In any event, the respondent in her replying affidavit and submissions indicated that if moving forward, the petitioner is not interested in being part of the Company, his shares can be valued and thereafter bought by her or any other third party. Further, Article 31 of the Company's Articles of Association provide for transfer of shares. That is evidence of other available remedies to take care of the stalemate by the Company's Directors. The petitioner's averments that the option of his shares being bought by the respondent is not available since the petitioner and the respondent cannot agree is neither here nor there since the Company's shares can be valued and thereafter sold to the respondent or a third party.
65. In the end, I find that the petition herein is bereft of merits. Consequently, I make the following orders:
 - i. The instant petition is hereby dismissed;
 - ii. The petitioner's shares shall be valued by an independent Valuer to be appointed by the Court;
 - iii. This matter shall be mentioned in forty-five days for purposes of appointment of an independent Valuer; and
 - iv. Each party shall bear his/her own costs.

It is so ordered.

DATED, SIGNED and DELIVERED at NAIROBI on this 15th day of May, 2024. Judgment delivered through Microsoft Teams Online Platform.

NJOKI MWANGI

JUDGE

In the presence of:

Ms Kadima h/b for Ms Lubano for the petitioner



Ms Mulomi for the respondent

Ms B. Wokabi – Court Assistant.

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