



**Njambi v The Big Two Limited & another (Winding Up Cause  
1 of 2015) [2024] KEHC 9542 (KLR) (18 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 9542 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIVASHA  
WINDING UP CAUSE 1 OF 2015  
GL NZIOKA, J  
JULY 18, 2024**

**BETWEEN**

**MARY NJAMBI ..... PETITIONER**

**AND**

**THE BIG TWO LIMITED ..... 1<sup>ST</sup> RESPONDENT**

**DAVID NDWIGA GATHENDU ..... 2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

1. The Petitioner commenced the petition herein by filing a petition dated 14<sup>th</sup> January 2014, wherein she is seeking for the following orders: -
  - a. A declaration that the 2<sup>nd</sup> respondent is conducting the affairs of the 1<sup>st</sup> respondent in a manner oppressive to the petitioner.
  - b. That the Big Two Limited may be wound up by the court under the provisions of the [Companies Act](#).
  - c. That the costs of this petition be granted to the petitioner and be paid by the 2<sup>nd</sup> Respondent.
  - d. That such order as may be made in the premises as shall be just.
2. The petition is supported by the petitioner's statement of the even date and a list of documents filed therewith. The petitioner avers in a nutshell that, the 1<sup>st</sup> respondent, Big Two Limited Company (herein "the Company") was established in the year 1994 and deals in the business of selling building materials and general transport. That it has two directors, namely the petitioner and the 2<sup>nd</sup> respondent and domiciled within Naivasha town along Kariuki Chotara road.
3. That in the year 2011, the directors who are husband and wife disagreed and she was chased away from her matrimonial home. Subsequently the 2<sup>nd</sup> Respondent locked her from the management



- and operations of the company. That ever since he has been disposing off the company assets and purchasing property in his own name.
4. Further by the time the 2<sup>nd</sup> Respondent chased her, the value of the company asset was Kshs 80,000,000 and a total of three (3) lorries purchased at Kshs 10,000,000 each. That she has tried to reach out to the 2<sup>nd</sup> Respondent with a view of settling their difference to no avail, thus demonstrating total deadlock between the directors of the company. As such, as a co-director and shareholder, she holds that, it is just and equitable that, the company be wound up and all its assets and liabilities shared out accordingly.
  5. However, the petition was opposed vide a replying affidavit dated 12<sup>th</sup> February 2014, sworn by the 2<sup>nd</sup> Respondent and supported by his statement of the even date. He avers in a nutshell that, the Petitioner left the matrimonial home in the month of August 2012 on her own volition and relocated to Mombasa. That she wrote a letter to the effect that, she did not want to be part of company.
  6. That ever since she left the company he had to double up as the manager of the wholesale shop and transport business, as the Petitioner was the one in charge of the day to day running of the company.
  7. Further, the Petitioner withdrew money from the company account for her own use, and he has had to pay off the company's debt on his own, and that, since the Petitioner left the company has not been able to access any loans from third parties as the Petitioner has refused to consent to passing of a resolution to authorize the company to borrow, thus frustrating the company's operations. The 2<sup>nd</sup> respondent sought for dismissal of the winding up cause.
  8. However, by a replying affidavit dated 12<sup>th</sup> March 2014, the Petitioner averred that she fled to Mombasa after the 2<sup>nd</sup> Respondent threatened to kill her. That her failure to participate in the running of the day to day operations of the company was occasioned by the hostility of the 2<sup>nd</sup> Respondent. The Petitioner conceded to withdrawing of funds from the company account explaining it was for her upkeep and subsistence whenever need arose.
  9. That due to the aforesaid hostility the directors of the company cannot agree on any issues, hence the difficulty in passing any resolutions. Finally, due to lack of confidence and trust between the directors which was the basis upon which the company was formed it is only fair and just the company be wound up.
  10. The matter was heard, with each party giving its evidence basically, reiterating the averments in the respective statements and subjected to cross examination as evidenced by the proceedings herein. At the conclusion of the trial the parties filed their respective submissions which have been considered herein.
  11. Having considered the entire evidence on record, I find that several issues have arisen for consideration namely whether;
    - a. the petition is premised on proper provisions of the law and/or
    - b. the provisions of section 211 of the *Companies Act* (Cap 486) Laws of Kenya (repealed) are the proper provisions upon which the petition herein should have been anchored.
    - c. the petitioner has met the threshold of grant of the orders sought in the petition.
  12. However, before I delve into the afore issues I note that, an issue arose during the hearing of the matter herein, and which needs to be addressed first. The issue revolves around the fact that there is an appeal in the Court of Appeal wherein the company herein is a party and which has not been heard and determined.



13. In that regard, I note from the record herein that, on 13<sup>th</sup> May 2014, the 2<sup>nd</sup> Respondent filed a notice of motion application of even date, seeking for orders that, there be stay of proceedings in this matter pending the hearing and final determination of the matter HCCC No. 362 of 2012 at Nakuru. It is not clear from the court record what has transpired in that matter.
14. Be that, as it were, it does appear another suit, HCCC No. 2 of 2014. The Big Two Limited - v- Mary Njambi Ndwiga was filed at Naivasha High Court vide a plaint dated 12<sup>th</sup> August 2014 and at the same time the winding up cause herein was filed at Nakuru High Court. That by a notice of motion application dated 16<sup>th</sup> September 2016, the Respondents herein sought for the transfer of this matter from Nakuru High Court to Naivasha High Court and the same was allowed.
15. In the meantime, the HCCC No. 2 of 2014 proceeded to full hearing and determination, wherein judgment was entered in favour of the plaintiff the 1<sup>st</sup> Respondent herein. However, the defendant who is the Petitioner appealed against that decision.
16. The question that arises at this stage is whether; this court can make a determination on the winding up or otherwise of the company which is a party to an appeal in the Court of Appeal, and which appeal is still pending? What would be the legal consequences if the court were to order for the winding up of the company before the appeal is heard?
17. Notably, the Petitioner who is seeking for the winding up order herein is the same one who has an appeal pending in the Court of Appeal. Can the Petitioner be allowed to prosecute both matters simultaneously? I don't think so.
18. Thus taking into account the fact that determination of this matter may prejudice the appeal at the Court of Appeal, it is not tenable to delve in the merit thereof. In that regard, I hold that, this matter should be held at abeyance pending the hearing and determination of the appeal.
19. In fact, the court inquired on how long the appeal may take and it was evident that it may not be heard soon, and this court advised the parties to seek for expeditious disposal of the appeal but that has not been done. Eventually the parties sought for decision in this matter be heard.
20. Having taken into account the fact that this matter has taken a period of ten (10) years without an indication as to how long it will take to conclude the appeal. It is the considered opinion of this court that, the only reasonable cause of action the Petitioner can take is withdrawal of this cause pending the hearing and determination of the appeal on the ground that it is pre-mature and/or not tenable in view of the pending appeal.
21. It is so ordered.

**DATED, DELIVERED AND SIGNED THIS 18<sup>TH</sup> DAY OF JULY 2024**

**GRACE L. NZIOKA**

**JUDGE**

In the presence of:-

Mr. Akango for the petitioner

Mr. Mathi for the respondent

Ms. Ogutu: Court Assistant

