Gethenji v Gethenji (Insolvency Cause E071 of 2023) [2024] KEHC 12749 (KLR) (Commercial and Tax) (17 October 2024) (Judgment)

Neutral citation: [2024] KEHC 12749 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

INSOLVENCY CAUSE E071 OF 2023

AA VISRAM, J

OCTOBER 17, 2024

IN THE MATTER OF KIHINGO VILLAGE (WARIDI GARDENS) MANAGEMENT ONE LIMITED

AND

IN THE MATTER OF KIHINGO VILLAGE (WARIDI GARDENS) MANAGEMENT TWO LIMITED

AND

IN THE MATTER OF THE INSOLVENCY AC

BETWEEN

FREDRICK GITAHI GETHENJI ..... PETITIONER

AND

JAMES NDUNGU GEHTENJI ..... RESPONDENT

JUDGMENT

1. Before the court for determination is the Petition dated 21st November, 2023, ("the Petition") filed by the Petitioner and made under sections 424, 425, and 427 of the *Insolvency Act* (Chapter 53 of the Laws of Kenya) ("the Act") seeking the following orders:-

    a. A permanent injunction be issued pending the liquidation of Kihingo Village (Waridi Gardens) Management One Limited restraining the Respondent, his agents or servants howsoever from lodging any complaints whether civil or criminal or filing any suits in any manner whatsoever on behalf of Kihingo Village (Waridi Gardens) Management One Limited

and with interfering with the management of the suit property Land Reference Number 27754, Nairobi managed by Kihingo Village (Waridi Gardens) Management Ltd in any manner whatsoever.

b. Kihingo Village (Waridi Gardens) Management One Limited and Kihingo Village (Waridi Gardens) Management Two Limited be liquidated.

c. The Liquidator be appointed to liquidate Kihingo Village (Waridi Gardens) Management One Limited and Kihingo Village (Waridi Gardens) Management Two Limited.

d. The court be pleased to make such further orders as may be deemed just, equitable and expedient.

e. The Costs of the Petition be paid by the Respondent.

2. The Petition is supported by the affidavits sworn by the Petitioner on 21st November, 2023; 13th December, 2013; and 29th February, 2014, respectively. It is opposed by the Respondent through his replying affidavits sworn on 7th December, 2023; and 21st February, 2024, respectively.

3. The Petition was disposed by way of written submissions which are on record, and to which, I will make relevant references to in my analysis and determination. Because a number of facts in this matter are disputed, I have set out the parties' respective positions, as contained in the Petition, and the replying depositions.

The Petition

4. The Petitioner avers that the parties are both directors and shareholders of Kihingo Village (Waridi Gardens) Management One Limited and Kihingo Village (Waridi Gardens) Management Two Limited ("the Companies", "Kihingo One" and/or "Kihingo Two").

5. He avers that Kihingo One has a Nominal share capital of Kshs. 30,000/= divided into 30 shares of Kshs. 1000/= each, with each party holding one ordinary share whereas Kihingo Two has a Nominal share capital of Kshs. 25,000/= divided into 25 shares of Kshs. 1000/= each, with each party also holding one ordinary share.

6. The Petitioner states that Kihingo One and Kihingo Two were incorporated on 5th October, 2010, and 7th October, 2010 respectively, with the objects to inter alia acquire the leasehold property known as Land Reference Number 27754 Nairobi ("the Property") together, and to hold the same as an investment for the benefit of the Lessees of the houses erected through the joint and equal ownership of Kihingo Village (Waridi Gardens) Management Limited ("the Management Company"); and to undertake or direct management together, and in common, with each other of the said property.

7. The Petitioner averred that Clause 6 of the Companies' Memorandum of Association provided that no person was to be admitted to the membership of the Companies other than the subscribers thereto, and the Lessees of House Nos 1-55 erected on the said property; and that section 25 of the *Companies Act* (Chapter 486 of the Laws of Kenya) would not to apply to the above provision.

8. The Petitioner deposed that at no material time were the Lessees of Houses erected on the property admitted into membership of the Companies; and that the management of the property, and the buildings thereon, was subsequently taken up by the Management Company, where all the Lessees of the 55 houses are members, and in control of the said company.

9. The Petitioner deposed that the substratum of the Companies has since disappeared. He averred that there is no legal basis for the Companies to exist because the objects have come to an end; and the

Companies ceased to offer any management services over the suit property upon the incorporation of the Management Company on or about 29th January, 2010.

10. The Petitioner deposed that despite him having a 50% stake in Kihingo One, the Respondent illegally created a special class of shares known as Class B Shares in the Management Company in favour of Kihingo One. He averred that the said action was capricious, vindictive, unlawful, inequitable and unjust. The same gave rise to litigation and associated costs running into millions of shillings, and incurred by the 54 Lessees of the suit property, and have taken up valuable judicial time.

11. The Petitioner claimed that on diverse dates between 19th July, 2019, and 29th January, 2021, the 54 Lessees of the Management Company instructed their advocates to fight off a false and malicious complaint with the Registrar of Companies instituted by the Respondent over the purported Class B Shares, and that the Respondent has instigated various suits in the superior courts, including the Court of Appeal, ostensibly over his misconceived obsession with the illegally created Class B Shares.

12. The Petitioner averred that despite an arbitral award being published and implemented; a past decision of the Registrar of Companies; and various court decisions; the Respondent instructed his advocates on 13th December, 2022, to write yet another complaint to the Hon. Attorney General over his ousting as a director following the EGM held on 13th April, 2019, and the removal of Kihingo One's Class B Shares.

13. The said complaint was however never served on the advocates of the Management Company, despite the history of the matter, and despite the Petitioner's advocates being on record.

14. Further, that at no material time, was any resolution passed by Kihingo One to instruct the firm of Otieno Ogola Advocates to lodge any complaint over the former Class B Shares previously owned by Kihingo One.

15. The Petitioner averred that on 15th March, 2023, as a director of the Management Company, he was instructed by the board to file- JR No. E033 of 2023;Kihingo Village (Waridi Gardens) Management Ltd v The Hon. Attorney General & Others to, inter alia, quash a decision of the Registrar of Companies of 7th March, 2023, but that the suit was struck out on a technicality for the reason that leave to commence judicial review orders had not been obtained.

16. Accordingly, a fresh suit for leave to commence judicial review proceedings was filed in JR No. E169 of 2023; Kihingo Village (Waridi Gardens) Management Ltd v The Hon. Attorney General & Others, which matter is pending, and that the filing of the latest suit is therefore a testament to the continuous and persistent interference by the Respondent, who cannot let go of the fact that has lost control over the running of the management of the suit property.

17. The Petitioner averred that the Respondent was charged with forgery contrary to section 345 of the Penal Code for forging minutes of Kihingo One's minutes on 21st November, 2023, when Mr. Chacha Mabanga was fraudulently brought in as a director. In that matter, the court quashed the criminal case in JR No. E083 R v Director of Criminal Investigations & Others on 27th January, 2022. Following the same, an appeal namely, Civil Appeal No. E069 of 2022; Fredrick Gitahi Gethenji v Director of Criminal Investigations & Others was lodged against the judgment, and the same is pending in before the Court of Appeal.

18. Based on the above, the Petitioner was of the view that the Companies ought to be liquidated.

The Respondent's Reply

19. The Respondent opposed the Petition based on its grounds raised in response the Petitioner's application dated 21st November, 2023.

20. He averred that the Petition, and the orders sought, are incapable of being enforced against him as an individual. In his view, the Petitioner could not have any cause of action against him in his personal capacity.

21. The Respondent contended that the Petition is no more than a continuation of an old family dispute and is an abuse of the court process. He submitted that he has been arrested and arraigned in the criminal court on three occasions at the instigation of the Petitioner, and that the Magistrate's Court acquitted him of the criminal offenses, and the High Court in JR No. E083 of 2020 quashed the decision to charge him at the instigation of the Petitioner.

22. The Respondent contended that the Petition was filed with the sole purpose of defeating the Companies' stake and interest in the Management Company (where Kihingo One holds and retains 60 Class B Shares).

23. He averred that some shareholders of the Management Company, including the Petitioner, have sought to disenfranchise Kihingo One of its said shareholding with a view to take control of the Management Company.

24. The Respondent accused the Petitioner of mischief, on the basis that Kihingo One is presently involved in litigation before the Court of Appeal in Civil Appeal Number E099 of 2021. He averred that issues in the said appeal relate to the Petition which is also based on the shareholding in the Management Company.

25. That the Petitioner and some members of the Management Company have previously attempted to dilute the shares of Kihingo One in the said company by attempting to pass resolutions at company meetings with a view to removing its shares. However, the said resolution were passed in a manner that does not accord with the provisions of the *Companies Act*, and the Articles of Association, and that the Petitioner still sought to enforce the said illegal resolutions in court proceedings before the Court in JR No. E169 of 2023.

26. The Respondent submitted that in the said suits, the Petitioner has taken the position that Kihingo One is not a shareholder in Management Company; and that the present proceedings are intended to remove Kihingo One from existence, with the sole aim being to remove it from being a member of the Management Company.

27. Based on the above, the Respondent prayed that this court ought not liquidate Kihingo One since such an order would greatly prejudice the Company, and its interests, and divest it with the authority to carry out its business and affairs in the Management Company, where it is a major shareholder.

28. He submitted that differences between shareholders or directors of a company by themselves, are not a basis to seek for liquidation of a company. He submitted that courts have variously held that directors should seek to resolves their differences outside the rubric of liquidation, and not use the same as a basis to seek the liquidation of the Company.

29. He contended that if the Petitioner no longer desires to continue being a member of the said Companies, he is at liberty to sell his shares to the Respondent following an evaluation of the Companies' worth. He submitted that the Petitioner, has in the past, entered into communication with the Respondent expressing an interest to sell his shares to him, and even requested a valuation of

the shares be undertaken with a view to buying him out. However, thereafter, the Petitioner changed his mind.

30. Finally, that the Articles of Association of the Companies are very clear on the manner of deciding any issue when there is a tie in the voting of members at the Board of Directors and the General Meeting of members, and it is the Respondent's prayer that the Court ought to honour the said Articles of the Companies which are binding on the Petitioner as a member.

The Petitioner's Submissions

31. The Petitioner submitted that the Respondent has not objected to the liquidation of Kihingo Two and has only concentrated on Kihingo One. That the Petition is brought under Division 6 of the *Insolvency Act*- Liquidation by Court- under sections 424,425 & 427 of the *Insolvency Act* where he submitted that there is absolutely no requirement that the Petition must be submitted to the Official Receiver for approval, or gazettement, as those requirements do not fall under Division 6.

32. Senior Counsel submitted that Notice for gazettement of a liquidation of a company is only required under section 394 of the *Insolvency Act*, and only where the company has passed a resolution in the instance of voluntary liquidation. The said requirement does not apply under the just and equitable principle where leave of court to liquidate a company is required, and to require the same would be to engage in an illegality.

33. Senior Counsel contended that section 423 of the *Insolvency Act* confers absolute jurisdiction to the court to supervise liquidation of companies which then grants the liquidation order. He further argued that a liquidation order against a person rather than a company is permissible pursuant to section 454(1)(g) of the *Insolvency Act*, under the just and equitable principle. His view was that if shareholders are deadlocked, the company is incapable of being a party, hence the reason why the liquidation order is made against the other shareholder and not the company.

34. The Petitioner submitted that the facts in the present matter are that there is in fact a dead lock in Kihingo One. No resolution can ever be passed, and that the late Justice Majanja recognised this fact in HCCC No. E229 of 2019; Kihingo Village (Waridi Gardens) Management One v William Pike & Others; and that the Court of Appeal in relation to an application for stay in Civil Application No. E025 of 2021 Kihingo Village (Waridi Gardens) Management One Ltd v William Pike & Others found that the issue of lack of resolution to file suit by Kihingo One had not been rebutted.

35. The Petitioner submitted that the Respondent has been collaterally attacking the arbitral award issued between the parties; various court decisions; and that since the year 2019, more than 20 applications, at the very least, have been filed in various courts, between the ELC, High Court, and the Court of Appeal in relation to the dispute between the parties. He argued that these facts have not been rebutted by the Respondent; and the Respondent has unlawfully been using Kihingo One to file vexatious suits, waste judicial time, and has occasioned litigation costs to the 54 Lessees of the Property. Such actions are frowned upon by the court as was held in Salim Yusuf Mohamed & Another V Nabhan Swaleh Salim & 2 Others [2012] eKLR.

36. In support of the 'just and equitable rule', the Petitioner relied on various authorities from the UK and our own jurisdiction, namely: Mahesh Kumar Manubhai Patel v Benson Thiru Karanja [2020] eKLR, Lau v Chu [2021] 1 BCLC 1, [2021] 1 BCLC 1 and Thomson v Drysdale. 1925 SC 311, the relevant courts wound up companies based on the 'just and equitable principle' where the relationship between two directors who were also two sole shareholders of the companies had deteriorated.

37. The Petitioner submitted that in the present matter, there is no other remedy available other than the liquidation of the companies on account of the following: deadlock; loss of substratum of the company; dishonesty and fraudulent conduct of the Respondent; and he submitted that the Companies have no assets whatsoever, and have never traded.

38. Finally, the Petitioner reiterated that the Respondent was acting in bad faith, and has never promoted the interest of the Companies. Kihingo One had been used to perpetuate a personal agenda, namely to oppress the 54 shareholders who bought their properties, and had been denied mandatory membership in Kihingo One and Two.

The Respondent's submissions

39. In opposition to the Petition, the Respondent submitted that no case has been made out for the grant of the orders sought in the Petition. Counsel argued that that this Petition is brought in bad faith, with a view to serve extraneous interests, and to undermine certain ongoing litigation, in which the companies and the parties herein are involved in. Counsel pointed out the following live matters: JR No. E169 of 2023 before the High Court of Kenya at Nairobi; and Civil Appeal No. E99 of 2021 before the Court of Appeal at Nairobi in which Kihingo One is a Respondent in an appeal lodged by amongst others, the Petitioner herein. He submitted that the said matters revolve around the participation of Kihingo One in the affairs of the Management Company.

40. The Respondent submitted that the Petitioner was abusing the Court's processes in further pursuit of his illegal schemes against Kihingo One, and the same should be rejected. In his view, the Petition had not brought with clean hands, but rather, with the sole purpose of incapacitating Kihingo One, in a similar manner in which the Petitioner has variously tried unsuccessfully.

41. Counsel relied on various decisions of the court in Re Ukwala Supermarket Limited (2019) eKLR and Kenya Power & Lighting Co Ltd V Matic General Contractors Ltd [2000] eKLR in which the court stated that it would dismiss Petitions for winding up or liquidating a company not brought in good faith, or being used a vehicle of oppression.

42. The Respondent contended that Petition had not complied with mandatory and necessary steps for winding up of a company. The Petitioner had not issued a notice to the Official Receiver notifying him of intention to seek the winding up of the Companies; and neither had he sought for a gazettement of the notice to wind up the company. He argued that the failure to comply with these preliminary steps render the Petition incompetent, and therefore subject to dismissal with costs. He pointed out the provisions of Regulation 77 of the *Insolvency Act* Regulations 2018, which set out the requirement for notice and a statutory demand in a prescribed form before a winding up Petition is lodged.

43. Counsel submitted that the purpose of a notice being issued to the Official Receiver and gazettement is to give notice, and to make aware other persons in the general populace, who may have an interest in the company, or may have had dealings with the company, to be aware of the proceedings, and to take steps to participate in the said proceedings to ventilate and protect their interests in the company if need be.

44. He submitted that winding up of a company should not be pursued clandestinely, as a private matter between the members of the company, as sought by the Petitioner. Winding up must be a very public exercise that is notified to the general public, and intercessors of the company sought to be wound up. Counsel pointed out that the Petitioner had not sought to notify members of the public or the Official Receiver of his intention to seek a winding up of the two companies, and that the process adopted and pursued by the Petitioner is void ab initio for failing to comply with the mandatory requirements and steps provided in law to institute winding up proceedings.

45. The Respondent urged the court to find that the Petitioner's failure to join the Companies to the action, and instead, bring the Petition against the Respondent in his individual capacity was fatal. He submitted that the Petitioner has no cause of action against the Respondent in his individual capacity, and no such cause exists, and the orders sought are orders that ought to issue against the Companies. He contended that it is trite law, and Article 50 of *the Constitution* sets out the right to be heard and for fair hearing. He argued that the Companies have not been joined in the present proceeding as parties, while the Petitioner is seeking orders adverse to their existence and interests. Accordingly, the Petition is incompetent to that end.

46. As regards the substratum of the Companies, Counsel submitted that the same continues to subsist, because it holds shares, which are assets, in the Management Company. Counsel relied on Article 5 of the Memorandum of Association of the Management Company, which he submitted is replicated in Article 8 of the Management Company's Articles of Association, indicating the shareholding of the company, and the number of shares by which the company is established.

47. As regards the question of whether there is management stalemate in the running of the Company, Counsel submitted that Companies' Articles of Association regulate the manner in which the members and directors are to arrive at a decision. The said process recognizes that decisions may be made by vote and equally recognizes that where there is a tie in the votes cast by the directors or shareholders of the company, the chairperson would have a second and casting vote. Counsel relied on Articles 25 and 46 of the Companies' Articles of Association for the above position.

48. Counsel contended that in the present matter there are alternative remedies available to the Petitioner, and it would be a drastic measure to wind up the Companies without invoking the available alternative remedies. He explained that the Petitioner has previously expressed a willingness and desire to sell his shares, and the Respondent has expressed willingness to buy the same. In the circumstances, the shares ought to be valued, and the Respondent is may be granted the option to pay the Petitioner the fair value of his shares, and leave the Companies. In support of the above position, Counsel relied on decisions of the court in the following matters: Re In the Matter of Leisure Lodge Limited ML WC29 of 2006, cited by the court in Synergy Industrial Credit Limited v Multiple Hauliers (E.A) Limited [2020] eKLR and Mohamed Yusufali & Another V Bharat Bhardwaj & Another [2007] eKLR

49. Based on the above, the Respondent submitted that differences between directors of a company cannot be a basis for the liquidation of a company. He urged the court to find that Companies are distinct and separate legal entities which have managing instruments, accordingly differences between their directors ought not to be a basis for liquidation. Counsel relied on the decision of the court in Abdirashid Mude Ulow v Hassan Omar Kassai [2020] eKLR in support of the above position.

Analysis and Determination

50. The main issue for determination is whether or not the Companies ought to be liquidated? A secondary issue is whether or not a permanent injunction ought to be granted in the terms sought by the Petitioner?

51. Following the hearing of the interlocutory application dated 21st November, 2023, which (at prayer 3) sought the issuance of an interim liquidation order and the appointment of the Official Receiver; this court, vide its ruling dated 23rd January, 2024, ruled as follows:-

> " 12. I am unable to find evidence that the Petition has been submitted to the Official Receiver for approval. I have not seen a certificate of Compliance filed by the Official Receiver, and I do not see any evidence of notice of gazettement or

advertisement of the Petition. All the above are mandatory steps to be taken by a Petitioner prior to an order of liquidation by the court.

13. I do not think that the court may make such an order of liquidation at an interim stage without the necessary safe guards having been complied with given the draconian and final nature of an order of liquidation.

14. Further, I note that the present application was filed against the Respondent, and not the company, which is the subject of the liquidation order. The Petition therefore seeks to make the person, and not the Company the subject matter of a liquidation order....

16. Nor am I of the view that the various injunctive reliefs ought to be granted based on the evidence before me, especially because there are ongoing and live matters presently before various courts. I am also alive to the fact that those prayers may have already been determined in relation to the same subject matter by another court of concurrent jurisdiction."

52. Since then, the circumstances remain unchanged. More specifically, none of the pre-requisites or safe guards, referred to above have been implemented by the Petitioner. However, I take note, that the reason for this, is because the Petitioner is of the view that the same are not required when a Petition is grounded in Division 6 of the *Insolvency Act*, under the 'just and equitable' principle.

53. In support of the above argument, the Petitioner argued that the present Petition is brought under sections 424, 425 and 427 of the *Insolvency Act*. The relevant parts of the said sections read as follows:-

424. Circumstances in which company may be liquidated by the Court

(1) 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*, 2015; and

(ii) more than 12 months has elapsed since it was so registered;

(c) the company does not commence its business within 12 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. (emphasis mine)

54. Section 427 (3), which referrers to the powers of the court on hearing a liquidation Petition, reads as follows in relation to the just and equitable principle:-

> (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 hat 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. (emphasis mine)

55. The Petitioner correctly pointed out that the said sections do not expressly provide for submission of the Petition to the Official Receiver for approval or gazettement. In Senior Counsel's view, once a petition has been filed and served, the next logical step, is simply for the court to hear and determine whether or not it is just and equitable to make an order for liquidation. If the answer to the same is affirmative, the court may grant leave, and may manage the liquidation process.

56. In support of the reasons as to why, in the present circumstances, the court should find it is just and equitable to make such an order, Counsel argued, in sum: that the shareholders are deadlocked; the substratum of the company has been lost; the companies have no assets or creditors; the creation of Class B shares referred to above was illegal; no annual returns have been filed for several years; no shareholder meetings have taken place since 2010; and that the Companies no longer serve any useful existence.

57. On the other hand, the Respondent submitted: that Petitioner had not complied with the mandatory requirements; had not joined the companies to the proceedings; the substratum of companies continues to exist; that the articles of association provide for a process in the event of a deadlock; and that alternative remedies are available other than an order for liquidation; and finally, that differences between directors are not a basis for liquidation.

58. Given my previous ruling issued in relation to the Notice of Motion dated 21st November, 2023, I must turn my mind to the question of whether or not the section 424 (1) (g) exempts a Petitioner seeking a liquidation order against a company from providing notice to the public in the form of advertisement or gazettement of the Petition; and from obtaining a certificate of approval from the Official Receiver? Further, if imposing the same on a Petitioner would amount to this court "engaging in an act of illegality", as urged by the Petitioner.

59. I have considered the above argument, and I have read section 424 set out above in entirety. I am of the view that while the said section does not expressly provide for the various safeguards outlined by this court in its ruling dated 23rd January, 2024, the said section does not expressly exclude or exempt the same either. To my mind, logic dictates that if parliament had wished to exclude from Division 6, and in particular section 424 (1) (g), the various processes generally required in insolvency proceedings, nothing would have been easier that to expressly provide for the said exclusion or exemption.

60. However, in the absence of an express exclusion or exemption, I am of the view that the *Insolvency Act* and Regulations ought to be read as a whole, bearing in mind the objectives and purpose of the Act and Regulations. Among those objectives is the principle that liquidation is a last resort, only after efforts to rescue a company have been made, and only after the public, and parties affected, have had an opportunity to present their views.

61. In my view, insolvency proceedings are unique, and differ from ordinary civil proceedings which are between private parties or entities. Insolvency proceedings are of a more public nature. This is because the effect of a liquidation order goes beyond the parties on record, and may affect many more members of the public that may not be before the court at that moment in time.

62. If this court were to accept the view that one section of the *Insolvency Act*, namely section 424 (1) (g) allows the court to simply do away with the relevant notices and approvals (from the body mandated with the task of managing such proceedings), such a decision would prejudice affected parties. Moreover, it would run the risk of opening up the floodgates to two tiers of insolvency proceedings; one which requires approval and notices; and one which does not. It goes without saying that the latter path would be open to abuse.

63. I wish to clarify that my intent is not to render section 424 (1)(g) redundant. I am of the view that court may still make an order under the said section in the event it is 'just and equitable' to do so, but only after the relevant notices and approvals have been complied with. I have considered the authority of Mahesh Kumar (supra) and while I am not bound by the same, it is worth stating that this authority actually supports my point of view because in that case, the Petition was in fact advertised. Paragraph 7 of the said judgment states that "the Petition was advertised and/ or published in the Daily Nation newspaper of 2nd November 2001 and 3rd November 2001...inviting any creditor or contributory of the company desirous of supporting or challenging it, to take note accordingly."

64. I have also considered the UK authorities put forward by the Petitioner, and I note the same are persuasive rather than binding. I am also cognizant of the fact that the laws relating to insolvency proceedings in the UK may differ from our law, and therefore, the reasoning in the said authorities ought to be contextualized. Having stated the above, it is evident that both of the cited authorities refer to situations in which the relevant court made a finding characterizing the companies in question as "quasi partnerships". This finding was the basis upon which the English courts proceeded to make the relevant orders. No such term has been clearly defined, or is generally known in our law, and I do not think this court may draw the same or similar conclusions in respect of the present companies, based on what appears to be a unique finding, or set of circumstances, in the authorities relied on by the Petitioners.

65. Having stated why 'notice' is a necessary safe guard, I now turn to 'approval' from the Official Receiver. It is worth noting that under the previous insolvency law and now repealed *companies act*, approval from the Official Receiver was not a requirement, and that the court often did manage the process of liquidation. In this regard, Counsel's submission that the court may manage the process once leave is granted is based on our historical context.

66. However, things have changed since then, and the present Act and Regulations, read together, now require a certificate of compliance as part of the solution to the various historical challenges that the court faced in managing insolvency proceedings. Approval, and issuance of a certificate of compliance from the Official Receiver, is therefore a deliberate change, and part of an effort between the Judiciary and the office of Official Receiver to better manage insolvency proceedings, and in particular, to ensure compliance with process prior to court appearance.

67. The present Regulations therefore form part of a framework intended to save the court and the parties, time, and costs, and to improve efficiency in the process. I therefore hold that both notice and issuance of a certificate of compliance are a mandatory part of the liquidation process, including and under Division 6 of the Act, and that the same may not be dispensed with it.

68. However, in the event I am wrong, and for the sake of completeness, I will also address my mind to the issue of whether or not, it would be just and equitable to liquidate the Companies pursuant to section 424 of the Act.

69. In Re Garnets Mining Co Ltd [1978] eKLR, the court stated as follows in relation to the exercise of such discretion:-

> "So a summary of the way to approach the issue of whether or not to wind up a company under the just and equitable rule is this. It is a matter for the discretion of the court. The discretion is a very wide one. It will be a matter of fact whether the company should be wound up or not under this rule. Each case will depend on its own circumstances: Loch v John Blackwood Ltd [1924] AC 783 and Re Bleriot Manufacturing Air Craft Co (1916) 32 TLR 253. There must be a sound induction of all the facts to justify the exercise of the discretion. There is no general rule for this (Davis & Co Ltd v Brunswick (Australia) Ltd [1936] 1 All ER 299) and categories should be avoided (Re Straw Products Pty Ltd [1942] VLR 222, Ebrahimi v Westbourne Galleries Ltd [1973] AC 360), though illustrations assist."
>
> (Also see In re Spencon Holdings Limited (Under Administration) [2020] eKLR)

70. Guided by the law as set out above, I am not persuaded that based on a sound indication of all the facts, the exercise of such discretion may be properly justified in the present circumstances. I say this because the facts in the present matter are highly contested. It is not in dispute that there are several ongoing litigations between the parties concerning the shares in the Management Companies before several courts of concurrent, and of appellate jurisdiction. This court is not privy to all the specific issues before those courts, and in the circumstances, an order of liquidation may prejudice the parties in relation to the said litigation. In the circumstances, I do not think it would be appropriate to exercise the discretion sought by the Petitioner.

71. Finally, I am not persuaded that there is no alternative remedy available to the parties other than to liquidate the Companies. Nor is it entirely clear to the court, whether or not a deadlock truly exists, in such a manner causing paralyses or total inability of the company to function at the board or shareholder level. On this issue, the Respondent made detailed submissions in relation to the Articles of the Companies, and explained how under the same, a deadlock may be either dealt with, or resolved. In contrast, the Petitioner submitted that my late brother, Majanja, J. had already made a finding of a deadlock between the parties, and submitted that this court could not overturn the same. Counsel was of the view that based on the finding by Majanja, J., a liquidation order ought to ensue.

72. It is not this court's intention to overturn a finding of a court of concurrent jurisdiction, and I do not purport to do so. I am however not persuaded that that such a finding must, as of necessity, result in an order for liquidation. If this was the case, the court that made that finding ought to have made the appropriate order pursuant to its finding, and on that basis. It would appear to me that, on the contrary, despite the said finding, the late and learned judge did not do so, and therefore, must have had some reservation.

73. Finally, as regards the injunctive orders sought, I am of the view that in the absence of a liquidation order, the injunctive orders sought by the Petitioner may touch on, and concern matters that are still the subject as litigation between the parties. It would not be appropriate for this court to grant the same in the circumstances. In any event, I am not satisfied that sufficient evidence was tendered before this court to warrant the grant of a permanent injunction at the present stage.

74. Based on the reasons set out above, the Petition is dismissed with costs.

DATED AND DELIVERED VIRTUALLY VIA MICROSOFT TEAMS THIS 17TH DAY OF OCTOBER 2024

ALEEM VISRAM, FCIArb

JUDGE