



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
COMMERCIAL AND TAX DIVISION
WINDING UP CAUSE NO. 23 OF 2015

IN THE MATTER OF SIROLAND LIMITED,

AND

IN THE MATTER OF THE COMPANIES ACT, CAP 486 OF THE LAWS OF KENYA

BETWEEN

SIRO BRUGNOLI1ST PETITIONER

ELISABETH LOPINTO..... 2ND PETITIONER

AND

GIANCARLO CAMERUCCI1ST RESPONDENT

PHILIP CAMERUCCI 2ND RESPONDENT

RULING

1. This ruling relates to a notice of motion application dated 18th September 2018 brought under the provisions of; section 1A, 1B, 3A and 80 of the Civil Procedure Act, Order 45 Rule 1 and Order 50 Rule 1 of the Civil Procedure Rules, 2010 and all the enabling provisions of the law. It is supported by the grounds on the face of it an affidavit sworn by Siro Brugnoli, the 1st petitioner herein.

2. The Applicants are seeking for orders that the judgment and the orders given by the court on 2nd September 2016, be reviewed, varied and/or set aside and the order declining to wind up Siroland Limited be substituted with an order for its winding up. That the court do appoint a liquidator to investigate the affairs of the company, collect and getting all its assets, commission evaluation of all the company properties with a view to establishing the market value for the purposes of liquidating the company. The Honourable court be pleased to make any further order or direction it deems just in the circumstances of the case and make provision for the cause in favour of the applicants.

3. The Applicants aver that the court ordered inter alia in the subject judgment that the value of the Applicants shares in the company be determined and they be bought out by the Respondent. However, for the last one and a half years, the parties have been unable to implement the orders as the Respondents have been uncooperative and deliberately and continuously delayed and/or frustrated the implementation of those orders. By reasons whereof, the judgment has been rendered ineffective and the Applicants have been left without any effective remedy and they are apprehensive that they may lose the entire investment and interest in the company.

4. In addition, the management of the company remains in limbo as it is unable to meet even its basic statutory obligations such as filing returns. It is therefore necessary that the court issues the orders sought in the interest of justice as there is no appeal referred against the judgement.

5. The Applicants have detailed out the steps taken after judgment towards the implementation of the orders therein. That PWC was engaged on 15th March 2017 and they responded on 16th March 2017 confirming they would take up the assignment of the valuation of the Applicants shares in the company. However, the parties have been engaged in reviewing and amending the engagement letter and sharing the cost of the assignment but the same has not borne fruits, in that the final letter of engagement was sent to the parties on 21st February 2018, but the Respondents have not executed the same as they have alleged to have travelled outside the country. That, that reason is not plausible,

it is only meant to delay the orders in the judgement.

6. However, the Respondents filed a replying affidavit dated 23rd November 2018 sworn by Paul Ogunde, an Advocate seized of this matter. He deposed that, it is material to note that after engaging advocates for both parties, PWC issued revised engagement terms on 12th September 2018. As the Applicants have not disclosed the same, it renders the application untannable.

7. The application was disposed of by the parties filing submissions. The Applicants' submissions dated 17th December 2018 were filed on the same date and the Respondent submissions dated 25th October 2018 were also filed on the same date. I have considered the application, the affidavit in support and the submissions filed by the parties and I find that, the only issue to determine is whether the Applicants have advanced sufficient cause to grant the orders sought for. It is not in dispute that judgment was entered in this matter on 2nd September 2016. It is also not in dispute that among the orders given was an order that the petitioners' shares be valued by a reputable firm of accountants and/or determine the value of all company's properties. It is clear from the averments in the affidavits that, that has not been done. It is also clear from the averments in the affidavit in support of the application that, indeed the parties have been engaged in communication with a view to implementing the court orders.

8. From the affidavit in support of the application, it is averred that, the parties have indeed agreed to share PWC's costs for the assignment, and that the issue of the audited financial statements to be used for the assignment which was a bone of contention between the parties was eventually resolved, and so, the remaining issue was execution of the final engagement letter. The Applicants depose that, the final engagement letter was sent to the parties on 21st February 2018, which they executed and returned to the Respondents and the Respondents have not executed it yet, hence the delay in commencement of the assignment by PWC.

9. However, as already stated herein, the Respondents aver that, PWC issued revised engagement terms on 12th September 2018. It therefore appears to the court, there have been extensive discussions and/or engagements in a view to implement the orders issued by the court in the judgment.

10. To grant the orders sought herein, would in my opinion reverse the gains that have already been made so far. The Respondents have stated in their submissions that they are ready and willing to proceed with evaluation as ordered by the court and deny having frustrated the process. If that is the case then, it would only serve the interest of justice to allow the process to be completed.

11. I note that the application has been brought under the provisions of Section 80 of the Civil Procedure Act and Order 45(1) of the Civil Procedure Rules. The conditions to be satisfied for review under those provisions are clear. The Applicants must show inter alia there is a mistake or an error apparent on the face of the record or discovery of new or important matter or evidence which after exercise of due diligence was not within the Applicants knowledge or could not have been produced by the Applicants at the time the order was made or for any other sufficient cause.

12. The grant of an order for review is within the discretion of the court. That discretion must always be exercised judiciously and in the interest of justice. None of the first two grounds apply in this case, hence the need to establish any other sufficient cause as already stated. In considering the application, I have further noted that, it is over three (3) years since the judgment herein was delivered, and review of the orders would firstly mean setting aside the orders in the judgment and reverting the parties to the original position they were in before the judgment. That will not be in the interest of justice for it will only cause further delay in the matter. Secondly, once final orders are made in a matter, the cause of action will be an appeal not review.

13. Taking into account both parties have not appealed against the judgment, and have by conduct engaged into the implementation of the orders therein, I hold and find that it is in the interest of justice to order that the parties proceed with the appointment of an auditor to conduct the valuation of the shares and/or the assets of the company as ordered. In that regard, I want to draw the parties attention to the overriding objectives under Section 1A (3) and 1B of the Civil Procedure Act that states that;

“(3) a party to civil proceedings or an advocate for such a party is under duty to assist the court to further the overriding objective of the Act and, to that effect, to participate in the process of the court and to comply with the directions and orders of the court.”

14. In addition, Article 159(2) of the constitution of Kenya states that; “justice shall not be delayed.” In conclusion, I order that the parties should and with immediate effect, execute all the documents necessary to enable the auditor conduct the required exercise. In that regard, the parties shall exchange and consider any revised terms of engagement of the auditor within a period of fourteen (14) days of the date of this order, and therefore after execute the final engagement letter within fourteen (14) days thereafter. The final instructions to the auditor should be issued within thirty (30) days of the date of this order. If there are any challenges encountered, each party be at liberty to apply.

15. Those then are the orders of the court. There are no orders as to costs.

Dated, delivered and signed in an open court this 7th day of May 2020

G.L. NZIOKA

JUDGE

In the presence of:

Mr. Githua for Ms. Jalenga for the Applicants

Ms. Abuya for the Respondents

Delivered via virtual communication