



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI LAW COURTS**

**COMMERCIAL & TAX DIVISION**

**INSOLVENCY CAUSE NO. E002 OF 2020**

**IN THE MATTER OF MOTION PICTURES LIMITED**

**FRANCIS GICHABA GACHAGUA.....APPLICANT**

**-VERSUS-**

**JOHN FRANCIS KARIUKI THEURI.....RESPONDENT**

**RULING**

1. There is a deadlock between the only two shareholders of Motion Pictures Limited and one of them, Francis Gichaba Gachagua (the Petitioner), petitions for its liquidation or for such orders as may be necessary and just.

2. Alongside presenting the Petition, the Petitioner filed a Notice of Motion of 6<sup>th</sup> February 2020 seeking a mandatory order directing his co-director, John Francis Kariuki Theuri, to sign a cheque of Kshs.506,357.00 to offset the employees outstanding salaries for November 2019 pursuant to the agreement between the company and Robert Bosch East Africa pending the hearing and determination of the Petition.

3. But as a prefatory issue the Respondent raised a jurisdictional preliminary objection against the proceedings citing an Arbitration clause in the Articles of Association of the company. Article 31 reads:-

“Whenever any differences arise between the company on one hand and any of the members, their executors, administrators, or assigns on the other hand, touching the true intent of construction, or the incidents, or consequences of these Articles, or of the statutes, or touching anything then or thereafter done, executed, committed or suffered in pursuance of these Articles, or any claim or account of any such breach, or alleged breach or otherwise relating to the premises, or to these Articles or to any statutes affecting the company or to any of the affairs of the company, every difference shall be referred to the decision of an arbitrator to be appointed by the parties in difference, or if they cannot agree upon a single arbitrator to the decision of the two arbitrators, or whom one shall be appointed by each of the parties in difference.”

4. The Respondent seeks to rely on the provisions of Section 6 of the Arbitration Act which provides:-

“6. Stay of legal proceedings

(1) A court before which proceedings are brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than the time when that party enters appearance or otherwise acknowledges the claim against which the stay of proceedings is sought, stay the proceedings and refer the parties to arbitration unless it finds—

(a) that the arbitration agreement is null and void, inoperative or incapable of being performed; or

(b) that there is not in fact any dispute between the parties with regard to the matters agreed to be referred to arbitration.

(2) Proceedings before the court shall not be continued after an application under subsection (1) has been made and the matter remains undetermined.

(3) If the court declines to stay legal proceedings, any provision of the arbitration agreement to the effect that an award is a condition precedent to the bringing of legal proceedings in respect of any matter is of no effect in relation to those proceedings.”

5. The objection has to be misadvised because the relief sought by the Petitioner here, to wit, liquidation of the company is not one that the Arbitral Tribunal can grant. These proceedings are commenced by virtue of the Insolvency Act which is a statute that, inter alia, provides for liquidation of incorporated and unincorporated bodies. In Section 2 of the Act the Court is defined to mean the High Court, and if there is an insolvency division of that Court, means that division. Only the High Court can grant the statutory relief of liquidation of a company. It is not the type of dispute or difference that is contemplated by Article 31 of the Articles of Association of the Company. There is good reason because, by its very nature, the liquidation of a company may have an impact on the rights of other persons who are not shareholders and therefore not party to the arbitral agreement. These may include the Tax Authority and creditors, if any, who will have a right to participate in the proceedings

6. Now to the Motion. It has been stated, time over, that Courts should be slow in interfering with the internal management of companies. In Re K Boat Service [1998] eKLR Kuloba J sought to draw the line on when the Court can be said to properly intercede:-

“Courts will interfere only where the act complained of is *ultra vires* or is of a fraudulent character or not rectifiable by ordinary resolution. It is really very important to companies and to the economy of the country in general, that the court should not, unless a very strong case is made out on the facts pleaded and proved or admitted, take upon itself to interfere with the domestic forum which has been established for the management of the affairs of a company. Accordingly, acts by or on behalf of a company which require the authority of a resolution of the company and are done without it, or are otherwise irregular, but which can be regularised by the company at a general meeting and without a special resolution, and are neither *ultra vires* nor of a fraudulent character, are not a ground for the court's interference upon a winding-up petition (which is not this case), or a petition to remove a director by a minority shareholder (as in the present case) under the "just and equitable" rule. If the various acts which have been irregularly carried out by the company are not acts which are *ultra vires* the company, nor are they acts which require special resolutions of the company, or no fraud has been disclosed with regard to those irregularities, those irregularities should be regularised or nullified by the company at a general meeting as established in the rule in *Foss v Harbottle*, (1843) 2 Hare 461, and also explained by James, LJ, in *In re Lcmgham Skating Rink Co*, (1877), 5 Ch D669, at 685: *Cole v RC Irving & Co Ltd and others*, 1970(2) AL R Comm 422.”

7. So do the circumstances of this dispute bring it within the exceptional bracket?

8. The company's bank mandate is that both directors are signatory to its account. The petitioner tells Court that sometime in March 2019, the company entered into an agreement for marketing Agencies services with Robert Bosch East African (Bosch). That this in fact is one of the only remaining viable business of the company. That Bosch made payment to the company to enable it offset the employees' salaries but this has remained unpaid because Theuri has refused to co-operate. The Court is told that the wilful refusal by him has exposed the employees to untold suffering.

9. Theuri justifies his non-cooperation. He states that the Board did not authorize the Company to enter the contract and the contract was not signed as stipulated by Article 19 of the Articles of Association of the company. That, in fact, the agreement is between Bosch and the Applicant personally and not the company. In addition, Theuri states that he has always undertaken the duty of signing cheques diligently except in this instance where his request for clarification of statutory deductions on the salary payment had not been answered.

10. The Petitioner retorts by stating that the contract with Bosch has been ongoing for some time and Theuri has since its execution signed cheques under the agreement. As to the remittance of monthly statutory deductions, it is the Petitioner's case that he has caused payment of those deductions for the three months preceding November 2019.

11. Regarding the issue of the board resolution, he asserts that the company's obligation to Bosch and the employees remains intact even in the absence of the resolution and that the Respondent can pursue a remedy against him as a director.

12. It is clear that differences have arisen between the two sole and equal shareholders and directors of the company. That the company may have entered into the agreement with Bosch without the authority of a board resolution is not a trivial concern by Theuri because the Petitioner has not answered the matter directly. He instead states that the Respondent has a recourse against him in person as a director. As to whether, by conduct, the Respondent has ratified this agreement is something that will have to be resolved by evidence.

13. However, Theuri raises a serious question about the bona fides of the agreement. What the Petitioner is asking the Court to do is to compel him to make payments under an agreement whose legality he does not agree with. And as I observed, he may have good reason to hold that position.

14. Of course, the employees of the company would be suffering because of non-payment of salary but I am not certain that this Court should force a Director's hand on a transaction which appears problematic. This is not an occasion when the Court should interfere with the internal affairs of the company. It does not seem that Theuri's reluctance to cooperate can be characterized as simply obstinate and inexcusable.

15. The Notice of Motion dated 6<sup>th</sup> February 2020 is for dismissal and so I hereby dismiss it with costs.

**Dated, Signed and Delivered in Court at Nairobi this 7<sup>th</sup> Day of July 2020**

**F. TUIYOTT**

**JUDGE**

**ORDER**

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 17<sup>th</sup> April 2020, this Ruling has been delivered to the parties through virtual platform.

**F. TUIYOTT**

**JUDGE**

**PRESENT:**

Ms Wanja holding brief for Akatch for the Applicant.

Ms Chebet holding brief for Masinde for the Respondent.