



**REPUBLIC OF KENYA**

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

**INSOLVENCY CAUSE NO. 1 OF 2018**

**IN THE MATTER OF AL MARSHIDY ENTERPRISES LIMITED**

**JUDGEMENT**

**A. Introduction:**

1. The petitioner filed the instant petition under section 780, 782, 787(2)(b)(f) of the Companies Act, 2015 and section 424(1)(g) of the Insolvency Act, 2015 seeking the following Orders:

- a) **The company AL MARSHIDY KENYA LIMITED ,be and is hereby wound up by the court under the provisions of the Insolvency Act, 2012**
- b) **The Court do make an order for the appointment of a receiver for the purpose of liquidating the company.**
- c) **That the assets of the Company be fully ascertained , accounted for and distributed proportionately between the shareholders as by law provide.**
- d) **That the Courts do make an order to investigate the dealings of the company assets in the last 10 years**
- e) **That this Honourable Court be pleased to make such further orders as may be deemed just and expedient**
- f) **That the petitioner herein be at liberty to apply further orders**
- g) **That the costs of this Petition be provided to the petitioner out of the assets of the company on priority basis.**

**B. Background:**

2. The Petitioner alleges that they incorporated Al Marshidy Company Limited on 4<sup>th</sup> April, 2002 together with Heikal Hassan Salim and Fahmy Ahmed Salim as shareholders and directors each owning equal shares. The Company has a nominal share capital of **Kshs.100,000/=** divided into **1,000** ordinary shares of **Kshs.100.00** each.

3. The grounds upon which the Petition is based are stated in the Petition and the averments in the supporting affidavit sworn by the Petitioner. In a nutshell, these grounds are that the other two directors without any justification have shut out the Petitioner from Participating in the management of the company. This includes the appointment of managers and hiring of employees of the company.

4. Additionally, the petitioner alleges that he has been denied access to the books of account despite his incessant pleas and thus in the dark in regard to the financial position of the company. Further he alleges that efforts to convene a board meeting has been thwarted by the numerical strength of the two directors, hence the company has failed to hold the statutory meetings, for instance it has never held a General meeting or any other meeting provided in Law.

5. The petitioner therefore argues that his treatment in contempt and suspicion by the other two petitioners has exposed him to ridicule from the employees of the company, thus creating a deadlock and has since lost desire to continue being a director and shareholder of the company.

6. In sum the petitioner alleges that due to the deadlock occasioned by the said differences, the directors cannot agree on how to run the affairs of the company and therefore it is equitable and just for this court to wind up the company. Therefore, due to the ongoing tussle between the members of the company, a deadlock has arisen at the shareholder level making it impossible to agree on simple issues relating to the business and operations of the company.

7. The petitioner filed his submissions on 27<sup>th</sup> March, 2019 where he buttressed the grounds in the petition in support of his winding up case. He relies on the following authorities, *In Re Brandy Sarry Ltd(2018)eKLR* , *Siro Brogholi & Another vs Gancarlo Camerruci & Another(2016) eKLR*, *In Re Matter of Les Bellws Sauvgne Limited(2010)eKLR* and *In Re the Matter of Madhupper Internartional Limite(2006)eKLR*.

### C. Analysis:

8. The instant liquidation cause is brought under the provisions of section 780, 782,787(2)(b)(f) of the Company Act, 2015 and sections 424(1)e and 247 of the Insolvency Act, 2015. Section 424 of the Insolvency Act provides:-

**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 twelve months has 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.**

**2. A company may also be liquidated by the Court on an application made by the Attorney General under section 425(6).**

9. Section 425 of the Insolvency Act provides for persons eligible to apply for liquidation.

**a. The company or its directors.**

**b. A creditor or creditors**

**c. A contributory or contributories of the company**

**d. Provisional liquidator or an Administrator of the company .....”**

10. The Provisions of the Company Act, 2015 relied on by the petitioner herein and relevant for the determination of this Petition include, Section 780 which provides for application to the Court by company member for order under section 796 , it provides that a member of a company may apply to the Court by application for an order under [section 782](#) on the ground-

**a) that the company's affairs are being or have been conducted in a manner that is oppressive or is unfairly prejudicial to the interests of members generally or of some part of its members (including the applicant)**

11. Section 782 of the Company Act provides for the Power of Court to make orders for protection of members against oppressive conduct and unfair prejudice:-

**1) If, on the hearing of an application made in relation to a company under [section 780](#) or 781, the Court finds the grounds on which the application is made to be substantiated, it may make such orders in respect of the company as it considers appropriate for giving relief in respect of the matters complained of.**

**2) In making such an order, the Court may do all or any of the following:**

**a) regulate the conduct of the affairs of the company in the future;**

**b) require the company to refrain from doing or continuing an act complained of or to do an act that the applicant has complained it has omitted to do.**

**c) authorize civil proceedings to be brought in the name and on behalf of the company by such person or persons and on such terms as the Court directs;**

12. Therefore, this Court has the power to direct the company and the other directors to cease from acting in a manner that is oppressive to the petitioner.

13. In addition, Section 786 of the Company Act provides for Investigation of company's affairs on application of members, it provides:-

**1) The Court may appoint one or more competent inspectors to investigate the affairs of a company and to report on those affairs in such manner as the Court directs,(a) in the case of a company having a share capital - on the application either of - not fewer than two hundred members or members holding not less than one-tenth of the nominal value of the company's share capital; or(b) in the case of a company not having a share capital - on the application of not less than one-fifth in number of the members of the company.**

**2) The Court may decline to proceed with the application unless the applicants produce such evidence as the Court may require for the purpose of showing that the applicants have good reason for requiring the investigation.**

**3) Before appointing an inspector, the Court may require the applicants to give security of an amount not exceeding five hundred thousand shillings as contribution towards meeting the costs of the investigation.**

14. Based on the above and depending on the circumstances the court may also direct the appointment of an inspector to investigate the affairs of the company. It is notable that the Petitioner has sought this prayer in his petition. However, before such an action is taken all circumstances must be considered.

15. Furthermore, Section 427 of the Insolvency Act provides for the Powers of the Court on hearing of liquidation application, it provides (1) On the hearing of a liquidation application, the Court may make such of the following orders as it considers appropriate:-

**(a) an order dismissing the application**

**(b) an order adjourning the hearing, conditionally or unconditionally;**

**(c) an interim liquidation order; or**

**(d) any other order that, in its opinion, the circumstances of the case require.**

16. Additionally, section 427(3) of the Insolvency Act provides that 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 that the company should be liquidated.**

17. Notably, Section 427(4) of the Insolvency Act provides that the above 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.**

#### **CONCLUSION:**

18. The Jurisdiction of this Court to liquidate the Company herein has been rightly invoked by the petitioner under the above provisions of the Law, **The main ground being that the Court do find that it is just and equitable that the company should be liquidated and order investigations by appointing an investigator.**

19. It is the petitioner's main case that the other two shareholders and directors have locked him out of the operation of the company, kept him in the dark as to the Company finances and day to day operations and that a shareholders deadlock in power relations exist and that the company has failed to hold statutory meetings, thus in the circumstances it is otherwise just and equitable in the circumstances for the Court to liquidate the Company.

20. Essentially in the instant petition by the petitioner in so far as his affidavit and pleadings are concerned he has outlined the grounds upon which he has set to cause the company to be liquidated. This Court apart from ordering the liquidation of the company can make other orders that entitle the Petitioner relief without necessarily liquidating the company. This is pursuant to sections 782 of the Company Act, 2015 and Section 427 of the Insolvency Act above.

21. Therefore in my view the court is inclined to issue other reliefs other than liquidating the company; namely the company is hereby

directed;

- i. To stop shutting out the Petitioner from Participating in the management of the company. This includes the appointment of managers and hiring of employees of the company.**
- ii. To allow petitioner access to the books of account and stop keeping him in the dark in regard to the financial position of the company.**
- iii. To convene a board meeting of the directors within a period of 30days, and hold the statutory meetings, such as a General meeting or any other meeting provided in Law within a period of 45 days from dates herein.**
- iv. There be liberty to apply.**
- v. Costs to the petitioner to be paid by the respondents (2) directors namely Heikal Hassan Salim and Fahmy Ahmed Salim.**

**DATED, SIGNED AND DELIVERED IN OPEN COURT AT GARISSA THIS 21<sup>ST</sup> DAY OF MAY, 2019.**

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**CHARLES KARIUKI**

**JUDGE**