



**REPUBLIC OF KENYA**

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

**MILIMANI COMMERCIAL & TAX DIVISION**

**WINDING UP CAUSE NO. 44 OF 2015**

**LORNAH AMIMO.....PETITIONER**

**-VERSUS-**

**RUKE ENGINEERING WORKS LIMITED.....RESPONDENT**

**RULING**

1. **Lonah Amimo** Petitioned the liquidation of **Ruke Engineering Works Limited**, the Company. It is clear in the said Petition that the Petitioner is a shareholder of the Company holding 20 shares. From the Petition the said Petitioner is also Director of the Company. This can be discerned from Paragraph 8 of the Petition viz:

*“That your Petitioner is still concerned why the Directors and the Company have not formally stuck off your Petitioner as Director...”*

2. The Petitioner in the Petition stated that she invested Kshs. 2 Million as a Director at the formation of the Company. She demanded from the Company that money but the Company failed to pay. The Petitioner also stated that although she paid up all her shares she has not to date received her dividends. She therefore files for the Liquidation of the Company because she had not been repaid her investment even though the Company was making profit.

3. What is before court is Notice of Motion dated 24<sup>th</sup> March 2016. It is filed by the Company seeking for an order that the Petition be struck out. The application is supported by the affidavit of Lewnora Atieno Otieno a shareholder and Director of the Company.

4. In that affidavit the deponent stated that the Petitioner is barred from filing the present Petition by virtue of Article 31 of the Company's Articles of Association. Those Articles, although mentioned in that affidavit, were not annexed to the application. But it is important to state that the existence of that Arbitration Clause, which is binding on the Directors of the Company, was not denied by the Petitioner in her written submission. The Petitioner's response to the application, through those written submissions, is that she ceased being a Director of the Company by special resolution dated 17<sup>th</sup> December 2013. That resolution was not exhibited to the court.

**DISCUSSION AND DETERMINATION**

5. In exercise of the inherent power of the court I will cast the net wider than the issue raised in the application. I do this in the clear recognition that liquidation of a Company is not a matter which should be regarded lightly. The action seeking to liquidate a Company can have far reaching consequence on a Company, for example in failing to obtain credit from financiers who may consider it risky. The consequences of liquidation Petition of a Company when the Petition is unwarranted or is frivolous can be catastrophic.

6. The Jurisprudence of winding up, now called liquidation of companies has been that Company court cannot be used as debt collection agency, when the debt is disputed. These words were spoken in the case **RE LYMPNE INVESTMENTS LTD [1972] 2 ALL ER** where it was further stated:

*“The effects on a Company of the presentation of a winding up Petition against it are such that it would be wrong to allow the machinery designed for such Petitions to be used as a means of resolving disputes which ought to be resolved in ordinary litigation, or to be kept in suspense over the Company's head while that litigation is fought.”*

7. My reading of the Petition before me reveals that there has been disagreements between the Directors, including the Petitioner, particularly with the Petitioner's request for reimbursement of her investment in the Company. This is clear when the Petitioner stated in this Petition:

***“The relationship between the Petitioner and the other Directors is so seriously strained that the parties cannot run the Company affairs in accordance with its Articles of Association and the provision of the Companies Act.”***

8. The Petitioner further stated in the Petition:

***“Your humble Petitioner cannot succeed in getting to rectify the running of the affairs of the Company in accordance with the Articles of Association or according to the law since she has lost interest in the affairs of the Company and demands her interests to be paid.”***

9. The Petitioner proceeded to state that she had failed to convene meetings with her co-Directors and consequently she sought the Company by liquidated. She also prayed that the court do order she be reimbursed her investment in the Company of Kshs. 2 million.

10. The first thing I wish to state is that the Petitioner had an obligation, if those differences had arisen between the Directors, to have referred the dispute to arbitration as provided in the articles.

11. The second thing I wish to state is that it is clear throughout the Petition that what the Petitioner seeks to recover is her investment in the Company. Not a loan to the Company. When one invest either in a Company or otherwise they can either gain on their investment or lose the entire investment. There is always the risk. Such an investment cannot be the basis of a liquidation Petition of a Company as the Petitioner seeks here. Investment, such as in this Petition, unless otherwise agreed falls within the definition of a disputed debt. It is apt at this point to refer to the Court of Appeal decision in the case **PRIDEINN HOTELS & INVESTMENTS LIMITED V TROPICANA HOTELS LIMITED [2018] eKLR**, thus:

***“The Petition for winding up order of a Company should never be presented as a means of exerting pressure to pay even an admitted debt where there is no evidence of insolvency and inability to meet the debt”. (See also RAI vs RAI Civil Appeal No.63 of 2001).”***

12. My reading of the Petition reveals that the Petitioner, by this Petition seeks to exert pressure to be refunded her investment.

13. Further the Petitioner, in order to succeed in a Petition for liquidation ought to have served a 21 days notice on the Company at its registered office. That notice should have indicated that failure to comply would lead to a Petition being filed for liquidation. This was clearly discussed in the case **IN RE KIPSIGIS STORES LIMITED (2017) eKLR** where the court stated:

***“ 384 (1) For the purposes of this part (being part VI-liquidation of companies) a Company is unable to pay its debts if***

***a) A creditor (by assignment or otherwise) to whom the Company is indebted for hundred thousand shillings or more had served on the Company by leaving it at the Company’s registered office a written demand requiring the Company to pay the debt and the Company has for twenty-one days afterwards failed to pay the debt or to secure or compound for it to the reasonable satisfaction of the creditor;”***

***“Clearly, under both the Companies Act (Cap 486) and the succeeding insolvency statute, service of a statutory demand is a condition precedent to the commencement and success of a creditor’s Petition for liquidation by the court grounded on the Company’s inability to pay its debts: See also Kenya Cashewnuts Ltd v National Cereals & Produce Board (2002) eKLR.***

***As was stated by Maraga J (as he then was) in In Re African Safari Club Ltd (2006) eKLR there is no provision for service of the statutory demand (under Section 220 and now under Section 384 of the Insolvency Act) at any other place except at the registered office of the Company. Both the companies Act (Cap 486) and the insolvency Act do not specify that service be effected upon a Director or officer of the Company it is enough if left at the Company’s registered offices.”***

14. The Petitioner by letter dated 26<sup>th</sup> May 2015, attached to the Petition, demanded Kshs.2 million from the Company and in the last paragraph of that letter stated

***“TAKE NOTICE that unless this demand is unequivocally complied with within the next SEVEN (7) days of the date hereof we shall institute legal proceedings against you at your sole risk as to cost and other consequences and without further reference to yourself whatsoever....”***

15. It does not take much imagination to realize that that notice, which was served by an Advocate not the creditor, failed to meet the parameters of Section 384 (1) (a) of the Insolvency Act.

As discussed in the case above in **Re Kipsigis (Supra)** the Petition cannot in those circumstances succeed. The Petition failed its very first hurdle – on the Notice.

16. From my discussion it becomes clear that the Petition cannot stand in its present format. I do hereby strike it out with no orders as to costs.

**17. In the end this Petition is hereby struck out with no orders as to costs.**

DATED, SIGNED and DELIVERED at NAIROBI this 16<sup>TH</sup> day of MAY, 2019.

MARY KASANGO

JUDGE

*Ruling Read and Delivered in Open Court in the presence of:*

Sophie.....COURT ASSISTANT

.....FOR THE PETITIONER

.....FOR THE RESPONDENT