



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & TAX DIVISION

MILIMANI LAW COURTS

INSOLVENCY PETITION NO. 6 OF 2019

KAM HUNG TSUL.....PETITIONER

-VERSUS-

AMIGOS NUTS & COMMODITIES LTD.....RESPONDENT

RULING

THE PRELIMINARY OBJECTION

The Respondent filed on 17th April 2019 a Notice of Preliminary Objection dated 16th April 2019 on the grounds that:-

1. This court lacks jurisdiction to entertain the Petition herein in view of the Respondent's Articles of Association;
2. The aforesaid Articles of Association states that disputes if any as raised by the Petitioner in the Winding up Petition shall be referred to Arbitration;

The Respondent filed a Replying Affidavit dated 16th April 2019 in support of the Notice of Preliminary Objection.

It was thus the Respondent's prayer that the Petition be dismissed with costs to the Respondent.

RESPONDENT'S SUBMISSIONS

It was the Respondent's submission that the Petition for Winding Up herein is improperly before this court and the same should be dismissed with costs to the Respondent.

It was the Respondent's submission that the Petition is purely based on disputes and differences between a member and the company and such disputes are to be referred to Arbitration as provided by the Articles of Association of the Respondent Company. It was their submission that by including the arbitration clause in the Articles of Association, the directors intended that all disputes between them and the company be referred and settled by arbitration.

It was thus the Respondent's submission that this court lacks jurisdiction to hear the Petition and should thus dismiss the suit with costs.

PETITIONER'S SUBMISSIONS

In response to the Respondent's Notice of Preliminary Objection, the Petitioner filed its Submissions dated 19th July 2019 on 22nd July 2019.

It was the Petitioner's submission that the Notice of Preliminary Objection filed by the Respondent does not meet the criteria or description set out in *Mukisa Biscuits Manufacturing Limited vs West End Distributors Limited [1968] EA 697*. The Petitioner faulted the Notice of Objection on the following grounds:-

1. The Preliminary Objection has failed to raise any point of law and/or any legislation or section of a legislation that has been violated by the Petitioner's petition;

2. The Preliminary objection is incurably defective as it is supported by an affidavit which is a fatality;
3. The Preliminary Objection is incurably defective as it has been raised when there are facts to be ascertained;
4. The Preliminary Objection is incurably defective as the end objective sought of dismissal; of the Petition is a matter of judicial discretion;

The Petitioner relied on the case of *Nairobi Winding Up Cause No.18 of 2009 In the Matter of Kangwana Investments Company Limited.*

It was thus the Petitioner's submission that a Winding Up Cause is not arbitrable and in line with this, this court ought to dismiss the Notice of Preliminary Objection with costs to the Petitioner.

DETERMINATION

The issue for determination before this court is whether this court has jurisdiction to hear the Petition herein.

The case of *Mukisa Biscuits Manufacturing Co. Limited –vs- West End Distributors Ltd. [1969] EA 696* defined a Preliminary Objection in law as:-

“A Preliminary Objection in law is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”

423. Jurisdiction of High Court to supervise liquidation of companies

- 1) *Only the High Court has jurisdiction to supervise the liquidation of companies registered in Kenya.*
- 2) *Subsection (1) does not apply to a company that is in voluntary liquidation in accordance with Divisions 2 to 5.*

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 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).

The **Notice of Preliminary Objection** raised by the Respondent is based on the ground that this court lacks jurisdiction to hear the Petition herein as per **Section 31 of Articles of Association** of the Respondent Company which refers all disputes between the Company and members and/or any breach or alleged breach every difference shall be to arbitration.

In *Cecilia Wacuka Nganga v Bernadus Nganga Kamau & Another [2016] eKLR* it was held that a winding-up cause is not attributable to arbitration.

In *Nairobi Winding Up Cause No.18 of 2009 In the Matter of Kangwana Investments Company Limited.* The Court faced a similar objection by a party on the basis that the Articles of Association had an arbitration clause exactly the same as the one relied on by the Respondent. The Court dismissed the Application dated 25th February 2011 as follows:-

“The Application dated 25th February 2011 lacks merit for two reasons. First, the winding up cause is not arbitrable and secondly, the clause relied upon by the Applicant does not warrant the reference of the issues herein to arbitration.”

It was thus the Petitioner’s submission that a Winding Up Cause is not arbitrable and in line with this, this court ought to dismiss the Notice of Preliminary Objection with costs to the Petitioner.

The statutory jurisdiction of the High Court cannot be ousted by the Arbitration clause. The Notice of Preliminary Objection is hereby dismissed with costs to the Petitioner. The Petition dated 25th February 2019 is to be processed in the normal legal manner by parties for hearing and determination of the same. The Date shall be obtained from the Registry.

DELIVERED SIGNED & DATED IN OPEN COURT ON 4TH OCTOBER 2019.

M.W.MUIGAI

JUDGE

IN THE PRESENCE OF:

N/A FOR PETITIONER

N/A FOR RESPONDENT

COURT ASSISTANT: MS JASMINE