REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

PETITION NO. E029 OF 2018

EDWIN KIPNG'ENO RONO.....PETITIONER

VERSUS

LEAWIN LIMITED.....1ST RESPONDENT

LEAH CHELAGAT SAWE.....2NDRESPONDENT

JUDGMENT

1. The petitioner's case is contained in his petition dated 10th December, 2018 and the affidavit sworn in its support and written submissions filed on 12th April, 2019. In the said affidavit, the petitioner avers that sometime in the year 2011, he obtained two development loans for the purchase of three parcels of land described as Plots No. 832A, Residential Plot No. 276 Business and Plot 403 B(II) all situated in Ongata Rongai Trading Centre (hereinafter **"the suit properties"**).

2. He states that he provided all the necessary funds to facilitate the incorporation of the 1st respondent which was duly incorporated in 2012 vide CPR/2012/6694. The petitioner contends that at the time of purchase and acquisition of the suit properties, he was in a relationship with the 2nd respondent and therefore made the purchase in their joint names and added that it was agreed that they would form a company and transfer the suit properties into the company's name.

3. He further avers that the incorporation of the company was to be spearheaded by the 2nd respondent due to his busy work schedule as a surgeon. He claims that the 2nd respondent fraudulently manipulated the shareholding of the 1st respondent company by allocating to him only 10 shares out of the 100 shares thereby granting herself the majority 90 shares despite the petitioner's sole contribution to the capital in the 1st respondent company. He further avers that the 2nd respondent's fraudulent actions are demonstrated through the forging of the signature, rubber stamp and particulars of one **Ngugi Mwangi** to incorporate the 1st respondent and by the passing off the same person as the 1st respondent's Company Secretary.

4. The petitioner further avers that on 26th October 2018, he received a notice calling for an Annual General Meeting (AGM) of the 1st respondent from one **Peter Ng'eno**, a clerk in the law firm of **M/S Mathenge Gitonga & Company Advocates** informing him of a meeting scheduled to take place on 12th November 2018. He states that it is upon receiving the notice of the Annual General Meeting that he came to learn, from the Companies Registry, that one **Ngugi Mwangi** was listed as the 1st respondent's Company Secretary.

5. It is his case that he objected to the holding of the said AGM because the notice for the meeting fell short of the 21 days statutory period and was served on the petitioner by the alleged Company Secretary of the 1st respondent one **Ngugi Mwangi** who was a total stranger to him and who denied any knowledge of the 1st respondent.

6. He contends that the denial by the said **Mr. Ngugi** brought him to the realization that a fraud had been committed on the 1st respondent by the 2nd respondent since forms 203, 208 and statement of Nominal Capital bore the name signature and rubber stamp of the said **Mr. Ngugi Mwangi.**

7. The petitioner listed the particulars of fraud as follows:

i) Naming a stranger as a company secretary without the knowledge of the plaintiff.

ii) Creating a non-existent person and naming him as a company secretary of the 1st defendant.

iii) Forging particulars with a name, signature and practice number of a stranger one NGUGI MWANGI and passing them off as a true reflection of a Certified Public Secretary by the name of Ngugi Mwangi.

iv) Forging rubber stamp complete with particulars of one stranger NGUGI MWANGI.

v) ***Manipulating the shareholding of the 1st respondent thus giving the 2nd respondent 90 shares and the petitioner 10 despite the petitioner being the sole contributor of all the capital on which the 1st respondent sits.***

8. The petitioner faults the 2nd respondent for using her majority shareholding status to carry out meetings and to make unilateral resolutions that culminated in the issuance of a letter dated 28th November 2018 informing him of an intended buyout of his 10 shares if he did not acquiesce to a buyout.

9. The petitioner therefore seeks the following orders in the petition:

i. That the court appoints an Inspector to investigate the affairs of Leawin Limited and avail a report of the findings within 45 days from the date of appointment.

ii. A permanent injunction restraining the 2nd respondent, her servants and/or agents or otherwise howsoever from forcing or causing any buy-out of the petitioner's shares in the 1st respondent as per the notice issued by the 2nd respondent.

iii. A declaration that fraud has been committed on the 1st respondent by the 2nd respondent.

iv. A declaration that Leawin Limited, the 1st respondent herein was incorporated fraudulently.

v. Dissolution of Leawin Limited, the 1st respondent herein.

vi. Costs of the suit.

Petitioner's submissions.

10. At the hearing of the petition, the petitioner reiterated on the averments in his petition regarding the fraud allegedly committed by the 1st respondent and submitted that the court has the jurisdiction to interrogate the same as provided under Section 786 of the Companies Act (hereinafter "the Act"). The petitioner also cited the provisions of Section 862 of the Companies Act to emphasize that the court has the jurisdiction to entertain this matter.

11. According to the petitioner, the 2nd respondent has not controverted his assertions regarding the blatant fraud which had been specifically pleaded and satisfied. For this proposition, he relied on the decision in ***Vijay Mojaia v Nansingh Madhusingh Darbar & Another*** [2001]eKLR and ***Kinyanjui Kamau v George Kamau Njoroge*** [2015]eKLR.

12. The petitioner also submitted that Section 862 of the Companies Act provides for the interrogation of the company register and that the petitioner's prayer for a court appointed investigator would enable the court understand the magnitude of fraud committed and act as an oversight tool in corporate governance. For this argument, he relied on the decision in ***Frederick Thumo Maingi & Another v Jones Makau Mutisya & 2 others*** [2017] eKLR.

13. It was submitted that the 2nd respondent's cross petition did not specify or substantiate the grounds on which the cross petition was brought as required by Section 782(1) of the Act and that there is therefore no cause of action. It was further submitted the 1st respondent is an illegality as it was fraudulently incorporated using a strangers stamp.

14. Counsel maintained that the instant petition is not *res judicata* as the ELC case No. 498 of 2016 (hereinafter **"the ELC case"**) is a separate suit that has nothing to do with the present case and that the ELC case is still pending before the said court.

15. On the existence of the matter before the Arbitration Panel, counsel submitted that both the Environment and Land Court and the Arbitration Panel found that they lacked jurisdiction to deal with the issue of appointment of an administrator and thus referred the matter to this court.

2nd respondent's case

16. The 2nd respondent opposed the petition through a replying affidavit. She also filed a cross-petition dated 31st January 2019 together with a supporting affidavit. In the said replying affidavit the 2nd respondent avers that the ownership of shares in the 1st respondent company is an issue that is spelt out in the company's instruments. She adds that by reason of Section 17(1) of the Act, it is not permissible to inquire into the pre-incorporation matters of the company. She avers that the incorporation of the company was undertaken by her and the petitioner as indicated by their respective signatures on the Memorandum and Articles of Association. She contends that in the event that there was any defect in the said registration, the Act upholds the pre-eminence of a Certificate of Incorporation which certifies compliance with regard to pre-incorporation mechanisms of a company.

17. She adds that any defect or non-compliance during registration is a matter between the registrar and the lawyer and not for the members of the company. She maintains that the actions of the officers of the company are not the actions of the 2nd respondent and that the petition therefore disclosed no cause of action.

18. It is the 2nd respondent's case that the alleged convening of a statutory meeting of the company by an unauthorized person does not amount to fraud but is an irregularity which can be cured, ratified or otherwise corrected by members of the company.

19. It is the 2nd respondent's case that the petitioner is motivated by malice to present the petition in bad faith with the intention of achieving a collateral outcome. She accused the petitioner of material non-disclosure of the matters pleaded in prior suits between the same parties over the same subject matter.

20. It is the 2nd respondent's case that this court lacks the jurisdiction to hear and determine this matter as it involves the purchase, use and ownership of land which are issues that fall within the purview of the Environment and Land Court (ELC).

21. The 2nd respondent seeks the following orders in the cross petition:-

a) A declaration that the conduct of the petitioner has been and continues to cause unfair prejudice to the cross petitioner.

b) An order directing the petitioner to surrender his 10% shares in the 1st respondent company at a price to be determined by the 1st respondent's auditor or by an auditor appointed by the court.

22. The 2nd respondent reiterates the contents of her response to the petition in the cross petition and adds that in view of the long standing dispute that the petitioner has had with her before the Environment and Land Court and at the Arbitration Tribunal, it is clear that the petitioner is overwhelmed with vile hatred on account of the broken romantic relationship which has been manifested in the many cases filed by the petitioner all geared at "**getting at**" her.

23. She states that given the strained relationship between her and the petitioner, the proper functioning and management of the company has become impossible thereby causing her unfair prejudice. It is the 2nd respondent's position that in the circumstances of this case, the court ought to direct that the 2nd respondent be permitted to purchase the petitioner's 10% shares.

24. At the hearing of the petition, Counsel for the 2nd respondent submitted that by dint of the provisions of Section 17(1) of the Old Companies Act, which is the equivalent of Section 18(4) of the new Companies Act, a certificate of incorporation is proof of compliance with all the conditions of incorporation of a company and that it was therefore not open for the petitioner to challenge the pre-incorporation documents.

25. Counsel cited the cases of ***Zara properties Limited v Attorney General & Another*** [2017] eKLR and ***Root Capital Incorporation v Tekangu Farmers' Cooperative Society Limited & Another*** [2016] eKLR to emphasize the argument that the courts have upheld the preeminence and conclusiveness of the Certificate of Incorporation as evidence of compliance with requirements of the Companies Act.

26. Counsel submitted that the 2nd respondent did not appoint the 1st respondent's company's secretary and that she cannot therefore be held liable for any alleged fraud committed at the incorporation of the company.

27. According to the 2nd respondent, the petitioner would not have suffered any prejudice if he had attended the AGM because the Articles of Association requires consensus between the petitioner and the 2nd respondent in order to give effect to any resolutions.

Analysis and Determination

28. I have carefully considered the pleadings filed herein and the submissions filed by the parties' advocates together with the authorities that they cited. The main issues for determination are:

i) Whether this court has the jurisdiction to entertain this matter.

ii) Whether the suit is res judicata.

iii) Whether a basis has been laid for the appointment of an inspector to investigate the 1st respondent company.

iv) Whether the court can order the petitioner to surrender his 10% shares in the 1st respondent company at a price to be determined by the 1st respondent's auditor or by an auditor appointed by the court (buyout).

v) ***Whether the court can grant the orders for injunction and the winding up of the company.***

Jurisdiction

29. While relying on the provisions of Articles 162(2) and 165 of the Constitution which provides for the jurisdiction of the High Court and

courts of equal status, the 2nd respondent argued that this court lacks the jurisdiction to entertain this dispute on the basis that it is a land matter.

30. ***Black's Law Dictionary*, 9th Edition,** defines 'jurisdiction' as the Court's power to entertain, hear and determine a dispute before it.

31. Courts have held the view that the significance of jurisdiction cannot be gainsaid and that any court acting without jurisdiction would be employing its energy, time and resources in futility. See ***Jamal Salim v Yusuf Abdulahi Abdi & Another***, Civil Appeal No. 103 0f 2016 [2018] eKLR. This is because any decision rendered in the absence of jurisdiction amounts to a nullity. Underscoring the centrality of jurisdiction, Nyarangi, J.A in the celebrated case of ***Owners of Motor Vessel 'Lillian S' v Caltex Oil (Kenya) Limited*** [1989] KLR 1 expressed himself as follows on the issue of jurisdiction:

> ***"Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings…"***

32. In the case of ***Samuel Kamau Macharia & Another v Kenya Commercial Bank and 2 others***, Supreme Court Application No. 2 of 2011 [2012] eKLR the Supreme Court stated as follows on the subject of jurisdiction:

> ***"A court's Jurisdiction flows from either the Constitution or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law...where the Constitution exhaustively provides for the jurisdiction of a court of law, the court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation."***

33. The principle that emerges from the above cited decision is that, in our legal context, the court's jurisdiction to entertain any given matter can only be derived from the Constitution and/or an Act of Parliament. It therefore follows, a court either has or lacks jurisdiction to adjudicate on a dispute and that such jurisdiction cannot be conferred in any other manner except as is provided for by the law.

34. ***Article 165(3)*** and ***(6)*** of the **Constitution** elaborately sets out the jurisdiction of the High Court as follows:

> ***"(3) Subject to clause (5), the High Court shall have —***
>
> ***(a) unlimited original jurisdiction in criminal and civil matters;***
>
> ***(b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;***
>
> ***(c) jurisdiction to hear an appeal from a decision of a tribunal appointed under this Constitution to consider the removal of a person from office, other than a tribunal appointed under Article 144;***
>
> ***(d) jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of—***
>
> ***(i) the question whether any law is inconsistent with or in contravention of this Constitution;***
>
> ***(ii) the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;***
>
> ***(iii) any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and***
>
> ***(iv) a question relating to conflict of laws under Article 191; and***
>
> ***(e) any other jurisdiction, original or appellate, conferred on it by legislation.***
>
> ***(6) The High Court has supervisory jurisdiction over the subordinate Courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior Court."***

35. ***Article 162(2)*** on the other hand empowers Parliament to establish Courts with the status of the High Court to hear and determine disputes relating to-

> ***"(a) employment and labour relations; and***
>
> ***(b) the environment and the use and occupation of, and title to, land."***

36. Clause (3) thereof authorizes Parliament to determine the jurisdiction and functions of the Courts contemplated in clause (2). Pursuant to ***Article 162(3)*** of the Constitution, Parliament enacted the **Environment and Land Court Act**. Section 13 of the Act outlines the ELC's jurisdiction as follows:

"(1) The court shall have original and appellate jurisdiction to hear and determine all dispute in accordance with Article 162(2) (b) of the Constitution and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.

(2) In exercise of its jurisdiction under Article 162(2) (b) of the Constitution, the Court shall have power to hear and determine disputes—

(a) relating to environmental planning and protection, climate issues, land use, planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;

(b) relating to compulsory acquisition of land;

(c) relating to land administration and manaement;

(d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and

(e) any other dispute relating to environment and land.

(3) Nothing in this Act shall preclude the Court from hearing and determining applications for redress of a denial, violation or infringement of, or threat to, rights or fundamental freedom relating to a clean and healthy environment under Articles 42, 69 and 70 of the Constitution."

37. Having regard to the above cited provisions of the law, I find that the 2nd respondent's argument, on the issue of jurisdiction, does not present the true position in this case. A perusal of the prayers sought in the petition shows that they are in respect to the appointment of an inspector to investigate the company, a permanent injunction to restrain the 2nd respondent from causing any buyout of the petitioner's shares, the dissolution of the company and a declaration of fraud at the incorporation of the company. The 2nd respondent's own cross petition seeks orders for a buyout of the petitioner's minority shares.

38. My finding is that the prayers sought in both the petition and cross petition have nothing to do with the issue use and occupation of land for which this court would, under the provisions of Article 165 (5) and 162 (2) of the Constitution, have no jurisdiction. Furthermore it was not disputed that there is another matter pending before the ELC over the suit properties. My finding is that the instant petition has nothing to do with the use and occupation of land as it involves the incorporation and management of the 1st respondent which are issues preserved for the Commercial Division of the High Court where this petition and cross petition were properly instituted.

Res judicata.

39. The 2nd respondent argued that the instant petition is *res judicata* in view of the fact that a similar case has been filed by the petitioner before the Environment and Land Court which case was then referred to Arbitration and later the arbitral award adopted by the Environment and Land Court.

40. Section 7 of the Civil Procedure Act (CPA) stipulates as follows :

"No court shall try any suit or issue in which the matter directly and substantially in issue in a former suit between the same parties or between parties under whom they or any of them claim, litigating under the same title, in a court of competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court."

41. In **ET vs Attorney General & Another** [2012] e KLR it was held

"The court must always be vigilant to guard litigants evading the doctrine of resjudicata by introducing new causes of action so as to seek the same remedy before the court. The test is whether the plaintiff in the second suit is trying to bring before the court in another way and in a form of a new cause of action which has been resolved by a court of competent jurisdiction. In the case of Omondi vs NBK & Others [2001] EA 177 the court held that "parties cannot evade the doctrine of resjudicata by merely adding other parties or causes s of action in a subsequent suit." In that case the court quoted Kuloba J, (as he then was) in the case of Njanju v Wambugu and another Nairobi HCC No. 2340 of 1991(unreported) where he stated: If parties were allowed to go on litigating forever over the same issue with the same opponent before courts of competent jurisdiction merely because he gives his case some cosmetic face lift in every occasion he comes to court, then I do not see the use of doctrine of res judicata……"

42. It was not disputed that there exists a case before the Environment and Land Court being Nairobi High Court ELC Cause No. 498 of 2016 (hereinafter **" ELC case")** in which the petitioner herein sought the following orders:

a) "A mandatory order staying proceedings in this suit and reference of the dispute to arbitration and determination or further orders of this court.

b) A declaration that the 1st and 2nd defendants hold the properties described as plot Nos. 832 "A" Residential and plot No. 276 Business and 403B [II] all situated in the Ongata Rongai Trading Centre in trust for the plaintiff absolutely.

c) An order that the 1st and 2nd defendants do transfer the properties described as plots Nos. 832 "A" Residential and plot No. 276 Business and 403B [II] all situated in the Ongata Rongai Trading Centre to the plaintiff.

d) Alternative an order vesting the said properties in the plaintiff under Section 45 of the Trustees Act Chapter 167 of the Laws of Kenya."

43. It was also not disputed that the parties agreed to refer the ELC case to Arbitration and that on 16th March 2017, the Arbitrator found that the Arbitral Tribunal lacks jurisdiction to entertain the claim. It is noteworthy that in both the ELC case and the instant case, the parties and the subject matter are identical The orders sought in the two cases are however not similar as while the earlier suit seeks, as I have already stated herein, the declaration of ownership and transfer of property, the instant petition seeks the dissolution of the company and declaration of fraud.

44. From the above foregoing and having regard to the above cited case and provision of section 7 of the CPA, I find that the doctrine of *res judicata* is not applicable in this matter considering that the dispute between the parties has not been heard and determined by a court of competent jurisdiction in a previous decision so as to warrant the invocation of the doctrine.

Appointment of an inspector

45. The petitioner cited the provisions of Sections 786 and 787 of the Act in urging the court to find that he has demonstrated, through the various pleadings and affidavits, that there is an urgent need for inspection of all aspects of the affairs of the 1st respondent company.

46. Inspection of a company's affairs, on an application by a company's member is provided for under Section 786 of the Companies Act as follows:-

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 –

i. Not fewer than two hundred members; or

ii. 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."

47. In the instant case, the petitioner's reason for seeking orders for the appointment of an inspector to investigate the affairs of the company are in respect to alleged fraud and forgery committed by the 2nd respondent during the incorporation of the company. According to the petitioner, the 2nd respondent fraudulently manipulated the shareholding of the company by allocating to herself 90 shares out of the 100 shares available in the company while allocating only 10 shares to the petitioner. He further alleged that the 2nd respondent forged the signature, rubber stamp and particulars of one **Ngugi Mwangi** to incorporate the 1st respondent company and further passed off the said **Ngugi Mwangi** as the company secretary.

48. My finding on the above issue is two-fold; firstly, I note that the matters complained of by the petitioner are pre-incorporation matters. The 2nd respondent submitted on the conclusiveness of a Certificate of Incorporation issued by the Registrar under Section 17(1) of The Repealed Act. In this regard Sections 16 and 17 of The Repealed Act Provides as follows:-

"16. (1) On the registration of the memorandum of a company the registrar shall certify under his hand that the company is incorporated and, in the case of a limited company, that the company is limited.

(2) From the date of incorporation mentioned in the certificate of incorporation, the subscribers to the memorandum, together with such other persons as may from time to time become members of the company, shall be a body corporate by the name contained in the memorandum, capable of exercising all the functions of an incorporated company, with power to hold land and having perpetual succession and a common seal, but with such liability on the part of the members to contribute to the assets of the company in the event of its being wound up as is mentioned in this Act.

17. (1) A certificate of incorporation given by the registrar in respect of any association shall be conclusive evidence that all the requirements of this Act in respect of registration and of matters precedent and incidental thereto have been complied with, and that the association is a company authorized to be registered and duly registered under this Act.

(2) A statutory declaration by an advocate engaged in the formation of the company, or by a person named in the articles as a

director or secretary of the company, of compliance with all or any of the said requirements shall be delivered to the registrar, and the registrar may accept such a declaration as sufficient evidence of compliance".

49. In ***Root Capital Incorporation v Tekangu Farmers' Co-operative Society Ltd & another*** [2016] eKLR the court affirmed the conclusiveness of the certificate of incorporation and held that:-

> ***"The only proof that a Company is duly registered and it is a body corporate capable of exercising all the functions of an incorporated company including the power to sue is a certificate of incorporation given under the hand of the registrar of companies; this certificate was initially issued under section 16(1) of the now repealed Companies Act, Cap. 486 of the Laws of Kenya for companies incorporated in Kenya. Under section 17 of that Act, a certificate of incorporation issued by the registrar in respect of any association was conclusive evidence that all the requirements of the Act in respect of registration and matter precedent and incidental thereto had been complied with and that the association was a company duly authorized to be duly registered under that Act."***

50. A similar position was adopted in ***Zara Properties Limited v Attorney General & Another*** [2017] eKLR.

51. Having regard to the provisions of section 17(1) of the Act and the jurisprudence developed in the above cited cases, I find that it is not open for a party to challenge the pre-incorporation matters of a company once the company is registered and a certificate of incorporation issued, the only exception being where a company is incorporated to carry out illegal dealings, which was not the position in the present case.

52. Section 786 of the Act relates to the appointment of an inspector to investigate the affairs of a company that is already incorporated and conducting its business. My understanding of the functions of the inspector, under the said section, is that his mandate would be limited to investigating management affairs of the company and that such mandate does not extend to matters that took place during the incorporation of the company.

53. Be that as it may, and assuming that I am wrong in the finding on the mandate of an inspector, I note that even though the petitioner alleged that he was so busy with his work as a surgeon that he fully delegated the matter of incorporating the 1st respondent company to the 2nd respondent, no material was presented before the court to show that it is the 2nd respondent who unilaterally engaged the lawyer who dealt with the incorporation of the company.

54. I find that the claim of forgery and fraud, in the scale that has been alleged by the petitioner, are matters that fall within the purview of criminal investigation by the relevant government agencies and not an inspector appointed by this court. I further find that in instant case, the petitioner has not established that he subjected the alleged forged signatures and stamps of the said **Mwangi Ngugi** to the expert examination by the document examiner so as to justify his claim that they were forged and that the forgery was perpetrated by the 2nd respondent. Needless to say, it is trite law that fraud must not only be specifically pleaded but must also be distinctly proved. I find that even though fraud was pleaded, for the reasons that I have stated hereinabove, I am not satisfied that the petitioner proved the alleged fraud to the required standards or at all.

55. Furthermore, a perusal of the Memorandum and Articles of Association of the 1st respondent shows that the same were duly executed by the petitioner thereby signifying his agreement to the incorporation of the company and the mode of distribution of shares. In the circumstances of this case therefore, I find that it is not open for the petitioner to claim, in this petition filed 6 years after the incorporation of the company, that the distribution of shares was manipulated by the 2nd respondent.

56. Generally, of course, a petitioning contributor must be deemed to be aware from the outset of his position under the articles. This is the position that was taken by Lord Selborne LC in ***Oakbank Oil Co v Crum*** (1882) 8 App Cas 65, 70, 71). In the said case the court held that:

> ***"Each party must be taken to have made himself acquainted with the terms of the written contract contained in the articles of association, and the Acts of Parliament, so far as they are important. He must also in law be taken (though that is sometimes different from what the fact may be) to have understood the terms of the contract according to their proper meaning; and that being so he must take the consequences, whatever they may be, of the contract which he has made."***

57. Apart from the allegations of fraud committed at the incorporation stage of the company, I note that the petitioner has not established that there are any underhand dealings in the running of the affairs of the company so as to entitle this court to order for an investigation into the affairs of the company. I therefore find that the petitioner has not provided sufficient and satisfactory reasons for requiring the investigation.

Injunction

58. The petitioner also sought an order of permanent injunction to restrain the 2nd respondent from forcing or causing any buy-out of the petitioner's shares in the 1st respondent in line with the notice issued by the 2nd respondent.

59. The principles governing the granting of an order of injunction were settled in the case of ***Giella v Cassman Brown Co. Ltd*** [1973] EA 358, where it was held that for injunction to be granted the court has to be satisfied that; first the application has established a *prima facie* case with probability of success; secondly the Applicant stands to suffer irreparable loss which could not be compensated by an award of damages if injunction is not granted and lastly if the court is in doubt, the application would be determined on balance of convenience.

60. In the instant case, I find that even though the petitioner alleges that the 2nd respondent has threatened a buyout, no material was placed before this court to show that such a buyout would occasion him loss or damage that cannot be compensated by an award of damages. Without saying much, I find that the petitioner has not made out a case for the granting of the orders of permanent injunction sought.

Winding up/Buyout

61. The petitioner also sought the winding up of the company while the 2nd respondent sought an order to be allowed to buyout the petitioner's shares.

62. A winding-up order is ordinarily made, without much fuss, if the company appears and asks for it, or consents to it, or does not oppose it. Should the company not appear, or appears and opposes it, then the order is only made where the correct circumstances are shown to exist, including obvious insolvency, danger to the assets (including misappropriation or waste by those in control), or the public interest demands it, or for any other good cause.

63. In the present case, the parties did not suggest that the company is under threat of insolvency or that the assets are in any danger or that 'public interest' is affected. The company in this case is a private company in which there are only directors. It would however appear that there is a deadlock between the2 directors who claim that they do not see eye to eye following the breakup of the romantic affair that they had prior to the incorporation of the company.

64. Deadlock did not have to be stated specifically because it was an obvious or common ground between the parties. Courts have held that in circumstances where the directors quarrel about everything and the company was in a state which the parties did not contemplate it was formed so that, were it a partnership, it would be dissolved, it would be terminated if it were a company. See ***Re Yenidje Tobacco Co Ltd*** [1916] 2 Ch 426, 432, 434

65. It is notable that the jurisdiction given to this court with respect to liquidation of companies is under Section 424 of the Insolvency Act which provides as follows:-

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 required 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).

66. In the instant case, I find that among the above listed conditions for winding up a company, paragraph (g) hereinabove would be applicable as the other conditions have not been proved. Under section 219(f) of the Companies Act a company may be wound up by this Court if, among other things, the Court is of the opinion that it is just and equitable that the company should be wound up. Section 221(1) of the Act stipulates that an application for the winding-up of a company is by petition presented by the company, or by any creditor, or contributor, or by all of them together, or separately.

67. Section 222 [2] [b] provides as follows:

"Where the petition is presented by members of the company as contributories on the ground that it is just and equitable that the company should be wound up, the court if it is of opinion –

(a) ……..

(b) That in the absence of any other remedy it would be just and equitable that the company should be wound up, shall make a winding up order, unless it is also of the opinion both that some other remedy is available to the petitioners and that they are acting unreasonably in seeking to have the company wound up instead of pursuing that other remedy".

68. As is evident from the provisions, it is clear that the court will not order the winding of a company where there exists alternative remedy. This was the position taken by the Court of Appeal in ***Vadga Establishment v Yashvin Shretta & 10 others*** C.A. No. 83 of 2000 wherein it

was held (per Omolo JA):

> ***"I have held that even if the allegation in his petition were to be proved to be true, that would not entitle him to a winding up order as of right particularly if there were an alternative remedy available. The availability of a remedy alternative to a winding up order takes away his entitlement if any, to such an order and the dispute over the winding up is no longer a live issue"***

69. In ***Re A Company*** (1894) 2 Ch.349 and WC 57 0f 1987 wherein the petitioner who was a minority shareholder complained of pressure to a winding up of a company on the basis that he was excluded from participating in the management of the company. The petitioner rejected a counter offer for the purchase of his shares. The other two Directors applied to have the petition struck out under section 225 (2) of the United Kingdom Companies Act 1948 which is similar to our Section 222 (2) of the Companies Act. The Respondent relied on the holding of that case which was as follows: -

> ***"Section 225[2] of the 1948 Act contemplated the making of a winding-up order under section 225 only if the continuance of the company would cause the petitioner an injustice which could not be remedied by any other step reasonably open to him. If any other remedy, and not just the statutory remedy of a court direction under s 75 that the petitioner's shares be purchased by the other shareholders, was reasonably available to the petitioner a winding-up order under s 225 would not be made. It followed that if the offer by C and R to purchase the petitioner's shares was a reasonable offer the petitioner's acceptance of that offer would be 'some other remedy' reasonably available to him to redress any injustice done to him and in those circumstances the court would not make a winding-up order."*** *[Emphasis added].*

70. In ***Jasbir Singh Rai and 3 others v Tarlochan Singh Rai and 13 others*** Civil Appeal 63 of 2001 the Court of Appeal held that the established principal in Kenya is that if a reasonable offer is made for purchase of minority shareholding by the majority the Company ought not to be wound up and that a proper formula ought to be provided for valuation of such shares so that the dissident shareholders go out of the company leaving it to the other shareholders to run. The court further stated that at the stage when it comes to dealing with breaches of fiduciary duties and remedies sought in the petition, the Company court should down tools and say "***please go to a regular civil Court by way of plaint***". In considering whether or not the respondent's application can be entertained it was held that it is not in the place of the court to consider the alleged wrongs of the respondent as pleaded in the petition as the only thing that the court needs to concern itself is whether there is an alternative remedy made.

71. The question which then arises is whether there is an alternative remedy to the winding up. The 2nd respondent sought orders to be allowed to buyout the 10 shares held by the petitioner on the basis that the 2 directors are incapable of working together thereby prejudicing the affairs of the company.

72. Wikipedia defines a **buyout** as*"an investment transaction by which the ownership equity of a company, or a majority share of the stock of the company is acquired. The acquiror thereby "buys out" the present equity holders of the target company. A buyout will often include the purchasing of the target company's outstanding debt, which is referred to as "assumed debt" by the purchaser."*

73. Black's Law Dictionary (10th Edition) defines buyout as *'the purchase of all or controlling percentage of the assets or shares of a business; the acquisition of control of a company by buying all or most of its assets or shares.'*

74. From the above definitions of the term 'buyout', it is clear that it is a transaction where there is a seller and a buyer. I am of the view that shares in a company are assets just like any other asset that a person may have ownership rights over as contemplated under Article 40 of the Constitution. This being the case, I find that it is not within the purview of this court to compel a party to go into a buyout against his wish. I hasten to add that the issue of buyout can best be handled on a *willing buyer willing seller* basis.

75. Moreover, the 2nd respondent did not establish that she had conducted a valuation of the assets and liabilities of the company so as to enable this court know the financial standing of the company or if a buyout would be a viable option for the parties. Furthermore, the 2nd respondent did not establish that she had made a formal offer to the petitioner to purchase of his shares and that such an offer has unreasonably been rejected.

76. My finding on the twin issues of buyout and winding up is that orders regarding the same have been sought prematurely before each of the parties could fulfil the conditions preceding the granting of such orders. For the above reasons I strike out both the petition and cross petition with orders that each party shall bear his/her own costs.

77. I hasten to add that it is evident that both parties want to end their relationship in as far as the directorship of the company is concerned save that they are not in agreement on the mode of ending the said relationship as while the petitioner seeks a winding up, the 2nd respondent seeks a buyout. This court is of the view that whether or not the parties settle for a winding up or a buyout, it would be necessary that the value of the shares of the petitioner be ascertained by an independent valuer so that the parties can agree on the buyout or winding up. Such a valuer shall be appointed and agreed upon by the parties hereof. In default, the valuer shall be nominated by the president of the Institute of Chartered Accountants. The costs of the expert shall be shared by the parties.

78. It is so ordered.

Dated, signed and delivered in open court at Nairobi this 5th day of November 2019.

W. A. OKWANY

JUDGE

In the presence of:

Mr. Ochieng for Dr. Kiplagat for the 2nd respondent.

Mr. Kivumbi for the petitioner.

Court Assistant - Sylvia