



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**WINDING UP CAUSE NO. 1 OF 2010**

**IN THE MATTER OF: THE COMPANIES ACT CHAPTER 486 LAWS OF KENYA & THE WINDING UP RULES MADE THEREUNDER**

**IN THE MATTER OF: KILINDINI WAREHOUSE (KENYA) LIMITE**

**OMAR SALEH SAID.....PETITIONER**

**VERSUS**

**KILINDINI WAREHOUSE (K) LIMITED.....1<sup>ST</sup> RESPONDENT**

**AWADH SALEH SAID.....2<sup>ND</sup> RESPONDENT**

**BARIKA MOHAMED SHERMAN.....INTERESTED PARTY**

**R U L I N G**

**Outline of facts**

1. By a winding up petition dated 11/3/2010, the petitioner sought an order to wind up the company on the basis that the 2<sup>nd</sup> Respondent had fraudulently falsified the records and minutes of the 1<sup>st</sup> Respondent with the design and sole purpose of defrauding both the legal and beneficial shareholders of the company. It is also alleged that the 2<sup>nd</sup> Respondent as the managing director had excluded the petitioner from the affairs of the company including financial records.

2. The alleged falsification relate to the minutes and returns lodged with the Registrar of Companies which the petitioner allege are not genuine nor authentic. Those are the alleged facts in the body of the petition which were verified by the petitioner in the Affidavit of verification of the petition.

3. The gravamen is to the effect that both the petitioner and the personal representatives of the other director, MOHAMED SALEH SAID SHERMAN (deceased) have been kept away and in dark on how the affairs of the company are run and have not been contacted in that they had not been accorded access to the financial, accounting and company secretarial records of the company just as much as there had not been convened regular or any board special or extraordinary members meetings to discuss the affairs of the company.

4. The incidences of interference and exclusion are enumerated as follows:-

a) In about the year 2009, one Victor Were was allegedly and unilaterally appointed as the company secretary who then proceeded to prepare and file allegedly back dated forms, statements resolutions and annual returns from 1989 to the date of the petition including returns seeking to alter the share structure of the company.

i. Of note were forms 203A dated 12/7/1999 appointing SWALEH AWADH SALEH as a director/shareholder and another JERIM ONYANGO a secretary when he was not a registered CPC practitioner.

ii. Minutes of a purported meeting of 26/7/1999 increasing the share capital from 1,000 to 40,000 shares and a total of 40,000 shares were then issued to the 2<sup>nd</sup> Respondent and the said SWALEH AWADH SALEH.

iii. A purported resolution of a meeting held on the 6/12/1999 to alter the provisions of the articles on quorum to 2 members

for board and general meeting.

iv. The petitioner and the deceased director were all removed from directorship and dispossessed of their shareholding.

v. On 14/01/2000 Victor Were was appointed to be the Company Secretary and resolution were made the same day amending article 19 of the Articles of Association to allow board meeting with a quorum of just one director.

vi. A record that the other two directors, said Omar Saleh said and Hussein Saleh Said had not paid for the allotted shares contrary to the previously filed returns.

5. Upon complaint to the registrar's office, it was alleged the entries were reversed and the status hither to prevailing reverted including the Company Secretary remaining Abacus Registrar. Owing to the above the petition asserts to have unearthed facts pointing to conversion by the 2<sup>nd</sup> Respondent of the company's assets including money to own use.

6. For that reasons the petitioner prayed for the winding up of the 1<sup>s</sup> respondent and for such other orders deemed just be made.

7. In response to the said petition, the two respondents filed a joint answer. In that answer the registration particulars are admitted to be correct including the allocation of shares at inception save that it is contended the shares were never paid up for.

8. On exclusion and oppression to the shareholders, the answer was that has not been visited upon the bona fide shareholders and that the petitioner and deceased director ceased being a director with effect for the 6/12/1999 with a contention that by a letter of 29/6/2009 the directors of the company became the 2<sup>nd</sup> Respondent and SWALEH AWADH SAID only on the basis of having ceased to be directors the Respondents took the position that they are not entitled to records of the company while asserting that there had been regular meetings of the company but the petitioner even before removal had not participated in the affairs of the company by own violation.

9. On the identified dates meeting were said to have taken place, and resolutions made, the answer was maintained that the meetings were property called and transacted and nothing untoward was assignable to the said meetings with insistence that the appointment of company secretaries was proper on the law applicable to limited private companies. The appointment of the auditors and secretaries was reiterated to have been proper and overboard, free from fraud and that Ms. Abacus Registrars had never been appointed as company auditors. All else including the structure of increase and the allocation of shares were defended to have been genuine and proper and a vehement denial made of the accusation of conversation of company assets by the 2<sup>nd</sup> Respondent.

10. On the value of the company assets including LR No. Msa/Block/1/371 SHIMANZI, the Respondents contended that property was brought by the 2<sup>nd</sup> Respondent on behalf of the 1<sup>st</sup> Respondent and developed using personal resources of the 2<sup>nd</sup> Respondent and that the value thereof is Kshs.185, million and not one billion.

11. The Respondents equally filed a Replying Affidavit to the petition sworn by the 2<sup>nd</sup> Respondent which essentially reiterated the facts in the answer to petition and supported same facts by documents marked Ass 1-7.

12. Those documents include resolution by the company authorizing the 2<sup>nd</sup> Respondent to swear the Affidavit, a letter from the Registrar of Company disclosing the current directors of the company, notice and minutes of the extra ordinary general meeting held on 6/12/2018 by which two of the initial shareholders were removed, minutes appointing Victor were as the company secretary, minutes and resolutions to restructure the company at various meetings by which the shares were increased allotted and provisions as to quorum amended and the letter by Registrar of Companies to the effect that the returns filed were in compliance with the law. On the basis of not being a shareholder or director the Respondents contended that the petitioner lacked the locus standi to bring or retain the petition which the Respondents prayed should be dismissed.

13. That Affidavit provoked the petitioner into filing an affidavit referred to as '**AFFIDAVIT IN REPLY TO AFFIDAVIT IN OPPOSITION**'. In it the petition justify its purpose as being to set the records straight and demonstrate that the Respondents have withheld and concealed material facts from the court with the intention to shield the court from establishing the truth. In it the petitioner exhibits several documents including, the constituting documents being certificate of incorporation, copy of CR 12 dated 15/2/2010, accounts filed for a partnership called SALEH in which the company is disclosed as a property of the partnership, correspondence by lawyers, auditors and company secretary's, accounts of the company showing the one (1) share each allotted to the promoters were actually paid up, the contested returns to the Registrar of Companies and lease over Msa/Block/371.

14. On 24/11/2015, matter was listed for pre-trial conference when it emerged that there were two certificates of searches (CR 12) giving two different sets of directors/members of the company. On that basis and to enable the matter proceed further it was ordered and directed that the Registrar of Companies availed to court the current particulars of the directors of the company together with copies of latest returns filed and any resolutions altering the particulars.

15. Pursuant to that order the office of the Registrar of Companies filed a report on the 9/3/2018 the day the matter was due in court. It could not proceed as the counsel and court needed time to peruse the report for better understanding and way forward. After parties studied the report, the Respondent did request that the officer who compiled the report attends court for cross- examination, the request was allowed and the said officer was ultimately cross examined on the report on the 26/7/2017.

16. That cross-examination laid the basis of the evidence all parties were to later own seek to rely upon for purposes of urging and opposing the petition because upon conclusion of the cross examination parties agreed to cavass the petition by way of written submissions which were filed as follows:-

i. By the petitioner dated 30/5/2018 and filed on 31/5/2018 with separate list of authorities.

ii. By the Respondents dated 5/6/2018 and filed on 6/6/2018 together with a list of authorities.

iii. By the 1<sup>st</sup> interest party dated 4/6/2018 and filed on 5/6/2018.

#### **Yield for the cross examination**

17. Having introduced himself, as a chief state counsel in the AG's office, MR. JAMES NDUNA, said he had prepared a report on the company which he filed in court. He then produced that report as Exhibit 1. He confirmed that on Incorporation the company had three shareholders each holding over (1) share till the year 1999 when the share capital was increased from 1,000 to 40,000 each of 1000 and on the 14/01/2000 the directorship changed with a petitioner and the deceased director being dropped and one Swaleh Awadh Salim being admitted. At that time the 2nd Respondent was allotted 39,999 shares while the new director got one 1. He said thereafter the petitioner and another complained for having been removed without their participation and the registrar was compelled to reverse the entries to revert to the position at incorporation. At that time the officer said the Registrar had handed over the original documents and file to the Director of Criminal investigation because a criminal complaint had also been lodged there.

18. On cross examination by Mr. Chacha Odera for the 1<sup>st</sup> Respondents, the officer said that when he compiled the Report he did not see the original documents and did not have anything to show the original record of the company was ever handed over the DCI. He was however firm that given time the office could avail the original file but was not aware that part of the investigation by DCI was to establish the whereabouts of the original file. He said he used a soft copy of the file which he concluded may not have contained all the original file contents. He however admitted that upto 2009 there was never a legal requirement that annual returns be supported by other documents and that the requirement for a resolution only came in, in the year 2009 together with the requirement for a notice convening a meeting.

19. On payment of stamp duty the officer said he did not require evidence of payment by the company nor did he ask for any documents from the company. He also confirmed that the Estate of late Hussein Swaleh said was noted in the last CR 12 dated 22/4/2014.

20. When answering questions by the court, the officer said that there were two notices which gave two different dates for change being 28/6/1999 and 14/2/2000 respectively. On treatment of documents received by the Registrar, the witness said there is no record kept or notes made on such documents unless there be a dispute.

21. After cross examination of the officer by parties, they sought to file written submissions which were indeed filed as said before and highlighted orally.

#### **Submissions by the petitioner**

22. Upon rehearsal of the complaint in the petition, and the contents of his Affidavit as well as the report and evidence by the officer from the Registrar of Companies it was contended that the 2<sup>nd</sup> Respondent had acted oppressively and fraudulent against the petitioner and the estate of deceased director. On the question whether or not the shares had been paid for at incorporation, the petition sought the assistance and reliance in the averment by the 1<sup>st</sup> interested party that the company was set up with the resources of the family.

23. Those submissions then ventured into the isolated issues and it was stressed that there being evidence that the petitioner was a contributory at incorporation he remained such even after the changes were made because those changes were reversed by the Registrar of Companies as shown in the Report filed. It was underscored that the petitioner is a contributory as by law defined and that in his ruling in this file, Mwangi J, had dismissed such contention made in an application by Chamber Summons dated 19/7/2010.

24. On whether the petitioner and 1<sup>st</sup> interested party had been excluded from the affairs and operations of the company, emphasis was placed upon the various minutes of meetings held in their absence. Court was referred to the provisions of articles 33, 36 and 38 of the Articles of Association to demonstrate that the petitioner had not vacated his office as a director and shareholder as much there was no evidence of appointment of another person as a new director. Once again the report and evidence by JAMES NDUNA was relied upon to prove that there had been exclusion and oppression by the 2<sup>nd</sup> Respondent.

25. On whether or not the company ought to be wound up, the petitioner cited to court the decision of the court in the matter of *Madhupaper International Ltd [2006] eKLR* for the proposition that where the petitioner demonstrated lack of accounts for the goings on in the company and a breakdown in communication between the contributories/directors, then it becomes just and equitable that the company be wound up. On those submissions it was urged that a prima facie case had been made out for the company to be wound up.

#### **Submissions by the Respondent**

26. From the onset; it is contended that the petition does not state with precision under what provisions of the repealed Companies Act it was brought. However the Respondent concede that from the content it comes out that it was brought pursuant to Section 211 the repealed Companies Act, which by dint of section 734(2), Insolvency Act, remains the statute to be applied in determining the petition.

27. It was then argued that by dint of Section 28 of the Act, the fact that the petitioner was contributory of the company cannot be in doubt. The dispute is only on whether the change of share capital and membership of the company was properly effected and if in so affecting the changes the 2<sup>nd</sup> Respondent had acted oppressively and to the exclusion of the other directors.

28. The Respondents then make submission to the effect that there having been minutes and returns made and registered effecting the

increase in share capital and change in the membership of the company, the law does not give to the Registrar any jurisdiction to rectify the register because the jurisdiction is only on the court. The provisions of Section 118 of the Companies Act was therefore cited to support the position that the actions by the registrar in seeking to rectify the register was done without jurisdiction and therefore was of no effect.

29. Being of no effect the Respondents contended that it must be treated as such and the record deemed to be what it was before the alleged rectification. If that be upheld by the court then the Respondents contended and maintained that the petitioner was not a member of the company on the date he filed the petition and had no locus standi to lodge or maintain the petition.

30. That position is then pushed further by the respondent in their pursuit and contention that if the petitioner is not a member of the company then he is not entitled to be consulted and can thus not be entitled to demand that he be included in the management and decision making by the company and therefore that he could not be a victim of oppression. It was additionally submitted that the court must be alive to what amounts to an oppressive conduct and the decision in *Njuguna Kuria vs Nuclear Investments Ltd & 7 Others [2014] eKLR* was cited for the proposition that an oppressive conduct must be by the majority shareholders as against the minority shareholder which must be harsh burdensome and wrongful.

31. On whether or not the company ought to be round up, the respondent reiterated that Section 211 only allows a member *qua member* to bring a winding up cause on account of oppressive conduct on him or any other member of the company. On that point it was submitted that the winding up is the ultimate and last order the court may give even where oppression conduct is demonstrated. The decisions in *Re Abbey Leisure Ltd [1990] BCLC 342*, *Re A Company (No. 004415 of 1996) [1997] IBCLC 479* and *Brahmbhatt vs Dynamic Engineering Ltd, Civil Appeal No. 92 of 1983* were all cited for the principle of law that winding up ought not be granted where the petitioner has alternative because winding up is a harsh remedy that pronounces death of the company.

32. In conclusion it was urged and court invited to take judicial notice that prior to 2009 all that was required to effect changes on the directors/shareholders was form 203A or 201 without the need for any additional information or documents.

#### **Submissions by Interested Party**

33. For the 1<sup>st</sup> interested party, Barika Mohammed Sherman also filed submissions and supported the petition on the basis that she is the administrator of the estate of the late Hussein Saleh Said, one of the three contributories of the Company at incorporation. It was contended that the company was incorporated pursuant to a partnership agreement between the family members which entitled the deceased to 1/6<sup>th</sup> beneficial share of the partnership assets the instant company being one of the such assets. It was pointed out that such issues were being canvassed in the HCC No. 5 of 2010.

34. On the merits the interested party substantially adopted the position of petitioner albeit with a little departure by more reliance on the provisions of the Insolvency Act 2015 rather than the Companies Act, Cap 486. The records at inception were underscored to urge the point that the deceased was a contributory and member of the company whose estate had therefore being excluded and oppressively acted against. That position was reiterated for the court to hold and find that the petition was well founded by a member to protect the interests of excluded members.

35. Reliance was then placed on the report by the officer from the office Registrar of Companies and in particular the letter of 15/2/2010 which cancelled the entries purporting to amend the articles of association, increase share capital, allot the shares and exclude two contributories. The same foundation was built upon to bring out and support the claim by the petitioner that him and the interested party had been excluded and visited upon oppressive conduct.

36. On the need to wind-up the company it was submitted that under Section 424(1), Insolvency Act the company can be wound up if the court forms the opinion that it is just and equitable to do so. For that proposition, the decision is *Stephen R Karunditu vs Canvass Manufacturers Ltd [1991] KLR* was cited for the proposition that as a principal of equity it is permissible for the court to subject the exercise of legal rights to equitable considerations. Premium was laid on the memorandum and Articles of Association to reiterate that the petitioner and the interested parties were members of the company and entitled not to be excluded from the affairs of the company or be oppressed by the 2<sup>nd</sup> Respondent.

37. By consent of the parties, four issues were agreed upon for the determination of the court and filed in court on the 29/5/2018.

38. The issue are as follows:-

- i. “Whether the Petitioner is a shareholder of the 1<sup>st</sup> Respondent and whether he has locus to institute the petition.**
- ii. Whether the 2<sup>nd</sup> Respondent has acted to the exclusion of the petitioner and has acted oppressively towards the other shareholders in the management of the Company’s affairs and/or has failed to account for the day to day business and financial affairs of the Company.**
- iii. Whether the affairs of the 1<sup>st</sup> Respondent are being conducted in a manner oppressive to the petitioner.**
- iv. Whether the 1<sup>st</sup> Respondent should be wound u or an order of alternative remedy granted”.**

#### **Analysis and determination**

39. Even though there be four well captures issues, this court takes the view that the determination of the first issue, *whether or not the*

*petitioner was a member of the company on the date the petition was filed must be the very foundation upon which the entire decision will rest. I consider it so because if it be found that the petitioner was not a member of the company then it would serve no meaningful purpose to interrogate whether he had been excluded and oppressed by the 2<sup>nd</sup> Respondent and consequently, ipso facto it would then not be upon him to seek the winding up of the company on account of lack of locus standi.*

41. I propose to deal with the issue of the petitioners standing to bring the petition and only if I do find that he was a shareholder, as at the date of filing the petition, would it be necessary to delve into the other issues.

42. Both the petitioner and the Respondents have filed two certificates of search, **CR 12**, issued by the Registrar, on different dates and the two do not agree on the shareholders of the company on the material dates. The two certificates are dated 24/08/2015 and 16/11/2015. An insight on that incongruence can be got from the Report prepared by James Nduna dated 8/2/2016, pursuant to an order by this court, as well as a letter dated 11/11/2015 addressed to national police service, directorate of criminal investigation, and found at page 134 of the said report by Mr Nduna.

43. The long and short of the two documents is that the company's structure was changed by forms 213 and 203A dated 14/01/2000 in which the two contributories of the company; the petitioner, and Hussein Swaleh Said reportedly resigned their positions as directors and shareholders of the company, the company share capital was increased from 1,000 to 40,000 and all allocated to the second Respondent and one Saleh Awadh Saleh.

44. That position is said to have persisted till 6/07/2015 when the petitioner complained to the registrar and the registrar responded to that complaint by reversing the entries made since 2000 and reverted the shareholding of the company to what it was before the forms dated 14/1/2000 were filed.

45. Of note to this court is the admission in the two documents and by the officer Mr. James Nduna that he made the report with an incomplete file as the original file had been forwarded to the Director of Criminal Investigation. (*See page 4-5, Clause 4.0, of Mr. James Nduna report and 4<sup>th</sup> last paragraph of the letter dated 11/11/2015 at pages 134 – 135 of the Report filed in court on the 9/03/2016.*)

46. That notwithstanding the question one must pose and be answered is on what authority did the Registrar cancel the entries made in the Register pursuant to returns made by the company. That point was argued forcefully by the Respondents and not answered by the petitioner as well as the interested party.

47. This petition having been filed in the year 2010 and in line with the provisions of Section 734(2) of the Insolvency act, the law applicable to it is the companies act, cap 486, now repealed. Section 118 of that Act provides:-

**“118. (1) If-**

**(a) the name of any person is, without sufficient cause, entered in or omitted from the register of members of a company; or**

**(b) default is made or unnecessary delay takes place in entering on the register the fact of any person having ceased to be a member, the person aggrieved, or any member of the company, or the company, may apply to the court for the rectification of the register.**

**(2) Where an application is made under this section, the court may either refuse the application or may order rectification of the register and payment by the company of any damages sustained by any party aggrieved.**

**(3) On an application under this section the court may decide any question relating to the title of any person who is a party to the application to have his name entered in or omitted from the register, whether the question arises between members or alleged members, or between members or alleged members on the one hand and the company on the other hand, and generally may decide any question necessary or expedient to be decided for rectification of the register.**

**(4) In the case of a company required by this Act to send a list of its members to the registrar, the court, when making an order for rectification of the register shall by its order direct notice of the rectification to be given to the registrar”.**

48. It is overly clear that the law does not allow the registrar to rectify the register so as to add or subtract the name of a person who ought to be added or removed therefore. It is only the court with the legal power to rectify the Register.

49. Now that the only reason the entries in the register, which had subsisted from 2000 was changed in 2015, some 15 years later, were altered is the unilateral action by the registrar, done even without hearing the company and the other persons to be affected by loss of shares, it must be determined if that was lawful or legal.

50. The law as it stood when the actions occurred, past events, clearly say that was done without mandate. If done without legal mandate, an action is null and void. If null and void it confers on nobody a legal right in as much it cannot burden anybody with a legal obligation nor can it be the basis of deprivation of property.

51. The law applicable in such situations was laid by the Court in *Mcfoy vs United Africa Co. Ltd [1967] 3 ALL ER 1169*, which the courts in this country have consistently applied in the following words:-

**“If an action is void then in law it is nullity. It is not only bad, but incurably bad. There is no need for an order of the court to set it aside, it is automatically null and void without more ado though it is sometimes convenient to have the court to declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse”.**

52. I have said that the companies act did not donate to the Registrar the power to rectify the Register. He had no powers to purport to do what he did. But more importantly the actions by the Registrar seem to have been conducted, even if he had the power to so act, contrary to the rules of natural justice. The two documents alluded to above point to the fact that the registrar only acted on the petitioner’s complaint and did not seek a say from the two respondents here and even Mr. Swaleh Awadh Saleh who had been allotted a share pursuant the forms filed. By the action of the Registrar reverting to the entry at the time of incorporation, he did in fact divest the 2<sup>nd</sup> Respondent as well as the said Mr. Swaleh Awadh Saleh of their allotted shares without hearing them. That was not only in violation of the principles of natural justice but also an affront to article 40 of the Constitution of Kenya which guaranties rights to property. Such are the actions a court of law is entitled to set aside *ex-debito justitiae*.

53. In *Omega Enterprises Ltd (K) Ltd vs Kenya Tourist Development Corporation Ltd [1998] eKLR* the Court of Appeal when adverting on the right to be heard recited with approval the decision by Lord Diplock in Mcfoy’s case (supra) to the following effect;

**“The judges in cases that have it set aside save that specifically it includes orders that have been obtained in breach of the rules of natural have drawn distinction between the two types of orders have consciously refrained from seeking to lay a comprehensive definitions of defects that bring an order into category that attracts *ex-debito justitiae* the right to justice!!”**

54. It is to this court clear that in purporting to rectify the registrar the Registrar overstepped his statutory powers and violated not only the rules of natural justice but also the rights to property. Such action cannot be made to stand but at the very least cannot be the basis to maintain a court action like this winding up cause.

55. It is also of critical note that the rectification was done while this suit was pending with the sole purpose of giving to the petitioner a pedestal to maintain the petition pursuant to Section 211 of the Companies Act, Cap 486.

56. It is clear to me that when the petition was filed in 2010, the petitioner was by the records at the company registry and with the company secretary not a shareholder or a member. If he was not a member he had no locus standi to bring the action and that the registrar purported to reinstate him did not add much. If he had no standing at inception, he lacked the foundation to mount the petition and such foundation could not be erected subsequently to have retrospective effect.

57. I do find that the petitioner lacked the requisite *locus standi* at the time of filling petition and to date continues to lack the standing. For that reason the petition cannot be maintained but must fail. Consequently the other issues deserve no employment of courts time to consider because if there is no valid petition then there is nothing to be considered on the merits.

58. I do strike out the petition and order that costs be paid by the petitioner.

**Dated and delivered at Mombasa this 16<sup>th</sup> day of November 2018.**

**P.J.O. OTIENO**

**JUDGE**