



IN THE HIGH COURT OF KENYA AT MILIMANI (NAIROBI)

COMMERCIAL AND ADMIRALTY DIVISION

WINDING UP CAUSE NO.42 OF 2010

IN THE MATTER OF THE COMPANIES ACT

AND

IN THE MATTER OF HAPPY VALLEY SUPERMARKET COMPANY

LIMITED

HELLEN NJAMBI MBUGUA.....PETITIONER

VERSUS

SAMUEL MBUGUA GICHUHI.....RESPONDENT

J U D G M E N T

INTRODUCTION

This Petitioner filed this suit seeking to winding up Happy Valley Supermarket Company Limited on the ground that it was not possible for the Company to meet its objectives due to irreconcilable differences between the her and Respondent. She also sought appointment of Liquidator under Section 231 of the Companies Act other than official receiver to wind up the Company.

The Respondent and Petitioner are husband and wife respectively and they are the only two shareholders of the Company. The Company was incorporated on 9th May 2000. The nominal capital of the Company is Kshs. 100,000 divided into 2500 ordinary shares of Kshs. 40 each. 60% (1500) of the shares were issued and fully paid by Petitioner and 40% (1000) in the name of the Respondent.

Shortly after incorporation, the Company bought business carried on by Schilada Supermarket Limited at Kahawa Sukari Shopping Centre.

By ruling delivered by Justice Muga Apondi on 11th November 2011, the Respondent was restrained from interfering with the management of the Company.

Subsequently each of the two shareholders appointed a Liquidator who filed report on assets and liabilities of the Company. Counsel for the Respondent/Objector opted to cross-examine the Liquidators on the report.

PETITIONER'S CASE

The Petitioner contend that between 2004 and 2005, she expended Kshs. 3,450,000 to purchase shop space, stock and equipment of Imasereko Enterprises Limited and raise stock, which became Naivasha Branch of the Company and Kahawa Sukari Branch funded stocks worth 2,000,000.

The Petitioner further avers that the Company had an appointed Manager but the Respondent would interfere with management in order to get control of the Company. That interference by the Respondent intensified in the year 2001 when the Respondent lost employment as he began to hold himself as the sole owner of the business and made unilateral decisions.

Further, despite Petitioner's demand for inventory of stock and accounts of income and expenditure, the Respondent failed to respond and instead became openly hostile towards the Petitioner and carried out affairs of the Company without openness and transparency.

The Petitioner aver that the Respondent cohabited with the first Manager one Alice Mugure Nyoike and spend lavishly on her, employed the said Alice Mugure at unreasonable salary and both took goods and assets from the Company to the detriment of the Company's business and

income.

Petitioner contends that her attempts to call a board meeting to discuss the issues above were frustrated by Respondent's failure to cooperate.

The Petitioner contends that the Respondent's mismanagement has affected the Petitioner's investments negatively. That the affairs of the Company were being conducted in a manner that was oppressive to the Petitioner.

CROSS EXAMINATION OF LIQUIDATOR

Cross-examination by Respondents Advocate

Jackson Maina Gachau; Liquidator confirmed that on 9th June 2011 he was appointed together with Lawrence Karogo Thoithi by the Court as joint Liquidators of Happy Valley Supermarket Company Limited. He said that their mandate was to liquidate the assets of the Company; that they were required to assess status of the supermarket, understand the directors, employees, creditors and valuation of assets.

He testified that they took over the Company, sacked employees and employed others on temporary basis. He said they established that the Respondent was the immediate Manager before they took over. They found bank statements, which they attached to the report.

He said the environment was hostile as there was no agreement between the directors (Petitioner and Respondent). He further stated that they advertised the supermarket and sold to Shantec Solutions Limited at Kshs. 3,567,000. He showed Court the sale agreement. He said part of the sale price was paid to the creditors who had partly been paid and that creditors were settled to the tune of 3.2 million.

He added that due to counter allegations from the parties herein and failure to avail documents, they were not able to complete investigations and establish with finality whether the Respondent misappropriated 24 million; he said it was also difficult to know who was managing the Company as the Petitioner and Respondent kept pushing each other.

He however attached document to prove that the Respondent diverted money to purchase a vehicle but the other outstanding matters were not concluded. He said the Respondent had ATM card for the Company's account and confirmed that the Respondent withdrew Kshs. 700,000 as per the bank statement.

The auditor said over the counter withdrawal was made to pay staff and confirmed that Kshs. 949,777 was withdrawn. He said their remuneration was agreed at kshs 150,000 and that each shareholder appointed one Liquidator. He said they they paid themselves kshs 720,000 for 2 years.

The auditor further stated that the report show misappropriation of funds by both parties and that the counter allegations were not proved as they failed to provide documents that they were asked by Liquidators to produce.

CROSS EXAMINATION BY COUNSEL FOR THE PETITIONER

The Liquidator confirmed that he served as the Company's auditor prior to liquidation of the Company.

He confirmed that the Respondent had ATM card for the Company's account and that withdrawals were made but the systems had been corrupted to conceal facts.

The Liquidators report was adopted by Court.

SUBMISSIONS BY PETITIONER

Mr. Kabene Counsel for the Petitioner restated grounds on the face of the petition.

He submitted that due to acrimony between parties herein it became impossible to run the business. He submitted that the Liquidators recommended that the Company be wound up.

Counsel further submitted that the Respondent has not faulted the Liquidators. He stated that it is no longer tenable for the objectives of the Company to be realized as the relationship between the 2 Directors has irretrievably broken down.

SUBMISSIONS BY THE RESPONDENT

Counsel for the Respondent submitted that what is left for Court's determination is how Liquidators performed their duties. He submitted that the Company was placed under Liquidators on 9th June 2011 & Petitioner's submissions have been overtaken by events.

Counsel for Respondent submitted that the auditors made several allegations of funds by Respondent to the tune of Kshs. 24,261,781 in their final report but the allegations were never proved. He quoted the Liquidators statement to the effect that they did not have access to bank accounts for year 2008 to 2010; that they only received accounts for year 2011. He further said the report indicate that the Respondent purchased a vehicle at Kshs. 7 Million but no official search from Registrar of Motor Vehicles was done to confirm the registered owner of the vehicle.

He further submitted that no search was done to confirm if the Respondent purchased 6 acres of land and 5 bedroomed house for 4.5 M as alleged.

He accused the Liquidators for lack of diligence in selling the Company's assets, withdrawing Kshs. 749,777 from the account and paying Kshs. 322,000 to unknown creditors. He added that motor vehicle KAS 103Q was undervalued at Kshs. 186,500 instead of Kshs. 800,000. He prayed that the Liquidators be held personally responsible for failing to carry out its duty to shareholders and creditors arising from fiduciary relationship.

In a rejoinder, Mr. Kabene submitted that before appointment of Liquidators, parties were given opportunity to propose Liquidators to be appointed and each proposed one of the two Liquidators. He further submitted that Counsel for the Respondent has not shown that the Applicant is the Director of Shantec Solutions Ltd. He added that the Liquidators report was adopted by Court.

I have considered pleadings herein, evidence by the Liquidator, documents filed rival submissions by Counsels herein.

There is no dispute that the Company herein failed to continue with its operations due to irreconcilable issues between the two Directors herein.

It is not also disputed that the parties herein agreed to appointment of a Liquidator each to look into the assets of the Company and dispose them to pay Creditors.

Petitioner alleged misappropriation of funds by the second Respondent whom she accused of meddling with its management. The Liquidator confirmed that the Respondent had ATM for the Company's account and that he withdrew funds from the account. There are further allegations of purchase of vehicle, land and house by Respondents from Company's funds.

The auditor however indicated that documents to prove the allegations were not availed to enable them ascertain how much money was misappropriated.

From evidence the Company has already been wound up. The Petitioner sought in prayer (d) for any other order the Court may make.

What I see as unsettled is entitlement of each shareholder after identification of the Company assets and funds misappropriated by any shareholder. After payment of creditors what remained would have gone to each shareholder according to the shareholding in the Company. There was need to identify funds misappropriated for distribution to the shareholders. This was however not done as the Liquidator indicated that they never completed the investigations to establish the amount misappropriated. The petitioners alleged that the respondent misappropriated the company's assets before the Liquidators took over but with incomplete investigations it is difficult to tell whether there was misappropriation and by how much.

FINAL ORDERS

1. Happy Valley Supermarket Company Limited deemed wound up.
2. Each party to bear own costs.
3. Liberty to apply.

Judgment Delivered, Dated and Signed at Nairobi this 11th day of December, 2018

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RACHEL NGETICH

JUDGE

IN THE PRESENCE OF

Langat: **COURT ASSISTANT**

Kabene H/B for Ochieng Opiyo: **COUNSEL FOR PETITIONER**

No appearance for: **COUNSEL FOR RESPONDENT**