REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

WINDING UP CAUSE NO. 5 OF 2014

IN THE MATTER OF: THE COMPANIES ACT CHAPTER 486 LAWS OF KENYA

& THE WINDING UP RULES MADE THEREUNDER

IN THE MATTER OF: DHANJAL BROTHER LIMITED

R U L I N G

Outline of facts

1. Pursuant to Article 159(2)d of the Constitution, Sections 1A, 1B 3 & 3A of the Civil Procedure Act as read with Rule 23 of the Companies Winding-Up Rules the Respondent filed a notice of motion dated 17/9/2018 and prayed substantively that the court revisits its ruling of 4/12/2015 and reviews the same by striking out the petition.

2. The reasons advanced for the review are that there have been discovered an important matter of evidence that was not within the knowledge of the petition at the time the ruling was made being that the petitioner had promoted and incorporated a company in competition with the 1st Respondent and that the petitioner had become a director and shareholder of the 1st respondent pursuant to a settlement agreement which had been invalidated and annulled by the succession court in High Court Succession Cause No. 20 of 2006. For those two reasons the Applicants contend that there are sufficient grounds to review the decision rendered on 4/12/2015 by striking out petition. The application was supported by the Affidavit of the 2nd Respondent which expounded on the two grounds and exhibited a ruling by the succession court as well as the judgment of the Court of Appeal upholding the decision annulling the settlement agreement; a profile of a company called **Dhanjal East Africa Company Ltd** as well as a ruling of this court sought to be reviewed.

3. The application was opposed by the petitioner who filed a Replying Affidavit sworn on the 1/10/2018. That affidavit contests the allegations that this court had directed that this matter awaits the outcome of the succession matter and contended that even if that had been true, the succession matter had not ended but was still pending determination in the Supreme Court. It was then conceded that indeed the petitioner had impugned the settlement agreement successful at both the High Court and the Court of Appeal, admitted that the effect of such annulment had a direct impact of his shareholding in the company but contended that, that *Ipso facto*, did not deprive him of the right to bring and maintain the petition. The petitioner then added that all notwithstanding, he had been appointed the administrator of the estate of JASWANT SINGH BOOR SINGH DHANJAL, which estate owns among other assets, 1125 shares in the 1st Respondent, hence he maintains the locus to sustain the petition. It was also contended that the application was fatally defective having been brought after a delay of 3 years and long after the Succession Court and the Court of Appeal made their determinations.

4. While the Respondents/Applicants filed written submissions pursuant to the directions by the court made on the

2/10/2018, the petitioner/respondent did not file any and counsel informed the court that he would solely rely on the replying affidavit and make oral submissions.

Submissions by the parties

5. The Respondents/Applicants adopted their written submissions in which three issues are isolated for determination as being; whether the petitioner has lost the capacity to maintain the petition, whether there had been demonstrated breach of Section 140 to 152 of the Companies Act, 2015, and lastly if the petition should be struck out.

6. The decision in **Re-Boot Services (1998)eKLR** was cited to Court to support the proposition of law that a petition can be struck out if it discloses mischief. One line that runs in the written and oral submissions by the Applicant is that the petition has been used to suffocate the company while a company promoted by the petitioner gets a chance to compete for the same business the company was set up to undertake and unfairly so when the Respondent is deemed unstable for being subject to a winding up cause. The Respondents read ulterior motive to suffocate and ultimately kill the company in order to avoid competition, ride on the bad reputation as threatened with winding up or just ride on the name of the company after killing it.

7. The second ground was that the petitioner gained shareholding and directorship in the company pursuant to arrangement birthed by the settlement agreement. That settlement agreement was impugned and successfully invalidated by the petitioner himself in the succession court a decision which was upheld by the Court of Appeal. The respondents/Applicants therefore contend that with the invalidation and nullification of the settlement agreement came with it the invalidation and nullification of all the acts founded upon it to include the acquisition of shares by the petitioner in the 1st Respondent. It was argued that without the rights of a shareholder the petition was stripped of his capacity to bring and maintain the petition.

8. For the petitioner/respondent, Mr. Maloba advocate having relied on the replying affidavit submitted that there had been no attempt to show that there had emerged a new and important matter of evidence that did not exist and, if existed, could not be availed by the Respondents, due diligence notwithstanding. He pointed out that the expression of surprise by the 2nd Respondent in the affidavit in support of the application did not amount to proof of exercise of due diligence. He also submitted that existence of conflict of interest is not a basis to strike out a petition as there are definite sanctions provided by that Act. In effect the counsel was tacitly conceding that some acts by the petitioner could have amounted to him being conflicted

9. On the invalidation of the settlement agreement, the counsel pointed out to court the fact that even though his client succeeded in challenging the agreement both at the succession court and the Court of Appeal, the decision had been taken before the Supreme Court. He was however candid to say that the foundation upon which the petition was filed ceased to subsist and that the petitioner would even in the Supreme Court support the nullification of the settlement agreement. He however reminded the court of its directions made on 16/3/2017 to the effect that the company's shareholding structure be aligned with the decision of the family court and contended that being an administrator, he remains a director of the company by virtue of that decision and reiterated that the best forum to resolve this dispute is the family court and not this petition. In the counsel's view therefore, this matter should be held in abeyance to await the outcome of the final decision of the family court distributing the estate of the disputant's father.

10. In her closing submissions in response to the petitioners replying submissions, Ms. Nduati admitted the position of the petitioner as an administrator of the estate as aforesaid together with the fact that the estate owns the majority shares in the company but posed the question why such a trustee would work towards throttling a major asset of the estate by seeking to kill it. On conflict of interest, the counsel submitted that it discloses the motive of the petition as intent on killing the company to avoid competition and reiterated that the petitioner having had the settlement agreement by which he became a shareholder, invalidated, he has lost his capacity to bring the petition and therefore there was no basis to maintain the petition and the orders issued on the basis that the petitioner was a *bona fide* shareholder.

11. Having read and given due regard to the Affidavits filed and the submissions rendered, the only question that begs the courts determination is whether or not the decision by this court dated 4/12/2018 deserves being reviewed. In deed an order for review in its known character is intended to enable the court revisit its earlier decision in order that an incorrect, mistaken or unjust position is corrected. That is what I make of

the very wide discretion given to court, under both Section 80 and Order 45 Rule 1 of the Act, to grant review for sufficient reason. It has now been settled that the expression sufficient cause need not be interpreted to be *ejus dem generis* to the other three grounds for review under the provisions.

12. In **Pancras T Swai Vs Kenya Breweries Ltd (2014) eKLR** the Court of Appeal said of the expression ***for any sufficient cause:-***

> **"As repeatedly pointed out in various decisions of this court, the words "for any sufficient reason" must be viewed in the context firstly of Section 80 of the Civil Procedure Act, which confers an unfettered right to apply for review and secondly, on the current jurisprudential thinking that the words need not be analogous with the other grounds specified in the order". (Emphasis provide)**

13. Indeed the application before me is not shown to be made pursuant to either order 45 or Section 80 of the Act but rather under the inherent powers of the courts, the overriding objectives of the court and the constitutional dictate that justice should be administered without regard to undue technicalities. Failure to cite any provision of the law to court is never a reason for the court to close its eyes to such a provision and to deny a deserved remedy for only such failure. I will therefore consider and determine the application before me on the basis of the law on review as I understand it upon applying the facts availed to court to such law. The discretion to review is indeed wide and unfettered provided the court, like in all judicial discretions, gives a reason for the decision reached.

14. My determination here will largely be influenced if I believe the complaint and assertions by the respondents that the petitioner has lost the pedestal as a shareholder /director by which he premised the petition and short of that that he, as director/shareholder, has acted in a manner that conflicts with the interests and general benefit of the company by incorporating and promoting a company in competition with the 1st respondent.

15. In this court's decision sought to be reviewed, the court considered it the continued wellbeing of the company as paramount just as much it appreciated the blood relationship existing between petitioner and the 2nd respondent. That thought and view of the court can be seen at paragraphs 18 &19 when the court said:-

> "In **EBBRALE LTD -VS- ANDREW LAWRENCE HOUSING (2013) UKPC 1, Privy Council Appeal No 0060 of 2011 the court said:-**
>
> ***"Sometimes a petitioner who presents, or threatens to present, a winding up petition seeks not to obtain an actual order but rather, by the application of pressure on the company and in particular through the prospects of to cause damaging publicity as a result of the requisite advertisement of the petition, it to act in a particular way. Such is a classic example of abuse of is process of the court, which will lead to it to accede to an application by the company to stay the petition or by injunction to preclude its presentation"***
>
> ***The case cites several instances where the courts dismissed petitions to wind up companies for having been presented for ulterior motives. I find and hold that there is jurisdiction in this court, sitting as a Winding Up Court, to consider striking out a petition if it be demonstrated that the purpose is not to genuinely procure a Winding up order.***
>
> ***In the matter before me however, I note that the Petitioner and the 2nd Respondent are siblings. In fact the 2nd Respondents depones in his affidavit that he invited, the Petitioner, gratis, without consideration, into the company and that the other directors are not averse to a buy-out. I bear in mind that there could be genuinely a dispute that will continue to dog the shareholders of the company unless it is finally and effectively determined in a just and proportionate manner. For that reason, and without delving to believe the depositions in the affidavits either way, I am minded not to take that drastic step of striking out the petition. I find that I am clothed with jurisdiction but I exercise the discretion not to strike out the petition at this juncture. I decline the order to strike out or dismiss the petition for to do that shall have only postponed the dispute".***

16. Having sustained the petition, largely to keep the kindred relationship between the two directors, it has now been demonstrated to court, and not denied, that while a director of the 1st respondent, the petitioner has in fact incorporated and promoted a company with same objects as that of the 1st respondent and in fact engaged in the same area of business while the company, 1st respondent, continues to suffer the burden of bad reputation as a company threatened with hangman's noose. That to this court would impute bad faith that entitles the court to strike out the petition even at the level of revisiting an earlier decision made to save the parties relationship. That bad faith has been depicted in many other forms including the petitioner taking too long a time to avail to court own valuation of the company assets as a way of settling on a buy-out plan as proposed by the court. The reasonable inference is that the petitioner is content with the status quo of the company because his interests are best taken care of by the competitor he is promoting. Such is the ulterior motive a court ought to frown upon as did **Vigham Williams J** in **Re a company (1983) BCLC 492** cited with approval in In **EBBRALE LTD(supra).** The judge said:-

> ***"in my judgment, if I am satisfied that a petition is not presented in good faith and for the legitimate purpose of obtaining a winding up order, but for other purposes, such as putting pressure on the company, I ought to stop it if its continuance is to cause damage to the company. I think those reasons apply in the present case.. "***

17. Here it is reasonable to see bad faith on the petitioner if the duel in the family court revealed by allegation against each other between the petitioner and the 2nd respondent be taken into account. That bad faith or just vendetta presents a sufficient cause for review as it deprives the petitioner of good faith and presents the petition as a good candidate for striking out. I do strike it out on that account.

18. In addition, the petition dated 30.10.2014, was premised on the fact that the petitioner was a shareholder and director holding some 1292

shares, equal to the 2nd respondent. His basis for bringing the petition was that he had been excluded from the affairs and denied financial records of the company as such director and shareholder by act he considered oppressive. It has now been demonstrated and confirmed by the counsel for the petitioner in submissions to court that his shareholding was the result of a settlement agreement by which some deceased's property was shared out prior to grant of probate or letters of administration. That settlement agreement has since been authoritatively annulled and invalidated by the family court and confirmed by the court of appeal at the instance and application of the petitioner herein. Even though the court was told that, the decision of the court of appeal has been challenged before the Supreme Court, that challenge is by persons other than the petitioner whose counsel said opposes the appeal in the Supreme Court.

19. The petition as crafted was evidently brought pursuant to section211 of the repealed Companies Act. Under that provision only a member of a company can maintain a petition on the basis that the company's affairs are being conducted in a manner oppressive to other members including himself. As of today, after the two decisions of the Family Court and the Court Of Appeal, the undeniable fact is that the shareholding structure of the company has been reverted to the position it stool before the settlement agreement. As at that date the petitioner was not a shareholder and before the estate to which he is an administrator is distributed, he is not a member of the company and cannot legally maintain the petition as presently presented. That is the second a more reason the petition must be struck out.

20. I do now strike out the petition and, my mind having been disabused of the need to respect the relationship between the parties, owing to what I consider bad faith and lack of *bona fides* on the part of the petitioner, I order that the costs of the proceedings so far incurred be borne by the petitioner.

Dated, signed and delivered at Mombasa this 14th day of December 2018

P J O OTIENO

JUDGE