REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

MILIMANI LAW COURTS

COMMERCIAL AND TAX DIVISION

WINDING-UP CAUSE NO. 18 OF 2009

IN THE MATTER OF KANGWANA INVESTMENTS LIMITED

AND

IN THE MATTER OF THE COMPANIES ACT (CAP 486) LAWS OF KENYA

CECILIA WACUKA NGANGA .....APPLICANT

VERSUS

BERNADUS NGANGA KAMAU.....1ST RESPONDENT

KANGAWANA INVESTMENT CO. LTD .....2ND RESPONDENT

JUDGMENT

1. The Petitioner, **Cecilia Wachuka Nganga**, filed the Winding Up Petition dated **25th June, 2009** on **7th July, 2009,** in respect of the Company known as **Kangwana Investment Company Limited** (herein after **the Company**). The Petitioner prayed that:-

> ***a. Kangwana Investment Company Limited be wound up by the Court under the Provisions of Section 219 and other relevant provisions of the Companies Act, Chapter 486 of the Laws of Kenya (now repealed).***
>
> ***b. That Bernadous Nganga Kamau do avail the accounting records of the company for an independent audit of the assets and profits and/or loss of the company with effect from 13th September, 2004 till the date of the winding up.***
>
> ***c. That in the event a profit is realized from b) above, this Court do order payment thereof to the Petitioner by the said Mr. Bernadus Nganga Kamau;***
>
> ***d. That the costs of the Petition be provided the Petitioner out of the assets of the Company in priority.***

2. The Company was incorporated in Kenya with a nominal share capital of **Kshs.100,000/=** divided into 1,000 shares of **Kshs.100.00** each. The objectives of the Company were, inter alia, to carry on business

of general merchants, to buy and sell, import-export, manufacture and to deal in goods as otherwise set out in the Company's Memorandum and Articles of Association. The founding directors of the company were the Petitioner and the 1st Respondent, who were once husband and wife. They continue to be the directors as well as shareholders of the company in addition to their two children, **Keith Kamau Nganga** and **Faith Kamau Nganga,** who were minors as at the time the Petition was filed. It was pleaded that both the Petitioner and the 1st Respondent were responsible for the day to day affairs of the company.

3. The grounds upon which the Petition is based are stated in **Paragraphs 9 to 15** of the Petition. Those grounds are verified and supported by the Petitioner's Verifying Affidavit annexed thereto, in which the Petitioner deponed that the Company's main business was in real estate. Consequently after its formation, the 1st Respondent transferred their matrimonial property to the company. In the course of time, the 1st Respondent and the Petitioner experienced irreconcilable marital differences that resulted in the dissolution of their marriage vide **Nairobi Chief Magistrate's Divorce Cause No. 109 of 2005**. Following the divorce of the two Directors/shareholders, there followed a deadlock in the management of the Company. Consequently, the Company has since failed to hold any statutory or other meeting to transact its business. The Petitioner contends that the 1st Respondent has been running the company single handedly and making decisions that are detrimental to the interests of the Company, including chasing away tenants residing in the company properties as well as unilaterally terminating leases entered into by the company.

4. It was thus contended by the Petitioner that the company's affairs are being carried out in a manner that is oppressive to her as a shareholder; and further that the Company has failed to present audited accounts for adoption by shareholders thereby keeping her as the shareholder in the dark as to the financial probity of the company. Thus, it was the Petitioner's posturing that, in the circumstances, it is in the interest of justice to have the company wound up and a full investigation as to the management of the company be carried out, to ascertain the correct financial status of the Company as from **September, 2004.**

5. Following the filing of this Petition, the 1st Respondent proceeded to file a Notice of Motion dated **25th February, 2011** seeking to have the dispute referred t arbitration pursuant to **Clause 28** of the **Articles of Association** of the Company, However, the said application was dismissed by the court vide a Ruling dated **30th November, 2012,** on the ground that a winding-up cause is not arbitrable. What followed was a series of attempts by the parties to settle their differences out of court, to no avail. Thus, on **29th June, 2016**, this court ordered the parties to file their written submissions with regard to the Petition for a determination on the merits.

6. The Petitioner filed her submissions on **20th June, 2016**, while the Respondents filed their submissions on **8th July, 2016**. The same were orally highlighted before the court on **8th July, 2016.** The Petitioner who was acting in person, addressed the Court on the merits of her Petition, pursuant to the written submissions she filed herein, while Learned Counsel, **Mr. Githiomi,** was content to rely on their written submissions filed herein on **8th July 2016**.

7. It was the Petitioner's case that as a founding director and shareholder of the Company, she had the *locus standi* to bring this winding up petition for the reason that she has been excluded from its operations. It was her submission that she had demonstrated that the 1st Respondent had been running the Company single-handedly since the dissolution of their marriage. The Petitioner further accused the 1st Respondent of failing to account for the profits made by the company since **2008;** and urged that it was only fair that the total amount thereof be ascertained whereupon half of the said profits, be assigned to her. The Petitioner also submitted that other than carrying out the Company business in an oppressive manner, the 1st Respondent had failed to ensure compliance with the Companies Act and other statutory requirements, in that the Company had not filed statutory returns since **2006**; and added that the properties held by the company had accumulated outstanding rates of **Kshs. 41,198,884/=** combined. She thus urged that given the foregoing facts, it was only just and equitable to have the Company wound up. In support of this argument, she cited the case of **Re Garnets Mining Company Ltd [1978] KLR 224**.

8. Further to the foregoing, the Petitioner contended that the substratum of the Company has also since disappeared. According to her, the reason for the incorporation of the Company was to facilitate their cooperation as husband and wife and to use the income from the Company business to grow their family; and that with the dissolution of their marriage, their communication ceased. It was therefore her contention that their divorce precipitated a deadlock in the management of the Company, ruling out any possibility of smooth operation of the business of the Company. According to her the only option available in the circumstances is to have the Company wound up.

9. In response to the Petitioner's submissions, **Mr. Githiomi** pitched the argument that the Petitioner lacked the requisite *locus standi* to present this Petition, for the reason that she relied on **Section 226** of the **repealed Companies Act**. It was his submission that there being no resolution by the shareholders in favour of voluntary winding up, the Petition is misconceived. Counsel relied on the case of **Salomon vs. Salomon & Co. Limited [1896] UKHL 1** to underscore his submission that the company is a separate legal entity from its shareholders, hence the need for a resolution before a petition can be filed for its winding up under **Section 226** of the repealed Companies Act.

10. Mr. Githiomi further submitted that in filing this Petition, the Petitioner was actuated by malice following the dissolution of their marriage with the 1st Respondent and the subsequent dismissal by the Court of her claim to 50% of the 1st Respondent's property. He thus contended that the Company should not be dragged into the personal affairs of the Petitioner and the 1st Respondent. He added that to wind up a company is a remedial measure that is so grave and punitive to the company and the directors/shareholders that the court should only grant it as a last resort, and only in situations where there is no other alternative. He referred the Court to **Sections 131(2)** and **211** of the repealed Companies Act and urged the Court to consider other alternatives such as involving the Registrar of Companies and giving directions for regulating the conduct of the Company's affairs in the future or for the purchase of the shares of any members of the Company by other members of the Company.

11. Mr. Githiomi further refuted the Petitioner's averment that the substratum of the company is gone. He similarly cited the case of **Re Garnets Mining Company Ltd [1978] KLR 224** in support of his argument that the Company is still capable of carrying on the business it set out to do in is Memorandum and Articles of Association. With regard to the accumulated property rates, it was the 1st Respondent's position that though the same remain outstanding, the 1st Respondent had made attempts to mitigate the loss by paying the sum of **Kshs. 4,000,000/=.** Counsel further posited that as an equal shareholder, the Petitioner shared the obligation to make sure that the company assets are safeguarded but had taken no such initiative. For these reasons, the Respondents urged the Court to find that the Petitioner is undeserving of the orders sought in the Petition.

12. I have carefully considered the Petition and response thereto. Prior to September 2015, the general jurisdiction conferred to the court for winding up a company was contained in **Section 218** of the **repealed Companies Act, Cap 486, Laws of Kenya**. By virtue of **Section 734** of the **Insolvency Act, 2015**, the repealed Act is still applicable to all Winding Up Causes that were filed before the repeal aforementioned, of which this is one. **Section 218** of the repealed Act stated thus;

> ***"The High Court shall have jurisdiction to wind up any company registered in Kenya."***

13. The circumstances in which a company could be wound up by the Court were detailed in **section 219** of the repealed *Companies Act* which read as follows:

> ***"219. A company may be wound up by the court if –***
>
> ***a. the company has by special resolution resolved that the company be wound up by the court;***
>
> ***b. default is made in delivering the statutory report to the registrar or in holding the statutory meeting;***

c. the company does not commence its business within a year from its incorporation or suspends its business for a whole year;

d. the number of members is reduced, in the case of a private company, below two, or, in the case of any other company, below seven;

e. the company is unable to pay its debts;

f. the court is of opinion that it is just and equitable that the company should be wound up;

g. in the case of a company incorporated outside Kenya and carrying on business in Kenya, winding-up proceedings have been commenced in respect of it in the country or territory of its incorporation or in any other country or territory in which it has established a place of business"

14. It is not in dispute that the Petitioner and the 1st Respondent are the only two directors of the Company. As things stand now, they cannot transact the business of the Company on account of a deadlock resulting from the dissolution of their marriage. The bitterness between the two parties is evidenced in the dispositions in support and in opposition to the Petition. There is equally no dispute that the Petitioner has been excluded from the affairs of the company; that no audited accounts have been prepared since 2008; that the company is run contrary to the law and that there has been no Annual General Meeting. Given that no **AGM** has been held for a number of years, it is manifest that the Company's accounts have not been presented to shareholders for a number of years. The financial probity of the Company cannot therefore be ascertained. As such I find merit in the Petitioner's submission that the shareholders have been kept in the dark about the company's affairs, and that it would be just and equitable to wind up the Company.

15. The foregoing notwithstanding, it is now trite that winding up ought to be a last resort remedy and that even where a good basis has been made for it, the court may nevertheless consider and give alternative remedies. (See **Jasbir Singh Rai & 3 others –vs- Tarlochan Sigh Rai & 13 Others (2002) eKLR** and **The Matter of Tatu City Limited & Kofinaf Company Limited (2013) eKLR)**. The question that arises therefore is whether there is an alternative remedy to ameliorate the Petitioner's grievances. My answer to this is in the affirmative for **Section 222** of the **Companies Act** provides thus:

"222 (2) 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) that the petitioners are entitled to relief either by winding up the company or by some other means; and

(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."(emphasis added)

16. The parties are in agreement that attempts have been made to settle their disputes outside court but that these have failed. Though the Respondents have not indicated whether a reasonable offer has been made to the Petitioner to facilitate her exit, that is an option which can still be pursued under the supervision of the Court. The elements of a reasonable offer were suggested by Lord Hoffman in the case of **O'NEIL & ANOTHER vs. PHILLIPS, [1999] 1 WLR 1092 Lord Hoffman** thus:

a. The offer must be to purchase the shares at a fair value;

b. If not agreed the value must be determined by a competent expert;

c. The offer should include a determination of the value of the shares by an expert;

d. The offer should provide for the equality of arms between the parties and the same right of access to information about the company which bears upon the value of the shares.

17. However, a reasonable offer can only be considered after establishing the financial probity of the Company and the value of the Petitioner's shares therein. In the premises, the order that commends itself to the Court in the circumstances is that the value of the Petitioner's shares in the company be determined by a reputable firm of Accountants to be agreed upon by parties, failing which, the same shall be appointed by the Chairman of the Institute of Certified Public Accountants of Kenya upon application by the parties. Further to this, the Accountants so appointed should examine the books of Accounts of the **Kangwana Investments Company Limited** to determine the true and current value of the company as well as ascertain the profits and losses if any made by the company with effect from **13th September, 2004,** whereupon the value of the Petitioner shares shall be ascertained to determine is due to the Petitioner to facilitate her exit from the company.

18. Accordingly, further orders will be given herein by the court upon conclusion of the exercise aforementioned.

It is so ordered.

SIGNED, DATED AND DELIVERED AT NAIROBI THIS 9TH DAY OF SEPTEMBER, 2016

OLGA SEWE

JUDGE