REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

MILIMANI COMMERCIAL COURT

COMMERCIAL AND ADMIRALTY DIVISION

WINDING-UP CAUSE NO. 23 OF 2015

IN THE MATTER OF SIROLAND LIMITED

AND

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

SIRO BRUGNOLI.....1ST APPLICANT

ELISABETH LO PINTO.....2ND APPLICANT

VERSUS

GIANCARLO CAMERUCCI.....1ST RESPONDENT

PHILIP CAMERUCCI.....2ND RESPONDENT

JUDGMENT

1. The Petitioner filed this Winding Up Petition dated **21st April, 2015** on **6th May, 2015** seeking the winding up of the company known **Siroland Limited** (herein after the Company). Respondents also filed an application dated **21st April, 2015** seeking an order of interim injunction as well as the appointment of an Interim Liquidator. However upon filing their respective submissions, the parties agreed on **25th April, 2016**, to dispose of the main Petition since the material put forward in support of the application went to the substance of the entire Petition.

2. The Petitioners, **Siro Brugnoli** and **Elisabeth Lo Pinto**, petitioned this court praying that:-

a) Siroland Limited be wound up by the Court under the provisions of the Companies Act.

b) A permanent injunction restraining Giancarlo Camerucci and Philip Camerucci whether by themselves, their agents and/or servants or any other persons acting under their authority and/or instructions from withdrawing or collecting any monies from any of the bank accounts opened and/or operated on behalf of Siroland Limited.

c) That pursuant to the winding up order, any of the following suitable and independent persons

be appointed as liquidator of the Company with the specific mandate to investigate the affairs of the Company and collect and get in all assets of the Company , including cash which may have been improperly diverted :-

i. Kamal Shah;

ii. Robert Nyamu;

iii. Geoffrey Kamau;

iv. Felix Kimoli; or

v. Kariuki Muigwa

d) The Court be pleased to issue an order allowing the liquidator to commission a valuation of all the properties of the Company sold from the year 2011 with a view to establishing their market value at the time of disposal and to recover the difference between market value and the price sold from Philip and Giancarlo Camerrucci, where the same was sold at undervalue.

e) The Court be pleased to issue an order compelling Giancarlo Camerucci and Phillip Camerucci to disclose the details of all bank accounts opened and/or operated by themselves and/or any of their servants and/or agents on behalf of the Company.

f) The Court be pleased to issue an order compelling Giancarlo Camerucci and Phillip Camerucci to render a true and just account of all monies received from or in respect of the sale of the properties owned by the Company from the year 2011 to date.

g) This Court be pleased to issue an order compelling Giancarlo Camerucci and Phillip Camerucci to forthwith pay to the Company all monies illegally diverted to their personal accounts in respect or in connection to properties owned or previously owned by the Company and sold to third parties.

h) In alternative to (g) above, a declaration that the amount found to have been illegally collected and/or diverted from the Company be deducted from Giancarlo Camerucci's final share/entitlement in the Company at the point of distribution of the assets.

i) That subsequent to getting in and collection of all assets and monies truly belonging to the Company in terms of prayer c above, after payment of all debts owed by the Company, the remaining assets of Siroland Limited be divided among Giancarlo Camerucci, Elisabeth Lo Pinto and Siro Brugnoli, in accordance to their shareholding less any amounts due to the Company.

j) In the alternative to (i) above, all assets registered in the name of Siroland Limited be disposed of by way of sale by public auction and that the proceeds therein be divided between Giancarlo Camerucci, Elisabeth Lo Pinto and Siro Brugnoli, according to their shareholding less any amount found due to the Company.

k) Such other order as may be just in the circumstances be granted.

3. The 1st Respondent Company was incorporated in Kenya with the nominal share capital of **Kshs.100,000/=** divided into **1,000** ordinary shares of **Kshs.100.00** each. The objectives of the Company were, inter alia, to carry on business of real estate developers, house agents, land and estate agents, appraisers, valuers, brokers, commission agents, surveyors and general agents, among others. The Petitioners and the 1st Respondent are the only shareholders of the company. The Petitioners jointly own 50% of the Company's shares, while the 1st Respondent holds the remaining 50% of the shares to the

company. The 2nd Respondent, is a director of the Company with no direct shareholding. It is pleaded that the 2nd Respondent being the only director residing in **Malindi, Kenya,** was responsible for the day to day affairs of the company.

4. The grounds upon which the Petition is based are stated in paragraphs 11 to 28 of the Petition. The same are verified and supported by the 1st Petitioner's verifying affidavit and further affidavit sworn on **21st April, 2015** and **12th August, 2015,** respectively. In a nutshell, these grounds are that there is no valid Board of Directors to the company as both **Siro Brungoli** and **Giancarlo Camerucci** have attained the age of 70 and are therefore deemed to have vacated office; that the company has failed to hold general meetings, with the result that the company is in breach of **Section 131 of the Companies Act** and **Clause 37** of the Company's **Articles of Association**; that the Company has failed to present audited accounts for adoption by shareholders thereby keeping shareholders in the dark as to the financial management and status of the company since **2012**; that the Respondents have engaged in irregular disposal of Company assets and misappropriated the proceeds thereof; and that due to the ongoing tussle between the members of the company, a deadlock has arisen at the shareholder level making it impossible to agree on simple issues relating to the business and operations of the company.

5. In opposing the Petition the 2nd Respondent filed a replying affidavit sworn on **13th July, 2015**. It was contended that in seeking the prayers contained in the Petition, the Petitioners failed to disclose material information to this court; namely, that the Petitioners had filed previous proceedings in **Malindi** and **Mombasa;** that in respect to the **Mombasa High Court Civil Case Number 147** of **2012** (hereinafter **"the Mombasa Case"),** the Petitioners sought orders for the freezing of the company's accounts and for the auditing of the books of the company an independent auditor. It was further deponed that in the **Malindi Winding Up Cause Number 6 of 2013** (hereinafter **"the Malindi Case"**), the Petitioners sought to have the company wound up, but the Petition was withdrawn to explore an amicable settlement of the stalemate between the Petitioners and the Respondents. To this end, it was the 2nd Respondent's contention that the failure by the Petitioners to disclose material information disentitles them from any of the orders sought.

6. With regard to the accusations that the Company failed to hold meetings, it was averred that the company held an AGM meeting **18th May, 2012** where members, including the Plaintiffs, were represented. That during the said meeting, the Draft Financial Statements of the Company were presented by the Company's auditors, and that the said auditors confirmed that the Company had constructed 15 Apartments, 7 of which had been sold. That thereafter the meeting resolved to, *inter alia,* adopt the draft Financial Statements for the year ending **31st January, 2012**. However it was contended that planned meetings never happened due to the actions of the Petitioners who among other reasons, did not put in their proxies in time. The Respondents further denied dealing in and transferring properties of the company irregularly and maintained that Petitioners were all along aware of the properties' disposal as this was tabled at the AGM meeting held on **18th May, 2012**.

7. On the issue that the board of directors of the company is not properly constituted, it was the assertion of the Respondents that directors of a private company are not obliged to retire at a certain age. That in any case, even where directors are set to retire at a certain age, the said retirement would only be effective at the conclusion of the General Meeting after such a director reaches the prescribed retirement age. The Respondents also denied allegations that they diverted company funds to their personal accounts or that they unilaterally disposed of assets of the company without the Petitioner's knowledge and/or approval. As such, the Respondents contended that the Petitioners had not presented sufficient grounds to warrant the issuance of the orders sought in this Petition.

8. The Petitioners filed their submissions and further submissions on **28th October, 2015,** and **15th February, 2016,** respectively, while the Respondents filed submissions on **10th December, 2015**. The same were orally highlighted before the court on **13th June, 2016**. Learned Counsel, **Ms. Odari** presented the Petitioners' case, while, Learned Counsel **Mr. Ogunde** submitted on behalf of the Respondents.

9. Relying on its pleadings and written submissions before the court, the Petitioners argued that the Petition was filed pursuant to S**ection 222** of the repealed Companies Act, Chapter 486 of the Laws of Kenya, which allowed a member of a Company to file a winding up petition on the grounds that it was **just** and **equitable**. According to **Ms. Odari**, the Respondents acted inequitably and therefore the Petitioners were deserving of the Court's intervention in their behalf. It was further contended that the two directors of the company, that is **Giancarlo Camerucci** and **Siro Brugnoli**, had already attained 70 years leaving only **Phillip Camerucci** as the only Director, and therefore, the number of directors had fallen below what was required by the **Articles of Association** of the Company.

10. It was further submitted that the Respondents had admitted the existence of a stalemate at shareholder level, such that the parties could not agree on important issues affecting the company, including the replacement of the 2 directors who had attained retirement age. As such, **Ms. Odari** told the court that in the absence of consensus between its shareholders, the company cannot move forward and should therefore be dissolved. With regard to the failure by the Company to hold Annual General Meetings as required by **section 131** of **the Companies Act, Ms. Odari** relied on the case of **Agricultural Development Corporation of Kenya –v- Nathaniel Tum & Another (2014) eKLR**, as to the importance of an AGM, namely that it serves the twin purposes of **accountability** by the company to its shareholders on its business for the past year and for statutory **compliance**, including the appointment of directors and auditors.

11. It was therefore the Petitioners' submission that by operating for **three years** without calling an AGM, the company was in breach of the **Companies Act**. She also added that due to the failure to call for an AGM, there was failure by the Company to also lay audited accounts for adoption by shareholders. Learned Counsel for the Petitioners pointed out that at the AGM held on **18th May, 2016**, only the draft audited accounts were presented because the Auditors had not been supplied with the required information. Owing to this, the meeting was adjourned. However, subsequent scheduled meetings did not materialize. As such, no adoption of the accounts of the company has ever been done as required by law.

12. According to **Ms. Odari,** the shareholders have been kept in the dark as to the true financial status of the Company, which situation is not only in contravention of statute but is also adverse to the interests of the Company. The Petitioners further contended that on diverse dates from **February, 2011**, while operating without a valid Board of Directors in place, the Respondents disposed of various assets of the Company without the knowledge or consent of the Petitioners. That the Respondents subsequently failed to account for the income due to the Company and instead diverted the Company's funds for their own personal use. On **the Malindi case**, it was submitted that the said Case was withdrawn to facilitate an out of court settlement. However, the parties' could not agree necessitating the filing of the present petition. That in view of the foregoing submissions, the only order that commends itself is the winding up of the company and the appointment of a liquidator pursuant to **Section 234** of the repealed **Companies Act**.

13. On his part, **Mr. Ogunde** argued that the Petition as presented in Court was unmerited. It was submitted that a fundamental beacon in respect of the Court's power to wind up a company was that, if there was an alternative remedy to winding up then such a remedy should be pursued. He pointed out that in **the Malindi case**, the Petitioners were amenable to resolving the dispute through asset splitting on a 50/50 basis. That it was against this backdrop that the court in **Malindi** gave orders on **8th June, 2014** that the accounts of the company be availed before the court.

14. According to **Mr. Ogunde**, a path towards resolution of the stalemate had already been charted, thereby presenting a viable remedy in lieu of winding up. However, upon the presentation of the accounts, the Petitioners chose to abandon their court cases both in **Malindi** and **Mombasa**, and later on instituted the instant proceedings. That given these facts, it was **Mr. Ogunde's** posturing that the Petitioners should not be taken seriously on their complaint that they have been kept in the dark about the companies affairs.

15. In relation to the alleged sale of company assets, it was submitted that the Respondents had satisfactorily disproved the Petitioner's assertions in that regard and that in any case, lack of probity has no bearing on a winding up Petition where there are alternative remedies, for which reason the Petitioners were at liberty to pursue the alternative remedies available, including civil court action, where the

allegations can be tested through cross examination.

16. On the issue of deadlock, it was submitted that the same had been occasioned by virtue of the shareholders, who hold a 50/50 stake in the Company, disagreeing. Relying on the case of **Mohamed Yusufali & Another –v- Bharat Bhardwaj & Anor (2007) eKLR**, it was the Respondent's submission that a deadlock cannot form a proper ground for winding up of a company where a suitable alternative exists. Counsel proposed that a viable alternative in this case would be for the exit of the concerned shareholders with 50% of the assets. It was also submitted that the issue of the company not holding any AGM should not be looked at in isolation as the same has been occasioned by the deadlock between the shareholders. That once the deadlock is resolved, then the company could hold AGMs as prescribed under law. For these reasons, the Respondents urged the court to dismiss the Petition and give orders that would resolve the stalemate without winding up the company.

17. I have carefully considered the evidence and submissions in support and opposition to the Petition. The general jurisdiction conferred to the court for winding up a company was contained in **Section 218** of the repealed **Companies Act, Cap 486** of **the Laws of Kenya,** which by virtue of **Section 734(2)** of the Insolvency Act, 2015, applies herein. **Section 218** thereof stated thus ;

> ***"The High Court shall have jurisdiction to wind up any company registered in Kenya."***
>
> 12. The circumstances in which a company may be wound up by the Court are detailed in **section 219** of the *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".***

18. Based on the above section and the facts before this court, it is clear that the circumstances in which the Petitioners seek to have the company wound up primarily fall under **Section 219 (b), (d)** and **(f).** The issues for determination, which I propose to deal with here below, can thus be summed up as follows;

> ***a) Whether the Company has a valid board of directors;***
>
> ***b) Whether there was failure by the company to hold annual general meetings as prescribed by law and present audited accounts for adoption by shareholders;***
>
> ***c) Whether there was Illegal disposal of assets of the company by the respondents;***

d) Whether there was a deadlock that occasioned the running of the affairs of the company impossible;

e) Whether the Company should be wound up and a liquidator appointed.

f) Whether there is an alternative remedy to winding up the company that exists;

g) Whether there was a valid board of directors in place:

19. It was the Petitioners posturing that **Clause 51** of the **Articles of Association** of the Company provides that the number of directors shall not be less than two (2) and no more than seven (7). That further under **Clause 60** of the said **Articles of Association,** one of the ways in which a director can be removed from office, is upon the director attaining the age of seventy (70). As such, it was the Petitioners' argument that having attained the age of 70, two directors, that is, **Siro Brugnoli** and **Giancarlo Camerucci**, were automatically deemed to have retired and vacated office as directors. Thus, the only remaining director would be **Phillip Camerucci,** who would not validly transact business on behalf of the company.

20. Needless to say that Directors are the brain of the company and that they occupy a pivotal position in the structure and operations of the company. Therefore, given their importance, it is only when the board of directors is constituted in accordance with its Articles of Association, can a corporation be said to function as it should. In this case, it is not in contest that the minimum number of directors of the company should be two. It is also not disputed that out of the three remaining directors of the company, two have already attained the age of 70. Article 60 of the Company's Articles of Association states thus with regard to removal/vacation of office of Directors;

"Every director shall remain in office unless removed through an ordinary resolution of the company duly passed after a special notice, and whereupon the director concerned has been granted the right to be heard.

A director shall also vacate office if he;

a. .....

b. has not attained the age of twenty one, or has attained the age of seventy; or

c. .....”

21. From the above article, there can be no doubt that the members of the Company agreed to a set age limit for the retirement of directors, and that upon attaining that age a director would automatically vacate office. Since no procedure has been set forth on how the same should be done, I would reject the Respondents' argument that where directors are to retire on account of age, the retirement would only be effective after the conclusion of the General Meeting next after such a director reaches the prescribed retirement age. From my reading of the said article, I would agree with the Petitioners' position that once **Siro Brugnoli** and **Giancarlo Cammerruci** attained the age of 70, they were automatically deemed to have vacated office.

b) Whether there was a failure by the company to hold annual general meetings as prescribed by law and present audited accounts for adoption by shareholders.

22. With regard to AGMs Section **131(1) of the Companies Act** provides thus:

"Every company shall in each year hold a general meeting as its annual general meeting in addition to any other meetings in that year, and shall specify the meeting as such in the notices calling it; and not more than fifteen months shall elapse between the date of one annual general meeting of a company and that of the next:

Provided that, so long as a company holds its first annual general meeting within eighteen months of its incorporation, it need not hold it in the year of its incorporation or in the following year."

23. The importance of holding AGMs cannot be gainsaid. An AGM serves as a mechanism for accountability to shareholders and as an act of compliance with the law. It is not in dispute that **Siroland Ltd** has not held an Annual General Meeting since **2012.** Its attempts to do so, have been in futility owing to the various difficulties it initially faced from the court cases in addition to the stalemate in decision-making. It is apparent, however, that the company did not make any serious attempts to cause a general meeting to be convened particularly after withdrawal of the cases filed by the Petitioners in Mombasa and Malindi. Thus, the Company continues to operate without adhering to the law; an act which exposes the company to serious legal penalties and sanctions under **Section 131** of the **Companies Act.**

24. Given that no **AGM** has been held for a period of three years, it is obvious that the Company's accounts have not been presented to shareholders for a period of over three years. The financial probity of the Company cannot therefore be ascertained. I therefore find merit in the Petitioners' submission that Petitioners have been kept in the dark about the company's affairs. In **Winding Up Cause No. 12 of 1995: In the Matter of Madhupaper International Limited, Kasango J,** found that failure to lay audited accounts for adoption by shareholders is a basis of winding up on the ground that it is just and equitable. The court expressed this viewpoint as follows;

"The Court does find that the Petitioners have on a balance of probability made out a case for the winding up of the company. Considering how the respondent has for many years failed to account for the goings on of the company, to the rest of the members, and it does seem from the affidavits filed herein that there is a breakdown of communication between the respondent and the petitioner; it is in the opinion of the court that it is just and equitable that the company be wound up"

c) Whether there was Illegal disposal of assets of the company by the respondents

25. This was a hotly contested issue and seems to be the crux of the Petitioners' case. It was the Petitioner's contention that on diverse dates from **2011**, while operating without a valid Board of Directors in place, the Respondents disposed various assets, namely villas, of the company without the knowledge of the Petitioners and failed to account for the income due to the Company. The Petitioners contended that the Respondents diverted the company funds for their own personal use. The Respondents, on the other hand, denied these accusations and contended that the sale of **Villa Kipanga No.6** which was in contention was not sold and remains in the Company's name.

26. Given these opposing positions, I take the view that determination as to whether there was illegal disposal of company assets cannot be made based on affidavit evidence alone. There would be need for cross examination of the various deponents to test the veracity of the evidence on this issue. Other parties, namely those who purportedly purchased the villa in question would have to be cross examined. Such verification would best be carried out within the purview of a civil action as opposed to a winding up cause. (See **Re A. Singer & Co (Hat Manufacturers), Ltd [1943) 1 All E.R 225** and **Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 13 others [2002] eKLR).** Accordingly, my finding is that this issue cannot be the basis for winding up the company.

c) Whether there was a deadlock that occasioned the running of the affairs of the company impossible.

27. Under this head, it has been admitted by all parties to this Petition that there was an ongoing tussle between the shareholders that has resulted in a deadlock. It is my considered finding from the evidence availed herein that the relationship between the petitioners and the Respondents is so strained that it is impossible for them to carry on company business together. The deadlock can only be unlocked by disengaging the two opposing sides. There have also been previous cases that have been filed between the parties that have stagnated the operations of the companies. However, the stalemate alone is not enough

to warrant the winding up of a Company, if, as submitted by Counsel for the Respondents, there is an alternative remedy. (See **The Matter of Tatu City Limited & Kofinaf Company Limited (2013) eKLR)**

> ***g) Whether the Company should be wound up and a liquidator appointed and whether there is an alternative remedy to winding up the company that exists.***

28. From the foregoing, it is clear that there exists a basis for winding up the Company. However, it was the submission of the Respondents that there is the existence of an alternative remedy to winding up the company. That a viable alternative as articulated by **Mr. Ogunde** is for the aggrieved shareholders to exit with 50% of the company assets. The Petitioners insist that no suitable alternative exists as previous attempts to settle the issues bedeviling the company have yielded no results.

29. I have considered the various opposing arguments presented by the parties. **Section 222** of the **Companies Act** states as follows:

> ***"222 (1) On hearing a winding-up petition the court may dismiss it, or adjourn the hearing conditionally or unconditionally, or make any interim order, or any other order that it thinks fit, but the court shall not refuse to make a winding-up order on the ground only that the assets of the company have been mortgaged to an amount equal to or in excess of those assets or that the company has no assets.***
>
> ***(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, <u>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</u>." (emphasis supplied)***

30. Though there is contestation that a reasonable offer has been made to the Petitioners, I take the view that that it is not too late for the Court to intervene and have the parties agree on an amicable solution. As **McPherson J** stressed in **Re Dalkeith Investments Pty Ltd (1985) 3 ACLC 74 at 79**, winding up is a remedy of last resort and one which ought not to be granted if some other less drastic form of relief is available and appropriate.

31. In the case of **O'NEIL & ANOTHER vs. PHILLIPS, [1999] 1 WLR 1092, Lord Hoffman** set out what would amount to a reasonable offer of an alternative remedy as follows:

> **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 to have the value of the shares determined by an expert;**
>
> **d. The offer should provide for the equality of arms between the parties; Both should have the same right of access to information about the company which bears upon the value of the shares.**

32. Likewise in **Re A Company, [1983] 1 WLR 92** the court held the Petitioner was unreasonable in rejecting, as an alternative to winding up, a proposed valuation of his shares by an independent expert and

a subsequent offer by the respondents to buy his shares at a value reached by a reasonable method. Thus, it is clear from the foregoing cases that the course of justice would be in favour of not winding up a company if there is an alternative remedy.

33. The Respondents proposed the distribution of assets of the company to facilitate the exit of the Petitioners. However, this can only be done, after establishing the value of the Petitioners shares in the company. It is my considered view that the petitioners should pursue the alternative remedy as opposed to winding up of the company. Having considered all the affidavits and submissions by counsel, I have come to the conclusion that, whereas the petitioners have established some of the grounds in their petitions and are therefore entitled to some relief, a winding-up order would be a disproportionate relief in the circumstance, considering that there is an alternative remedy available.

34. In the premises, the order that commends itself to this Court is that the Petition be dismissed with an order that each party bears own costs. It is further ordered that:

(a) The value of the Petitioners' shares in the company be determined by a reputable firm of Accountants to be agreed upon by parties, failing which the firm shall be appointed by the Chairman of the Certified Public Accountants of Kenya.

(b) Further to this, the Certified Accountants so appointed should be allowed to examine the books of Accounts of the Siroland Limited to determine the true and current value of the company.

(c) At the same time, a reputable firm of Valuers should also be agreed upon by the parties to undertake valuation of all the companies' properties. If one cannot be agreed upon by the parties, then the firm shall be appointed by the chairman of the Institute of Surveyors.

(d) Further orders be given by the court on a mutually agreed date by the parties when this matter will be mentioned with a view to the parties informing the court of the reconciled amount due and owing by the Company to the Petitioners.

(e) Interim injunction is hereby issued restraining the company from disposing any of its assets pending the valuation exercise of the company shares and assets, and further orders of the court.

It is so ordered.

SIGNED, DATED AND DELIVERED AT NAIROBI THIS 2ND DAY OF SEPTEMBER, 2016

OLGA SEWE

JUDGE