



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

WINDING UP CAUSE NO. 1 OF 2014

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

HARUN MNJAU PETITIONER

V E R S U S

SAGALLA RANCHERS LTD 1ST RESPONDENT

ELIUD T. MWAMUNGA 2ND RESPONDENT

RULING

1. The Petitioner **HARUN MNJAU** filed a Petition in this matter for the Winding Up of the Company **SAGALLA RANCHERS LIMITED**, the 1st Respondent. It is not clear to me what remedy the Petitioner seeks from the 2nd Respondent **ELIUD T. MWAMUNGA**, the claim against this 2nd Respondent is not clear from the pleadings at all.

2. The Petitioner seeks the Winding Up of the Company on the ground that it would be just and equitable. He also seeks the following orders-

- **THAT the Official Receiver be appointed so as to immediately take all necessary steps to extend the lease of Plot No. 12177 situated in Taita Taveta County and thereafter oversee the Winding Up of Sagalla Ranchers Limited.**
- **THAT pending the determination of this Petition, an order be made prohibiting any withdrawals from Kenya Commercial Bank Limited, Voi Branch, Account No. 1104865564.**
- **THAT such other Orders be made as this Honourable Court may deem just and expedient.**

3. The Petitioner simultaneously when he filed the Petition also filed a Notice of Motion dated 9th January 2014 (hereinafter called '**Petitioner's Notice of Motion**'). He seek the following order-

“THAT pending the hearing and determination of this Petition, an order be issued restraining the Respondents, their agents and/or servants from making any withdrawals of the Company's funds held in Kenya Commercial Bank Limited, Voi Branch, Account No. 1104865564 or in any other bank account held or that may be held by the 1st Respondent.”

The bank account the subject of the above prayer is the Company's bank account. When the Petitioner's Notice of Motion was presented before Court under Certificate of Urgency, on 13th January 2014 the Court issued an interim injunction in terms of that prayer of the Petitioner's Notice of Motion. That order has remained in force until the date of delivering this Ruling.

4. The two Respondents filed a Notice of Motion dated 27th January 2014 (hereinafter referred to as Respondents' Notice of Motion) where they seek the following prayers-

- **The orders of injunction issued by the Honourable Court ex-parte on 13th January, 20 14 freezing the 1st Respondents A/c No. 1104865564 held at Kenya Commercial Bank Ltd at Voi through Application dated 9th January, 2014 be discharged and/or lifted forthwith.**
- **There be a stay of any further proceedings on the Winding up proceedings in this matter pending the hearing and determination of this Application inter-parties.**
- **The Winding up proceedings filed in this Court on the 13th January, 2014 be struck out with costs.**

5. Both the Notice of Motion were argued together and are therefore the subject of this Ruling. It is important to state that the Respondents prayer for striking out the Petition was not adequately, in my view attended to in the parties' submission both in written and oral. Particularly the Petitioner, from whom the Court would greatly benefit from his submission on that prayer. The Petitioner failed to respond in depth. In order to do justice I will not deal with that prayer and at the reading of today's Ruling I shall give the parties opportunity to further address the Court on that prayer. If parties do not wish to address the Court further the Court will proceed to give a date of its Ruling on that prayer. As a consequence there are grounds or depositions which largely touch on the merits or demerits of the Petition which at this stage I shall not deal with.

6. It is also important to note that whichever way the Court Rules on the Petitioners Notice of Motion for injunctive order the Court will have dealt with Respondent's prayer for discharging or lifting the interim injunction.

PETITIONER'S NOTICE OF MOTION

7. Petitioner largely based his prayer after injunction on the same grounds as the Petition.

8. The grounds which support the prayer for injunction to restrain the operation of the 1st Respondents account are that; the 2nd Respondent, has irregularly paid himself "colossal" amounts of money of the 1st Respondent's funds; that he made transfers to unauthorized accounts to the tune of Kshs. 15,455,096; issued outward cheques that were unaccounted for to the tune of Kshs. 13,880,837; that the Respondent irregularly misused the 1st Respondent Company's funds in purchasing a motor vehicle registration No. KBU 703Z which the 2nd Respondent personally uses; and that the Respondents irregularly paid the 2nd Respondent's son commission "in million of shillings" from sale proceeds of 1st Respondent's land.

9. The 2nd Respondent by his replying affidavit denied the allegation that he paid himself money. In this regard he stated in his affidavit-

"THAT, the statements being relied upon are not authenticated by the bank that it has ever given the 1st Respondent such statements. The source is therefore unknown and the Court cannot rely on them. (I have adopted the affidavit of Allan Mwandata) to rebut the allegation that he did supply the Petitioner with the statements and accept his set of statements as correct and authentic."

10. 2nd Respondent annexed a write up and architectural drawing of a Petrol Station which he said was a

project the 1st Respondent was undertaking, and deponed that that project had stalled after the 1st Respondent's Bank accounts were frozen. Contrary to Petitioner's deposition 2nd Respondent stated that the 1st Respondent account was in credit which demonstrated the 1st Respondent was not mismanaged.

11. That the 1st Respondent was not dormant but was vibrant and engaged in many income generating activities such as the construction of its headquarters located at Maungu which project is ongoing and a Petrol Station. That those projects had been authorized by a board resolution of the 1st Respondent.

12. 2nd Respondent had this to say on the freezing of 1st Respondent's bank accounts-

“THAT, further to the above the Winding Petition and the order freezing the accounts are from a disgruntled member who was disgraced by other fellow members for failure to participate in company activities. He is a lone ranger bent on frustrating 49 members engaged in vibrant economic activities.

13. Petitioner responding to bank statements attached to the 1st Respondents General Manager's affidavit and criticized failure to attach the statements for the years 2009 upto 1st October 2013 and insisted that the statements produced in his application were from 1st Respondent's bank.

14. The Petitioner contended that if indeed 1st Respondent's Company was well managed it would be having a credit balance of Kshs. 300,000,000/-.

15. Petitioner in reference to 2nd Respondent submissions deponed-

“Indeed my demand for the 2nd Respondent to resign his Chairmanship of the Board of the 1st Respondent on account of his lack of a sound mental frame is not out of ill-will or spite [but] the 2nd Respondent's unreasonable, unwarranted and utter irresponsibility.”

According to the Petitioner if the injunction to freeze the account is granted pending the hearing and determination of the Petition, it would ensure the 1st Respondent was not plundered for the “personal aggrandizement by the 2nd Respondent and his family.”

ANALYSIS

16. On the first allegation that 2nd Respondent irregularly paid himself ‘colossal’ amounts of money, I have looked at the statements attached to Petitioner's affidavit, notwithstanding that those statements are disputed, and I have looked at the transactions of 3rd September 2009 and 7th October 2013. On 3rd September 2009 there was a cheque paid to Allen of Kshs. 75,500/-. That payment was not to the 2nd Respondent. On 7th October 2013 there are two transactions as follows: Standing Order Transfer membership fee Kshs. 1,000/- and a cheque issued to Wilson at Voi of Kshs. 18,000/-. Those too were not payments made to the 2nd Respondent. Petitioner had stated in his affidavit that 2nd Respondent received a total of Kshs. 40,174,467.65 but failed to state when those were made. I have had a casual look at the statements I cannot find support for that allegation by the Petitioner, at most I have seen at least two payments to 2nd Respondent for Kshs. 50,000/- and Kshs. 49,440/-. That does not amount to the claim that the 2nd Respondent received a large amount of money, as claimed by the Petitioner. Similarly there is no evidence of the Respondents making unauthorized transfer as alleged or that the outward cheques were unaccounted for.

17. The claim that the motor vehicle was irregularly purchased was not based on evidence at all. The 2nd respondent has shown that there is kept a record of all the trips that were made with that vehicle and purposes of those trips are recorded.

18. Petitioner alleged the 2nd Respondent paid his son a commission irregularly. I have looked at the Commission agreement attached to Petitioner's affidavit and it clearly shows, as deposed by 2nd Respondent, that the commission agreement was between Gitonga Wambugu Kariuki and Samuel Mazera Mwamunga. It follows that there is no basis for the allegation of irregular commission payment by the Respondents.

19. When the Petitioner approached the Court for an ex parte injunction application he ought to have realized that he had a heavy burden to put before the Judge all the relevant material. He had an obligation to be candid to the Court and to demonstrate *uberrima fide* (utmost good faith). A case in point is **UHURU HIGHWAY DEVELOPMENT LIMITED –Vs- CENTRAL BANK OF KENYA & OTHERS CIVIL APPLICATION NO. 140 FO 1995** where the Judges of the Court of Appeal had the following to say-

“... Order 39 rule 3(1) of the Civil Procedure (revised) Rules (now Order 40 of the Civil Procedure Rules, 2010) permits the granting of ex parte injunctions but it must clearly be understood that a party who goes to a Judge in the absence of the other side assumes a heavy burden and must put before the Judge all the relevant materials, including even material which is against his interest. The basis for this requirement is obvious; it is a universal rule of natural justice that court orders ought to be made only after hearing or giving all the parties an opportunity to be heard. Ex parte orders, whether they be injunctions or whatever, form an exception to this rule and for a party to benefit from the exemption, there must be a good and compelling reason for it.”

20. I refer to the above case because, as it can be seen above all the grounds that supported Petitioner's prayer for freezing 1st Respondent's account and upon which the ex parte interim injunction was granted are in my view based on Petitioner's suspicion innuendos and are unsubstantiated. It is more the pity that 1st Respondent's financial activities have been paralyzed for now over a year due to the interim injunction granted. In my view interest of justice calls upon this Court to discharge and lift that injunction. It would follow that the Notice of Motion dated 9th January 2014 shall be dismissed.

CONCLUSION

21. As stated before the prayer for striking out the Petition is held in abeyance to give parties more time, if they so wish, to further address the Court on the same. For now the following are the orders of the Court:-

- a. **The Notice of Motion dated 9th January 2014 is dismissed with costs to the Respondents.**
- b. **Prayer No. (c) of Notice of Motion dated 27th January 2014 is granted with costs to the Respondents to the effect that this Court's ex parte injunction freezing the bank account of Sagalla Ranchers Limited A/C No. 1104865564 at Kenya Commercial Bank at Voi is discharged and lifted.**
- c. **The costs of the Notice of Motion dated 27th January 2014, where prayer (d) and (e) were not granted, shall be the subject of the subsequent Ruling.**
- d. **At the reading of this Ruling parties will be given opportunity to further submit on prayer No. (d) and (e) of the Notice of Motion dated 27th January 2014. Until that Ruling is delivered this Petition is hereby stayed.**

DATED and DELIVERED at MOMBASA this 5TH day of MARCH, 2015.

MARY KASANGO

JUDGE