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 CAP 486 LAWS OF KENYA & WINDING UP RULES MADE THEREUNDER

IN THE MATTER OF: DHANJAL BROTHERS LTD.

JOGINDER SINGH DHANJAL...APPLICANT

VERSUS

DHANJAL BROTHERS LIMITED..1ST RESPONDENT

DALJIT SINGH DHANJAL...2ND RESPONDENT

RULING

1. Before me for determination are two applications:-
   - Notice of Motion dated 16/2/2015 by the Petitioner seeking orders that:-
     1. THAT this application be certified as urgent and heard *exparte* in the first instance.
     2. THAT there be a temporary order of stay of the *exparte* orders issued on 13th November 2014 restraining the Petitioner from advertising the Petition in the Gazette pending the hearing and determination of this application.
     3. THAT the *exparte* orders issued on 13th November 2014 be discharged and set aside.
     4. THAT the costs of this application be provided for.

2. When the parties appear before court, Kasango J on the 22/6/2015, it was agreed by consent that the applications be heard together. As can be seen the application dated 16/2/2015 basically seeks to discharge the *exparte* orders granted on the 13/11/2014. To my mind having read and considered the two applications, the determination of the Respondent's application dated 13/11/2014 will *ipso facto* dispose of the application by the petitioned. I say so because, should I allow the Respondent's application, the petitioners application will stand dismissed. Conversely if I dismiss the application by the Respondent, the petitioner application will stand allowed. That being my view of the applications, I will treat the Petitioners application as an opposition to the Respondents application. Consequently and to syncronise the papers filed, I will treat the application dated 16/2/2015 together with the Replying affidavit of the petitioner sworn on the 19/11/2015 as replies to the Respondents notice of Motion dated the 13/11/2014. I will thus strive to deliver one ruling on the Respondents application which will dispose of the Petitioners application on the same breath.

3. That application dated 13/11/2014 is supported by the affidavit of the 2nd Respondent sworn on the 13/11/2014 in reply to the Petition as well as supplementary affidavits sworn on the 15/4/2014.
4. The gist of the Respondents application is that unless the application is granted, the petition will be advertised with the inevitable consequence that the reputation of the company will be damaged and all the persons who deal with it like the banks, and clients will shun it consequently it will be ruined in its dealings and ultimately its contributories will be called upon to absorb such effects. It is further contended that the reasons advanced for winding up the company are not sufficient or plausible but are self centered in that his overiding purpose is to coerce the other directors and in particular the 2nd respondent into buying him out. The allegations of fraud are denied as much as the allegations that the Petitioner has been shut out of the company's affairs.
5. Infact it is contended that the petition and demand for buy out was made *mala fides* coming at a time the 2nd Respondent was out of the country for medical attention and that the petition was prepared while he was still under the said medical attention and filed to coincide with his arrival in Kenya on the 5/11/2014.
6. In the Response to the petition, the 2nd Respondent says he is not averse to the buy out but it ought to be structured in that the company assets need to be valued and be measured against the debts and each contributory paid out of the surplus or called upon to meet the deficit in accordance with their shareholding ratios. It concludes, by alleging improprieties against the petitioner ranging from vandalising a motor grader, diversion of some 60,000 litres fuel, buying goods from his son at astronomical prices and loss of Kshs. 2,1955,249 from the company while he acted the operations and Procurement director. In summary it is the Respondents case that there are viable and effective alternatives to winding up the company and the court should lean towards saving the company.
7. The supplementary affidavit largely echos the averments in the Reply to the Petition but adds that an explanation about the holding by the estate of one, Jaswant Singh Dhanjal and the fact that the company shares have infact been valued the stress is once again made on the desirability to resort to the alternative remedies prior to an order for Winding up.
8. In opposition to that application the papers filed by the petitioner are to the effect that the application to stop the advertisement does not lie as that is a prerequisite before a petition for Winding up could be heard; that section 222 of the Act and Rule 23, companies (Winding up) Rules do not permit restrainet of a statutory edict to advertise the petition; that the court was misled into granting the temporary injunction, that the Respondent will not be prejudice if the advertisement is effected as it shall be afforded an opportunity to be heard and that the effect of granting the orders would be to impede the petitioners rights under Articles 48 and 50 of the Constitution.
9. In the Replying Affidavit it is contended that the application is bad in law, fatally defective and an abuse of the process of the courts that **prayer** c is vague, unclear and incapable of grant;, that the prayer for security for costs has no basis in law. The Petitioner then denies the accusation that he has indirectly advertised the petition while contending that the News item that appeared in the Daily Nation was due to the fact that court documents are documents in the public domain.
10. Additionally, the petition contends that advertising the petition is a mandatory statutory requirement that the provision of the law cited do no avail to the Respondent the orders sought and that section 222 can only be invoked at the hearing and not before as the Respondent has sought to do. It is therefore the petitioner's prayer that the application be dismissed and the petitioner allowed to proceed with his petition by having same advertised and way cleared for its hearing.

Oral arguments

11. When the parties attended court to highlight the filed submission, Mr.Kadima for the Respondent argued in the main that a Companies' Court looks at the interests of the company, its contributories and other people who deal with it in the course of its business. He relied on he submissions filed which stress the position that there is no sufficient evidence to enable the court consider Winding up the company; that there exist an alternative remedy to Winding up and that the Winding up prayer is not genuine but intended to evade the advise by the company auditors to the effect that the contributories should source funds to fund the company's overdraft and financial accommodation from Diamond Trust Bank Ltd and that the allegation of fraud against the 2nd

Respondent have been investigated and the said Respondent cleared of wrong doing. Reliance was also placed on the list of authorities and filed documents to buttress the Respondents legal and factual grounds for the application under consideration. On that basis it was prayed that the application be allowed and the application and petition be dismissed.

12. On his part Mr.Khalid also relied on his submissions filed on the 23.7.2015 and the authorities cited and annexed thereto. The gist of Mr.Khalid submissions are that the requirement for advertisement being a mandatory statutory provision, the same cannot be stopped. He relied on the decision by *Fred A. Ochieng, J* in the case of **ERIC C. HANNA -VS- INTERNATIONL HOMES LTD. & OTHERS [2005] eklr** to the effect that advertisement is a prerequisite to the petition being heard. There was also reliance put on the decision in **Re of Wind up of Kam Pharmacy Ltd,** where Harelock J. held that Rule 23 was couched in mandatory terms.

13. Mr.Khalid also stressed the fact that to the application by Respondent no facts by way of affidavit was availed and that there was no reply to the petitioners application. In my opinion, the direction by the Kasango J that the two applications be heard together and my directions at the commencement of this ruling that the petitioner's application be treated as an opposition to the Respondents application effectively resolve and determine these concerns by Mr.Khalid. Had there been no order to hear both together and had the prayers in the petitioner's application been wider than merely attack the interim *exparte* orders, I would have held a different view.

<u>Determination:</u>

14. Having considered the applications as filed together with all related papers filed in support and opposition thereto as well as the submissions and authorities cited, I have isolated the following issues as presenting themselves for my determination:-
    i. Is there power on the court to grant an injunction stopping an advertisement under Rule 23 of the companies (Winding up) Rules?
    ii. Is there Power upon the court to strike out a petition prior to the same being heard?
    iii. Is there need to consider alternative remedies due to a petitioner other than Winding up?
    iv. What orders commend themselves to meeting the interests of justice in the matter before the court?

<u>Power of the court to grant an injunction stopping advertisement:</u>

15. None of the authorities cited by the parties addressed this point although it is a question that is vividly running throughout the application and indeed the primary issue. I have however of my own come across read decisions in the matter of **Alamin Insurance Brokers Ltd. [2009}eKLR** in which Kimaru J, granted an order restraining the petitioner from publishing the petition. The court said:-

"I therefore hold that the Company has established a substantial ground which constitutes sufficient reason or restraining the petitioner by means of an injunction from publishing the gazettement of this Petition"

16. I think there is a justification in the Respondent seeking to stop the advertisement. It is deponed in the Reply to the petition that there are clients/customers of the company who since the Daily Nation article on the company have expressed anxiety on the status of the company. Noting that the Presentation of Winding up cause effectively paralyses the company, (see **QUEENWAY TRUSTEES LTD. -VS- OFFICIAL RECEIVER AND LIQUIDATROS, TANNERIS OF KENYA LTD)** it is not difficult to imagine the possible run in on the company by its creditors and the customers a like. It is not far fetched that bank creditors would be entitled under charges to recall loans purely on the basis that a Winding up cause has been presented. In that event the effect on the company which would reflect on contributories, including the petitioners is not difficult to fathom. I am minded to say that a Winding up court is bound to strive to obviate such eventualities occurring to the detriment of all concerned. It can only do that by looking at what I would call the best interest of the company. In this case the company has three living shareholders two of whom are opposed to the petition to wind it up. There is also the estate of father to the three

directors which also has shares in the company. These shares have been distributed in a succession cause at 1/5 to the surviving directors. My reading of the decision by Kimaru J (supra) and that by the court of appeal in **BRAHUMBHATT -VS- DYMENYA ENGINEERING LTD,** informs me that it is plausible and the court has the power to consider an application for injunction and it needs to consider the interests of justice in each case regard being had to the peculiar circumstances of each such case. As a consequence to the foregoing finding, I hold that this court has the power and jurisdiction to consider the application for injunction and that the same is not misconceived nor is it an abuse of the court process as contended by the petitioner. See page 9 of **EBBRALE LTD -VS- ANDREW LAWRENCE HOUSING** paragraph 3.

Can the court consider an application to struck out petition prior to hearing?

17. Ultimately this court, Whether sitting as a winding up court or in its ordinarily civil jurisdiction would jealously guard against an abuse of its process if not for anything but to save on the very valuable and limited judicial time as a public resource. It is therefore clear to me that in appropriate cases the court when satisfied that the Winding up cause has been presented for in genuine, ulterior or some obscure motive, not to genuinely litigate and determine a *bona fide* claim by the petitioner, would intervene to terminate a petition by having same struck out for abusing the process and not securing the purpose of justice.
18. In Ebbrale Limited (supra) the court of appeal of the common wealth of Bahames 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."

19. 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.
20. In the matter before me however, I note that the Petitioner and the 2nd Respondent are siblings. Infact 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.

Is there an effective alternative remedy to a Winding up order.

21. The jurisdiction of this court under PART VI of the Companies Act Cap 486 now repealed when read with *stare decisis* inform me that it is always advisable on a court prior to passing **the death sentence** on a company, by way of a Winding up order, to consider alternatives available if they be effective. In **RAI -VS- RAI CACA** No. 63 or 2001 the court of appeal held that the established Principle of Law in Kenya is that if a reasonable offer is made for the purchase of minority shareholding by the majority, the company ought not to be wound up.
22. In this matter, the petitioner has offered to be brought out and the 2nd Respondent and the 3rd director have agreed to such a buy out provided the company's worth is established and the Petitioner takes a share of his obligations to the company. I hold he view that, to that extent, the disagreement between the parties is not far wide as to be irreconcilable. It might just require the court's intervention in setting timelines for certain actions to be taken by the company and those directors in control.

23. Additionally, it is apparent to me that the petitioner alleges exclusions from the company decision making process. I have in mind the Annual or Special General Meeting of the Company to decide on the management or indeed the valuation of the company shares and the worth of each shareholder in the company.
24. In my opinion, the holding of Annual General Meeting or a Special One and exploring the buy out plan are, as at this juncture, suitable and effective alternative remedies that the court needs to consider and assist the parties at exploring.

Conclusion

25. The upshot and totality of my finding above, in summary, is that I allow the Respondents application dated 13/11/2014 in terms of prayer 3 and grant an order suspending and restraining the publication of an advertisement of the petition to enable the company and its directors explore the prospects of alternative remedies available to the petitioner besides the order for Winding up. It is therefore ordered that:
    i. The company shall within 60 days from today call an annual General Meeting or a Special General Meeting, as the circumstances shall permit, to deliberate on the offer by the Petitioner to be brought out.

ii. Within 45 days after the such general meeting the company shall at its costs cause to be valued the shares of the company to ascertain the accurate and true value for the purposes of the company or its other directors purchasing the petitioner's shares. The valuation report shall be availed to all shareholders of the company individually by the valuer appointed by the company.

iii. Within 14 days upon the valuation report being availed as aforesaid, the company shall make an offer to the petitioner for the purchase of his shares which offer the Petitioner shall accept or decline within 7 days from the date of receipt.
iv. Alternatively the all the shareholders are at liberty to make offers for the purchase or sale of their share to the other side or the company provided the offer they so make would be acceptable to them if made by the opposite party.
v. This petition shall be mentioned in court on the 28/3/2015 to confirm the progress made and for further orders.
vi. The costs of these application are ordered to be costs in the petition for the purposes of according to parties the proposed alternative Dispute Resolution.
vii. Having taken the root of an amicable settlement I think I need not consider the prayer for security for costs.

Dated, signed and delivered at Mombasa this 4th day of December 2015.

In the presence of

Khalid for the Petitioner.

Ms.Wafula for Kadima for the Respondent.

P.J.O.OTIENO

JUDGE