



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**COMMERCIAL & ADMIRALTY DIVISION**

**MILIMANI LAW COURTS**

**WINDING UP CAUSE NO.7 OF 2012**

**MULTI-TRACK**

**IN THE MATTER OF IGI HOLDINGS LIMITED**

**AND**

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

**AND**

**IN THE MATTER OF A PETITION BY A MINORITY SHARE HOLDER**

**BETWEEN**

**ANN WAMBUI**

**IRIGA .....PETITIONER**

**AGAINST**

**JANE WANJIRU IRIGA (sued on her own behalf and as an Administrator of the estate of the late**

**Ignatious Iriga Nderi).....1ST  
RESPONDENT**

**ALOISIUS IRIGA NDERI (sued on his own behalf**

**and an Administrator of the estate of the late**

**Ignatious Iriga Nderi).....2ND  
RESPONDENT**

**HELLEN MIMI NDERI.....3RD  
RESPONDENT**

**JANE MUTHONI KAGAME (The**

**administrator of the estate of the late**

ANTHONY KAGUME.....	4TH
RESPONDENT	
LYDIA KABUGO NDERI.....	5TH
RESPONDENT	
MARGARET MURUGI.....	6TH
RESPONDENT	
SUSAN MUMBI WAMATU.....	7TH
RESPONDENT	
PACT SECURITIES LIMITED.....	8TH
RESPONDENT	
ANGELA WANJIRU IRIGA.....	9TH
RESPONDENT	
ANN MURUGI IRIGA.....	10TH
RESPONDENT	
SUSAN MURINGO NDERI .....	11TH
RESPONDENT	
BEN NDERI IRIGA.....	12TH
RESPONDENT	
IGI HOLDINGS LIMITED.....	13TH
RESPONDEN	

### RULING

1. This is a ruling on the Preliminary Objection by the 1st, 9th, 10th, 11th and 12th Respondents dated 14th May, 2012 and on a Motion on Notice by the 13th Respondent dated 17th July, 2012. The grounds for the objection was that the Petition in the Case was a collateral attack made on the findings made in H. C. Petition No.9 of 2011, that the matter was *res judicata* and that it was an of the court process for the Respondents to be subjected to multiple proceedings arising from the same facts or series of frivolous complaints.
2. On its part, the Motion was brought under Rule 7 (1) of the Companies (Winding Up) Rules Order 2, Rule 15 (1) (a), (b), (c) and Sections 1, 1A and 3A of the Civil Procedure Act. The grounds upon which the Motion was predicated upon were set out in the body of the Motion and the Affidavit of Ben Nderi Iriga sworn on 17th July, 2012. It was contended in the application that the Petition does not disclose a reasonable cause of action as the grounds for the same are not grounded under Sections 219 and 220 of the Companies Act, the Petition was barred by the doctrine of *res judicata* and/or estoppel that the Petition is otherwise scandalous, frivolous or vexatious that it may embarrass or delay the fair trial of the action and that it was otherwise an abuse of the court process.
3. In the Affidavit, it was deponed that the allegations of fraud raised by the Petitioner were untrue, that the grounds cited in the Petition to wind up the Company are not envisaged under Section 219 of the Companies Act, that the Petition therefore should be struck out in limine for failing to disclose a reasonable cause of action. The deponent further asserted that the Company was being run in accordance with the Articles of Association and that the Petitioner was at liberty to participate during the meetings of the Company and raise her complaints thereat. That it would be unjust and inequitable to wind up the Company. That in all previous proceedings, the Petitioner was unable to prove the allegations of fraud and that therefore, the current proceedings were being used for ulterior motive.

4. Mr. Ngatia, learned Counsel for the 1st, 9th, 10th, 11th and 12th Respondents, relying on his written submissions, submitted that there was a previous Petition in **Winding Up Cause No.9 of 2011** wherein a ruling was delivered on 20th February, 2012. That the parties in that Petition were similar as in the present Petition and that the facts were same in both. That the said ruling made determinations and findings which renders the current proceedings *res judicata*. That the present Petition was a collateral attack on that ruling which the Petitioner should have appealed against rather than bring the present proceedings. That in the premises, the current proceedings are debarred and should be struck out.
5. Mr. Thangei, Learned Counsel for the 2nd Respondent supported the objection and the application. His client Aloisious Iriga Nderi swore an Affidavit on 13th September, 2012 in support of the application while opposing the Petition which Learned Counsel referred to and submitted that, the allegation of fraudulent transfer of 195 shares was factually incorrect as the shares were transferred to Pack Securities Ltd, that all shares had been transferred to the irrespective beneficiaries and that the allegation of mismanagement was also not correct. Counsel urged that the objection and the application be allowed.
6. Mr. Ng'ang'a, Learned Counsel for the 13th Respondent/Applicant analysed the allegations in the Petition and submitted that failure by the Petitioner to bring herself within the ambit of the laid down statutory basis upon which a relief is sought makes the Petition amenable to striking out. Counsel cited the Case of **Jacob Marianus Kiriara -vs- Kendindia Assurance Company Ltd HCCC 2154 of 2001** in support of that submission. That the grounds upon which the Petition was founded were not envisaged under Section 219 of the Companies Act.
7. On *res judicata*, Counsel submitted that the Petitioner sought to re-litigate issues that had been directly and substantially in issue in **HCCC No. 607 of 2003** and **W. U. Cause No.9 of 2011**. That Order 12, Rule 6 (2) barred the filing of the Petition after the dismissal of **HCCC No.607 of 2003**. Counsel cited the Case of **Edwin Thuo -vs- AG & Another Pet. No.212 of 2011 (UR)** in support of that submission. That once the court decided that a matter is *res judicata*, it must lay down its hands, the Cases of **Safari's Unlimited (AFRICA) Ltd -vs- Muchanga HC (OS) 293 of 2009 (UR)** and **Jetlink Express Ltd -vs- E.A Safari Express Ltd HCCC No.73 of 2007 (UR)** were cited in support of that proposition.
8. As to the frivolity and vexatious nature of the Petition, counsel submitted that this suit is a third (3rd) one in a row. That it was intended to cause annoyance as it sought to have the assets of the Company liquidated and distributed to the shareholders. The Case of **Mpaka Road Development Ltd -vs- Kana [2004] EA 160** was relied on for that submission. That since **Cr. Case No.136 of 2011** had been instituted on the same allegations of fraud, the Winding Up proceedings were meant to wrongly exert pressure on the Company thereby being an abuse of the court process. The Cases of **Cruisair Ltd -vs- CMC Aviation Ltd [1978] KLR 131** and **Williams -vs- Spautz [1992 66 NSWLR** were cited in support of that submission.
9. Mr. Ng'ang'a further submitted that the objection to the use of a Supporting Affidavit in the application was untenable. In his view, there was nothing wrong as the Affidavit set out a clear distinction as the same was for grounds (b), (c) and (d) of Order 2, Rule 15 (1). The Case of **Murri -vs- Murri [1999] 1 EA 212** was relied on. Counsel therefore urged that the application be allowed.
10. The Petitioner opposed the Preliminary Objection and the application through a Replying Affidavit of Ann Wambui Nderi sworn on 31/7/2012. she deponed that the Petitioner had complained that Company affairs, that only a few shareholders benefited from the assets of the Company. In her view, these were legitimate claims. That the allegations in the Petition had not been controverted. That the grounds in the Petition were under Section 219 of the Companies Act. That the Petition disclosed a reasonable cause of action and was not frivolous, vexatious or abuse of court process as alleged by the Applicants. The Petitioner admitted however, the existence of a criminal case in respect of the allegations of fraud. That the doctrines of estoppel and/or *res judicata* did not apply in that in its ruling of 20/2/2012, the court did not determine the issues raised in that Petition. She denied that the Petition herein was a collateral attack on the ruling of 20/02/12.
11. In his submissions, Mr. Kariuki, Learned Counsel for the Petitioner submitted that the application had fallen foul of Order 2, Rule 15 (4) of the Civil Procedure Rules as it was supported by Affidavit evidence. That the Petition disclosed a cause of action as there are allegations that give

the Petitioner a cause for complaint. The Cases of **D. T Dobie & Co. Ltd -vs- Muchina 1982 KLR 1 and bullen and Leake Precedents of Pleading 12th Ed.** were cited in support of that contention. That it had not been established that the Petition was frivolous or an abuse of the court process. Counsel therefore urged that the objection and the Motion be dismissed with costs.

12. I have carefully considered the Affidavits on record, the submissions of Counsel and the authorities relied on. The first and second grounds of attack by Mr. Ngatia were that the Petition was a collateral attack on the ruling made by this Court in **Winding Up No.9 of 2011** between the same parties. It was argued that since the issues raised in **Winding Up Petition No.9 of 2011** were the same as in the present Petition and since the ruling of 20/2/12 delivered in that Petition (9 of 2011) had analysed the law and issues and made determinations thereon, the Petitioner should have appealed against that decision but not to refile the Petition. That in the ruling of 20/2/12, the court had made a finding that issues are deemed to be determined as between parties even if the dismissal of an action is for non-prosecution. These grounds were also contained in the Notice of Motion dated 17th July, 2012.

13. I have looked at the Petition herein and the Petition in **Winding Up No.9 of 2011**. The Petitioner did not deny that she had re-heard in the current Petition the same complaints she had raised in **Winding Up Petition No.9 of 2011**. The ruling of 20/2/2012 was necessitated by an application by the Respondents in this Petition on various grounds. Those grounds were; that the Petition was an abuse of the court process as it sought orders that could only be granted by way of a derivative action; that the Petition violated Section 219 of the Companies Act; that the Petition sought orders that had been denied in **HCCC No. 607 of 2003 Aloisius Iringa Nderi -vs- Jane Wanjiru Iriga & Anor**; that the Petitioners had an effective alternative remedy to Winding Up; that the Petition had been filed for an improper motive other than the winding up of the Company; that the Petition had been presented by the petitioner's Advocates instead of the Petitioners themselves; that the Petition was not sealed in terms of Rule 10 of the Companies (Winding Up) Rules and that the Verifying Affidavit was filed simultaneously with the Petition contrary to Rule 25 of the Companies (Winding Up) Rules and that the same did not contain particulars of fraud. After considering all those issues raised against that Petition, the Court dismissed all of them except two. The court struck out the Petition on the grounds that the Verifying Affidavit did not set out the particulars of fraud and that the Petition was not sealed in terms of Rule 10 of the Companies (Winding-Up) Rules.

14. In addressing the objections raised by the Respondents that led to the striking out of the Petition in **Winding Up Cause No.9 of 2011**, the court did not consider the merits or demerits of the Petition. The Petition was struck out on the grounds I have stated above and not otherwise. It was not dismissed. My view is that, when a pleading is struck out for technical reasons and not for any of the grounds set out in Order 2, Rule 15 (1) of the Civil Procedure Rules, it cannot be argued that issues between the parties have been determined to lead to a bar of a subsequent pleading under the *res judicata* rule. I hold that view because, when the court considers a pleading under Order 2, Rule 15 (1) of the Civil Procedure Rules, ordinarily the court is called upon to examine the merits or otherwise of a party's claim.

15. A court will no doubt examine a party's case before it can arrive at a conclusion that a pleading does not disclose a reasonable cause of action or defence, or a pleading is frivolous, vexatious or scandalous or it will delay trial of an action or that it is an abuse of the court process. The position is in my view different if the court is considering, as it did in the case of the Petition in **Winding Up No.9 of 2011**, whether a pleading complies with the formal requirements of the law. In that Case, the merits or otherwise of a party's case does not fall for consideration and the issues raised by such a party cannot be said to have been considered if his/her pleading is struck out.

16. In the ruling of 20/2/2012, the court held thus:-

**“Accordingly, I am of the view and so hold that the failure to supply particulars of fraud in the Verifying Affidavit and have the Petition sealed in terms of Rule 10 of the Winding Up rules makes the Petition fatally defective and liable to be struck out as I hereby do with costs to the Respondents.” (Emphasis added).**

It is clear that although the Court was alive to the fact that it was dealing with the Respondents' Prayer 5 of the subject motion which sought the striking out of the Petition for being **“fatally defective, embarrassing, scandalous, frivolous, vexatious and an abuse of the court process,”** the court was careful not to grant the prayer as prayed. It was alive to the fact that the striking out of a pleading for **“being fatally defective”** is not one of the grounds under Order 2, Rule 15 (1) of the Civil Procedure Rules. For that reason, the Court couched its order in a way that would allow the Petitioners in that Cause to put their house in order and re-litigate the issues in the Petition.

17. Indeed, in the ruling of 20/2/12, the court rejected all the attacks directed at the alleged frivolity or otherwise of the Petition. In this regard, I reject the objection that the Petition herein is an attack on the ruling of 20/2/12 or that it is barred under the doctrine of *res-judicata* or estoppel as argued by the Respondents. The Cases of **Hunter -vs- Chief Constable of the Westlands Police and Others [1982] AC 530** and **Edwin Thuo -vs- AG (supra)** are not applicable in the circumstances of this Case.

18. To the contrary, most of the issues raised by the Respondents against the Petitioner herein are the ones that are *res-judicata*. The court had ruled on those issues in the ruling of 20/2/2012. These issues are; that the Petition contravenes Section 219 of the Companies Act, that the Petition was *res-judicata* **HCCC No. 607 of 2007** and that the Petition had been filed for an improper motive other than the winding up of the Company. To the extent that the Respondents' Preliminary Objection dated 14/5/12 and 17/7/12, respectively extended to these issues that were determined in the ruling of 20/2/12, I find them to be *res-judicata*.

19. It was the Respondents' contention that in the ruling of 20/2/12, the Court made a finding that once a suit had been dismissed for want of prosecution, the issues in that suit are deemed to have been determined for the purposes of the principle of *res-judicata*. That under Order 12 Rule 6 (2) of the civil procedure Rules 2010, the findings, the claims, complaints and allegations made in **HCCC No. 607 of 2003** and **Petition No.9 of 2011** are deemed to have been determined. Order 12, Rule 6 (2) provides:-

**“When a suit has been dismissed under Rule 3, no fresh suit may be brought in respect of the same cause of action.”**

20. With due respect to Counsel, this provision is not applicable in this Case as the Petition in **Winding Up Cause No.9 of 2011** was not dismissed under Order 12, Rule 3 of the Civil Procedure Rules. Rather, the same was struck out for falling foul of Rules 10 and 25 of the Companies (Winding Up) Rules.

21. The other objection raised by the Respondents was that, the Petition was an abuse of the court process as it amounted to subjecting the Respondents to multiple proceedings from the same facts. The Respondents complained that they had faced **HCCC No. 607 of 2003 Aloisius Iriga Nderi -vs- Jane Wanjiru Iriga & Another, Criminal Case No. 136 of 2011** and **Winding Up Petition No.9 of 2011**. As I have already stated, the court had in the ruling of 20/2/2012 dealt with the issue of **HCCC No. 607 of 2003**. The court made a firm finding that, that suit was between the 2nd and the 1st Respondents, and that it did not involve the Petitioner. There was no evidence to show that it was a representative suit and therefore it cannot be a bar as against the Petitioner.

22. As regards the **Criminal Case No. 136 of 2011**, although the parties were in agreement as to its existence, there was no evidence to confirm who the complainant was, who the accused was, in which court the Case was pending, the actual charges and the particulars thereof. It is not clear whether the charges in that Criminal Case are based under the Companies Act or the Penal Code. These particulars lacking, in my view, the court cannot rule as to whether the present Petition is a harassment *vis a vis* that Criminal Case or not. Accordingly, I reject the allegation that Petition is an abuse of the court process.

23. This disposes of the 1st, 9th, 10th, 11th and 12th Respondents' Preliminary Objection and the various grounds in the Notice of Motion by the 13th Respondent. What remains is the ground that the

Petition does not disclose a reasonable cause of action. Let me point out here that the Notice of Motion as drawn is fatally defective. I have considered some of the issues raised in the motion above only because they were also contained in Mr. Ngatia's Preliminary Objection. If that was not the case, I would have dismissed the motion in limine. This is because whilst the Motion is expressed to be brought under Order 2 Rule 15 (1) (a) among other provisions, the Motion was supported by an affidavit in breach of Order 2, Rule 15 (2) of the Civil Procedure Rules. Mr. Ng'ang'a explanation was that the Affidavit was in support of the grounds under Order 2, Rule 15 (1), (b), (c) and (d) of the Rules.

24. The answer to Mr. Ng'ang'a's contention is to be found in the holding in the Case of **Kyanzavi Farmers Ltd -vs- Middle East Bank Kenya Ltd [2012] eKLR**. Faced with a similar situation, the court delivered itself thus:-

***“In my view, having sought to strike out the Plaintiff for disclosing no cause of action, it was not open for the Defendant to rely on evidence as it did in this case..... To my mind, therefore, in so far as the application was based on the evidence of Mr. Joseph Kinuthia as contained in the said Affidavit, the same is fatally defective and on that ground alone is susceptible for dismissal. In the Case of Olympic escort International Co. Ltd & 2 Others -vs- Perminder Singh Sandhu & another [2009] eKLR the Court of Appeal when considering an application made under our former Order VI, rule 13 (a) held that:-***

***“We think for our part that it was inappropriate to combine the two prayers, one of which requires evidence before a decision is made and one that does not. There was affidavit evidence on record and it was in fact considered by the learned judge. It matters not therefore that the Applicant had stated that the affidavits should not be considered. As the prayer sought under Order 6, rule 13 (1) (a) was in contravention of sub-rule (2) of that order, it was not for consideration and we would have similarly struck out the application on that score.”***

***I will here add that, since our legislature in its wisdom decided that the grounds in Rule 15 (1) of Order 2 are in the alternative and that three (3) out of four (4) of them, that is Rule 15 (1), (b), (c) and (d) may be based on evidence whilst the one under Rule 15 (1) (a) should not, I do hold that whilst a party can bring an application combining the grounds in Rule 15 (1) (b) (c) and (d)- such an application cannot and should not be brought with a ground under Rule 15 (1) (a). This is so because, if those grounds are combined, there would definitely be prejudice in that, the Court would have to look at the evidence produced in support of the grounds under sub-rule (1) (b) (c) and (d) yet sub-rule (2) has specifically barred the Court from considering any evidence once an application under rule 15 (1) (a) is set up for consideration. Applying the rule of interpretation that a latter provision amends or varies an earlier provision, I hold that the intention of the legislature in enacting Rule 15 (2) was that if an application is brought to strike out a pleading for disclosing no reasonable cause of action or defence, no evidence at all shall be adduced in support of such an application. That is so even if any of the grounds thereon are under Order 15, Rule (1), (b), (c) and (d). In my view, prejudice must be guarded against and it will be very difficult for the Court to consider the other grounds based on the evidence produced then disabuse itself of that evidence when considering the ground of disclosing no reasonable cause of action under Rule 15 (1), (a).”***

I will apply the same reasoning on this Case.

25. In view of the foregoing, I am unable to address the other issues raised that touch on the merit of the complaints in the Petition. They should be considered at the hearing of the Petition itself. In the premises, I am of the view and so hold that both the Preliminary Objection and the Motion are without merit. The same are hereby dismissed with costs to the Petitioner.

It is so ordered.

Dated and Signed at Bungoma this 20th day of February, 2014.

**A. MABEYA**

**JUDGE**

Dated and Delivered at Nairobi this .....5<sup>th</sup> ..... day of .....March..... 2014.

**J. B. HAVELOCK**

**JUDGE**