



REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT NAIROBI  
MILIMANI COMMERCIAL & ADMIRALTY DIVISION  
COMPANIES PETITION NO. 29 OF 2006  
IN THE MATTER OF UMOJA SERVICE STATIONS LIMITED  
AND

IN THE MATTER OF A PETITION BY MINORITY SHAREHOLDERS

THE HUMBLE PETITION OF;

NAFTALI WACHIRA NJOROGE.....1<sup>ST</sup> PETITIONER  
EMMANUEL NDERITU THEURI.....2<sup>ND</sup> PETITIONER  
PETER GAKONYO NDERITU.....3<sup>RD</sup> PETITIONER  
JOYCE MUGURE GAKUGI.....4<sup>TH</sup> PETITIONER  
GITUKU KAMAITHA.....5<sup>TH</sup> PETITIONER  
PETER NDERITU MUTHOGA.....6<sup>TH</sup> PETITIONER  
PHOEBE NJOKI WAMBUGU.....7<sup>TH</sup> PETITIONER  
ADAM WERU MWANIKI.....8<sup>TH</sup> PETITIONER

- VERSUS -

HEZY JOHN LIMITED.....1<sup>ST</sup> RESPONDENT  
ANTHONY WAGURA IKIKI.....2<sup>ND</sup> RESPONDENT  
SAMUEL GICHOHI KING'ORI.....3<sup>RD</sup> RESPONDENT  
DOUGLAS KING'ORI MUTHUA.....4<sup>TH</sup> RESPONDENT  
PETER GICHOHI GITAU.....5<sup>TH</sup> RESPONDENT  
UMOJA SERVICE STATIONS LIMITED.....6<sup>TH</sup> RESPONDENT

J U D G M E N T

1. Before the Court is the Petition dated 24<sup>th</sup> November 2006, in which the Petitioners humbly pray as follows:-

**a. A permanent injunction restraining the directors of the Company from issuance of any further shares and or further declaring dividend until all the company assets are valued, a true value of the company shares determined, the company books audited and accounts taken to determine the Profits.**

**b. A permanent injunction restraining the company directors or anybody acting on their instructions from further share transfers and allotment until a valuation of the Company assets is undertaken and a fair share price determined, and the Company books be valued to determine the profits.**

**c. A declaration that all changes in the shareholding done after 1<sup>st</sup> January 2006 is null and void and any transfer of shares effected after 1<sup>st</sup> January 2006 be cancelled.**

**d. A declaration that the current directors are in office illegally and an order for their removal from office be issued and fresh elections be held in strict observance with the law and company articles. The Registrar of Companies be directed to effect changes on this company register in tandem with the Court Order.**

**e. A declaration that the purported purchases of shares by H.W Gichohi and his wife Mrs. Margaret W. Wang'ombe or anybody else acting as their proxy is null and void and ultra vires to the Articles of Association of the Company and further order for cancellation of the said shares with a refund of amounts paid by the said persons.**

**f. An order halting all development activities being undertaken by the Company pending the auditing of accounts for the period of 1<sup>st</sup> January 2006 to date, valuation of Company assets and fresh transparent elections by the bonafide members of the Company.**

**g. That in the alternative this honourable court do appoint an interim receiver manager of all the company assets with powers to run the day to day affairs of the said Company but without powers to transfer any property or share without orders of the Court.**

**h. An order restraining the Company from surcharging the Petitioners for the amounts paid to their advocates, auditors, travelling expenses and fuel expenses in their capacity as directors to the company and the company be further restrained from purporting to hold their shares as lien to the aforesaid alleged debt and if any such lien is already placed it be lifted unconditionally.**

**i. That the current directors and Board of Directors be permanently restrained from convening the annual General Meeting scheduled for 9<sup>th</sup> December 2006 and/or any other Special Meetings or at all until this matter is heard and determined.**

**j. This Honourable court be pleased to issue any further orders that it may deem just to make in the premises.**

2. The Petition is supported by the affidavit of **Joyce M. Gakugi** sworn on **24<sup>th</sup> November 2006** and the further affidavits of **Naftali Wachira** and **Peter Gakonyo Nderitu** sworn on **9<sup>th</sup> June 2011** and **10<sup>th</sup> June 2011** respectively. The said deponents, being the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Petitioners respectively, testified in support of the Petition.

3. The Petition is opposed vide the replying affidavits of **Hezekiah Wang'ombe Gichohi** sworn on **19<sup>th</sup> February 2007**, **21<sup>st</sup> October 2009** and **27<sup>th</sup> June 2011** respectively.

4. The Respondent Company, Umoja Service Stations Ltd was duly incorporated in 1962 and its objectives are as stated in the Petition and in the Company's Memorandum of Association. The Company was formed to carry on the business of motor fuel and Petrol supplies. As at September 2005, the Company had 65 members as shown in paragraph 6 of the Petition. The list shows that some of the members have since passed on.

#### **THE GRIEVANCES OF THE PETITIONERS AS SET OUT IN THE PETITION**

5. The affidavit of the 4<sup>th</sup> Petitioner sworn on **24<sup>th</sup> November 2006** essentially reiterates the grievances of the Petitioners set out in the Petition. The 3<sup>rd</sup> Petitioner's affidavit sworn on **10<sup>th</sup> June 2011** similarly reiterates the said grievances.

6. The 1<sup>st</sup> Petitioner as well swore an affidavit dated **10<sup>th</sup> June 2011**. The affidavit essentially elaborated on the grievances of the Petitioners. In the said affidavit, the 1<sup>st</sup> Petitioner described himself as one of the founding members of the Respondent Company. He narrated how the Company was founded and its subsequent growth. He averred that the intention of the members was to have a close knit private Company limited by shares whose membership was only open to employees of the company. He further averred that the company had since inception been run peacefully and in a trustworthy manner until the year 2001 when Mr. Gichohi purported to declare himself chairman.

7. In paragraph 9 of the Petition the Petitioners aver that they are dissatisfied with the manner in which the affairs of the Company were being conducted particularly by the current directors whom they contend are in office unlawfully.

8. The Petitioners submit that the affairs of the company are being conducted in a manner oppressive to a part of the members of the company inclusive of themselves and that while it would be just and equitable that the company be wound up, to do so

would unfairly prejudice them and other members of the Company.

9. The Petitioners have challenged the manner in which the 1<sup>st</sup> Respondent, Hezekiah Wang'ombe Gichohi and Mrs. Margaret Wang'ombe Gichohi became shareholders of the said Company. It is the Petitioners' submission that prior to becoming a shareholder, Hezekiah Gichohi was the company's auditor and as such he took advantage of the inside information he had concerning the running of the company. The Petition states that Mr. Gichohi abused his confidential position to illegally purchase shares from Rukwaro Gichuru without approval of the Board or formal transfer to buy shares in the name of Hezy Johns Limited.

10. It is averred in the Petition that the Chairman of the Board of Directors, one Mr. Hezekiah, has been fraudulently approaching the family members of deceased shareholders to illegally and unprocedurally purchase the shares of the deceased without due process to the law and the Company's Articles of Association. According to the Petition, Mr. Hezekiah is out to allocate himself majority shareholding in the company in order to gain absolute control over the company affairs.

11. The Petitioners' case is that the issuance of any further shares and or further declaration of dividends should be stopped until all the Company assets are valued, a true value of the Company's shares determined, the company books be audited and accounts taken to determine the profits. It is the Petitioners' position that though the Company's asset base has grown and appreciated over the years, the Chairman of the Company has resisted the valuation of the Company's assets for purposes of increasing the Company share value.

12. It is stated in the Petition that notwithstanding the fact that the Respondent Company has registered offices, the said Mr. Hezekiah has been holding meetings in his personal offices purporting to be company meetings whereas the shareholders do not recognise and/or approve of any such meeting place and meetings.

13. It is further stated that during the period of the first, third, fourth and sixth Petitioners' directorship, they made certain payments in their capacities as Directors of the Company (see paragraph 28 of the Petition). Upon the new management taking over stewardship of the Company in January 2006, the Chairman insisted that the payments were unlawful and surcharged them by placing a lien over their shares and dividends. The Petitioners maintain that the said payments were lawful and that the Company is therefore acting oppressively against them.

#### **THE RESPONDENTS' CASE**

14. The Respondents opposed the Petition herein by filing various replying affidavits as sworn by **Hezekiah Wang'ombe Gichohi on 19<sup>th</sup> February 2007, 21<sup>st</sup> October 2009 and 27<sup>th</sup> June 2011** respectively.

15. In the elaborate affidavit of H. W Gichohi sworn on **21<sup>st</sup> October 2009** the deponent explained the circumstances under which some of the Petitioners were removed from office as directors and replaced by the new directors then. He also explained how the Company was managed and its performance under various directors.

16. It was submitted for the Respondents that the Petition was the project of the 1<sup>st</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> Petitioners who were removed from office by the majority of shareholders. Mr. Gichohi averred that the 2<sup>nd</sup>, 7<sup>th</sup> and 8<sup>th</sup> Petitioners did not complain of any adverse action taken against them as shareholders and that they did not participate in the proceedings. However, the 7<sup>th</sup> and 8<sup>th</sup> Petitioners have since passed on.

17. It was Mr. Gichohi's averment in his affidavit dated **19<sup>th</sup> February 2007** that the 1<sup>st</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 6<sup>th</sup> Petitioners were bitter debtors of the company and directors who were removed from office democratically. He further averred that following their removal, the said Petitioners filed **Nyeri HCCC No. 79 of 2005** in which they questioned the validity of the elections of the incumbent directors then. The application for an injunction to restrain the elected directors from serving as such was dismissed by the High Court after which they filed another application in the Court of appeal which was also dismissed.

18. It is further the Respondents' case that the 3<sup>rd</sup> and 4<sup>th</sup> Petitioners are not shareholders and therefore have no Locus to bring the Petition under **section 211** of the **Companies Act**. According to the Respondents, the 3<sup>rd</sup> and 4<sup>th</sup> Petitioners have brought the petition in their capacity as debtors and directors. The Respondents admits that the 1<sup>st</sup> Petitioner is the only lawful shareholder. However it's their contention that he swore a detailed affidavit on **9<sup>th</sup> June 2011** but did not avail himself for cross-examination. Therefore, the veracity of his averments in the said affidavit cannot be ascertained.

19. It is also stated by the Respondents that the 5<sup>th</sup> and 6<sup>th</sup> Petitioners withdrew the Petition as against the Company. This is averred by Mr. Gichohi in his affidavit sworn on **21<sup>st</sup> October 2009**.

#### **THE HEARING**

##### **The Petitioners' case**

20. The hearing commenced on **25<sup>th</sup> June 2010** with the 4<sup>th</sup> Petitioner giving evidence as PW 1. He was led by his counsel Mr. King'ara. It was her testimony that her late father-in-law was a joint shareholder with her late husband. She testified that in 1998, she was called by the Shareholders of the Company who then invited her to be one of the directors. Thereafter, she was made the general manager of the Company in the year 2000 which position she held until 2005. The witness used to keep the

shareholders List (Para 4 of her affidavit shows list of Shareholders as at September 2005).

21. PW 1 reiterated prayer (e) of the Petition by requesting that the purchase of shares by H.W Gichohi and his wife Mrs. Margaret be declared null and void. It was her testimony that Mr. Gichohi took office in September 2005 by breaking into the offices of the Company. It was her contention that between the years 1960 up to 2005, one could only get dividends when the shares were over one year old. However, after 1<sup>st</sup> January 2006 anybody could buy shares at Kshs. 100 and still be given dividends even after 5 months. According to PW 1, the new issue of shares was directed to benefit the associates of Gichohi and that the other Petitioners including herself were not allowed to buy new shares.

22. On cross-examination, PW 1 confirmed that she was invited by the shareholders of the Company to be a director in 1998 and that at the end of that year there was an AGM whereby she was confirmed as a director. It was her testimony that elections were conducted on 2nd September 2005 and she was removed from office unprocedurally.

23. PW 1 testified that as a Company they paid out money to Advocates to defend the ousted directors. She further testified that it was not true that they filed a Petition after they had been wronged but that one of their complaints was the refund that was being demanded by the new directors.

24. PW 1 also confirmed that her husband and father in law were joint shareholders and that she inherited all her husband's property and debts. The witness testified that she did not know the terms under which the shares were being sold. It was her testimony that the Gichohi's bought shares from individuals and the shares were not floated back to the Company. It was her contention that her shares had been taken back by the Company for a debt that she had not admitted.

25. PW 1 complained that whenever the Chairman called for meetings he gave dividends and that some sellers were given dividends even after 2 months. She testified that as from 2006 she did not know much about the Company as to whether they were making profits or not and so forth.

26. On re-examination, it was PW 1's testimony that the issuance of shares had not been done after the year 2006 and that the shares had been sold to outsiders from one family. It was further her testimony that as Petitioners it was their prayer that a Receiver be appointed because he/she would act independently and also bring normalcy to the Company. It was also her testimony that this would enable them to know the value of the Company.

27. The 1<sup>st</sup> Petitioner took the stand as PW 2. He introduced himself as one of the founding members of the Company. He reiterated the contents of his affidavit sworn on **10<sup>th</sup> June 2011**. It was his testimony that the initial Chairman of the Company was Gituku Kamaitha. PW 2 testified that there were no wrangles in the Company until the year 2000. According to him, the wrangles of power and property were brought by Hezekiah Gichohi who used to be an accountant and advisor.

28. He further testified that he never purchased any shares after the year 2006. He was not allowed to buy any new shares due to the fact that he was indebted to the Company to the tune of **Kshs. 133,990/=**. It was PW 2's testimony that around the year 2000, strangers started joining the Company and buying shares at Kshs. 100 which was the market value of the said shares in 1962. According to him their shares became almost valueless.

29. It was further his testimony that since the new shareholders had more shares, they always had their way in the AGM. He testified that Hezekiah Gichohi had 5,000 shares and the wife had a similar amount. Hezy John Limited which belonged to Mr. Gichohi also had 5,000 shares. It was also his testimony that the new directors required a shareholder to pay **Kshs. 30,000/=** to be able to call an AGM which denied the ordinary shareholder any fairness. According to him, the same was not a requirement in the Articles of Association.

30. It was PW 2's prayer that the Court appoint receivers and that the current directors be stopped from demanding any money that they had paid as legal fees.

31. On cross-examination, PW 2 testified that he did not accuse the chairman of any fraud but that he could not get any information from his office. He also testified that the chairman and his group had bought many shares that he was using to oppress other people. The witness was not able to proceed with the cross-examination and that was the end of his evidence.

32. PW 3, Peter Gakonyo Nderitu and the 3<sup>rd</sup> Petitioner testified on 3<sup>rd</sup> February 2012. It was his testimony that he became a shareholder when his father passed away in 1993 through transmission. It was further his testimony that his father was employed in the Company in 1964 when he became a member and that as an employee he became a shareholder. His late father, Isaiah Nderitu had 3,000 shares as seen on the list of shareholders.

33. PW 3 testified that he got into the Board of Directors in March 2001 as director until 2003 when he became the vice-chairman then he became the chairman in 2004. He further testified that Hezy John Limited is owned by Gichohi who purportedly became a shareholder in 2006. PW 3 testified that the Company's value was in excess of Kshs. 200 million and that there had never been a valuation of the Company. Further, it was his testimony that it had been agreed by members that no member would have more than 5,000 shares.

34. PW 3 testified that when he became chairman he had succeeded Mr. Gichohi. Thereafter, Mr. Gichohi started calling general meetings in his own name. PW 3 testifies that they stopped him by going to Court and injuncting him.

35. PW 3 contends that the chairman has refused to release his shares to him claiming that he owes the Company a sum of

**Kshs. 137,040/=**. It is further his contention that the Company has not been giving him dividends because of the alleged debt. The Company is exercising lien on the shares he holds.

36. He testified that the Company is aware of the grants of letters of administration and that the administrator wrote to the Company asking them to divide the shares of his father to his elder brother, his mother and himself. The letter is dated **25<sup>th</sup> February 2008**.

37. PW 3 testified that those issued with shares recently included Mr. Gichohi, his wife, the Estate of Onesmus Ngigi, Mrs. M. W Kameru, Peter Gichohi and other relatives of Mr. Gichohi. It was his testimony that these people became shareholders after he ceased being the chairman. Further, it was his testimony that the articles of association were clear in that a non member could not come into the Company.

38. He further testified that only those allied to Mr. Gichohi were allowed to buy shares at Kshs.100 which in his view was oppressive. He also testified that since 2006, Company meetings have been done on the basis of number of shares which meant that the original members had no say in the Company.

39. It was PW 3's testimony that he attended the Company meetings where voting was by shares but his shares had not been transferred to him. It was also his testimony that the valuation of the shares needed to be done so that members could know the true value of their shares for purposes of trading in them. It was PW 3's view that the new members who acquired shares after 1<sup>st</sup> January 2006 ought to have their shares cancelled. According to him the said members came in illegally and therefore their acts are *ultra vires* the Articles of the Company.

40. He referred to prayer (f) of the Petition which seeks a halt to the developments of the Company and testified that the directors were using the said process to steal money from the company and secondly to make sure that there were no funds to refund the Petitioners.

41. On cross-examination, he testified that his claims were based on the shares of his late father. It was his testimony though that the confirmed grant was not in the Court records. He confirmed that the list of shareholders as set out in paragraph 6 of the Petition was correct and that his late father's name was there. It was PW 3's contention that they had never recognized Hezy John's Shareholding and that it was not true that Mr. Gichohi saved the Company from collapsing.

42. PW 3 testified that Mr. Gichohi had fraudulently acquired shares through Hezy John Limited. He further testified that the records did not approve sale of shares to Mr. Gichohi and that Mr. Rukwaro did not sell any shares to Mr. Gichohi. It was his testimony that he found out about the fraud when he entered into the Board of the Company. PW 3 testified that the Articles and Memorandum of Association of the Company prohibit sale of shares by members to non-members. According to PW 3 the transfer of shares in question involved Mr. Gichohi, his co-directors and family members.

43. It was PW 3's testimony that he was never a tenant of the premises owned by the Company. However, his brother was a tenant of the said premises and it was his testimony that the rent paid was at market rate. He also confirmed that the rent was in arrears but in his view that was normal. PW 3 went ahead and testified that he thereafter became a tenant of the said premises as from 2006. It was however his testimony that he had surrendered part of the premises as he wanted the Company to get more rent. In addition the Board had requested that they take up the part they required and surrender the rest.

44. It was further his testimony that the Company did not experience any financial problems during his chairmanship. It was PW 3's contention that in stating that the Company was doing badly during his stewardship, Mr. Gichohi was lying. He testified that there were never any complaints from the shareholding during his chairmanship and that his stewardship of the Company was competent.

45. During the cross-examination, PW 3 expressed his dissatisfaction with his removal and others from office among other complaints. He confirmed that he had sought various injunctive orders in various courts which were eventually dismissed. He testified that though he respected the decisions of the shareholders, Mr. Gichohi was leading unlawfully. He further testified that the Company secretary came with Mr. Gichohi and did not belong to the Company. It was his concern that Mr. Gichohi was so domineering and that he was not efficient.

46. When referred to the affidavits of Mr. Gichohi sworn on **22<sup>nd</sup> October 2009** and **27<sup>th</sup> June 2011** he confirmed that the Company had been recording profits in the years 2006 and 2007. He also confirmed that developments had taken place since 2006 but that he could not confirm the amounts involved.

47. It was however PW 3's testimony that the contents of paragraph 25 of his affidavit were true to the effect that the Chairman and the other board members had misused the Company's assets and misappropriated the Company's funds. It was also his testimony that he was threatened with expulsion from Annual General Meetings.

48. PW 3 testified that he had Letters of administration and that he was entitled to shares. He further testified that his grievances included the demand that he refunds some money to the Company and that he was also being forced out of the Company. It was his testimony that they had not handed over officially to the current board as they broke into the Company's premises illegally.

49. On re-examination, PW 3 testified that he became a shareholder by virtue of his family's proposal to take up his late father's shares. He further testified that the practice on the company is that when a shareholder passes on the family will nominate a person to take over the shares. This is to be made in writing to the Company. It is PW 3's testimony that a letter to this effect

was written to the Company.

50. PW 3 testified that the sum of more than **Kshs. 130,000/=** claimed from him on allegations that he misappropriated the money was actually spent on the activities of the Company when he was the chairman. He further testified that he vacated office in January 2006 when Mr. Gichohi took over. PW 3 challenges the manner in which Mr. Gichohi took office and also the manner in which he has been running the Company since then.

51. At this juncture, Counsel for the Petitioners informed the Court that Naftali Njoroge, PW 1 who had given half evidence was indisposed. PW 1 was yet to be cross-examined and for that reason Counsel for the Respondents argued that the evidence of PW 1 ought to be expunged. The Court ruled that the probative value to be placed on the evidence of PW 1 would be at the discretion of the Court. That marked the close of the Petitioner's case.

### **THE DEFENCE CASE**

52. The defence case commenced on **18<sup>th</sup> June 2012** with Senior Counsel, Dr. Kuria, for the Respondents making an opening statement. It was his submission that the Defence of the Company and the other respondents was that in law, a Petitioner for relief against oppression had to meet four (4) requirements which the Petitioners had not met. The first requirement is that the Petition must be presented in good faith and that secondly the Petitioners must present their Petition in their capacity as shareholders. Thirdly, the Petitioners must produce evidence upon which an order under Section 219 of the Companies Act can be given. The fourth requirement is that the Petitioners must set out with precision the reliefs that they are seeking.

53. The first Defence witness was Hezekiah Wang'ombe Gichohi. He clarified to the Court that he had sworn three affidavits on which he based his evidence. The said affidavits were sworn on **19<sup>th</sup> February 2007, 21<sup>st</sup> October 2009 and 27<sup>th</sup> June 2011** respectively.

54. DW 1 confirmed that he knew the 1<sup>st</sup> Petitioner as they had served together in the Board of the Company between the years 2001 to 2003. He testified that he was the chair of the Board on behalf of Hezy John Ltd. He further testified that Peter Gikonyo, the third Petitioner never challenged the shares of Hezy John Limited during the time he served with them.

55. He went ahead to testify that the 2<sup>nd</sup> Petitioner was a manager of one of the Company's Petrol stations at the time he represented Hezy John Ltd. It was his position that when the 2<sup>nd</sup> Petitioner realised he would be removed from office he took Kshs. 250,000/= from the Company and deposited it in his Bank account claiming that he had loaned the Company the same amount. According to DW 1, the 2<sup>nd</sup> Petitioner could not prove how he loaned the Company the said amount.

56. It was DW 1's testimony that the Company's Memorandum and Articles of Association gave the Company the right to hold a lien over any assets or dividends of any member who owed money to the Company.

57. DW 1 testified to the effect that he served with the 3<sup>rd</sup> Petitioner in the Board between the years 2001 to 2003, during which period they were engaged in turning around the Company. He testified that at that time the Company was struggling with a loan of **Ksh. 27,500,000/=** owed to various banks and individuals. Therefore, their duty was to repay the loans. According to DW 1, the former directors of the Company had borrowed money from Banks and given Company assets as security. He mentioned the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> Petitioners as some of the former directors.

58. It was his testimony that the Company was in receipt of the Letters of Administration from Peter Gakonyo. However the procedure therein had not been exhausted and there was no confirmed grant. Further, it was his testimony that it turned out that Peter Gakonyo's elder brother was the holder of the Letters of administration and as a result they had not acted on the said letter.

59. With regard to the 4<sup>th</sup> Petitioner, DW 1 testified that they found her name in the list of shareholders but when they looked at the records they established that there was no grant of letters of administration. He confirmed that the shareholder was his father in law, Mr. Gakugi. He further testified that there was no record that the 4<sup>th</sup> Petitioner had bought any shares to enable her to be registered as a shareholder. DW 1 indicated that the process of becoming a shareholder in the Company were to be found in the Memorandum and Article of Associations.

60. In relation to the allegations of fraud in transfer of shares, it was DW 1's testimony that the said allegations were false. He testified that the transfer of shares involved a willing buyer and a willing seller as approved by the Board. According to him, Hezy John Limited and his alleged relatives were free to buy shares which they did and the same were approved. He further testified that the Company permitted sales of shares to both shareholders and non-shareholders. He noted that there were no complaints from the sellers of the said shares.

61. It was DW 1's testimony that he had never fleeced the Company and that there was no evidence on oath to prove that he had stolen any money. To the contrary, it was his position that he had used his skills to improve the financial status of the Company. He testified that the Company had been making profits since 2006 and shareholders were being paid dividends regularly. Further, the Company had undertaken many asset development projects.

62. It was further his testimony that since 2005, the Company had held its annual general meeting every year whereby Peter Gakonyo and Joyce Gakugi had been in attendance either by self or through proxy. He acknowledged that the Company had barred people who had taken the Company to Court from attending the Company meetings. He testified that the same was not a policy but was meant to stop the said persons from causing chaos at the meeting.

63. He further informed the court that the Company was managed by a Board of Directors and that the chairman only summarised the views of the directors on any issue.

64. DW 1 testified that the 3<sup>rd</sup> Petitioner who purported to be the chairman of the company occupied one of the Company's properties while the 4<sup>th</sup> Petitioner had taken up a shop at one of the Company's properties. It was his contention that some of the rents were not properly accounted for and members were concerned. He confirmed that on 2<sup>nd</sup> September 2005, a company meeting was held and all the Petitioners were present. It is in this meeting that the previous directors were removed from office.

65. DW 1 testified that after removal from office, some of the Petitioners moved from one Court to another seeking injunction orders and they were not successful.

66. It is DW 1's testimony that when the new directors took office they established that many entities and individuals, including the former directors, were indebted to the Company. He testified that only the 5<sup>th</sup> and 6<sup>th</sup> Petitioners explained how they became indebted to the Company and eventually repaid the amount found to be due. Thereafter, after clearing their debts, the 5<sup>th</sup> and 6<sup>th</sup> Petitioners withdrew from the Petition.

67. It was further DW 1's testimony that the claim by the Petitioners that property should be valued was baseless since they had already done valuation. It was also his position that shares were sold at market price and they had no direct relation with the assets of the Company.

68. On cross-examination, DW 1 clarified that he was the chairman of the Company and that he was authorised to represent the Company as well as the Board of directors in this suit. He testified that the board passed a resolution to this effect.

69. DW 1 testified that the qualifications for a directorship required one to be a shareholder or a representative of a particular Company. He further testified that where a member died, the estate of the Deceased was to inform the Company. Further, a Shareholder was entitled to write a letter giving directions on his rights after death.

70. It was his testimony that in the past a family could nominate one person to represent the estate of a deceased shareholder. However, they were subsequently advised by the Company Secretary that only a person with letters of administration was entitled to represent a deceased shareholder. He testified that the 4<sup>th</sup> Petitioner used to represent the estate of her father in law but that since she did not have a letters of administration she ought not to have been a petitioner in the matter. It was also his position that the 3<sup>rd</sup> and 6<sup>th</sup> Petitioners were not shareholders. He noted that a brother to the 3<sup>rd</sup> Petitioner had been attending the company meetings on behalf of the family. It was therefore his position that they could not both attend the meetings.

71. On the issue of allowances, it was DW 1's testimony that the same was determined at the Annual General Meeting. The Directors fees was also decided at the AGM while the travelling allowance and legal costs were determined by the directors. He testified that the monies paid to the previous directors had neither been approved nor authorised by the Company. He confirmed that some of the said directors, being the 5<sup>th</sup> and 6<sup>th</sup> Petitioners, reconciled their accounts and paid up the claims.

72. DW 1 testified that he became a shareholder by buying shares from a shareholder after an approval by the Board. The criterion for approval was whether a person was fit and able to sit in the Company. He further testified that there was no limit to the number of shares an individual could hold. In addition it was his testimony that the value of a share was determined by the seller.

73. The witness testified that voting was done by show of hand except when shareholders holding 10% of the Company's shareholding requested voting by shares.

74. He confirmed that before he joined the Company, he had an audit firm that used to audit the Company until 1996 and that then he was not a director of the Company. Subsequently, the Company terminated the services of his Audit firm and sued him in person for a debt of Kshs. 52,000/=. He testifies that a reconciliation was done that established he owed the Company a sum of about Kshs. 4,000/= which he paid.

75. On re-examination, DW 1 affirmed that the only shareholders in the Petition were the 1<sup>st</sup>, 2<sup>nd</sup>, 5<sup>th</sup>, 7<sup>th</sup> and 8<sup>th</sup> Petitioners. However, the 5<sup>th</sup> Petitioner had withdrawn from the Petition and the 7<sup>th</sup> and 8<sup>th</sup> Petitioners had since passed on.

76. DW 1 testified that he had known the Company since 1980 to the year 2006 when the new directors took over and formalised the operations of the Company to conform with the Companies Act. It was his testimony that initially the Company was operated as a partnership though it was a limited liability company.

77. It was averred by DW 1 in his affidavit dated 21<sup>st</sup> October 2009 that the view of majority of shareholders was that the directors who were elected in September 2005 were to continue running the Company. He further averred that the majority views had been expressed at the annual general meetings of the Company held on 22<sup>nd</sup> December 2007 and 19<sup>th</sup> April 2008. He annexed a copy of minutes of those meetings and the chairman's reports marked as "HWG5". At this juncture, the Defence closed its case.

## **ANALYSIS**

## Preliminary issue of shareholding

78. **Section 28** of the Act defines a member of the company as a person who has subscribed to the Memorandum of Association of the company or a person whose name is entered in the Register of Members thereof. In the current case some of the Petitioners have come before Court as administrators of the estate of deceased shareholders or heirs to the said deceased shareholders.

79. It is averred in the affidavit of Mr. Gichohi as well as the affidavit of Douglas Muthua both dated **27<sup>th</sup> June 2011** that Mr. Gakonyo, the 3<sup>rd</sup> Petitioner, has never been a beneficial owner of any shares in the Respondent Company. The 3<sup>rd</sup> Petitioner was to hold his late father's shares in trust on behalf of the members of the family. It is further averred that the 3<sup>rd</sup> Petitioner's family brought to the Company a copy of grant of representation. According to the said grant, his late mother and his brother John Muchunu Nderitu were named as the administrators.

80. DW 1 in his evidence noted that a brother to the 3<sup>rd</sup> Petitioner had been attending the company meetings on behalf of the family. He further testified that **clause 3 of the Articles of Association allows the Board the discretion to vet incoming shareholders for the good of the Company. This had not been done for the 3<sup>th</sup> Petitioner. Further, the 3<sup>rd</sup> Petitioner had not produced a document to show that he was in the register of shareholders. The witness held the same position as regards the 4<sup>th</sup> Petitioner. It was his position that she did not hold any grant or representation to show that she ever inherited any shares.**

81. In relation to the above issue of shareholding and membership, I find the following cases to be relevant. In the English case of **Re Jermyn Street Turkish Baths Ltd (1970) 3 All ER 57** where the Court of Chancery had held that:

***“ . . . Even if the Petitioners were not registered as members of the company, personal representatives of a deceased member must be regarded as members of the company.”***

82. In the Matter of **Uniconsult (K) Ltd (2008) eKLR**, the Judge had found:

***“For the purpose of the preliminary objection raised this court finds that the petitioner has Locus Standi to present petition for winding up of the company. And she is a contributory herself being a personal representative of a deceased holder of shares which devolve upon her.”***

83. In the case of **Kenyazuga Hardware Ltd (2005) 2 KLR 381**, the Court had held:

***“If it was found that the deceased indeed had shares, the second petitioner would then by virtue of being one of the administrators of his estate, be registered as a holder of the Shares and therefore have capacity as a shareholder or a contributor under Section 221 (1)(ii) to present a petition for winding up.”***

In **Halsbury Laws of England Vol.6 at page 262** subject on transferring of shares, it is stated that:

***“upon the death of the sole shareholder the title to his shares devolves upon his personal representative who may transfer the shares without being registered in the register of shareholders.”***

84. In light of the above authorities, it is my view that a personal representative or administrator to the estate of a deceased shareholder should be considered as a member of the company despite the fact that they are not in the register of the Company. Therefore a Personal representative to a deceased shareholder is entitled to bring a petition for the winding up of a company.

85. Taking into account the narration above, it seems that the 3<sup>rd</sup> Petitioner and his family are yet to confirm who will be the administrator of the shares of their late father for purposes of membership. Whether they will nominate one person or they will choose to hold the shares jointly is up to them and subject to the Company's approval. However, for the purposes of this Petition, since it has not been disputed that the 3<sup>rd</sup> Petitioner was listed as one of the administrators of the estate of his father, I find that he had *locus standi* to bring the said Petition.

86. With regard to the 4<sup>th</sup> Petitioner, it has been established that her name is in the register of members. It is her case that she became a shareholder by inheriting the shares jointly held by her late father in law and her late husband. On the other hand, the Respondents case is that her name might have found its way in the register illegally as there was no document to indicate transfer of shares. It is also the Respondent's position that she had not presented a grant of administration.

87. It is not in dispute that the 4<sup>th</sup> Petitioner did not present a document showing she inherited the aforesaid shares. However, her name is in the register of members which is *prima facie* evidence that she is a member of the company. The Respondents have not given any substantial evidence to indicate that she was illegally put in that list. The Petitioner had also served as a director some time back upon being invited by the said Company. The Respondents themselves have indicated that the Company was initially run by members who were not conversant with the company law. In that case it would not be unlikely that the said management were not particular on the processes the Respondents are insisting on. It was also DW 1's testimony that in the past a family could nominate one person to represent

the estate of a deceased shareholder.

88. That said, it was DW 1's position that once the said Petitioners made the appropriate applications the same would be considered. It is therefore upon the said Petitioners who are not yet shareholders formally to pursue the proper channel provided by the Respondent Company. The Petitioners have not demonstrated that they pursued any such channels to become shareholders and the Respondent Company denied them. The said Petitioners will not suffer any prejudice by following the procedure.

89. That notwithstanding, for the purposes of this Petition, I find that the 3<sup>rd</sup> and 4<sup>th</sup> Petitioners *prima facie* had *locus standi*. It is for the Respondent Company to put its house in order and regularise the list of members after considering the applications by personal representatives or administrators of the estate of deceased shareholders.

90. As earlier stated, the 7<sup>th</sup> and 8<sup>th</sup> Petitioners have since passed on and did not give any evidence in relation to this Petition. The 2<sup>nd</sup> Petitioner did not also present any evidence against the Respondents. The 5<sup>th</sup> and 6<sup>th</sup> Petitioners withdrew from the Petition or rather they did not present any case against the Respondents. That leaves us with the 1<sup>st</sup>, 3<sup>rd</sup>, and 4<sup>th</sup> Petitioners. The foregoing notwithstanding, this Court will determine the current Petition on its merits.

#### **SUBSTANCE OF THE PETITION**

91. In my view the main issue for determination in this Petition is whether the affairs of the Company are being conducted in a manner oppressive to the Petitioners who instituted the Petition as minority shareholders. What amounts to oppressive conduct of a company's business should be addressed in the context of section 211 of the *Companies Act*. As per **Musinga J.** (as he then was) **In The Matter of Tatu City Ltd & Kofinaf Company Ltd (2013) eKLR:**

*“The Supreme Court of India answered that question in S. P. Jain v Kalinga Tubes Ltd (1965) AIR 1535, (1965) SCR (2) 720 commenting on section 397 of the Indian Companies Act which is the equivalent of our section 211 of the Companies Act, the court held that for a petition under section 397 to succeed it is not enough to show that there is just and equitable cause for a winding-up of a company, though that must be shown as preliminary. It must further be shown that the conduct of the majority shareholders was oppressive to the minority as members and this require that events have to be considered not in isolation but as part of a consecutive story. There must be continuous acts on the part of the majority shareholders, continuing up to the date of the petition, showing that the affairs of the company were being conducted in a manner oppressive to some part of the members . . . Further, the conduct must be burdensome, harsh and wrongful and mere lack of confidence between the majority shareholders and the minority shareholders could not be enough unless lack of confidence springs from the oppression of the minority by a majority in the management of the company's affairs, and such oppression must involve at least an element of lack of probity or fair dealing to a member in the matter of proprietary rights as a shareholder . . .*

*Halsbury's Laws of England, 4th Edition Volume 7 (2) at page 1095, the learned author states that the words “just and equitable” in Company Law are a recognition of the fact that a limited liability company is more than a “mere judicial entity with a personality in law of its own: behind or among it there are individuals of rights, expectations and obligations inter se which are not necessarily submerged in the company structure.” The court must therefore subject the exercise of legal rights by various shareholders to equitable considerations of a personal culture arising between the shareholders in order to determine whether any of the actions are unjust or inequitable.”*

92. I have also noted the authority referred to by the Respondents in **Re: Jermyn Street Turkish Baths Ltd. (1971) WLR** with regard to the test applicable to a petition for relief from oppression under section 211 of the *Companies Act*.

93. It is evident from the pleadings and the proceedings herein that the tussle between the Petitioners and the Respondents emanated in 2005 when the Petitioners were removed from office and the new ones elected. Further, after their removal from office, the company claimed some monies from some of the Petitioners which claim they did not receive well as is evident from the Pleadings. Since then the Company has elected directors annually and some current directors were not in office when the Petition was filed.

94. The Petitioners contend that their removal from office was unprocedural and unlawful. Some of the Petitioners filed various applications to the High Court and even Court of Appeal to stop the then Board of Directors from assuming office or holding meetings but the said applications were dismissed. The Petitioners complain that Mr. Gichohi colluded with other members to requisition a special general meeting with the aim of removing them as the directors then. There was no evidence to show that there was collusion. The Petitioners in essence have not demonstrated how their removal from office was unlawful. It is averred for the Respondents that the Petitioners have refused to offer themselves for elections of directors when the same are held every year.

95. The accusations made by the Petitioners against the Respondents and especially directed to Mr. Gichohi have not been substantiated. The Petitioners have accused Mr. Gichohi of joining the Board irregularly to which Gichohi averred that he joined the Board in 2001 following arbitration.

96. The shareholding of Hezy John Ltd and Mr. H.W Gichohi has been questioned. How did they become shareholders? It is averred by Mr. Gichohi that he became a shareholder by purchasing shares from a shareholder. He purchased the shares from the beneficiaries of the estate of the late Mary Karuri. It was his argument that this was based on willing

buyer willing seller subject to the approval of the Board. There is no documentary evidence of the said purchase or Board's approval. It was further Mr. Gichohi's position that the company permits sale of shares to both shareholders and non-shareholders in accordance with provisions of the Company's Memorandum and Articles of Association and the Companies Act.

97. However, the only evidence on record as regards the shareholdings of Hezy John Limited and Mr. Gichohi is the current list of the sixty five shareholders as shown in the Company's register. This is *prima facie* evidence that the transfer of shares was duly effected to him. His shareholding and that of his Company is not disputed by the other shareholders other than the Petitioners. There is also no complaint from the beneficiaries of the estate of the late Mary Karuri to the effect that the said shares were acquired from them fraudulently.

98. It is evident from the Articles of Association of the Company that any invitation to the general public to subscribe to the shares of the Company was prohibited. However, there was no provision that the shareholders would not sell or transfer their shares to a willing buyer. Therefore, it would seem that the shareholders and the respondent company were at liberty to sell their shares to persons of their choice.

99. It seems that the Petitioners are disgruntled as their views did not have the support of majority shareholders. It is evident that they are the only ones complaining about the Board of Directors in office in the Company. If it were true that Mr. Gichohi and his board of directors were fleecing the company and mismanaging it, then there would be more petitioners than the current ones. Further, it would have not been possible to run the Company in a profitable manner as is the case now if the current board of directors were mismanaging the said Company.

100. It has been demonstrated that the Respondent Company has been making profits since the Board of Directors chaired by Mr. Gichohi took over in 2005. The company has also been paying out dividends since 2006. This has not been disputed by the Petitioners. In that case, there are no reasons to justify the appointment of an Interim Receiver Manager by this Court. It has not been shown that the board is incapable of running the company or that they have managed the company in a fraudulent and oppressive manner.

101. On the other hand, it is the Respondents' claim that Peter Gakonyo and Joyce Gakugi during their tenure as directors used to live in the Company's premises for lower rent which was uneconomic to the Company. (See *the minutes of the meeting held on 2<sup>nd</sup> July 2005 attached to the affidavit of Joyce Gakugi sworn on 24<sup>th</sup> November 2006.*) The company also found that the former directors had incurred unauthorised expenditures and were surcharged. It is the Respondents' case that the 1<sup>st</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 6<sup>th</sup> Petitioners had claimed as directors' allowances sums in respect of alleged board meetings to which other directors had not been invited.

102. As it is, the Respondents are purportedly exercising a lien on the shares of the 3<sup>rd</sup> and 4<sup>th</sup> Petitioners who they claim are not shareholders of the Company. Of course this is a conflicting position as it is not possible for one to be entitled to shares if they are not shareholders. However, as I have already stated above, it is for the Respondent Company to put its house in order and iron out the issue of shareholders. This is a matter of internal management of the company which I believe the management is competent to handle and this Court should not interfere.

103. The Petitioners herein should present their grievances before the other shareholders in a meeting to be held by the Company. I am of the view that these grievances can be dealt with internally in the Company and the Court need not to be involved. The Petitioners grievances are by and large matters of management of the Company. Lakha JA in the case of Murri v Murri & "K" Boat Services Ltd (2000) eKLR held as follows–

*“Upon a careful consideration of the petition it is plain and obvious that basically this is a dispute about the internal management of the company and the court does not interfere with the internal management of the company acting within its powers: see the rule in Foss v Harbottle (1843) 2 Hare 261. Facts necessary to support intervention by the court, e.g. ultra vires or fraud have not been pleaded.”*

104. The Petitioners have not made out a case to warrant this Court to make an order that the Respondent Company be wound up on the just and equitable clause because the directors have conducted its business fraudulently and oppressively. The Petitioners have also not made out a case to warrant the grant of the numerous prayers they have made in their Petition. Further, the various orders the Petitioners are seeking do not represent the available remedies under section 211 of the Companies Act.

105. I have also noted that the Petitioners in their prayers are interested in the valuation of the Company assets and that a fair share price be determined. It is the Court's assumption that since the Respondent Company is a limited liability Company they have been keeping books of accounts which should be audited annually. In the event that that has not been happening, or to avoid any doubt on the issue, I will make a direction on the same.

106. In the upshot, the following is the Judgement of this court:-

*a. Save and except as stated hereunder, the Petition is dismissed.*

*b. A special General Meeting of the Company be convened within 30 days from the date of this Judgement, whose agenda shall include:-*

*i. Auditing the Company books of accounts,*

*ii. Valuation of the Company assets,*

*iii. Determination of a fair share price,*

*iv. Revision of the Member's Register,*

*v. Determination of succession in case where members have passed on.*

*c. The costs of the Petition shall be paid by the Company.*

DATED, READ AND DELIVERED AT NAIROBI THIS 14TH DAY OF MAY 2014

E. K. O. OGOLA

**JUDGE**

**PRESENT:**

Njenga for the Petitioner

Dr. Kuria for the Respondent

Teresia – Court Clerk