



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI (NAIROBI LAW COURTS)**

**Bankruptcy & Winding-Up Cause 34 of 1983**

**In the Matter of Ruirie Ltd v In the Matter of Companies Act**

**JUDGMENT**

The petitioner has applied for the winding up of Ruirie Limited on the grounds

- (1) that the Company is unable to pay debts
- (2) that the court should be of the opinion that it is just an equitable that the company should be wound up.

Also under consideration is an application for injunction to restrain John Wandina and Peter Mahugu from selling or otherwise disposing of assets belonging to the company and from operating the bank account of the company.

Already an interim injunction has been granted restraining John Wandina and Peter Mahugu, the two directors of the company from disposing of the assets of the company or withdrawing money from the company's bank account except for the purposes of running day to day operations of the company until further orders of the court and the petitioner has been ordered not to interfere with the running of the day to day operations of the company until further orders of the court.

At the hearing of this matter it was the view of the court and the counsel that the injunction depended upon the argument in the winding up petition and so these matters were heard together.

Since then and in view of the delay in writing this judgment which I much regret, the petitioner has been forced to take out another chamber summons asking for detention of John Wandina in prison for breach of the injunction granted by the court on 4<sup>th</sup> October, 1983 above recited.

There has been a flurry of the affidavits this matter and both in support of the petition and replying affidavits in that respect and also in support of various chamber applications which have been made.

The first ground upon which the petitioner relies is that the company is unable to pay its debts. The basis upon which the petitioner says that this is so is that in 1983 a statutory demand under section 220 of the Companies Act requiring the company to pay Shs 660,017/- owed by the company in respect of motor vehicles transferred by the petitioner to the company. The statutory demand is set out at page 3 of the petition.

The whole basis of the section 220 notice was that the petitioner advanced to the company the sum of Shs 660,017/- for the purpose of purchasing some lorries.

However, in the petition at para 10 on page 2 the petitioner alleges that he transferred to the company some motor vehicles at an agreed value of Shs 660,000/-. The preamble to para 18 of the petition describes the statutory demand as requiring the company to pay Shs 660,017/- owed by the company in respect of the motor vehicles transferred by the petitioner to the company.

The allegation set out in the statutory notice is quite different to the allegation set out in the petition. This amount is an amount disputed by the company as owing to the petitioner and it is necessary to see whether or not the dispute is a real dispute. That is how the authorities in the matter should be dealt with.

If the petitioner is unable to say upon what ground the company owes money to the petitioner, how then is the court going to be able to declare that any dispute by the company about the debt is a mere dispute and without foundation. The mere service of a section 220 notice is not sufficient by itself to establish that the company is unable to pay its debts where there is a genuine dispute as to the liability of the company for the debt. In those circumstances I am not on the material before me able to say that the company should be wound up because it is unable to pay its debts under section 219(e) of the Companies Act (Cap.486).

The other basis upon which the petition asks this court to wind up this company is under section 219 (f) of Cap 486, the Companies Act. He says that it is just and equitable that the company should be wound up.

His grounds as set out in the petition are that in 1977 the petitioner as prime mover of the company with two of his younger brothers decided to form a private family company to carry on transport business in which the petitioner and the two younger brothers were to be shareholders and they all subscribed for one share each in the capital of the company but the two brothers did not pay for and were never issued with any share certificates by the company nor did they make any contribution towards the acquisition of assets of the company whilst the petitioner transferred 5 motor vehicles, some company debts and loans from his other businesses amounting in all to over a million shillings.

The management of the company's affairs was entrusted to John Wandina and the cheques of the company were signed either by John Wandina or Peter Mahugu but countersigned by the petitioner.

The petitioner has set out that the company does not hold formal meetings or follow the rules laid down in the Articles of Association and all its affairs have been conducted in a domestic and very informal manner and does not declare any dividends.

It is then alleged in the petition that the two directors of the company that is John Wandina and Peter Mahugu have withdrawn for their own private purposes most of the company's money from the company account and further sold a total of 140 sheep and 30 head of cattle belonging to the company and used the proceedings for their own private purposes and to the exclusion of the petitioner.

He sets out that there is a dispute between the directors and the petitioner and that there is a High Court case filed against the petitioner in that respect and that the petitioner and his two younger brothers have been quarrelling about almost everything with regard to the company and are not on talking terms.

The petitioner now alleges that the directors' views and methods have become incompatible and they cannot work together as he thought they could at the beginning and therefore nothing is left than to wind up the company. He alleges that there is a real and present danger to the remaining assets of the company due to misappropriation and /or waste by the said two directors who are in de facto control of the management of the company to the exclusion of the petitioner and the petitioner has a justifiable lack of confidence in the conduct and management of the company by the said two directors.

John Wandina has entered an affidavit in opposition to the petition and sets out the position in the company. He is the managing director and a share-holder, Mr Peter Mahugu is a co-director and a

shareholder and the petitioner is a shareholder and appears to hold no position as a director.

It seems on the affidavit now before the court that in fact none of the parties have been issued with share certificates but all are subscribers to the memorandum of the association in respect of one share each. He attached to his affidavit copies of notices of meeting which were alleged to have been served on the petitioner and denies that the company has been conducted in very informal manner. Two notices are attached and refer to meetings in May and June, 1983” at home in the evening hours as usual”.

It is alleged that regular company meetings are held which the petition has always refused to attend. The allegation that withdrawals have been made out of the company’s bank account by John Wandina and Peter Mahugu for their own private purposes have been denied and Mr Wandina alleges that the company is in a very healthy financial position and owns substantial assets. He says that the profits made by the company are ploughed back into the company to further strengthen it. He denies that the petitioner and other directors are not on talking terms but alleges that the petitioner will not come to directors meetings and it is for that reason that he has been given notice that he is suspended from the office of directorship with effect from the 2<sup>nd</sup> of September, 1983.

Mr Wandina also points out that the petitioner has been writing letters posing as the managing director of Ruirie Limited a post which he does not and has never held. The letter concerned is attached to Mr Wandina’s affidavit. This letter was written after the petitioner had been removed as a director.

One of the matters which has caused some difficulty between the parties is that the petitioner employed one Joseph Ngumo Kariuki to keep an eye on the livestock belonging to Ruirie Limited and to inform him of any reduction in their number because he was alleging that John Wandina had been stealing cattle from the company.

This subject arose because on behalf of the company Mr Wandina applied for an injunction to stop the petitioner from interfering in the affairs of the company and such an injunction was in the end granted.

The actions of Mr Kariuki revealed that some cattle had been taken away in November 1983 from the ranch and were found being looked after by the herdsman of John Wandina. Also 60 head of cattle had been sold and the railway documents showed that only 30 head were sold in the name of Ruirie Limited and 30 other cattle were sold in the name of one Ibrahim Wairera. Documents were attached to show the consignment notes of the animals supporting witnesses’ affidavits were filed as to the movement of these cattle.

The reason for discussion of these matters was whether there was a question of disposal of assets of the company.

The argument of those on behalf of the company is that the cattle and sheep concerned could not be said to be assets of the company and indeed the petitioner had amended his application for injunction by deleting cattle and sheep and leaving only the words the “assets of the company”.

For myself I am of the view that that distinction was deliberately made and clearly referred to in the judgment of the Judge who was dealing with the application for injunction. Cattle and sheep are stock in trade for such a company and not assets of it. If an injunction was granted to stop the directors who were in control of the company disposing of cattle or sheep then as has been pointed out that would completely cripple the company which never was the intention of any of the parties. It is essential that in order to run such a business the stock in trade can be dealt with as necessary I do not therefore find that disposal of cattle or sheep is relevant to any of the matters before the court with the possible exception of whether the petitioner is justified in saying he no longer has confidence in the present directors.

It seems to me however that to apply for the company to be wound up is a step which is a fairly drastic step to take in respect of the company which even according to the petitioner’s own affidavits is a company which trades successfully. There are too many companies around which are trying to trade which should be wound up and are not. It would be a pity to wind up a company which was according

to all the parties involved in successful trading.

Thus the application based upon the injunction for committal to prison for breach of it on the basis of disposal of cattle and sheep is not a breach for the order of injunction and no imprisonment of the parties involved should follow.

Further the petitioner seems to be of the view that he is unable to work now with the other directors. It has to be pointed out that there are other remedies available to the petitioner. He is a shareholder of the company although not a director and he is entitled to call for accounts, and if he is able to get together the necessary support he would be able to call necessary meetings to consider and deal with the position. It is now for the council to prompt the -----.

I have considered the evidence coming from the affidavits now before me. I have looked at the bank account of the company which is attached to one of the affidavits from the petitioner. Whilst taken together with the evidence of the petitioner about the way in which the company trades and how much it costs to run it, ----- nevertheless there is an allegation in affidavit of John Wandina the profits are being ploughed back into the company. It is not a matter which I am able to decide upon the facts before me as to whether somebody is stealing money from the company. That is a matter which could be resolved by the taking of an account on the action of the petitioner under the Act, nor made in these proceedings.

It is true to say that I have been assisted greatly by counsel in this matter in reference to the case law which would assist me in coming to a decision on the winding up of this company.

However, I have looked at the facts as set out in the affidavits. Without wishing to minimise the efforts of the advocates for they have gone to a great deal of trouble, it is my view that upon the facts there is not sufficient to convince me that it is just and equitable that this company be wound up.

The petition therefore will be dismissed with costs.

July 28, 1985

Porter, J