IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NAMBUYE, MUSINGA & KIAGE, JJ.A.)

CIVIL APPEAL NO. 266 OF 2016

BETWEEN

YUSSUF ABDI ADAN...APPELLANT

VERSUS

HUSSEIN AHMED FARAH.................................1ST RESPONDENT

HUSSEIN UNSHUR MOHAMMED..................2ND RESPONDENT

MOHAMED ABDIKADIR ADAN......................3RD RESPONDENT

BLUEBIRD AVIATION LIMITED.....................4TH RESPONDENT

(Being an appeal from the Ruling and Decree of the High Court of

Kenya at Nairobi (E.K. Ogola, J.) delivered on 24th May, 2015

in

Winding Up Cause No. 7 of 2016)

****

JUDGMENT OF THE COURT

1. By a petition dated 9th March, 2016, **Yussuf Abdi Adan (the petitioner)** sought, *inter alia*, a winding up order against **Bluebird Aviation Limited (the Company)**, which was incorporated on 29th May, 1992. The petitioner, who is the appellant in this appeal, is a director of the company with a 25% shareholding.

2. The petition was brought under the **repealed Companies Act Cap 486** as read with **sections 381 and 734(1) and (2)** of the **Insolvency Act No. 18 of 2015.**

3. The appellant alleged, *inter alia*, that since the incorporation of the Company it had not held any general meeting; that he had been excluded from the management of the company; and that he had never received any dividend as a shareholder of the company.

4. The Company and the other three directors opposed the application and each one of them filed an application seeking to strike out the petition on various grounds. The common ground in each of the four applications was that the petition was seeking reliefs and remedies under the Companies Act, which had been repealed prior to the filing of the petition, and therefore the court had no jurisdiction to grant the reliefs sought. It was also argued that the petition was not predicated on the provisions of the Insolvency Act or any other permissible law.

5. The four applications were opposed by the appellant, who contended that although the Company was incorporated under the provisions of the repealed Companies Act, having invoked the provisions of **sections 381, 734 (1) and (2)** of the **Insolvency Act No. 18 of 2015** which provide for transitional and saving provisions of the repealed Companies Act, the petition

was properly before the court.

6. The appellant conceded that the **Companies Act No. 17 of 2015** as well as the **Insolvency Act No. 18 of 2015** are the applicable laws but posited that due to the fact that the company was incorporated before the enactment of the **Companies Act No. 17 of 2015** and the **Insolvency Act No. 18 of 2015**, the applicable law was the repealed Companies Act.

7. Fortifying that line of submission, the appellant's counsel argued that **part VI** of the **Insolvency Act No. 18 of 2015** was operationalised on 18th January, 2016 but the same only caters for companies that were incorporated under the **Companies Act No. 17 of 2015**; that under **section 734(1) and (2)** of the **Insolvency Act No. 18 of 2015** there were transitional and saving provisions of the **repealed Companies Act, Cap 486,** especially for the purposes of winding up petitions.

8. In response, the respondents contended that the term "Winding-up" under the repealed Companies Act had been replaced with the term **"Liquidation"** under the new Companies Act; that **section 381(1)** of the **Insolvency Act** provides for the liquidation of a company, which at **sub-section (2)** provides for either voluntary or court mandated liquidation.

9. Further, the respondents argued that **section 3** of the new **Companies Act** provides for companies that had been incorporated under the repealed Companies Act and that therefore the transitional and saving provisions under **section 734(1) and (2)** could not be invoked to save the appellant's petition. The respondents added that **section 424** of the **Insolvency Act No. 18 of 2015** provided proper procedures for dealing with a complaint such as that of the appellant.

10. In its ruling, the High Court agreed with the respondents that the petition was founded on faulty grounds and struck it out. The learned judge added that the procedural rules and guidelines required under the Insolvency Act No. 18 of 2015 for liquidation of companies were not in place and made a recommendation to Parliament to craft the same. That is the ruling that gave rise to this appeal.

11. The memorandum of appeal raises six grounds of appeal that are as f*ollows:*

> ***"1. The learned judge erred in law and fact in striking out the Winding Up Petition dated 9th March, 2016 on a pure procedural technicality that the Petition allegedly cited the wrong statute and thus denied the Appellant his day in court.***
>
> ***2. The learned judge erred in law and in fact in holding that Sections 7(1) as read with Section 7(2) (a) and***
>
> > ***(b) of the Sixth Schedule of the Constitution allows for the sole application of the provision of the Companies Act Number 17 of 2015 and the Insolvency Act Number 18 of 2015, and oust the provisions of the Companies Act Chapter 486 of the Laws of Kenya (repealed).***
>
> ***3. The learned judge erred in law and in fact in holding that the applicable law to a winding up cause of a company registered under the repealed Companies Act, Chapter 486 of the Laws of Kenya is the Companies Act No. 17 of 2015 and the Insolvency Act No. 18 of 2015.***
>
> ***4. The learned judge erred in law in holding that the Superior Court had no jurisdiction to hear the petition before it.***
>
> ***5. The learned judge erred in law and in fact in striking out the petition before it on the sole ground that it was wrongly grounded on the provisions of the Companies Act, Cap 486, (repealed) and erred in striking out the same having come to the conclusion that the applicable laws are the provisions of the Companies Act No. 17 of 2015 and the Insolvency Act No. 18 of 2015.***
>
> ***6. The learned judge erred in law and in fact in failing to appreciate that amendment of the Petition and insertion of the applicable provisions of the Companies Act No. 18 of 2015 and the Insolvency Act Number 18 of 2015 would have cured the alleged defect and would further have allowed the petition to proceed."***

12. The appellant urged the court to allow the appeal, set aside the High Court ruling and dismiss the four applications by the respondents.

13. When the appeal came up for hearing, the appellant was represented by **Mr. Ahmednasir Abdullahi, SC**; while the respondents were represented by **Ms. Janmohammed, Mr. Ondieki, Mr. Ngaca** and **Mr. Kemboy** respectively. The appeal was canvassed by way of written submissions.

14. We have carefully perused the record of appeal as well as the submissions. The central question for determination in this appeal is whether the learned judge was right in law in holding that the petition had not been instituted under the appropriate law and thereby striking it out.

15. It is not in dispute that as at 9th March, 2016 when the petition was filed the **Companies Act Cap 486** of the **Laws of Kenya** and the **Winding Up Rules** made thereunder had been repealed by **section 1023(1)** of the

Companies Act 2015. The Companies (Winding Up Rules) were also repealed as per **section 1023(4)** of the **Companies Act 2015**. What then was the applicable legal regime for a petition to wind up a company registered under the repealed Companies Act, in light of the Companies Act 2015 and the Insolvency Act No. 18 of 2015?

16. In answer to that question, the appellant's learned senior counsel cited **section 734(2)** of the **Insolvency Act** which reads as follows:

> ***"Despite the repeal of the Companies Act, or of Parts VI to IX of that Act, those parts, and any other provisions of that Act necessary for their operation, continue to apply, to the exclusion of this Act, to any past event and to any step or proceeding preceding, following, or relating to that past event, even if it is a step or proceeding that is taken after the commencement."***

17. The appellant's counsel asserted that the operative words in the above quoted section are **"past event"**, which are defined in **section 734(1)** to mean **"any of the following that has occurred before the commencement**:

> ***(a) the passing by the company of a special resolution resolving that the company be wound up;***
>
> ***(b) the making of an application to the Court for a winding up order in respect of the company;***
>
> ***(c) the appointment of a liquidator or provisional liquidator in respect of the company;***
>
> ***(d) a failure by the company to deliver the statutory report to the Registrar or to hold the statutory meeting required under the repealed Companies Act;***
>
> ***(e) failure by the Company to commence its business within a year from its incorporation or, if the company has suspended carrying on business, the elapse of a whole year since the business was suspended;***
>
> ***(f) a reduction of the number of members of the company, in the case of a private company, below two, or, in the case of any other company, below seven;***
>
> ***(g) the inability of the company to pay its debts;***
>
> ***(h) in the case of a company incorporated outside Kenya and carrying on business in Kenya – the commencement of winding-up proceedings in respect of it in the country or territory of its incorporation or in any other country or territory in which it carries on or formerly carried on business;***
>
> ***(i) the appointment of a receiver of in respect of the company by the holders of the company's debentures;***
>
> ***(j) the appointment of a receiver and manager in respect of the property of the company."***

18. The appellant's counsel then submitted that since the petition was filed on 9th March, 2016 and the Insolvency Act 2015 came into operation on 18th January 2016, the law applicable to such scenario is not provided in any relevant statute. In the premises a legal lacuna exists, and which he invited the court to address it in a judicious manner.

19. Regarding the appropriate legal regime, the learned judge stated:

> ***"If the winding up proceedings had been commenced before the commencement of the new laws, it would then have been deemed to be a past event or proceedings relating to a past event. But for the reason that the event that has commenced was after the commencement of the new laws, viz the Companies Act No 17 of 2015 and the Insolvency Act No 18 of 2015, then the provisions of Section 723(1) & (2) Companies Act No. 17 of 2015 would be applicable as a salve for the effectiveness and deficiencies of the petition."***

20. The respondents submitted that the filing of the petition could not be classified as a **"past event"** as it was done long after the Insolvency Act had come into effect.

21. We do not agree with the appellant that the filing of the petition could be deemed as a **"past event"** simply because the Company had been incorporated under the repealed Companies Act Cap 486. If the winding up petition had been filed before commencement of the Insolvency Act the petition would have been properly before the Court, even if during its pendency the Companies Act Cap 486 had been repealed.

But that was not the case.

22. We do not think that interpretation of the provisions of **section 734(1) and (2)** lends itself to any constructional difficulties. The transitional clauses in both the Companies Act, No. 17 of 2015 and the Insolvency Act No. 18 of 2015 were of no assistance to the appellant.

23. In the circumstances, can it therefore be said that the learned judge abused his discretion in striking out the appellant's petition, having found that it was founded on a repealed law? We do not think so. We have no basis for interfering with the learned judge's exercise of discretion. In **MBOGO v SHAH [1968] E.A. 93**, this Court held:

> ***"An appellate court will interfere if the exercise of the discretion is clearly wrong because the judge has misdirected himself or acted on matters which it should not have acted upon or failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion."***

24. Similarly, in **CO-OPERATIVE MERCHANT BANK LTD v GEORGE FREDRICK WEKESA Civil Appeal No. 54 of 1999,** this Court held:

> ***"The power of the Court to strike out a pleading under Order 6 rule 13 (1) (b) (c) and (d) is discretionary and an appellate court will not interfere with the exercise of the power unless it is clear that there was either an error on principle or that the trial judge was plainly wrongly."***

See also **D.T. DOBIE & COMPANY (KENYA) LTD v MUCHINA [1982] KLR**

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25. We are not satisfied that there is any basis upon which this Court can interfere with the exercise of discretion by the learned judge. The applicant is not without a recourse in law. He can file an appropriate petition if he still intends to pursue the respondents.

26. All in all, we find this appeal lacking in merit and dismiss it with costs to the respondents.

Dated and delivered at Nairobi 20th day of April, 2018.

R.N. NAMBUYE

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JUDGE OF APPEAL

D.K. MUSINGA

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JUDGE OF APPEAL

P.O. KIAGE

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR