REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT NAIROBI
Civ Appli 218 of 2006

S.K. MACHARIA ….....…..……..…INTENDED 1ST APPELLANT/APPLICANT

MADHUPAPER INTERNATIONAL LTD.....INTENDED 2ND APPELLANT/APPLICANT

AND

SAMUEL NJOROGE MUCHIRI …….....……..……. 1ST RESPONDENT

WILLIAM WOKABI KARANJA ……..…..... 2ND RESPONDENT

JOSEPH MUNORU MUTURI …….....…….. 3RD RESPONDENT

(An application for a stay of a winding up order pending the lodging and hearing of an intended appeal from the judgment of the High Court of Kenya at Nairobi (Milimani) (Kasango, J.) dated 6th March, 2006

in

H.C. WINDING UP CAUSE NO. 12 OF 1995)

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RULING OF THE COURT

By their notice of motion dated 10th August, 2006, the applicants seek two substantive orders under ***rule 5(2) (b)*** of the rules of this Court, as follows: -

"1. That there be a stay on (sic) the order made on 6th March, 2006 winding up Madhupaper International Ltd. pending the lodging and hearing of the applicants' intended appeal.

2. That there be a stay of all other further proceedings in Milimani High Court Winding Up Cause No. 12 of 1995 pending the lodging and determination of the applicants' intended appeal."

The brief background to the application is this: -

The three respondents went before the superior court, sitting as a Winding up Court, on 27th March, 1995 and instituted a Winding up Petition against **M/S. Madhupaper International (Kenya) Ltd** (hereinafter "*the company*") which was incorporated in 1976. They contended that they were minority shareholders of the Company whilst the 1st applicant was the principal or majority shareholder and the Company's Director or Chief Executive. To be precise the 1st applicant held 341,151 shares while the respondents'

combined shareholding was 22,474 shares. That translates into a percentage shareholding of approximately 94% to 6% respectively. They further, contended that the Company had since 1985 neglected to call any Annual General Meeting where balance sheets, audited accounts and statement of the affairs of the Company would be presented. It was, they complained, the 1st applicant who solely ran the affairs of the Company and had, amongst other complaints, kept the respondents in the dark about proceeds of sale of the Company's assets, payments made to debenture holders, amounts owed to secured or unsecured creditors, and net balances, if any, standing to the Company's credit. The affairs of the Company were generally conducted in a manner oppressive to some members of the Company and therefore, they pleaded, it was just and equitable that the Company be wound-up by the court under ***section 219(f***) of the ***Companies Act, Cap 486***.

The 1st applicant responded to the petition on behalf of himself and on behalf of the Company. He denied that the respondents were members of the Company at any time, or were known by the Company at all, and asserted that they were not entitled to the prayers sought. Confronted by sworn evidence that the respondents were staff members who were lawfully invited by the Company to take up, and did in fact take up shares in 1980 which were recorded in the company's register and Share Certificates were issued upon payments being made, the 1st applicant did not deny that there was such issuance of shares and registration of the respondents as shareholders as they assert. He instead swore that the allocation of shares was made at a time of intended restructuring of the company, in his own words, as a "*private limited liability company"* in order to handle bigger business with the assistance of the International Monetary Fund. Due to frustrations for which the Kenya Government was responsible however, the restructuring plans fell through and the Company was placed under receivership in 1985. For that reason, the respondents who never were shareholders before the restructuring plan was sold to them, could not claim to be members of the Company after the plan failed. The 1st applicant further deponed that he single-handedly fought for the welfare of the Company against predatory manoeuvres by Government officials, creditor-banks, receivers and other individuals who intended to destroy it. In the process he filed no less than eight suits in various courts, some of which were finalized while some were still pending by the time the petition was filed. He believed the Company had the capacity to bounce back into life once the pending suits were decided in its favour. As for the respondents, he was of the view that they were feigning oppression and he branded them as "hypocrites, greedy and selfish pessimists who equate their own interests with those of the Company". The company, according to the 1st applicant was not for winding up.

Two issues arose before the Winding-up court: firstly, whether the respondents were shareholders or members of the company, and secondly, whether it was just and equitable to wind-up the company. On both issues the superior court, Kasango J, gave affirmative answers and an order was issued forthwith on 6th March, 2006 winding-up the company. Aggrieved by that order, both the Company and the 1st applicant filed a notice of appeal to this Court. They also sought interim orders of stay of the winding-up order and stay of all further proceedings but the orders were rejected by the superior court on 10th July, 2006, hence the application now made before us.

As correctly submitted by learned counsel for the applicants, Dr. Kamau Kuria, relying on the decision of this Court in **Githunguri v Jimba Credit Corporation Ltd (No.2) [1988] KLR 838**, in order to obtain the orders sought, the applicants must show not only that the intended appeal is not frivolous or as is otherwise put, that there is an arguable appeal, but also that if the order is not granted the intended appeal would, if successful, be rendered nugatory. To satisfy the first requirement, Dr. Kuria rehashed the self-same issues that arose before the superior court and sought to persuade us that the decision thereon was erroneous and the applicants will most likely succeed on appeal. He submitted, on the first issue, that it did not matter that there was exhibited before the superior court, evidence of the company's resolution for share allotment, payment receipts for the shares, share certificates and registration in the company's register, the fact remained that the respondents were not members of the Company from inception in 1976 and were only invited to join when abortive plans to restructure the Company were afoot between 1981 and 1983. At best, they only became "conditional members" of the Company. As such, he submitted, they had no *locus standi* to file the petition.

In coming to the conclusion that the respondents were shareholders of the Company, the learned Judge of the superior court expressed herself as follows: -

"**The petitioners presented the present petition as shareholders of the company. To support their contention that they are shareholders, they annexed to the affidavit minute Number 14/81 which showed the resolution to allot shares to members of staff of the company at that relevant time. The petitioners further annexed a copy of the Register of members which reflected their names. It was argued by the respondents that the petitioners did not have locus standi, because they have failed to prove on a balance of probability that they were shareholders. The respondent relied on the case: HC W/U Cause No. 23 of 2002 IN THE ESTATE OF KAHAWA SUKARI LTD and section 120 of the Companies Act. That section provides: -**

"***The register of members shall be prima facie evidence of any matter by this Act directed or authorized to be inserted therein."***

The petitioners, as stated herein before, annexed a copy of the company's register, which reflected their names and also annexed copies of share certificates. The respondent other than deponing in his replying affidavit and stating that the petitioners were not shareholders did not annex the company's register to disprove the assertions of the petitioners. The respondent also did not disown his letter to the petitioners dated 18th November, 1991, which stated in the last paragraph as follows: -

"***Last but not least, as Mr. Karanja indicated during our last meeting, any shareholder has a right to sell his/her share if he/she wishes.***

You can sell your shares if you wish and you could also buy mine yourselves if I am wiling to sell which I am not ……."

The respondent even in his submissions on the issue of shareholding as well as his replying affidavits, contradicts himself on his stand with regard to the petitioner's shareholding in the company. The respondent has stated, therein that the petitioners are not shareholders only to later contradict this stand. On page 6 of the respondents written submission, it is stated: -

"***The petitioners are the minority shareholders in the said Limited Liability Company. The second respondent is the majority shareholder in the said Limited Liability Company****."*

With respect, we think the finding on membership appears to have been made on sound basis in law and fact and we highly doubt the arguability of that ground on appeal. The concept of "conditional membership", as propounded by Dr. Kuria, whatever may be its meaning in Company Law, which is intended to displace the *prima facie* evidence in the Company register, is in our view untenable. It is clear to us on perusal of the documents on record that the respondents had, as at 27th March, 1995 when they filed their petition, the *locus standi* to do so. It is not clear why the petition took eleven (11) years to be determined in March, 2006, but there is no evidence that the status of the respondents in the company changed at any stage.

The second issue argued by Dr. Kuria was on the exercise of discretion in granting the order sought. In his view, the learned Judge took a narrow view of ***section 219(f)*** which donates the discretion exercisable by the court, and merely applied the letter of the law without consideration of equitable principles. He relied on the decision of Kneller J in **Re: Garnets Mining Co. Ltd (1978) KLR 224** where the learned Judge stated: -

"**So a summary of the way to approach the issue of whether or not to wind up a company under the just and equitable rule is this. It is a matter for the discretion of the court. The discretion is a very wide one. It will be a matter of fact whether the company would be wound up or not under this rule. Each case will depend on its facts."**

And as to the manner of the exercise of that wide discretion, Dr. Kuria borrowed from the House of Lords in "**In Re: Westbourne Galleries Ltd.**" **(1973) AC 360** where the Court stated:

"**A limited company was more than a mere legal entity and the rights, expectations and obligations of the individuals behind it inter se were not necessarily merged in its structure (post, p. 379B-C); that, while the "just and equitable" provision did not entitle a party to disregard the obligation which he assumed by entering a company, it enabled the court to subject the exercise of legal rights to equitable considerations of a personal character arising between individuals which might make it inequitable to insist on legal rights or to exercise them in a particular way."**

Applying those principles, Dr. Kuria submitted that the superior court should have considered, but did not, the catalogue of events narrated by the 1st applicant on his struggles since 1985 to save the company from extinction. It was impractical to continue such fights with powerful forces and at the same time prepare accounts or call meetings or file returns. The Company was virtually non-existent and all it had were rights of court action which it pursued. In all the circumstances therefore, in his submission, the company was not for winding-up but for alternative orders under ***section 211*** of the Companies Act.

For his part, learned counsel for the respondents, Mr. Tindi, strongly supported the manner in which the discretion of the superior court was exercised. That the respondents had legal rights in the Company was not in doubt, he submitted, and they had petitioned the court for vindication of those rights. It was admitted by the 1st applicant that the respondents were deliberately sidelined from the affairs of the company because of his belief, firstly, that they were not members of the company and, secondly, because he equated himself with the company itself. Such attitude if upheld in favour of the applicant would according to Mr. Tindi, be tantamount to legalising disobedience of the law by companies. The catalogue of problems that faced the company would have been resolved if meetings of the company were called and the facts, which the law requires be furnished to members, were so furnished. But the 1st applicant would not hear of such pleas, hence resort to the law. In those submissions, Mr. Tindi was supported by Mr. Mc Court, learned counsel for a supporting Creditor.

We have carefully examined the manner of exercise of the discretion by the superior court which Dr. Kuria vehemently criticised but in our view such criticism is rather exaggerated. The learned Judge certainly appreciated and cited the law on the extent and the manner in which the wide discretion she had would be exercised. She made findings of fact which are all borne out by affidavit evidence on both sides. She then considered the 1st applicant's contentions regarding the welfare of the company and his titanic fights with the government or elements of it but still found that his attitude towards the respondents was oppressive, that is to say, *"burdensome, harsh and wrongful"*. She stated: -

"**The respondent failed to specifically respond to the contentions of the petitioners and instead denied that the petitioners were oppressed and proceeded to show how single-handedly he has stirred (sic) the company in fighting for its rights particularly through various court cases and in ensuring that funding was obtained. To show the respondents attitude towards the petitioner's action one only needs to quote from his submissions where he stated: -**

"***It also becomes clear that the petitioners are hypocrites pessimists and greedy persons who are feigning oppression in the hope that the company may be wound up and they hopefully get a share of what they regard to be surplus assets realized through the majority shareholder's entrepreneurship, energies and investments."***

The respondent's stand as seen in his replying affidavits and submissions seem to go against the 'thread' of consequences of incorporation……

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Indeed in the famous case of SALOMON –V- SALOMON CO. [1897] A.C. 22, the House of Lords held that the business of a validly incorporated company belongs to that company and not to Mr. Salomon. As per Lord Macnaghten:

"**The company is at Law a different person altogether from the subscriber."**

Having that decision in mind one is tempted to climb to the roof top and shout to the respondent that the company is not his personal property, which he has to protect from the other shareholders, who request for disclosure of how this business is being carried out……

In the case of In RE H.R. HARMER LTD [1959] 1 W.L.R. 62, it was stated as follows: -

"***If there is oppression, it remains oppression even though the oppression is due simply to the controlling share holder's overwhelming desire for power and control, and not with a view to his own advantage in the pecuniary sense. It seems to me the result rather than the motive is the material thing."***

Oppression in that case was defined as: "burdensome, harsh and wrongful."

The respondent's failure and actions in relation to the company, although it may well be well intended, amount to oppression to the petitioners. The petitioners are entitled to have the affairs of the company conducted as required by Law and as laid down in the Articles of Association, without being referred to as greedy or hypocrites.

The court does find that the petitioners have, on a balance of probability made out a case for winding up of the company. Considering how the respondent has for many years failed to account the going (sic) on of the company, to the rest of the members, and it does seem from the affidavits filed herein that there is a breakdown of communication between the respondent and the petitioners; it is in the opinion of the court that it is just and equitable that the company be wound up. The respondent states that he has sold assets of the company in times past. It is not clear whether such dispositions were after the commencement of this petition. If indeed they were, such disposition are void by virtue of section 224 of the Companies Act."

It is trite that an appellate court would not merely substitute its discretion for that of the trial court unless there is a compelling reason to do so, which is difficult to find in this case.

In "**In re: Westbourne Galleries Ltd."** (supra) which is relied on by Dr. Kuria, the House of Lords reversed the finding of the Court of Appeal that a shareholder had been lawfully removed from the management of the company through an ordinary resolution of the majority shareholders. It reinstated the finding of the winding-up court that the majority shareholders had abused their powers and were in breach of good faith by excluding one of them from all participation in the business. The Company was wound-up under ***section 222(f)*** (equivalent to ***section 219(f))***, instead of saving it by issuing orders under ***section 210*** (equivalent to ***section 211***) as sought by the respondents in that case.

In all the circumstances of this case we express once again our grave doubts that the appeal is arguable. It follows that we would not be inclined to grant the prayers sought since the applicants do not, in our view, surmount the first test.

If we had found for the applicants on that issue, we would have proceeded to find, as argued by Dr. Kuria, that the appeal would be rendered nugatory if the orders are not granted. But in view of our findings the analysis of submissions of counsel on the issue would be of no consequence.

In the result the application is dismissed with costs.

Dated and delivered at Nairobi this 9th day of February 2007.

E.O. O'KUBASU

……**……**

JUDGE OF APPEAL

P.N. WAKI

…….……

JUDGE OF APPEAL

J.W. ONYANGO OTIENO

……..

JUDGE OF APPEAL

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

DEPUTY REGISTRAR