



**REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT NAIROBI**

(CORAM: TUNOI, O’KUBASU & WAKI, JJ.A)

CIVIL APPEAL NO. 178 OF 2002

BETWEEN

KIAI MBAKI

WAWERU MUGO

THIONG’O KIUNGAAPPELLANTS

AND

GICHUHI MACHARIA

DUNCAN MWAURARESPONDENTS

(An appeal from the decision/Judgment of the High Court

of Kenya at Nairobi (Ransley, C.A) dated 29.05.2002

in

WINDING-UP CAUSE NO. 1 OF 2000)

JUDGMENT OF THE COURT

Although this appeal turns on the short issue whether the appellants were afforded a fair hearing before the superior court, it is pertinent to relate, albeit briefly, the background to the appeal. Some 42 years ago at the dawn of our independence in 1963, 21 persons pooled their resources in partnership and purchased a prime property in the centre of Nairobi City known as “**Terrace Hotel**” on LR. No. 209/8012. Among them were the five protagonists in this appeal, who do not purport to be acting in any representative capacity for the other partners. It is common ground that the management of the partnership business in Terrace Hotel was entrusted to one of the partners **Gichuhi Macharia**, the 1st respondent. The hotel had boarding and lodging facilities, and it would appear from available records that the business did so well that the profits made from it were used to purchase two other prime commercial properties: a block of residential flats in Mbotela Estate on LR. No. 4844/113, another hotel with boarding and lodging facilities situate at Ngara on LR. No. 209/2490/31- (hereinafter “the *partnership property*”). The valuation for those properties as at 1997 was Kshs. 73,756,000/=. It was in that year however that everything went awry for the partners and for the partnership property.

In December 1997, a suit was filed in the High Court by a private limited liability company known as “**Terrace Hotels Ltd**” (hereinafter “*the company*”). It was HCCC 3194/97 and was filed against the three appellants in this appeal and two sons of one of the original partners, one **Kobu Ndio**. The company claimed that it was incorporated on 26.04.1971 and it owned the three partnership properties which it was running as going business concerns. Its four directors were named as: **Gichuhi Macharia**, and **Duncan Mwaura Kamau** (the two respondents), **Mwangi Kimanga** and **James Maina**. The latter would plead later that he was not a party to the incorporation of the company and that it was **Gichuhi Macharia** who was the prime mover of the incorporation, naming himself the Managing Director for life and allotting himself 60% shareholding in the company. The company also claimed that the three appellants were shareholders. The cause of action pleaded in the suit was that the appellants had, in September that year, forcefully and unlawfully taken over the management of the partnership property and evicted the employees of the company. It sought a permanent injunction to stop them from those acts of trespass, amongst other remedies.

The Company’s attempt to stop the appellants from their activities pending the hearing of that suit did not succeed. The appellants denied knowledge of the company or its entitlement to the partnership property and Githinji J. (as he then was) found no clear case disclosed by the company to warrant the issuance of the order sought for a temporary injunction. The legal status of the ownership for the business was in dispute; the shareholding of each of the 21 persons in the original partnership was shrouded in mystery; the shareholding of each of the 21 persons in the company was not shown in the Memorandum & Articles of Association; and their *locus standi* in the affairs of the company was doubtful. The application was dismissed on 02.12.98 but there was no appeal preferred. The company has not pursued the main suit ever since.

It was instead the three appellants here who returned to the High Court and filed suit against the company and the four persons named as the Shareholders/Directors in the Memorandum & Articles of Association. That was HCCC 96/99 filed on 18.01.99. They pleaded membership of the original partnership and ownership of the partnership property and accused the company and the four defendants of fraudulently and unlawfully converting the partnership property. They sought a declaration that the company was a sham and an order for winding it up thus reverting the partnership property to its lawful ownership. That suit too has yet to be heard and determined.

Despite the pendency of the two suits, **Gichuhi Macharia** and **Duncan Mwaura Kamau** petitioned the High Court for the winding up of the company in Winding up Cause No. 1/2000 filed on 5th January 2000. They pleaded that it was just and equitable to wind up the company for various reasons. That would be an application under **section 219 (f)** of the Companies Act, **Cap 486**, although there was no mention of it. Eventually the petition was placed before Ransley, Commissioner of Assize (as he then was) who conducted the proceedings between 28.07.00 until he made the order now the subjectmatter of this appeal, on 29.05.02. The order was made apparently without hearing any of the parties although they were present and the matter had been stood over for further hearing on that day. It was a curt order as follows:

“Order: It appears to me that there are irreconcilable differences between the shareholders in the company and indeed in HCCC No. 3194 of 1997 the Respondents seek an order for the winding up of the company. I make an order for the company to be wound up. The companies (sic) auditors Kago Mukunya & Associates C.P.A being (sic) the liquidators of the company. The Liquidators to enquire and determine who are shareholders and the extent of the holding. Also to determine the companies (sic) assets and liabilities .” Liberty to apply (sic) costs in this winding up to Petitioners and Respondents (sic).”

Although the appellants laid out some five grounds of appeal which basically asserted that there was no factual or legal basis for making the winding up order, the gravamen of the appeal was in grounds 4 and 5 of the Memorandum of Appeal which state as follows: -

“4. The learned Commissioner of Assize erred in law in conducting the proceedings in a manner which was irregular and unprocedural thereby denying the appellants their undoubted right of presenting their case.

5. The learned Commissioner of Assize erred in law in failing to write a judgment in accordance with the provisions of the Civil Procedure Act and Rules.”

Learned counsel for the appellants, Mr. Musyoka, referred to the proceedings since 28.7.00 when the learned Commissioner of Assize was seized of the matter and pointed out the various orders made suo motu or at the instance of the respondents’ counsel, completely ignoring the appellants’ counsel. Such were the proceedings recorded on 28.07.00 when the petitioners’ counsel made a few opening remarks and the court made an order for production of various documents which no party had applied for. The matter was then adjourned severally thereafter until 12.6.01 when the petitioner appeared with a different advocate who recommenced the submissions before compliance with the earlier court order. A further order was made, again suo motu, that the Company Secretary makes a report relating to various matters. Those orders were repeated on 11.07.01 and on subsequent dates when compliance therewith was not forthcoming. Eventually the learned Commissioner of Assize made an order on 16.12.01; thus:

“Stood over to 18.12.01. The books to be returned to the respondent to bring them upto date. If accounts not available, petition to go for hearing.”

The books were not availed in accordance with the order and the petition was therefore set down for hearing on 28th and 29th May, 2002. Both counsel attended court on 28.05.02 and the record shows:

“28.5.2002

Coram: Ransley, Commissioner of Assize.

Martha – Court Clerk.

Mr. Kirundi for Petitioner

. Mr. Githinji for Respondent.

Mr. Kirundi: Ask for company to be wound up. Refer to proceedings in HCCC 96 of 1999 and plaint filed by the

Respondents in this suit ask for the company to be wound up. There are irreconcilable disputes between the parties. Mr. Githinji: See Ruling of Githinji J. The shareholders are not certain. Want to come at 11 a.m. tomorrow after consulting with my clients.

Mr. Kirundi: The defendants are in possession.

P.J. RANSLEY

COMMISSIONER OF ASSIZE

(sic)

Stood over to 29.5.2002 at 11 a.m.

P.J. RANSLEY

COMMISSIONER OF ASSIZE”

On 29.05.02 the final order was made without any further hearing of the parties, as stated above.

It was for those reasons that the appellants’ counsel attacked the proceedings as wanting procedurally and in breach of the appellants’ right to be heard. On the other hand, Mr. Kirundi, learned counsel for the respondents saw no breach of any procedure or right of the appellants. In his view, the court had control

of the proceedings under section 211 of the Companies Act and need not have heard any of the parties provided that it was in full picture of what was happening in the company. The partners here were hopelessly at loggerheads, and it was evident that both parties wanted the company to be wound up. No submissions were therefore necessary from either party. In his view, the order caused no prejudice to the appellants since they were still at liberty to proceed with the cases pending in court, and furthermore, the winding up rules provide for the protection of all shareholders by the liquidator who is an agent of the court. We have carefully considered the submissions made and the authorities cited on both sides which we find unnecessary to reproduce. We have also perused the record of the superior court and have formed the firm view that there is considerable force in the complaint raised by the appellants.

The right to be heard is a valued right. It would offend all notions of justice if the rights of a party were to be prejudiced or affected without the party being afforded an opportunity to be heard. This Court has indeed reiterated that principle on many occasions and we need only cite one for emphasis: - *Matiba vs. Attorney General* [1995 – 1998] 1 EA 192 where in an application for leave to seek an order of certiorari, the superior court refused to grant the prayer for stay without hearing counsel for the applicant who was present in court. On appeal this Court stated: -

“On the face of the record, it appeared that the appellants counsel had made no submissions before the learned Judge in the court below, since if they had been made, they would have been reflected in the record. There was thus an order on record in the presence of the appellants’ counsel but without affording him an opportunity to address the Judge. This was a fundamental breach of the rule that no man shall be condemned unless he has been given a fair opportunity to be heard, which is a cardinal principle of natural justice. Any order that flowed from such a fundamental breach cannot be sustained.”

It cannot be gainsaid that the appellants in this matter had considerable interest in the outcome of the winding up petition. They had appointed an advocate to oppose it and to urge the court to consider the existence of pending suits between the same parties which raised weighty issues of fact and law. There is nothing in the Company’s Act, or the Winding up Rules made thereunder, which donates the power to the court to determine a winding up petition summarily. Nor was there any application before the court seeking such summary determination. On the contrary, Rule 203 of the Companies (Winding up) Rules provides: -

“In all proceedings in or before the court, or any judge, registrar or officer thereof, or over which the court has jurisdiction under the Act or these Rules, where no other provision is made by the Act or these Rules, the practice, procedure and regulations in such proceedings shall, unless the court otherwise directs, be in accordance with the rules and practice of the court.”

No reason was given in this matter for the procedure adopted by the court in issuing interlocutory orders which, on the face of it, no party requested for nor required. The order now challenged before us was clearly made in the presence of the parties’ advocates on a date fixed for the hearing of the petition but without giving them an opportunity to be heard. We hold that this was a serious breach of procedure amounting to a denial of justice. Consequently the order made in such circumstances cannot be sustained and is for setting aside. We allow the appeal, set aside the order made on 29th May 2002, and remit the matter back to the superior court for hearing of the petition in accordance with the law, before any Judge other than Ransley C.A (as he then was). The costs of the appeal shall be borne by the respondents.

Dated and delivered at Nairobi this 16th day of September, 2005.

P.K. TUNOI

..... JUDGE OF APPEAL

E.O. O’KUBASU

..... JUDGE OF APPEAL

P.N. WAKI

..... JUDGE OF APPEAL

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

DEPUTY REGISTRAR