IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: GICHERU, SHAH & O'KUBASU JJ.A)

CIVIL APPEAL NO. 297 OF 2000

BETWEEN

HENRY NJAU KOIGI .... RESPONDENT

AND

ADAMA DIAWARA .... RESPONDENT

(Being an appeal by HENRY NJAU KOIGI against the Ruling/Order of the High Court of Kenya heard at Nairobi by Hon. Mr. Justice A. I. Hayanga delivered on 25th March, 1998

in

WINDING UP CAUSE NO. 29 OF 1994)
****

JUDGMENT OF O'KUBASU J.A

This is an appeal from the ruling of Hayanga J. delivered on 25th March, 1998 in which he dismissed application to strike out the petition for winding up.

This matter was commenced in the superior court as Winding Up Cause No. 29 of 1994 relating to Cheetah Contractors Limited. The Petitioner was Adama Diawara who described himself as Director and shareholder of this company. In that petition, which was later amended, the petitioner was seeking the following reliefs:

"a.That the Company be wound up by this honourable court pursuant to the provisions of the Companies Act Chapter 486 of the Laws of Kenya.

b.That the Honourable Court do issue an injunction restraining the defendant by himself his servants or agents from transacting the business of the company or implementing the alleged resolution. c.That this Honourable Court do issue an order compelling the said Henry Koigi Njau to disclose to the Petitioner the accounts of the company since the 1st of March, 1994.

d.That a Provisional Liquidator be forthwith appointed to take possession and charge of the

Company's properties assets and affairs and that he be directed to apply for a special manager for the management of the same.

e.Such other order be made in the premises as this Honourable Court shall deem fit.

f.The costs of this Petition be provided for to your petitioner out of the Company in priority".

The appellant herein who is the respondent in the petition filed a Notice of Motion stated to be brought under "Rules 7 and 203 of the Companies (Winding Up) Rules and S.3A and Order VI Rule 13 (1) and (d) of the Civil Procedure Act and Rules" seeking from the superior court the following orders:-

"1.THAT the petition filed herein be struck out with costs as the same is scandalous, frivolous and is an abuse of the process of the court.

2.THAT costs of this application be provided for".

That application came up for hearing before Hayanga, J who considered the arguments for and against striking out and in the end dismissed the application. In his ruling the learned Judge stated inter alia:-

".... A case is scandalous where it contains imputation on opponent and makes charges of bad faith such a case is scandalous and can be struck out but I see no such in the petition neither has the application specified which parts of the petition are scandalous.

The same with allegation that it is frivolous. It is not shown that the petition is obviously frivolous or obviously unsustainable. The pleading must be so frivolous that to put it forward would be an abuse of courts process.

Here no such is shown (sic). Lastly it is alleged that the pleading is an abuse of the process of the court, but the phrase means that the process of the court is being used in a way not bonafide and improperly amounting to an abuse. The court can even stop such practice of its own to safeguard its authority from being abused and used as a means of vexation but in my view such is not shown here.

It is my view that the petition is properly instituted and does not suffer from any of such features".

It is against that decision that the appellant comes to this court asking us to set aside that order of Hayanga J and in its place we order that the winding up petition be struck out. There were four grounds of appeal which were as follows:-

"1.The learned Trial Judge erred in law and in fact in failing to make a finding that the petition before him was one of complain by the Petitioner who was a member of the company that the affairs of the company were being conducted in a manner oppressive to him and thus arrived at the wrong conclusions.

2.The learned Trial Judge erred in law in his interpretation of Section 211 of the Companies Act by holding that the Petitioner could also bring a petition under the said section when it is plainly clear that it is only the Attorney General who is mandated under the Section to bring a petition based on the complain of a member or members that the affairs of a company were being conducted in a manner oppressive to him.

3.The Learned Trial Judge erred in law and infact in making an erroneous finding that the Appellant did not state whether it sought to strike out the whole or only part of the petition while it was manifest that the application before him sought to strike out the whole petition.

4.The Learned Trial Judge erred in law in holding that the Appellant had not shown that the petition

was frivolous and an abuse of the process of the Court and therefore ought to be struck out under Order VI Rule 13(1) (b) and (d) when it was clear from the pleadings and evidence that the petition before him had been brought in non-compliance with the law which non-compliance made it incompetent".

In his submissions, Mr. Chege for the appellant stated that the petition to wind up was brought as alternative remedy but in the petition there was no prayer for winding up. A perusal of the record shows that the petition as filed on 25 October, 1994 the prayers sought were as follows:-

"a.That this honourable court do make a declaration that the alleged resolutions purporting to exclude the petitioner from the directorship are invalid.

b.That the Honourable Court do issue an injunction restraining the defendant by himself his servant or agent from implementing the alleged resolution.

c.That this Honourable Court do issue an order compelling the said Henry Koigi Njau to disclose to the petitioner the accounts of the company since the 1st of March, 1994.

d.That a receiver and manager be forthwith appointed to take possession and charge of the Company's properties assets and affairs and that he be directed to apply for a special manager for the management of the same.

e.Such other order be made in the premises as this Honourable Court shall deem fit.

f.The costs of this Petition be provided for to your petitioner out of the company in priority.

Clearly, from the above there was no prayer for winding up. However, the petition was later amended with leave of the court and in the amended petition there was prayer for winding up which was framed thus:-

"a.That the company be wound up by this honourable court pursuant to the provisions of the Companies Act Chapter 486 of the Laws of Kenya".

It was Mr. Chege's argument that even after the amendment of the petition this did not take the matter out of Section 211 of the Companies Act. In his view, it was only the Attorney General who could bring action for winding up. Mrs. Majiwa, for the respondent pointed out that the application before Hayanga, J was for striking out on the ground that it (petition) was frivolous. In her view, the petitioner had made out a prima facie case and hence the matter merited a full trial for proper determination. She said that the petition was brought under section 219 (f) of the Companies Act with alternative prayer under section 211 of the Companies Act.

The issue, as I see it, is whether the petition was properly before the superior court. If the procedure was wrong then the petition was not properly before the superior court. As regards what Mrs. Majiwa referred to as alternative prayer under section 211 of the Companies Act I think this was not the correct procedure. Under Section 211 of the Companies Act, it is the Attorney General who is to make an application to the Court. In the present case it was a shareholder/director who presented the petition. Clearly this was wrong procedure and I would agree with Mr. Chege for the appellant when he says that the procedure adopted was wrong.

But the matter does not end there. We are told that section 211 of the Companies Act was invoked as an alternative remedy otherwise the petition was brought under Section 219 (f) of the Companies Act which provides:-

"the court is of opinion that it is just and equitable that the company should be wound up".

It is to be noted that paragraph 8 of the Amended Petition reads as follows:-

> "Your petitioner submits that the business and affairs of the Company have been conducted in a manner oppressive to the Petitioner and that in the premises, it would be just and equitable that the company should be wound up, and that a provisional liquidator be forthwith appointed to take possession and charge of the company's assets and affairs".

In view of the fact that a number of allegations made by the petitioner were not specifically denied then it could be said that a prima facie case had been shown to the effect that irreconcilable differences had arisen between the petitioner and Henry Koigi Njau. On that score I would say that the learned Judge was right in allowing the petition to go on for trial but I do not accept his interpretation of section 211 of the Companies Act especially when states:-

> "It is therefore not correct to say that the petition should be via the Attorney General".

I think, a petition under section 211 of the Companies Act must go via the Attorney General.

Having considered the Amended Petition and the ruling of the learned Judge I am of the view that while he might have erred in his interpretation of section 211 of the Companies Act, he cannot be faulted in dismissing the application to strike out the petition since section 211 of the Companies Act was merely brought in as an alternative remedy while the petition was based on the provision of section 219 (f) of the Companies Act. Admittedly, the petition could have been presented in a better form than what we have on record, but nevertheless the petitioner was seeking redress from the superior court as a result of serious differences between him and Henry Koigi Njau. The pleadings show the nature of the petitioner's complaints and the expected remedy.

It is my view that this petition should be sustained so that it may proceed to full trial. As was said by Madan JA (as he then was) in D.T. Dobie & Company (Kenya) Ltd. vs. Joseph Mbaria Muchina and Another - Civil Appeal No. 37 of 1978 (unreported):-

> "No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action, and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it".

Having considered the ruling of the learned Judge and the arguments advanced during the hearing of this appeal, I am satisfied that although the petition might have had defects as regards section 211 of the Companies (and its interpretation by the learned Judge) on the whole, I find that the learned Judge was right in rejecting the application for striking out of the entire petition. That being my view of this matter, I would, therefore, dismiss this appeal. As regards costs I agree with the orders as proposed by Shah J.A.

Dated and delivered at Nairobi this 17th day of August, 2001.

E. O. O'KUBASU

....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR