REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & TAX DIVISION

CIVIL SUIT NUMBER E138 OF 2021

WILKINS LOVEGA CHAGADWA.....PLAINTIFF

-VERSUS-

GERDA MARGO SYBELLA.....1ST DEFENDANT

JOLANDA ALEXANDRA.....2ND DEFENDANT

R U L I N G

1. By a plaint dated 17/3/2021, the plaintiff pleaded that he is a 25% shareholder in the 1st interested party while the defendants held 75% shareholding thereof. That by a resolution made on 10/3/2021, the defendants resolved to have the 1st interested party (hereinafter "the Company") wound up.

2. It was his contention that the decision to wind up the Company was made in bad faith and was intended to circumvent the audit that had been carried out on the Company which revealed financial impropriety on the part of the defendants. In the premises, the plaintiff prayed for a declaration that, the Company was being run in an oppressive manner and the Court should run the affairs of the Company in future.

3. Together with the plaint, the plaintiff lodged a Motion on Notice under ***section 782 (1) and (2) of the Companies Act, 2015*** seeking to restrain the 1st defendant from interfering with the day to day running of the Company, open up the premises of the Company and allow the 2nd to 8th interested party to continue working with the Company. He also sought that the bank mandate for the accounts operated by the Company do revert to how they were prior to 10/3/2021.

4. The defendants opposed the application vide their replying affidavits sworn on 23/3/2021 wherein they challenged the competence of the suit. That the suit should have been brought against the Company and not them. Together with the replying affidavit, the defendants filed a Notice of Preliminary Objection ("objection") dated 23/3/2021.

5. On 24/3/2021, the Court directed that both the Motion and the objection be argued together. The parties have filed their respective submissions which the Court has carefully considered. The Court proposes to determine the objection first.

6. The objection was to the effect that; the defendants did not have locus standi to answer the plaintiff's case, that the plaint discloses no reasonable cause of action and is fatally defective and incompetent and an abuse of the court process.

7. The defendants submitted that they have no locus standi to defend any aspect of the suit as it arises out of acts done in their capacity as director/shareholders of the Company. That the suit is incompetent and should be struck out.

8. On the other hand, the plaintiff claimed that the act of resolving to wind up the Company was fraudulent and oppressive of him. It was his contention that there had been unearthed financial or fraudulent activities by the 1st defendant and that in order to cover up the same, the two defendants decided to resolve to wind up the Company.

9. It should be noted that a preliminary objection is argued on the assumption that all the facts pleaded are correct. That there are no facts to be ascertained and that it is not the judicial discretion of the court is being sought. See **Mukisa Biscuits Manufacturing Co. Ltd vs. West End Distributors Ltd EA 696.**

10. The allegations by the plaintiff against the defendants were neither denied nor challenged. It is their individual actions that was said to constitute wrongdoing. That they were using their majority shareholding to oppress the plaintiff as the minority shareholder in the Company. Those were not allegations to be answered by the Company but the defendants. They chose to ignore the same and plead that they have no capacity to answer them.

11. The Court therefore finds that, in so far as there were allegations made against the defendants in their individual capacity which was said to constitute fraud or oppression against the plaintiff, they had been properly sued. They cannot allege that they lack locus standi to answer for their alleged wrongdoing. Who is well placed to answer whether the winding up resolution was an act meant to perpetuate a fraud against the plaintiff if not the defendants"

12. In **Foss v Harbottle [1843] 2 Hare 261** the Court held: -

"... an elementary principle is that the court does not interfere with the internal management of companies acting within their powers."

13. In **Re K Boat Service [1998] Eklr,** Kuloba, J. held: -

"Courts will interfere only where the act complained of is ultra vires or is of a fraudulent character or not rectifiable by ordinary resolution. It is really (sic) very important to companies and to the economy of the country in general, that the court should not, unless a very strong case is made out on the facts pleaded and proved or admitted, take upon itself to interfere with the domestic forum which has been established for the management of the affairs of a company".

14. In the present case, the plaintiff has alleged that he has brought the suit as a minority shareholder seeking protection under ***sections 780 and 782 of the Companies Act, 2015.*** He has enumerated what he considers to be oppressive conduct against him by the majority shareholders. Those allegations, although made on oath, have not been denied or challenged. The Court therefore holds that not only that the defendants were properly sued but that the plaint discloses a cause of action.

15. In view of the foregoing, the objection has no merit and is dismissed with costs to the plaintiff.

16. That paves the way for the Court to consider the Motion dated 17/3/2021. As already indicated, that Motion sought several orders against the defendants. ***Section 393 of the Insolvency Act*** allows a company to enter into voluntarily liquidation if it resolves to do so by special resolution.

17. ***Section 257 of the Companies Act*** provides that a resolution is a special resolution of the members of a company if it is passed by a majority of not less than 75% while ***Section 258 (1) (a)*** thereof provides that if a company has a share capital each member has one vote for each share.

18. In the present case, a special resolution was passed by the defendants who jointly have 75% of the shares of the company. The prayers sought in the plaint do not include a prayer challenging the aforesaid resolution. There is no prayer to stay the said resolution. The same was passed in accordance with the law and the present suit has not challenged the same.

19. Further, the prayers being sought in the application are not sought in the plaint. The Company should have been made a party not just an interested party. It is the Company to be affected by the prayers in the plaint. It will be the Company to comply with the orders to be made therewith. With the foregoing flows, it cannot be said that the plaintiff has disclosed any prima facie case with any probability of success.

20. As regards damages, the plaintiff has a remedy in the proposed insolvency proceedings. He may join the same and raise questions as to the way the Company arrived where it is. He may make a claim against his Co-directors/shareholders if found culpable.

21. In view of the foregoing, I find that the application is without merit and is therefore dismissed with costs.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 19TH DAY OF AUGUST, 2021.

A. MABEYA, FCI Arb

JUDGE